S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DURAKON INDUSTRIES,

Plaintiff-Appellant,

v

COLUMBIA CASUALTY COMPANY and TRANSCONTINENTAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
July 25, 2006

No. 268612
Lapeer Circuit Court
LC No. 04-034812-CK

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting defendants summary disposition, pursuant to MCR 2.116(C)(10), in this insurance contract dispute. We affirm.

Plaintiff is a Michigan corporation that manufactures truck bed liners. Defendants are foreign corporations providing general and umbrella commercial liability insurance to plaintiff. This dispute relates to a wrongful death action brought in state court in Texas, arising out of a fatal accident in Texas involving a Nissan Motor Company truck equipped with one of plaintiff's bedliners. Nissan settled with the estate of the decedent, and plaintiff, with defendants' consent, also settled with the estate. Nissan then sought indemnification from plaintiff, but did not commence litigation.[1] Plaintiff requested that defendants provide coverage for Nissan's indemnification claim, but defendants denied coverage. Plaintiff then negotiated a settlement[2] with Nissan and paid it, and then commenced this litigation, alleging breach of contract and seeking a declaratory judgment that defendants were obligated to indemnify plaintiff for its settlement with Nissan.

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[1] Nissan sought contractual indemnification under California law, which governed the contract between Durokan and Nissan, and statutory indemnification under Texas law, as Texas was the site of the accident at issue.

[2] Nissan claimed $558,765.87, its $450,000 estate settlement plus litigation expenses of $108,765.87; plaintiff agreed to a total payment of $550,000 spread over three installments.

The trial court's grant of summary disposition to defendants was based on a finding that the contracts between plaintiff and each defendant relieved each defendant of any obligation to indemnify plaintiff because plaintiff had voluntarily paid Nissan's claim. Plaintiff argues that the court erred in concluding that its indemnification of Nissan was voluntary because plaintiff asserts it was legally obligated to provide indemnification under Texas law. We disagree.

We review motions for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Also, contract interpretation involves a question of law we review de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). The general rules of contract interpretation apply to the interpretation of insurance contracts. See *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417-418; 668 NW2d 199 (2003). Our primary obligation is to discern and effectuate the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). We enforce unambiguous contract language as written. *Id*.

The contracts at issue here are very similar to that addressed in *Coil Andoizers, Inc v Wolverine Ins Co*, 120 Mich App 118; 327 NW2d 416 (1982), where this Court considered an insurer's reimbursement obligations to its insured following the insured's settlement of a claim with a third party. The parties' insurance agreement provided, in pertinent part:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence. The company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . and may make such investigation and settlement of any claim or suit as it deems expedient.
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> The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for first aid to others at the time of occurrence.
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> * * *
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> No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have finally been determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company. [*Id.* at 121-122.]

This Court concluded that, pursuant to the contract, the plaintiff was not entitled to recover.

> The language of the contract's "no action" clause clearly contemplates that the insured's liability to the claimant shall first be fixed by formal judgment or be formally acquiesced in by defendant as a condition precedent to recovery. Neither a judgment nor formal consent in the three-way setoff between plaintiff, . . . [the intermediary and the third party] was obtained here. Accordingly,

> plaintiff's settlement . . . effectively excused defendant from liability. That plaintiff may have felt a certain "compulsion" to settle in order to retain the good will of its customers does not render the settlement any less voluntary for purposes of . . . the contract; defendant has bargained for the contractual right to contest the liability of its insured instead of having its money given away by an agreement to which it was not a party. . . . In this case, plaintiff's interest in retaining the good will of its customers may have led it to settle, believing the claim to be insured, for a larger amount than defendant may have been able to obtain had defendant conducted the negotiations. In fact, defendant did not even believe the claim to be covered, since it denied liability when plaintiff first notified it. [*Id.* at 123-124.]

Because two separate insurance agreements are involved in this dispute, we consider plaintiff's argument under each independently. Plaintiff's contract with defendant Columbia provides, in pertinent part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result.
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> No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.
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> No person or organization has a right under this Coverage Part:
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>> To sue us on this Coverage Part unless all of its terms have been fully complied with.
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> * * *
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> A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial . . . . An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

By this plain language, Columbia is not obligated to indemnify plaintiff for the Nissan settlement. The above provisions are essentially identical to those in *Coil*. They "clearly contemplate" that Columbia's liability to Nissan must be established either by formal judgment or its formal acquiescence in a settlement agreement. *Coil, supra* at 123. According to the contract, an action to recover against Columbia requires that the obligation be owing under an

"actual trial" or an "agreed settlement" in which it acquiesced. It is undisputed that plaintiff and Nissan did not litigate their dispute. It is undisputed that Columbia was not a party to plaintiff's settlement with Nissan. Plaintiff thus failed to comply with the contract terms. As in *Coil*, it is unnecessary for us to determine whether plaintiff was "legally obligated" to settle with Nissan under Texas law. *Id.* at 122-123. The "unambiguous conditions of liability" in the Columbia contract, a formal judgment or express acquiescence, operate as a condition precedent to plaintiff's recovery. *Id.* at 123.

Plaintiff's contract with defendant Transcontinental provides as follows:

> We will pay on behalf of the insured all sums that the insured becomes legally obligated to pay as "ultimate net loss" because of . . . "Bodily injury" . . . . caused by an "incident" which takes place during the policy period and in the policy territory.
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> * * *
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> No legal action shall be brought against us unless you have fully complied with all the terms of this policy and the amount of your obligation to pay has been finally determined either by:
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> > Judgment against you after actual trial; or
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> > Written agreement between us, you and the claimant.
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> * * *
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> "Ultimate net loss" means the actual damages the insured is legally obligated to pay, either through:
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> > Final adjudication on the merits; or
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> > Through compromise settlement with our written consent or direction;
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> because of "incident(s)" covered by this policy.

By this plain language, Transcontinental is likewise not obligated to indemnify plaintiff for the Nissan settlement. While Transcontinental is bound to pay "legally obligated" sums under the contract, this obligation is qualified to the extent that such sums constitute "ultimate net losses." To constitute an ultimate net loss, the contract requires that plaintiff have suffered "actual damages" which it is "legally obligated to pay" through either full adjudication on the merits or settlement in which Transcontinental is a part. Again, it is undisputed that there was no litigation between plaintiff and Nissan. It is undisputed that Transcontinental was not a party to the settlement between plaintiff and Nissan. It is accordingly irrelevant whether Texas statutory indemnification requirements constituted a "legal obligation" under the contract. In any event, plaintiff's indemnification of Nissan did not constitute an "ultimate net loss" for which Transcontinental could be held contractually liable. As in *Coil*, plaintiff's settlement excuses Transcontinental from liability on the indemnification. *Coil, supra* at 123-124.

Plaintiff argues that defendants are required to demonstrate prejudice resulting from the settlement with Nissan to avoid their obligations on the contracts. In fact, where the contract is unambiguous, we have "consistently upheld policy exclusions barring recovery of benefits where" an insured settles without the insurer's consent, without requiring a showing of prejudice. See *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 675-676; 554 NW2d 610 (1996); *Coil, supra* at 123-124. Because the contracts are unambiguous, plaintiff's argument is without merit.

Plaintiff next argues that defendants waived their right to rely on the no action clauses because they denied coverage on the contracts. As we observed in *Coil*, however,

> [t]he allegation that defendant had refused to 'undertake any defense' did not establish a waiver of the 'no action' clause. To show waiver, an insured must show that the insurer both denied liability *and* refused to defend an *action* brought against the insured. The undisputed facts show that no lawsuit was ever brought against plaintiff. [*Coil, supra* at 124.]

Although they denied liability, no suit was instituted which defendants could refuse to defend. Defendants thus did not waive their rights under the contracts.

Similarly, we reject plaintiff's argument regarding defendants' alleged bad faith. Plaintiff cannot prevail on such a theory based on a supposed refusal to settle litigation that had yet to arise. *Frankenmuth Mut Ins Co v Keeley (On Rehearing)*, 436 Mich 372, 375-376; 461 NW2d 666 (1990).

Because of our resolution of these issues, we need not address plaintiff's remaining arguments on appeal.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper