

STATE OF MICHIGAN
COURT OF APPEALS

BRENDA DUNLAP and ALFRED DUNLAP,

Plaintiffs-Appellees,

v

FARMERS INSURANCE EXCHANGE,

Defendant-Appellant.

UNPUBLISHED

November 22, 2005

No. 255492

Wayne Circuit Court

LC No. 03-318141-NF

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order denying its motion for partial summary disposition under MCR 2.116(C)(8) and (10) with respect to plaintiffs' claim for benefits under the "Uninsured Motorist Coverage" section of their policy with defendant. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Brenda Dunlap (Brenda) was injured while a passenger in a vehicle insured by Allstate Insurance Company. The vehicle was struck by another vehicle and the driver of the other vehicle was not identified. Plaintiffs submitted a claim for uninsured motorist benefits to Allstate and exhausted the benefits available under the Allstate policy. Plaintiffs then sought "underinsured" motorist benefits under their policy with defendant. Defendant refused to pay, and plaintiffs filed this action alleging two counts of breach of contract (failure to pay personal injury protection benefits in Count I and failure to pay "underinsured" motorist benefits in Count II), as well as a claim for loss of consortium.

Defendant moved for partial summary disposition with respect to Count II, relying on the following policy exclusion labeled "PART II – UNINSURED MOTORIST" and "Coverage C – Uninsured Motorist Coverage":

This coverage does not apply to bodily injury sustained by a person:

* * *

4. If the injured person was occupying a vehicle you do not own which is insured for this coverage under another policy.

Defendant also relied on a separate provision concerning "[o]ther insurance."

The trial court reasoned that the provisions on which defendant relied were intended to prevent double recovery. The court reasoned that plaintiffs were not attempting to obtain double recovery, but were seeking damages from defendant only to the extent that they exceeded the amount recovered from Allstate. Therefore, the trial court denied defendant's motion for partial summary disposition.

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "The proper interpretation of a contract is a question of law, which this Court reviews de novo." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

There is no dispute that, at the time of the accident, Brenda was occupying a vehicle that she did not own that was insured under another policy, specifically, the Allstate policy. The applicability of Exclusion (4) concerns the scope of the phrase "this coverage." Defendant asserts that the phrase "this coverage" refers to uninsured motorist coverage and, because the Allstate policy provided uninsured motorist coverage, the exclusion applies.

Plaintiffs concede that because they received *uninsured* motorist benefits from Allstate, Exclusion (4) precludes recovery of those benefits under defendant's policy, but they also contend that, because the vehicle Brenda was occupying did not provide for *underinsured* motorist benefits and because plaintiffs' policy with defendant does provide this coverage, plaintiffs are not precluded from recovering benefits from defendant. This argument is without merit. Defendant's policy states that defendant will "pay all sums which an insured person is legally entitled to recover *as damages from the . . . operator . . . of an uninsured motor vehicle* because of bodily injury sustained by the injured person. The bodily injury must be caused by accident and arise out of the ownership, maintenance or use of the uninsured motor vehicle." The policy defines "[u]ninsured motor vehicle" as including a motor vehicle that is "[i]nsured by a bodily injury liability bond or policy at the time of the accident which provides coverage in amounts less than the limits of Uninsured Motorist Coverage shown in the Declarations."

Plaintiff would be "legally entitled to recover . . . damages" from the operator of the vehicle that struck Brenda. However, because the vehicle that struck Brenda was a "hit-and-run" vehicle, it is not possible to determine whether the vehicle was "underinsured" as defined in the policy.¹ Benefits in conjunction with the "underinsured motorist" definition are therefore not available to plaintiffs. The trial court erred in failing to grant defendant's motion for partial summary disposition.

¹ We note that the policy had a specific provision in place for recovering benefits in connection with a hit-and-run vehicle. Indeed, the policy includes a hit-and-run vehicle in the definition of "uninsured motor vehicle." It was logical for plaintiffs to seek benefits under that applicable provision. Now, however, plaintiffs are attempting to proceed under the specifically defined underinsurance provision, when there is no basis for doing so.

In light of our conclusion, we need not address defendant's remaining arguments.

Reversed.

/s/ David H. Sawyer

/s/ Patrick M. Meter

I concur in result only.

/s/ William B. Murphy