Circuit Court for Wicomico County
Case No. C-22-CV-23-000113

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1809

September Term, 2023

THOMAS MITCHELL

v.

GEICO CASUALTY COMPANY

Wells, C.J.,
Albright,
Hotten, Michele D.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Wells, C.J.

Filed: October 24, 2024

This appeal arises from an uninsured motorist ("UM") claim between the appellant, Thomas Mitchell ("Mitchell"), and the appellee, GEICO Casualty Company ("GEICO"). Mitchell was injured in an automobile accident with Brittany Mosher ("Mosher"), a non-party to this case. GEICO insured both individuals under separate policies. Mitchell settled with GEICO, acting on behalf of Mosher, receiving Mosher's policy limits, and releasing her from liability. But Mosher's policy limits were not enough to cover Mitchell's expenses from the crash. So, he demanded the entire amount available under his own GEICO UM policy. GEICO denied the UM claim. As a result, Mitchell sued GEICO in the Circuit Court for Wicomico County for the denial of coverage. GEICO moved for summary judgment arguing that Mitchell failed to get GEICO's consent before settling with Mosher. The circuit court agreed. Mitchell then appealed to this Court.

He presents three questions for our review, which we have condensed and rephrased for clarity to two issues:[1]

[1] Mitchell's verbatim questions are:

1. Did the circuit court err or abuse its discretion when it granted the Appellee's pre-discovery Motion for Summary Judgement when the record showed a genuine dispute of material fact existed?
2. Did the circuit court err or abuse its discretion when it granted the Appellee's Motion for Summary Judgement without allowing Appellant the right to conduct discovery to ascertain critical documents solely in the possession for the Appellee?
3. Did the circuit court err or abuse its discretion when it granted the Appellee's Motion for Summary Judgement where a procedural defect existed with should have been resolved in accordance with Md. Rule 2- 341?

1. Did the Circuit Court err when it granted GEICO's motion for summary judgment?
2. Did the Circuit Court abuse its discretion when it granted GEICO's motion for summary judgment before discovery took place? [2]

For the reasons set forth below, we hold that the court did not err or abuse its discretion in granting summary judgment. Accordingly, we affirm.

[2] In regard to the third issue Mitchell raises in his brief, we find that no procedural defect exists for us to consider. Mitchell named the defendant as "GEICO Insurance Agency, LLC" in his original complaint. In GEICO's answer, GEICO notified Mitchell that "GEICO Casualty Company" was the correct entity for the lawsuit, which Mitchell later corrected in an amended complaint on June 5, 2023. GEICO also agreed in its answer to respond to Mitchell as though the correct entity was sued. Mitchell contends that summary judgment was not proper because GEICO did not yet file an amended answer in response to Mitchell's amended complaint.

GEICO did not need to answer Mitchell's amended complaint, and GEICO waived any defense related to the misnomer in its answer; therefore, there was no procedural defect as Mitchell contends. Md. Rule 2-341(a) states that "if an amendment [of a pleading] introduces new facts or varies the case in a material respect" then an adverse party must file a new or additional answer. If an additional answer is not filed, then the previously filed answer will be treated as the answer to the amended complaint. *Id.* Mitchell's amended complaint only changed the defendant's name from "GEICO Insurance Agency LLC" to "GEICO Casualty Company," which clearly does not introduce a new fact or vary the case in a material respect. Furthermore, even if GEICO wished to make the misnomer an issue, it waived the opportunity to do so by failing to raise it in a motion to dismiss before the answer. *See Chapman v. Kamara*, 356 Md. 426, 438 (1999) ("Once a party files an answer without raising the defense of insufficient service of process, that defense ordinarily is waived."); *see also* Md. Rule 2-322(a) ("The following defenses shall be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process. If not so made and the answer is filed, these defenses are waived."). Therefore, there was no procedural defect precluding the circuit court from ruling on summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2021, Mosher's car crashed into Mitchell's vehicle. No one disputes Mosher was the at-fault driver. Mitchell and Mosher were both insured by GEICO under separate insurance policies. According to GEICO's counsel at the summary judgment hearing and at oral argument before this Court, when GEICO is the insurance carrier for both parties in a car crash, each party is assigned to a separate GEICO adjuster, and each treats the other as if they belong to different insurance companies. Negotiations between the adjusters proceed in the same manner.

On November 20, 2022, Mitchell entered into a settlement agreement with GEICO, acting on behalf of Mosher, for the policy limit payout under Mosher's policy for bodily injury and agreed to release Mosher from liability. Mitchell alleged that Mosher's policy limits were not enough to cover Mitchell's expenses from the crash.[3] On November 28, 2022, Mitchell sent a demand letter to GEICO requesting it pay out the maximum coverage under his UM policy.

Consistent with Md. Code Ann., Insurance ("IN") § 19-509, which requires UM coverage in all motor vehicle liability policies, Mitchell's UM policy provided for additional funds to him in the event that a tortfeasor's, insurance policy limits were not enough to cover his expenses from a collision. However, IN § 19-511(b)–(c) requires an insured individual and their insurance company to undertake settlement procedures with a

[3] Mosher's policy limit for bodily injury was $30,000. Mitchell alleged that he sustained a non-specific amount in damages from the crash, which exceeded Mosher's $30,000 personal injury limit as well as Mitchell's UM policy limit.

tortfeasor's insurance company before taking advantage of funds from their UM policy. *First*, under IN § 19-511(b), before settling, Mitchell must provide written notice to GEICO of the tortfeasor's insurance company's offer to settle an amount that exhausted the tortfeasor's policy limits:

> **Settlement offers sent to insurers providing uninsured motorist coverage**
>
> (b) *If an injured person receives a written offer from a motor vehicle insurance liability insurer or that insurer's authorized agent to settle a claim for bodily injury or death, and the amount of the settlement offer*, in combination with any other settlements arising out of the same occurrence, *would exhaust the bodily injury or death limits of the applicable liability insurance* policies, bonds, and securities, *the injured person shall send by certified mail,* to any insurer that provides uninsured motorist coverage for the bodily injury or death, *a copy of the liability insurer's written settlement offer.*

IN § 19-511(b) (bold in original) (emphasis added). *Second*, GEICO would then have sixty days to accept or refuse consent for the settlement:

> **Consent or refusal to consent to acceptance of settlement offer**
>
> (c) *Within 60 days* after receipt of the notice required under subsection (b) of this section*, the uninsured motorist insurer shall send to the injured person*:
>
> (1) written consent to acceptance of the settlement offer and to the execution of releases; or
>
> (2) written refusal to consent to acceptance of the settlement offer.

Id. IN § 19-511(c) (bold in original) (emphasis added) [hereinafter "IN § 19-511's procedural requirements"]. Only after taking these steps could Mitchell access the funds provided by his UM policy.

Mitchell admits that when he signed the settlement agreement with GEICO releasing Mosher from liability on November 20, 2022, he did not first notify his GEICO

adjuster about Mosher's offer to settle for her policy limits. Consequently, according to GEICO, when Mitchell demanded to receive the full payout from his UM policy, GEICO denied it because he failed to comply with IN § 19-511's procedural requirements. On January 23, 2023, Mitchell requested GEICO's retroactive consent to settle with Mosher's policy, but GEICO refused.

In April 2023, Mitchell filed suit against GEICO in the Circuit Court for Wicomico County alleging negligence, breach of contract, and breach of the duty of good faith and fair dealing. GEICO filed an answer and moved for summary judgment. Relevant to this appeal, GEICO's answer contained, along with a general denial, the negative defense that Mitchell's complaint improperly named the defendant as "GEICO Insurance Agency, LLC", and affirmative defenses centered around Mitchell's failure to satisfy IN § 19-511's procedural requirements. In GEICO's motion for summary judgment, it likewise argued that Mitchell failed to comply with IN § 19-511, and that the case should be dismissed as a matter of law. Mitchell responded that the motion was premature because GEICO did not accept service of Mitchell's amended complaint properly naming the defendant as "GEICO Casualty Company." On September 18, 2023, the day before the hearing on the motion to dismiss, Mitchell filed a supplemental opposition brief where he first made the argument that forms the major basis of this appeal—that GEICO waived IN § 19-511's written notice requirement.

