STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE CO.,

Plaintiff-Appellee,

v

HAROLD HARRIS, ANGELA HARRIS and NORMA FORD, Co-Personal Representatives of the Estate of GWENDOLYN HARRIS, Deceased,

Defendants-Appellants,

and

WILLIAM BEAUDOIN, SHARON BEAUDOIN, and CYNTHIA BEAUDOIN,

Defendants.

UNPUBLISHED
April 24 2001

No. 215264
Oakland Circuit Court
LC No. 95-508486-CK

Before: Smolenski, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Defendants Harold Harris and the personal representatives of the Estate of Gwendolyn Harris (hereafter collectively referred to as defendants) appeal as of right the declaratory judgment entered in favor of plaintiff. We affirm.

This is the second time this case has been before this Court. Based on the record as it existed the first time the case was here, the declaratory judgment for plaintiff was reversed, and the case was remanded for further proceedings based on our finding that a genuine issue of material fact existed regarding whether William Beaudoin received a letter stating that plaintiff reserved its right to later disclaim any obligations under a homeowners insurance policy. *Allstate Ins Co v Harris*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 1998, p 4. Our ruling was without prejudice to plaintiff renewing its motion for summary disposition on remand. *Id*.

After remand, plaintiff renewed its motion for summary disposition and presented proof of a reservation of rights letter mailed on June 7, 1995. In addition to a copy of that letter, plaintiff presented: (1) a copy of a certified return receipt card signed by "Cindy Beaudoin" on

June 8, 1995, which accompanied a June 7, 1995 reservation of rights letter addressed to William Beaudoin at 304 Dick in Pontiac; (2) the affidavit of Cynthia Beaudoin, William Beaudoin's wife, stating that she signed for the certified letter and gave it to her husband; and (3) the affidavit of Jean Keitz, an Allstate claims analyst, explaining plaintiff's standard procedure for sending out reservation of rights letters. The trial court granted plaintiff's motion on the grounds that plaintiff satisfied its burden of proving, by a preponderance of the evidence, that the reservation of rights letter was properly mailed and was received by William Beaudoin. Subsequently, the trial court entered an order relieving plaintiff from any obligation to defend or indemnify William Beaudoin.

On appeal, defendants first argue that none of plaintiff's newly presented evidence obviates the uncertainty surrounding William Beaudoin's receipt of the June 7, 1995 letter dated June 7, 1995. We disagree. A letter properly addressed and mailed in the due course of business is rebuttably presumed to have been received by the addressee. *Crawford v Michigan*, 208 Mich App 117, 121; 527 NW2d 30 (1994). When the alleged recipient denies receipt, a question of fact exists for the trier of fact. *Cuttle v Concordia Mut Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940); *Rousseau v Brotherhood of American Yeoman*, 186 Mich 101, 106; 152 NW 939 (1915).

Defendants characterize the deposition testimony of William Beaudoin as a denial that he received a reservation of rights letter. However, William Beaudoin never actually denied receiving the reservation of rights letter. Rather, he testified that he did not recall receiving the letter. Further, Keitz' testimony regarding plaintiff's custom and habit of addressing and mailing reservation of rights letters to its insureds lends additional weight to the presumption of receipt. "[U]pon proper evidence of business custom and habit of a commercial house as to addressing and mailing, the mere execution of a letter in the usual course of business rebuttably presumes subsequent receipt by the addressee." *Good v Detroit Auto Inter-Insurance Exchange*, 67 Mich App 270, 275; 241 NW2d 71 (1976). Accord *Morales v Auto-Owners Ins Co*, 458 Mich 288, 304 n 8; 582 NW2d 776 (1998).

Defendants maintain that Keitz' testimony is inadmissible under the Michigan Rules of Evidence because Keitz was not the adjuster who signed the letter in question, and because there is no evidence that Keitz is intimately familiar with any facts relevant to the present action. Defendants' argument, however, ignores Michigan case law that allows evidence of business custom or usage to establish the fact of mailing without further testimony by an employee of compliance with the custom. *Good*, *supra* at 275. Therefore, despite defendants' contention otherwise, the claims adjuster whose name appears on the letter is not required to testify that he complied with the ordinary business practice. William Beaudoin's testimony that he does not recall receiving the June 7, 1995 letter is not sufficient to rebut the presumption of receipt.

Next, defendants argue that, even assuming William Beaudoin received the June 7, 1995 letter, plaintiff is estopped from denying coverage because the letter was both untimely and unclear. Thus, defendants assert they were not given reasonable notice of the possible conflict of interest between plaintiff's duty to defend and its duty to pay under the policy. We disagree.

"[W]hen an insurance company undertakes the defense of its insured, it has to give reasonable notice to the insured that it is proceeding under a reservation of rights, or the

insurance company will be estopped from denying its liability." *Kirschner v Process Design Associates, Inc*, 459 Mich 587, 593; 592 NW2d 707 (1999)(emphasis removed). Accord *Fire Ins Exchange v Fox*, 167 Mich App 710, 713-714; 423 NW2d 325 (1988)("The general rule is that an insurer which undertakes the defense of an insured while having actual or constructive knowledge of facts which would allow avoidance of liability will be deemed to have waived its right to avoid coverage unless reasonable notice is served to the insured of the possible disclaimer of liability."). As we have just discussed, plaintiff established that it notified William Beaudoin of its reservation of rights on June 7, 1995, approximately five months after the complaint was filed in the underlying tort action. We believe this letter gave plaintiff timely notice of the potential conflict of interest. See *id.* at 714.

Additionally, we reject defendants' assertion that the June 7, 1995 letter was not sufficiently clear. The letter enumerated the specific definitions, coverage provisions, and exclusions contained within the policy under which plaintiff might "later disclaim any obligation under the policy and assert a defense of no coverage[.]" The letter further stated:

> [I]t is Allstate's belief that you were not a resident of the household of a named insured on January 22, 1993 and, accordingly, do not fall within the above-quoted definition of an "insured person".
>
> It is also Allstate's position that the bodily injury allegedly sustained by the Estate of Gwendolyn Harris did not arise from an accident and, thus, falls outside of the coverage provisions of the Allstate policy. Further, either one or more of the exclusions quoted above applies to the allegations directed against you.
>
> Since the litigation presently pending against you makes allegations which may limit the defense and/or indemnity obligation of Allstate, you should immediately notify your other insurance carriers whose coverage might apply to the claims made against you and ask that they participate in the defense and indemnity of these claims. If you do not have such coverage, you may obtain your own personal attorney to help protect you against these potential uninsured damages. Allstate, however, assumes no obligation to pay the fees of such personal attorney.
>
> Thus, the defense of this lawsuit is being, and will continue to be, handled under a full reservation of rights. Indeed, Allstate is not waiving any right it has to deny coverage, to raise any additional policy grounds or exclusions as they arise or to refuse to defend you further at any future time.

This letter does not suffer from the vagueness and uncertainty present in the letters involved in *Merithew v Last*, 376 Mich 33; 135 NW2d 353 (1965), and *Cozzens v Bazzani Building Co*, 456 F Supp 192 (ED Mich, 1978), two cases relied on by defendants. The June 7, 1995 letter is sufficiently clear and unambiguous to notify a layperson of an insurer's possible conflict of interest and to notify him of the specific policy defenses the insurer might later claim. Therefore, the trial court properly granted summary disposition in plaintiff's favor.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage