STATE OF MICHIGAN

COURT OF APPEALS

JOHN D. MCAULIFFE and RUTH L. RYE,

Plaintiffs-Appellees,

v

AUTO-OWNERS INSURANCE COMPANY and HOME-OWNERS INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
December 10, 2015

No. 323349
Menominee Circuit Court
LC No. 13-014547-CK

Before: OWENS, P.J., and MURPHY and HOEKSTRA, JJ.

PER CURIAM.

Defendant Home-Owners Insurance Company, which issued the insurance policy pertinent to the parties' litigation, and defendant Auto-Owners Insurance Company, which is the parent company of Home-Owners, appeal by leave granted the trial court's order denying defendants' motion for summary disposition.[1] This case arises out of a motor vehicle accident involving two cars that resulted in injuries to plaintiff John D. McAuliffe (McAuliffe), whose wife, plaintiff Ruth L. Rye, alleged a loss of consortium claim. The case further stems from plaintiffs' settlement with the insurance company of the motorist alleged to have been at fault in the accident, seconded by plaintiffs' claim for underinsured motorist (UIM) benefits from their own carrier – the insurer, which rejected the claim. The insurer argued, for purposes of summary disposition, that plaintiffs were not entitled to UIM benefits, given that plaintiffs had failed to obtain written consent to settle from the insurer prior to the settlement, as effectively mandated by an exclusion in the policy. The trial court ruled that there existed issues of fact regarding underlying communications, and lack thereof, that could support a conclusion that the insurer was equitably estopped through silence from relying on the policy exclusion. We hold that there is a dearth of evidence supporting plaintiffs' equitable estoppel theory and that there is no genuine issue of material fact that plaintiffs are barred from recovering UIM benefits under the plain and unambiguous language of the exclusion, as plaintiffs never sought the insurer's consent to settle before the settlement was reached. Accordingly, we reverse and remand for entry of judgment in favor of the insurer.

[1] For purposes of this opinion and ease of reference, and given the parent-subsidiary relationship, we shall hereafter collectively refer to the two defendants as "the insurer."

The underlying motor vehicle accident occurred on October 18, 2010, injuring McAuliffe, who was a passenger in a car that was struck by a vehicle owned by a Wisconsin couple. Nationwide Insurance Company (Nationwide) insured the Wisconsin couple and/or the driver of their vehicle under a policy that had a $100,000 liability limit. Plaintiffs' no-fault insurance policy with the insurer provided $500,000 in UIM coverage, subject to a specific exclusion with respect to "any person who settles a **bodily injury** claim without **our** written consent." In a letter dated June 6, 2013, and apparently received by the insurer on June 10, 2013, plaintiffs' then-counsel stated:

> Please be advised that the underlying liability carrier pertaining to this claim, Nationwide . . . *has tendered its $100,000 policy limit* to . . . McAuliffe *in exchange for a release of the Company and its insured* . . . . I am enclosing a copy of the [Nationwide] declarations page for your file.
>
> At this time, we are pursuing an underinsured motorist claim with [the insurer]. To date, we have received and are enclosing the following items of special damages regarding the above claim[.] . . . .
>
> [Based] upon the above specials and [a] lien, our demand for settlement is for your policy limit.
>
> After you have an opportunity to review this matter, I would appreciate if you would contact me to discuss settlement of this claim.

A fair reading of this letter strongly suggested that plaintiffs *had* settled with Nationwide in exchange for a release of liability. Even if construed in a manner indicating that settlement was merely pending, the language in the letter certainly made no request, expressly or implicitly, for written consent relative to a settlement with Nationwide. There was no indication that consent was being sought. Indeed, in an affidavit by the insurer's field claim representative who was assigned plaintiffs' claim for UIM benefits, she averred that she construed the letter "to mean that the underlying suit had been settled without the written consent" of the insurer. She further asserted that she received no further written or oral communication regarding plaintiffs' UIM claim until October 9, 2013, when a new attorney representing plaintiffs indicated that a settlement had been previously reached and that plaintiffs were demanding payment of the $500,000 policy limit as to UIM benefits. The field claim representative additionally averred:

> If a request for written consent to settle the underlying claim had been made, I would have sent a written request for additional identifying data for the parties being released, as well as information relating to the assets, liabilities and collectability of the parties being released in order to determine whether to grant written consent to settle the underlying suit . . . .

In an affidavit by plaintiffs' former counsel who had signed the June 6, 2013 letter, he averred that the insurer failed to respond to the letter, that his bookkeeper had contacted the

insurer "multiple times th[r]ough out the time frame of June 10, 2013 and July 9, 2013, notifying [the insurer] of the pending settlement with Nationwide . . . and inquiring as to [the insurer's] PIP[2] interest in the case," that plaintiffs had settled with Nationwide and the Wisconsin owners on August 5, 2013, for the policy limit of $100,000, and that between June 6 and August 5, 2013, he received "no form of communication from [the insurer] as to a denial of their UIM claim for reasons of lack of consent to settle." As gleaned by close examination of this affidavit, at no point did plaintiffs' former counsel aver that a request for consent to settle had been communicated to the insurer.

In an affidavit executed by the above-referenced bookkeeper, she averred that she had "placed several unreturned phone calls to [the insurer] between the dates of June 10, 2013, and August 9, 2013 [apparently after settlement], with regards to pending settlement matters pertaining to this case[,]" that she had "left a voicemail with the manager . . . on June 18, 2013, with the intention to discuss settlement matters[,]" that she had "left a voicemail with [an employee of the insurer] . . . on June 26, 2013, with the intention to discuss settlement matters[,]" and that she had spoken with another employee of the insurer on July 9, 2013, who confirmed that the insurer did "not have subrogation rights out of settlement."[3] While the affidavit referred to pending settlement matters and an "intention" to discuss such matters, there was no averment indicating that the bookkeeper had spoken to anyone or had left any message or voicemail in which she inquired about obtaining written or any kind of consent from the insurer concerning the Nationwide settlement. We also point out that the bookkeeper's affidavit, although repeatedly making reference to "settlement matters," failed to specifically identify those matters as being connected to the Nationwide settlement, as opposed to settlement of the UIM or PIP claims.

On October 17, 2013, plaintiffs filed their complaint, alleging failure to pay UIM benefits as required by the terms of the insurance policy. The insurer filed a motion for summary disposition under MCR 2.116(C)(10), arguing that plaintiffs were precluded from recovering UIM benefits in light of the failure to obtain the insurer's written consent to enter into the settlement agreement. In response, plaintiffs maintained that the insurer was equitably estopped from denying UIM coverage, given that the insurer had failed to respond to plaintiffs' June 6, 2013 letter and the bookkeeper's phone calls and voicemails. The trial court ruled that there existed issues of fact regarding underlying communications, and the insurer's lack of responsive communications, that could support a conclusion that the insurer was equitably estopped through

---

[2] Personal protection insurance benefits.

[3] In regard to this last averment, the named employee was a claims representative assigned to McAuliffe's PIP benefits claim, and he executed his own affidavit regarding the July 9, 2013 conversation with the bookkeeper. He averred that he was asked "whether there would be a subtraction or claim for reimbursement by [the insurer] for PIP benefits paid or payable if . . . McAuliffe settled his claim against the other motorist." He additionally asserted that he did not refer the bookkeeper to the UIM claims representative "because the question of an underinsured motorist claim or consent to settle the claim against the other motorist never came up."

silence from relying on the policy exclusion.[4] This Court granted the insurer's application for leave to appeal. *McAuliffe v Auto-Owners Ins Co*, unpublished order of the Court of Appeals, entered February 10, 2015 (Docket No. 323349).

On appeal, the insurer argues that it was not equitably estopped from enforcing the plain and unambiguous language of the policy exclusion relative to UIM benefits on the basis of failure to respond or silence, where plaintiffs never made a request for consent to settle. We agree. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). We likewise review de novo the application and interpretation of an insurance policy. *Hunt v Drielick*, 496 Mich 366, 372; 852 NW2d 562 (2014).[5] Our Supreme Court in *Hunt* observed:

---

[4] In the written order entered by the trial court, it ruled that it was rejecting the insurer's argument on summary disposition "for [the] reason that an insurer may be estopped from enforcing the written consent policy provision by 'nothing more than silence,' and for those reasons further stated by the Court on the record." At the hearing on the motion for summary disposition, the trial court stated:

> I'm denying the motion. I'm finding that there . . . are some factual issues here as to the number and nature of the calls and other efforts that plaintiff[s] made to bring [the insurer] to a decision.

[5] With respect to the well-established principles governing the analysis of a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), stated:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

> An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to determine what the agreement was and effectuate the intent of the parties. We employ a two-part analysis to determine the parties' intent. First, it must be determined whether the policy provides coverage to the insured, and, second, the court must ascertain whether that coverage is negated by an exclusion. While it is the insured's burden to establish that his claim falls within the terms of the policy, the insurer should bear the burden of proving an absence of coverage. Additionally, exclusionary clauses in insurance policies are strictly construed in favor of the insured. . . . However, it is impossible to hold an insurance company liable for a risk it did not assume, and, thus, clear and specific exclusions must be enforced. [*Id.* at 373 (citations, quotations marks, and alteration brackets omitted).]

There is no dispute that plaintiffs failed to obtain written consent from the insurer with respect to the underlying settlement with Nationwide and its policy holders. Therefore, under the plain and unambiguous language of the UIM exclusion in the insurance policy, plaintiffs were not entitled to UIM benefits. The question becomes whether the doctrine of equitable estoppel can overcome this contractual obstacle. "Almost a century ago, the Supreme Court held that an insurer may be equitably estopped from denying coverage when it unreasonably delays in responding to its insured." *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). The *Moore* panel further observed:

> The doctrine of equitable estoppel rests on broad principles of justice and applies to actions at law and in equity. Equitable estoppel arises when a party, by representations, admissions, or silence intentionally or negligently induces another party to believe certain facts. The second party must not only have justifiably relied on this belief, but also must be subject to prejudice if the first party is permitted to deny the facts upon which the second party relied. [*Id.* (citation omitted).]

Reasonable minds would not differ in agreeing that the record simply does not lend any support for the conclusion that the insurer, by its silence, intentionally or negligently induced plaintiffs to believe that it was consenting to the settlement at issue. As mentioned earlier, the June 6, 2013 letter sent by plaintiffs' former attorney strongly suggested, if not conclusively indicated, that a settlement had already been reached and a release obtained. And even if construed as communicating the existence of a mere pending settlement, there was no request for written consent from the insurer. In fact, plaintiffs' counsel only desired a response in regard to settling the UIM claim. The affidavits by former counsel and his bookkeeper also failed to indicate that any of the phone communications and voicemails included a request for written consent, or any type of consent for that matter, relative to the Nationwide settlement. Furthermore, with respect to whether plaintiffs had justifiably relied on the purported belief that the insurer, by its silence, had consented to the Nationwide settlement, leading them to execute the settlement and release, the affidavits presented by plaintiffs contained absolutely no averments to that effect. Accordingly, there is no genuine issue of material fact regarding the complete lack of reliance on the insurer's silence. And, under the circumstances, reasonable minds would agree, assuming the existence of documentary evidence showing reliance, that the presumed reliance would not have been justified. In sum, there was no basis to invoke equitable

estoppel; therefore, the policy exclusion was enforceable and barred plaintiffs' claim for UIM benefits. Accordingly, the trial court erred in denying the insurer's motion for summary disposition.

Briefly, plaintiffs' reliance on *Rauch v Michigan Millers' Mut Fire Ins Co*, 131 Mich 281; 91 NW 160 (1902), and *Moore*, 224 Mich App 370, are misplaced. In *Rauch*, an insured had written a letter to the insurance company expressly asking to be "advise[d]" if his actions violated or conflicted with his insurance policy because he did not "remember[] the conditions." *Rauch*, 131 Mich at 283 (GRANT, J., dissenting). In *Moore*, the insured sent a letter to the insurance company expressly stating that if it did not receive a response, it would " 'assume [the insurance company had] no objections to the [r]eleases being signed.' " *Moore*, 224 Mich App at 372-373. In each of these cases, the insured expressly requested a response from the insurer, which simply did not occur here with respect to the matter of consent.

Reversed and remanded for entry of judgment in favor of the insurer. We do not retain jurisdiction. Having fully prevailed on appeal, taxable costs are awarded to the insurer under MCR 7.219.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Joel P. Hoekstra