The court heard oral argument on GEICO's motion for summary judgment. Approximately a month later, the court signed an order granting the motion in GEICO's

favor and dismissed the case. Mitchell filed a timely appeal to this Court.

DISCUSSION

I. The Circuit Court Did Not Err When it Granted GEICO's Motion for Summary Judgment Because There was no Genuine Dispute as to Material Fact.

A. Parties' Contentions

On appeal, both parties agree that Mitchell failed to comply with IN § 19-511's procedural requirements because he did not provide his GEICO insurance adjuster written notice of Mosher's settlement offer under her policy before releasing Mosher from liability. However, Mitchell claims that the circuit court erred when it granted summary judgment because GEICO had not yet answered Mitchell's amended complaint, and there was a genuine dispute of material fact as to whether GEICO waived IN § 19-511's procedural requirements. Mitchell, citing *Woznicki v. GEICO Gen. Ins. Co.*, 443 Md. 93 (2015), claims that GEICO's representation of both parties in the settlement with Mosher's policy was evidence that GEICO had notice of the settlement and implicitly waived the § 19-511 procedural requirements.

GEICO contends, also citing *Woznicki*, that notice of a settlement is not the same as waiving it, which requires evidence that GEICO communicated IN § 19-511's procedural requirements to his representative. GEICO further asserts that Mitchell did not allege any other facts to support his argument that waiver occurred. Therefore, GEICO argues that the circuit court correctly found there were no facts in dispute as GEICO did not waive the requirements of IN § 19-511.

B. Standard of Review

"Because the decision to grant summary judgment is purely legal, we review it *de novo*, determining for ourselves whether the record on summary judgment presented a genuine dispute of material fact, and if not, whether the moving party was entitled to summary judgment as a matter of law." *Dett v. State*, 161 Md. App. 429, 441 (2005), *aff'd*, 391 Md. 81 (2006) (cleaned up). In our review, we consider only the grounds upon which the trial court relied. *See D'Aoust v. Diamond*, 424 Md. 549, 575 (2012) (quoting *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 541–42 (2007)).

C. Analysis

1. The Circuit Court Did Not Err When It Found There Was No Genuine Dispute of Material Fact

When the circuit court ruled on the motion for summary judgment, both parties agreed that Mitchell failed to comply with IN § 19-511. In other words, it seemed clear that GEICO was entitled to judgment as a matter of law. *See* Section II of this opinion. Therefore, the only issue remaining for the trial judge to consider was whether there was any genuine dispute of material fact centered on the issue of whether GEICO waived Mitchell's duty to comply with IN § 19-511. For the reasons set forth below, we hold that there was no genuine dispute of material fact, and the circuit court did not err when it granted summary judgment.

Woznicki directly addresses the issue of waiving IN § 19-511's procedural requirements and provides an example of evidence that was insufficient to overcome a motion for summary judgment. In *Woznicki*, the Supreme Court of Maryland first

established that a UM insurance carrier can waive IN § 19-511's procedural requirements even if an insured individual fails to provide their insurance company notice of a pending settlement offer. *Woznicki*, 443 Md. at 112 ("We conclude that . . . an insurer may waive . . . the insured's duty to send the insurer written notice of the pending settlement offer."). The Court then explained that the waiver must be intentional, clearly established, and mutually knowing:

> Waiver is *the intentional relinquishment of a known right*, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances. Our case law *requires mutual knowledge and acceptance*, whether implicit or explicit, of the non-conforming action. A waiver of a contractual provision must be *clearly established and will not be inferred from equivocal acts or language*. As a general matter, given the highly factual nature of the waiver inquiry, it is an uncommon case in which the issue can be resolved by summary judgment. In some instances, however, the waiver, or lack thereof, may be so apparent that a court can make a determination as a matter of law.

Id. at 119 (emphasis added) (citations omitted) (cleaned up).

Woznicki was an injured motorist whose insurance company, GEICO, denied her UM coverage for settling with the other insurance company without complying with IN § 19-511's procedural requirements. In that case, GEICO filed for summary judgment, and Woznicki argued that it was not proper because there was a factual dispute as to whether a GEICO representative orally consented to the pending settlement in a phone call with Woznicki's attorney, thereby waiving IN § 19-511's procedural requirement to provide written notice of settlement. *Id.* at 119–22. The existence and content of the phone call was supported solely by the deposition testimony of Woznicki's attorney, who said he believed the phone conversation amounted to a waiver. *Id.* However, the Court still found the

attorney's deposition was not enough to defeat summary judgment because his account of the phone call contained no "indication that GEICO informed [Woznicki's attorney], or that [Woznicki's attorney] requested, that GEICO was waiving compliance with" the procedural requirements of IN § 19-511. *Id.* at 122. In other words, even if GEICO did give Woznicki's attorney oral consent to settle over the phone, it did not evince that the two parties had "mutual knowledge and acceptance" of waiving the written notice requirement under IN § 19-511. *Id.* at 124 (citation omitted).

In this case, Mitchell points to the fact that GEICO offered to settle under Mosher's policy as evidence that it had notice of the settlement and thereby implicitly waived IN § 19-511's procedural requirements. However, as GEICO points out, having knowledge of a settlement offer is not the same as waiving those requirements to provide written consent.[4] Woznicki's attorney also made GEICO aware that they were in the process of settling with the tortfeasor's insurance company, but the Supreme Court of Maryland held that did not mean a waiver occurred. *Woznicki*, 443 Md. at 121–22. Here, we too hold that mere knowledge of settlement negotiations with the tortfeasor's insurance company does not support waiver of IN § 19-511's procedural requirements on its own. Mitchell needed to allege more facts—such as a phone call, email, or some other communication or action—manifested by a GEICO representative to Mitchell's attorney that showed an intentional,

[4] Even if GEICO's settlement offer was deemed to waive the IN § 19-511 requirement to provide written notice and initiated the 60-day window for GEICO to accept or deny the settlement, Mitchell still settled with Mosher before GEICO responded, and therefore did not comply with IN § 19-511(c).

mutually accepted, and clearly established waiver of IN § 19-511's procedural requirements.

Mitchell also argues that *Woznicki* is distinguishable because no discovery occurred in this case. He argues that if discovery had occurred, it likely would have uncovered some evidence in the communications and files between Mitchell and Mosher's insurance adjusters proving that GEICO waived IN § 19-511. But supposition is not fact. As discussed in *Woznicki*:

> To establish a genuine issue of material fact, a "party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. In other words, the mere existence of a scintilla of evidence in support of the plaintiff's claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff."

443 Md. at 118 (quoting *Butler v. S & S P'ship*, 435 Md. 635, 665–66, (2013)). Mitchell's contention that there may be unspecified information in the adjusters' files or communications proving waiver does not even provide a scintilla of evidence to create a dispute of fact. Additionally, even if that evidence existed, it still would not show an intentional, mutually accepted, and clearly established waiver between Mitchell's GEICO insurance adjuster and his attorney. If they had, Mitchell's attorney would know it. Therefore, we conclude the circuit court did not err in finding that there was no dispute of material fact and, accordingly, granting summary judgment.

2. The Circuit Court did not Err as a Matter of Law in Granting Summary Judgment

To the extent that we must review the circuit court's conclusions of law, it did not

err. Both parties agree that Mitchell did not comply with the requirements of IN § 19-511. Although *Woznicki* says it is possible to waive those requirements, neither IN § 19-511 nor *Woznicki* suggests that an insurer is automatically considered to have waived them because it insured both parties. Instead, the waiver must be clearly established, mutual, and knowing. *Woznicki*, 443 Md. at 119. Because Mitchell did not comply with IN § 19-511's requirements, and compliance was not waived, GEICO was within its legal right to deny Mitchell the UM coverage. Therefore, we agree with the circuit court that, as a matter of law, Mitchell did not comply with the procedural requirements of IN § 19-511, and GEICO did not waive them.

II. The Circuit Court Did Not Abuse its Discretion in Granting Summary Judgment Before Discovery

Mitchell contends that the circuit court erred by deciding on summary judgment before discovery took place, which was necessary because GEICO's records may have evidence that it waived the procedural requirements of IN § 19-511. GEICO responds that the circuit court had grounds to deny discovery for two reasons. *First*, Mitchell failed to comply with Maryland Rule 2-501(d) requiring an affidavit to support a party's opposition to a motion for summary judgment. *Second*, additional discovery was not necessary.

The circuit court's decision to deny discovery is reviewed for abuse of discretion. *Clark v. O'Malley*, 169 Md. App. 408, 420–21 (2006). The court "abuses its discretion only if no reasonable person would take the view adopted by the trial court in denying discovery." *Yacko v. Mitchell*, 249 Md. App. 640, 690 (2021) (citation omitted). The court has discretion to deny a motion for summary judgment to allow further discovery, but "it

is not reversible error if the court chooses not to do so." *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 263 (1994).

We agree with GEICO that the circuit court did not abuse its discretion in denying discovery for two reasons. *First*, Md. Rule 2-501(b)–(c) requires that a response to a motion for summary judgment shall be in writing, "identify with particularity each material fact" in dispute, and be supported by an affidavit "made upon personal knowledge . . . ." An affidavit may also state "that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit." Md. Rule 2-501(d). This Court has previously upheld failure to comply with Md. Rule 2-501 as a reason to find the circuit court did not abuse its discretion in denying discovery before summary judgment. *Clark*, 169 Md. App. at 421. *C.f. A.J. Decoster Company*, 333 Md. at 263 (explaining that an affidavit must contain language made on personal knowledge to sustain a motion for summary judgment). Mitchell did not file an affidavit complying with Md. Rule 2-501. Therefore, it was proper grounds for the circuit court to deny discovery before summary judgment.

Second, we agree with the trial court's finding that discovery would not support Mitchell's argument. The fact that no discovery took place in this case, as opposed to partial discovery, does not change the fact that "[t]he status of the scheduling order, in and of itself, has no direct bearing on whether the court's grant of summary judgment prior to the completion of discovery was an abuse of discretion." *Clark*, 169 Md. App. at 421. Although the "court could consider the status of discovery under a scheduling order in its decision to grant or deny summary judgment . . . the rule is not limited by such an order." *Id.*

Mitchell alleged that discovery could reveal additional facts in the communications and files of GEICO's insurance adjusters during the settlement of Mosher's case. However, Mitchell does not specifically explain how those communications would favor his waiver argument, except that those communications may show the two GEICO adjusters settled under Mosher's policy with Mitchell's UM policy in mind. Under *Woznicki*, even if communications like that existed, GEICO's waiver of Mitchell's duty to provide written notice of the settlement would have to be communicated to Mitchell in some way, not just discussed between the insurance adjusters. *Woznicki*, 443 Md. at 119 ("Our case law requires mutual knowledge and acceptance . . . of the non-conforming action.") (cleaned up). Mitchell does not allege that discovery would divulge any such communication between his attorney and a GEICO representative. Therefore, we believe that a reasonable person could adopt the view taken by the trial court in choosing to grant summary judgment before discovery. We hold that the court did not abuse its discretion in granting summary judgment before discovery and affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.