IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-370

Filed: 5 January 2016

Davidson County, No. 14 CVS 1454

RODNEY ALAN BACON, Plaintiff,

v.

UNIVERSAL INSURANCE COMPANY, Defendant.

Appeal by plaintiff from order entered 19 November 2014 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 21 September 2015.

Pinto Coates Kyre & Bowers, PLLC, by Paul D. Coates, Jon Ward, and Adam L. White, and Joe D. Floyd Law Firm, PA, by Kimberly H. Floyd, for plaintiff-appellant.

Burton, Sue & Anderson, LLP, by Gary K. Sue and Stephanie W. Anderson, for defendant-appellee.

DAVIS, Judge.

Rodney Alan Bacon ("Plaintiff") appeals from the trial court's 19 November 2014 order granting judgment on the pleadings in favor of Defendant Universal Insurance Company ("Universal") in this insurance coverage dispute. On appeal, Plaintiff argues that the trial court should have granted judgment on the pleadings in his favor and issued a declaration that his insurance policy with Universal

provided him with $1,000,000 in underinsured motorist ("UIM") coverage. After careful review, we affirm.

Factual Background

Universal issued a commercial auto insurance policy ("the Policy") to Plaintiff "dba Thomasville Creations" on 26 September 2010. The Policy expressly provided liability, medical, and uninsured motorist ("UM") coverage and was in effect from 26 September 2010 to 26 September 2011. The Policy contained various forms and endorsements, including endorsement CA 21 16 04 10 ("the UM Endorsement"), which was entitled "North Carolina Uninsured Motorists Coverage."

On 25 May 2011, Plaintiff was involved in an automobile accident and sustained serious injuries. The other driver, Myra Clonch ("Clonch"), was determined to be at fault, and her liability insurance carrier, State Farm Mutual Automobile Insurance Company, tendered to Plaintiff a payment of $50,000 — the full amount of liability coverage provided by Clonch's insurance policy. Shortly thereafter, Plaintiff submitted a UIM claim to Universal, contending that "the vehicle operated by Clonch was an 'underinsured motor vehicle,' pursuant to the definition of that term in the Policy and as included in the term 'uninsured' coverage on [sic] the policy, and pursuant to North Carolina General Statutes § 20-279.21(b)(3) and (4)." Universal denied Plaintiff's UIM claim.

On 21 May 2014, Plaintiff filed a civil action in Davidson County Superior Court against Universal seeking a declaratory judgment that "the Policy issued by Defendant Universal Insurance Company provides Plaintiff with underinsured motorist coverage in the amount of $1,000,000.00 per person in relation [to] the May 25, 2011 motor-vehicle accident involving Plaintiff and Clonch" and asserting accompanying claims for breach of contract and unfair trade practices pursuant to Chapter 58 and Chapter 75 of the North Carolina General Statutes. Plaintiff attached the Policy to his complaint and incorporated its terms by reference. On 25 July 2014, Universal filed an answer denying the material allegations in the complaint and asserting a counterclaim in which it sought a declaratory judgment that it was not obligated to provide UIM coverage to Plaintiff under the Policy.

On 2 September 2014, Plaintiff filed a motion for judgment on the pleadings. Universal filed a cross-motion on 9 September 2014. The parties' motions came on for hearing before the Honorable Mark E. Klass on 27 October 2014. On 19 November 2014, Judge Klass entered an order granting Universal's cross-motion for judgment on the pleadings, denying Plaintiff's motion, and dismissing Plaintiff's complaint with prejudice. Plaintiff gave timely notice of appeal.

Analysis

I. Appellate Jurisdiction

Following the filing of his notice of appeal, Plaintiff served Universal with a timely proposed record on appeal. Plaintiff's counsel and Universal's counsel exchanged email correspondence concerning the contents of the proposed record. Plaintiff then failed to file the settled record with this Court until 1 April 2015, which was well past the deadline contained in Rule 12 of the North Carolina Rules of Appellate Procedure.

On 11 May 2015, Universal filed a motion to dismiss Plaintiff's appeal, contending that Plaintiff's failure to file the record on appeal within the time period set forth in Rule 12 of the Appellate Rules requires the dismissal of his appeal. Plaintiff filed a petition for writ of *certiorari* asking this Court to consider the merits of his appeal pursuant to Appellate Rule 21 in the event the Court was to determine that his violation of the Appellate Rules mandated the dismissal of his appeal as of right.

"The appellate rules that regulate the timing of the settlement and filing of the record on appeal are not arbitrary formalities, but are designed to keep the process of perfecting an appeal flowing in an orderly manner." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 346, 666 S.E.2d 127, 132 (2008) (citation, quotation marks, and alteration omitted), *disc. review denied*, 363 N.C. 260, 677 S.E.2d 461 (2009). However, "a violation of Rule 12 of the Rules of Appellate Procedure is nonjurisdictional," and "[o]ur Supreme Court has stressed that a party's failure to

comply with nonjurisdictional rule requirements normally should not lead to dismissal." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 693, 682 S.E.2d 726, 731 (2009) (citation and quotation marks omitted).

Because Plaintiff's violation of the Appellate Rules neither deprived this Court of jurisdiction to hear this matter nor impeded our ability to perform our "core function of reviewing the merits of the appeal," *id.* at 693, 682 S.E.2d at 732 (citation and quotation marks omitted), we deny Universal's motion to dismiss the appeal and dismiss Plaintiff's *certiorari* petition as moot. We therefore proceed to the merits of the appeal.

II. Declaratory Judgment

"Generally, questions involving the liability of an insurance company under its policy are a proper subject for a declaratory judgment." *Builders Mut. Ins. Co. v. Glascarr Props., Inc.*, 202 N.C. App. 323, 325, 688 S.E.2d 508, 510 (2010) (citation and quotation marks omitted). A declaratory judgment may be resolved on the pleadings "when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Cmty. Hous. Corp. of Haywood Cty.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (citation and quotation marks omitted). When documents are attached to and incorporated in a complaint, they may be properly considered in connection with a motion for judgment on the pleadings. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707

(2007). On appeal, we review an order granting judgment on the pleadings *de novo*. *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008).

Here, Plaintiff contends that the trial court erred in granting judgment on the pleadings in Universal's favor based on his contentions that (1) "General Statute § 20-279.21(b)(4) requires an automobile liability policy to provide underinsured . . . motorist coverage equal to the limit of liability coverage, if the policy provides such coverage"; and (2) the UM Endorsement contained within the Policy provides Plaintiff with such UIM coverage. Resolution of this case, therefore, requires us to interpret Plaintiff's insurance policy with Universal in conjunction with the provisions of North Carolina's Motor Vehicle Safety and Financial Responsibility Act ("the Act").

A. UIM Coverage Requirements under the Act

"The avowed purpose of the Financial Responsibility Act is to compensate the innocent victims of financially irresponsible motorists." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573, 573 S.E.2d 118, 120 (2002) (citation, quotation marks, alteration, and ellipses omitted). The Act is a remedial statute and is "liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). The Act's provisions "are written into every automobile liability policy as a matter of law, and, when the terms of a policy conflict with the statute, the provisions of the statute will prevail."

Hendrickson v. Lee, 119 N.C. App. 444, 449, 459 S.E.2d 275, 278 (1995) (citation, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 20-279.21 — the provision of the Act at issue here — initially states that a vehicle owner's or operator's policy of liability insurance must, at a minimum, insure the person named in the policy (and any other person using a covered vehicle with the insured's express or implied consent) for

> thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars ($60,000) because of bodily injury to or death of two or more persons in any one accident, and twenty-five thousand dollars ($25,000) because of injury to or destruction of property of others in any one accident[.]

N.C. Gen. Stat. § 20-279.21(b)(2) (2013). Section 20-279.21 then provides that a policy of liability insurance must also include coverage "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . because of bodily injury, sickness or disease, including death, resulting therefrom." N.C. Gen. Stat. § 20-279.21(b)(3).

> The limits of such uninsured motorist bodily injury coverage shall be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy; provided, however, that (i) the limits shall not exceed one million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident regardless of whether the highest limits of bodily injury liability coverage for any one vehicle insured under the policy exceed those limits and (ii) a named insured may purchase greater or lesser limits, except that the limits shall not be

> less than the bodily injury liability limits required pursuant to subdivision (2) of this subsection, and in no event shall an insurer be required by this subdivision to sell uninsured motorist bodily injury coverage at limits that exceed one million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident.

Id.

Finally, with regard to UIM coverage, § 20-279.21 states that motor vehicle liability policies that exceed the statutory minimums prescribed in subdivision (b)(2) shall also provide underinsured motorist coverage. N.C. Gen. Stat. § 20-279.21(b)(4).

> The limits of such underinsured motorist bodily injury coverage shall be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy; provided, however, that (i) the limits shall not exceed one million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident regardless of whether the highest limits of bodily injury liability coverage for any one vehicle insured under the policy exceed those limits, (ii) a named insured may purchase greater or lesser limits, except that the limits shall exceed the bodily injury liability limits required pursuant to subdivision (2) of this subsection, and in no event shall an insurer be required by this subdivision to sell underinsured motorist bodily injury coverage at limits that exceed one million dollars ($1,000,000) per person and one million dollars ($1,000,000) per accident, and (iii) the limits shall be equal to the limits of uninsured motorist bodily injury coverage purchased pursuant to subdivision (3) of this subsection.

Id.

Our Supreme Court has noted that N.C. Gen. Stat. § 20-279.21(b)(4) of the Act "was passed to address circumstances where the tortfeasor has insurance, but his or

her coverage is in an amount insufficient to compensate the injured party for his or her full damages." *Lunsford v. Mills*, 367 N.C. 618, 626, 766 S.E.2d 297, 303 (2014) (citation, quotation marks, and brackets omitted).

Plaintiff's primary contention on appeal is that subdivisions (b)(3) and (b)(4) of N.C. Gen. Stat. § 20-279.21 concerning UM and UIM coverage have "contradictory and ambiguous terms" that "must be construed in favor of the highest level of coverage." Specifically, Plaintiff argues that

> [t]he Act uses imperative language ("shall") at the start of its discussion of UM/UIM limits. In using this language, the Act indicates that the limits of UM/UIM coverage must equal the highest limits of liability coverage. Thereafter, however, the Act goes on to state that the limits of UM/UIM may be less or more than the limits of liability coverage, if the UM/UIM limits exceed the statutory liability minimum limits. These provisions are hopelessly at odds.

Because $1,000,000 is the limit for bodily injury liability coverage under the Policy, Plaintiff argues that he is therefore entitled to that same amount in UIM coverage based on the first clause of N.C. Gen. Stat. § 20-279.21(b)(4). He contends that the language appearing later in subdivision (b)(4) allowing an insured to purchase greater or lesser UIM limits contradicts that first clause and, therefore, should not be given effect.

It is a well-established rule of statutory construction that "significance and effect should, if possible, be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word." *Brown v. N.C. Dep't of Environ. &*

Natural Res., 212 N.C. App. 337, 346, 714 S.E.2d 154, 161 (2011) (citation, quotation marks, ellipses, and alteration omitted), *disc. review denied*, ___ N.C. ___, 724 S.E.2d 525 (2012); *see also State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) ("If possible, a statute must be interpreted so as to give meaning to all of its provisions."). Accordingly, "the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute." *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979).

