STATE OF MICHIGAN

COURT OF APPEALS

OTTO HERMAN, JR.,

Plaintiff-Appellee,

v

HOME INSURANCE COMPANY,

Defendant-Appellant.

March 25, 1993

No. 132789

Before: Jansen, P.J., and Cavanagh and Schaefer,* JJ.

PER CURIAM.

Defendant appeals from an August 20, 1989, order of the Wayne Circuit Court granting plaintiff's motion for summary disposition and awarding full personal injury protection insurance benefits ("PIP") under a policy issued by defendant. We affirm.

For purposes of the motion for summary disposition, the parties stipulated to the following facts. On August 11, 1988, plaintiff was employed by Jeep Corporation which is a subsidiary of Chrysler Corporation. On that date, plaintiff was involved in an auto accident in Michigan while operating a vehicle insured under a policy issued to Chrysler Corporation by defendant. The parties stipulated that the automobile that plaintiff was driving was properly insured under the policy. In addition to the policy, defendant issued endorsements providing for coordination of PIP benefits with any wage loss and medical benefits that the insured was eligible to receive. The effective date of the policy was April 1, 1988, and it was to continue through April 1, 1989. The endorsements at issue were prepared January 3, 1989, but purported to be effective from the date the policy was issued. The parties further stipulated that there was no known documentation reflecting an agreement by plaintiff to be bound by the endorsements.

On February 12, 1990, plaintiff filed this claim when it became apparent that defendant was going to treat the policy as one providing for coordinated PIP benefits. Plaintiff subsequently filed his motion for summary disposition, claiming that there was no genuine issue of material fact and asking that the policy be construed as providing full PIP coverage. See MCR 2.116(C)(10). Defendant claimed that the date the endorsements were prepared was inconsequential to the date upon which they became effective. A hearing was conducted and, following oral argument, the trial court ruled that the endorsements were not part of the original insurance contract and that, once the accident occurred, defendant was in no position to change the terms of the policy as they related to plaintiff's PIP benefits. The court subsequently issued the order granting plaintiff's motion and defendant now appeals.

A motion for summary disposition pursuant to MCR 2.116(C)(10), tests the factual support for a given claim. Mascarenas v Union Carbide Corp, 196 Mich App 240, 243; 492 NW2d 512 (1992). The court considering the motion is obligated to consider the pleadings, depositions, affidavits, admissions, and any other documentary evidence presented by the parties. Id. Giving the benefit of doubt to the nonmoving party, the court must ask whether a record might be developed that would leave open an issue of fact upon which reasonable minds might differ. Id. However, if the pleadings show that a party is entitled to judgment as a matter of law or that there is no genuine issue of fact, the court is obligated to enter judgment without delay. MCR 2.116(I)(1); Nationwide Mutual Ins Co v Quality Builders, Inc, 192 Mich App 643, 648; 482 NW2d 474 (1992).

In this case, we conclude that the trial court properly granted summary disposition in favor of

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

plaintiff. It is axiomatic that the liability of an insurer becomes absolute once the injury or damage implicating coverage takes place. Madar v League General Ins Co, 152 Mich App 734, 742; 394 NW2d 90 (1986); DAIIE v Ayvazian, 62 Mich App 94, 100; 233 NW2d 300 (1975). Once that liability is fixed, the policy may not be cancelled or annulled by agreement between the parties or otherwise. Id.

Contrary to defendant's contention, we construe the endorsements prepared on January 9, 1989, as an attempt at annulling coverage after the insurable event had already taken place. The face of the insurance policy does not contain a reference to the endorsements purporting to limit liability for full PIP benefits. There is a specific section in the policy that refers the insured to endorsements that are effective when the policy was originated. The endorsements at issue herein were not mentioned. Moreover, there are sections containing limitations with regard to each area of coverage also documented on the face of the policy. Again, under the PIP section, there is no specific reference to the endorsements upon which defendant now relies.

Defendant spends a great deal of time arguing that the intent of the parties was to limit liability to coordinated coverage, and that we should consider previous policies and endorsements in order to ascertain whether such an intent was existent in the instant case. We are not permitted to create an ambiguity in an insurance contract where none is evident. Auto-Owners Insurance Company v Churchman, 440 Mich 560, 567; 489 NW2d 431 (1992). The fact that the parties opted to coordinate coverage in the past has no bearing on the instant case where it is clear from the face of the policy that the endorsements were not included at the policy's inception. To hold otherwise would be to give insurers incentive to draft retroactive policy modifications after concluding that the inclusion of a particular clause may not have been in the best interests of the company.

If, as defendant suggests, the parties had historically agreed to coordinate PIP benefits with available wage loss and medical benefits, then the endorsements should have been included at the time the policy was renewed and reference thereto made in the appropriate areas of the policy. In this case, the endorsements were not prepared until some nine months after the original policy became effective. Inasmuch as plaintiff suffered an insurable loss before the endorsements were prepared, the presumption must be that the original policy did not limit his PIP benefits to coordinated coverage.

Having concluded that plaintiff was entitled to full PIP benefits on the date the accident occurred, it is unnecessary for us to address defendant's argument with regard to the propriety of an employer's provisions for coordinated benefits in a fleet policy.

Affirmed. Plaintiff may tax costs.

s/Kathleen Jansen
s/Mark J. Cavanagh
s/Philip D. Schaefer