STATE OF MICHIGAN

COURT OF APPEALS

MARTIN A. NOWELL,

Plaintiff-Appellee,

v

TITAN INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 23, 2001

No. 218229
Oakland Circuit Court
LC No. 98-005656-CZ

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right orders denying defendant's motion for summary disposition, granting summary disposition in favor of plaintiff, and denying defendant's motion for reconsideration. We affirm.

On February 20, 1997, defendant mailed a notice to Duane Isley, advising him that his automobile insurance policy was going to be canceled on March 5, 1997, unless he paid the premium. On March 5, 1997, defendant canceled Isley's automobile insurance policy because he failed to pay the premium. That same day, Isley was involved in an automobile accident. Plaintiff, who was a passenger in Isley's vehicle, was seriously injured. Isley was taken to the hospital and then to jail for driving without a license. On March 11, 1997, he was released from jail, and returned home, where he found the notice of cancellation sent by defendant. When Isley and plaintiff filed insurance claims for their medical expenses, defendant denied these claims because Isley's insurance policy had lapsed.

Plaintiff filed suit against defendant, seeking damages and declaratory relief. Plaintiff alleged that defendant's cancellation of Isley's insurance policy was not effectuated and therefore defendant must pay for plaintiff's medical and other expenses resulting from the accident. Defendant subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff could not rebut the presumption that Isley had received the notice of cancellation. The trial court denied defendant's motion for summary disposition and granted summary disposition for plaintiff pursuant to MCR 2.116(I)(2), holding that defendant had not presented any evidence that Isley had received at least ten days notice of the cancellation of his policy, as required by MCL 500.3020(1)(b); MSA 24.13020(1)(b). Defendant subsequently filed a motion for reconsideration and attached Isley's recently amended affidavit where he stated it was possible that the notice was delivered to his house prior to the accident. The trial court also

denied this motion because defendant "has raised an issue that should have been raised in its prior briefs, namely that discovery has not been cut off."

On appeal, defendant first argues that the trial court erred by denying its motion for summary disposition and further erred by granting summary disposition in favor of plaintiff. We disagree. A motion for summary disposition may be granted when, except as to the amount of damages, 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). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The Court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Maiden, supra* at 119-120. "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden, supra* at 121. This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Defendant argues that the trial court erred by denying its motion for summary disposition because the only evidence plaintiff presented in opposition to defendant's motion was Isley's deposition testimony. Defendant claims that this testimony is inadmissible hearsay because it was a deposition from a different case and should not have been considered by the trial court.

Generally, an issue not raised and considered before the trial court is not preserved for appeal absent manifest injustice. See *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1993), *Herald Co, Inc v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). Defendant did not argue that this deposition testimony was inadmissible in the trial court. Therefore, this issue was not preserved for appeal. Nonetheless, evidence presented in support or opposition to a motion for summary disposition need not be in admissible form, but must be admissible in content. MCR 2.116(G)(6); *Maiden, supra* at 124 n 6 (citations omitted). The trial court did not err by considering Isley's deposition testimony when ruling on defendant's motion for summary disposition. Therefore, ~~our~~ review of this unpreserved issue is not necessary to prevent manifest injustice. *Herald Co, Inc, supra* at 390. Because Isley's deposition testimony demonstrated, at the very least, a genuine issue of material fact, the trial court correctly denied defendant's motion for summary disposition.

Next, defendant argues that even if the trial court did not err by considering Isley's deposition testimony in denying its motion for summary disposition, the trial court erred by granting summary disposition in favor of plaintiff because the evidence plaintiff presented did not rebut the presumption that Isley received the notice of cancellation. The method of cancellation of no-fault insurance policies is governed by MCL 500.3020; MSA 24.13020. *American States Ins Co v Auto Club Ins Ass'n*, 193 Mich App 248, 251-252; 484 NW2d 1 (1992). This statute states, in pertinent part:

> That the policy may be canceled at any time by the insurer by mailing to the insured at the insured's address last known to the insurer or an authorized agent of the insurer, with postage fully prepaid, a not less than 10 days' written notice of cancellation with or without tender of the excess of paid premium or assessment

> above the pro rata premium for the expired time. [MCL 500.3020(1)(b); MSA 24.13020(1)(b).]

Before cancellation is effective, actual notice of the cancellation must be received by the insured. *American States Ins Co, supra* at 254. This actual notice must be received ten days before the cancellation. *Citizens Ins Co of America v Crenshaw*, 160 Mich App 34, 37-38; 408 NW2d 100 (1987). An insurer's burden to prove such notice, however, is aided by MCL 500.3020(5); MSA 24.13020(5), which states, in pertinent part, that "[t]he mailing of notice *is* prima facie proof of notice." MCL 500.3020(5); MSA 24.13020(5). This creates a presumption of notice once the cancellation notice has been mailed. *American States Ins Co, supra* at 254.