An application of these canons of statutory construction here defeats Plaintiff's argument that he is *necessarily* entitled under the Act to UIM coverage in an amount equal to his bodily injury liability coverage limits of $1,000,000. In reading the pertinent clauses of subdivision (b)(4) together, as we must, it is clear that the statutory requirement that an insurance policy's UIM coverage "*shall* be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy," N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis added), is only applicable when the insured does not select a greater or lesser limit. The Act provides a default UIM coverage limit in an amount equal to the bodily injury liability limits under the policy (up to maximum limits of $1,000,000 per person and $1,000,000 per accident) *but* permits an insured to deviate from this default coverage limit by purchasing UIM coverage in a greater or lesser amount so long as the policy's UIM coverage exceeds

$30,000 per person and $60,000 per accident. *See id.* ("The limits of such underinsured motorist bodily injury coverage shall be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy; *provided, however*, that (i) the limits shall not exceed one million dollars ($1,000,000) per person . . . (ii) *a named insured may purchase greater or lesser limits*, except that the limits shall exceed the bodily injury liability limits required pursuant to subdivision (2) of this subsection . . . ." (emphasis added)).

This interpretation is supported by a separate provision of the Act imposing an obligation on insurers to provide reasonable notice to their insureds of certain features of the Act. This provision states, in pertinent part, as follows:

> (m) Every insurer that sells motor vehicle liability policies subject to the requirements of subdivisions (b)(3) and (b)(4) of this section shall, when issuing and renewing a policy, give reasonable notice to the named insured of all of the following:
>
> . . . .
>
> > (4) The named insured's underinsured motorist bodily injury coverage limits, if applicable, shall be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy *unless* the insured elects to purchase greater or lesser limits for underinsured motorist bodily injury coverage.

N.C. Gen. Stat. § 20-279.21(m)(4) (emphasis added).

Thus, because the Act allows an insured to purchase lesser limits for UIM coverage than the amount of his bodily injury liability coverage limits, we reject Plaintiff's argument that he was *automatically* entitled to $1,000,000 in UIM coverage pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) simply because $1,000,000 was the bodily injury liability coverage limit provided under the Policy. Instead, the relevant inquiry is whether Plaintiff did, in fact, avail himself of the opportunity provided under subdivision (b)(4) to purchase UIM coverage in some lesser amount.

It is undisputed that the insurance policy Plaintiff purchased from Universal provided $1,000,000 in liability coverage and $50,000 per person and $100,000 per accident in UM coverage for bodily injury. Thus, as Plaintiff states in his brief, "[t]he only question in controversy, therefore, is whether the Policy provides $50,000.00 or $1,000,000.00 in UIM coverage."

As explained above, when the UM and UIM provisions of the Act are construed together, an insured whose policy exceeds the minimum statutory requirements for bodily injury liability coverage (1) will receive the same amount of UM coverage as his bodily injury liability coverage unless he elects to purchase a greater or lesser amount of UM coverage; and (2) if he selects a greater or lesser amount of UM coverage than his bodily injury liability limits, he will receive the same amount of UIM coverage as the UM coverage amount he selected.

Our review of the record demonstrates that Plaintiff was informed by Universal as required by law that UM and UIM coverage were available to him and that the limits for each would be equal to the highest limits for bodily injury liability coverage existing under the Policy *unless* he elected to purchase greater or lesser limits. The record further reveals that Plaintiff chose to purchase UM coverage in the amount of $50,000 per person and $100,000 per accident as shown by (1) his initials and signature on a form labeled "Selection/Rejection Form Uninsured Motorists Coverage Combined Uninsured/Underinsured Motorists Coverage," stating that he was selecting UM coverage in said amounts; and (2) the declarations page of the Policy, which reflects the fact that he would be charged a $10 premium for such UM coverage.

While the declarations page is silent as to the amount of *UIM* coverage available to Plaintiff under the Policy, the Act, which is "written into every automobile liability policy as a matter of law," *Hendrickson*, 119 N.C. App. at 449, 459 S.E.2d at 278 (citation, quotation marks, and brackets omitted), mandates that Plaintiff be entitled to receive UIM coverage limits "equal to the limits of uninsured motorist bodily injury coverage purchased pursuant to subdivision (3) of this subsection," N.C. Gen. Stat. § 20-279.21(b)(4). We therefore conclude that the Policy provides Plaintiff with $50,000 — rather than $1,000,000 — in UIM coverage.

B. Status of Clonch's Vehicle Under the UM Endorsement

The only issue left for our decision is whether Clonch's vehicle is properly classified as an "underinsured motor vehicle." With regard to this issue, Plaintiff directs our attention to the definition of that term contained within the UM Endorsement.

The UM Endorsement first states that Universal will pay sums to an insured that he "is legally entitled to recover as compensatory damages from the owner or driver of . . . [a]n 'uninsured motor vehicle' because of 'bodily injury' sustained by the 'insured' and caused by an 'accident.'" The UM Endorsement then defines the term "uninsured motor vehicle" to include *underinsured* motor vehicles, stating, in pertinent part, as follows:

> 4. "Uninsured motor vehicle" means a land motor vehicle or "trailer":
>
> . . . .
>
> b. That is an underinsured motor vehicle. An underinsured motor vehicle is a land motor vehicle or "trailer" for which the sum of all bodily injury liability bonds or policies at the time of an "accident" provides at least the amounts required by the North Carolina Motor Vehicle Safety and Responsibility Act, but their limits are either:
>
> (1) Less than the limits of underinsured motorists coverage applicable to a covered "auto" that the Named Insured owns involved in the "accident;"
>
> (2) Less than the limits of this coverage, if a covered "auto" that the Named Insured

> owns is not involved in the "accident"; or
>
> (3) Reduced by payments to others injured in the "accident" to an amount which is less than the Limit of Insurance for this coverage.

Plaintiff argues that pursuant to the UM Endorsement Universal was obligated to accept his UIM claim because the vehicle at fault in the accident — Clonch's automobile — was an underinsured motor vehicle under the above-quoted definition. We reject his argument, however, because Clonch's vehicle does not meet any of the three prongs set out in Section 4(b)(1)-(3) of the UM Endorsement.

As explained in the previous section, Plaintiff's UM and UIM coverage limits are both $50,000 per person for bodily injury. The liability limits for bodily injury under Clonch's insurance policy were also $50,000 per person, and Clonch's insurance provider tendered the full amount of said coverage to Plaintiff. With these facts in mind, we turn to the provisions of Section 4(b)(1)-(3) of the UM Endorsement.

Section 4(b)(1) does not apply because Plaintiff's motorcycle — which he was riding when he was involved in the accident — was not a covered auto under the Policy. Moreover, even had he been driving a covered auto at the time of the accident, Clonch's bodily injury liability coverage of $50,000 is not *less than* Plaintiff's UIM coverage of $50,000.

Similarly, Section 4(b)(2) is inapplicable to Clonch's vehicle because her limit of $50,000 in liability coverage is not "*[l]ess than* the limits of this coverage" under

the Policy. Section 4(b)(2) (emphasis added). Finally, Section 4(b)(3) does not apply because the accident at issue only involved Plaintiff and Clonch, and therefore, Clonch's liability coverage of $50,000 was not split among several injured parties and was instead paid in full solely to Plaintiff.

Accordingly, Clonch's vehicle was not an underinsured motor vehicle. For this reason, Plaintiff was not entitled to UIM benefits from Universal, and the trial court properly granted judgment on the pleadings in favor of Universal on his declaratory judgment claim.

III. Plaintiff's Remaining Claims

Finally, we also affirm the trial court's entry of judgment on the pleadings in Universal's favor as to the remaining claims contained in Plaintiff's complaint. Based on our determination that Universal was not obligated to pay UIM benefits to Plaintiff, he has not shown that Universal breached its contract with him. *See Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (explaining that claim for breach of contract requires (1) valid contract between parties; and (2) defendant's breach of a term of that contract).

With regard to Plaintiff's claim for unfair trade practices, Plaintiff's appellate brief does not contain any argument regarding the trial court's entry of judgment on the pleadings in favor of Universal on that claim, which was largely premised on Plaintiff's assertion that Universal acted unfairly by failing to honor its obligations

to him under the Policy. As such, any arguments regarding the trial court's ruling on that claim are deemed abandoned on appeal. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Conclusion

For the reasons stated above, we affirm the trial court's order.

AFFIRMED.

Chief Judge McGEE and Judge ELMORE concur.

Report per Rule 30(e).