Rel: November 18, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0466

Progressive Direct Insurance Company

v.

Madison Keen, Robert Creller, and Alfa Mutual Insurance Company

Appeal from Baldwin Circuit Court
(CV-21-900221)

SELLERS, Justice.

Progressive Direct Insurance Company ("Progressive") appeals from an order of the Baldwin Circuit Court granting a motion for a partial

summary judgment filed by Madison Keen and joined by Robert Creller and Alfa Mutual Insurance Company ("Alfa"); the trial court certified its order as final pursuant to Rule 54(b), Ala. R. Civ. P. We reverse the trial court's judgment and remand the case for further proceedings.

In September 2019, Keen was involved in a motor-vehicle accident. She sought compensation from Creller, who was the driver of the other vehicle involved in the accident. The vehicle Creller was driving was owned by his parents and was insured by Alfa. The evidence suggests that Creller and his spouse were living with Creller's parents at the time of the accident. Alfa paid Keen the limits of the insurance policy, and Keen executed a settlement agreement and a release in favor of Creller and Alfa.

In June 2021, Keen commenced the present action in the trial court, seeking underinsured-motorist benefits from two different policies, namely, a policy issued by Progressive covering the vehicle Keen was driving at the time of the accident and a policy issued by State Farm Automobile Insurance Company ("State Farm") covering a second vehicle in Keen's household. Because Keen was driving the vehicle insured by Progressive at the time of the accident, her Progressive underinsured-

motorist coverage was the primary insurance and the State Farm underinsured-motorist coverage was the secondary insurance.

During the litigation, Creller was deposed and revealed the existence of an additional insurance policy covering his spouse's vehicle, which had been issued by Allstate Insurance Company ("Allstate") and which identified Creller as a named insured. The discovery of the Allstate policy raised the possibility that Creller might have had additional liability insurance coverage that could have compensated Keen for her injuries.

Keen subsequently amended her complaint to add Creller and Alfa as defendants and to add a claim seeking a judgment declaring that the settlement agreement and the release she had executed in favor of Creller and Alfa were void. Based on the alleged existence of additional insurance benefits available under the Allstate policy, she asserted that there had been a mutual mistake among the parties to the settlement agreement and the release.[1]

[1]Keen also stated claims alleging negligence and wantonness against Creller.

Eventually, Keen filed a motion for a partial summary judgment, seemingly aimed primarily at her declaratory-judgment claim. But she did not argue in that motion that the undisputed facts demonstrated that the Allstate policy provided Creller with additional liability insurance coverage and that the parties to the settlement agreement and the release were unaware of that circumstance. Instead, she argued the opposite -- that the Allstate policy did not provide coverage. Thus, she asked for a judgment that would defeat her own claim seeking a judgment declaring that the settlement agreement and the release were void because of a mutual mistake regarding the availability of additional insurance coverage. Because an order granting Keen's motion would result in the dismissal of her claims against Creller and Alfa, those parties joined in the motion. For its part, Progressive opposed Keen's motion, because the availability of benefits under the Allstate policy might affect Progressive's interests with respect to Keen's underinsured-motorist claim. The trial court granted Keen's motion and certified its order as final pursuant to Rule 54(b). Progressive appealed.[2]

[2]Progressive did not designate Creller and Alfa as appellees in its notice of appeal. Rather, it identified only Keen as the appellee. Rule 3(c), Ala. R. App. P., requires an appellant to designate "each adverse

Progressive argues initially that the trial court could not consider Keen's partial summary-judgment motion because, under Rule 56(a), Ala. R. Civ. P., Keen could seek a summary judgment in her favor only on a claim she had raised. According to Progressive, Keen did not plead a claim requesting that the trial court enter a judgment declaring that the Allstate policy did not provide coverage with respect to her accident with Creller. Also, as Progressive suggests, Keen's motion essentially requested that the trial court enter a summary judgment against Keen on her declaratory-judgment claim (as well as her negligence and wantonness claims against Creller, see note 1, supra).

