STATE OF MICHIGAN

COURT OF APPEALS

THOMAS R. TIBBLE, Trustee,

Plaintiff-Appellant,

v

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY, NATIONAL BENEFIT PLANS, INC., and NICHOLAS CALDWELL,

Defendants-Appellees.

UNPUBLISHED
May 1, 2014

No. 314271
Ingham Circuit Court
LC No. 12-000624-CK

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff, as trustee for the bankruptcy estate of Jeffrey Ernsberger, brought this action after defendant American Community Mutual Insurance Company (ACMI) denied coverage for Jeffrey's medical expenses resulting from injuries he suffered while riding a motocross bike at a motocross track. The trial court granted defendants' motion for summary disposition. Plaintiff appeals as of right. We affirm.

On July 13, 2009, Laurel Ernsberger met with defendant Nicholas Caldwell, an independent insurance agent employed by defendant National Benefit Plans, Inc. (NBP). Laurel testified in her deposition that her son, Jeffrey, had given her permission to apply for health insurance for him. She testified that she discussed different insurance options and costs with Caldwell and decided to apply for a policy with ACMI. She testified that Caldwell asked her several questions and inputted her answers on his laptop. The application stated Jeffrey's weight as 249 pounds, though Laurel testified that she told Caldwell that Jeffrey weighed 280 pounds. Regarding the question, "Does any applicant engage in scuba or sky diving, organized racing, flying or other hazardous activities," she testified that she explained to Caldwell that, while Jeffrey was no longer competing in organized motocross races, he was still riding dirt bikes. The question was answered "No" on the application. Laurel testified that she never saw the application. The application states that it was "e-signed" by Jeffrey.

The application stated in pertinent part as follows:

> 1. I represent that I have read this Application and understand each of the questions, and that the answers to each of the questions I have given are complete

and true to the best of my knowledge. I agree that any misrepresentation on this Application will void my policy at the discretion of American Community. I further agree that if a policy is issued, it will be issued by American Community in full reliance and in consideration of the information, answers and statements contained herein. I understand that this application will be medically underwritten. I agree to provide American Community with any additional information that may be necessary to complete the underwriting process.

* * *

4. I understand and agree that no agent or broker has the authority: (i) to bind American Community by making promises regarding eligibility, benefits, or the issuance of a policy; (ii) to waive any answer or any portion of any answer to any question on this application or any information American Community requests; (iii) approve coverage; (iv) make or alter any contract on behalf of American Community; or (v) waive or alter any of American Community's other rights or requirements.

* * *

8. I am signing this application on my own behalf and on behalf of all listed dependents. I understand that my statements and answers in this application must continue to be true as of the date I receive the policy. I understand that if my or my dependent's health or any of the answers or statements change prior to delivery of the policy, I must inform American Community in writing. I understand that failure to do so may result in my application being denied or rescission of my or my dependent's coverage under the policy.

9. I understand that, unless required by law, the completion of this application and submission of any estimated initial premium does not: a.) provide interim coverage, b.) guarantee coverage, or c.) guarantee issue of a policy.

* * *

Do not cancel any current health insurance coverage until you receive an approval letter and an insurance policy from American Community. You will be notified of the effective date of your policy.

ACMI thereafter sent Jeffrey a letter stating in pertinent part as follows:

Thank you for your recent application for health insurance with American Community Mutual Insurance Company. Your application is currently being reviewed by the Individual Medical Underwriting Dept. to determine if coverage will be offered. This is not an approval or offer of health insurance coverage. DO NOT CANCEL YOUR CURRENT HEALTH COVERAGE UNLESS YOU HAVE RECEIVED WRITTEN NOTIFICATION OF YOUR APPROVAL FROM US.

* * *

> As indicated on your application, all statements and answers made on the date the application was completed and signed must continue to be true until the date you are approved. You must notify American Community in writing if applicants experience a change in health or if any answers to question on the application are no longer correct. Failure to notify us of changes these changes may result in claims being denied for pre-existing condition, condition riders or rating being placed on the policy or the policy being rescinded back to the effective date of coverage.

