STATE OF MICHIGAN

COURT OF APPEALS

ALICE JO MARALES, as Guardian of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY, a Michigan corporation,

Defendant-Appellee.

UNPUBLISHED

No. 178479
LC No. 92-2882-NF

Before: White, P.J., and Sawyer, and R.M. Pajtas,* JJ.

White, J. (dissenting).

I respectfully dissent. I conclude that 1) the policy requires that a notice of non-renewal be sent, even where the insured has been late with premium payments, [1] 2) there was a question of fact whether notice was sent, and 3) *Smith v Slaughter*, 167 Mich App 400; 421 NW2d 702 (1988), does not require a second notice of non-renewal under the facts presented here.

The policy states:

RENEWAL

> If the Company elects not to renew this policy, it shall mail to the named insured at his address last known to the Company or its authorized agent, by first class mail, written notice of such non-renewal not less than twenty days prior to the expiration date; provided that, notwithstanding the failure of the Company to comply with the foregoing provisions of this paragraph, this policy shall terminate on such expiration date, if
>
> (1) the named insured fails to pay the premium as required by the Company for renewal or continuance of this policy, or
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> (2) the named insured has failed to discharge when due any of his obligations in connection with the payment of premium for this policy, or any installment

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* Circuit judge, sitting on the Court of Appeals by assignment.

> thereof, whether payable directly to the Company or his agent or indirectly under any premium finance plan.

Subparagraph 2 must be read in context. The initial clause provides that if the company elects not to renew the policy, notice must be sent. It then goes on to provide that notwithstanding the failure to send the notice, the policy shall terminate on the expiration date if the insured fails to pay the renewal premium, or otherwise fails to discharge when due any payment obligations under the policy. A fair and common-sense reading of this clause is that defendant is required to send a notice of non-renewal if it elects not to renew the policy, but that notwithstanding its failure to so elect and notify an insured, the policy will not be renewed, and will expire at the end of its term, if the insured fails to pay the renewal premium as required by the company, or if the insured has not fully paid for the expiring policy. The provision contemplates that defendant will either elect, and send timely notice of, non-renewal, or will renew the policy and require a premium payment. If the latter course is chosen, the policy will nevertheless terminate at the expiration date if the required premium is not paid or if a payment is owing. Here, no notice of premium was sent, and plaintiff was paid-up on the expiring policy.

Plaintiff's estoppel argument is related to the policy interpretation question. If the policy is construed to allow for automatic non-renewal without notice, one may ask how an insured is to know whether defendant has elected to renew or not. Further, if defendant has repeatedly renewed the policy notwithstanding the insured's repeated failures to pay interim installments when due, the insured may justifiably conclude that the automatic non-renewal provision has been waived absent some notice. Because I conclude that the policy does not eliminate the notice requirement when subsections 1 and 2 are operative, but merely provides that in cases where defendant did not elect non-renewal, and therefore did not send the required notice, the policy nevertheless will terminate upon expiration of the policy period and will not be renewed if the new premium is not paid or any past premium has not been paid, I find it unnecessary to address the estoppel issue.

I next conclude that *Smith, supra*, does not require that a second notice of non-renewal be sent under the facts of this case, where the notice of non-renewal was sent at the insurance company's election and explicitly stated that the reason for non-renewal was the driving record of the insured. Under these circumstances, an insured would not reasonably be confused by a subsequent notice of cancellation for nonpayment followed by a notice of reinstatement.

Lastly, I conclude that there are genuine issues of material fact regarding whether defendant actually mailed the notice of non-renewal. The policy states that "The mailing of notice … shall be sufficient proof of notice. Delivery of such written notice by the Company shall be equivalent to mailing." However, plaintiff may still attack defendant's assertion that the notice was mailed. Here, defendant relied on its procedures rather than a post-office receipt or a witness with actual knowledge of the mailing. Its procedures apparently involve an outside private mail service. Further, the microfiche copy of the notice and the notice to the agency bear two different dates. Additionally, plaintiff asserted that she did not receive the notice.

I would reverse and remand for trial on the notice issue.

/s/ Helene N. White

[1] The majority correctly observes that plaintiff does not argue that subsection 2 of the non-renewal clause is inapplicable, but, rather, that defendant is estopped from enforcing it. Nevertheless, I conclude that plaintiff's estoppel argument is related to the policy interpretation issue, that the estoppel argument is answered by a correct interpretation of the policy, and that the interests of justice require that the issue be addressed. I further observe that the issue on which defendant prevailed was raised belatedly in the circuit court, and that until the issue was raised at oral argument of the motion, defendant conducted itself as if the policy required notice of renewal by sending (defendant's contention) or purporting to send (plaintiff's contention) notice of non-renewal, and relying on that notice. Defendant's motion for summary disposition argued that the policy had expired and that defendant had followed the policy provisions regarding non-renewal, i.e., notice of non-renewal had been mailed. Defendant did not argue that no notice of non-renewal was required. Plaintiff responded that defendant was obliged to send a second notice of non-renewal under *Smith v Slaughter*, 167 Mich App 400; 421 NW2d 702 (1988), because a notice of reinstatement had been sent in the interim, that there was a question of fact whether notice was in fact mailed, and that actual receipt is required. At the hearing on the motion, defendant raised the argument that the policy expired notwithstanding any failure to send notice of non-renewal because plaintiff failed to pay the renewal premium, and because plaintiff did not make payments when due. Plaintiff responded that the policy had conflicting provisions and that defendant's conduct estopped it from relying on an automatic non-renewal provision. The circuit court addressed the issues raised in the briefs, concluding that defendant established that the notice of non-renewal was mailed, but that *Smith* requires that a second notice be sent. The court then entertained defendant's additional argument and concluded that the policy terminated on the expiration date because plaintiff had failed to make a number of installment payments when due.