However, as noted, Creller and Alfa expressly joined in Keen's motion, thus effectively making it their own. Assuming Keen did not

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party against whom the appeal is taken" and to "designate the judgment … appealed from." But that rule also provides that "such designation … shall not … limit the scope of appellate review." Creller and Alfa joined Keen's motion for a partial summary judgment, and the trial court entered only one order granting that motion, expressly noting that Creller and Alfa had joined in the motion. Likewise, Creller and Alfa joined in Keen's appellee brief to this Court and asserted therein that Progressive's failure to designate them as appellees was "incorrect" and that they "should be additional Appellees on appeal and have joined in [the appellee] brief as such." Progressive has not disputed that Creller and Alfa should be considered appellees. Based on all the circumstances, we treat them as such.

have the right to make the motion, we are of the opinion that Creller and Alfa did. Keen's amended complaint sought to avoid the effect of a settlement agreement and a release she had executed in favor of Creller and Alfa based on the factual assertion that the parties thereto were unaware that the Allstate policy would provide additional insurance coverage. In defense of that claim, Creller and Alfa had the right to assert, as a basis for a summary judgment in their favor, that no such mistake existed because the Allstate policy did not in fact provide coverage.[3]

Progressive argues alternatively that a genuine issue of material fact exists with respect to whether insurance coverage would be available pursuant to the Allstate policy. See Varden Cap. Props., LLC v. Reese, 329 So. 3d 1230, 1232 (Ala. 2020) (noting that, in reviewing a summary judgment, "appellate courts … view the evidence in a light most favorable to the nonmovant and … determine whether there is substantial evidence demonstrating a genuine issue of material fact").

[3]The Court notes that there has been no argument that Progressive did not have the right to appeal from what is essentially a summary judgment against Keen on her claims against Creller and Alfa.

The parties grapple over the legal effect of the language in the Allstate policy. They appear to be in agreement that the Allstate policy would provide coverage if the vehicle Creller was driving at the time of the accident was a "non-owned" vehicle as that term is used in the policy. One provision of the policy defines a non-owned vehicle as one that is being driven by the insured but is not owned by the insured or a "resident relative" of the insured. As noted, the evidence before the trial court suggests that Creller lives with his parents and was driving their vehicle at the time of the accident. Thus, Keen, Creller, and Alfa assert that Creller was driving a vehicle owned by a resident relative and therefore was not driving a non-owned vehicle. For its part, Progressive relies on a different portion of the Allstate policy, which defines a "non-owned" vehicle as one that is owned by a resident relative and being driven by the insured if the vehicle is not owned by the insured or furnished for the insured's regular use. Apparently, however, Progressive did not rely on that portion of the policy in opposing the partial-summary-judgment

motion in the trial court. Thus, Keen, Creller, and Alfa assert that Progressive cannot rely on it on appeal.[4]

In any event, as Progressive points out, requests for admissions answered by Creller indicate that he was covered by the Allstate policy at the time of the accident and that Allstate had not refused to provide benefits under that policy. Thus, regardless of the parties' views on how the Allstate policy should be construed and applied, we cannot say that Keen, Creller, and Alfa established in their motion for a partial summary judgment that, based on the evidence presented to the trial court along with that motion, the undisputed facts demonstrate that there will in fact be no coverage available under the Allstate policy.[5]

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[4]Keen, Creller, and Alfa also argue that the evidence demonstrates that the vehicle Creller was driving at the time of the accident was available for his regular use and, therefore, was not a non-owned vehicle even under the definition in the Allstate policy upon which Progressive relies.

[5]Keen, Creller, and Alfa claim that, after this appeal was commenced, Allstate issued a reservation-of-rights letter to Creller, which is "[a] notice of an insurer's intention not to waive its contractual rights to contest coverage or to apply an exclusion that negates an insured's claim." Black's Law Dictionary 1564 (11th ed. 2019). According to Progressive, however, the letter "fails to indicate that coverage is denied under the logic of [Keen's] argument." The letter is not in the appellate record and was not before the trial court when it entered the partial summary judgment under review. Accordingly, this Court cannot

Because it appears that a question of fact based on the evidence before the trial court existed when it entered the partial summary judgment, we reverse that judgment and remand the case for further proceedings.[6]

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur.

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consider it. Roberts v. NASCO Equip. Co., 986 So. 2d 379, 385 (Ala. 2007) (indicating that the Court will not consider evidence that is not in the appellate record and that appellate review is limited to evidence and arguments considered by the trial court).

[6]We note that Allstate has not been made a party to this action. The parties do not discuss the implications of that fact.