S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CHARLES DWIGHT JONES, Plaintiff-Appellant,	UNPUBLISHED December 22, 2009
v WOLVERINE MUTUAL INSURANCE COMPANY, Defendant-Appellee.	No. 288301 Oakland Circuit Court LC No. 2007-087932-CK

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On December 17, 2001, plaintiff was injured when his vehicle was rear-ended by a semi truck owned by Towles Transport and driven by Scott Swackhamer. On that date, plaintiff was covered by a policy issued by defendant. Plaintiff's policy included uninsured/underinsured (UIM) coverage. At the scene, Swackhamer identified American States as his insurer. Defendant paid plaintiff first-party no-fault insurance benefits. Plaintiff sent "multiple" letters to Swackhamer but received no response. Plaintiff filed suit against Swackhamer on December 7, 2004, and obtained a default judgment. Plaintiff filed a garnishment against American States, but the company responded that it had never insured Swackhamer.

Plaintiff sued defendant on December 12, 2007, seeking UIM benefits for serious impairment of bodily function. Defendant moved for summary disposition, stating that Towles had a million-dollar policy with Northland Insurance in effect covering Swackhamer and the truck at the time of the accident and that summary disposition was appropriate because benefits would be payable only if the other vehicle or driver lacked insurance.

Plaintiff's answer argued that *when* defendant learned about the Northland policy was critical: "If Defendant knew of the existence shortly after the accident, and did not inform its insured, who had purchased and was relying up on the optional uninsured/underinsured coverages, and was thus aware of the affirmative act of the driver, it should not be allowed to benefit from such concealment." Plaintiff also argued that the policy had a latent ambiguity "aris[ing] from the manner in which the existence of 'uninsured' status is to be determined."

Plaintiff contended that he was entitled to rely on the policy, which was intended to provide insurance when no other coverage was available. Plaintiff asserted, "If Defendant knew of such coverage early on . . . and did not notify its insured, . . . such action violates the intention of the parties."

In reply, defendant argued that the policy was unambiguous: if the other vehicle is insured, defendant is not required to pay UIM benefits. Defendant asserted that it had no duty to investigate plaintiff's UIM claim when it did not even know he would be seeking damages from the other party, citing *Morley v Automobile Club of Michigan*, 458 Mich 459; 581 NW2d 237 (1998). Defendant stated that it had not investigated and did not know about the claim until plaintiff sued, and attached as support the affidavit of the claim manager handling plaintiff's case, who stated defendant did not learn of the Northland policy until January 8, 2008.

The trial court found there was no dispute that the truck was insured by an ample policy at the time of the accident and, therefore, the UIM provision of plaintiff's policy did not apply. Even if plaintiff's "latent ambiguity" theory had been pleaded in the complaint, the court found it was without legal or factual merit. Neither the policy itself nor any fact outside the policy indicated an intent other than having coverage only where the other vehicle in fact is not insured. The court noted that under Michigan law the insured bears the burden of determining whether the other driver is insured. *Morley, supra* at 466-467, 467 n 6. Even if defendant was required to share information about the other party's insurance with plaintiff, defendant's unrefuted evidence showed it had no knowledge of the Northland policy until after plaintiff filed suit.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Issues of contract interpretation are questions of law that we review de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

Plaintiff contends that the language of defendant's insurance policy contends a latent ambiguity, because it does not describe or define "the manner in which the existence of 'uninsured' status is to be determined. The trial court correctly found that plaintiff is not entitled to UIM benefits because there was no uninsured or underinsured motorist, and that the UIM provision lacked any ambiguity. The provision fairly admits of a single interpretation, nothing in the policy supports that defendant bore an obligation to inform itself regarding plaintiff's pursuit of a claim against Swackhamer. Plaintiff makes no effort to distinguish or limit *Morley*, which unequivocally states, "the duty to determine if the tortfeasor is insured [is on] the insured. It is not the insurance agency that has that responsibility." *Morley*, *supra* at 467 n 6. For the same reason, defendant had no duty to direct plaintiff to Towles Transport, and the language of the

insurance policy does not provide otherwise.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder