

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA FELDKAMP,

Plaintiff-Appellee,

V

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 23, 2006

No. 255185
Washtenaw Circuit Court
LC No. 03-000642-NI

Before: Wilder, P.J., and Zahra and Davis, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order granting plaintiff's motion to compel defendant to grant plaintiff written consent to settle a claim against a third party tortfeasor, and the trial court's order denying its motion for relief from this order. We reverse and remand.

The instant case arose after plaintiff suffered injuries in an automobile accident allegedly caused by another driver, Rachel Kobish. At the time of the accident, plaintiff had an insurance policy with defendant that provided for \$100,000 of underinsured motorist coverage. Plaintiff filed suit seeking payment under this policy. The policy requires the insured to exhaust the limits of liability under the underinsured driver's insurance policies before payment may be recovered. Pursuant to an offer from Kobish and her insurer, plaintiff requested that defendant allow her to settle all claims against Kobish for the \$50,000 limit of Kobish's insurance policy, and to release Kobish and her insurer from further liability. Defendant refused, on the basis that it had the right to determine Kobish's ability to reimburse defendant in the event defendant pursued its right to subrogation under its policy with plaintiff. Plaintiff filed a motion to compel defendant to give her written consent to settle, and the trial court granted the motion. The trial court also denied defendant's motion for relief from this order. This appeal, on leave granted, ensued.

Defendant argues that the trial court erred in ordering it to consent to settlement by plaintiff of the underlying claim, contrary to the clear language of its contract with plaintiff. We agree.

The proper interpretation of a contract constitutes a question of law subject to de novo review. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). Courts construe the terms of insurance policies in accord with the well-settled principles of contract

construction. *Id.*, 417. In *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994), citing *Clevenger v Allstate Ins Co*, 443 Mich 646, 654; 505 NW2d 553 (1993), this Court stated:

An ambiguous provision in an insurance contract must be construed against the drafting insurer and in favor of the insured. However, if the provision is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense.

Generally, an unambiguous contract must be enforced according to its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

In Part IV of the insurance policy in question, titled Family Protection Coverage, defendant agreed to pay all sums that the insured is legally “entitled to recover from the owner or operator of an uninsured automobile” because of a bodily injury sustained by the insured in an automobile accident. But in a subsection labeled “exclusions,” the policy states that Part IV does not apply

b) to bodily injury to an insured with respect to which such insured, his representative or any person entitled to payment under this coverage shall, without consent of the company, make any settlement with any person or organization who may be legally liable therefore.

In addition to the uninsured motorist provision, the parties added an endorsement modifying the family protection coverage to include \$100,000 of underinsured motorist coverage. The endorsement contains the following pertinent provisions:

5. Consent to Settlement: The insured may not settle with anyone responsible for the accident without *the Company’s written consent*. The Company shall be obligated to respond within thirty (30) days of receiving an insured’s written request to settle. If an insured agrees to settle with the person(s) responsible for the accident for an amount which does not exhaust the sum of the limits of liability under all bodily injury bonds and insurance policies applicable at the time of the accident, the coverage under this endorsement shall be void.

6. Subrogation: In the event of any payment under this policy, the Company shall be subrogated to all the insured’s rights of recovery therefore against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights. [Emphasis added.]

Under the clear terms of the underinsured motorist provision, in order to secure defendant’s right to subrogation, plaintiff may not settle with anyone responsible for an accident without first obtaining permission from defendant. Here, Kobish and her insurance company offered to pay plaintiff the entire \$50,000 available under Kobish’s insurance policy, but only if plaintiff would release both Kobish and her insurer from any further liability. Such a release would potentially negate defendant’s contractual right to pursue subrogation against Kabish. *Lee v Auto Owners Ins Co* (On Second Remand), 218 Mich App 672, 675; 554 NW 2d 610 (1996).

By ordering defendant to grant its consent to the settlement requested by plaintiff, the trial court effectively rewrote the contract. Courts may only reform contracts where there is clear evidence that the instrument does not express the true intent of the parties because of either mutual mistake or mistake on one side and fraud on the other. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998). Since plaintiff does not assert the existence of any fraud or mistake, the trial court erred when it ordered defendant to give plaintiff written consent to settle the third party claim.

We reverse the trial court's order directing defendant to provide plaintiff with a written release of liability of the third party tortfeasor and her insurer, and remand for further proceedings to determine defendant's liability to plaintiff under the insurance policy. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

/s/ Alton T. Davis