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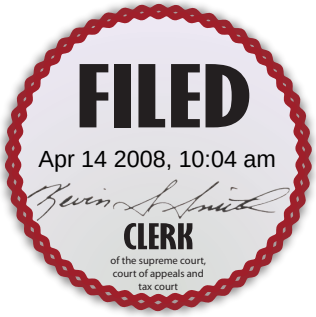

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IN THE
COURT OF APPEALS OF INDIANA

INDIANA INSURANCE COMPANY,	)	
	)	
Appellant/Cross-Claim Plaintiff,	)	
	)	
vs.	)	No. 49A02-0710-CV-899
	)	
TODD AND SUSAN E. HALL, BRIAN D. BURNELL, CINCINNATI INSURANCE COMPANY, JOSEPH R. COLEMAN, DEOBOLIQUE L. MAVITY, and JOSE GARCIA,	)	
	)	
Appellees/Cross-Claim Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gerald S. Zore, Judge
Cause No. 49D07-0312-CT-2222

April 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Cross-Claim Plaintiff Indiana Insurance Company ("Indiana") appeals from the trial court's grant of summary judgment in favor of Appellee/Cross-Claim Defendant Joseph R. Coleman, who was injured in a 2003 automobile accident. Indiana contends that the trial court erroneously concluded that it has a duty to defend and indemnify Brian Burnell, the driver of one of the vehicles involved in the accident and against whom Coleman has filed a negligence suit. Concluding that two genuine issues of material fact remain, we reverse and remand with instructions.

FACTS

On July 30, 2003, Burnell was driving a red Chevrolet Suburban owned by Todd and Susan Hall. Todd, who was the sole proprietor of "Neighbor's Envy," a lawn mowing business, had telephoned Burnell the night before to see if he could help him with his Neighbor's Envy obligations, because Todd and Susan had been on vacation, and he had fallen behind.

At approximately 8:00 a.m. on the 30th, Susan and Burnell, who was driving the Suburban with her permission, left the Halls' home. Burnell and Susan stopped to mow one lawn and then set off to meet Todd at a location on the southeast side of Indianapolis. On the way, the Suburban struck a vehicle at the intersection of Emerson Avenue and Washington Street in Indianapolis, which vehicle then struck other vehicles, including one driven by Coleman, who was injured.

Indiana had provided insurance to Neighbor's Envy since February of 1999, including a policy covering the company's vehicles ("the policy"). During the year from February

2000 to February 2001, Neighbor's Envy made two late premium payments, which may have been made and accepted after the date specified for cancellation. In the third year of the policy, one late payment may have been made and accepted after a specified cancellation date.

On February 7, 2003, Indiana issued a notice of intent to cancel the policy for non-payment, effective February 21, 2003. On March 3, 2003, Indiana processed a final cancellation of the policy effective February 21, 2003. On March 26, 2003, Susan called Rick Sharp, the insurance agent who had arranged for Neighbor's Envy's coverage with Indiana, and asked him what amount of money would be sufficient to reinstate the policy. On April 8, 2003, an Indiana diary of policy activity indicated that "INS[ure]D CALLED TO PROVIDE[] NO LOSS[,]" *i.e.*, a statement that Neighbor's Envy had suffered no losses that would be covered under the policy since the cancellation date of February 21, 2003, and that the Halls would be shipping a payment overnight to Indiana. Appellant's App. p. 881. On April 9, 2003, Indiana received payment from Susan of $1518.81, but not a written no-loss letter, and reinstated the policy the next day, retroactive to February 21, 2003.

On June 11, 2003, Indiana issued a notice of intent to cancel the policy due to non-payment, effective June 25, 2003. On or before July 15, 2003, Susan spoke with Sharp regarding reinstating the policy. Susan claimed in a deposition that Sharp "gave [her] an amount to send and told [her] if [she] sent it in it would be fine." Appellant's App. p. 803. Both parties agree that, other than the alleged statements from Sharp, Indiana never gave Susan any assurances that the policy would be reinstated or that Indiana communicated

directly with her or Todd in any way. Shortly thereafter, and prior to July 30, 2003, Susan sent Indiana a check for $1529.20.

Indiana's records reflect that on July 22, 2003, Indiana sent Todd a "non-rescind" notice that read:

> Payment in the amount of $1,049.20 has been applied to earned premium on the above numbered account. This payment was received too late to reinstate the policy on the account. Cancellation remains effective on the date as set forth in the Notice of Cancellation. As soon as practicable after the cancellation is processed, either the balance of the earned premium will be billed or any overpayment of the policy balance will be applied to the account or refunded as applicable.
> Please contact your agent for replacement of coverage.

Appellant's App. p. 894-95.

On July 30, 2003, the accident involving the Suburban occurred. On August 11, 2003, twelve days after the accident, Indiana refunded to Neighbor's Envy the difference between its $1549.20 payment and an amount applied to earned premiums, and the policy was never reinstated. As it happened, Susan did not apply for new coverage before the accident and testified in a deposition that she would have done so through Sharp had she known that the Indiana policy would not be revived.

At the time of the accident on July 30, 2003, the "Named Insured" in the policy was "TODD HALL DBA NEIGHBOR'S ENVY[.]" Appellant's App. p. 608. Regarding which vehicles would be covered by the policy, it provided, in relevant part, as follows:

> SECTION I–COVERED AUTOS
> ….
> 7 = Specifically Described "Autos." Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to

any power unit described in Item Three).

8 = Hired "Autos" Only. Only those "autos" you lease, hire, rent, or borrow. This does not include any "auto" you lease, hire, rent, or borrow f[ro]m any of your "employees," partners (if you are a partnership), members (if you are a limited liability company) or members of their households.

9 = Non-owned "Autos" Only. Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees," partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business or your personal affairs.

Appellant's App. pp. 608, 630. The accident ultimately spawned a number of lawsuits, some of which were consolidated under the lower court cause number in this case. Several of the issues raised by the various parties have already been disposed of, including whether the Halls' personal automobile insurance carrier, Indiana Farmer's Mutual Insurance Company, was obligated to defend and indemnify them. During the resolution of that particular issue, the Halls designated, *inter alia*, Susan's sworn affidavit, in which she averred that "Todd and I own a Chevrolet Suburban vehicle[.]" Appellant's App. p. 453.

On April 13, 2006, Indiana, the Halls, Sharp, and his insurance agency signed a release settling all claims between the signatories. On October 13, 2006, Indiana filed a motion for summary judgment, contending that it had no duty to defend or indemnify the Halls, or any other person, including Burnell, in any matters arising out of the July 30, 2003, accident. Indiana designated, *inter alia*, "All pleadings in the consolidated matter." Appellant's App. p. 599.

On June 8, 2007, Coleman responded to Indiana's summary judgment motion and also filed a cross-motion for summary judgment. In Coleman's response and motion, he

designated a deposition of Todd in which his response to "[t]ell me what vehicles you and [Susan] own personally" was "[t]he Suburban and Honda Accord." Appellant's App. p. 773. Later, when Todd was asked if "the day of the accident was the first time that Brian Burnell's ever driven any of your vehicles?", he responded, "That's right." Appellant's App. p. 775. In his response, however, Coleman also designated Indiana's responses to his request for admissions, in which Indiana admitted that "on July 30, 2003, the Suburban was owned by [Susan]." Appellant's App. p. 754. Coleman also designated Susan's deposition response to the question, "What vehicles are in your name, if any?", which was "The Suburban was, or is." Appellant's App. p. 791. On September 24, 2007, the trial court granted summary judgment to Coleman, concluding that Indiana had a duty to defend and indemnify Burnell.

