STATE OF MICHIGAN

COURT OF APPEALS

CATHY MITCHELL and ROBERT P. LADD, Conservator of the Estate of BRUCE ALLEN MITCHELL, JR.,

Plaintiffs-Appellees,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 24, 2005

No. 251755
St. Clair Circuit Court
LC No. 02-000821-CK

AMERISURE MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant,

and

CATHY MITCHELL and ROBERT P. LADD, Conservator of the Estate of BRUCE ALLEN MITCHELL, JR.,

Defendants-Appellees.

No. 251756
St. Clair Circuit Court
LC No. 02-002767-CZ

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

In this consolidated appeal, Allstate Insurance Company (Allstate) appeals by leave granted the order denying it summary disposition under MCR 2.116(C)(10). This case arises out of a claim for first-party no-fault insurance benefits brought by Cathy Mitchell and Robert P.

Ladd, as conservator of the estate of Bruce Allen Mitchell, Jr., Mitchell's son, for injuries that Bruce sustained in a March 17, 2001, automobile accident. Amerisure Mutual Insurance Company's (Amerisure) subrogation claim for property damage to a vehicle owned by Burgett's Towing II, Inc., was consolidated with Mitchell and Ladd's action for a declaration regarding Allstate's obligation to provide coverage under Mitchell's no-fault automobile insurance policy. We reverse and remand.

Beginning in 1999, Mitchell was insured by an insurance policy issued to her by Allstate pursuant to Michigan's no-fault insurance act, MCL 500.3101 *et seq*. In exchange for her agreement to pay a premium of $1,435.20, Allstate renewed her policy for a six-month period to begin on January 8, 2001, and end on July 8, 2001. On January 19, 2001, Allstate sent Mitchell a bill for the second monthly payment of $241.06, due February 8, 2001. The premium was not paid. As a result, on February 16, 2001, Allstate issued a cancellation notice, stating that there was a minimum amount due of $478.62, which included the premium payments for both February 2001 and March 2001, and was due by 12:01 a.m. on March 8, 2001. The proof of mailing indicated that the cancellation notice was sent on February 17, 2001.[1]

Mitchell's payment of $241.06 was received on or about February 21, 2001. Allstate sent her a letter confirming the payment but informing her that a balance of $241.06 was still owed. Allstate explained that the cancellation notice would be enforced unless the full amount due was received before 12:01 p.m. on March 8, 2001. Mitchell did not pay the requested amount due by the specified time. As a result, her policy was cancelled, effective 12:01 a.m. on March 8, 2001. On March 16, 2001, Mitchell's Allstate insurance agent, Paul Gillihan, sent her a letter, informing her that he had just received notice of the cancellation of her policy for nonpayment of the premium. The letter stated, in pertinent part, "If you have already made your premium payment of $241.06, please disregard this letter. If it was an oversight on your part, consider this a friendly reminder to make your payment as soon as possible to keep your insurance in force." On March 19, 2001, Mitchell went to Gillihan's office, where Gillihan accepted $241.06 in cash from her in purported payment of the March premium.

On March 17, 2001, before Mitchell received Gillian's letter, Bruce was involved in an automobile accident while driving a vehicle named in Mitchell's insurance policy. Bruce sustained bodily injuries, including a closed head injury that has rendered him legally incapacitated. The other vehicle involved in the accident was owned by Burgett's Towing and was covered under an insurance policy issued to Burgett's Towing by Amerisure. Allstate denied coverage for the accident because there was a lapse in Mitchell's coverage from March 8, 2001 through March 20, 2001. Allstate also denied Amerisure's subrogation claim for damage to the tow truck on the ground that Mitchell's policy had lapsed.

Mitchell and Ladd filed a complaint seeking a declaration that defendant was obligated to provide coverage for the accident. Relying on Allstate's denial of coverage, Amerisure filed a subrogation action against Mitchell and Ladd seeking to recover property protection benefits for damages to Burgett's Towing's vehicle. Allstate moved for summary disposition, arguing that

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[1] "The mailing of notice is prima facie proof of notice." MCL 500.3020(5).

there was no genuine issue of material fact that the policy was not in force on March 17, 2001. Allstate also argued that because Amerisure's claim was not brought until approximately two years after the accident, it was time-barred under the one-year period of limitations set forth in MCL 500.3142(2).

The trial court denied Allstate's motion for summary disposition, finding that a question of fact existed with regard to the effectiveness of the cancellation notice. The court noted that when the February 16, 2001, cancellation notice was sent, only the February payment was owing. The court reasoned that the statutory and contractual requirement that Allstate provide a window of ten days between notice of cancellation and the effective date of cancellation would make "little sense" if the ten days began to run before the amount became due. See MCL 500.3020(1)(b); *Nowell v Titan Ins Co*, 466 Mich 478; 648 NW2d 157 (2002). The court concluded that Allstate was obligated to give Mitchell ten days notice from the March payment due date before canceling the policy. The court also denied Allstate's motion for summary disposition with respect to Amerisure's claim. The court reasoned that because Amerisure made a timely notification and relied on Allstate's representation, Allstate was estopped from asserting the statute of limitations as a defense. This Court granted Allstate's application for leave to appeal and stayed the lower court proceedings.

Allstate argues that the trial court erred in denying it summary disposition because there is no genuine question of material fact that the cancellation notice complied with the policy and Michigan law, and was effective. We agree. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Where, as here, the trial court grants a motion for summary disposition under both MCR 2.116(C)(8) and (C)(10), and it is clear that the court looked beyond the pleadings, we will treat the motions as having been granted pursuant to MCR 2.116(C)(10), which tests whether there is factual support for a claim. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). If a contract's language is clear, its construction is a question of law for the court that is subject to de novo review. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). The proper interpretation of a statute is a question of law subject to de novo review. *Dressel v Ameribank*, 468 Mich 557, 562; 664 NW2d 151 (2003).

"An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 381; 565 NW2d 839 (1997), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Thus, "the court looks to the contract as a whole and gives meaning to all its terms." *Harrington*, *supra*. An unambiguous contract must be construed according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). An insurer has a duty to defend if the allegations of the underlying suit arguably fall within the coverage of the policy. *Royce v Citizens Ins Co*, 219 Mich App 537, 543; 557 NW2d 144 (1996). It is the insured's burden to prove that coverage exists. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995). Any doubt regarding insurance coverage

must be resolved in the insured's favor. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 448; 550 NW2d 475 (1996).

In accordance with MCL 500.3020(1)(b),[2] the policy states in pertinent part as follows:

> Allstate may cancel part of all of this policy by mailing notice t [sic] you at your last known address. *If we cancel because you didn't pay the premium, the date of cancellation will be at least 10 days after the date of mailing.* Otherwise, we will give you 20 days notice.
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> Proof of mailing the notice will be proof of notice. A refund, if due, will be in proportion to the time your policy has been in effect. Cancellation will be effective even if the refund is not made immediately.
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> After your original policy has been in effect 55 days, Allstate won't cancel or reduce your coverage during the policy period unless:
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> 1. You don't pay the premium when it's due[.] [Emphasis added.]

Here, the notice was created on February 16, 2001, and sent on February 17, 2001. There is no dispute that plaintiff received the notice at least ten days before March 8, 2001. Regardless, our Supreme Court noted in *Nowell* that even if the insured does not actually receive the notice of cancellation ten days before the date of cancellation, the cancellation is nevertheless effective. Specifically, the Court held that, to be effective, the mailing of a notice of cancellation "must be reasonably calculated to be delivered so as to arrive at the insured's address at least ten days before the date specified for cancellation for the notice." *Nowell*, *supra* at 484. The Court explained:

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[2] MCL 500.3020(1)(b) provides in relevant part as follows:

> A policy of casualty insurance, . . . including all classes of motor vehicle coverage, shall not be issued or delivered in this state by an insurer authorized to do business in this state for which a premium or advance assessment is charged, unless the policy contains the following provisions:
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> * * *
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> (b) 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. [Emphasis added.]

> The plain language of MCL 500.3020(1)(b), which allows cancellation by a simple first-class mailing precludes a conclusion that an insured must receive some type of actual notice, i.e., be aware of the issuance of a notice of cancellation by the insurer, in order for an insurer's cancellation of the insured's policy to be effective. Rather, the statute provides by its clear language that an insurance policy "may be cancelled at any time by the insurer by mailing" in accordance with its provisions "a not less than 10 days' written notice of cancellation."
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> In other words, an insurer has the duty to mail far enough in advance of the beginning of the ten day period so as to reasonably ensure that the notice will arrive and provide an insured with the potential to have the full ten days' notice that the statute provides. While the Legislature undoubtedly expected that this should ordinarily result in personal receipt of the notice of cancellation by the insured before it became effective, the statutory language utilized cannot fairly be read as requiring actual notice as a condition for a cancellation to become effective. [*Id*. at 482-484.]

