STATE OF MICHIGAN

COURT OF APPEALS

LEE ROBINSON,

Plaintiff-Appellee,

v

JARONN LEE REID,

Defendant,

and

TITAN INDEMNITY COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 7, 2008

No. 275360
Wayne Circuit Court
LC No. 05-532458-NI

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant Titan Indemnity Company appeals by leave granted from a circuit court order denying its motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). The construction and interpretation of a contract, including an insurance policy, is a question of law that is also reviewed de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999); *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

Plaintiff had an automobile insurance policy with Defendant, Titan Indemnity Company ("defendant"). The vehicle he had insured through defendant was stolen, and he went to Dollar Rent-A-Car to rent a vehicle. After filling out the paperwork to rent a vehicle, the rental agent informed him he had to place a deposit on the vehicle with a credit card. Plaintiff advised that he did not have a credit card, but his friend, who had driven him to the rental facility, did. Plaintiff's friend came into the rental facility and, using her credit card, filled out the rental paperwork for the vehicle in her name. Plaintiff thereafter left the rental facility, driving the rental vehicle. Several days later, while driving the rental vehicle, plaintiff was involved in an automobile accident with an uninsured motorist.

It is undisputed that to recover uninsured motorist benefits from defendant, plaintiff must have been driving the rental car with the owner's permission. The vehicle was owned by Dollar Rent A Car and rented to Martha Radelet. Although it was apparently understood by all involved that the car was intended for plaintiff's use, he was not named as an authorized driver in the rental agreement. Under the terms of the rental agreement, plaintiff did not have permission to drive the car because he was not the named renter and did not sign the agreement as an additional driver. The rental agreement provides that "[n]o term of this Agreement may be waived or changed except by a written agreement signed by an authorized representative of Dollar." There is no evidence of any writing signed by a Dollar representative changing the terms of the agreement.

The issue becomes, then, whether, despite the fact that plaintiff's name does not appear on the contract and he is not listed as an authorized driver, whether the rental car facility's agent, through her conduct and actions, gave plaintiff permission to drive the vehicle. As stated by our Supreme Court:

> . . . parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract. However, with or without restrictive amendment clauses, the principle of freedom to contract does not permit a party *unilaterally* to alter the original contract. Accordingly, mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract.
>
> This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract. [*Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003).]

Plaintiff presented evidence that the agent was aware that plaintiff intended to rent the vehicle for his own use. Plaintiff also presented evidence that, immediately after his friend signed the contract in her name and using her credit card, the rental agent handed the keys to the vehicle to plaintiff, in view of the friend, and that plaintiff entered the vehicle, showed the rental paperwork to a guard/employee, and was permitted to drive the rental vehicle off the rental lot. Under these circumstances, the trial court was correct in determining that a question of fact exists as to whether the parties to the contract mutually agreed to modify the contract provisions thereby granting plaintiff permission to drive the rental vehicle.

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto