

STATE OF MICHIGAN
COURT OF APPEALS

DANA HENSLEY,

Plaintiff-Appellant,

v

AUTO CLUB GROUP INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

October 14, 2021

No. 353205

Wayne Circuit Court

LC No. 19-003411-NI

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant in this case regarding uninsured motorist (UM) benefits. We affirm.

I. FACTUAL BACKGROUND

This case arises out of a hit-and-run automobile accident that allegedly occurred on August 8, 2017 at about 3:15 or 3:30 p.m. At the time of the accident, plaintiff had UM insurance through an automobile insurance policy issued by defendant. The policy required UM claimants to make a written report of a hit-and-run accident to law enforcement within 24 hours of the accident. Plaintiff reported the accident to the Inkster Police Department. The police report lists the “Report Date/Time” as August 10, 2017 at 15:37 p.m. (3:37 p.m.) and the “Created Date/Time” as August 10, 2017 at 5:32 p.m.

Plaintiff filed a complaint on March 11, 2019, alleging that defendant was liable for UM benefits.¹ On November 11, 2019, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that plaintiff was not entitled to UM benefits because he had failed to make a police report of the accident within 24 hours of its occurrence and failed to establish that the at-fault vehicle was uninsured—which were conditions precedent to UM coverage. Plaintiff did not file a response to defendant’s motion for summary disposition. Plaintiff

¹ To date, plaintiff had not filed a lawsuit against the alleged hit-and-run driver of the vehicle.

also did not appear for the motion hearing on December 13, 2019. The trial court noted that it had not received a response to defendant's motion and, "given the fact of no response and no appearance today, the Court will grant [defendant's] motion." On December 30, 2019, plaintiff filed a motion for reconsideration arguing that he "made a signed written statement to the Inkster Police at 3:00 p.m. on August 9, 2017, within the first 24 hours following the accident as required by the insurance contract." Plaintiff attached the purported written statement to his motion. The trial court denied plaintiff's motion for reconsideration for lack of palpable error, and further noted that plaintiff's alleged written statement was unwitnessed and the date and time of its preparation could not be verified. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), the trial court considered documents outside of the pleadings so we will consider the motion as granted under MCR 2.116(C)(10). See *Spiek v Mich Dep't of Transp*, 456 Mich 331, 338; 572 NW2d 201 (1998). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the evidence, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party can satisfy its burden of showing there is no genuine issue of material fact by submitting evidence that negates an essential element of the nonmoving party's claim. *Id.* Once the moving party meets that burden, the burden shifts to the nonmoving party to submit evidence establishing that there is a genuine issue of material fact. *Id.* at 362-363.

In this case, plaintiff did not file a response to defendant's motion for summary disposition; accordingly, the motion was granted as unopposed. However, plaintiff filed a motion for reconsideration arguing that he did fulfill the reporting condition precedent, and thus, the trial court palpably erred. Plaintiff submitted his purported written statement made at the police department as an exhibit to his motion for reconsideration. Because plaintiff's argument was first raised in his motion for reconsideration after the trial court already granted defendant's motion for summary disposition, plaintiff's argument is unpreserved and our review is for plain error affecting substantial rights, i.e., error that was plain and affected the outcome of the proceedings. See *Total Armored Car Serv, Inc v Dep't of Treasury*, 325 Mich App 403, 412; 926 NW2d 276 (2018) (citation omitted); *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

III. LAW AND ANALYSIS

Plaintiff argues that the trial court erred in granting summary disposition because there is a genuine issue of fact whether plaintiff made a written report of the accident to law enforcement within 24 hours of the accident. We disagree.

UM benefits are "distinct from [PIP] benefits." *Citizens Ins Co of America v Buck*, 216 Mich App 217, 224; 548 NW2d 680 (1996). "Uninsured motorist insurance permits an injured

motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver.” *Rory v Continental Ins Co*, 473 Mich 457, 465; 703 NW2d 23 (2005). However, UM benefits are optional and a matter of contract; they are not mandated by the no-fault act. *Id.* at 465-466. Thus, the language of the insurance policy “dictates under what conditions [UM] benefits will be provided.” *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 470; 556 NW2d 517 (1996). As with other contracts, when the language of an insurance policy is clear and unambiguous, a court must enforce the policy as written. *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 672; 939 NW2d 738 (2019). This holds true for reporting provisions like the one at issue in this case. “[A]n unambiguous notice-of-claim provision setting forth a specified time within which notice must be provided is enforceable without a showing that the failure to comply with the provision prejudiced the insurer.” *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367-368; 817 NW2d 504 (2012).

In this case, the UM insurance policy states, in relevant part:

2. A person claiming Personal Protection Insurance or Uninsured Motorists or Underinsured Motorists Coverage must promptly:

* * *

d. give us a copy of any legal papers served in connection with any lawsuit started by you or your legal representative to recover damages for bodily injury against a person or organization who may be liable;

e. under Uninsured Motorists and Underinsured Motorists Coverages, make a written report of a hit-and-run accident within 24 hours to a law enforcement agency; allow us to inspect the car occupied by the insured person, if that car is within the possession and control of the insured person or his or her representative; file with us within 30 days written notice of the hit-and-run accident.

The plain language of the reporting provision—which must be enforced as written—required plaintiff to make a written report of the incident to law enforcement within 24 hours of the accident occurring. See *TNT Equip, Inc*, 328 Mich App at 672. In support of its motion for summary disposition, defendant provided the police report dated August 10, 2017. Specifically, the police report lists the “Report Date/Time” as August 10, 2017 at 15:37 (3:37 p.m.) and the “Created Date/Time” as August 10, 2017 at 5:32 p.m. The alleged day and time of the hit-and-run accident was August 8, 2017 at about 3:15 or 3:30 p.m. Therefore, the police report relied upon by defendant in support of its motion clearly shows the date and time of the report are outside the 24-hour reporting window mandated by the policy. Thus, the trial court’s decision to grant defendant’s motion for summary disposition was supported by the evidence.

And, as the trial court concluded, the evidence plaintiff submitted in support of his motion for reconsideration was not persuasive. Plaintiff submitted a handwritten “statement sheet” dated August 9, 2017 at 3:00 p.m., on which he recounted his view of the accident. Plaintiff argued that the statement sheet showed that he made a written report to the police department within 24 hours of the accident. However, as the trial court noted, there is no way to verify that the statement sheet was actually prepared on the date and time that plaintiff placed on the statement. In fact, the space

on the statement sheet for a witness to sign is blank; no witness signed the document. Therefore, plaintiff's argument was without sufficient evidentiary support to create a genuine issue of material fact on the issue whether he satisfied the reporting requirement entitling him to UM benefits under the insurance policy. Accordingly, the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Michael F. Gadola