

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY T. SHERROD, M.D., and SHIRLEY T.
SHERROD, M.D., P.C.,

UNPUBLISHED
November 10, 2009

Plaintiffs-Appellants,

v

AMERICAN PHYSICIANS CAPITAL, INC., and
AMERICAN PHYSICIANS ASSURANCE
CORPORATION,

No. 287784
Oakland Circuit Court
LC No. 2007-087279-CK

Defendants-Appellees.

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order that granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) is properly granted if the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 119-120 (citations omitted). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002).

The circuit court correctly granted summary disposition to defendants with respect to the breach of contract claim. The claim alleged that defendants, plaintiffs' medical malpractice insurer, breached the contract when it satisfied a judgment without the consent of Dr. Sherrod. However, the insurance policy provided in pertinent part:

The COMPANY shall not settle any CLAIM by payment of DAMAGES
without the NAMED INSURED's written consent, unless:

* * *

3. The trial court, or initial hearing level of an alternative proceeding, has rendered final judgment or other disposition of the CLAIM and the COMPANY, in its sole discretion, decides that all feasible remedies by appeal or other legal proceedings shall not be pursued.

The circuit court entered judgment in the underlying action and defendants decided not to pursue post-judgment or appellate remedies. Plaintiffs assert that defendants had an obligation to pursue a post-trial motion that had been filed on plaintiffs' behalf and all appellate remedies. However, their contention is refuted by the language of the contract under which the decision to pursue those avenues was in the "sole discretion" of defendants. In light of the clear language of the contract, summary disposition was properly granted.

On appeal, plaintiffs attempt to premise a breach of contract action on the email "promise" by defendants' claim representative that defendants "will await the courts [sic] ruling on defense counsel's post trial motions before reaching a judgment on issues surrounding an appeal." However, as argued by defendants, the complaint did not allege that this promise was the basis of a breach of contract action, there is no indication that it was supported by consideration, and the insurance policy was a fully integrated agreement that could not be modified except by written endorsement.

Inasmuch as the parties agreed in the contract that, upon a final judgment, defendants could settle a claim without the insured's consent, defendants' exercise of their contractual rights does not support a claim for intentional infliction of emotional distress. The conduct was not extreme and outrageous, i.e., "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). Therefore, to the extent that the complaint purported to state a claim for intentional infliction of emotional distress, summary disposition was properly granted.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Donald S. Owens