SUMMARY
February 15, 2024

2024COA15

No. 23CA0117, *Babayev v. Hertz* — Insurance — Motor Vehicle Rental Companies

A division of the court of appeals considers whether a motor vehicle rental company can be an insurer in light of the statutory amendments enacted in the wake of *Passamano v. Travelers Indemnity Company*, 882 P.2d 1312 (Colo. 1994). The division concludes that it can. The division therefore reverses the trial court's contrary ruling.

COLORADO COURT OF APPEALS **2024COA15**

Court of Appeals No. 23CA0117
City and County of Denver District Court No. 21CV32904
Honorable Alex C. Myers, Judge

Stanislav Babayev and Oleg Chikov,

Plaintiffs-Appellants,

v.

Hertz Corporation,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE RICHMAN*
Dunn and Davidson*, JJ., concur

Announced February 15, 2024

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Plaintiffs, Stanislav Babayev and Oleg Chikov, were passengers in a rental car and were injured when a van collided with their car and fled. Apparently unable to collect from the hit-and-run driver, they made insurance claims with the rental car company — defendant, Hertz Corporation — under the uninsured/underinsured motorist (UM) policy in the rental agreement. When Hertz did not fully pay their claims, they sued Hertz alleging breach of contract, bad faith breach of contract, and statutory claims for unreasonable delay and denial of insurance benefits. The district court held that Hertz was not the insurer and owed plaintiffs no duty. The court therefore dismissed all of plaintiffs' claims. Plaintiffs appeal. We reverse and remand for further proceedings.

I. Background

¶ 2 Hertz rented the car to Roman Rakhimov, who is not a party to this appeal. At the time of the rental, Hertz offered Rakhimov a "Liability Insurance Supplement" (LIS). The LIS included UM coverage for occupants of the car. Rakhimov accepted the LIS and paid Hertz an additional $18.85 per day for it. Hertz also offered,

and Rakhimov accepted, a loss damage waiver for an additional $26.99 per day.

¶ 3 At the time of the collision, Rakhimov was driving and plaintiffs were passengers. Plaintiffs were taken to the hospital after the collision and received extensive medical treatment.

¶ 4 Plaintiffs submitted claims to Hertz for their medical expenses under the UM coverage in the LIS that Rakhimov had purchased. After they received less than the full amount of their claimed expenses, plaintiffs filed this action against Hertz, alleging (1) breach of contract; (2) common law bad faith breach of an insurance contract; and (3) unreasonable delay and denial of insurance benefits under sections 10-3-1115 and -1116, C.R.S. 2023.[1] In these claims, plaintiffs alleged that Hertz either was their

[1] Plaintiffs' first claim for relief is titled simply "breach of contract." But it describes the contract as a "contract for automobile insurance"; alleges that Hertz, as the provider of insurance services, has an "implied duty of good faith and fair dealing"; and asserts that the insurance contract contains an "implied covenant of good faith and fair dealing." Therefore, we treat this claim as one for common law bad faith breach of an insurance contract. Consequently, the question whether Hertz is an insurer (or functioned like an insurer) is pertinent to all the claims in the case.

insurer or owed them an insurer's duty of good faith and fair dealing and breached that duty.

¶ 5 As trial approached, the parties asked the district court to resolve two questions under C.R.C.P. 56(h): (1) whether Hertz was plaintiffs' insurer; and (2) if Hertz was not plaintiffs' insurer, whether Hertz nevertheless owed plaintiffs an insurer's duty of good faith and fair dealing under *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462 (Colo. 2003), and *Riccatone v. Colorado Choice Health Plans*, 2013 COA 133. Under those opinions, a non-insurer owes a duty of good faith and fair dealing if it performs the function of an insurer and has a financial incentive to limit the insured's claim. *Riccatone*, ¶ 17 (citing *Cary*, 68 P.3d at 469). The parties and the district court referred to such a non-insurer as a de facto insurer, and we will too.

¶ 6 Hertz argued it was neither an actual nor a de facto insurer. According to Hertz, plaintiffs' actual insurer was Hertz's insurer, CHUBB Ace American Insurance Company (CHUBB). Hertz's contract with CHUBB (CHUBB policy) contained a UM provision

insuring Hertz's vehicles and renters against damages caused by uninsured motorists.[2]

¶ 7 Hertz argued it was not a de facto insurer because it had a risk management services agreement (RMSA) with a company called ESIS, under which ESIS handled all claim adjustment and administration for insurance claims against Hertz. Thus, Hertz contended it did not perform the functions of an insurer and owed plaintiffs no duty.

¶ 8 After receiving briefing from the parties, the court determined that the material facts for both questions were undisputed and agreed with Hertz. The court held, as a matter of law, that Hertz was neither an actual insurer nor a de facto insurer.

¶ 9 Plaintiffs then moved to amend their complaint to include CHUBB and ESIS as defendants and add a claim under the Colorado Consumer Protection Act. The court denied the motion. It

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[2] The CHUBB policy is a "fronted" policy. It provides that CHUBB will initially pay UM claims on behalf of Hertz up to the policy limit, but Hertz has to repay as a "deductible" to CHUBB whatever amounts CHUBB "fronts." The UM policy limit and Hertz's deductible were the same amount, $1,000,000. Thus, CHUBB assumed no financial liability for damage caused by uninsured motorists, and all financial liability remained with Hertz.

then dismissed all of plaintiffs' claims against Hertz — as we understand it, the court ruled that because Hertz was neither an actual nor a de facto insurer, it owed plaintiffs no duty and was not the proper party for plaintiffs to sue.

¶ 10 Plaintiffs appeal the district court's dismissal of their claims, arguing that the court erred by (1) ruling as a matter of law that Hertz was neither an actual nor a de facto insurer and (2) denying plaintiffs' motion to amend their complaint. We agree that the court's C.R.C.P. 56(h) rulings were error. We therefore reverse and remand on that basis without addressing the denial of the motion to amend the complaint.

II. The District Court's C.R.C.P. 56(h) Rulings Were Error

¶ 11 A court may resolve a question of law under C.R.C.P. 56(h) if there is no genuine issue of any material fact necessary for its resolution. *See Coffman v. Williamson*, 2015 CO 35, ¶ 12. For purposes of Rule 56(h), courts give the nonmoving party the benefit of all favorable inferences from the undisputed facts. *Id.* And courts must resolve all doubts about the existence of a triable issue of fact against the moving party. *Id.* Because we are reviewing the district court's grant of Hertz's motion for a declaration that it is

neither an actual nor a de facto insurer, we treat the plaintiffs as the nonmoving party and Hertz as the moving party. We review a district court's Rule 56(h) ruling de novo. *Id.*

¶ 12 We also interpret statutes de novo, aiming to give effect to the legislature's intent. *Antero Treatment LLC v. Veolia Water Techs., Inc.*, 2023 CO 59, ¶ 11. We do this by affording the language the legislature chose its ordinary and common meaning. *Id.* We interpret the statute as a whole and in the context of the entire statutory scheme, giving consistent, harmonious, and sensible effect to all its parts. *McCulley v. People*, 2020 CO 40, ¶ 10. If the language is unambiguous when considered in context, we apply it as written without resort to other interpretive aids such as legislative history. *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 2017 COA 31, ¶ 17.

¶ 13 Applying these standards, we conclude that the district court erred. We first explain that Hertz was plaintiffs' actual insurer under the relevant statutes and therefore the proper party for all of plaintiffs' claims. We also conclude that the district court erred by resolving the question of whether Hertz was a de facto insurer

because the material facts necessary to resolve that issue were disputed.

A. Hertz Was Plaintiffs' Insurer

1. General Statutory Definitions

¶ 14 Colorado's insurance statutes are found in title 10 of the Colorado Revised Statutes. In title 10, article 1, part 1, the legislature separately defines "insurance," "insurer," and "motor vehicle rental company." § 10-1-102, C.R.S. 2023.

¶ 15 Section 10-1-102(12) defines insurance as "a contract whereby one, for consideration, undertakes to indemnify another or to pay a specified or ascertainable amount or benefit upon determinable risk contingencies."

¶ 16 An "insurer" is "every person engaged as principal, indemnitor, surety, or contractor in the business of making contracts of insurance." § 10-1-102(13).

¶ 17 And, as relevant here, a "motor vehicle rental company" is "an entity that is in the business of renting . . . motor vehicles." § 10-1-102(15).

¶ 18 Nothing about these separate definitions suggests that a motor vehicle rental company cannot also be an insurer. Indeed, based

only on these definitions, Hertz was plaintiffs' insurer.[3] The rental agreement between Hertz and Rakhimov indemnified Rakhimov and his passengers for damage caused by uninsured motorists. It stated that the LIS "includes uninsured/underinsured motorist coverage . . . for bodily injury and property damage, if applicable, for the difference between the statutory minimum underlying limits and $1,000,000 for each accident." Hertz therefore engaged as a contractor, if not an indemnitor, in the business of making an insurance contract. And Hertz's status as a motor vehicle rental company doesn't exclude it from also being an insurer under section 10-1-102(13).

¶ 19 The district court concluded that Hertz was not an insurer based on the legislature's partial abrogation of our supreme court's opinion in *Passamano v. Travelers Indemnity Co.*, 882 P.2d 1312 (Colo. 1994), and various provisions of title 10. Hertz urges us to adopt the district court's analysis. We decline to do so.

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[3] To be clear, we are saying only that Hertz qualified as plaintiffs' insurer under the general definition of that term in section 10-1-102(13), C.R.S. 2023. We express no opinion about whether Hertz was subject to any requirements imposed by other sections of title 10.

2. *Passamano*

¶ 20 Title 10, article 4, part 6 contains provisions governing what must be included in automobile insurance policies. At the time of *Passamano*, these provisions required that all automobile insurers offer UM coverage to their insureds. § 10-4-609(1), C.R.S. 1994. *Passamano* addressed whether this requirement applied to rental car companies. 882 P.2d at 1317.

¶ 21 In *Passamano*, the driver rented a car from a rental car agency, which itself was insured by a third party. *Id.* at 1314. The rental agreement included collision damage waiver insurance. *Id.* But the rental agency did not offer or provide UM coverage. *Id.*

¶ 22 The driver was injured in a crash caused by an uninsured motorist and sued the rental agency and the agency's third-party insurer. *Id.* at 1315. Among other things, the driver alleged that the rental agency was an insurer and was therefore required to offer him UM coverage in the rental agreement under section 10-4-609(1), C.R.S. 1994. *Passamano*, 882 P.2d at 1315.

¶ 23 Our supreme court recognized that there were two separate insurance contracts, both of which insured the driver. *Id.* at 1317. Under the contract between the rental agency and third party, the

rental agency was an insured and the driver was an additional insured. *Id.* More importantly, the court held that the rental agency qualified as an insurer because it "offer[ed] to sell [the driver] various insurance coverages for specified prices."[4] *Id.* The rental agency was therefore subject to section 10-4-609(1), C.R.S. 1994, "requiring insurers to offer [UM] coverage to potential insureds." *Passamano*, 882 P.2d at 1317.

¶ 24 Hertz and the district court rightly point out that after *Passamano*, the legislature amended section 10-4-609(1) to fully exempt motor vehicle rental companies from the requirement to offer UM coverage. § 10-4-609(1)(b), C.R.S. 2023; *see* Ch. 51, sec. 4, § 10-4-609(1)(b), 1995 Colo. Sess. Laws 143. In fact, the legislature went further — it exempted rental car insurance policies from all of title 10, article 4, part 6's rules on automobile insurance. § 10-4-608(1)(c), C.R.S. 2023 ("This part 6 does not apply to any policy . . . arising out of a motor vehicle rental agreement . . . ."); *see* Sec. 3, § 10-4-608(1)(c), 1995 Colo. Sess. Laws at 143. The legislature did not, however, change the definition of "insurer" or

[4] The statutory definition of insurer is the same now as it was then.

"insurance." *Compare* § 10-1-102(12), (13), C.R.S. 2023, *with* § 10-1-102(7), (8), C.R.S. 1994. Thus, we are unpersuaded that the changes to the statutory scheme clarifying that rental car agencies are not required to offer UM coverage abrogated *Passamano*'s holding that by offering insurance coverages for specified prices, a motor vehicle rental company qualifies as an "insurer" under section 10-1-102(13), C.R.S. 2023. *See Passamano*, 882 P.2d at 1314.[5] That holding from *Passamano* therefore remains good law. Accordingly, although Hertz was not required to offer UM coverage to its customers, it did. And by offering that and other coverages to customers, it could qualify as an insurer.

3. Hertz's Reliance on Other Title 10 Provisions is Misplaced

¶ 25 We are not persuaded otherwise by Hertz's and the district court's reliance on various other provisions of title 10.

¶ 26 Hertz first points to another provision of title 10, article 4, part 6. Section 10-4-601(10)(a), C.R.S. 2023, says that "[a]s used in this

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[5] When the legislature chooses to legislate in a particular area, it "is presumed to be aware of existing case law precedent." *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004). Thus, the legislature was aware of this holding from *Passamano*, and the absence of a statutory amendment abrogating it evinces the legislature's intent that it remains the law.

part 6 . . . 'Policy' means an automobile insurance policy . . . under which the insured vehicles therein designated are of the following types only: [a vehicle not] rented to others pursuant to the terms of a motor vehicle rental agreement." The plain meaning of this provision is clear and limited: when the word "policy" appears in part 6, it does not refer to a rental car insurance policy in a rental agreement. That is consistent with the legislative amendments that followed *Passamano*, which make clear that part 6 does not apply to rental car insurance policies. *See* § 10-4-608(1)(c).

¶ 27 Hertz attempts to give this provision a broader reach and meaning, both of which are inconsistent with the words the legislature chose. According to Hertz, because a rental car insurance policy is not a policy for purposes of the inclusions required by article 4, part 6, it is *also and necessarily* not a contract of insurance as that term is used in the article 1 definition of insurer (one engaged in the business of making "contracts of insurance," § 10-1-102(13)).

¶ 28 This argument fails. Section 10-4-601(10)(a) explicitly says that its delineation of what is and is not a policy applies only to the use of that term in article 4 part 6 ("As used in this part 6 . . .

'Policy' means . . . ."). It therefore does not apply to a different term (contracts of insurance) in a different article and part of title 10 (section 10-1-102(13)'s definition of insurer).

¶ 29 Finding no additional support for its position in the provisions that specifically address automobile insurance in article 4, part 6, Hertz relies on two provisions in other articles of title 10. We find these arguments unpersuasive as well.

¶ 30 The first of these is found in article 2 of title 10, which "governs the qualifications and procedures for the licensing of insurance producers." § 10-2-102, C.R.S. 2023. Article 2 requires that every "insurance producer" be "duly licensed as an insurance producer." § 10-2-401(1), C.R.S. 2023. Hertz relies, as the district court did, on section 10-2-105(2)(g), C.R.S. 2023, which says that "[o]fficers or employees of a motor vehicle rental company" are not "insurance producers." This means exactly what it says: employees of motor vehicle rental companies are not insurance producers. It says nothing about whether motor vehicle rental companies may be insurers as that term is defined in section 10-1-102(13). Thus, exempting motor vehicle rental company officers or employees from being insurance producers has no bearing on whether a motor

vehicle rental company itself may qualify as an insurer under section 10-1-102(13). *See* § 10-2-105(1) (insurers need not obtain an insurance producer license).

¶ 31 Next, Hertz urges us to adopt the district court's reliance on a provision in article 3, which regulates insurance companies. The district court posited that section 10-3-903, C.R.S. 2023, stands for the proposition that motor vehicle rental companies are not "transacting insurance business" when they sell insurance in a rental agreement. And because a motor vehicle rental company's sale of insurance is not "transacting insurance business," the company is not engaged in the business of making insurance contracts, and is therefore not an insurer. This reading of section 10-3-903 contradicts the plain language the legislature chose.

¶ 32 Section 10-3-903(1) lists the acts that constitute "transacting insurance business . . . as the term is used" in the statute requiring insurance companies to procure a certificate of authority to transact insurance business in Colorado. §§ 10-3-903(1), 10-3-105(1), C.R.S. 2023.

¶ 33 But section 10-3-903(2)(j) provides that "[t]his section does not apply to . . . [t]he sale of authorized insurance by agents of a motor

vehicle rental company." The "section" that "does not apply" to rental car insurance is section 10-3-903. And section 10-3-903 explains what is and is not "transacting insurance business" for purposes of requiring insurance companies to procure a certificate of authority. Thus, this delineation of what is and is not "transacting insurance business" does not apply to rental car insurance, presumably because motor vehicle rental companies are not insurance companies that must procure a certificate of authority to do business. Nor does it alter the definition of insurer under section 10-1-102(13). It is therefore irrelevant to our analysis here.

4. The Applicable Rule and Consequences of Hertz Being an Insurer

¶ 34 To recap, *Passamano* held that a motor vehicle rental company is an insurer within the meaning of section 10-1-102(13) *if* it offers to sell the renter "various insurance coverages for specified prices." *Passamano*, 882 P.2d at 1317. Neither Hertz nor the district court has identified any statutory provision that contradicts or abrogates this rule. Therefore, this is the rule we must apply in this case. The question then becomes whether the undisputed material facts

established that Hertz offered to sell Rakhimov various insurance coverages for specific prices. We conclude that the undisputed material facts did just that.

¶ 35 There is no dispute that Hertz offered and Rakhimov purchased two separate insurance coverages at specific prices. According to the rental agreement, Rakhimov purchased the optional LIS that included UM coverage and the loss damage waiver that covered Rakhimov's "responsibility for damage to the vehicle." The LIS cost an extra $18.85 per day and the loss damage waiver cost an extra $26.99 per day. Because Hertz offered to and did sell Rakhimov two separate insurance coverages for specified prices, we conclude that Hertz was an insurer under section 10-1-102(13).

¶ 36 The conclusion that Hertz was plaintiffs' insurer means that Hertz was the proper party for plaintiffs to bring all its claims against.

¶ 37 The common law bad faith breach of an insurance contract claim requires a breach of the duty of good faith and fair dealing. *See Riccatone*, ¶ 12. And all insurers owe their insureds this duty. Thus, as the insurer, Hertz owed plaintiffs that duty and was potentially liable for breaching it.

¶ 38 And because Hertz could be subject to a claim of common law bad faith breach of insurance contract, Hertz could also be subject to a claim under sections 10-3-1115 and -1116 for unreasonable delay and denial of insurance benefits. *Id.* at ¶ 43 (section 10-3-1116(1) claim lies against only those who would also be subject to a common law bad faith breach claim). Thus, the court should have allowed plaintiffs' statutory claim against Hertz to proceed.

¶ 39 We therefore conclude that because Hertz was plaintiffs' insurer, the district court erred by dismissing plaintiffs' claims against Hertz.

B. Hertz as a De Facto Insurer

¶ 40 We also conclude that the district court erred by concluding that Hertz did not become a de facto insurer owing the plaintiffs an insurer's duty of good faith and fair dealing.

¶ 41 As mentioned above, non-insurers become de facto insurers if they "(1) perform the functions of an insurer *and* (2) have a financial incentive to limit an insured's claims." *Riccatone*, ¶ 17.

¶ 42 The facts material to Hertz's financial incentive were undisputed. The district court correctly found that Hertz "retains financial liability for Plaintiffs' claims" because the UM policy limit

under Hertz's CHUBB policy was equal to Hertz's deductible. We agree with this conclusion and the related inference that Hertz had a financial incentive to limit plaintiffs' claims.

¶ 43 However, the facts about the extent to which Hertz performed the functions of an insurer were disputed. In its order, the district court wrote that ESIS performed the claim administration on behalf of CHUBB, not Hertz. The court specifically found that Hertz "had not taken on any claim handling responsibilities" and had "no control over ESIS as CHUBB's claim administrator except as to approving settlements and claims handling expenses . . . that exceed certain thresholds."

¶ 44 But the district court's analysis ignores the simple fact that Hertz, not CHUBB, hired ESIS. And ESIS was responsible for administering claims against Hertz, not claims against CHUBB. The RMSA between Hertz and ESIS does not mention CHUBB. Based on the RMSA, ESIS was Hertz's claim administrator, not CHUBB's. Indeed, the RMSA explicitly provides that claim payments "are the obligation of Client [Hertz]."

¶ 45 Moreover, plaintiffs presented evidence in their Rule 56(h) filings suggesting that Hertz directed and was deeply involved in

ESIS's administration of plaintiffs' insurance claim. In a deposition, the ESIS claims adjuster assigned to plaintiffs' claim was asked whether it was her job to determine whether plaintiffs' injuries were attributable to the collision. She testified that "it's [Hertz's] case" and her role was "essentially the middle man to provide the information and pass it along." She testified that she could not reach out to defense counsel without authority from Hertz. In response to a question about her authority to hire a medical doctor for this claim, she testified that "[t]he Hertz Corporation maintains high involvement." And when asked if she or someone else determined that a specific medical procedure was related to the collision, she testified that Hertz "hold[s] the ultimate authority, when it comes to their files. It is their money."[6] She then reiterated that the "end-all, be-all" in investigating and evaluating conflicting expert medical opinions were two Hertz employees.

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[6] In its order, the district court explained that it "places little weight on any activity by Hertz after this litigation was filed . . . because it is reasonable to expect Hertz to defend itself as a defendant and be actively involved in the defense and negotiation of any possible resolution." We find this reasoning inapposite to the ESIS adjuster's deposition testimony. That testimony was about Hertz's involvement in the evaluation and adjustment of the claim, not its involvement in defending the legal action or settlement negotiations.

¶ 46 In short, there was some evidence that Hertz performed the functions of an insurer as delineated in *Riccatone*. The RMSA provided that claim payments were Hertz's obligation, and the adjuster's testimony suggested that Hertz had at least some involvement in adjusting and administering plaintiffs' claim. The district court acknowledged this evidence but dismissed it as "evidence in isolation." The court did not address whether this evidence was material or created a genuine issue of material fact, as a Rule 56(h) ruling requires.

¶ 47 Resolving all doubts about the existence of disputed material facts against Hertz, as we must, we conclude that the material facts about whether Hertz performed the functions of an insurer were disputed. It was therefore error for the district court to resolve this issue under Rule 56(h).

III. Disposition

¶ 48 The district court's judgment dismissing plaintiffs' claims is reversed and the claims are reinstated. The case is remanded to the district court for further proceedings consistent with this opinion.

JUDGE DUNN and JUDGE DAVIDSON concur.