ATTORNEY FOR APPELLANTS:

TERRY A. WHITE
Olsen White & Hambidge, LLP
Evansville, Indiana

ATTORNEY FOR APPELLEE:

MICHAEL K. LILICH & ASSOCIATES
Danville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MELINDA SMITH, GARY SMITH, and KADY SMITH b/n/f MELINDA SMITH and GARY SMITH,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 82A01-0803-CV-106
AMERICAN SERVICE INSURANCE COMPANY INC., A SUBSIDIARY COMPANY OF KINGSWAY FINANCIAL SERVICES, INC.,)	)	
Appellee-Defendant.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Scott R. Bowers, Judge
Cause No. 82D03-0610-CT-4238

August 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Melinda, Gary, and Kady Smith appeal the trial court's grant of summary judgment in favor of American Service Insurance Company ("ASI"), a subsidiary company of Kingsway Financial Services, Inc. We affirm.

Issues

We restate the two[1] issues before us as:

I. whether the trial court had discretion to consider evidence presented by the Smiths at the motion for summary judgment hearing; and

II. whether the trial court properly granted ASI its motion for summary judgment.

Facts

On October 28, 2003, Melinda and her daughter, Kady, were involved in an automobile accident. Melinda's vehicle was struck by a vehicle driven by an uninsured motorist, Amy Davidson. Both Melinda and Kady suffered bodily injuries. Melinda was insured by ASI. Pursuant to the terms of Melinda's policy, under the medical payment provision, a claim was limited to a $1,000 recovery per person. Melinda's potential recovery under the uninsured motorist provision for a bodily injury claim was limited to $25,000 per person/$50,000 per accident. The property damage provision under the uninsured motorist portion limited the recovery to $10,000. Gary, Melinda's husband, was listed as a driver on the policy.

[1] The record shows the Smiths allege bad faith in their complaint. Bad faith is not raised on appeal.

On July 21, 2004, ASI offered Melinda $2,500, and $500 to Kady, as a settlement for the accident. Melinda declined to accept the offer. ASI attempted to offer the same amount in August of 2004, and the offer was again rejected. Melinda stated she also attempted to negotiate with ASI, through her attorney, relative to the uninsured motorist coverage of the insurance policy, but ASI ignored her requests.

The Smiths filed a complaint on October 3, 2006,[2] three years after the accident. On February 16, 2007, Melinda and Gary were tendered requests for admissions. The Smiths requested an extension until May 18, 2007 to respond, and the extension was granted. On May 18, 2007, the Smiths did not submit their answers to the request for admissions. There is nothing in the evidence that demonstrates another extension was requested, or that a request to vacate the admissions was ever filed.

On July 27, 2007, ASI filed a motion for summary judgment. As grounds for the motion, ASI argued the Smiths were barred from recovery because Melinda did not comply with the arbitration clause of the contract. The clause provides, if applicable, no claim will lie against the company if a policyholder does not submit a written demand for arbitration within two years of the date of the accident. ASI argued the arbitration clause was applicable because there was a failure to agree on the settlement amount. Melinda never submitted a demand for arbitration. Relevant portions of the arbitration clause follow:

> If any person making a claim hereunder and the Company do not agree that both the automobile(s) and the driver(s) of the automobile(s) with which any person making claim has had

[2] Melinda, Gary, and Kady all were listed as plaintiffs.

> an accident, or do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to an insured or damage to an insured automobile or do not agree as to the amount payable hereunder, then these matters shall be submitted to arbitration . . . . No claim shall lie against the company where an insured has failed to make a written demand for arbitration within two years from the date of the accident.

App. p. 48 (emphasis added).

The Smiths never filed a response to ASI's motion for summary judgment. They did, however, file the answers to the request for admissions on August 7, 2007— three months past the extended deadline. The Smiths also requested the summary judgment hearing be continued three times. The hearing finally took place on January 23, 2008.

At the hearing, the Smiths attempted to orally designate the responses to the requests for admissions as evidence opposing ASI's motion for summary judgment. The Smiths argued ASI's offers of $2500 and $500 were made under the medical payments, not the uninsured motorist, provision of the policy; therefore, the arbitration clause did not apply. ASI asked the trial court not to rule on the oral statements concerning the responses to the request for admissions, and it is unclear from the record whether the trial court considered the overdue answers. The trial court granted ASI's motion for summary judgment. The Smiths now appeal.

Analysis

I. Evidence

On appeal, the Smiths contend the trial court did not reject the belatedly-filed responses to the requests for admissions as evidence in opposition of ASI's motion for

summary judgment, implying we can and should consider the responses. They further argue the responses establish a genuine issue of material fact that defeats summary judgment. In support of their argument, the Smiths cite numerous cases as authority holding a plaintiff is able to meet the designation requirements of Indiana Trial Rule 56 through oral presentation at the summary judgment hearing. The cases, however, are no longer good law.

Until recently, case law had been somewhat inconsistent regarding the authority of a trial court to consider evidence designated in opposition to summary judgment after the thirty-day deadline established in Rule 56(C).[3] See HomeEq Servicing Corp. v Baker, 883 N.E.2d 95, 98 (Ind. 2008). The inconsistency was first resolved when our supreme court cited Desai v. Croy, 805 N.E.2d 844 (Ind. Ct. App. 2004) trans. denied, with approval in 2005. See Borsuk v. Town of St. John, 820 N.E.2d 118, 124 n.5 (Ind. 2005). In Desai, we held a trial court does not have discretion under Trial Rule 56(I) to allow a nonmoving party to designate evidence in opposition to a motion for summary judgment unless the nonmoving party filed a response, or requested an extension of time in which to file a response, to the summary judgment motion within thirty days of the date the motion was

---

[3] Compare, e.g. Thayer v. Gohil, 740 N.E.2d 1266, 1269 (Ind. Ct. App. 2001), trans. denied; Markley Enters., Inc. v. Grover, 716 N.E.2d 559, 563 (Ind. Ct. App. 1999); Morton v. Moss, 694 N.E.2d 1148, 1151-52 (Ind. Ct. App. 1998); Brown v. Banta, 682 N.E.2d 582, 585 (Ind. Ct. App. 1997), trans. denied; Seufert v. RWB Medical Income Properties I Ltg. P'ship, 649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995) (requiring adverse party to file within thirty days any opposing affidavits and materials or seek extension of time within which to file same); with Farm Credit Servs. v. Tucker, 792 N.E.2d 565, 568 (Ind. Ct. App. 2003) (holding trial court has discretion to consider designated evidence in opposition of motion for summary judgment at the hearing where respondent failed to respond to petitioner's motion for summary judgment within the thirty-day deadline).

filed. See Desai, 805 N.E.2d 844 at 850. We later concluded the holding in Desai is a bright line rule. Starks Mech., Inc. v. New Albany-Floyd County Consol. Sch. Corp., 854 N.E.2d 936, 940 (Ind. Ct. App. 2006).

This year, our supreme court again reiterated its approval of the reasoning in Desai, and held if a nonmoving party fails to respond to a motion for summary judgment within thirty days either by (1) filing affidavits showing issues of material fact, (2) filing his or her own affidavit under Rule 56(F) indicating why the facts necessary to justify his or her opposition are unavailable, or (3) requesting an extension of time in which to file his or her response under Rule 56(I), the trial court lacks discretion to permit that party to thereafter file a response. HomeEq Servicing Corp., 883 N.E.2d 95 at 98.

Here, the Smiths never responded to the motion for summary judgment. They never filed affidavits, nor did they request an extension of time in which to respond. The trial court, therefore, did not have discretion to consider any evidence presented by the Smiths at the hearing in response to ASI's motion for summary judgment. For the same reasons, we will not consider the evidence today.

Even if this court were to consider the evidence properly designated, the answers to the requests for admissions were deemed admitted when the Smiths declined to provide their answers in a timely manner. Regarding answers to questions, Trial Rule 36(A) provides in part:

> The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed service upon the

> party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.

The Smiths filed their answers three months after the extended due date. Trial Rule 36 (B) also provides, "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission . . . ." There is nothing in the record indicating the Smiths filed a request for withdrawal or an amendment to the admissions. The Smiths have not followed procedure with the request for admissions, nor with the motion for summary judgment. Regardless, a motion for summary judgment should only be granted if the designated materials, even if they stand unopposed, warrant it. Starks v. Village Green Apartments, 854 N.E.2d 411, 414 (Ind. Ct. App. 2006).

II. Entry of Summary Judgment

Summary judgment is appropriate only when the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). A genuine issue of material fact exists when there are disputed facts, or undisputed facts capable of supporting conflicting inferences, about an issue that would dispose of the litigation. Cox v. Town of Rome City, 764 N.E.2d 242, 245 (Ind. Ct. App. 2002). All facts and reasonable inferences drawn from the facts need to be construed in favor of the nonmoving party. State Farm Mut. Auto. Ins. Co v. D'Angelo, 875 N.E.2d 789, 795 (Ind. Ct. App. 2007), trans. denied. Once the moving party demonstrates that there is no genuine issue of material fact, the burden is on the non-moving party to produce evidence to the contrary. Cox, 764 N.E.2d at 245.

On appeal, we must carefully review the grant of a motion for summary judgment to ensure a person was not improperly denied his or her day in court. Evan v. Poe & Associates, Inc., 873 N.E.2d 92, 97-98 (Ind. Ct. App. 2007). We do not need to defer to a trial court's reasons for granting or denying a motion for summary judgment, even though specific findings and conclusions by the trial court may offer us valuable insight into the rationale for the judgment. Id. D'Angelo, 875 N.E.2d at 795. We will reverse the grant of a summary judgment motion if the record discloses an incorrect application of the law to the facts. Eckman v. Green, 869 N.E.2d 493, 496 (Ind. Ct. App. 2007), trans. denied.

Uninsured motorist coverage is designed to afford the same protection to a person injured by an uninsured motorist as the person would have enjoyed if the offending motorist carried liability insurance. Gheae v. Founders Ins. Co., 854 N.E.2d 419, 422 (Ind. Ct. App. 2006). However, the Uniform Arbitration Act (codified at Indiana Code Section 34-57-2-1(a)) provides: "A written agreement to submit to arbitration is valid, and enforceable, an existing controversy thereafter arising is valid and enforceable, except upon such grounds as exist at law or in equity for the revocation of any contract." In other words, insurance companies are free to limit their liability, or require arbitration, if they do not violate public policy as reflected by case or statutory law. Gheae, 854 N.E.2d 419 at 423. The Smiths make no claim on appeal the arbitration clause, or two-year time limit for demanding arbitration, are unenforceable.

The Smiths argue that ASI did not make any offers under the uninsured motorist coverage of the policy and the question of whether the offers were made under the medical payments portion or the uninsured motorist portion of the policy creates a genuine issue of

material fact requiring deliberation by a jury. ASI argues the Smiths cannot recover because they did not comply with the arbitration clause of the contract, and the clause was triggered due to the parties' failure to agree on the settlement amount. We agree with ASI.

We conclude the question of whether ASI expressly stated the offers were under the uninsured motorist provision of the policy is not an issue. The terms of the contract unambiguously state the recovery under the medical payment portion of the policy was subjected to a $1,000 maximum. Because Melinda was hit by an uninsured motorist, it would logically follow any offer above the amount of $1,000 would be under the uninsured motorist provision of the policy. When there was a failure to agree on the settlement amount, the arbitration clause was triggered. The Smiths were required to submit a written demand requesting arbitration within two years of the date of the accident and they failed to comply with the terms of the contract.

To the extent the Smiths argue "even though the medical payments limits under the policy were only $1,000, there was still the matter of comprehensive and collision for the automobile which only had a $500.00 deductible," the logic of this argument is unclear. Appellant's Br. p. 8. Melinda claims she understood the offer of over $1,000 to be for medical payments, therefore the arbitration clause would not apply. She also asserts, in contradiction to the medical payments argument, that she had more coverage under the comprehensive and collision portion of the policy, implying it would make sense for the insurance company to offer her more than $1,000. Comprehensive and collision is for property damage, not medical payments. At best, an issue of contract interpretation exists here.

Summary judgment is appropriate in the context of contract interpretation because the construction of a written contract is a question of law. Von Hor v. Doe, 867 N.E.2d 276, 278. (Ind. Ct. App. 2007), trans. denied. As with other contracts, an insurance policy is to be interpreted with the goal of ascertaining and enforcing both parties' intent as manifested in the actual contract. Id. "We construe the insurance policy as a whole and consider all of the provisions of the contract and not just the individual words, phrases, or paragraphs." Briles v. Wausau Ins. Cos., 858 N.E.2d 208, 213 (Ind. Ct. App. 2006). "We must interpret the language of an insurance policy so as not to render any words, phrases, or terms ineffective or meaningless." T.B. ex rel. Bruce v. Dobson, 868 N.E.2d 831, 836 (Ind. Ct. App. 2007), trans. denied, (quoting Vann v. United Farm Family Mut. Ins. Co., 790 N.E.2d 497, 502 (Ind. Ct. App. 2003), trans. denied)). "Any doubts to coverage shall be construed against the insurer as the contract drafter." Vann, 790 N.E. 2d at 502.

The only way the Smiths' argument would be logical is if Melinda incorrectly understood the comprehensive and collision portion of the policy to be some sort of extended coverage for the medical payments provision. That is simply not the case. We may not extend coverage beyond that provided in the contract. T.B ex rel. Bruce, 868 N.E.2d 831 at 836. Additionally, even if we were to interpret the Smiths' argument as if ASI's offers had been made under the medical payments portion of the policy, Melinda also stated she tried to negotiate unsuccessfully with ASI in regard to the uninsured motorist provision of the policy.

There is no question a failure to agree exists here. It is clear ASI never agreed to provide uninsured motorist benefits in an amount that Melinda believed was adequate,

regardless of whether the amount ASI "offered" was $2,500 or $0. Thus, the Smiths were required to submit an arbitration demand within two years and they did not do so. We find the Smith's arguments to be without merit.

Conclusion

The trial court lacked discretion to consider the evidence presented by the Smiths at the summary judgment hearing, and the grant of the motion for summary judgment in favor or ASI was proper. We affirm the trial court.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.