

STATE OF MICHIGAN
COURT OF APPEALS

JACK LEONARD DARMER,
Plaintiff-Appellee,

UNPUBLISHED
December 14, 2010

v

CITIZENS INSURANCE COMPANY,
Defendant-Appellant,

No. 290805
Ingham Circuit Court
LC No. 03-001881-NI

and

COALITION PROTECTING AUTO NO FAULT,
INSURANCE INSTITUTE OF MICHIGAN,
AMERICAN INSURANCE ASSOCIATION,
MICHIGAN INSURANCE COALITION,
MICHIGAN CATASTROPHIC CLAIMS
ASSOCIATION, MICHIGAN ASSOCIATION
FOR JUSTICE, and MICHIGAN CITIZEN
ACTION,

Amicus Curiae.

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant Citizens Insurance Company appeals as of right the trial court's order granting plaintiff Jack Leonard Darmer's motion for summary disposition based on MCR 2.116(C)(10) and denying defendant's motion for summary disposition. This case has been before this Court previously. *Darmer v Citizens Ins Co*, memorandum opinion of the Court of Appeals, issued July 7, 2005 (Docket No. 260479), lv den 475 Mich 907 (2006). In our previous decision, we reversed, in part, and remanded for the trial court to consider whether, under MCL 500.3109a, "a question of fact exists as to whether an appropriately reduced premium was provided in light of [plaintiff's] employer's self-funded long-term disability plan and whether the reduction was 'reasonably related' to his being entitled to such benefits." *Id.*, slip op p 2. On remand, the trial court exceeded the scope of this Court's remand instructions. Therefore, for the reasons stated in this opinion, we again reverse and remand for the trial court to consider whether, under MCL 500.3109a, a question of fact exists as to whether an appropriately reduced premium was

provided in light of plaintiff's employer's self-funded long-term disability plan and whether the reduction was reasonably related to his being entitled to such benefits.

I. BACKGROUND AND PROCEDURAL HISTORY

This case arose after plaintiff was involved in a disabling automobile accident on October 11, 2002. Plaintiff was a General Motors employee and was entitled to no-fault work loss benefits under a coordinated policy issued by defendant. He was also entitled to receive compensation under General Motors' self-funded long-term disability (LTD) plan. Defendant paid plaintiff no-fault work loss benefits, but deducted amounts equivalent to plaintiff's disability benefits. Plaintiff filed suit to challenge the coordination of benefits. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that the reduction or set-off was proper under MCL 500.3109a. The trial court ruled that defendant was not entitled to reduce plaintiff's no-fault work loss benefits by his disability benefits and denied defendant's motion for summary disposition. Defendant appealed to this Court. We held the case in abeyance pending our Supreme Court's decision in *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207; 696 NW2d 621 (2005).¹ On May 3, 2005, the Supreme Court decided *Jarrad*, holding "that a self-funded long-term disability plan constitutes 'other health and accident coverage' that is subject to coordination under MCL 500.3109a." *Jarrad*, 472 Mich at 209.

After our Supreme Court released *Jarrad*, plaintiff filed with this Court a motion to affirm or to remand for the trial court to engage in further fact finding and consider whether defendant provided an appropriately reduced premium to plaintiff in light of his employer's self-funded long-term disability plan and whether any reduction was reasonably related to his being entitled to such benefits. On July 7, 2005, this Court denied plaintiff's motion to affirm as moot.² On the same day, we issued an unpublished opinion, holding that pursuant to *Jarrad*, plaintiff's LTD plan constituted "other health and accident coverage" that is subject to coordination under MCL 500.3109a. *Darmer*, slip op p 2. We therefore reversed the trial court's ruling that defendant was not entitled to set-off plaintiff's LTD benefits and remanded the case to the trial court with the following instructions:

[P]laintiff maintains that *Jarrad, supra*, does not resolve the issue of whether coordination is required here. Instead, pointing to the language of MCL 500.3109a above, he argues that a question of fact exists as to whether an appropriately reduced premium was provided in light of his employer's self-funded long-term disability plan and whether the reduction was "reasonably related" to his being entitled to such benefits. Plaintiff did not argue this claim below, nor was it decided by the trial court. Therefore, we reverse the trial court's

¹ *Darmer v Citizens Ins Co*, unpublished order of the Court of Appeals, entered April 20, 2005 (Docket No. 260479).

² *Darmer v Citizens Ins Co*, unpublished order of the Court of Appeals, entered July 7, 2005 (Docket No. 260479).

decision as it pertains to plaintiff's LTD benefits, and remand for consideration of plaintiff's claim. [*Id.*]

On remand, additional discovery was completed in the form of the depositions of Douglas Warner, State Manager for personal lines of insurance for defendant, and Randy Parlor, a Departmental Analyst with the Office of Financial and Insurance Services, formerly the Michigan Insurance Bureau. The parties filed cross motions for summary disposition. Plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10), arguing that the provisions of MCL 500.3109a had not been satisfied because defendant failed to get "prior approval by the Commissioner" of the reductions in premium rates that it charged for plaintiff's coordinated insurance policy. According to plaintiff, Parlor's testimony established that the insurance commission has never established any policies or procedures to enable it to determine whether or not reduced premium rates under MCL 500.3109a are appropriately reduced. Therefore, plaintiff contended that "the only appropriate relief is to deny coordination of [plaintiff's] work loss benefits with his long term disability benefits." Defendant moved for summary disposition under MCR 2.116(I)(2), arguing, in relevant part, that plaintiff had not shown that there was a basis to reform the insurance policy from a coordinated policy to an uncoordinated policy and that there was no question of fact that defendant provided an appropriately reduced premium.

At the hearing on the parties' respective motions for summary disposition, plaintiff argued that reduced premium rates require the prior approval of the insurance commissioner and that such approval had not been granted. Defendant asserted that plaintiff's prior approval argument was not based on this Court's instructions in remanding the case. The trial court agreed with plaintiff that defendants had not received prior approval of the insurance commissioner as required by MCL 500.3109a and granted summary disposition in favor of plaintiff, holding that "because the provisions of MCL 500.3109a have not been complied with, the Plaintiff's insurance policy with Citizens Insurance Company is not a coordinated policy[.]"

II. STANDARD OF REVIEW

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10)³ is as follows:

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this

³ Because the trial court relied on documentary evidence in granting plaintiff's motion, we will review this issue as if the trial court granted summary disposition under MCR 2.116(C)(10).

Court “must consider the documentary evidence presented to the trial court ‘in the light most favorable to the nonmoving party.’” *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

To the extent that this case requires us to engage in statutory interpretation of MCL 500.3109a, the interpretation of a statute is a question of law that we review de novo. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

III. ANALYSIS

A. COORDINATION OF BENEFITS UNDER MCL 500.3109a

The no-fault act allows an insured party to elect to coordinate no-fault coverage with health or accident insurance. MCL 500.3109a; see *Smith v Physicians Health Plan, Inc*, 444 Mich 743, 750; 514 NW2d 150 (1994). The legislative intent in permitting coordination “was to provide individuals with an opportunity to reduce premiums if they already had health insurance that covered automobile accidents.” *Id.* at 749. When an insured elects coordinated coverage, the insured pays a lower premium and, in return, the no-fault carrier is secondarily responsible for certain expenses arising from an accident, while the insured’s other insurer becomes primarily responsible to the extent of the risk it contracted to cover. See *Auto Club Ins Ass’n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 384; 505 NW2d 820 (1993). The coordination of benefits provision of the no-fault act, MCL 500.3109a, provides:

An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.

B. TRIAL COURT’S DECISION ON REMAND

In our previous decision in this case, we remanded to the trial court for consideration of plaintiff’s claim “that a question of fact exists as to whether an appropriately reduced premium was provided in light of his employer’s self-funded long-term disability plan and whether the reduction was ‘reasonably related’ to his being entitled to such benefits.” *Darmer*, slip op p 2. This instruction clearly encompassed only the first sentence of MCL 500.3109a: “An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the

insured.” Our remand instructions did not encompass a determination by the trial court regarding the insurance commissioner’s prior approval of defendant’s reduced premium rates, which involves the second sentence of MCL 500.3109a. Nevertheless, it is clear from its comments on the record that the trial court focused on the “prior approval by the commissioner” language in the second sentence of MCL 500.3109a:

Thank you. And Plaintiff in the Court of Appeals conceded that *Jarrad* was controlling for the purpose of determining that no-fault benefits may, in general, be coordinated with his LTD plan. That’s—I’m quoting from the Court of Appeals’ decision:

However, Plaintiff—Instead, pointing to the language of MCL 500.3109(a) [sic] above, he argues that a question of fact exists as to whether an appropriately reduced premium was provided in light of his employer’s self-funded long-term disability plan and whether the reduction was reasonably related to his being entitled to such benefits.

That’s basically the language of 500.3109(a) [sic], which says:

The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy.

The word shall is defined in case law. It means mandatory. It’s not discretionary. It’s not permissive. It shall be subject to prior approval by the commissioner. And I realize Defendant and the carrier submitted all of the documents that appeared to be necessary for requesting coordinated—it looks like everything was submitted perfectly in order from my review of that submission.

However, I question—I don’t think that constitutes prior approval of the commissioner. Simply by no action on behalf—on the part of the commissioner equals approval by the insurance commissioner.

* * *

So, therefore, the Court finds that although the coordination is permissible and is allowable by law, I don’t believe that 500.3109(a) [sic] has been complied with because there is no action. There is no final decision of approval by the insurance commissioner. So the Court is—so the Court is granting summary disposition in favor of Plaintiff that the subject insurance policy at this point is a noncoordinated insurance policy.

Curiously, the trial court correctly articulated our instructions on remand, but then only quoted the second sentence of MCL 500.3109a, which is the portion of the statute requiring the prior approval of the insurance commissioner. The trial court’s statements on the record indicate that it focused exclusively on the question of prior approval.

The trial court's order granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition also demonstrates its failure to adhere to our instructions on remand. According to the order, this Court remanded "for consideration of whether or not there has been proper compliance with MCL 500.3109a[.]" As noted above, our instructions on remand were not as broad or general as this. We did not instruct the trial court to determine general compliance with MCL 500.3109a; to the contrary, our remand instructions specifically limited the trial court's determination on remand to a determination regarding the first sentence of MCL 500.3109a.

"[W]hen an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). "It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Id.* at 544-545, quoting *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). In this case, our clear instructions to the trial court limited the scope of remand to a determination regarding the first sentence in MCL 500.3109a and did not implicate the second sentence in the statute relating to prior approval by the insurance commissioner. Therefore, the trial court failed to strictly comply with our instructions in granting summary disposition in favor of plaintiff based on the lack of prior approval of the reduced premium rates by the insurance commissioner. Such a determination was outside of our clearly articulated instructions on remand and was improper.

Finally, even if we had not concluded that the trial court's ruling in this case exceeded the scope of our remand instructions, we would question the trial court's remedy in this case. The trial court's ruling effectively reformed the insurance contract by transforming it from coordinated coverage to a policy that was not coordinated. Courts will reform a contract to reflect the parties' actual intent where there is a mutual mistake, fraud, or the instrument does not express the true intent of the parties.⁴ *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995). In this case, however, there was no mutual mistake or fraud, and the policy expressed the parties' true intent.

In *Rory v Continental Ins Co*, 473 Mich 457, 465-470; 703 NW2d 23 (2005), our Supreme Court held that a court may not modify or refuse to enforce a provision in an insurance contract based on a judicial determination of reasonableness because to do so undermines the parties' freedom to contract. As the Supreme Court explained:

A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that "[t]he general rule [of contracts] is that competent

⁴ Although *Olsen* did not involve an insurance contract, "insurance policies *are* subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) (emphasis in original).

persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.”
[*Rory*, 473 Mich at 468 (emphasis in original; footnotes omitted).]

Although the trial court’s reformation of the insurance policy in this case was not based on a judicial determination of reasonableness, it nonetheless undermines plaintiff’s freedom to contract for the purchase of a coordinated insurance policy. The judiciary should not rewrite an insurance contract that was freely entered into if the contract does not violate the law or public policy. *Id.* at 469.

Reversed and remanded. We do not retain jurisdiction. No taxation of costs pursuant to MCR 7.219, a public question being involved.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens