STATE OF MICHIGAN

COURT OF APPEALS

WAYNE KENNETH JOHNSON,

Plaintiff,

and

CITIZENS INSURANCE COMPANY,

Defendant/Cross-Plaintiff/
Third-party Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant/
Cross-Defendant-Appellant,

and

DEANNA LYNNE BRIDGEFORTH and
JOYCE KATHLEEN BRIDGEFORTH,

Third-party Defendants.

UNPUBLISHED
October 6, 1995

No. 168083
LC No. 92-217453-CK

Before: Holbrook, Jr., P.J., and Hoekstra and Duncan Beagle,* JJ.

PER CURIAM.

This appeal concerns whether Citizens Insurance Company or Allstate Insurance Company is the proper insurer for purposes of paying no-fault personal protection insurance (PIP) benefits for injuries sustained by plaintiff in a motor vehicle accident. The circuit court granted summary disposition to Citizens on the basis that Allstate is the proper insurer, ordering judgment of $22,281.61 in favor of Citizens on its cross-claim against Allstate and declaring that the orders regarding the cross-claim were final. Allstate appeals as of right and we reverse and remand for further proceedings.

For purposes of its motion for summary disposition, Citizens agreed that Allstate cancelled Deanna Bridgeforth's policy prior to September 16, 1991. However, Citizens asserted that Allstate's act of accepting payment "on or about September 16, 1991" and its notice of September 30, 1991, to Deanna Bridgeforth that her policy "was continued in effect without interruption" established that Allstate was liable for plaintiff's no-fault benefits as a result of the September 16 accident. Thus, Citizens apparently relied on a waiver or estoppel theory against Allstate.

In reviewing a grant of summary disposition under MCR 2.116(C)(10), this Court must independently determine whether the moving party was entitled to judgment as a matter of law. Adkins v Thomas Solvent Co, 440 Mich 293, 302; 487 NW2d 715 (1992). Giving Allstate the benefit of all doubts and resolving all reasonable inferences in its favor, we conclude that a genuine issue of material

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

fact exists whether Allstate accepted the late, partial premium payment of $205 for the purpose of retroactively continuing coverage from September 4, 1991, or reinstating coverage on September 17, 1991, the date it received the payment. Citizens asserts in its cross-claim that Allstate is estopped from claiming lapsed coverage, relying on waiver/estoppel principles espoused in Glass v The Harvest Life Ins Co, 168 Mich App 667; 425 NW2d 107 (1988), and Auto Club Ins Ass'n v Dennie, 188 Mich App 634; 470 NW2d 409 (1991). However, because an insurer generally cannot be held liable for a loss for which it charged no premium, if no premium was tendered and accepted by Allstate for the period between September 4 and 16, 1991, it would follow that neither waiver nor estoppel principles would apply. See Lee v Evergreen Regency Cooperative, 151 Mich App 281; 390 NW2d 183 (1986). Because resolution of these issues requires further factual development, neither party was entitled to summary disposition as a matter of law.

Reversed. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra
/s/ Duncan M. Beagle

as defendant's actions in retaining the premium.

As this Court explained in Glass v Harvest Life Ins Co, 168 Mich App 667, 670-671; 425 NW2d 107 (1988), an insurance company which otherwise has the right to cancel an insurance policy may waive that cancellation by acceptance and retention of a late premium:

> Waiver is the intentional relinquishment of a known right. Weller v Manufacturer's Life Ins Co, 256 Mich 532, 536; 240 NW 34 (1932). An insurer which unconditionally accepts a premium with knowledge of a loss may be found to have waived its right to assert the policy lapse. Weller, supra; Farmers' Mutual Fire Ins Co v Bowen, 40 Mich 147 (1879). The doctrine applies to an insurer who, with knowledge of the insured's death, accepts and retains a premium tendered to cover the loss. Ramirez v Metropolitan Life Ins Co, 580 P2d 1136 (Wy, 1978). The premium must be promptly returned upon learning that death preceded payment.

In Glass, not only was the insurance premium paid late, but it was also paid after the claim accrued, that is, after the insured's death. The insurance company, aware of the insured's death, accepted payment of the premium, deposited it and made no investigation until plaintiff's claim was submitted. In the case at bar, plaintiff's position is even stronger in that the premium was tendered to defendant prior to the claim arising. Defendant, like the insurance company in Glass, deposited the premium and, in fact, retained the premium until almost three months after plaintiff's claim accrued.

We are unpersuaded that the provision in the October 10 notice informing plaintiff that the premium was received too late to reinstate coverage and that plaintiff must contact his agent in order to establish new coverage should operate to defeat plaintiff's claim. First, the notice earlier states that defendant had received plaintiff's payment, and that that payment had been "credited to the outstanding premium on your account." Moreover, the notice itself reflects that no additional premium was due. Thus, defendant accepted plaintiff's late payment of premium, credited it to plaintiff's account, and acknowledged that no further premium was due.

Accordingly, we conclude that defendant, by its conduct and by the specific information contained in the October 10 notice, waived cancellation of the policy. Had defendant wished to cancel the policy, it could have refused to accept plaintiff's late premium payment and returned plaintiff's money order to him and directed plaintiff to contact his agent to reestablish coverage. For that matter, even having accepted plaintiff's premium, defendant could have notified plaintiff that it was cancelling coverage due to plaintiff's failure to tender the full premium payment by the deadline and refund plaintiff the premium received prior to the accrual of the claim, but defendant failed to do this. Indeed, it was only after a claim accrued that defendant chose to tender back the premium and then did so three months after the accrual of the claim.

In sum, we conclude that defendant's conduct establishes a waiver of the cancellation of the policy. At most, the statements in the October 10 notice that plaintiff had to contact his agent to reinstate coverage create an ambiguity between that portion of the notice and the statements in the notice that plaintiff's premium payment had been received, credited to his account, and that no remaining amount was due on plaintiff's account. Such ambiguity we will construe against defendant as the issuer of the notice. Cf. Allstate Ins Co v Tomaszewski, 180 Mich App 616, 619; 447 NW2d 849 (1989).

Affirmed. Plaintiff may tax costs.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Robert B. Burns