On July 19, 2009, Jeffrey suffered severe injuries while riding a dirt bike at a motocross track. Laurel testified that Jeffrey was practicing at the time of his injury. The owner of the track stated that no racing activities were taking place at the track. Laurel described the circumstances of the accident as follows:

> It was what I'm going to describe as a quad jump where there's a series of four different humps. And he got kicked back on the bike as approached the first one which set him back on the seat which made the throttle go. And he hit the first jump and went straight up in the air and came down and landed feet first on the third jump of that series of jumps.

Jeffrey was treated for his injuries that day and subsequently incurred extensive medical expenses. A record from the health center where Jeffrey was initially treated on July 19, 2009, lists his weight as 280 pounds. Another record from a subsequent facility where Jeffrey was treated on July 21 lists his weight as 317 pounds.

ACMI issued Jeffrey a policy with an effective date of July 20, 2009. A letter sent from ACMI to Jeffrey dated July 21, 2009, informed Jeffrey of the approval. The letter also stated as follows:

> To ensure all your information is accurate, **please read the copy of the application attached to this policy.** Carefully check the application, and write to American community **within ten (10) days** if any information shown on the application **is not correct and complete,** or if any **past medical history has been left out** of the application . . .
>
> This application is part of the policy and the policy was issued on the basis that the answers to all questions and the information shown on the application are correct and complete.

The insurance policy stated that it would not pay charges for the treatment of pre-existing conditions, which included medical conditions that were treated within six months before the effective date of the policy.

In a letter dated September 21, 2009, ACMI rescinded Jeffrey's policy. The letter stated in pertinent part:

> We have completed your medical history review. The medical records from Borgess Medical Center and Community Health Center of Branch County indicate your medical history regarding a significant change to your health status and history of organized racing (motocross), which was revealed after your health insurance application was signed but before the approval date of your policy. These records also indicate your build of 6 feet 2 inches tall with a weight of 317 pounds. A review of your health insurance application has determined that this information was not originally disclosed at the time of application or in writing to American Community before the approval date of your policy.
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> * * *
>
> This information should have been disclosed on the application and in writing to American Community before the approval of your policy. Our records show your policy was approved on July 20, 2009. The coverage you applied for would not have been issued if we had known this medical history at the time of application. Therefore, we are rescinding (canceling) your policy retroactive to the effective date of July 20, 2009. Rescission means that the health insurance coverage was never in force with us.

ACMI's grievance commission upheld the rescission in a letter dated November 25, 2009. The letter also states that "since Mr. Ernsberger suffered an injury and sought medical treatment on July 19, 2009, the day before the effective date, American Community could not provide coverage for treatment of this pre-existing condition, even if his policy had not been rescinded."

Jeffrey subsequently filed for bankruptcy and his medical expenses were discharged. Plaintiff, as the trustee of Jeffrey's bankruptcy estate, filed the present action. Plaintiff alleged that defendants committed fraud and deceit, breach of contract, negligence, and violations of the Uniform Trade Practices Act (UTPA), MCL 500.2001 *et seq*., and the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq*. Defendants filed motions for summary disposition. In plaintiff's response, he provided the affidavit of Arthur Skogsberg, who indicated he had been an insurance agent for over 20 years. Skogsberg averred that an independent insurance agent has a duty to know the underwriting requirements of the various insurance companies he is selling and owes a duty to provide applicants with coverage that is as comprehensive as possible and that adequately addresses the applicant's individual needs. He opined that Caldwell breached that duty during the application process by, inter alia, not adequately inquiring into Jeffrey's participation in motocross. Skogsberg also asserted that Caldwell should have applied for a policy with Blue Cross Blue Shield because "it was obvious from Jeffrey's weight, his premium would be significantly higher whereas his weight would have no impact on the Blue Cross Blue Shield policy." He also averred that Caldwell should have secured a short-term interim policy for Jeffrey.

Following a hearing on defendants' motion, the trial court granted summary disposition in favor of defendants. With regard to ACMI, the court noted that the documentary evidence demonstrated that the insurance policy had not yet become effective on the date of the accident. With regard to the duty of defendants Caldwell and NBI to apply for insurance with Blue Cross Blue Shield instead of ACMI, the court opined:

> I don't think he had a duty like that. I don't think you do. I think that people need to come in and disclose honestly what their situation is in order to obtain proper insurance, not to have an agent go out and ferret out whether you are lying to them, because they were clearly lying to this agent. That's what I think.

