STATE OF MICHIGAN

COURT OF APPEALS

KIRK ALFORD,

Plaintiff-Appellant/Cross-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant,

and

AMERICAN CASUALTY COMPANY of READING, PENNSYLVANIA, a/k/a CNA

Defendant.

UNPUBLISHED
January 19, 2006

No. 262441
Wayne Circuit Court
LC No. 03-338615-CK

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Plaintiff Kirk Alford appeals as of right the trial court's order granting defendant Allstate Insurance Company's motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) in this no-fault insurance action. We reverse and remand to the trial court for further consideration on the merits.

I. Facts and Procedural Background

On November 29, 2002, plaintiff, a 44-year-old man, was injured when another driver disregarded a stop sign and collided with plaintiff's truck. As a result of this collision, plaintiff suffered various injuries to his back, right foot, and left knee that required physical therapy. Although the other driver produced a certificate of no-fault insurance, plaintiff later discovered that he was, in fact, uninsured.[1] At the time of the accident, plaintiff believed that his own vehicle was insured under the fleet insurance policy of his employer, Willie McCormick &

[1] Plaintiff has not filed suit against that driver for his injuries.

Associates (McCormick), with American Casualty Group (also known as CNA). McCormick had secured its fleet insurance policy through the Zervos Group (Zervos), a local agency with the authority to enter into insurance contracts on CNA's behalf. Plaintiff leased his vehicle from the manufacturer in September of 2002, and used it in the course of his employment throughout these proceedings. It is undisputed that plaintiff's vehicle was included in the fleet insurance policy in the year prior to his accident. McCormick renewed the policy approximately one month before plaintiff's accident. At that time, plaintiff was issued a new certificate of insurance indicating that his policy was effective from October 28, 2002 until October 28, 2003. Around the time of the accident, however, plaintiff purchased his vehicle and leased it back to McCormick.[2] Although Zervos took part in these transactions, and had previously insured plaintiff's vehicle, it alleged that McCormick failed to include this vehicle in the fleet insurance policy until December 18, 2002, nearly three weeks after plaintiff's accident.[3] Therefore, CNA denied plaintiff's claim for personal injury protection (PIP) benefits.[4]

Thereafter, plaintiff sought uninsured motorist (UM) benefits through a no-fault insurance policy issued by Allstate to his daughter, who lived with him.[5] The UM provision of the Allstate policy provides, in relevant part:

> We will pay damages which an *insured person is legally entitled to recover* from the owner or operator of an uninsured auto because of bodily injury sustained by an *insured person*. The bodily injury must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto. . . .[6]

Allstate does not dispute that plaintiff is an "insured person" as defined by the policy, as he resided with a named policyholder at the time of his accident.[7] Allstate initially denied

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[2] Plaintiff testified at his deposition that there was a discrepancy in the documents relating to this purchase. The title indicated that the "date of sale" was November 26, 2002, but the "purchase date" was listed as December 9, 2002. Plaintiff could not recall the actual dates on which the purchase and leaseback transactions occurred.

[3] Yet, there is no indication in the record as to when plaintiff's vehicle was removed from the fleet insurance policy in the first instance.

[4] Plaintiff testified at his deposition that, one week after the accident, a Zervos employee verbally informed him that his vehicle was uninsured. His employer promised to investigate the situation. In April of 2003, CNA initially denied plaintiff's claim for uninsured motorist benefits, as his policy did not include such coverage. CNA did not formally deny that plaintiff's vehicle was covered by the fleet insurance policy until November 13, 2003.

[5] Plaintiff originally sought PIP, as well as UM, benefits from Allstate. As CNA entered into a consent judgment with plaintiff for the amount of PIP benefits, the trial court dismissed plaintiff's claim against Allstate on that ground. Plaintiff does not challenge that dismissal on appeal.

[6] Emphasis altered from original.

[7] The Allstate policy defines an "insured person" as the named policy holder "and any resident relative."

plaintiff's request for benefits on August 12, 2003, claiming that the vehicle was insured by CNA.[8] Based on CNA's subsequent denial of coverage, however, Allstate ultimately determined that plaintiff was not entitled to any coverage, alleging that he was the owner and driver of an uninsured vehicle.

As neither Allstate nor CNA provided plaintiff with any coverage, he filed the instant lawsuit in November of 2003. Following case evaluation, CNA entered into a consent judgment with plaintiff for $7,000—the amount of PIP benefits to which the mediator determined that plaintiff was entitled—and was dismissed from the case.[9] Allstate subsequently filed its motion for summary disposition. The trial court agreed with Allstate that plaintiff "was operating an 'uninsured vehicle'" at the time of the accident and, therefore, was not entitled to coverage under the UM provision of the Allstate policy. Accordingly, the trial court dismissed plaintiff's remaining claims against Allstate.

II. Standard of Review

We review a trial court's determination regarding a motion for summary disposition de novo.[10] A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.[11] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[12] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[13] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[14] We also

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[8] Allstate conceded at oral argument, however, that it must provide UM benefits to plaintiff if plaintiff establishes that his vehicle was, in fact, insured by CNA on the date of his accident.

[9] Plaintiff contends that CNA's settlement constitutes an admission that it did, in fact, provide insurance coverage for his vehicle on the date of the accident. However, a party does not necessarily admit liability by entering into a consent judgment. Rather, the settling party acknowledges that a dispute exists and negotiates an end to the controversy. *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 573; 525 NW2d 489 (1994), citing *Protective Ins Co v American Mut Liability Ins Co*, 143 Mich App 408, 417 n 4; 372 NW2d 577 (1985).

[10] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[11] *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

[12] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[13] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[14] *MacDonald, supra* at 332.

review "questions involving the proper interpretation of a contract or the legal effect of a contractual clause" de novo.[15]

III. Uninsured Motorist Coverage

Plaintiff contends that the trial court erroneously determined that he was operating an "uninsured motor vehicle" at the time of his accident and, therefore, improperly dismissed its claim against Allstate for UM benefits. We agree. The certificate of insurance issued to plaintiff in October of 2002, at a minimum, created a question of fact that his vehicle was insured under McCormick's fleet insurance policy with CNA.

In determining whether plaintiff was entitled to UM benefits under the Allstate policy, we must determine from the policy itself whether the parties intended to extend coverage under the circumstances.

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Uninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are *purely contractual* and are construed without reference to the no-fault act.[16]

We must enforce an unambiguous insurance policy as written.[17] The Allstate policy specifically excludes coverage for "bodily injury to any person injured while in, on, getting into or out of or when struck by *an uninsured motor vehicle which is either owned by you or . . . a resident relative.*"[18] The policy defines an "uninsured motor vehicle," in relevant part, as a vehicle "which has no bodily injury liability bond or insurance policy in effect at the time of the accident." We must apply these terms as defined by the contract for insurance.[19] Pursuant to the plain language of these provisions, an "insured person" is entitled to UM benefits when his or her vehicle is covered by any insurance policy. Viewing the evidence presented in the light most favorable to plaintiff, he was entitled to benefits under these provisions.

Approximately one month before plaintiff's accident, McCormick renewed its fleet insurance policy and Zervos issued a certificate of insurance to plaintiff indicating that it was effective for one year. The certificate identified CNA as the named insurer and specifically identified plaintiff's vehicle as the insured vehicle by its vehicle identification number.

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[15] *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

[16] *Rory*, *supra* at 465-466 (emphasis added and internal citations omitted).

[17] *Twichel*, *supra* at 534; *Allstate Ins Co v Muszynski*, 253 Mich App 138, 141; 655 NW2d 260 (2002).

[18] Emphasis altered from original.

[19] *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 346; 556 NW2d 207 (1996).

Although Allstate now alleges that plaintiff's vehicle was not included in the CNA fleet insurance policy until mid-December, it is well established that such a certificate represents a binding contract for insurance. Pursuant to the *motor vehicle code* (rather than the no-fault act),

> Any carrier authorized to issue motor vehicle liability policies may, pending the issuance of such a policy, execute an agreement, to be known as a "binder", or may, in lieu of such a policy, issue an indorsement to an existing policy. Every such binder or indorsement shall be subject to the provisions of this section and *shall be construed to provide indemnity or insurance in like manner and to the same extent as a motor vehicle liability policy*.[20]

This Court has described an insurance binder as a temporary contract for insurance, allowing the applicant to drive or register his or her vehicle until a formal policy can be issued.[21] The terms of the policy ultimately issued are incorporated into the binder through the initial oral or written agreements of the parties.[22] Although temporary in nature, a binder remains in effect until a formal policy is issued or the insurer notifies the insured that the policy has been denied or cancelled.[23]

A certificate of no-fault insurance is clearly a "binder" as contemplated by the statute and prior caselaw. This Court has repeatedly found such a certificate to be evidence of a temporary contract for insurance.[24] A certificate of insurance obviously binds the issuing insurance carrier to provide coverage in the event of a loss. However, the certificate also notifies the world that the holder has secured the mandatory no-fault insurance coverage.[25] An individual seeking to register his or her motor vehicle may present the certificate to the secretary of state as proof of insurance.[26] A car dealership may rely on a certificate provided by an insurance agency when entering into a transaction with a potential customer.[27] Such proof of insurance also places other drivers and insurance carriers on notice that an insurer intended to provide coverage to the plaintiff.

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[20] MCL 257.520(k) (emphasis added).

[21] *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 721; 635 NW2d 52 (2001); *Jackson v Transamerica Ins Corp of America*, 207 Mich App 460, 462-463; 526 NW2d 31 (1994); *State Auto Mut Ins Co v Babcock*, 54 Mich App 194, 204; 220 NW2d 717 (1974).

[22] *Universal Underwriters*, *supra* at 721; *Babcock*, *supra* at 204.

[23] *Universal Underwriters*, *supra* at 721, quoting 43 Am Jur 2d, Insurance, § 219, p 304; *Jackson*, *supra* at 463; *Babcock*, *supra* at 204-205.

[24] See *Universal Underwriters*, *supra* at 721; *Blekknek v Allstate Ins Co*, 152 Mich App 65, 68; 393 NW2d 883 (1986).

[25] MCL 500.3101(1).

[26] MCL 257.518(a); *Universal Underwriters*, *supra* at 721; *Jackson*, *supra* at 463.

[27] *Universal Underwriters*, *supra* at 721-722.

Allstate contends that it should not be bound by the allegedly inaccurate certificate of insurance issued to plaintiff by Zervos. However, even if Zervos or CNA erroneously omitted plaintiff's vehicle from the fleet insurance policy, Allstate's recourse would be against those agencies, not the consumer.[28] "Insurance companies are bound by all acts and contracts made by their agents which are within the apparent scope of authority conferred upon them . . . ."[29]

> "The general public transact their business with insurance companies through representatives of such companies without actual notice of any limit upon the authority of such representatives. The agent is usually clothed with at least apparent authority to transact the business in hand, *i.e.*, the effectuating of insurance."[30]

An independent insurance agent, such as an independent brokerage firm, is ordinarily considered to be an agent of the insured, rather than the insurer.[31] However, the power to renew existing insurance policies and issue certificates of insurance relating to a renewed policy are certainly "within the apparent scope of authority" conferred by CNA to Zervos.

CNA had provided coverage for plaintiff's vehicle for more than a year at the time of his accident. CNA further admitted that it continued to provide coverage after McCormick allegedly requested that the vehicle be added to the policy on December 18, 2002. Allstate's only explanation for the apparent gap in coverage is that CNA or Zervos made some error. Yet, the erroneous, short-term omission of plaintiff's vehicle from the policy would not negate plaintiff's coverage in light of the binding certificate of insurance. It appears clear from the evidence presented on the record that CNA intended to enter into a binding contract for insurance with plaintiff. At a minimum, plaintiff created an issue of fact that his vehicle was covered under McCormick's fleet insurance policy on the date of the accident, as suggested by the certificate of insurance. Accordingly, whether plaintiff owned an "uninsured motor vehicle" pursuant to the

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[28] We recognize that an unknown third-party's ability to recover from an insurance agent or carrier has recently been placed into question in this state. In *Michigan Tooling Ass'n Workers Comp Fund v Farmington Ins Agency, LLC*, unpublished opinion of the Court of Appeals, issued December 7, 2004 (Docket No. 249013), a panel of this Court determined that an independent insurance agency has a duty to foreseeable third-parties to prepare and issue accurate certificates of insurance. *Id.* at 2-4. In that case, the agency forwarded a certificate of insurance to a third-party as evidence that its client had secured workers compensation insurance. That third-party then shared this information with a related corporation. *Id.* at 2. The Michigan Supreme Court recently scheduled oral argument on the insurance agency's application for leave to appeal and ordered the parties to address whether the agency owed a duty to an additional third-party with whom it had no contact. *Michigan Tooling Ass'n Workers Comp Fund v Farmington Ins Agency, LLC*, 474 Mich 878; 704 NW2d 696 (2005).

[29] *Babcock*, *supra* at 201.

[30] *Id.* at 202, quoting *Ames v Auto Owners Ins Co*, 225 Mich 44, 49; 195 NW 686 (1923).

[31] *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 20; 592 NW2d 379 (1998).

Allstate insurance policy was a question of fact for trial. Therefore, the trial court improperly dismissed plaintiff's claims under the UM provision against that party.

IV. Serious Impairment of Body Function

On cross-appeal, Allstate contends that we should affirm the trial court's order on alternate grounds, as plaintiff cannot establish that he suffered a serious impairment of a body function. However, the trial court failed to address this issue in connection with Allstate's motion for summary disposition. The trial court has the benefit of a more complete record and personal experience with the evidence and parties in this case. Accordingly, that court should consider Allstate's motion in the first instance.

Reversed and remanded to the trial court for further consideration on the merits. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Pat M. Donofrio