275 Neb. 136

Mary Lyn LYNCH and Thomas Lynch, individually and as representatives of all others similarly situated, appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, appellee.

No. S–06–737.

Supreme Court of Nebraska.

Feb. 22, 2008.

Background: Insureds brought class action against automobile insurer for breach of contract, bad faith, violation of the Uniform Deceptive Trade Practices Act, fraud, unjust enrichment, and violation of the Consumer Protection Act by billing for traditional indemnity medical payments coverage, while actually delivering a medical cost containment/managed care program. The District Court, Douglas County, J. Patrick Mullen, J., entered summary judgment in favor of insurer. Insureds appealed.

Holdings: The Supreme Court, Stephan, J., held that:

(1) insurer's partial denial of claim for medical payments benefits did not result in waiver of right to rely on exclusion;

(2) insurer owed nothing in medical payments since insured's tort settlement exceeded medical expenses;

(3) lack of viable cause of action for breach of contract precluded the other claims; and

(4) insured was unqualified to represent purported class.

Affirmed.

1. Judgment ⚿185(6)

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. Appeal and Error ⚿934(1)

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. Insurance ⚿1713

An insurance policy is a contract.

4. Insurance ⚿3571

In asserting claims for damages in insurance contract actions, it is ordinarily necessary to assert a breach.

5. Insurance ⚿1806, 1812

A court must construe insurance policy as any other contract and give effect to the parties' intentions at the time the contract was made.

6. Insurance ⚿1721, 2090, 2098

Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.

7. Insurance ⚿3110(1)

Automobile insurer's partial denial of claim for medical payments benefits did not result in waiver of right to rely on exclusion stating that insurer owed nothing if insured was paid damages by or on behalf of tortfeasor equal to or greater than insured's total reasonable and necessary medical expenses.

8. Insurance ⚿2845

Automobile policy exclusion stating that insurer owed nothing in medical payments, if insured was paid damages by or on behalf of tortfeasor equal to or greater than insured's total reasonable and necessary medical expenses, was an enforceable bar against double recovery of medical expenses.

9. Insurance ⚿2845

Automobile insurer had no contractual obligation to insured under medical payments coverage, where she recovered more than the amount of her medical expenses in her settlement with tortfeasor and policy excluded coverage if insured was paid damages by or on behalf of tortfeasor equal to or greater than insured's total reasonable and necessary medical expenses.

10. Insurance ⚿3419

Lack of a viable claim against automobile insurer for breach of contract since insured's tort recovery exceeded medical expenses and policy thus relieved insurer of liability for medical payments benefits precluded claim against insurer for breach of the covenant of good faith and fair dealing by marketing medical payments coverage as a promise of indemnity, but in fact providing managed care coverage for which a lesser premium should have been charged.

11. Antitrust and Trade Regulation ⚿221

Lack of a viable claim against automobile insurer for breach of contract since insured's tort recovery exceeded medical expenses and policy thus relieved insurer of liability for medical payments benefits precluded claim against insurer for violation of the Uniform Deceptive Trade Practices Act and Consumer Protection Act by marketing medical payments coverage as a promise of indemnity, but in fact providing managed care coverage for which a lesser premium should have been charged. Neb. Rev.St. §§ 59–1601 et seq., 87–301 et seq.

12. Insurance ⚿3424

Lack of a viable claim against automobile insurer for breach of contract since insured's tort recovery exceeded medical expenses and policy thus relieved insurer of liability for medical payments benefits precluded fraud claim against insurer for marketing medical payments coverage as a promise of indemnity, but in fact providing managed care coverage for which a lesser premium should have been charged.

13. Implied and Constructive Contracts ⚿3

Lack of a viable claim against automobile insurer for breach of contract since insured's tort recovery exceeded medical expenses and policy thus relieved insurer of liability for medical payments benefits precluded unjust enrichment claim against insurer for marketing medical payments coverage as a promise of indemnity, but in fact providing managed care coverage for which a lesser premium should have been charged.

14. Judgment ⚿181(1)

The right of a party to sue as representative of a class may be determined on a motion for summary judgment. Neb. Rev.St. § 25–319.

15. Parties ⚿35.9

Considerable discretion is vested in the trial court in determining whether a class action is properly brought.

16. Parties ⚿35.11, 35.17

In order to justify class action treatment, there must exist both a question of common or general interest and numerous parties so as to make it impracticable to bring all the parties before the court. Neb.Rev.St. § 25–319.

17. Parties ⚿35.1

Class certification may be denied even if a named plaintiff meets all technical requirements of class action statute. Neb. Rev.St. § 25–319.

18. Parties ⚿35.73

Insured who had no individual cause of action against automobile insurer was unqualified to represent purported class of insureds for marketing medical payments coverage as a promise of indemnity, but in fact providing managed care coverage for which a lesser premium should have been charged. Neb.Rev.St. § 25–319.

Syllabus by the Court

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the patty against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Insurance: Contracts.** An insurance policy is a contract.

[137] 4. **Actions: Insurance: Breach of Contract: Damages.** In assessing claims for damages in insurance contract actions, it is ordinarily necessary to assert a breach.

5. **Insurance: Contracts: Intent: Appeal and Error.** An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made.

6. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.

7. **Class Actions: Standing: Summary Judgment.** The right of a party to sue as representative of a class may be determined on a motion for summary judgment.

8. **Class Actions.** In determining whether a class action is properly brought, considerable discretion is vested in the trial court.

9. **Class Actions.** In order to justify class action treatment, there must exist both a question of common or general interest *and* numerous parties so as to make it impracticable to bring all the parties before the court.

Christopher D. Jerram, of Kelley & Lehan, PC, Omaha, for appellants.

Mark C. Laughlin, Joseph K. Meusey, and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., Omaha, for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MILLER–LERMAN, JJ.

STEPHAN, J.

This case is before us for the second time. Initiated as a class action, the named plaintiffs alleged that with respect to "medical payments coverage" included in their automobile insurance policies, State Farm Mutual Automobile Insurance Company (State Farm) charged a premium for indemnity coverage but instead provided managed care coverage of lesser value. In *McGinn v. State Farm Mut.*

Auto. Ins. Co.,[1] we held that a named plaintiff who had not asserted a claim against State Farm under his medical payments coverage could not state a cause of action for breach of contract or any of his other theories of recovery. [138]We affirmed an order dismissing his claims and ordering him stricken as a party plaintiff. This appeal involves the original plaintiffs, Mary Lyn Lynch and Thomas Lynch, who appeal from a subsequent order granting State Farm's motion for summary judgment and dismissing the action. We affirm.

I. BACKGROUND

Mary was involved in an automobile accident on August 18, 1995, in which the vehicle she was driving was struck from behind by a vehicle driven by Rita Norman. Mary sought medical treatment for the injuries sustained in the accident, for which she incurred expenses.

At the time of the accident, Mary and her husband, Thomas, were insured under an automobile insurance policy issued by State Farm. The portion of the policy designated "MEDICAL EXPENSES," which included an "Amendatory Endorsement" provided in pertinent part:

> We will pay reasonable medical expenses incurred, for *bodily injury* caused by accident, for services furnished within three years of the date of the accident. These expenses are for necessary medical, surgical, X-ray, dental, ambulance, hospital, professional nursing and funeral services, eyeglasses, hearing aids and prosthetic devices.
>
> . . . .
>
> We have the right to make or obtain a utilization review of the medical expenses and services to determine if they are reasonable and necessary for the *bodily injury* sustained.
>
> . . . .
>
> 1. If the injured *person* has been paid damages for the *bodily injury* by or on behalf of the liable party in an amount:
>
> . . . .
>
> b. equal to or greater than the total reasonable and necessary medical expenses incurred by the injured *person*, we owe nothing under this coverage.

Mary submitted bills to State Farm for medical expenses in the amount of $1,906, which she claimed to have incurred as a result of the accident. State Farm paid $1,351 of this amount and denied the remainder.

[139]Mary asserted a claim for her injuries against Norman. The claim was settled on August 24, 1999, for $6,838.67. As a part of this settlement, Mary and Thomas specifically reserved any and all claims they had against State Farm. Of the total settlement amount, $500 was deposited in escrow "to fully protect any and all alleged subrogation claims by State Farm . . . presently owed or hereafter ordered in any subsequent judicial proceeding to be paid by State Farm to Mary Lynch."

The Lynches commenced a class action suit against State Farm in the district court for Douglas County. They alleged that State Farm was engaged in a scheme whereby it marketed medical payments medical coverage "as a promise of protection through indemnity, not as a managed care plan," but in fact provided managed care coverage for which a lesser premium should have been charged. They sought to represent a class defined to include

> every individual within the State of Nebraska who purchased a contract of automobile insurance from [State Farm]

1. *McGinn v. State Farm Mut. Auto. Ins. Co.*, 268 Neb. 843, 689 N.W.2d 802 (2004).

> on or since January 1, 1990, which included medical payments coverage, and who, at the time of purchase or renewal of said contract were not informed by [State Farm], either in the contract itself or by other means, of [State Farm's] scheme.

The Lynches alleged six separate theories of recovery, designated as "causes of action," including: breach of contract; breach of covenant of good faith and fair dealing; violation of the Uniform Deceptive Trade Practices Act, Neb.Rev.Stat. § 87–301 et seq. (Reissue 1999); fraud; unjust enrichment; and violation of Nebraska's Consumer Protection Act, Neb. Rev.Stat. § 59–1601 et seq. (Reissue 1998). They prayed for various forms of relief, including damages measured by the difference between the premiums actually paid for medical payments coverage and the lesser premium which they contend was applicable to the managed care coverage they received.

State Farm filed a motion for summary judgment, seeking dismissal of the entire case or, in the alternative, partial summary judgment and dismissal of the class action allegations. The Lynches filed a motion to approve a class notice and a motion seeking partial summary judgment with respect to certain factual and legal issues.

[140] In an order granting State Farm's motion for summary judgment and dismissing the action, the district court determined that the Lynches' own claim against State Farm must fail because they could not establish a breach of contract. Specifically, the court determined that because the Lynches received more than the amount of their medical payment claim in the settlement with Norman, State Farm had no liability to them under its medical payments coverage, and thus, the Lynches "cannot be heard to complain about an alleged scheme if they have not been damaged by it. Further they cannot be the standard bearers for all of those in a class who have submitted claims and been denied by [State Farm]." The court determined that the Lynches, "having been paid in full no longer share a common interest with those in the purported class whose claims have been denied" and, further, that individual issues with respect to each member of the purported class would be dissimilar and predominate over issues common to the class. Finally, the court noted that the Lynches' expert witnesses were "generally unfamiliar with [State Farm] and its policyholders in the state of Nebraska and offer opinions derived from other cases in other states which have little bearing on the issues in this case" and that their opinions were therefore without sufficient foundation and were conclusory in nature. Accordingly, the court granted State Farm's motion for summary judgment and dismissed the action.

The Lynches perfected a timely appeal, and we granted their petition to bypass, in which State Farm concurred.

II. ASSIGNMENTS OF ERROR

The Lynches assign, restated and consolidated, that the trial court erred in (1) granting State Farm's motion for summary judgment, (2) failing to grant their motion for summary judgment, (3) determining that their expert witnesses' opinions were conclusory and lacked foundation, and (4) concluding that the case could not proceed as a class action.

III. STANDARD OF REVIEW

[1, 2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as [141] to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is

entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

IV. ANALYSIS

1. Mary Lynch

(a) Breach of Contract Claim

[3, 4] An insurance policy is a contract.[4] In assessing claims for damages in insurance contract actions, it is ordinarily necessary to assert a breach.[5] In *McGinn*, we held that a State Farm insured who had not filed a claim under the policy could not state a cause of action for breach of contract. Here, Mary filed a claim under the medical payments coverage, which State Farm denied in part. The first issue presented is whether the district court erred in determining as a matter of law that the denial did not constitute a breach of the insurance contract. Under our standard of review, we afford Mary the benefit of all favorable factual inferences in resolving this issue.

[5, 6] We begin with the language of the policy. An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made.[6] Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are [142] not inconsistent with public policy or statute.[7] Here, the policy unambiguously provided that if an insured receives a payment from a third-party tort-feasor which is equal to or greater than medical expenses incurred by the insured, State Farm would "owe nothing" under its medical payments coverage. Other courts have held that language identical to that in the policy before us constitutes a legitimate policy exclusion intended to prevent double recovery of medical expenses.[8]

[7] Relying on *Otteman v. Interstate Fire & Cas. Co., Inc.*,[9] Mary argues that State Farm waived its right to rely on the exclusion by its partial denial of her claim for medical payments benefits. We are not persuaded by this argument. *Otteman* involved a claim by an insurance agent against his errors and admissions liability

2. *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007); *Erickson v. U–Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

3. *Id.*

4. *McGinn v. State Farm Mut. Auto. Ins. Co.*, *supra* note 1; *Guerrier v. Mid–Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

5. *McGinn v. State Farm Mut. Auto. Ins. Co.*, *supra* note 1; 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 232:42 (2000).

6. *Guerrier v. Mid–Century Ins. Co.*, *supra* note 4; *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002).

7. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006); *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

8. See, *State Farm Mut. Auto. Ins. Co. v. Walker*, 234 Ga.App. 101, 505 S.E.2d 828 (1998); *State Farm Mut. Auto. Ins. Co. v. Brewer*, 221 Ga.App. 745, 472 S.E.2d 529 (1996); *Maynard v. State Farm Mut. Auto. Ins. Co.*, 902 P.2d 1328 (Alaska 1995).

9. *Otteman v. Interstate Fire & Cas. Co., Inc.*, 172 Neb. 574, 111 N.W.2d 97 (1961).

insurer. The policy provided that the insured could not settle a liability claim asserted against him without the written consent of the insurer. We held that the insurer's unreasonable delay in processing a third party's liability claim against its insured amounted to a denial of coverage and constituted a waiver of any right to enforce the policy provision requiring its consent to settlement. Here, the medical payments coverage is not liability insurance, and no claim was made against Mary. Instead, Mary had potential claims against her insurer and a third party for the same medical expenses. Neither the provisions of the policy nor State Farm's denial of benefits restricted Mary from asserting a claim against the third party. The policy simply provided that if she were successful in recovering an amount equal to or greater than the amount of her medical expenses, State Farm would "owe nothing." *Otteman* does not support Mary's waiver argument in these circumstances.

[8] [143]Finally, we are not persuaded by Mary's argument that the policy provision in question should be declared void in violation of public policy. As noted, other courts have found the same policy provision enforceable, implicitly, and in one case explicitly, rejecting a claim that the provision is contrary to public policy.[10] Mary has provided no authority to the contrary. We conclude, as other courts have, that the provision is an enforceable contractual bar against double recovery of medical expenses.

[9] It is undisputed that the amount which Mary recovered from the party responsible for her injuries exceeded the amount of medical expenses she claimed from State Farm under her medical payments coverage. We note that she was also reimbursed by her health insurance carrier for some of the expenses, but we do not consider these reimbursements pertinent to our analysis. We conclude as a matter of law that because Mary recovered more than the amount of her medical expenses in her settlement with a third party, State Farm had no contractual obligation to Mary under the plain language of its medical payments coverage provisions.

In *McGinn*, we reasoned that because the plaintiff had not filed a claim against his medical payments coverage, he could not claim a breach of contract with respect to those policy provisions. Similarly here, where the undisputed facts demonstrate that Mary has no legal entitlement to medical payments benefits under the State Farm policy, she has no cognizable claim for breach of contract.

(b) Other Individual Claims

[10–13] The claims asserted by Mary in this case are the same as those asserted by the plaintiff in *McGinn*. We noted in that case that each of the claims "incorporates the existence of the contract for insurance and each is dependent on the viability of [the named plaintiff's] breach of contract claim."[11] We concluded that because McGinn had not stated a viable claim for breach [144]of contract, he could not state a cause of action with respect to his remaining claims. Here, we conclude that because Mary's breach of contract claim fails as a matter of law, so too must the remainder of her claims.

(c) Class Action Claims

[14–17] The right of a party to sue as representative of a class may be deter-

10. See *Maynard v. State Farm Mut. Auto. Ins. Co.*, *supra* note 8.

11. *McGinn v. State Farm Mut. Auto. Ins. Co.*, *supra* note 1, 268 Neb. at 849, 689 N.W.2d at 806.

mined on a motion for summary judgment.[12] In determining whether a class action is properly brought, considerable discretion is vested in the trial court.[13] Class actions are authorized under Neb. Rev.Stat. § 25–319 (Reissue 1995), which provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." In order to justify class action treatment, there must exist "both a question of common or general interest *and* numerous parties so as to make it impracticable to bring all the parties before the court." [14] Class certification may be denied even if a named plaintiff meets all of the technical requirements of § 25–319.[15]

[18] Because her breach of contract claim against State Farm is without merit as a matter of law, Mary lacks commonality with members of the purported class on whose behalf she sought to litigate similar breach of contract claims. The district court did not err in concluding that because Mary could not maintain her individual cause of action against State Farm, she was unqualified to represent the purported class.[16]

[145](d) Expert Testimony

Mary assigns error in the determination by the district court that her expert witnesses lacked foundation for their opinions concerning the alleged scheme by which State Farm administered and charged premiums for medical benefits coverage. Because we conclude as a matter of law that Mary had no individual entitlement to medical payments benefits and cannot sue as the representative of the purported class, the manner in which State Farm may have administered such medical benefits with respect to other policyholders is not before us, and we need not reach this assignment of error.

2. Thomas Lynch

Thomas' personal interest in this case is somewhat unclear from the record. He is the named insured on the State Farm policy, but there is no indication that he has ever asserted a medical payments claim in his own behalf. As such, his claims would be barred by our holding in *McGinn.* However, at oral argument, counsel suggested that Thomas is a coclaimant with his wife, Mary. Assuming without deciding that to be so, his assignments of error are without merit for the reasons discussed herein with respect to Mary's claim.

V. CONCLUSION

For the reasons discussed, we conclude that the district court did not err in granting State Farm's motion for summary judgment and dismissing this action. Accordingly, we affirm.

Affirmed.

12. *Blankenship v. Omaha P.P. Dist.,* 195 Neb. 170, 237 N.W.2d 86 (1976).

13. *Berkshire & Andersen v. Douglas County Board of Equalization,* 200 Neb. 113, 262 N.W.2d 449 (1978); *Gant v. City of Lincoln,* 193 Neb. 108, 225 N.W.2d 549 (1975).

14. *Hoiengs v. County of Adams,* 245 Neb. 877, 901, 516 N.W.2d 223, 240 (1994).

15. See *Berkshire & Andersen v. Douglas County Board of Equalization, supra* note 13.

16. See *McGill v. Automobile Ass'n of Michigan,* 207 Mich.App. 402, 526 N.W.2d 12 (1995).

WRIGHT, J., participating on briefs.

McCORMACK, J., not participating.

275 Neb. 112

David G. SHOEMAKER, Trustee of the Marion P. Shoemaker Revocable Trust, and Harley G. Shoemaker, Trustee of the Harley G. Shoemaker Revocable Trust, appellants,

v.

Don SHOEMAKER and Yvonne Shoemaker, appellees.

No. S–06–319.

Supreme Court of Nebraska.

Feb. 22, 2008.

Background: Two withdrawing partners in Nebraska general partnership sought an accounting and an order compelling the partnership to wind up and terminate its business. The other two partners counterclaimed for breach of contract, alleging plaintiffs failed to complete the partnership agreement's appraisal process for determining the buyout value of their interests. The District Court, Lancaster County, Jeffre Cheuvront, J., entered judgment for defendants. Plaintiffs appealed.

Holdings: The Supreme Court, Connolly, J., held that:

(1) under the Revised Uniform Partnership Act, mandatory dissolution of the partnership, based on a partner's voluntary withdrawal, is a gap-filling default rule that applies only when the partnership agreement does not provide for the partnership business to continue;

(2) parties' partnership agreement gave remaining partners a right to continue the business if a partner withdrew from the partnership;

(3) the Revised Uniform Partnership Act does not require strict compliance with a buyout provision in the partnership agreement, to prevent mandatory dissolution upon withdrawal of a partner;

(4) partnership agreement did not require dissolution of partnership, though remaining partners failed to timely pay the buyout price, under the partnership agreement, for withdrawing partners' interest in the partnership; and

(5) the Revised Uniform Partnership Act did not authorize profit distributions to withdrawing partners.

Affirmed.

1. Partnership ⚿345

An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.

2. Appeal and Error ⚿1009(1)

On appeal from an equity action, the appellate court resolves questions of law and fact independently of the trial court's determinations.

3. Appeal and Error ⚿1011.1(6)

In an equity action, when credible evidence is in conflict on material issues of fact, the appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.

4. Statutes ⚿176

Statutory interpretation presents a question of law.