Plaintiff thereafter filed a motion for reconsideration, arguing, inter alia, that the trial court mischaracterized Laurel's statement to Caldwell as a lie. The trial court denied the motion, stating that:

> First, Plaintiff argues that this Court improperly made a determination of credibility when it noted that Laurie Ernsberger was not truthful in her statement to the insurance agent that her son "was never going to ride motor cross again." . . . . Neither party disputes that Jeffrey Ernsberger was practicing motor cross at the time of the accident in question. Therefore, this Court's statement that Laurie Ernsberger "lied" when she told the insurance agent that her son "was never going to ride motor cross again" was not a credibility determination, but a conclusion based on undisputed facts that Laurie Ernsberger's statement that her son was not going to ride motor cross again was contrary to the facts.
>
> Second, Plaintiff argues that this Court made a palpable error in denying the negligence action against Defendant Caldwell, who Plaintiff alleges should have applied Plaintiff for Blue Cross/Blue Shield insurance policy instead of American Community insurance policy "because Jeffery Ernsberger was involved in motorcross [sic] racing." *Id*. at 3. This is the same argument that Plaintiff presented in response to Defendant's November 28, 2012 motion for summary judgment. An insurance agent is not required to parse through an applicant's statements to determine which insurance policy would be best for the applicant. Here, Laurie Ernsberger stated that her son "was never going to ride motor cross again." *Id*. at 1. Defendant Caldwell does not have a duty to determine that this statement was false and to find an insurance policy accordingly.

We review de novo a trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). The moving party is entitled to summary disposition if "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." MCR 2.116(C)(10). The trial court "must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), citing *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must draw "all reasonable inferences in favor of the nonmoving party." *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). "A question of material fact exists when the record leaves open an issue on which reasonable minds might differ." *Jimkoski v Shupe*, 282 Mich App 1, 4-5; 763 NW2d 1 (2008). When deciding a motion for summary disposition, a trial court "is not permitted to assess credibility, or to determine facts." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "This Court is liberal in finding genuine issues of material fact." *Id*. at 5.

At the outset, it is clear that summary disposition in favor of ACMI was proper. "[U]nambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005). Jeffrey's insurance policy with ACMI became effective on July 20, 2009, one day after the accident.[1] The policy stated that ACMI would not pay for charges incurred for pre-existing conditions, including medical conditions for which medical care or treatment was received within six months before the effective date. Thus, ACMI is not liable for the medical expenses that Jeffrey incurred as a result of the accident.[2] Furthermore, it is ultimately irrelevant whether Jeffrey was, in fact, "racing" within the meaning intended in the policy contract, because the racing-related exclusionary language could not have become applicable where the policy itself that contained the exclusion never went into effect.

Defendants Caldwell and NBP argue that, pursuant to *Harts v Farmers Ins Exchange*, 461 Mich 1, 8-9; 597 NW2d 47 (1999), "an insurance agent merely takes and fills an order for insurance, rather than counseling clients about insurance needs." However, the agent in *Harts* sold policies exclusively for one company and therefore he owed duties to the company, his principal, rather than to its insureds. *Id*. at 3, 6-7, 8, 12. In this case, Caldwell was an agent for NBP, an independent insurance broker, rather than for an insurance company. When an insurance policy 'is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer.' *Genesee Foods Servs, Inc v Meadowbrook, Inc*, 279 Mich App 649, 654; 760 NW2d 259 (2008), quoting *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998). The duty owed includes providing "the most comprehensive coverage and . . . ensuring that the insurance contract properly addresse[s] their needs." *Id*. at 656.

The gist of plaintiff's argument is that Caldwell breached his duty to Jeffrey by applying for insurance coverage with a company whose underwriting requirements Jeffrey did not satisfy, and that Caldwell should have applied for coverage with Blue Cross Blue Shield. Plaintiff relies on Skogsberg's affidavit in arguing that Caldwell

> should have determined that [ACMI] was an inappropriate health insurance provider to place Jeffrey Ernsberger in [because he entered an environment that contained photographs, trophies, and other paraphernalia related to motocross racing.]. This was mainly because of the particular exclusionary language that is contained in [ACMI's] insurance policy. Mr. Skogsberg is of the opinion that Mr. Caldwell should have placed the application with Blue Cross Blue Shield based on their policy which does not contain any similar restrictive exclusions.

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[1] As noted previously ACMI had informed Jeffrey by way of letter that "Your application is currently being reviewed by the Individual Medical Underwriting Dept. to determine if coverage will be offered. This is not an approval or offer of health insurance coverage."

[2] The fact that ACMI subsequently rescinded the policy back to the effective date is not relevant because the policy never became effective before the date of injury.

A review of Skogsberg's affidavit, however, does not support plaintiff's argument, for several reasons.

First, although Skogsberg avers that Caldwell breached a duty by failing to "[make] particular inquiries and provide sufficient warnings about Jeffrey's involvement in organized racing," Laurel testified that she discussed this topic with Caldwell and that she denied Jeffrey's continued involvement in motocross racing. Thus, on this record there is no genuine issue of material fact with regard to whether Caldwell breached a duty to inquire into Jeffrey's participation in motocross racing. Skogsberg further averred that:

> As an independent insurance agent, Mr. Caldwell should have placed Mr. Ernsberger's health insurance with Blue Cross Blue Shield because it was obvious from Jeffrey's weight, his premium would be significantly higher whereas his weight would have no impact on the Blue Cross Blue Shield policy.

Even accepting as true Laurel's testimony that she told Caldwell that Jeffrey weighed 280 pounds and that Caldwell misstated Jeffrey's weight in the application for insurance, at no point in Skogsberg's affidavit does he state that that Jeffrey's weight prevented him from qualifying for insurance with ACMI or that Caldwell should have known that Jeffrey's weight would prevent him from qualifying for insurance with ACMI. Rather, Skogsberg stated that Jeffrey's weight would have resulted in a higher premium with ACMI.

Similarly, at no point in Skogsberg's affidavit does he state that Jeffrey's participation in motocross racing would not have affected his ability to qualify for an insurance policy with Blue Cross Blue Shield, nor does he state that a Blue Cross Blue Shield policy does not have exclusionary language similar to the language in the ACMI policy. The affidavit is silent as to the language of the Blue Cross Blue Shield policy.[3] The nonmoving party "must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." MCR 2.116(G)(4). If the nonmoving party does not make such a showing, the trial court properly grants summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Plaintiff failed to establish that Caldwell breached his duty by giving Jeffrey insurance that did not cover him given that he rode dirt bikes, when a different insurance would have covered him despite that he rode dirt bikes.

Finally, the trial court's determination that Lauren told Caldwell that Jeffrey would never ride motocross again was a mischaracterization of her deposition testimony. Furthermore, we disagree with the trial court's apparent *per se* conflation of riding a dirt bike with racing. However, whether Jeffrey was riding recreationally or competitively when he was injured is irrelevant. Plaintiff failed to establish that Caldwell failed to provide Jeffrey with the most comprehensive coverage *that addressed his needs*. But even more significantly, plaintiff failed to establish a causal connection between *any* alleged failures on Caldwell's part and the ultimate

[3] Plaintiff did not provide documentary evidence of the language contained in a Blue Cross Blue Shield insurance policy, or of Blue Cross Blue Shield's underwriting requirements, to the trial court.

harm Jeffrey suffered of being denied coverage. Whether or not Jeffrey was racing, and whether or not there was any ostensibly applicable exclusionary language in the policy, the proximate cause of the denial is that the policy had not yet gone into effect. Plaintiff has not established that Caldwell engaged in any improper acts or omissions that would have necessarily changed the effective date of the policy, and consequently, that there is an unbroken causal link between any of those acts or omissions and Jeffrey's damages. The trial court properly determined that plaintiff failed to establish a genuine issue of material fact with regard to whether Caldwell breached a duty to Jeffrey in applying for an insurance policy with ACMI, and even if Caldwell had breached a duty in the abstract, whether any such breach caused Jeffrey any harm.

Affirmed.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck