STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH SIMS,

Plaintiff-Appellant,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee,

and

JOHN DOE and LAWRENCE WHITE,

Defendants.

UNPUBLISHED
May 18, 2010

No. 290684
Wayne Circuit Court
LC No. 08-112308-NI

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition to defendant Progressive Michigan Insurance Company ("defendant") in this action to recover uninsured motorist benefits. We reverse.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although defendant moved for summary disposition under MCR 2.116(C)(8) and (10), its arguments required consideration of the insurance contract and the police report, which were not part of the pleadings. Therefore, we review the motion under MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden*, 461 Mich at 120. Summary disposition may be granted under MCR 2.116(C)(10) when there is no "genuine issue of material fact, [and] the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120.

The trial court agreed with defendant that it was entitled to summary disposition because plaintiff, by failing to timely name and serve the alleged uninsured driver, Lawrence White, thereby violated a "do nothing" provision in defendant's insurance policy. The policy states, in part:

OUR RIGHTS TO RECOVER PAYMENT

> In the event of any payment under this policy, **we** are entitled to all the rights of recovery that the insured person to whom payment was made has against another. That insured person must sign and deliver to **us** any legal papers relating to that recovery, do whatever else is necessary to help **us** exercise those rights, and *do nothing* after an **accident** or **loss** to prejudice **our** rights. [Italics added.]

The "do nothing" provision on which defendant relies[1] prohibits affirmative acts that prejudice defendant's rights of recovery. Other cases involving similar "do nothing" provisions have involved insured persons who settle with a tortfeasor. See, e.g., *Flanary v Reserve Ins Co*, 364 Mich 73, 74-75; 110 NW2d 670 (1961). Defendant would have this Court interpret a directive to "do nothing . . . to prejudice" defendant's rights as a directive to "do everything to preserve" them. That interpretation would be an impermissible judicial revision of the insurance contract. A court may not expand the plain meaning of an insurance policy beyond the stated language of the policy when that language is unambiguous. *In re Seitz Estate*, 426 Mich 630, 639; 397 NW2d 162 (1986).

Furthermore, plaintiff in fact "d[id] nothing . . . to prejudice [defendant's] rights." Although defendant complains that plaintiff's failure to timely sue the uninsured driver prejudiced defendant's rights to recover, defendant did not have to wait until plaintiff filed this action to preserve its rights. When plaintiff made a claim to defendant for uninsured motorist benefits, defendant could have protected its rights by paying the claim and filing a claim for subrogation against the driver. See, generally, *Citizens Ins Co of America v Buck*, 216 Mich App 217, 228; 548 NW2d 680 (1996). Defendant's insistence that plaintiff's inaction prejudiced its right to recover from the driver ignores the availability of an avenue that was open to defendant to protect its interests. Moreover, defendant's opposition to plaintiff's efforts to add Lawrence White, the driver, to this action is inconsistent with a claim that defendant was actually interested in pursuing White for recovery; rather, it appears that defendant sought to enhance the showing of alleged prejudice, in order to further its contention that plaintiff's claim for uninsured motorist benefits should be barred.

Defendant did not establish that plaintiff violated the policy provision requiring that plaintiff "do nothing to prejudice [the insurer's] rights." Therefore, defendant was not entitled to summary disposition on this basis.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering

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[1] We note that defendant focuses on the specific language from the paragraph indicating that an insured person must "do nothing after an accident or loss to prejudice our rights" (bolding removed).