STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Counter Defendant-Appellee,

v

CHERYL LABO, Personal Representative of the Estate of ANGELA LABO, deceased,

Defendant-Counter Plaintiff-Appellant.

UNPUBLISHED
September 9, 1997

No. 188201
Otsego Circuit Court
LC No. 94-006160-NZ

Before: Saad, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a July 31, 1995, order of the circuit court granting summary disposition[1] in favor of plaintiff. We reverse and remand for further proceedings.

This case arises out of an automobile accident that occurred on May 21, 1993. Angela Labo was a passenger in an automobile with Charles Haller when a collision occurred and killed Angela. Haller's automobile was insured by AAA with a policy containing a bodily injury limit of $25,000 per person. Further, Ben and Cheryl Labo, Angela's parents, had an automobile policy with plaintiff. Pursuant to the terms of plaintiff's policy, Angela was insured under it as a resident relative of Ben and Cheryl Labo. Plaintiff's policy provided underinsured motorist coverage with a limit of $300,000 per person.

Defendant entered into a settlement agreement and received the $25,000 limit under AAA's policy. The settlement of October 4, 1994 released the Hallers from all liability. Defendant then made a claim against plaintiff for underinsured motorist coverage. On December 14, 1994, plaintiff filed this declaratory judgment action, contending that there was no coverage under the policy because defendant entered into the settlement without plaintiff's written consent. In the answer to complaint, defendant stated that plaintiff was "fully aware of the settlement" and that plaintiff's attorney was invited to attend the hearing. Defendant also averred that the execution of the release was done with the full knowledge and in the presence of plaintiff's attorney.

On April 19, 1995, plaintiff moved for summary disposition. The sole argument raised in the motion was that defendant was precluded from receiving underinsured motorist coverage because she had entered into a settlement with another insurer without plaintiff's written consent. In an opinion and order dated July 6, 1995, the trial court granted plaintiff's motion for summary disposition on the following basis:

> The plaintiff's motion for summary disposition is GRANTED. The terms of the insurance contract between the parties are controlling. The policy provides no coverage in this situation where a settlement is entered into without the "written consent of the Company." See Adams v Prudential Ins. Co., 177 Mich App 543; 442 NW2d 641.
>
> The defendant's settlement with AAA without written consent bars this claim for underinsured motorist benefits against Auto-Owners.

On appeal, defendant argues that plaintiff is estopped from raising the lack of written consent policy term because plaintiff's attorney consented orally to the settlement agreement.

Plaintiff's policy states in pertinent part:

> This coverage shall not apply: . . . (b) to bodily injury to an insured, or care or loss of services recoverable by an insured, with respect to which such insured, his legal representative or any person entitled to make payment under this coverage shall, without written consent of the Company, make any settlement with any person or organization who may be legally liable therefor[.]

Plaintiff contends that, because defendant did not obtain written consent from it to settle with the Hallers for their policy limit, defendant is not entitled to coverage for underinsured motorist benefits. Policy exclusions clearly set forth in an insurance policy are to be given effect. *Allstate v Keillor (After Remand)*, 450 Mich 412, 417; 537 NW2d 589 (1995). However, we agree with defendant that she has set forth sufficient evidence that plaintiff waived or is estopped from relying on this policy exclusion.

On July 2, 1993, defendant's attorney notified plaintiff's agent (Barbara Sherbino) that "[t]his letter should serve as our formal request to your company for the limits of your uninsured[2] motorist coverage" because AAA's policy limits were $25,000. On August 19, 1993, plaintiff's branch claims adjuster, James Smith, returned a letter to defendant's attorney acknowledging receipt of the letter and requesting information on the underinsured motorist claim. Defendant's attorney again contacted Sherbino by letter on August 25, 1993, indicating that the AAA policy contained only $25,000 in insurance benefits. On September 22, 1993, defendant's counsel again sent a letter to Smith informing him of the settlement and stating:

> Since there is only $25,000.00 available in insurance proceeds and the liability is absolutely clear, please accept this letter as a demand for your full policy limit on the underinsured motorist portion of the Labo's coverage. I will await your advice.

Moreover, in an affidavit dated June 16, 1995, defendant's attorney stated that before presenting the settlement agreement to the trial court, Smith was contacted by telephone and informed of the settlement. Smith told counsel to "go ahead, but if any other policies pop up, we will be taking full credit for those."

The trial court's reliance on *Adams v Prudential Ins Co,* 177 Mich App 543; 442 NW2d 641 (1989), is misplaced inasmuch as there was no claim in that case that the insurer had waived or was estopped from raising the no written settlement exclusion. Moreover, this Court has stated that a "plaintiff's settlement with a negligent motorist or other responsible party destroys the insurance company's subrogation rights under the policy and bars the plaintiff's action for uninsured motorist benefits *unless the insurer somehow waives the breach of the policy conditions.*" (Emphasis added). *Lee v Auto-Owners Ins Co (On Second Remand),* 218 Mich App 672, 675; 554 NW2d 610 (1996), citing *Adams v Prudential Property & Casualty Ins Co,* 177 Mich App 543, 544-545; 442 NW2d 641 (1989). We find that such a waiver has been presented by defendant in this case.

Further, we reject plaintiff's claim that defendant's defense of waiver and estoppel has been waived for failing to raise it as an affirmative defense in her answer to the complaint. Plaintiff did not raise this argument as a basis for its motion for summary disposition below. Plaintiff only contended in the motion for summary disposition that the no written settlement exclusion precluded coverage. The trial court, not being presented with the claim that defendant failed to raise waiver and estoppel as an affirmative defense, obviously could not, and did not, rule on such an argument. Issues not raised below and not addressed by the trial court are not properly preserved for appellate review. *Peterman v Dep't of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994); *Auto Club Ins Ass'n v Lozanis,* 215 Mich App 415, 421; 546 NW2d 648 (1996). Therefore, this issue raised by plaintiff for the first time on appeal is not properly preserved for our review.

Moreover, to the extent that defendant failed to plead the defenses of estoppel and waiver[3] "under a separate and distinct heading," MCR 2.111(E)(3), upon remand defendant shall be permitted to amend her pleading pursuant to MCR 2.118(A)(2).

The trial court's order granting summary disposition in favor of plaintiff is reversed and we remand for further proceedings. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Janet T. Neff
/s/ Kathleen Jansen

[1] The trial court did not specifically state under which subrule it was granting summary disposition.

[2]Although the letter does state "uninsured" motorist coverage, this is probably a typographical error that should have read "underinsured" motorist coverage.

[3] We note that plaintiff cannot seriously contend that it would be surprised by an affirmative defense of estoppel and waiver because in the answer to complaint, defendant specifically denied that the settlement was done without the knowledge or written consent of plaintiff and that plaintiff was fully aware of the pendency of the settlement and the settlement itself.