DISCUSSION AND DECISION

Standard of Review

When reviewing the grant or denial of a summary judgment motion, we apply the same standard as the trial court. *Merchants Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000). Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Id.* Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist. *Id.* The party appealing the summary judgment bears the burden of persuading us that the trial court erred. *Id.*

Indiana contends that the trial court erred in granting summary judgment to Coleman because the designated evidence allegedly establishes three things: (1) the Halls' policy with Indiana was no longer in effect at the time of the accident due to non-payment of premiums, (2) the Suburban was not a vehicle covered under the policy, and (3) the release Indiana signed with the Halls relieved it of any obligation to defend and indemnify Burnell. We conclude that genuine issues of material fact remain regarding the question of non-payment and whether the Suburban was covered by the policy.

I. Whether the Policy Was Validly Cancelled for Non-Payment

Indiana contends that the policy had been validly cancelled due to non-payment when the accident occurred. Coleman contends that Indiana is equitably estopped from denying coverage and that it waived its right to insist on strict compliance with the terms of the insurance contract.

A. Equitable Estoppel

Coleman contends that Indiana should be estopped from denying coverage because the Halls were misled by Sharp's assurances regarding reinstatement of the policy to their detriment. "The doctrine of estoppel springs from equitable principles, and it is designed to aid in the administration of justice where, without its aid, injustice might result." *Levin v. Levin*, 645 N.E.2d 601, 604 (Ind. 1994). "Our use of this doctrine is not limited to circumstances involving an actual or false representation or concealment of an existing material fact." *Id.* "Rather, equitable estoppel is a[] remedy available if one party through his course of conduct knowingly misleads or induces another party to believe and act upon

his conduct in good faith without knowledge of the facts." *Id*. Quite simply, there is no designated evidence in the record that Sharp ever *knowingly* misled the Halls, however detrimental their reliance on his inaccurate assurances might have been.

Coleman contends that the Halls relied, to their detriment, on Sharps assurances that the policy would be reinstated and his failure to tell them that a no-loss letter might be required. Even assuming, *arguendo*, that a no-loss letter would have benefited the Halls and that Sharp was acting as an agent for Indiana at the time, Sharp testified that he never told Susan in July of 2003 that she needed to send a no-loss letter because he did not know Indiana would require one. Coleman points to no evidence, and we have found none, to contradict this designated evidence. As such, no question of material fact remains regarding the question of equitable estoppel.

B. Waiver

Coleman contends that Indiana waived its right to insist on strict compliance with the terms of its insurance contract with the Halls by exhibiting a pattern of reinstating the policy after cancellation for non-payment "The conduct of an insurer inconsistent with an intention to rely on the requirements of the policy that leads the insured to believe that those requirements will not be insisted upon is sufficient to constitute waiver." *Am. Std. Ins. Co. of Wis. v. Rogers*, 788 N.E.2d 873, 877 (Ind. Ct. App. 2003). "[W]aiver on the part of an insurance company to avail itself of its right to assert a forfeiture or avoidance of the policy by reason of the insured's breach of a condition of the policy must be established by a preponderance of the evidence[.]" *Cont'l Ins. Co. v. Thornburg*, 141 Ind. App. 554, 559, 219

N.E.2d 450, 453 (1966) (citation omitted). "The conduct or acts on the part of the insurer or its authorized agents must be sufficient to justify a reasonable belief on the part of the insured that the company will not insist on a compliance with the policy provisions." *Id*. (citation omitted). While it is well-settled that "forfeitures [of insurance coverage] are not looked on with favor[,] it has been repeatedly held that courts cannot avoid enforcing them when the party by whose fault they are incurred cannot show some good ground in the conduct of the other party on which to base a reasonable excuse for the default."[1] *Farmers' & Merchs.' Mut. Life Ass'n v. Mason*, 65 Ind. App. 66, 91, 116 N.E. 852, 860 (1917).

"Waiver is generally a question of fact." *Rogers*, 788 N.E.2d at 877. "Where there are no disputed facts and the undisputed facts establish a party is entitled to judgment as a matter of law, however, summary judgment is proper." *Id*. This is not one of those cases, however, because the material evidence is not undisputed.

Both sides agree that Indiana had accepted late payments from the Halls on several occasions, although always before the designated cancellation date. As for other undisputed facts, particularly the prior cancellation and reinstatement of the policy, both sides agree that on February 7, 2004, Indiana issued a notice of intent to cancel the policy for non-payment, effective February 21, 2003. On March 3, 2003, Indiana processed a final cancellation of the policy effective February 21, 2003. On March 26, 2003, Susan called Sharp and asked him

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[1] On the *www.westlaw.com* database and in West Publishing's printed Northeastern Reporter, this passage reads, in relevant part,"[I]t has been repeatedly held that courts cannot avoid enforcing them when the party by whose fault they are incurred *can now* show some good ground in the conduct of the other party on which to base a reasonable excuse for the default." (Emphasis added). This error is troubling in that it, at

what amount of money would be sufficient to reinstate the policy. On April 8, 2003, an Indiana diary of policy activity indicated that "INS[ure]D CALLED TO PROVIDE[] NO LOSS[,]" *i.e.*, a statement that Neighbor's Envy had suffered no losses that would be covered under the policy since the cancellation date of February 21, 2003, and that the Halls would be shipping a payment overnight to Indiana. Appellant's App. p. 881. On April 9, 2003, Indiana received payment from Susan of $1518.81, but not a written no-loss letter, and reinstated the policy the next day, retroactive to February 21, 2003.

Regarding the June cancellation, both sides seem to agree that on June 11, 2003, Indiana issued a notice of intent to cancel the policy due to non-payment, effective June 25, 2003. On or before July 15, 2003, Susan spoke with Sharp regarding reinstating the policy. Susan claimed in a deposition that Sharp "gave [her] an amount to send and told [her] if [she] sent it in it would be fine." Appellant's App. p. 803. Indiana never gave Susan any assurances that the policy would be reinstated or, indeed, communicated directly with her or Todd in any way. Shortly thereafter, Susan sent Indiana a check for $1529.20, but the policy was never reinstated.

Not all material facts, however, are undisputed. First and foremost, while there is some indication that the Halls had been allowed to reinstate insurance with Indiana after it had been cancelled on other occasions, the designated evidence indicates only that this *may* have happened. A pattern of more cancellations and reinstatements would, of course, tend to

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best, renders the passage nonsensical, and, at worst, reverses its meaning. We will continue to use caution in citing to non-official sources.

establish waiver of insistence on timely payment on Indiana's part. Moreover, nothing in the record indicates whether Indiana made representations to either of the Halls in April, or on any other occasion, that similar lapses in payment would be excused in the future. In the end, we conclude that a genuine issue of material facts remains with respect to whether Indiana waived its right to insist on strict compliance with the terms of its insurance contract with the Halls. *See Wingenroth v. Am. States Ins. Co.*, 455 N.E.2d 968, 970 (Ind. Ct. App. 1983) ("[W]e believe there are genuine issues of material fact present concerning the issue of waiver.").

II. Whether the Suburban was Covered by the Policy

As both sides agree, the Suburban involved in the accident was not one of the vehicles specifically named as covered in the policy, and that if it did qualify for coverage, it was because it was a "Hired" or "Non-owned" "auto" as defined by symbols 8 or 9 in the "COVERED AUTOS" section of the policy. Appellant's App. p. 630. As both sides also agree, the crucial question, then, is whether the Suburban was owned only by Susan or by Todd and Susan jointly. If the Suburban was, in fact, owned solely by Susan, then Neighbor's Envy could have "borrowed" it from her and it would have been covered under symbol 8, or it would have qualified as a "non-owned" vehicle under symbol 9. On the other hand, if Todd *also* owned the suburban, he, even though doing business as Neighbor's Envy, could not have borrowed it from himself, and it would also not be a non-owned "auto."

Indiana contends that the designated evidence establishes that Todd and Susan jointly owned the Suburban, while Coleman claims that it establishes that only Susan owned it. On

this point, we conclude that the designated evidence establishes that a question of fact remains. Our examination of the record uncovers evidence indicating that the Suburban was owned both by Susan and Todd. Indiana, in its summary judgment motion, designated all pleadings in the consolidated action, which included a summary judgment motion in which the Halls designated, *inter alia*, Susan's sworn affidavit. In that affidavit, Susan averred that "Todd and I own a Chevrolet Suburban vehicle[.]" Appellant's App. p. 453. Moreover, in Coleman's response to Indiana's summary judgment motion, he designated a deposition of Todd in which Todd's response to "[t]ell me what vehicles you and [Susan] own personally" was "[t]he Suburban and Honda Accord." Appellant's App. p. 773. Later, when Todd was asked if "the day of the accident was the first time that Brian Burnell's ever driven any of your vehicles?", he responded, "That's right." Appellant's App. p. 775. While only the first piece of designated evidence unambiguously indicates that Susan and Todd both owned the Suburban, Todd's statements arguably tend to support it.

On the other hand, there is also designated evidence tending to show that Susan alone owned the Suburban. Indiana admitted that the Suburban was owned by Susan, an admission that, while perhaps consistent with joint ownership, would be understood by many to be an admission of sole ownership. Even more compelling is Indiana's admission that the Suburban was registered in Susan's name as well as Susan's deposition testimony that the Suburban was "in her name," which could mean that it was either titled or registered to her. It has long been recognized in Indiana "that certificates of registration or 'title' issued by the Bureau of Motor Vehicles are not such proof in themselves of ownership or legal title to the

automobile involved, as is true of deeds or grants to real estate." *Jones v. Kilborn*, 125 Ind. App. 88, 91-92, 122 N.E.2d 739, 741 (1954). "However, certificates of title or registration of automobiles are *indicia* of their ownership and control and, standing alone, raises an inference of legal title in the holder thereof, subject, of course, to contradiction of such fact under the ordinary rules of evidence." *Id*. at 92, 122 N.E.2d at 741. Evidence that the Suburban was registered, at least, to Susan therefore raises the inference that she owned it, subject to contradiction by evidence that she did not. Because such evidence was designated here, the question remains an unresolved one of fact for the finder.

III. Whether Coleman is Subject to the Release Executed By the Halls and Indiana

Indiana contends that the release it signed with Halls, Sharp, and Sharp's insurance agency extinguished any claim Coleman might have had that Indiana must defend and indemnify Burnell in Coleman's action against him.[2] "A release agreement is a species of contract that surrenders a claimant's right to prosecute a cause of action." *Morfin v. Estate of Martinez*, 831 N.E.2d 791, 801 (Ind. Ct. App. 2005). Coleman, however, is a potential third-party beneficiary of the insurance contract between Indiana and Neighbor's Envy. "Contracts for the benefit of third parties have been long recognized in Indiana, and a third person may sue to enforce the promise made for his benefit even though he is a stranger to the contract and the consideration therefor." *Blackard v. Monarch's Mfrs. & Distribs., Inc.*, 131 Ind. App. 514, 522, 169 N.E.2d 735, 739 (1960). Moreover, "[i]t is a general rule that where a contract for the benefit of a third person has been accepted or acted upon, it cannot

[2] This case is apparently still pending as *Coleman v. Burnell*, Cause No. 49D04-0506-CT-21072.

be rescinded by the parties without the consent of the third person." *Id*. at 523, 169 N.E.2d at 739. Here, Coleman did not consent to the release, and we see no reason to depart from the general rule that he is, therefore, not subject to it. Indeed, it seems to us that it would be bad public policy, to say the least, to allow an insurance company to avoid potential liability to an injured third party simply by signing a release with its insureds, especially if, as seem to be the case here, the third party was gravely injured and the insureds were not.

We reverse the judgment of the trial court and remand for trial on the issues of whether Indiana waived its right to insist on timely payment from the Halls and whether the Suburban was solely owned by Susan.

BAKER, C.J., and DARDEN, J., concur.