STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN INSURANCE COMPANY,

Plaintiff-Appellee,

V

LAKE SHORE ELECTRIC OF WEST MICHIGAN, INC. and MICHAEL KENNETH WELMERINK,

Defendants,

and

MICHAEL JOHN BECKER and DENISE BECKER

Defendants-Appellants.

UNPUBLISHED
May 30, 2006

No. 266389
Newaygo Circuit Court
LC No. 04-018746-CK

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this declaratory judgment action involving a commercial automobile insurance policy issued by plaintiff to defendant Lake Shore Electric of West Michigan, Inc. ("Lake Shore"), defendants Michael Becker and Denise Becker (hereinafter "defendants") appeal as of right from an order granting summary disposition to plaintiff under MCR 2.116(C)(9) and (10). We reverse and remand.

Defendants first argue that, in its brief below, plaintiff misrepresented the standard of review applicable to motions for summary disposition brought under MCR 2.116(C)(9). After reviewing the record, we are not persuaded that plaintiff misrepresented the applicable standard. See, generally, *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). Regardless, it is apparent that in granting plaintiff's motion, the trial court considered evidence beyond the pleadings and, therefore, decided the motion under MCR 2.116(C)(10) rather than (C)(9). Therefore, this issue is moot.

A decision granting summary disposition under MCR 2.116(C)(10) is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The court must

examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact existed. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Only "the substantively admissible evidence actually proffered" may be considered. *Maiden*, *supra* at 121; see also MCR 2.116(G)(6). In determining whether a question of material fact exists, a court may not weigh the credibility of witnesses or make findings of fact. *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

We agree with defendants that the trial court erred to the extent that it considered evidence offered by plaintiff that was not substantively admissible for its truth.

In its motion for summary disposition, plaintiff repeatedly urged the court to assess the credibility of Lake Shore's co-owner, Michael Welmerink, and, for that purpose, presented evidence that Welmerink had been convicted of possession of marijuana. MRE 609 governs the admissibility of evidence of prior convictions for the purpose of attacking a witness's credibility. Because possession of marijuana, MCL 333.7403(2)(d), is a misdemeanor punishable by imprisonment for up to a year and does not contain an element of theft, dishonesty, or false statement, it is not admissible under MRE 609 for the purpose of attacking a witness's credibility. Furthermore, the trial court was not permitted to consider Welmerink's credibility in the context of deciding plaintiff's motion for summary disposition. *Nesbitt*, *supra* at 225.

Plaintiff also presented evidence that the same attorney who represented Welmerink in his criminal case later represented defendants in the underlying lawsuit against Lake Shore. Although this evidence may be relevant under MRE 401 for its impeachment value, it does not appear relevant for any other purpose. Because a trial court may not decide issues of credibility when deciding a motion for summary disposition, the evidence was not relevant for purposes of determining whether there was a genuine issue of material fact for trial.

Plaintiff also presented evidence of various recorded and unrecorded statements made by Welmerink concerning his trip to Whiskey Creek. We agree that these statements were not admissible for their truth as party admissions under MRE 801(d)(2)(a), because they were offered against defendants, not against Welmerink. We also reject plaintiff's argument that Welmerink's statements to Deborah O'Brien were admissible under MRE 803(3) as evidence of Welmerink's then-existing state of mind. The statements concerned Welmerink's recollection of the purpose of his past trip to Whiskey Creek and were based on his memory. MRE 803(3) expressly excludes "statement[s] of memory or belief to prove the fact remembered or believed . . . ."

Although Welmerink's various statements may be admissible for purposes of attacking his credibility, the trial court is not permitted to resolve credibility disputes when deciding a motion for summary disposition. *Nesbitt*, *supra* at 225.

With regard to the trial court's ultimate decision to grant summary disposition to plaintiff, we conclude, after viewing the evidence in the light most favorable to defendants, that a genuine issue of material fact existed with regard to the question of coverage.

Section II(A) of plaintiff's policy provides that plaintiff will pay "all sums an 'insured' legally must pay as damages because of 'bodily injury' . . . to which this insurance applies." As

it did below, plaintiff relies on section II(A)(1) to argue that Welmerink was not an "insured" within the meaning of the policy. Section II(A)(1) provides, in pertinent part:

> The following are "insureds":
>
> a. You[1] for any covered "auto."
>
> b. Anyone else while using *with your permission* a covered "auto" you own, hire *or borrow* except:
>
> (1) The owner or anyone else from whom you hire or borrow a covered "auto." This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.
>
> (2) Your employee if the covered "auto" is owned by that employee or a member of his or her household.
>
> (3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.
>
> (4) Anyone other than your employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered "auto."
>
> (5) A partner of yours for a covered "auto" owned by him or her or a member of his or her household. [Emphasis added.]

Section I of plaintiff's policy provides that the determination of a "covered auto" is governed by the designation on the declarations page. The declarations page of Lake Shore's policy with plaintiff contains the designation "1," which is defined in section I(A) as encompassing "ANY 'AUTO.'" It is undisputed that the "any auto" designation provides coverage for both hired and nonowned autos. Under the applicable policy language, a covered auto would include a vehicle that is borrowed if used for a business purpose.

Welmerink testified in his deposition that part of the purpose of the trip to Whiskey Creek was to submit a bid to a condominium association for a wiring job and that the job was to be done through Lake Shore, not as a "side job." Although plaintiff presented evidence suggesting that Welmerink was not credible, this Court must view the evidence in the light most favorable to defendants, the nonmoving parties, and may not resolve credibility disputes. Thus, we conclude that there is a genuine issue of material fact regarding whether Welmerink was driving the vehicle for a business purpose.

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[1] Plaintiff's policy states that "the words 'you' and 'your' refer to the Named Insured shown in the declarations." The declarations page lists "Lake Shore Electric" as the named insured. Thus, "you" refers to Lake Shore Electric.

We reject plaintiff's argument that the trial court reached the right result, even if for the wrong reason, because the result would be the same in a bench trial before the same judge. This argument is purely speculative, and it ignores the fact that the parties at trial would be given an opportunity to test the veracity of testimony through cross-examination and other appropriate means that are not available in the context of a motion for summary disposition. Further, plaintiff fails to cite any authority in support of its position that an improper grant of summary disposition may be affirmed on this basis.

Plaintiff also argues that there is no evidence that Lake Shore granted Welmerink permission to borrow the vehicle he was driving. However, it is undisputed that Welmerink and Paul Winsemius are equal partners in and owners of Lake Shore. There was no evidence that either needed the other's express permission before borrowing a vehicle on Lake Shore's behalf. Drawing all reasonable inferences in defendants' favor, there is a genuine issue of material fact regarding whether Welmerink could permissibly borrow a car to drive to Whiskey Creek to, in part, submit a bid on Lake Shore's behalf.[2] See *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 343-346; 561 NW2d 138 (1997).

Plaintiff additionally argued below that it was entitled to summary disposition because it was not promptly notified of the accident. The trial court did not expressly address this issue, but stated that it was granting summary disposition to plaintiff "on all of the grounds . . . presented." Plaintiff does not address this issue on appeal. The evidence presented below indicated that plaintiff received notice of the accident at least nine days after it occurred. Additionally, in *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998), our Supreme Court reaffirmed that, to bar a claim on the basis that a policy's notice provision has been violated, an insurer must show prejudice. In this case, plaintiff neither alleges nor submitted any evidence of prejudice. Thus, to the extent that the trial court may have relied on the prompt-notice provision as an additional basis for granting summary disposition, we conclude that summary disposition was not warranted on this basis.

We hold that the trial court erred in granting plaintiff's motion for summary disposition.

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

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

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[2] Plaintiff also argues that there was no evidence that Shannon Allen, the registered owner of the vehicle, consented to Welmerink's use of the car. Although there was no direct evidence that Allen expressly consented to Welmerink's use of the vehicle, evidence was presented that she stopped making payments on the vehicle because she could no longer afford them and surrendered possession of the vehicle. At a minimum, there was an issue of fact regarding whether Allen impliedly consented to Welmerink's use of the vehicle.