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NO. COA07-1323

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

MOSS HAMMOND,

Plaintiff,

v.

Wake County

No. 05 CVS 9669

MICHAEL GENE WRAY, MARY HEAD WRAY,

Q & R, INC., D/B/A CHECKER'S

PIZZA & SUBS,

Defendants.

Court of Appeals

Appeal by plaintiff from orders entered 29 May 2007, 23 April 2007, and 17 April 2007, by Judge Ronald L. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 13 May 2008.

Slip Opinion

Stam, Fordham & Danchi, P.A., by Henry C. Fordham, Jr. and Theodore S. Danchi, for plaintiff-appellant.

Larcade & Heiskell, PLLC, by Margaret P. Eagles, for unnamed defendant-appellee Allstate Insurance Company.

WYNN, Judge.

On appeal from summary judgment, we review "whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law."¹ Here, the plaintiff argues that the trial court erred by granting partial summary judgment to Allstate Insurance Company. Because there is a genuine issue of material fact as to whether Allstate gave the plaintiff an

¹ *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted).

opportunity to select or reject underinsured motorist (UIM) coverage, we reverse the trial court's grant of partial summary judgment.

This case stems from a 14 May 2003 motor vehicle accident that occurred when Michael Gene Wray pulled his car out from a side street directly in front of a motorcycle driven by Plaintiff Moss Hammond. Mr. Hammond was seriously injured as a result of the accident and filed a lawsuit for his personal injuries against Mr. Wray, Mary Head Wray, and Mr. Wray's employer. Pursuant to Mr. Wray's liability insurance policy, State Farm paid Mr. Hammond the policy limit of \$50,000.

The motorcycle driven by Mr. Hammond was owned by Catherine Edwards and insured by Allstate Insurance Company. As part of his lawsuit, Mr. Hammond served his complaint and notice of UIM claim on Allstate.

The Allstate insurance policy was initially issued on 16 March 2000; however, the motorcycle was not added to the policy as a covered vehicle until 2 October 2002, one day after Ms. Edwards purchased the motorcycle. The policy in effect on 14 May 2003 was a renewal policy with an automobile liability limit and uninsured motorists limit of \$50,000 per person and \$100,000 per occurrence ("50/100"). The renewal policy did not address UIM coverage, but there was a Selection/Rejection Form for uninsured/underinsured motorist coverage, dated 15 March 2000 and purportedly signed by Garry Edwards, on which the undersigned rejected UIM coverage.

On 15 September 2006, Allstate filed a motion for summary

judgment, arguing that Mr. Edwards did not carry UIM coverage at the time of the automobile accident. On 20 March 2007, Mr. Hammond filed a motion for summary judgment and opposition to Allstate's motion for summary judgment, arguing that Allstate must provide \$1,000,000 in UIM coverage because there was no rejection of such coverage. The trial court held a hearing on summary judgment on 29 March 2007 and, on 5 April 2007, Mr. Hammond filed a motion to reopen the hearing on summary judgment prior to entry of order. After the trial court entered its denial of the motion to reopen on 5 April 2007, Mr. Hammond requested findings of fact and conclusions of law on the denial of the motion to reopen, which the trial court also denied.

In its order filed 15 May 2007, amended 29 May 2007, the trial court denied Allstate's motion for summary judgment in part and granted it in part, and denied Mr. Hammond's motion for summary judgment. The trial court found that

there are genuine issues of material fact as to whether Allstate Insurance Company has any UIM coverage applicable to the claims asserted by the plaintiff herein; However, the court further finds that there exists no genuine issue of material fact with respect to the fact that if the finder of fact determines that any UIM coverage existed, then in that event the court finds that Allstate Insurance Company as Underinsured motorist carrier has underinsured motorist coverage limits in the amount of \$50,000.00 per person and \$100,000.00 per occurrence[.]

On appeal, Mr. Hammond argues that the trial court erred by granting partial summary judgment to Allstate because there is a genuine issue of material fact as to whether Allstate gave Mr.

Edwards the opportunity to select or reject UIM coverage. Specifically, Mr. Hammond argues that because he presented evidence that Mr. Edwards did not sign the Selection/Rejection form, there is a genuine issue of material fact as to whether Allstate offered Mr. Edwards the option to select or reject UIM coverage. We agree.

On appeal from summary judgment, we review "whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted); see also N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007) (stating that summary judgment "shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.").

Section 20-279.21(b) (4) of the North Carolina General Statutes governs UIM coverage and states that "[i]f the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy." N.C. Gen. Stat. § 20-279.21(b) (4) (2007). However, this Court has held:

A total failure on the part of the insurer to provide an opportunity to reject UIM coverage or select different UIM policy limits violates the requirement that these choices be made by

the policy owner. Such a failure should not invoke the minimum UIM coverage limits established in N.C.G.S. § 20-279.21(b) (4) [.]

Williams v. Nationwide Mut. Ins. Co., 174 N.C. App. 601, 605-06, 621 S.E.2d 644, 647 (2005). In *Williams*, because there was a total failure by the insurer to offer the insured the opportunity to reject or select UIM coverage, this Court affirmed the grant of summary judgment determining UIM coverage with limits of \$1,000,000 per person and \$1,000,000 per accident. *Id.*

Here, attached to Mr. Hammond's motion for summary judgment and opposition to Allstate's motion for summary judgment were an affidavit and report from Haywood Starling, a handwriting examiner. After comparing the signature on the Selection/Rejection form to other signatures of Mr. Edwards, Mr. Starling concluded to a reasonable degree of certainty that Mr. Edwards did not sign the Selection/Rejection form. Although Allstate initially argued that Mr. Edwards signed the Selection/Rejection form, after receiving Mr. Starling's report, Allstate obtained an affidavit from Mr. Edwards in which he stated "if the signature [on the Selection/Rejection form] is not mine, I directed and authorized an Allstate agent or representative to sign my name[.]" However, Bill Gunter, the Allstate agent who sold the policy to Mr. Edwards and also signed the Selection/Rejection form, testified that he typically would not sign the form without the insured being present as, "[y]ou get the customer in, he signs, and you sign."

Taking the evidence in the light most favorable to Mr. Hammond, *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at

577, we cannot conclude that there is no genuine issue of material fact as to whether Mr. Edwards was given the opportunity to sign the Selection/Rejection form. Mr. Starling's report and Mr. Gunter's testimony create a genuine dispute as to whether Mr. Edwards signed, or authorized someone else to sign, the Selection/Rejection form. Without a valid signature on the Selection/Rejection form, the record does not contain any other evidence that Allstate gave Mr. Edwards the opportunity to select or reject UIM coverage. Because we are unable to conclude from the pleadings, depositions, and affidavits in the record that Allstate provided Mr. Edwards with an opportunity to select or reject UIM coverage, we reverse the trial court's partial grant of summary judgment to Allstate.²

Reversed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).

² We will not address Mr. Hammond's remaining assignments of error because we reverse the trial court's grant of partial summary judgment for Allstate.