STATE OF MICHIGAN

COURT OF APPEALS

JERRY W. MOLLIEN and MOIRA G. MOLLIEN,

Plaintiffs-Appellees,

v

DAVID A. MERILLAT d/b/a/ GEETINGS PARTS & SERVICES, INC. AND BRANDY K. MERILLAT,

Defendants-Cross
Plaintiffs-Appellees,

and

FARM BUREAU INSURANCE COMPANY,

Defendant-Cross
Defendant-Appellant,

and

FRANKENMUTH MUTUAL INSURANCE COMPANY,

Defendant-Cross
Defendant-Appellant.

UNPUBLISHED
February 20, 1996

Nos. 169947; 170277
LC No. 92-22582-NI

Before: Marilyn Kelly, P.J., and Corrigan and C.D. Stephens,* JJ.

PER CURIAM.

In this insurance coverage dispute, cross-defendants Farm Bureau Insurance Company and Frankenmuth Mutual Insurance company appeal as of right the order granting summary disposition under MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

On October 8, 1992, plaintiffs Jerry W. Mollien and Moira G. Mollien filed a complaint seeking damages against defendants Brandy K. Merillat, David A. Merillat (Brandy's father) d/b/a Geetings Parts & Services, Inc., AAA (plaintiffs' insurer), Farm Bureau Insurance Company (David Merillat's family automobile insurer), and Frankenmuth Mutual Insurance Company (David Merillat's business automobile insurer). Plaintiffs settled their claims with AAA. Plaintiffs alleged that they suffered injuries on July 27, 1991, when defendant Brandy Merillat, driving a red, 1981 Ford Escort, struck the motorcycle they were riding. Plaintiffs further alleged that, at the time of the accident, defendant Brandy Merillat was operating the Ford Escort in the course of her employment with defendant David Merillat, d/b/a Geetings Parts & Services, Inc. Plaintiffs also sought a declaratory judgment finding that defendants Frankenmuth and Farm Bureau owed coverage to defendant Merillats.

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

Defendants/cross-plaintiffs Brandy and David Merillat filed cross-claims against defendants/cross-defendants Farm Bureau and Frankenmuth. They alleged that cross-plaintiff Brandy Merillat transferred the red, 1981 Ford Escort to her father on July 20, 1991, one week before the accident, to replace a blue, 1981 Ford Escort. They further allege that, at the time of the accident, cross-plaintiff Brandy Merillat was operating the vehicle in the course of her employment with her father and that she resided in her father's household. Cross-plaintiff David Merillat allegedly notified both insurers of the accident within thirty days of acquiring the red Escort. Cross-plaintiffs pled alternative theories of insurance coverage, asserting that, if David was not the legal owner of the red Escort at the time of the accident, then Brandy was, and coverage still existed under both insurance policies.

Cross-plaintiffs filed a motion for summary disposition against cross-defendants Farm Bureau and Frankenmuth under MCR 2.116(C)(9) and (10). The trial court granted their motion under MCR 2.116(c)(10). On February 28, 1994, this Court issued an order granting a stay of the trial court action pending resolution of the present appeal.

II. CASE NO. 169947

Cross-defendant Farm Mutual asserts that the trial court erred in granting cross-plaintiffs' motion for summary disposition because many questions of material fact still exist. We agree. This Court reviews grants and denials of motions for summary dispositions de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

Farm Bureau's family auto policy states that it will pay on behalf of insureds damages "arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile . . . ." The policy further defines "owned automobile" as:

> (a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded,
> (b) a trailer owned by the named insured,
> (c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided
> (1) it replaces an owned automobile as defined in (a) above, or the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and (2) the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or
> (d) a temporary substitute automobile.

A "non-owned automobile" is defined as "an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile." The policy specifically excludes from coverage:

> [A]n owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured, such resident or partnership.
>
> [A] non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in (1) the automobile business of the insured . . .

In their brief on appeal, cross-defendant Farm Mutual cites several issues of material fact that precluded the trial court from entering summary disposition. These issues include: (1) was the vehicle an owned, non-owned, or neither under Farm Bureau's policy; (2) was the vehicle a personal or business automobile; (3) who owned the vehicle at the time of the accident; (4) did Farm Bureau insure the vehicle in question; (5) did David Merillat intend to insure the vehicle in question on Farm Bureau's policy; and (6) was Brandy Merillat a resident of David Merillat's household at the time of the accident.

Cross-plaintiffs assert that cross-defendant Farm Bureau failed to establish a genuine issue of material fact regarding the portion of the insurance policy which defines an owned automobile. In their motion for summary disposition, cross-plaintiffs assert that cross-defendant Farm Bureau insured all private passenger automobiles owned by cross-plaintiff David Merillat. In their response, cross-defendant Farm Bureau asserts that the policy did not insure all private passenger automobiles owned by cross-plaintiff David Merillat. Cross-plaintiffs, as moving parties, must submit a proper affidavit as to a dispositive fact before cross-defendant Farm Bureau is obligated to submit any affidavit in kind. *Bobier v Norman*, 138 Mich App 819, 823; 360 NW2d 313 (1984). Cross-defendant Farm Bureau is not required to refute the bald assertion contained within the motion for summary disposition without proper attestation from cross-plaintiffs. Their affidavits did not properly state with particularity facts establishing the grounds stated in the motion. This issue therefore remains in dispute.

The next issues are whether the red Escort was a business automobile or a personal automobile and whether cross-plaintiff David Merillat intended to insure the vehicle on Farm Bureau's policy. In its response to cross-plaintiffs' motion for summary disposition, cross-defendant Farm Mutual quoted a portion of cross-plaintiff David Merillat's deposition. David Merillat stated that, prior to the accident, he never intended to use the red Escort as a personal car. He further admitted that he would not have put the red Escort on his Farm Bureau policy if the accident had not occurred. Cross-defendant Farm Bureau has met their burden of establishing a genuine issue of material fact on these issues.

The next issue is who owned the vehicle at the time of the accident. In their answer to the cross-complaint, cross-defendant Farm Bureau admitted paragraph 12 of the cross-complaint, which states as follows:

> That on or about July 20, 1991, Defendant David A. Merillat acquired a red 1981 Ford Escort wagon from Brandy K. Merillat and received from Brandy K. Merillat a signed transfer of title conveying title of said vehicle to David A. Merillat.

Therefore, as it relates to cross-defendant Farm Bureau, the issue of the ownership of the vehicle is not in dispute. The parties agreed that cross-plaintiff David Merillat owned the red Escort at the time of the accident.

Cross-plaintiffs assert that cross-defendant Farm Bureau conceded in its answer to the cross-complaint that the red Escort was a replacement vehicle and therefore covered under the policy. At oral argument, cross-plaintiffs' attorney withdrew this assertion. The issue regarding whether cross-defendant Farm Bureau insured the vehicle in question remains disputed.

The next issue is whether cross-plaintiff Brandy Merillat resided in her father's home at the time of the accident. This is relevant to the owned automobile exception provision for business automobiles under the Farm Bureau policy. Cross-plaintiffs both stated in their affidavits in support of summary disposition that Brandy Merillat was living at home on the date of the accident. In its response to the motion for summary disposition, cross-defendant Farm Bureau cited to cross-plaintiff David Merillat's deposition, where he stated that Brandy Merillat was not living at home. Thus, cross-defendant Farm Bureau has met its burden of establishing a genuine issue of material fact on this issue.

Because genuine issues of material fact remain in dispute, we reverse the grant of summary disposition.

Based on this Court's decision to reverse the order of summary disposition, we will not address cross-defendant Farm Bureau's argument that the court erred in granting summary disposition prior to the close of discovery.

III. CASE NO. 170277

A. Adequacy of Affidavits under MCR 2.119(B)(1)

Cross-defendant Frankenmuth asserts that summary disposition under MCR 2.116(C)(10) was improper because the affidavits submitted in support of cross-plaintiffs' motion failed to comply with M CR 2.119(B)(1). While we agree that the affidavits did not comply with MCR 2.119(B)(1), because cross-defendant Frankenmuth failed to establish resulting prejudice, we decline to reverse the court's grant of summary disposition on this ground.

MCR 2.119 applies to motions brought under MCR 2.116. See MCR 2.116(G). MCR 2.119(B)(1) states the following requirements for the form of affidavits:

> If an affidavit is filed in support of or in opposition to a motion, it must:
> (a) be made on personal knowledge;
> (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
> (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

An affidavit that is based only on "information and belief" fails to set forth with particularity facts that are admissible into evidence. *Durant v Stahlin*, 375 Mich 628, 639; 135 NW2d 392 (1965). The purpose of an affidavit is not to resolve an issue of fact; rather, it is to determine whether an issue of fact exists. *Id.* at 640; *SSC Associates v General Retirement System of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). The moving party must submit a proper affidavit as to a dispositive fact before the non-moving party is obligated to submit any affidavit. *Bobier v Norman*, 138 Mich App at 823.

The inadequacy of an affidavit does not, however, mandate reversal. This Court has found that, despite an affidavit being defective under MCR 2.119(B), plaintiff's failure to show resulting prejudice precluded reversal. *Hubka v Pennfield Township*, 197 Mich App 117, 119-120; 494 NW2d 800 (1992), rev'd in part on other grounds 443 Mich 864; 504 NW2d 183 (1993).

Cross-plaintiff David Merillat's affidavit states as follows:

> 1. That he is the defendant in the above-titled action.
> 2. That he is a resident of Lenawee County, Michigan.
> 3. That Brandy K. Merillat was living in his house at the time of the accident.
> 4. That the facts as stated in the attached Motion for Summary Disposition are true.
>
> I DECLARE THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

Cross-plaintiff Brandy Merillat's affidavit states essentially the same thing, except that she is a resident of Hillsdale County, Michigan.

We agree that the affidavits of cross-plaintiffs Brandy and David Merillat violated MCR 2.119(B)(1). The affidavits did not indicate whether they were based on personal knowledge. The affidavits failed to state with particularity facts admissible as evidence; rather, they merely stated that the facts stated in their motion for summary disposition were true. Finally, the affidavits did not show affirmatively that cross-plaintiffs could testify competently as to the facts stated in the affidavit. Despite the inadequacy of the affidavits, cross-defendant Frankenmuth have failed to establish resulting prejudice. Cross-defendant's brief supporting their motion for summary disposition properly identified the issues that they claimed involved no factual dispute. MCR 2.116(G)(4).

B. Issue of Credibility

Cross-defendant Frankenmuth contends that summary disposition was improper because the material issue of whether the red 1981 Escort was sold or traded to cross-plaintiff David Merillat on July 20, 1991 depended solely on the issue of credibility of cross-plaintiffs. We agree.

The law in Michigan is settled that a genuine issue of material fact exists and a trial court cannot grant a motion for summary disposition "where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility . . . ." *SSC Associates, supra* at 365, citing *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1976); *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 118; 421 NW2d 592 (1988); *Crossley v Allstate Ins Co*, 139 Mich App 464, 468; 362 NW2d 760 (1984). See also *Shimmons v Mortgage Corp of America*, 206 Mich App 27, 29; 520 NW2d 670 (1994). This is true even when the non-moving party is unable to counter the moving party's affidavit. See *Durant v Stahlin*, 374 Mich 82; 130 NW2d 910 (1964).

In their motion for summary disposition, cross-plaintiffs state that "Defendant, DAVID A. MERILLAT, acquired the red 1981 Ford Escort in trade from BRANDY K. MERILLAT on July 20, 1991." Through their affidavits filed in support of their motion for summary disposition, cross-plaintiffs both attested to this statement. The truth of this statement depends solely on their credibility, which is inherently suspect because they are interested parties. See *Durant v Stahlin*, 374 Mich at 88. The date of the transfer of the red Escort is a material fact affecting coverage. If cross-plaintiff Brandy Merillat owned the car at the time of the accident, coverage under the policy, if any, would depend upon whether she was driving the car during the course of her employment, which remains disputed.

Cross-defendant Frankenmuth further contends that summary disposition was improper because a material question of fact remains regarding whether cross-plaintiff David Merillat gave proper notice of the acquisition of the red Escort. We agree. Cross-plaintiff David Merillat asserts and attests in his motion for summary disposition that he notified his insurance agent on July 27, 1991, the date of the accident, that the vehicle was to be a covered auto under the Frankenmuth policy. However, cross-plaintiff David Merillat testified at a deposition that he notified the Frankenmuth agent about the accident but did not request that the vehicle be added to his Frankenmuth policy. The policy requires that the insured inform Frankenmuth "within 30 days after you acquire it that you want us to cover it for that coverage."

Because genuine issues of material fact exist, we reverse the grant of summary disposition and remand for further proceedings.

C. Alternative Argument:

Cross-defendant Frankenmuth asserts that summary disposition was improper because cross-plaintiffs failed to meet their burden regarding their alternative argument that Frankenmuth was responsible for providing coverage even if Brandy Merillat owned the red 1981 Escort. The trial court

did not make a ruling on this alternative theory of liability. Therefore, the Court need not review this issue. *Vugterveen Systems, Inc v Olde Millpond Corp*, 210 Mich App 34, 38; 533 NW2d 320 (1995). Even if we were to review it, genuine issues of material fact remain regarding whether cross-plaintiff Brandy Merillat was driving the car during the course of her employment at the time of the accident, which affects coverage in this case.

Plaintiff Molliens' assertion that cross-defendant Frankenmuth conceded coverage under the policy is without merit. Cross-defendant Frankenmuth did not concede whether cross-plaintiff Brandy Merillat was driving the car during the course of her employment, which is a pivotal issue in this case.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Maura D. Corrigan
/s/ Cynthia Diane Stephens