STATE OF MICHIGAN

COURT OF APPEALS

JAMIE LYNN KIENITZ,

Plaintiff-Appellant,

and

PAUL EDWARD KIENITZ and CHRISTOPHER MICHAEL BURGDORF,

Plaintiffs,

v

RICHARD KRAE DAVIDSON and DEBORAH ANN ROBERTS,

Defendants-Appellees.

UNPUBLISHED
December 20, 2002

No. 231425
Tuscola Circuit Court
LC No. 98-016777-NI

JAMIE LYNN KIENTIZ,

Plaintiff-Appellant,

v

FARMERS INSURANCE EXCHANGE,

Defendant-Appellee.

No. 231461
Tuscola Circuit Court
LC No. 00-018612-NF

Before: Fitzgerald, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

In these consolidated cases involving no-fault automobile insurance, plaintiff appeals as of right from orders of the circuit court granting summary disposition in favor of defendants Richard Davidson, Deborah Roberts, and Farmers Insurance Exchange. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We remand for further proceedings.

Plaintiff was severely injured when the car she was driving was struck by a vehicle driven by Davidson and owned by Roberts. Allegedly, Davidson was intoxicated and fleeing from City of Vassar police officers at the time of the accident. As a result of the accident, plaintiff sustained numerous injuries, including broken bones, head trauma, partially collapsed lungs, and a burst uterus. Plaintiff, who was two-months pregnant at the time of the accident, lost the child as a result of the accident. Subsequently, plaintiff initiated three separate lawsuits: (1) a third-party complaint against Davidson and Roberts; (2) an action against the City of Vassar, the Vassar Police Department, and Police Officer Myra Voorhess (hereinafter the "Vassar defendants"); and (3) a declaratory action for first-party no fault insurance benefits against Farmers, plaintiff's no-fault insurer.[1] All three cases were consolidated by order of the trial court.

In Docket No. 231425, the court granted summary disposition in favor of Davidson, Roberts, and the Vassar defendants. The court based its decision on the conclusion that plaintiff was uninsured at the time of the accident because plaintiff had not properly renewed her automobile insurance policy. In Docket No. 231461, the court granted summary disposition in favor of Farmers, also concluding that plaintiff was uninsured at the time of the accident because she had not properly renewed the policy.

Plaintiff first argues that the grant of summary disposition to all defendants was based on the erroneous finding that plaintiff's no-fault insurance policy had not been renewed as opposed to being cancelled. This Court reviews decisions on motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

We review the court's findings for clear error. MCR 2.613(C). "A finding is clear error when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994).

The record establishes that plaintiff had a pattern of paying her monthly premiums late. The record also indicates that she was in the habit of paying a little less than the total due. For example, while plaintiff's November 1997 bill was for $120.06, she actually paid $120.00. Farmers apparently found this deficiency to be trivial, in that it simply rolled the deficient $.06 over into plaintiff's December 1997 bill. Viewing this evidence is a light most favorable to

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[1] The suit against the Vassar defendants is not a part of this appeal.

plaintiff, we believe it does create a question of fact on whether a course of dealing by Farmers had developed with respect to late premium payments.

However, this evidence does not establish a course of dealing by Farmers to accept a late payment beyond a notified date of cancellation. On January 16, 1998, Farmers mailed to plaintiff a notice of cancellation. It indicated that plaintiff's policy would be terminated on January 31, 1998, if plaintiff did not pay the total due, which was $122.38. The amount consisted of the total billed in December 1997, plus the January 1998 premium, an unspecified service charge, a state assessment, and two credit adjustments in plaintiff's favor. It is undisputed that plaintiff did not pay this amount prior to the cancellation date.[2] A letter from Farmer's indicating that the policy had been cancelled was sent on February 12, 1998. Plaintiff asserts, and defendants do not deny, that this letter was sent to the wrong address.

The record does contain evidence that plaintiff made a $60.00 insurance payment one day prior to the mailing of the cancellation notice.[3] However, that leaves a balance due of $62.38. Assuming arguendo that the course of dealing regarding late payments applies, plaintiff's actions did not comport with the common basis of understanding evidenced in their course of dealing. Plaintiff's payment was not simply a few pennies short; it was less than half the total due.

While plaintiff's insurance contract does not directly speak of renewal, it does contain the following nonrenewal provision: "We will mail to you at the address shown in the Declarations, or deliver to you, notice of nonrenewal not less than 20 days before the end of the policy period, if we decide not to renew or continue this policy." We construe this provision as implying that absent the delivery of a notice of nonrenewal, plaintiff would automatically be extended an offer to renew at the end of every six-month coverage period. See *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261-262; 617 NW2d 777 (2000) ("Any ambiguities in insurance contracts are liberally construed in favor of the insured and against the insurer, who drafted the contract."). Extension of a renewal offer means that coverage would continue, subject to the conditions set for acceptance by the offer. Plaintiff's insurance contract states that the "failure to pay the required renewal premium as [Farmers] . . . require means that you have declined our offer.

Plaintiff was sent a six months renewal notice on December 15, 1997, i.e., one month prior to the notice of cancellation. The notice indicates that the renewal certificate of insurance is enclosed. According to the renewal notice, the renewal term was from January 29, 1998 through July 29, 1998. Thus, the renewal notice indicates that continuation of the policy would begin two days prior to the cancellation of the policy for nonpayment of the $122.38 past due balance.

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[2] The fact that plaintiff did not pay the total noted on the cancellation notice distinguishes this case from *Morales v Auto-Owners Ins Co*, 458 Mich 288; 582 NW2d 776 (1998).

[3] This payment was made with a money order dated January 15, 1998. Plaintiff testified in her deposition that she always paid her insurance bill with a money order. When her mother would pay the bill, her mother would use a personal check.

The renewal notice is silent on when the renewal premium is due. Indeed, the renewal notice indicates in typeface intended to alert the reader:

D-O N-O-T P-A-Y

T-H-I-S N-O-T-I-C-E

PREM. BILLED MONTHLY BY

PREMATIC SERVICE CORP.

It further directs that the policyholder should "[r]etrun this portion with your payment (*except for Monthly Billed Policy(ies)*) (emphasis added).

We read the renewal notice as creating a grace period whose duration is determined by the billing practices of Prematic Service Corp. If the renewal term had begun after the policy was to be cancelled, then the grace period would have been extinguished. Simply put, there would have been no policy to renew. However, because the renewal period predated the cancellation by two days, the grace period was in effect at the time of the purported cancellation on January 31, 1998. While it is true that plaintiff admitted that she did not make a payment on the policy after the January 15, 1998 payment, the record is devoid of any evidence on when the renewal payment was due. There are some indications in the record that could lead to the conclusion that the first renewal payment would have been due on February 28, 1998, i.e., the day of the accident.[4] Conversely, the lack of evidence on the delivery of a renewal bill by Prematic can lead to the conclusion that the limits of the grace period had not been established, and thus was still in effect at the time of the accident. We need not attempt to resolve this question by limiting ourselves to the record before us, given the effective alternative of remanding the matter to the trial court for further proceedings.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.

[4] Looking to the December 1997 bill, it appears as if Prematic required that payment be made by the end of the month for that month's period of coverage. If this is accurate, and the previous six-month term of the policy expired on January 29, 1999, then plaintiff's first payment on the renewed term would have been due on February 28, 1998.