STATE OF MICHIGAN

COURT OF APPEALS

MIC GENERAL INSURANCE CORPORATION, Plaintiff-Appellee,	UNPUBLISHED January 21, 2000
v	No. 210062 Wayne Circuit Court
AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellant.	LC No. 96-639730 CK

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff summary disposition in this insurance liability dispute. We reverse and remand.

On April 25, 1995, defendant issued a Michigan no fault automobile insurance policy to George Nagy, Jr. of 2060 Council Avenue, Lincoln Park, Michigan. The policy was to endure for six months, expiring on October 25, 1995. Nagy's designated address represented the address of an Alcoholics Anonymous facility called the Al-Anon Club. During the first half of 1995, Nagy lived out of his car in the Al-Anon Club parking lot and received his mail at the club. During the early summer of 1995, Nagy moved from the parking lot. Nagy's mail subsequently received at the club from defendant allegedly was returned to defendant as undeliverable. Defendant denied receiving prior to its cancellation of Nagy's policy any undelivered mail that it had sent Nagy at the Al-Anon club address.

Nagy's payment plan required an initial down payment, which Nagy paid, followed by four installment payments. Nagy failed to timely make his first installment payment, and defendant on June 7, 1995 mailed to him at the Al-Anon club a cancellation notice. This notice advised Nagy that if defendant did not receive his payment by June 26, 1995, defendant would cancel his policy effective that date. Nagy's tardy July 5, 1995 payment was accepted by defendant, however, as within defendant's thirteen-day grace period, and the policy remained in effect. When Nagy failed to make his second installment payment, defendant in late August mailed to the Al-Anon club address a cancellation notice stating that if defendant did not receive payment by September 5, 1995, it would cancel Nagy's policy as of that date. Nagy made no further payments. On September 19, 1995, defendant mailed to

the Al-Anon club address a cancellation notice indicating that as of September 5, 1995, Nagy's policy was terminated.

On September 16, 1995, while walking across a street, Nagy was struck by a vehicle insured by plaintiff. Plaintiff's policy included Michigan no-fault automobile insurance coverage. After Nagy's accident, as of December 15, 1997, plaintiff paid him no fault personal injury protection ("PIP") benefits amounting to $223,771.71.

On September 10, 1996, plaintiff sued defendant alleging that defendant should have paid Nagy's PIP benefits, and that plaintiff is subrogated to Nagy's rights to seek reimbursement from defendant. The trial court granted plaintiff summary disposition because Nagy did not receive notice of defendant's cancellation.

Defendant first contends that the trial court erred in granting plaintiff's motion for summary disposition because genuine issues of material fact exist with respect to whether plaintiff rebutted defendant's prima facie proof that it properly notified Nagy of the policy cancellation. Defendant also argues that the trial court, in relying on Nagy's affidavit, impermissibly assessed the credibility of this evidence. The trial court granted plaintiff summary disposition pursuant to MCR 2.116(C)(10), which tests a complaint's factual sufficiency. In evaluating a (C)(10) motion, a court must consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

MCL 500.3020; MSA 24.13020 governs the cancellation of no fault automobile insurance policies. *Citizens Ins Co of America v Crenshaw*, 160 Mich App 34, 37-39; 408 NW2d 100 (1987). MCL 500.3020(1); MSA 24.13020(1) provides as follows:

> A policy of casualty insurance, except worker's compensation and mortgage guaranty insurance, including all classes of motor vehicle coverage, shall not be issued or delivered in this state by an insurer authorized to do business in this state for which a premium or advance assessment is charged, unless the policy contains the following provisions:
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> * * *
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> (b) That the policy may be canceled at any time by the insurer by mailing to the insured at the insured's address last known to the insurer or an authorized agent of the insurer, with postage fully prepaid, a not less than 10 days' written notice of cancellation with or without tender of the excess of paid premium or assessment above the pro rata premium for the expired time.

MCL 500.3020(5); MSA 24.13020(5) further provides the following:

> Cancellation as prescribed in this section is without prejudice to any claim originating before the cancellation. The mailing of notice is prima facie proof of notice. Delivery of written notice is equivalent to mailing.

An insured must receive actual notice of the cancellation. *State Farm Mut Auto Ins Co v Allen*, 191 Mich App 18, 21; 477 NW2d 445 (1991).

In proving actual notice of an attempted cancellation, an insurer is assisted by the provision in § 3020 that mailing of notice shall be prima facie proof of notice. *State Farm*, *supra*; *Celina Mut Ins Co v Falls*, 72 Mich App 130, 136; 249 NW2d 323 (1976). Section 3020 incorporates the common law presumption that a letter mailed is presumed received by the addressee. *Good v Detroit Auto Inter-Ins Exchange*, 67 Mich App 270, 272-273; 241 NW2d 71 (1976). The function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device that allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). See also MRE 301.[1]

The opposing party's presentation of evidence rebutting the presumption dissipates the presumption. *State Farm*, *supra* at 22. When rebutted by competent evidence, the presumption becomes only a permissive inference. *State Farm*, *supra* at 23; *Good*, *supra* at 278. "[W]hile the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced." *Widmayer*, *supra*.

Defendant invoked the presumption that Nagy received actual notice of the cancellation by presenting affidavit testimony and a copy of the cancellation notice.[2] To rebut the presumption, plaintiff produced affidavits from two Al-Anon volunteers who attested that Nagy moved out of the parking lot and was last seen early in the summer of 1995, before July 4, and that after Nagy moved from the parking lot, additional mail received from defendant was returned to defendant undeliverable. Plaintiff also produced Nagy's affidavit in which he disclaimed knowledge that defendant had canceled his policy; stated that he had not been to Al-Anon since July 1995 and that he had not received any mail from Al-Anon since July 1995; and averred that he never received a cancellation notice from defendant during the four weeks before his accident. This evidence eliminated the presumption that Nagy had actual notice of defendant's cancellation.

While the trial court properly recognized that plaintiff's evidence eliminated the presumption of actual notice established by defendant's mailing of the cancellation notice to defendant's last known address, the trial court failed to appreciate the continued existence of an inference that Nagy received the cancellation notice. As mentioned above, after the presentation of plaintiff's opposing evidence "the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced." *Widmayer*, *supra*.

> There is a presumption that the notice of cancellation was received by [the insured], but like all presumptions it fades away in the light of the testimony of [the insured] that he did not receive the notice of cancellation. In such a case, a question of fact is raised that should be determined by the trier of the facts. The trial court was in error in failing to submit this issue to the jury. [*DeHaan v Marvin*, 331 Mich 231, 241; 49 NW2d 148 (1951).]

See also *Good*, *supra* at 272-273 (If in proving actual notice the insurer relies on the presumption that a letter sent is presumed received by the addressee and the insured denies receiving the cancellation notice, a question of fact is raised that should be resolved by the trier of fact.); *Cooper v State Farm Mut Auto Ins Co*, 33 Mich App 390, 392-393; 190 NW2d 350 (1971) ("There was ample proof that the notice had been mailed and the [the insured]'s denial that he had received it gave rise to a question of fact."). Because a question of fact existed, the trial court erred in granting plaintiff summary disposition pursuant to MCR 2.116(C)(10). *Maiden*, *supra*. Furthermore, the trial court likewise erred to the extent that its grant of summary disposition rested on its determination of the veracity of Nagy's affidavit. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994) (Where the truth of a material factual assertion of a moving party depends on a deponent's credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted.).

While plaintiff relies on *Phillips v Detroit Auto Inter-Ins Exchange*, 69 Mich App 512; 245 NW2d 114 (1976), this case is distinguishable on its facts. *Phillips* involved the following events:

> [T]he defendant mailed a Cancellation Premium Notice to the plaintiff at the Andover address stating that her policy would be cancelled on September 10, 1973, unless the defendant received the past due amount of $44.75 by that date. This notice was returned to the defendant by the post office unopened and bearing the stamped inscription "RETURN TO SENDER—ADDRESSEE UNKNOWN".
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> It is not disputed that the plaintiff moved from the Andover address to 8938 Pinehurst, Detroit, Michigan, sometime prior to August 23, 1973, without notifying the defendant. Although she had informed the post office of her change of address and had filed a request that her mail be forwarded, the post office failed to forward the August 23 notice and instead returned it to the defendant.
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> A notice of cancellation was mailed September 20, 1973, to the Andover address, but this notice was properly forwarded to plaintiff at 8938 Pinehurst. The notice indicated that the policy had been cancelled September 10, 1973, for nonpayment of premium. On September 12, 1973, the plaintiff was involved in an automobile accident with an uninsured motorist and required hospitalization as a result. She remained in the hospital until October 27, 1973; she returned home on that date and found the notice of cancellation.
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> It is not disputed that plaintiff did not receive actual notice of the cancellation until October 27, 1973. [*Id*. at 514.]

The trial court found that no genuine issue of fact existed with respect to whether the plaintiff received actual notice of the defendant's attempted cancellation at least ten days prior to the cancellation's effective date, and therefore granted the plaintiff summary disposition, which this Court affirmed. *Id*. at 513, 518. *Phillips* differs from the instant case because there the defendant apparently received the returned cancellation premium notice it had mailed and no dispute existed that the plaintiff did not receive actual notice of the cancellation until after her accident, while in this case the parties dispute whether the cancellation notice defendant mailed was returned to it or received by Nagy. The *Phillips* Court itself recognized, however, that "[t]he insured's denial of receipt [of a mailed cancellation notice] raises a factual question to be determined by the trier of fact." *Id*. at 516.

Defendant additionally argues that plaintiff should be estopped from challenging an alleged lack of actual notice because Nagy failed to keep it apprised of his whereabouts. We decline to address this unpreserved issue, however, because defendant raises it for the first time on appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] MRE 301 states as follows:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[2] Plaintiff did not challenge below the sufficiency of defendant's evidence that it mailed Nagy the August 21, 1995 cancellation notice. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) ("This issue was not preserved for appeal because it was not raised in and decided by the trial court."). Moreover, defendant did present sufficient evidence in this respect. Christine Pipia, defendant's processing systems analyst, testified in her deposition regarding defendant's computer generated cancellation notices. She identified the August 21, 1995 cancellation notice, and indicated that pursuant to defendant's procedure the notice would have been mailed on the next business day. See *Good*, *supra* at 275 ("Evidence of business custom or usage is sufficient to establish the fact of mailing without further testimony by an employee of compliance with the custom."). Pipia further testified that she had checked the record of returned mail kept by defendant's corporate document center, and found no returned documents pertaining to Nagy's policy. *See id*. at 276 ("[T]he fact that a letter was mailed with a return address but was not returned lends strength to the presumption that the letter was received."). The evidence indicated that the August 21, 1995 cancellation notice would have been mailed, apparently from Dearborn to Lincoln Park, on Tuesday, August 22, 1995, fourteen days

prior to the purported cancellation date of September 5, 1995. From these facts a reasonable inference arises that Nagy would have received the notice at least ten days prior to the cancellation date.