STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL HEGYI, Plaintiff-Appellant,	UNPUBLISHED December 15, 2011
v	No. 298539 Oakland Circuit Court
AUTO CLUB INSURANCE GROUP, Defendant-Appellee.	LC No. 2009-102646-NI

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition in this insurance coverage dispute. Because plaintiff failed to present evidence sufficient to rebut the presumption that he received the amendatory endorsement containing the exclusion at issue, and the policy language unambiguously precludes underinsurance benefits if an insured settles a claim without defendant's consent, we affirm.

This case stems from an October 2, 2007, automobile accident in which Kevin Murdock's Jeep rear-ended plaintiff's vehicle after Murdock had fallen asleep at the wheel. Plaintiff filed a lawsuit against Murdock, which settled for $20,000, the policy limit of Murdock's insurance policy with Travelers. Pursuant to the settlement, plaintiff executed a "Release and Satisfaction," releasing Murdock and Travelers from all further liability.

Plaintiff thereafter filed suit against defendant, his insurer, seeking underinsured motorist benefits. Defendant moved for summary disposition, arguing that plaintiff's failure to notify it of his lawsuit and settlement with Murdock precluded underinsurance coverage under the "consent to settle" provisions of plaintiff's policy. In response, plaintiff argued, principally, that the "consent to settle" provisions were unenforceable because defendant never sent him the amendatory endorsement containing the provisions, and, in any event, defendant was not prejudiced by the settlement. The trial court agreed with defendant and determined that plaintiff's failure to notify defendant of his lawsuit and settlement precluded coverage.

We review de novo a trial court's decision on a motion for summary disposition. *In re Egbert R Smith Trust*, 480 Mich 19, 23; 745 NW2d 754 (2008). In reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). "Summary disposition is

appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 552. We also review de novo as a question of law an issue involving the interpretation of language in an insurance contract. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition because he never received the endorsement containing the "consent to settle" provisions that excluded coverage. Part IV of the amendatory endorsement contains the following two provisions regarding settlement:

> INSURING AGREEMENT
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> * * *
>
> 4. The **insured person** may not settle with anyone responsible for the accident without **our** written consent. **We** shall be obligated to respond within thirty (30) days of receiving an insured's written request to settle.
>
> EXCLUSIONS
>
> 1. This Coverage does not apply to **bodily injury** sustained by an **insured person:**
>
> *** * ***
>
> e. if that **insured person** or their legal representative settles or prosecutes to judgment their **bodily injury** claim with the owner, operator or other person or organization legally responsible for an **uninsured motor vehicle** or **underinsured motor vehicle** without **our** written consent. [Emphasis in original.]

Under the "mailbox rule," defendant created a rebuttal presumption that plaintiff received the amendatory endorsement. The proper addressing and mailing of a document creates a rebuttal presumption that the addressee received it. *Good v Detroit Auto Inter-Ins Exch*, 67 Mich App 270, 273, 276; 241 NW2d 71 (1976). Further, other factors, such as business custom and the fact that a letter was not returned, lend weight to the validity of the presumption. *Id.* at 275-276.

Here, plaintiff submitted an affidavit asserting that defendant sent him only the policy itself, i.e. "Policy Form 1207," along with the renewal declaration certificate for the 2006-2007 policy term. In response, defendant submitted the affidavit of John E. Anolick, an underwriting supervisor, who asserted that the amendatory endorsement was included in renewal packages sent to plaintiff on October 31, 2005, September 28, 2006, and September 28, 2007, and that none of the packages was returned to defendant by the United States Postal Service. The renewal package sent on September 28, 2006, pertained to the 2006-2007 policy term during which the accident at issue in this case occurred. Defendant also submitted a computer printout concerning plaintiff's policy, which indicates that the renewal packages were sent on the dates that Anolick claimed. This evidence created a rebuttable presumption that plaintiff was sent and

received the endorsement. Moreover, plaintiff's conclusory statement, without more, that defendant never sent the endorsement was insufficient to rebut the presumption.[1] See *id.* at 277-278; *Stacey v Sankovich*, 19 Mich App 688, 694-695; 173 NW2d 225 (1969). Further, it is untenable that plaintiff never received the endorsement when he admitted receiving the renewal declaration certificate and both documents were sent in the same package. Also included in the package was the insurance premium invoice, which it is undisputed that plaintiff paid. Thus, the trial court properly determined that there was no genuine issue of material fact that plaintiff received the endorsement.

Plaintiff next argues that even if defendant sent him the amendatory endorsement, he is nevertheless entitled to underinsurance benefits because the policy language is unclear, ambiguous, and perhaps contrary to public policy. Because underinsured motorist coverage is not required by law, the scope and limitations of such coverage is governed by the insurance contract. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 19; 592 NW2d 379 (1998). Insurance policies are subject to the same rules of contract interpretation that apply to contracts in general. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "[A]n insurance policy must be read as a whole to determine and effectuate the parties' intent." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). The policy terms must be accorded their plain and ordinary meanings, and if the language is unambiguous, we must interpret and enforce the contract as written. *Id.* "'An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy.'" *Manier v MIC Gen Ins Corp*, 281 Mich App 485, 492; 760 NW2d 293 (2008), quoting *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995).

In *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672; 554 NW2d 610 (1996), this Court examined policy language similar to that at issue here. In that case, the plaintiff, a passenger, was injured in an automobile accident. He sought underinsured motorist benefits with his insurer, the defendant, after settling with the driver for $20,000, the limit of the driver's policy. *Id.* at 674-675. The defendant denied the plaintiff's claim based on policy language stating that coverage "'shall not apply . . . to bodily injury to an insured, or care or loss of services recoverable by an insured, with respect to which such insured, . . . shall, without written consent of the Company, make any settlement with any person or organization who may be legally liable therefor.'" *Id.* at 674. The trial court determined that the defendant had to show prejudice in order to deny coverage based on the plaintiff's breach of the policy conditions. *Id.* at 675. This Court disagreed, holding that the language of the exclusion was clear and unambiguous and did not contravene public policy. This Court recognized that "an insured's release of a potentially liable tortfeasor is prejudicial to the insurer because such a release destroys any possibility that the insurer could recoup through its right to subrogation some of the

[1] Specifically, plaintiff averred that "[he] never had another policy sent to [him] by" defendant other than the policy attached to his affidavit. He further asserted that "[he] was never sent the policy which required prior approval from [defendant] before settling the case."

amounts paid." Thus, this Court determined that the exclusion must "be enforced as written, without incorporating a condition of prejudice." *Id.* at 676.

Plaintiff contends that *Lee* is distinguishable because the policy language at issue in this case appears under the heading "Insuring Agreement," rather than under the heading "Exclusions," and does not indicate the consequences of an insured's settlement without defendant's written consent. Plaintiff's argument lacks merit. Paragraph (4) under the heading "Insuring Agreement" is not ambiguous merely because it does not indicate the consequences of an insured's unapproved settlement. That provision states that an "insured person may not settle with anyone responsible for the accident without [defendant's] written consent," and indicates that defendant must respond to insured's written request to settle within 30 days after receiving the request. Moreover, plaintiff overlooks paragraph (1)(e) under the heading "Exclusions," which contains language very similar to that at issue in *Lee*. Specifically, that provision states that "Coverage does not apply to bodily injury sustained by an insured person . . . if that insured person . . . settles . . . their bodily injury claim with the owner, operator or other person or organization legally responsible . . . without our written consent." (Emphasis omitted.) Thus, the clear and unambiguous policy language bars plaintiff's claim. This case is on all fours with *Lee*, and plaintiff's attempts to distinguish it from *Lee* are unavailing.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio