STATE OF MICHIGAN

COURT OF APPEALS

NICKOLAS EDWARD SHOWMAN,

Plaintiff-Appellee,

v

ALBINA BUSSER,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
November 14, 2013

No. 311141
Macomb Circuit Court
LC No. 2011-002637-NI

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Defendant State Farm Mutual Automobile Insurance Company appeals as of right from the trial court's order denying its motion for summary disposition, granting summary disposition to plaintiff, and resolving the case in favor of plaintiff. Plaintiff brought this action seeking recovery for allegedly severe injuries received in an automobile accident when the vehicle driven by defendant Albina Busser hit plaintiff's vehicle. We reverse.

Plaintiff sought benefits under his underinsured motorist coverage, which he purchased separately from uninsured coverage. Plaintiff had underinsurance benefits of $20,000 per person and $40,000 per occurrence, which is the statutory minimum. MCL 500.3009(1). Underinsured motorist benefits permit a motorist to obtain coverage from his or her own insurer to the extent that a negligent third party has insufficient coverage. The underinsured motorist vehicle endorsement of the policy in question defines an "underinsured motor vehicle" as follows:

> ***Underinsured motor vehicle*** means a land motor vehicle or motorcycle:
>
> 1. the ownership, maintenance, and use of which is:
>
> a. insured or bonded for bodily injury liability at the time of the accident; or

b. self-insured under any motor vehicle financial responsibility law, any motor carrier law, or any similar law; and

2. for which the total limits of insurance, bonds, and self-insurance for bodily injury liability from all sources:

a. are less than the Underinsured Motor Vehicle Coverage limits of this policy; or

b. have been reduced by payments to ***persons*** other than ***you*** and ***resident relatives*** to less than the Underinsured Motor Vehicle Coverage limits of this policy.

The underinsured motorist endorsement next excludes certain vehicles, including those which are "uninsured" under the policy:

> ***Underinsured Motor Vehicle*** does not include a land motor vehicle or motorcycle:
>
> * * *
>
> 6. defined as an ***uninsured motor vehicle*** under Uninsured Motor Vehicle coverage of this policy.

The policy in question also has an endorsement for uninsured motor vehicle coverage, which includes the following definition:

> ***Uninsured Motor Vehicle*** means:
>
> 1. a land motor vehicle or motorcycle the ownership, maintenance, and use of which is:
>
> a. not insured or bonded for bodily injury liability at the time of the accident; or
>
> b. insured or bonded for bodily injury liability at the time of the accident; but
>
> (1) the limits are less than required by the financial responsibility act of Michigan; or
>
> (2) the insuring company:
>
> (a) denies that its policy provides liability coverage for compensatory damages that result from the accident . . .

Also at issue is the underinsured motorist endorsement provision entitled "Limits":

> **Limits**

1. The Underinsured Motor Vehicle Coverage limits are shown on the Declarations Page under "Underinsured Motor Vehicle Coverage Bodily Injury Limits — Each Person, Each Accident."

a. The most ***we*** will pay for all damages resulting from ***bodily injury*** to any one ***insured*** injured in any one accident, including all damages sustained by other ***insureds*** as a result of that ***bodily injury***, is the lesser of:

(1) the limits shown under "Each Person" reduced by the sum of all payments for damages resulting from that ***bodily injury*** made by or on behalf of any ***person*** or organization who is or may be held legally liable for that ***bodily injury***; or

(2) the amount of all damages resulting from that ***bodily injury*** reduced by the sum of all payments for damages resulting from that ***bodily injury*** made by or on behalf of any ***person*** or organization who is or may be held legally liable for that ***bodily injury***.

b. Subject to a. above, the most ***we*** will pay for all damages resulting from ***bodily injury*** to two or more ***insureds*** injured in the same accident is the limit shown under "Each Accident" reduced by the sum of all payments for ***bodily injury*** made to all ***insureds*** by or on behalf of any ***person*** or organization or is or may be held legally liable for the ***bodily injury***.

State Farm filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that plaintiff could not receive underinsured motorist benefits under its policy. Specifically, Busser's policy had a liability limit and underinsured motorist coverage limits of $20,000/$40,000. State Farm argued that because these amounts were equal to plaintiff's limits, under the "Limits" language in the underinsured motor vehicle endorsement, plaintiff was not entitled to collect benefits. State Farm stated that its underinsured motorist coverage was not illusory because it permitted recovery when $20,000/$40,000 liability limits were reduced by payments to persons other than the named insured and resident relatives, to less than $20,000/$40,000, and also provided coverage when in another state with lower minimum requirements (e.g., Ohio, $12,500).

Plaintiff also sought summary disposition pursuant to MCR 2.116(I)(2), and argued that State Farm's underinsured motorist coverage was illusory because its underinsured limits equaled Michigan's auto liability coverage limits, so plaintiff could never recover underinsured benefits. In addition, State Farm's policy excluded uninsured vehicles from the definition of underinsured. The policy defined an out-of-state driver with liability limits less than Michigan's minimum as "uninsured." The policy further defined a vehicle as "uninsured" if its insurance company denied coverage. Because of these provisions and the further exclusions under "Limits," plaintiff argued that neither underinsured nor uninsured motorist coverage would apply. Plaintiff also argued that he also could never recover the full $20,000 in underinsured motorist coverage where available insurance limits had been reduced by payments to non-resident relatives.

The trial court thought that, as in *Ile v Foremost Ins Co*, 293 Mich App 309; 809 NW2d 617 (2011), judgment rev'd by 493 Mich 915; 823 NW2d 426 (2012), uninsured motorist coverage would never actually come into play. Further, the trial court found that State Farm's example of a person having a policy with a $12,500 limit was a "wild example." The trial court also termed State Farm's argument "ridiculous" and stated that it involved the insurer "tak[ing] the money from your insured and not pay[ing] them." Consequently, the trial court denied defendant's motion for summary disposition and granted summary disposition for plaintiff. The parties stipulated to a $20,000 judgment so a final order could be entered for State Farm to pursue its appeal in this Court.

On appeal, State Farm argues that the trial court erred in granting summary disposition to plaintiff. We agree. Legal issues, including interpretation of insurance policies, are reviewed de novo. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004). Decisions on motions for summary disposition are likewise reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The trial court did not specify which rule it based its decision on, but because it relied on material outside the pleadings, we construe the motion as having been decided pursuant to MCR 2.116(C)(10). See *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). Motions for summary disposition pursuant to MCR 2.116(C)(10) should be granted if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). The moving party must support its position with affidavits, depositions, admissions, or other documentary evidence, which are considered in a light most favorable to the nonmoving party. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012).

The parties argue over the applicability of *Ile*, in which this Court construed similar provisions of an insurance policy and found the underinsurance coverage illusory. *Ile*, 293 Mich App at 322, 329-331. The plaintiff's decedent in *Ile* struck a parked vehicle and was killed. He had paid $26 for "bundled" uninsured and underinsured motorist coverage and had the $20,000/$40,000 minimum coverage for each. His personal representative first recovered $20,000 from the insurer of the parked vehicle. The defendant Foremost Insurance Company denied excess coverage based on arguments similar to State Farm's. The trial court found the underinsurance coverage illusory, and this Court agreed. This Court held that because the plaintiff's decedent's policy limits equaled the statutory minimum, the policy would never provide excess coverage. The coverage was illusory since the insured could never collect the full limits for both uninsured and underinsured benefits. *Id.* at 322.

However, our Supreme Court issued an order reversing this Court's decision in *Ile*, and remanded the case for entry of summary disposition in favor of the defendant, finding that the clear language of the policy provided circumstances were the decedent could recover underinsured motorist benefits, and thus, the policy was not illusory. *Ile v Foremost Ins Co*, 493 Mich 915; 823 NW2d 426 (2012). The Supreme Court further stated:

> Moreover, when read as a whole, the clear language of the policy provides for combined uninsured and underinsured motorist coverage that, as promised, would have operated to supplement any recovery by Ile to ensure that he received a total recovery of up to $20,000/$40,000 (the policy limit) had the other vehicle

> involved in the crash been either uninsured or insured in an amount less than $20,000/$40,000. That such coverage would, under the terms of the policy, always be labeled "uninsured," as opposed to "underinsured," does not make the policy illusory. [*Id.*]

Further, the Supreme Court found that this Court had "erroneously concluded that the underinsured motorist coverage . . . was illusory because Ile could reasonably believe that his insurance premium payment included some charge for underinsurance when there were no circumstances in which Ile could recover underinsured motorist benefits given the policy limits Ile selected." *Id.* The Supreme Court stated that it had "expressly rejected the notion that the perceived expectations of a party may override the clear language of a contract." *Id.*, citing *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003).

In *Wilkie*, which the Supreme Court cited in *Ile*, the Supreme Court found that a section of the uninsured motorist clause entitled "Limits of liability," which is similar to the "Limits" provision in State Farm's policy, was not ambiguous when read in context with other policy provisions. *Wilkie*, 469 Mich at 44-45, n 3, 49-50. The *Wilkie* Court stressed the role of courts to enforce the parties' agreement as written, "absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Id.* at 51.

In this case, the underinsured policy excludes vehicles that are uninsured, which are defined as a land motor vehicle that is "insured or bonded for bodily injury liability at the time of the accident; but the limits are less than required by the financial responsibility act of Michigan." This is the same definition as the policy in *Ile*, but this did not prevent our Supreme Court in *Ile* from looking to the policy language to conclude that there were circumstances when underinsured coverage would be provided. The same situation is true here. When looking at the plain language of the policy, as a whole, the policy is not illusory. Although the policy limits equal the statutory minimum in Michigan, the insurance policy in question still provides underinsured motorist benefits when the tortfeasor's liability insurance is less than $20,000 or when the tortfeasor's liability insurance is reduced to less than $20,000 by payments to other injured persons other than resident relatives. By the plain language of the policy, there are circumstances where the insured's coverage is triggered, and thus, the policy is not illusory. See *Ile*, 293 Mich App at 315-316, quoting Black's Law Dictionary (9th ed), p 554 (noting that an insurance policy may be illusory if the "insured's coverage is never triggered and the insurer bears no risk").

Plaintiff argues that the insurance contracts themselves are distinguishable from those in *Ile* because plaintiff paid separate premiums for underinsured and uninsured motorist benefits, and our Supreme Court emphasized the fact that the coverage was bundled in *Ile*. However, there is no indication that our Supreme Court's decision relied on the bundling feature. The Court merely noted that the policy provided for combined uninsured and underinsured motorist coverage that operate to supplement the decedent's recovery. However, this does not indicate that the Court "placed great emphasis on" the bundling feature, as plaintiff suggests. Further, in *Ile*, this Court indicated that bundling the benefits is irrelevant, noting that "the fact that a single premium is charged for two types of coverage is not determinative." *Ile*, 293 Mich App at 322, quoting *Western Reserve Mut Cas Co v Holland*, 666 NE2d 966, 969 (Ind App, 1996). The key determination is whether, as a whole, the plain language of the policy provides for recovery.

And as discussed, the policy in question does. Accordingly, the trial court erred by granting summary disposition to plaintiff.

State Farm also argues that the determination whether an insurance policy is unreasonable is left to the purview of the insurance commissioner. State Farm correctly notes that the Commissioner of Insurance is responsible for determining reasonableness; however, this Court may review insurance policy provisions for alleged deficiencies under traditional contract principles, which includes the contractual defense of an illusory promise. See *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005); *Ile*, 293 Mich App at 331-332.

Reversed. Defendant State Farm, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra