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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-471

Filed 5 December 2023

Wake County, No. 21 CVS 7789

LISA GARRITY, Plaintiff,

v.

TYLER GODBEY, Defendant.

Appeal by Plaintiff from judgment entered 3 March 2022 by Judge Vince M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 25 January 2023.

*Trehy Safety Law, by Jerome P. Trehy, Jr., and Johnson & Groninger PLLC, by Ann Groninger, for plaintiff-appellant.*

*Teague Rotenstreich Stanaland Fox & Holt, P.L.L.C., by Kara V. Bordman and Camilla F. DeBoard, for unnamed defendant-appellee Allstate Property and Casualty Insurance Company.*

MURPHY, Judge.

Defendant-Insurer, Allstate, properly offset and is entitled to a credit for the amounts paid under its medical payments coverage policy to reduce the amount owed Plaintiff-Insured, Lisa Garrity, under Plaintiff's underinsured motorists' coverage policy. The Financial Responsibility Act does not prohibit this credit for medical

payments coverage, and we affirm the trial court's order granting Allstate's motion for judgment on the pleadings dismissing Plaintiff's claims to recoup the credit previously withheld by Allstate.

### **BACKGROUND**

On 10 May 2020, Plaintiff Lisa Garrity suffered over \$100,000.00 in damages after the named Defendant Tyler Godbey hit her with his vehicle while Plaintiff was riding her bike. Godbey's insurance company, State Farm Insurance Company, paid Plaintiff \$30,000.00, the limit of Godbey's State Farm policy, to compensate for Plaintiff's loss.

Plaintiff maintained a medical payments coverage and an underinsured motorists' coverage policy with unnamed Defendant-Insurer Allstate Property and Casualty Insurance Company. The underinsured motorists' coverage portion of the Allstate Policy contained a coverage limit of \$100,000.00 for bodily injury. The medical payments portion of Plaintiff's policy had a limit of \$10,000.00. Allstate tendered to Plaintiff, under the medical payments coverage portion of the policy, the \$10,000.00 limit toward reimbursement of Plaintiff's medical expenses.

The "Part B Medical Payments Coverage" of Plaintiff's policy contained a "Non-Duplication" provision, which stated that "[n]o person for whom medical expenses are payable under this coverage shall be paid more than once for the same medical expense under this or similar vehicle insurance . . . ." Likewise, "Part C2-Combined Uninsured/Underinsured Motorists Coverage" provided that, for the underinsured

motorists' coverage portion of Plaintiff's policy, "[t]he limits of bodily injury liability . . . shall be reduced by all sums . . . [p]aid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible . . . ." The underinsured motorists' coverage also provided that "[t]his coverage is excess over and shall not duplicate any amount paid or payable under Part B" for medical payments coverage. Allstate subtracted from its \$100,000.00 underinsured motorists' liability coverage to Plaintiff a \$30,000.00 credit for the coverage paid to Plaintiff by Godbey's State Farm policy, as well as a \$10,000.00 credit for the medical payments coverage Allstate had paid to Plaintiff under the medical payments portion of the Policy. Allstate therefore tendered to Plaintiff a total payout under the underinsured motorists' coverage portion of the Policy of \$60,000.00. The Parties do not dispute that Plaintiff was left with more than \$10,000.00 in remaining uncovered medical expenses after receipt of her total payouts from the three policy coverages paid to her.

On 4 June 2021, Plaintiff filed suit against Godbey and sought from Allstate an additional \$10,000.00 under her underinsured motorists' coverage policy on the ground Allstate was not entitled to the credit it claimed for the \$10,000.00 payment it made to Plaintiff under the medical payments coverage portion of the Policy. On 4 October 2021, Allstate filed an *Answer and Counterclaim for Declaratory Judgment* and, on 20 December 2021, filed a motion for judgment on the pleadings. Plaintiff referenced the Allstate policy in her complaint, and Allstate attached it to its answer and counterclaim.

The trial court heard the matter on 22 February 2022 and, on 3 March 2022, entered an order granting judgment on the pleadings in favor of Allstate on the ground Allstate was entitled as a matter of law to the \$10,000.00 credit and offset on the underinsured motorists' coverage for the \$10,000.00 payment it made to Plaintiff under the medical payments coverage portion of the Policy. The trial court dismissed Plaintiff's claims against Allstate as a result, and Plaintiff timely appealed.

### **ANALYSIS**

On appeal, Plaintiff contends the trial court erred in concluding Allstate was entitled to the \$10,000.00 credit for medical payments coverage as a matter of law. Plaintiff also contends the trial court improperly converted Allstate's motion for judgment on the pleadings into a motion for summary judgment and therefore denied Plaintiff the right to conduct certain discovery of Allstate. We disagree and affirm the trial court's order.

"Judgment on the pleadings is properly entered only if all the material allegations of fact are admitted, only questions of law remain, and no question of fact is left for jury determination." *Cooper v. Berger*, 268 N.C. App. 468, 472-73 (2019) (quotation marks and alterations omitted) (citing *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974) and *N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 336 (2010)), *aff'd*, 376 N.C. 22 (2020); *Mabrey v. Smith*, 144 N.C. App. 119, 124 ("[A] motion for judgment on the pleadings is properly granted when all material questions of fact are resolved in the pleadings, and only issues of law

remain.”), *disc. rev. denied*, 354 N.C. 219 (2001). “All allegations in the nonmovant’s pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.” *Barefoot v. Rule*, 265 N.C. App. 401, 403-04 (2019). We review *de novo* a trial court’s entry of judgment on the pleadings. *Cooper*, 268 N.C. App. at 472. Moreover, “[t]he construction and interpretation of provisions in an insurance contract is a question of law[,]” proper for judgment on the pleadings and reviewed by this Court *de novo*. *Kessler v. Shimp*, 181 N.C. App. 753, 756, *disc. rev. denied*, 361 N.C. 568 (2007).

#### **A. Improper Conversion to Summary Judgment**

We first address Plaintiff’s argument the trial court erroneously converted Allstate’s motion for judgment on the pleadings into a motion for summary judgment without giving Plaintiff the opportunity to conduct discovery.

Rule 12 of our Rules of Civil Procedure governs motions for judgment on the pleadings. *See* N.C.G.S. § 1A-1, Rule 12(c) (2022). Rule 12(c) provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.G.S. § 1A-1, Rule 12(c) (2022). Thus, “[o]nly the pleadings and exhibits which are attached and incorporated into the pleadings may be considered by the trial court” in ruling on a motion under Rule 12(c). *Helms v. Holland*, 124 N.C. App. 629, 633 (1996). “The phrase ‘matters outside the pleading[s]’ refers to evidentiary materials used to establish facts.” *Blue v. Bhiri*, 381 N.C. 1, 6 (2022) (quoting N.C.G.S. § 1A-1, Rule 12(b)); see *Sauls v. Barbour*, 273 N.C. App. 325, 330 (2020) (“[Rule 12(c)] sets forth a procedure analogous to the conversion of a motion to dismiss under Rule 12(b)(6) to a motion for summary judgment.”). Moreover, “memoranda of points and authorities as well as briefs and oral arguments are not considered matters outside the pleading.” *Blue*, 381 N.C. at 6 (quotation and alterations omitted). It is also “axiomatic that the arguments of counsel are not evidence.” *Id.* (quotation omitted).

“In determining whether a trial court considered matters outside the pleadings when entering judgment on the pleadings, reviewing courts have looked to cues in the trial court’s order.” *Sauls*, 273 N.C. App. at 330. “In the event that the matters outside the pleadings considered by the trial court consist only of briefs and arguments of counsel, the trial court need not convert the motion into one for summary judgment.” *Id.* (citations and quotation marks omitted). The exception to this rule is that “the consideration of memoranda of law and arguments of counsel can convert a Rule 12 motion into a Rule 56 motion if the memoranda or arguments contain any factual matters not contained in the pleading[s].” *Blue*, 381 N.C. at 4 (quotation, internal quotation, and alteration omitted); *Helms*, 124 N.C. App. at 633

(treating a motion for judgment on the pleadings as a motion for summary judgment where the trial court considered a deposition and “statements of fact in the briefs of the parties”).

We have held that, “where the trial court considers the terms of a contract that is both the subject of the action and specifically referenced in the complaint, a dispositive motion under Rule 12 is not thereby converted into a Rule 56 motion for summary judgment.” *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 242, *disc. rev. denied*, 367 N.C. 226 (2013). We have also explained “plaintiffs cannot complain of surprise when the trial court desires to familiarize itself with the instrument upon which the plaintiffs are suing because the plaintiffs have failed to reproduce or incorporate by reference the particular instrument in its entirety in the complaint.” *Coley v. N.C. Nat’l Bank*, 41 N.C. App. 121, 126 (1979).

The trial court in this case noted that, “after having reviewed the court file, the case law submitted by the parties, and having heard the argument of counsel, and finding that no genuine issue of material fact exists in the pleadings as to Plaintiff’s claims against [Allstate], . . . [Allstate] is entitled to Judgment as a matter of law.” Plaintiff argues this caselaw included materials from the records on appeal in those cases, which was improper and therefore converted Allstate’s motion into a motion for summary judgment. We see no reason why the underlying record on appeal in a case relied upon constitutes anything other than relevant legal authority, and it does not convert a motion into one for summary judgment absent some recitation of new

facts specific to the case being considered by the court. *See Erie*, 227 N.C. App. at 243-44 (“Having reviewed the briefs submitted by the parties at the hearing below, we agree with plaintiffs that the briefs are simply memoranda of points and authorities and contain no factual allegations outside of those presented in the complaint.”). Moreover, Plaintiff cites no binding authority for her contention the underlying case file in cited caselaw is not appropriately considered “legal authority,” and we have found none.

Plaintiff also maintains Allstate’s motion should have been addressed pursuant to Rule 56 in that she submitted discovery requests she would serve upon Allstate. According to Plaintiff, these discovery requests—which sought Allstate’s assessment of Plaintiff’s damages as well as information about its underwriting and “[c]laims-handling” of similar claims to Plaintiff’s—required the trial court to allow her the opportunity to obtain this information and prepare for a summary judgment hearing.

As discussed below, Allstate was entitled to judgment as a matter of law, *see Barefoot*, 265 N.C. App. at 404 (A motion for judgment on the pleadings is “the proper procedure when . . . only questions of law remain”), and Plaintiff was not entitled to obtain further discovery, which was irrelevant to the ultimate question of law underlying Allstate’s motion for judgment on the pleadings. *See Kessler*, 181 N.C. App. at 758 (“Defendant was entitled to judgment as a matter of law.”); *Davis v. Durham Mental Health/Dev. Disabilities/Substance Abuse Area Auth.*, 165 N.C.



App. 100, 104 (2004) (“No evidence is to be heard . . .”). The trial court did not err in proceeding under Rule 12(c).

### **B. Policy Construction and Financial Responsibility Act**

Plaintiff next argues North Carolina’s Financial Responsibility Act “nullifies and supersedes the provisions” in the policy that provide for non-duplication and a credit for medical payments coverage paid in determining the amount she is entitled to receive under her underinsured motorists’ coverage portion of the Policy. Plaintiff contends this is especially true where an insured has excess damages that remain unreimbursed and there is no risk of double recovery. Plaintiff cites numerous canons of contractual construction to support this argument. We conclude the pertinent provisions of the Financial Responsibility Act do not disallow the disputed credit for medical payments set forth in Allstate’s Policy and that this case is governed and controlled by our holding in *Kessler v. Shimp*. *Kessler*, 181 N.C. App. at 754.

“An insurance policy is a contract, and its provisions, where not contrary to the law, govern the distribution of any insurance proceeds.” *McLeod v. Nationwide Mut. Ins. Co.*, 115 N.C. App. 283, 289, *disc. rev. denied*, 337 N.C. 694 (1994). “[Underinsured motorist] coverage is governed by the Motor Vehicle Safety and Financial Responsibility Act—a lengthy, complicated statute . . . written into every policy of automobile insurance” in this State. *Tutterow v. Hall*, 283 N.C. App. 314, 317 (2022) (marks and citation omitted), *disc. rev. denied*, 384 N.C. 33 (2023). “The

provisions of the Financial Responsibility Act are ‘written’ into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail.” *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441 (1977). “The purpose of underinsured motorist (UIM) coverage in our state is to serve as a safeguard when tortfeasors’ liability policies do not provide sufficient recovery—that is, when the tortfeasors are under insured.” *N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 378 N.C. 181, 186 (2021) (marks omitted). Thus, once the tortfeasor’s own liability coverage is exhausted but a plaintiff is not yet fully compensated, the plaintiff “then turns to [her] own UIM coverage.” *Id.* (emphasis omitted); *see also Tutterow*, 283 N.C. App. at 316-17 (marks omitted) (“UIM coverage serves as a safeguard when tortfeasors’ liability policies do not provide sufficient recovery.”). Under the Financial Responsibility Act, if it is determined that the limits of the tortfeasor’s liability policy have been exhausted but the plaintiff retains unreimbursed losses from the accident, “the court must calculate the amount of coverage that is available under the applicable UIM policy” in accordance with the provisions of the Financial Responsibility Act. *Tutterow*, 283 N.C. App. at 317.

The relevant provision of the Financial Responsibility Act in this case provides, in pertinent part that, “[i]n any event[,]”

the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between *the amount paid to the claimant under the exhausted liability*

*policy or policies* and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

N.C.G.S. § 20-279.21(b)(4) (2022) (emphasis added).

In *Kessler v. Shimp*, the plaintiff appealed from an order of summary judgment in favor of the defendant-insurer who insured the vehicle the plaintiff was driving at the time she was injured in an accident caused by the defendant-tortfeasor. *Kessler*, 181 N.C. App. at 754. The plaintiff's policy with the defendant insurer provided coverage to the plaintiff of "\$100,000.00 per injured person in underinsured motorists' ('UIM') coverage and \$2,000.00 per injured person in medical payments coverage." *Id.* The tortfeasor's insurance company in *Kessler* had paid the plaintiff a policy limit of \$20,000.00 pursuant to the tortfeasor's own liability policy. *Id.* The defendant insurer therefore reduced its underinsured motorists' liability payment to the plaintiff by \$20,000.00, the amount paid to the plaintiff by the tortfeasor's insurance company. *Id.* The defendant insurer also paid the plaintiff \$2,000.00 pursuant to the medical payments coverage portion of that policy and therefore further reduced its underinsured motorists' liability coverage by a \$2,000.00 medical payments credit, resulting in a total underinsured motorists' coverage payment to the plaintiff of \$78,000.00. *Id.*

As in this case, the plaintiff in *Kessler* filed suit against the defendant insurer, claiming it was not entitled to take a credit for the paid medical payments coverage and that the plaintiff was therefore owed \$80,000.00 pursuant to the underinsured

motorists' coverage liability portion of the policy. *Id.* at 755. The trial court awarded summary judgment in favor of the defendant insurer, ruling that it was entitled to the \$2,000.00 medical coverage payment credit. *Id.* The plaintiff appealed, arguing the defendant insurer was not entitled to offset the \$2,000.00 medical coverage payment from its underinsured motorists' liability on the grounds that "(1) there was no potential duplication of payment because her damages exceeded all coverages available and (2) the language of the insurance contract [was] vague and must be construed against [the] defendant and in favor of coverage." *Id.* at 756.

In *Kessler*, we acknowledged the rule that "[a]ny ambiguities . . . as to the scope of coverage are to be resolved in favor of coverage." *Kessler*, 181 N.C. App. at 757 (quoting *McLeod*, 115 N.C. App. at 290). "This is because the insurance company prepared the policy and chose the language contained therein." *Id.* Nonetheless, we made clear that "the aforementioned rules of construction cannot be used to rewrite an unambiguous policy[.]" *Id.* (citation omitted). The defendant insurer's underinsured motorists' coverage policy that covered the plaintiff in *Kessler* "expressly" provided that the coverage was in "excess over and shall not duplicate any amount paid or payable under Part B" of the policy, the "Medical Payments Coverage" portion of the policy. *Id.* at 757-58 (emphasis omitted). We therefore held that, "[p]ursuant to the express terms of [the] defendant's insurance policy, [the] defendant properly credited and setoff the \$2,000.00 it had previously paid to [the] plaintiff

under the medical payments portion of its policy against the \$80,000.00 due [the] plaintiff for UIM coverage.” *Id.* at 758.

The policy in this case contains the same operating provisions regarding the setoff for and non-duplication of medical payments coverage that was at issue in *Kessler*, and we are bound by the holding of that case. *Id.* at 757-58. The policy contains a “Non-Duplication” provision, which states that “[n]o person for whom medical expenses are payable under this coverage shall be paid more than once for the same medical expense under this or similar vehicle insurance . . . .” Likewise, “Part C2-Combined Uninsured/Underinsured Motorists Coverage” provides as a limit of liability that “[t]he limits of bodily injury liability shown in the Declarations for each person and each accident for this coverage shall be reduced by all sums . . . [p]aid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible.” Part C2 also provides “[t]his coverage is excess over and shall not duplicate any amount paid or payable under Part B” for medical payments coverage.

Plaintiff nonetheless contends this case is different from and not controlled by *Kessler* in that the plaintiff in *Kessler* failed “to establish the absence of any double recovery” and that *Kessler* did not consider the Financial Responsibility Act’s “mandate for limits of liability” for underinsured motorist coverage. However, we noted specifically in *Kessler* that “*the medical payments coverage is not discussed in . . . the Financial Responsibility Act[.]*” *Id.* at 757 (emphasis added). We likewise

acknowledged in *Kessler* that there was “no potential duplication of payment *because [the plaintiff’s] damages exceeded all coverages available . . .*” *Id.* at 756 (emphasis added). The plaintiff in *Kessler* had similarly argued that the “defendant improperly set off from the amount due to her under the UIM portion of the insurance contract the \$2,000.00 previously paid to [the] plaintiff under the Part B medical payments portion of its policy[,]” *Id.* at 757, and we held that, under “the express terms of [the] defendant’s insurance policy, [the] defendant properly credited and setoff the \$2,000.00 it had previously paid to the plaintiff under the medical payments portion of its policy against the \$80,000.00 due [the] plaintiff for UIM coverage.” *Id.* at 758.

Plaintiff draws our attention to various other states that, by caselaw or otherwise, do not permit enforcement of an underinsured motorists’ coverage setoff or credit for medical payments made when the plaintiff’s damages exceed the available underinsured motorists’ coverage limit, so long as there is no threat of double recovery. Plaintiff urges us to follow suit and hold “that the express language of [N.C.G.S.] § 20-279.21(b)(4) proscribes for UIM policies the enforcement of Non-Duplication Clauses for MedPay coverage and of the MedPay Credit clause of UIM coverage, in the absence of a double recovery for a UIM insured.” But that is not the law in *this* State, and this Court is bound by our holding in *Kessler* that “the medical payments coverage is not discussed in [N.C.G.S. §20-279.21, *et seq.*], the Financial Responsibility Act[,] and . . . in the absence of an applicable provision in the Financial Responsibility Act, an insurer’s liability is measured by the terms of the policy as

written.” *Id.* at 757; *In re Appeal from Civil Penalty*, 324 N.C. 373, 384 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”). We cannot overrule the holding in *Kessler*, and any addition to the Financial Responsibility Act broadening the protection afforded to plaintiffs by underinsured motorists’ coverage in this State is for our General Assembly to make. *Civil Penalty*, 324 N.C. at 384; *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169-70 (2004) (marks and citations omitted) (“The General Assembly is the policy-making agency because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws. . . . [U]nlike the judiciary, the General Assembly is well equipped to weigh all the factors surrounding a particular problem, balance competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time[.]”).

### **CONCLUSION**

We agree with the trial court that, as a matter of law under the provisions of the relevant Allstate Policy, the total amount to be paid to Plaintiff as a tender by Allstate of her underinsured motorists’ coverage is \$60,000.00, representing the payment of the \$100,000.00 underinsured motorists’ policy limit less the \$40,000.00 previously paid to her under Godbey’s State Farm policy and the \$10,000.00 paid to her under the medical payments coverage portion of the Allstate Policy. Allstate is

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entitled to the \$10,000.00 credit as a matter of law, and we affirm the trial court's order granting Allstate's motion for judgment on the pleadings.

AFFIRMED.

Judges DILLON and FLOOD concur.

Report per Rule 30(e).