NO. COA08-1221

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

TERESA WALSH SMITHEY,

Plaintiff-Appellant,

v. Wilkes County
No. 08 CVS 206

NATIONWIDE MUTUAL
INSURANCE COMPANY,

Defendant-Appellee.

Appeal by plaintiff from order entered 24 July 2008 by Judge Richard Doughton in Wilkes County Superior Court. Heard in the Court of Appeals 11 March 2009.

Franklin Smith for plaintiff.

Willardson, Lipscomb & Miller, L.L.P., by Sigsbee Miller, for defendant.

ELMORE, Judge.

Teresa Walsh Smithey (plaintiff) appeals from a superior court order granting judgment on the pleadings to Nationwide Mutual Insurance Company (defendant). The superior court ruled that the Uninsured and Underinsured Motorist coverage available to plaintiff was in the amount that plaintiff selected at the time of the original purchase of the automobile insurance policy from defendant on 10 August 1999. Plaintiff contends that the trial court erred when it refused to invoke the statutorily approved maximum of

$1,000,000.00 Uninsured and Underinsured Motorist coverage. Plaintiff also claims that attorney fees and costs associated with this matter should be taxed against defendant. We disagree and affirm the superior court's ruling.

I

On 10 August 1999, plaintiff and her husband William Walsh, now deceased, purchased an automobile insurance policy from Billy Ray Faw, who worked as an agent of defendant. This policy bears the number 61 32 K 588189 and was renewed periodically by plaintiff following her original purchase; the particular policy at issue is the one that provided coverage from 21 August 2006 through 21 February 2007. This policy insured a 2002 Toyota Corolla and provided property damage liability coverage of $50,000.00 for each accident, bodily injury coverage of $50,000.00 for each person, and total coverage of $100,000.00 for each accident. The policy also included Uninsured Motorist (UM) and Underinsured Motorist (UIM) coverage of $50,000.00 for each person for bodily injury, coverage of $100,000.00 for each accident, and property damage coverage of $50,000.00 for each accident.

When plaintiff and her husband first obtained the policy from defendant, they executed a Selection/Rejection form wherein they acknowledged the availability of UM/UIM coverage up to $1,000,000.00 per person and $1,000,000.00 per accident, and then selected limits of $50,000.00 per person and $100,000.00 per accident for their policy. Defendant did not have plaintiff execute new Selection/Rejection forms with each renewal of the

policy, including the renewal of the policy period at issue in this litigation. There is no evidence in the record that plaintiff at any time requested a change in the limits of her primary coverage or expressed any desire to change the limits of the UM/UIM coverage that she previously selected in the original policy.

Plaintiff was involved in an automobile accident on 28 January 2007. As a result of this accident, plaintiff suffered injuries to her right leg, right hip, and right ribs. Plaintiff incurred substantial hospital and doctor expenses and faces the possibility of ongoing medical treatment and costs.

Plaintiff filed a complaint against defendant in this case asking the superior court to enter an order declaring that plaintiff had UM and UIM coverage amounts of $1,000,000.00 at the time of her accident. On 24 June 2008, defendant made a motion to the trial court for judgment on the pleadings, contending that the allegations made in the plaintiff's complaint do not entitle her to recover. On 24 July 2008, the trial court entered an order granting judgment on the pleadings in favor of defendant. The court found that plaintiff acknowledged the availability of UIM coverage up to $1,000,000.00, but selected limits of $50,000.00 per person and $100,000.00 per accident for her policy. The court also found that "[a]t no time since the inception of [plaintiff's] policy has the plaintiff changed the limits of her primary coverage or expressed any desire to change the limits of underinsured coverage which she initially selected." The trial court concluded that, at the time of the accident on 28 January 2007, plaintiff's

policy with defendant provided UIM coverage of $50,000.00 per person and $100,000.00 per accident. Plaintiff now appeals.

II

An appeal of a trial court's grant of a motion for judgment on the pleadings is subject to *de novo* review. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Rule 12(c) of the North Carolina Rules of Civil Procedure provides that, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2007). The purpose of Rule 12(c) is "to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Furthermore, a court has "inherent power to render judgment on the pleadings where the facts shown and admitted by the pleadings entitle a party to such judgment." *Erickson v. Starling*, 235 N.C. 643, 656, 71 S.E.2d 384, 393 (1952). In evaluating a Rule 12(c) motion, the court should grant the motion when a complaint does not allege "facts sufficient to state a cause of action or pleads facts which deny the right to any relief." *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988). When rendering judgment, the court may consider the parties' pleadings and any exhibits that are attached to the pleadings. *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996).

The North Carolina Motor Vehicle Safety and Financial Responsibility Act mandates that automobile insurers offer UM and

UIM coverage to automobile owners. *See* N.C. Gen. Stat. § 20-279.21(b)(4) (2007). Section 20-279.21(b)(4) allows an insured to select UIM coverage in an amount different from his liability limits, but not less than $30,000.00 for one injured person or $60,000.00 for two injured persons per accident, nor greater than $1,000,000.00 per accident. *Id.* "The purpose of UM and [UIM] coverage is to compensate the innocent victims of financially irresponsible motorists." *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 115 N.C. App. 438, 443, 445 S.E.2d 79, 82 (1994).

Plaintiff first argues that, since she was not given an opportunity to consider a new Selection/Rejection with the policy renewal, she should be allowed to receive $1,000,000.00 in coverage. In support of her argument, plaintiff relies heavily on *Williams v. Nationwide Mutual Ins. Co.*, 174 N.C. App. 601, 621 S.E.2d 644 (2005). In *Williams*, the automobile policy at issue was initially obtained by the insured couple in 1984, and they were not offered any opportunity to select or reject UIM limits greater than their liability limits at any time prior to the accident in July 2001 in which the plaintiff was injured. *Id.* at 603, 621 S.E.2d at 645-46. This Court held that "[a] total failure on the part of the insurer to provide an opportunity to reject UIM coverage or to select different UIM policy limits violates the requirement that these choices be made by the policy owner." *Id.* at 605, 621 S.E.2d at 647. In order to promote the policy of allowing the insured to choose their benefits, this Court allowed the plaintiff to recover the highest available limit of UIM coverage of $1,000,000.00. *Id.*

at 605-06, 621 S.E.2d at 647. Defendant argues that the case at hand is factually indistinguishable from *Williams*, and that the pleadings here establish that plaintiff has no right to recovery in the instant matter. We disagree.

Defendant points us to section 20-279.21(b)(3) of the Motor Vehicle Safety and Financial Responsibility Act, which states in pertinent part that

> [o]nce the option to reject the uninsured motorist coverage or to select different coverage limits is offered by the insurer, *the insurer is not required to offer the option in any renewal*, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy *unless the named insured makes a written request to exercise a different option*.

N.C. Gen. Stat. § 20-279.21(b)(3) (2007) (emphases added). In the case *sub judice*, plaintiff does not contend that she was not given the option to select or reject different UM/UIM coverage limits at the time of the original purchase. On the contrary, the pleadings establish that plaintiff was given such an option: the record contains a copy of the Selection/Rejection form signed by plaintiff. The following provision is included in that Selection/Rejection form and appears above the plaintiff's signature:

> My selection or rejection of coverage below will apply to any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy with this company, or affiliated company, unless a named insured makes a written request to the company to exercise a different option.

At no time since the inception of the policy has plaintiff changed the limits of the primary coverage or expressed any desire to change the limits of UM/UIMM coverage as selected initially. Plaintiff now asks this Court to disregard her selection of UIM coverage and declare that the statutorily approved maximum of $1,000,000.000 be available to her for compensation for injuries arising out of her 2007 car accident. We disagree.

Since plaintiff was given an opportunity to select higher coverage, which she rejected, the case *sub judice* is distinguishable from *Williams*, in which this Court found a "total failure" of the insurer to provide an opportunity to select or reject different UIM policy limits. 174 N.C. App. at 605, 621 S.E.2d at 647. In construing section 20-279.21(b)(4), the Court in *Williams* noted that 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. *Id.* at 605-06, 621 S.E.2d at 647. In that case, the parties stipulated that the defendant insurance company never offered the insured an opportunity to select or reject UIM limits greater than their liability limits at any time, including the initial purchase, prior to the accident in which the plaintiff was injured. *Id.* at 602-03, 621 S.E.2d at 645-46. In the case at hand, the fact that plaintiff had executed a valid Selection/Rejection form at the time of initial purchase whereby she rejected the higher coverage amount, along with the fact that

plaintiff subsequently did not make a written request for a different coverage amount, distinguishes it from *Williams*.

Plaintiff also argues that she is entitled to recover reasonable attorney fees and costs in this matter. However, plaintiff did not make any motion for attorney fees or costs before the trial court. Arguments that are not raised at the trial level may not properly be made before this Court. *Cain v. N.C. Dep't of Transp.*, 149 N.C. App. 365, 371, 560 S.E.2d 584, 588 (2002); *see* N.C.R. App. P. 10 (b)(1) (2008) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Additionally, plaintiff did not enter an assignment of error in her appeal regarding attorney fees or costs. *See* N.C.R. App. P. 10 (c)(1) (2008). Furthermore, as a general rule, "attorney's fees are not allowable as part of the costs in civil actions." *Hill v. Jones*, 26 N.C. App. 168, 169, 215 S.E.2d 168, 169 (1975). Thus, this argument is overruled.

IV

We find that plaintiff was given an option to purchase additional UM/UIM coverage when she initially purchased her policy. Plaintiff chose to reject the additional coverage amount. The pertinent provisions of the Motor Vehicle Safety and Financial Responsibility Act do not require defendant to provide this option to plaintiff at each renewal of the policy. Therefore, plaintiff

is entitled to UM/UIM benefits in the amounts that were originally purchased by her. Plaintiff is also barred from recovering attorney fees and costs from defendant.

Affirmed.

Judge BRYANT and STEELMAN concur.

Report per Rule 30(e).