In the instant case, the parties do not dispute that defendant mailed copies of the notice of cancellation to Isley and Tecumseh on February 20, 1997, informing them that Isley's policy was to be canceled on March 5, 1997. This was sufficient to establish prima facie proof of notice. MCL 3020(5); MSA 24.13020(5). The burden then shifted to plaintiff to rebut the presumption of notice and establish the existence of a genuine issue of material fact. *American States Ins Co, supra* at 255. Plaintiff argued that Isley did not receive the notice of cancellation ten days before Isley's insurance policy was canceled. Isley swore at his deposition, and in an affidavit, that he first saw the notice of cancellation when he got home from jail on March 11, 1997.[1] Although Isley testified inconsistently that he first saw the notice of cancellation two weeks after he returned home from jail, both of these dates are after Isley's insurance had been canceled and after his accident. Although Isley did not know when the notice of cancellation was actually delivered to his house, he did know that he actually saw it for the first time when he returned home from jail. The trial court held that this evidence was sufficient to prove that Isley did not receive ten days notice of the cancellation of his insurance policy.

The only evidence presented by defendant to show that Isley did receive ten days notice was the notice of cancellation and Byer's affidavit, which both state that the notice of cancellation was mailed to Isley on February 20, 1997, and Isley's affidavit, which states that he does not know when the notice of cancellation was delivered to his house.[2] Defendant did not present any evidence that Isley actually received the notice of cancellation ten days before his policy was canceled. Therefore, defendant failed to establish a genuine issue of material fact regarding this issue. In light of our previous treatment of similar cases, this Court finds that the trial court correctly granted summary disposition in favor of plaintiff. See *Citizens Ins Co of*

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[1] Although the affidavit says he returned home on April 11, 1998, the other evidence shows that, and the parties do not dispute that, he actually returned home on March 11, 1997.

[2] Perhaps, more telling are the exhibits attached to defendant's brief in support of its original motion for summary disposition. Exhibit D is the affidavit of Renee Byer attesting that she mailed a notice of cancellation to Mr. Isley on February 20, 1997. Attached to her affidavit is a certificate of mailing which lists Mr. Isley's address and zip code as Blissfield, Michigan 49283. Exhibit E contains the face of the notice of cancellation that lists Mr. Isley's address and zip code as Blissfield, Michigan 49228-9540. In order for Mr. Isley to have received a ten day notice of cancellation, the mail would have had to arrived three days after mailing. This Court notes that one of those days was a Sunday.

America v Lemaster, 99 Mich App 325; 298 NW2d 19 (1980). Finally, defendant argues that the trial court abused its discretion by refusing to consider Isley's amended affidavit and by denying defendant's motion for reconsideration. This Court disagrees. Generally, a motion for reconsideration, which merely presents the same issues ruled on by the court, will not be granted. MCR 2.119(F)(3). "The moving party must demonstrate palpable error by which the court and the parties have been mislead and show that a different disposition of the motion must result from the correction of the error." MCR 2.119(F)(3). This Court reviews a trial court's denial of a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). A trial court does not "abuse . . . [its] discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Charbeneau v Wayne Co General Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

The trial court denied defendant's motion for reconsideration because defendant "raised an issue that should have been raised in its prior briefs, namely that discovery has not been cut-off." Defendant argues that the trial court abused its discretion by denying defendant's motion for reconsideration because defendant presented an amended affidavit, signed by Isley, swearing that it was possible that the notice of cancellation was delivered to his home prior to his accident, and that it was possible that he ignored the letter until he came home from jail. Defendant claims that it would have been impossible for it to present this evidence prior to the trial court's order granting summary disposition in favor of plaintiff.

In support of its motion for summary disposition, defendant presented Isley's original affidavit. Isley's amended affidavit, which defendant presented in support of its motion for reconsideration, merely added two possible scenarios that were known to Isley when he signed the original affidavit. These statements could have easily been added to Isley's original affidavit. In addition, defendant never argued that it needed more time for discovery before the trial court ruled on the motion for summary disposition. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for reconsideration because the statements in Isley's amended affidavit could have been presented before the trial court ruled on the motion for summary disposition. *Charbeneau, supra* at 733.

Additionally, Isley's amended affidavit neither demonstrates palpable error nor shows that defendant's motion for summary disposition would have been decided differently if the trial court would have considered this evidence. MCR 2.119(F)(3). Isley's amended affidavit did not present any new facts or call into question any of the facts the trial court relied upon in granting summary disposition in favor of plaintiff. This affidavit merely expressed that there was a *possibility* that the notice of cancellation was delivered to Isley's house prior to his accident. This does not affect the evidence indicating that Isley actually received the notice when he returned home from jail. Isley's amended affidavit does not reveal that Isley actually received the cancellation notice ten days before Isley's policy was canceled. Thus, defendant failed to demonstrate that had it presented this affidavit with its motion for summary disposition, the trial

court would have declined to grant summary disposition in favor of plaintiff or would have granted defendant's motion for summary disposition. Consequently, the trial court did not abuse its discretion by denying defendant's motion for reconsideration.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Jessica R. Cooper