STATE OF MICHIGAN

COURT OF APPEALS

WOODROW ALLEN BYERS, Plaintiff-Appellant,	UNPUBLISHED May 22, 2007
v	No. 274409 Kent Circuit Court
CINCINNATI INSURANCE COMPANIES, Defendant-Appellee.	LC No. 06-005667-CK

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order granting summary disposition to defendant pursuant to MCR 2.116(C)(8) and (C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from an underlying automobile accident that occurred in Barry County on June 10, 2005. Plaintiff was riding a motorcycle when a car driven by Douglas Edward Carpenter struck him. Plaintiff sustained serious injuries. Carpenter was intoxicated at the time of the accident and was determined to be at fault.

Carpenter was insured by State Farm Automobile Insurance. Plaintiff was insured by defendant and carried underinsured motorist coverage. On December 13, 2005, plaintiff's attorney, on behalf of plaintiff, sent defendant a letter demanding the policy limit of $500,000 and requesting arbitration under the terms of the policy.

On June 7, 2006, plaintiff brought the present suit against defendant claiming he is entitled to the policy limits of the underinsured motorist coverage. Defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10) arguing that the plain language of the insurance policy required that before it could be liable for any underinsured motorist benefits, plaintiff must first exhaust any other bodily injury policies applicable against the at-fault driver (i.e., plaintiff must file suit against Carpenter and State Farm). The trial court agreed and granted defendant's motion.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v State,* 470 Mich 105, 119; 680 NW2d 386 (2004). The court accepts all well-pleaded factual allegations as true and construes

them in a light most favorable to the non-moving party. *Id.* Under MCR 2.116(C)(10), summary disposition is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion for summary disposition under (C)(10) tests whether there is factual support for a claim. *Dressel, supra* at 561. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004).

The basis for the trial court's grant of summary disposition is straightforward. The plain language of plaintiff's underinsured motorist policy requires that plaintiff exhaust all coverage limits against the at-fault driver before seeking underinsured benefits from defendant. Insurance policies are construed according to principles of contract construction. *Farmers Ins Exch v Kurzmann,* 257 Mich App 412, 417; 668 NW2d 199 (2003). The terms in an insurance policy are given their common meanings unless defined in the policy. *Twichel v MIC Gen Ins Corp,* 469 Mich 524, 534; 676 NW2d 616 (2004).

Plaintiff's underinsured motorist policy with defendant states in relevant part:

> "We" will pay under this coverage only if the limits of liability under any applicable "bodily injury" liability bonds or policies have been exhausted by payments of judgments or settlements.

The policy also contains the following clause:

> No lawsuit or action whatsoever or any proceeding in arbitration shall be brought against "us" for the recovery of any claim under this Part unless the "covered person" has satisfied all of the things that "covered person" is required to do under this policy and unless the lawsuit or arbitration is commenced within two years from the date of the accident.

Here, there is no question that plaintiff had not even filed suit against the at-fault driver when he brought the present suit. Indeed, plaintiff does not dispute that he failed to satisfy the requirement of the policy. Rather, he argues, for the first time on appeal, that this language is unconscionable. An issue not raised before and considered by the trial court is generally not preserved for appellate review. *Adam v Sylvan Glynn Golf Course,* 197 Mich App 95, 98; 494 NW2d 791 (1992). Here, the trial court explicitly granted summary disposition because plaintiff failed to comply with the terms of the policy. Although plaintiff now makes several additional arguments on appeal, we confine our review to that specific ruling and conclude that the trial court properly granted summary disposition.

Plaintiff also argues that he is prejudiced by defendant's failure to arbitrate. However, the plain language of the policy indicates that while plaintiff may request arbitration, both plaintiff and defendant must "mutually agree to arbitrate the disagreements." Therefore, again, the plain language of the policy prevails over plaintiff's argument. Additionally, plaintiff argues that he has been prejudiced by defendant's failure to give permission to file a lawsuit against Carpenter. This issue was not raised below, and is therefore not properly before this Court.

In sum, the trial court properly granted defendant's motion for summary disposition because the plain language of the insurance policy required plaintiff to exhaust his claims against Carpenter and because plaintiff has failed to do so. Plaintiff's additional arguments are without merit or are not properly before this Court.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray