IN THE COURT OF APPEALS OF IOWA

No. 0-402 / 09-1673
Filed August 11, 2010

SIMON ESTES,
Plaintiff-Appellee,

vs.

PROGRESSIVE CLASSIC INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Greer (summary judgment) and Jon Fister (motion to modify), Judges.

Progressive Classic Insurance Company appeals from the district court's order denying its motion for summary judgment and granting partial summary judgment in favor of their insured, Simon Estes, on his claim for underinsured motorist benefits. **AFFIRMED.**

Steven T. Durick and Joseph M. Barron of Peddicord, Wharton, Spencer, Hook, Barron & Wegman, L.L.P., Des Moines, for appellant.

David J. Dutton and Erin Patrick Lyons of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

TABOR, J.

Progressive Classic Insurance Company (Progressive) appeals from the district court's order denying its motion for summary judgment and granting partial summary judgment in favor of its insured, Simon Estes, on his claim for underinsured motorist benefits. Progressive contends the court erred in concluding Estes's insurance policy did not include either a "consent-to-settlement" clause or an "exhaustion" clause. It also contends the court erred in calculating the interest on the judgment. Because neither of the cited clauses in the Progressive policy bar Estes's recovery, we affirm the district court's denial of Progressive's motion for summary judgment. We also affirm the district court's order modifying the interest portion of the judgment.

I. Background Facts and Proceedings. The facts of this case are not in dispute. On October 2, 2005, a vehicle driven by Annette Rivers struck Simon Estes while he was checking the brake pads on his daughter's car in the tire and battery center of the Sam's Club in Waterloo.[1] He was thrown to the ground as a result of the collision and sustained injuries to his right shoulder, right knee, right hip, and left leg. On June 20, 2006, Estes and his wife, Ovida, filed a petition against Rivers and Sam's Club seeking damages for the injuries resulting from the collision. After obtaining consent from Progressive, the Esteses settled with Rivers for $231,446, which was less than the $250,000 bodily injury limit of her insurance policy. The Esteses settled their premises liability claim against Sam's Club for $75,000, which was less than the $9,950,000 bodily injury limits of its

[1] Estes had the permission of a Sam's Club employee to be in the restricted area.

insurance policy. The Esteses did not obtain Progressive's consent before settling with Sam's Club.

On September 24, 2007, Estes filed a petition for underinsured motorist benefits against Progressive.[2] Progressive filed a motion for summary judgment, alleging Estes settled his claim against Sam's Club without its consent, in violation of the terms of his policy. It also alleged Estes's damages were less than the amount of total bodily injury limits in the insurance policies held by Rivers and Sam's Club. Estes filed a cross-motion for partial summary judgment arguing he was entitled to judgment as a matter of law on Progressive's affirmative defense regarding consent-to-settlement. On April 27, 2009, the court entered its order denying Progressive's motion and granting partial summary judgment in favor of Estes.

The district court held trial on this matter in September 2008. The jury entered a verdict in favor of Estes for $1,189,489.11. The court then entered judgment in favor of Estes in the amount of $300,000—the limit on coverage of his underinsured motorist policy—plus interest from September 24, 2007 forward. The court denied Progressive's motion for new trial, but amended its order to provide interest on the judgment to run from June 20, 2006 forward. Progressive filed a notice of appeal on November 2, 2009.

II. Scope and Standard of Review. Our review of a ruling on a motion for summary judgment is for the correction of errors at law. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998). Summary judgment is only appropriate where

[2] Ovida Estes was originally named as a plaintiff in the action, but dismissed her claim against Progressive without prejudice prior to trial.

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We review the record before the district court to determine when an issue of material fact exists; if it does not, we determine whether the district court properly applied the law. *Id.* We review the record in the light most favorable to the nonmoving party. *Id.*

Our review of interest calculation issues is also for the correction of errors at law. *Opperman v. Allied Mut. Ins. Co.*, 652 N.W.2d 139, 142 (Iowa 2002). Likewise, when the issue turns on an interpretation of the relevant rules of civil procedure, our review is for correction of legal error. *Hasselman v. Hasselman,* 596 N.W.2d 541, 543 (Iowa 1999).

***III. Consent-to-Settlement Clause*.** Progressive first contends the court erred in denying its motion for summary judgment because Estes settled his claim with Sam's Club without its consent. It alleges a "consent-to-settlement" clause in Estes's policy bars recovery.

Under a consent-to-settlement clause, an insured has a duty to notify the insurer and obtain written consent to a proposed settlement with the tortfeasor. *Grinnell Mut. Reins. Co. v. Recker*, 561 N.W.2d 63, 70 (Iowa 1997). Consent-to-settlement clauses are valid in Iowa. *Kapadia v. Preferred Risk Mut. Ins. Co*., 418 N.W.2d 848, 851 (Iowa 1988). The purpose of such clauses is to protect an insurer's subrogation rights. *Id.* at 850-52.

A consent-to-settlement clause may not be enforced unless an insurer is able to show it was prejudiced by the settlement. *Hoth v. Iowa Mut. Ins. Co*., 577 N.W.2d 390, 392 (Iowa 1998). Prejudice may arise because by consenting to a

proposed settlement agreement, an insurer's subrogation rights against the third-party are relinquished. *Id.* at 392-93. However, failure to obtain the insurer's consent is not a complete defense; an insurer is only entitled to set off an amount it reasonably could have collected from the third-party. *Id.* at 393.

The district court denied Progressive's motion for summary judgment regarding the claimed breach of a consent-to-settlement clause on two grounds: (1) the language of Estes's policy did not require he receive written consent from Progressive before settling with Sam's Club and (2) Progressive failed show to that any failure to receive written consent before settling prejudiced its subrogation rights. Because the issue is dispositive, we focus our inquiry on the first ground articulated by the district court.

In construing an insurance policy, the intent of the parties controls. *Nationwide Agri-Business Ins. Co. v. Goodwin*, 782 N.W.2d 465, 470 (Iowa 2010). The parties' intent is determined by what the policy itself says. *Id.* It is the insurer's duty to define any limitations or exclusionary clauses in clear and explicit terms and a clear and unambiguous exclusion must be given effect. *Id.* However, where an exclusionary policy is fairly susceptible to two reasonable constructions, the court will adopt the construction most favorable to the insured. *Id.* If the exclusionary language is not defined in the policy, we give words their ordinary meaning. *Id.*

The language of Estes's uninsured motorist policy provides as follows:

> In the event of any payment under this policy we are entitled to all the rights of recovery of the person or organization to whom the payment was made. That person or organization must sign and deliver to us any legal papers related to that recovery, do whatever

> else is necessary to help us exercise those rights, and do nothing after loss or accident to harm our rights.
>
> When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held in trust for us and reimbursed to us to the extent of our payment, provided that the person to or on behalf of whom such payment is made is fully compensated for their loss.
>
> In the event recovery has already been made from the responsible party, any rights to recover by the person(s) claiming coverage under this policy no longer exists.

Nothing in the language of this clause requires Estes to obtain Progressive's consent before settling with a third-party tortfeasor like Sam's Club. In contrast, other provisions of the Progressive policy require written consent before settling against the owner or operator of an uninsured auto or underinsured auto. Because nothing in the exclusionary clause requires consent to settle, Estes's claim for underinsured benefits cannot be barred on the basis he did not obtain Progressive's consent before settling with Sam's Club. We affirm the district court's denial of Progressive's motion for summary judgment on this issue and its partial grant of summary judgment in favor of Estes.

IV. Exhaustion Clause. Progressive next contends the district court erred in denying its motion for summary judgment on the grounds Estes's damages do not exceed the amount of the bodily injury limits on the tortfeasors' insurance policies. It argues the limits on Sam's Club's liability insurance policy of $9,950,000 and Rivers's liability limit of $250,000 exceed the $3,719,986.11 in damages Estes calculated in his interrogatories.

Progressive refers to the following clause of its policy as an exhaustion clause:

> [I]f an insured enters into a settlement agreement for an amount less than the sum of the limits of liability under all applicable bodily injury liability bonds or policies, [Progressive's] limit of liability for underinsured motorist coverage shall not exceed the difference between the damages sustained by the insured and the sum of the applicable bodily injury liability limits.

In its ruling on the parties' motions to reconsider the ruling on summary judgment, the district court held as follows:

> The court agrees with plaintiff that the Progressive-issued underinsured motorist policy does not contain an exhaustion clause. The clause Progressive argues is an exhaustion clause simply provides that Progressive's "limit of liability for underinsured motorist coverage shall not exceed the difference between the damages sustained by the insured and the sum of the applicable bodily injury limits." This does not constitute an exhaustion clause. There is no requirement that plaintiffs exhaust all applicable liability insurance prior to applicability of Progressive's insurance.

Our supreme court addressed the issue of exhaustion clauses in *In re Estate of Rucker*, 442 N.W.2d 113 (Iowa 1989). The court found the failure to fully exhaust a tortfeasor's insurance should not preclude a claim for underinsured motorist coverage. *Rucker*, 442 N.W.2d at 116-17. The court recognized there may be instances in which the best interests of the injured party are served by settling with the tortfeasor's liability carrier for less than the liability limits on the tortfeasor's policy. *Id.* at 116. However, in instances where an injured party settles with the tortfeasor's liability carrier for less than the policy's liability limits, there will be a "gap" between the amount settled for and the policy limits. *Id.* The court reconciled the effect of this gap and the purpose of chapter

516A to protect an injured party from a tortfeasor who failed to carry adequate liability insurance by holding as follows:

> We hold that the injured party who settles with a tortfeasor's liability carrier shall be assumed to have received the policy limits of the tortfeasor's liability policy. Settlement by the injured party with the liability carrier is acknowledgment that the policy has been exhausted. Consequently, *the injured party may only recover the difference between the liability policy limit and the damages suffered*, subject to the underinsured motorist policy limits.

Id. at 117 (emphasis added).

Here, the plain language of the Progressive policy states Progressive's liability may not exceed the difference between the damages suffered by its insured and the liability policy limit of the tortfeasor. Although there is no specific requirement Estes "exhaust" the liability limits of the tortfeasors' policies, the policy's language is in keeping with the court's holding in *Rucker*. Because Estes settled the claim against Rivers, he is assumed to have received her policy's liability limit of $250,000. Thus, he may recover the difference between the damages suffered--$1,189,486.11 as determined by the jury's verdict—and the underinsured motorist's policy limit of $250,000 subject to the $300,000 limit on underinsured motorist coverage in the Progressive policy.

Estes argues on appeal that *Rucker* does not address the more ticklish question in this case, i.e., whether the disputed clause in Progressive's policy requires exhaustion of the bodily injury limits in the premises liability policy held by Sam's Club, which was not an underinsured motorist. Estes analogizes his case to *McClure v. Northland Insurance Cos.*, 424 N.W.2d 448, 449 (Iowa 1988), which held that an injured person's recovery from an underinsured motorist policy

could not be reduced by the amount of worker's compensation benefits received for the same injury. Instead, the worker's compensation benefits should be treated the same as the recovery from a tortfeasor and deducted from the total amount of damages sustained by the victim; the underinsured motorist coverage then should make up the difference subject to the policy limits. *McClure*, 424 N.W.2d at 450. Estes proposes the jury verdict of $1,189,486.11 should be reduced by the $75,000 settlement with Sam's Club, as well as the $250,000 liability limit in Rivers's policy.

Progressive counters in its reply brief that *McClure* is inapposite because it addressed worker's compensation benefits and not a second tortfeasor with ample liability insurance. Progressive notes that its policy limits coverage to no greater than the difference between the insured's damages and "the sum of all applicable bodily injury limits." Progressive does not argue that Estes's reliance on *McClure* is a new ground upon which to affirm not urged in the district court.[3]

We agree with Estes that *McClure* is instructional here. *McClure* established that Iowa's underinsurance coverage in Iowa Code chapter 516A (2009) is designed to make the victim whole. *McClure*, 424 N.W.2d at 450. Progressive's proposed inclusion of the premises liability settlement with Sam's Club under its policy's "exhaustion clause" does not serve to make Estes whole.

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[3] We recognize our preservation-of-error rule that appellate courts will not consider a matter raised for the first time on appeal, even if it is the only basis to uphold the district court. *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002). However, Estes consistently maintained Progressive was not entitled to judgment as a matter of law because its "exhaustion" theory did not apply. We believe that basis for resisting Progressive's motion for summary judgment encompasses his argument on appeal.

The key language in the Progressive policy clause is "the sum of the limits of liability under all *applicable* bodily injury liability bonds or policies." (Emphasis added.) The Sam's Club premises liability policy is not an applicable bodily injury liability policy under the terms of the insurance contract because Sam's Club was not the owner or operator of an underinsured auto within the definitional section of the Progressive policy.

Moreover, Iowa Code section 516A.1 requires underinsured motorist coverage to be included in every motor vehicle liability policy for the protection of persons "who are legally entitled to recover damages from the owner or operator of . . . an underinsured motor vehicle because of bodily injury . . . caused by accident and arising out of the ownership, maintenance or use of such . . . underinsured motor vehicle . . . ." That code section anticipates that underinsured motorist coverage will bridge the gap between the damages suffered by the insured and the motor vehicle insurance policy limits of the underinsured motorist who causes the accident. It does not contemplate that an insured would have to exhaust the liability limits of other insurance policies—such as the premises liability policy of the business where the accident occurred—before being eligible to recover underinsured motorist benefits under their own motor vehicle policy. To interpret the phrase "applicable bodily injury liability bonds or policies" in the Progressive policy's "exhaustion clause"

consistently with section 516A.1, we must find that it does not encompass insurance policies other than that held by an underinsured motorist. [4]

Because the exhaustion clause of Estes's policy with Progressive does not apply to Sam's Club, we affirm the district court's order denying summary judgment in favor of Progressive on this ground.

V. Interest. Finally, Progressive contends the district court erred in granting Estes's motion to modify the court's order for judgment. Progressive first asserts the district court should not have considered the motion to modify because it was untimely. It also claims interest on the judgment should accrue from the date Estes filed his underinsured motorist claim, not from the date he filed his action against Sam's Club.

Under Iowa Rule of Civil Procedure 1.1007, a party has ten days[5] in which to file post-trial motions, unless granted up to an additional thirty days by the court for good cause shown. Here, the court's order for judgment was filed on September 3, 2007. Estes did not file his motion to modify until September 23, 2007. In his motion, he conceded the ten-day deadline had passed, but argued the deadline did not apply because Progressive had filed a motion for new trial.

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[4] This interpretation finds support in exhaustion cases arising in other jurisdictions. *See, e.g., Wedemeyer v. Safeco Ins. Co.*, 73 Cal. Rptr 3d 415, 421 (Cal. Ct. App. 2008) (holding that after tortfeasor's automobile liability policy limit was exhausted, injured driver was entitled to payment under underinsured motorist policy, even though he had not yet recovered under tortfeasor's business insurance policy, because business policy was not "bodily injury liability policy" under state code); *Am. Universal Ins. Co. v. DelGreco*, 530 A.2d 171, 181 (Conn. 1987) (holding the statute requiring insurer to make payments after limits of liability under "bodily injury liability bonds or insurance policies" applicable at the time of the accident had been exhausted did not require dram shop policy to be exhausted before triggering of underinsured motorist coverage).

[5] The rule was recently amended, effective August 9, 2010, to provide fifteen days in which to file a post-trial motion.

Estes claimed the court was free to correct an error within the order for judgment any time before its ruling on the motion for new trial.

We conclude the court was within its power to modify the interest calculation in the final judgment order. Although the order for judgment was a final and appealable judgment, the court did not lose control over the case because Progressive timely filed its motion for new trial. *See Schmatt v. Arenz*, 176 N.W.2d 771, 774 (Iowa 1970) ("When a motion for new trial is timely filed, a trial court does not lose control over the case because judgment is or has been entered under [rule 1.955]."). At that point the order for judgment became interlocutory, and remained interlocutory, until the court ruled on the motion. *See IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 627-28 (Iowa 2000) ("When a posttrial motion—such as a rule [1.904(2)] motion, motion for judgment notwithstanding the verdict, and motion for new trial—is pending before an appeal is taken, the judgment or decision to which the motion is addressed is interlocutory until the district court rules on the motion."). "A district court's power to correct its own perceived errors has always been recognized by this court, as long as the court has jurisdiction of the case and the parties involved." *Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 396 (Iowa 1988).

Because the district court retained jurisdiction of the case while the motion for new trial was pending, the court had the authority to correct its own perceived error. It would impede a fair disposition of causes if a court, convinced of an error, could not correct it. *Davenport Bank & Trust Co. v. City of Davenport*, 318 N.W.2d 451, 455 (Iowa 1982) (stating "no litigant has a vested right in an

erroneous ruling"). In its corrective order, the court stated it "was unaware of the cases which hold that interest runs from the date of filing of the underlying action against the tortfeasors." It is apparent the court perceived the error to be its own. Whether the error was brought to the court's attention by an arguably untimely motion or whether the court discovered the issue on its own is irrelevant to its ability to correct the perceived error.

We next turn to the propriety of the order correcting the interest calculation. The court modified the judgment to provide that interest on Estes's judgment shall run from the date he filed the underlying action, June 20, 2006, as opposed to the date he filed his claim for underinsured motorist benefits. Two cases support the district court's action.

In *Opperman v. Allied Mutual Insurance Co.*, 652 N.W.2d 139, 142 (Iowa 2000), our supreme court found Allied was bound under its underinsured motorist policy to pay its insured what the insured would have recovered if the tortfeasor had been adequately insured. The court held, "By statute that includes interest on past damages from the date the *tort* suit was filed." *Opperman*, 652 N.W.2d at 142. Our supreme court recently reaffirmed the *Opperman* ruling in *Wilson v. Farm Bureau Mutual Insurance Co.*, 770 N.W.2d 324, 332 (Iowa 2009). In both cases, the court emphasized that slight differences in the procedural histories did not ultimately effect the interest calculation. *Wilson*, 770 N.W.2d at 332 (holding the act of bringing successive actions against the tortfeasor and the tortfeasor's insured—rather bringing than a single action brought against both—was a procedural distinction that did not require a different interest calculation);

Opperman, 652 N.W.2d at 142 (holding Allied's attempt to distinguish on the basis there was no judgment entered against the tortfeasor in the prior action was "a distinction without a substantive difference" because the issue in either situation is "what it would take to fully compensate the plaintiffs for the damages they suffered" and concluding that under either scenario, prejudgment interest would accrue from the time of the filing of the underlying tort action).

Progressive attempts to distinguish the facts of this case from the holdings in *Opperman* and *Wilson*. It argues the present case involves a settlement, rather than obtaining a judgment against the tortfeasor. Progressive notes *Opperman* did not involve a prior judgment against the tortfeasor, but argues the court's holding in *Wilson* "does appear to require such a judgment." It cites the following language:

> On the date judgment was entered in the contract action, the damages due under the insurance contract—i.e., the excess of the aggregated tort judgment and post judgment interest—were converted into a judgment on the contract and interest began to accrue on the contract according to § 535.3.

Wilson, 770 N.W.2d at 332.

We are not persuaded by this argument. The court in *Wilson* acknowledged the differences in procedural history and found it did not prevent the fundamental holding of *Opperman* from applying to the facts. *Id.* ("While this case is factually distinct from *Opperman* in one way, we do not believe the distinction makes a legal difference."). There is nothing in *Wilson* to suggest the court was modifying its prior holding. Rather, it appears the court was simply applying the holding to the unique set of facts before it.

Progressive also points out that in the present case, Estes settled with the torfeasor for less than the limit of the tortfeasor's policy and notes the fighting issue in the district court was whether underinsured motorist coverage was available to Estes. We conclude these distinctions do not remove this case from the reach of our supreme court's earlier holdings. To fully compensate Estes, prejudgment interest should be awarded as of June 20, 2006, the date the underlying tort action was filed. Accordingly, we affirm.

AFFIRMED.