

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0584, Janice Perkins v. Champlain Casualty Company of Vermont, the court on May 18, 2005, issued the following order:

The defendant, Champlain Casualty Company of Vermont (Champlain), appeals, and the plaintiff, Janice Perkins, cross-appeals, the superior court's grant of summary judgment to the plaintiff on her declaratory judgment petition. We reverse and remand.

While waiting at a red light in the far left lane, the plaintiff's car was struck from behind by a vehicle driven by Tracy Uliano. A witness reported that Uliano was mostly in the center lane when a pickup truck pulled out from a gas station into the far right lane. Uliano swerved to the left and hit the plaintiff. The pickup truck did not stop and its driver was never identified. The police report concluded that Uliano should have been traveling at a speed that would have allowed her to stop.

The vehicle driven by Uliano was insured under an automobile liability policy with limits of \$100,000 per person, while Uliano had a separate policy with limits of \$25,000 per person. The plaintiff was insured by Champlain, with uninsured motorist coverage of \$100,000 per person.

In January 2001, the plaintiff sued Uliano. By letter dated September 18, 2001, the plaintiff notified Champlain that the

police report identified a Tracy Uliano as the responsible party, and we have sued Ms. Uliano.

As discovery progresses in that lawsuit, it appears that an unidentified driver in a black pick up truck may be at least in part responsible for the accident. Since this driver left the scene of the accident, he or she remains unidentified and there does not appear to be any way to identify him or her.

We are making a claim under [the plaintiff's] uninsured motorist coverage for any injuries caused by this unidentified driver of the black pick up truck.

A copy of the police report was enclosed with the letter. On September 21, 2001, the plaintiff informed Champlain that her injuries were in excess of \$100,000.

By letter dated January 9, 2002, the plaintiff informed Champlain that she was scheduled to participate in court-ordered mediation of her suit against Uliano, stating:

On January 18th, commencing at 9:00 a.m., we are scheduled for court ordered mediation. In the event defense counsel for Ms. Uliano makes an offer that is below policy limits, but that we would consider, we would like you to be available. We would need you to approve such an offer, as we would then proceed under [the plaintiff's] underinsured motorist coverage for the conduct of the unknown driver of the black pickup truck.

Champlain responded on January 16, 2002, that its position was that there "would be no uninsured motorist bodily injury claim unless Ms. Uliano's policy is first exhausted. No UMBI would be available unless some liability is attributed to the black 'phantom' vehicle." Champlain requested that the plaintiff keep it informed as to the results of the alternate dispute resolution. Champlain did not attend the mediation.

In August 2002, the plaintiff and Uliano reached a settlement at a second, private mediation, for \$87,500, which was less than Uliano's policy limits. The plaintiff did not inform Champlain that the second mediation session was to occur. In November 2002, the plaintiff gave formal notice to Champlain of her claim for uninsured motorist coverage. In December 2002, the plaintiff first informed Champlain that she had settled her claim against Uliano.

Champlain denied the plaintiff's claim for uninsured motorist coverage, relying in part upon the plaintiff's failure to obtain its consent to the settlement with Uliano. The plaintiff filed this declaratory judgment action.

The trial court ruled that the plaintiff's policy unambiguously provided that Champlain would not provide uninsured motorist coverage for bodily injury if the insured settled the bodily injury claim without Champlain's consent, and found that the plaintiff did not obtain Champlain's consent prior to settling with Uliano. The court further found, however, that Champlain had refused to participate in court-ordered mediation, taking the position that no uninsured motorist claim existed unless Uliano's policy was first exhausted and some liability was attributed to the pickup truck. The court concluded that under the circumstances of this case, "the plaintiff's failure to obtain [Champlain's] consent prior to settling her claim with Ms. Uliano does not violate the policy such that her right to recover uninsured motorist benefits is precluded." Accordingly, the court granted summary judgment in favor of the plaintiff.

On appeal, Champlain argues that the trial court erred by not enforcing the consent-to-settle provision in its policy, and that its conduct did not constitute a waiver of that provision. In her cross-appeal, the plaintiff argues that the trial court erred in ruling that the consent-to-settle provision is unambiguous.

In reviewing the trial court's grant of summary judgment, we consider the affidavits and other evidence, and all properly drawn inferences in the light most favorable to the non-moving party. If our review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the grant of summary judgment. We review the trial court's application of the law to the facts *de novo*. City of Manchester Sch. Dist. v. City of Manchester, 150 N.H. 664, 665 (2004).

We begin with the cross-appeal. In relevant part, the plaintiff's policy provides:

B. We do not provide Uninsured Motorists Coverage for . . . "bodily injury" sustained by any "insured":

1. If that "insured" or the legal representative settles the "bodily injury" . . . claim without our consent. However, this exclusion (B.1.) does not apply to damages an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle".

We recently held that a similar provision "clearly and unambiguously requires the plaintiff to obtain [the insurer's] consent before he settles any bodily injury or property damage claim in order to receive uninsured motorist benefits related to that claim." Harrington v. Concord Gen. Mut. Ins. Co., 151 N.H. ___, ___ (decided March 21, 2005). We agree with the trial court that this provision also unambiguously required the plaintiff to obtain Champlain's consent to settle her claim against Uliano.

Turning to Champlain's appeal, while it is clear that Champlain declined the plaintiff's invitation to participate in the court-ordered mediation and indicated its belief that uninsured motorist benefits would not be available unless Uliano's policy was first exhausted and liability was attributed to the pickup truck, we do not agree with the trial court's conclusion that Champlain thereby waived its right to enforce the consent-to-settle provision as a matter of law. To the contrary, viewed in the light most favorable to Champlain, Champlain's conduct indicated its intent to rely upon that provision to ensure that the plaintiff did not settle her claim with Uliano for less than Uliano's policy limits.

The plaintiff argues that the real question in this case is whether Champlain "unreasonably withheld its cooperation with the settlement approval." Assuming without deciding that the trial court ruled that Champlain acted

unreasonably, we agree with Champlain that the evidence, viewed in the light most favorable to it, does not support the grant of summary judgment. In January 2002, Champlain had good reason to believe that Uliano was primarily, if not solely, liable for the plaintiff's injuries. The police report concluded that Uliano should have been traveling at a speed that would have allowed her to stop; the plaintiff's own letter dated September 18, 2001, informed Champlain that the police report identified Uliano as the responsible party. In addition, the plaintiff informed Champlain in September 2001 that her injuries were in excess of \$100,000. Moreover, the plaintiff did not provide Champlain with notice of the second mediation session that resulted in the settlement. In light of these facts, we do not agree that Champlain's actions were unreasonable as a matter of law. Cf. Prudential Prop. & Cas. Ins. Co. v. Dumont, 136 N.H. 569, 571 (1992) (underinsured motorist carrier has legitimate interest in making sure insured receives greatest amount possible from other tortfeasors).

Accordingly, we reverse the grant of summary judgment to the plaintiff, and remand for further proceedings consistent with this order. In light of our ruling, the motion to strike the plaintiff's supplemental authority is moot.

Reversed and remanded.

NADEAU, DALIANIS, and DUGGAN, JJ., concurred.

**Eileen Fox,
Clerk**