Neither the policy nor any Michigan authority supports the trial court's conclusion that Allstate had to wait until after the premium due date to send the ten-day notice. To the contrary, the statute clearly states that the policy may be cancelled *at any time* as long as proper notice is given. And notice is proper as long as it provides the insured with the potential to have the full ten days' notice that the statute provides, i.e., ten days from when the notice is reasonably expected to arrive at the insured's address. Nothing requires that the ten days only begin to run after the premium due date. There is no dispute that the outstanding balance of $241.06 had not been paid as of 12:01 a.m. on March 8, 2001. Thus, pursuant to the cancellation notices, the policy was no longer in force as of that time and date.

Mitchell, Ladd, and Amerisure object to the fact that the cancellation notice stated that the policy would be cancelled on March 8, 2001, if both the February *and March* premiums were not paid by that date. It is important to note that the March premium was due on March 8, 2001, and it is undisputed that the March premium was not paid on the due date. Therefore, Allstate did not cancel the policy *before* the due date, it cancelled the policy *on* the due date. Requiring a timely payment did not impose any additional burden on Mitchell that could have arguably obligated Allstate to give her more time. The fact that Allstate set the cancellation date for March 8, 2001, was in accordance with the policy language stating that it would not cancel the policy unless payment was not made "when its due." Allstate properly gave notice that if the March premium was not paid "when its due," then the policy would be cancelled. The payment was not made when it was due, and, therefore, the policy was cancelled. There is no error in this practice.

With regard to Mitchell's track record of late payments, Allstate's acceptance of those late payments did not create a "course of conduct" that obligated it to continue to accept late payments. It is true that Allstate did accept Mitchell's previous late payments, but it is important to note that during the times when those payments were outstanding there was a lapse in her coverage. And when her payment was finally received, Allstate credited her account for the

lapse period. In other words, Mitchell was not expected to pay for those lapsed days because she had no coverage on those days. There is no course of conduct of Allstate waiving or excusing the cancellation penalty. In fact, in denying coverage for the March 17, 2001, accident, Allstate was actually adhering to its course of conduct by recording a lapse in coverage for the periods when payments were outstanding. When Mitchell finally made her March payment on March 19, 2001, her account was credited $94.90 for the lapse period between March 8, 2001, and March 19, 2001.

Further, Mitchell could not have relied on Gillihan's letter because it was not sent until after the policy was cancelled. Mitchell was sent two notices that clearly stated the minimum amount due and the date of cancellation if that amount was not paid. She was aware, or should have been aware, that her policy was cancelled when payment was not received as of March 8, 2001. And regardless, the cancellation was effective irrespective of whether she had actual notice. See *Nowell, supra* at 484. Any reliance that she did place on the letter was irrelevant.

Moreover, the fact that Gillihan accepted Mitchell's payment on March 19, 2001, did not waive the cancellation penalty. As explained, the payment did nothing to remedy the lapse in coverage for the dates that the payment was outstanding. And that the payment had no effect on the lapse period was explained on the conditional receipt that Mitchell received for her payment, which stated: "our acceptance of this payment does not (a) reinstate the policy, or (b) afford coverage for any accident, occurrence, or loss which took place before this receipt was issued." Therefore, it should have been no surprise to plaintiff that the March 17, 2001, accident, which occurred during the lapse period, was not covered by the policy.

Furthermore, we believe the court misconstrued the testimony of Loretha McKinley, an Allstate senior customer advocate. McKinley stated that, when a premium is not paid and a cancellation notice is issued, Allstate automatically extends coverage for that month. In other words, Allstate continued to extend Mitchell's policy from February 8, 2001, to March 8, 2001, despite the fact that the February premium had not been paid. There is no reason to conclude that Allstate was required to extend coverage for another month, i.e., until April 8, 2001. Moreover, we stress again, that MCL 500.3020 states that the insurer may cancel *at any time* after giving at least ten days notice. It does state that the insurer must wait until ten days after a payment is due to cancel the policy.

Accordingly, we conclude that the trial court erred in denying defendant summary disposition. There is no genuine issue of material fact that the policy was not in force on the date of the accident, March 17, 2001. Allstate gave proper notice of the cancellation date, and by not timely paying the amount due, Mitchell allowed her policy to lapse.

Finally, because there was no coverage under the policy on the date of the accident, whether Amerisure's complaint was timely filed is irrelevant and moot.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh