IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT NASHVILLE

LUVELL L. GLANTON, ET AL.,	)	Davidson County Circuit Court No. 94C-3329
Plaintiffs/Appellants.	)	
VS.	)	C. A. No. 01A01-9506-CV-00275
SHELBY INSURANCE COMPANY, ET AL.,	)	
Defendants/Appellees.	)	

FILED

February 28, 1996

Cecil W. Crowson
Appellate Court Clerk

From the Circuit Court of Davidson County at Nashville.
Honorable Barbara N. Haynes, Judge

Tusca R. S. Alexis, Nashville, Tennessee
Attorney for Plaintiffs /Appellants.

C. Hayes Cooney,
WATKINS, McGUGIN, McNEILLY & ROWAN, Nashville, Tennessee
Attorney for Defendants/Appellees.

OPINION FILED:

REVERSED AND REMANDED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)
HIGHERS, J. : (Concurs)

This case is the converse of the typical case where the insured is insisting that the insurer settle a claim against the insured within policy limits, thus protecting the insured from a potential judgment in excess of the policy limits.

Plaintiffs, Luvell L. Glanton and Luvell L. Fisher, sued the defendants, Shelby Insurance Company and Sharon Bates, for breach of contract. Glanton was insured with Shelby on June 6, 1994 when his son, Luvell L. Fisher, was involved in a vehicular accident with Daniel Bell. The complaint alleges that Glanton informed Shelby that he did not want Shelby to investigate the complaint and that it was his opinion that the other party, Bell, was 100% at fault. It is further alleged that Sharon Bates, an employee of Shelby, phoned Glanton and advised him that she wanted to investigate the claim but would not pay anything on the claim without first consulting him. Glanton subsequently received a letter from Bates stating that she had found Luvell at fault, had paid 70% of the claim and if he decided to discuss it further he should contact her. It is further alleged that Glanton's insurance premiums had tripled because of the payment of this claim. Defendants responded with a motion for summary judgment or dismissal with a copy of the policy attached. The policy includes a provision which states

> We will pay damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the **insured**. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. (Emphasis in original.)

The trial court entered summary judgment in behalf of Defendants and Plaintiffs appeal. The issues presented are:

> I. Did the trial court err in refusing to grant the plaintiffs' request for the production of documents?
>
> II. Did the trial court err in granting summary judgment motion to the defendants?

Plaintiffs moved the court for an order requiring Defendants to produce recorded statements of the driver of the other vehicle, Daniel Bell. The motion states that the request was

pursuant to Rule 34 T.R.C.P. and that Defendants had failed to comply. The trial court denied the motion, stating that Plaintiffs had the same opportunity to obtain Bell's statement.

Decisions with regard to pretrial discovery matters are within the sound discretion of the trial court. ***Benton v. Snyder***, 825 S.W.2d 409, 416 (Tenn. 1992). A party may discover anything "relevant and not privileged" involved in the pending action. Discovery may be limited by the court in certain instances, including whenever the court determines that it is obtainable from some other source that is more convenient, less burdensome or less expense or the party seeking discovery has had ample opportunity by discovery to obtain the information sought. Rule 26.02 T.R.C.P. However, the party opposing discovery must demonstrate that limitations being sought are necessary to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26.03 T.R.C.P. A trial court should decline to limit discovery if the party seeking the limitation cannot support its request. The trial court should balance the competing interests and hardships involved and consider whether less burdensome means for acquiring the requested information are available. If the court limits discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved and the procedural posture of the case. ***Duncan v. Duncan***, 789 S.W.2d 557, 561 (Tenn. App. 1990).

It is the defendants' position that Plaintiffs had ample opportunity to obtain Bell's statement directly. They did agree to furnish a transcript of Fisher's recorded conversation. The record before us does not indicate any effort on the part of Plaintiffs to obtain Bell's statement or any refusal on Bell's part to cooperate. We note that it is not unlikely that a claimant such as Bell would be more apt to voluntarily give a statement to a representative of the insurance company for the party against whom the claim was being made as opposed to giving one to the adverse party. Defendants failed to demonstrate sufficient basis for refusing Plaintiffs' request for production. Therefore, we find the trial court erred in denying the motion to compel.

The policy language set forth above, which states that the insurer "will settle or defend, as we consider appropriate," is the cornerstone of Defendants' argument that they are entitled to summary judgment. In response to the motion for summary judgment, Plaintiffs filed the affidavit of Luvell L. Glanton basically reiterating the allegations in the complaint concerning his

conversation with Ms. Bates. The affidavit states that Ms. Bates stated to Mr. Glanton that she merely wanted to investigate the claim and would not pay on the claim without first consulting him. The affidavit further states that he informed Bates that his son was not at fault, he did not want the claim to be paid and he would handle the claim himself. Her response was to request a letter from him to this effect so that Shelby could not be held responsible for failure to pay or investigate the claim and he complied by sending the letter. He subsequently received a letter from her stating that she had found his son at fault in the accident and had paid 70% of the claim. Defendants have not rebutted this assertion. We note that the policy further provides "[t]his policy contains all the agreements between you and us. Its terms may not be changed or waived except by endorsement issued by us." As a general rule, parol evidence is not admissible at law to vary the terms of a written contract. ***Galbreath v. Harris***, 811 S.W.2d 88, 91 (Tenn. App. 1990). However, these contractual provisions can be waived or abrogated by the parties, even if the contract provides it can only be modified in writing. ***Knoxville Rod and Bearing, Inc. v. Bettis Corp.***, 672 S.W.2d 203, 207 (Tenn. App. 1983). Any provision of the policy may be waived by acts of the insurer's agent. ***Bill Brown Constr. Co. v. Glens Falls Ins. Co.***, 818 S.W.2d 1, 13 (Tenn. 1991). According to Glanton's affidavit, Ms. Bates orally agreed to modify the insurance contract.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56.03 T.R.C.P. In determining whether a genuine issue of material fact exists, the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn therefrom, the motion is to be denied. The burden is on the movant to persuade the court that no genuine and material fact issues exist. Once this is shown by the moving party, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial.

Our examination of this record convinces us that the Plaintiffs, through the affidavit of Mr. Glanton, have created a factual issue as to whether the insurance contract was modified as stated in his affidavit. "Whether a contract has been modified by the parties is a question of fact for the trier of fact." ***Baldwin v. United American Land Co.***, No. 03A01-9508-CH-00250 (Tenn. App.

December 12, 1995) (citing 17A Am Jr 2d § 523). Therefore, the grant of summary judgment is reversed and the cause remanded to the trial court for further proceedings consistent with this opinion. Costs of this appeal are taxed to the defendants, for which execution may issue if necessary.

_____
FARMER, J.

_____
CRAWFORD, P.J., W.S. (Concurs)

_____
HIGHERS, J. (Concurs)