

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH BENJAMIN MILES,

Plaintiff-Appellant,

v

TIG INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

August 22, 1997

No. 194779

Wayne Circuit Court

LC No. 95-519047

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant in this contract action alleging breach of an insurance policy. Plaintiff allegedly injured his left wrist in a hit-and-run accident. Defendant denied plaintiff uninsured motorist coverage under an automobile insurance policy issued to plaintiff. We affirm.

Plaintiff first argues that his case should not have been decided by the trial court but, rather, that the trial court should have ordered arbitration pursuant to the arbitration clause in the insurance policy. We disagree. The existence of an arbitration contract and the enforceability of its terms are judicial questions that cannot be decided by the arbitrator. *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995). To ascertain the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from the arbitration by the terms of the contract. *Id.* In the instant case, the insurance policy provides that defendant will pay plaintiff all sums which plaintiff would be legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury. The arbitration clause in the uninsured motorist endorsement section of the policy provides that a case is to go to arbitration when the parties disagree on whether an uninsured motorist would be legally liable to plaintiff or when the parties disagree on the amount of damages. The trial court properly determined that the arbitration provision did not apply to plaintiff's case because the parties did not disagree about whether an uninsured motorist would be legally liable or the amount of damages. Rather, defendant denied plaintiff coverage on the ground that plaintiff did not comply with the notice requirements of the policy.

Plaintiff next argues that the trial court should not have decided whether he provided adequate notice of his accident and that, even if he did not provide such notice, coverage was not precluded. We disagree. “When the facts are undisputed and only one conclusion is reasonably possible, the question of compliance with notice requirements in an insurance policy is one of law.” *Koski v Allstate Ins Co*, 213 Mich App 166, 175; 539 NW2d 561 (1995). In the instant case, the facts were undisputed and only one conclusion was reasonably possible. Therefore, the issue was one in which the trial court could rule on as a matter of law.

An insured must comply with the time set out in an insurance policy for filing notice of a claim. *Aldalali v Underwriters at Lloyd’s, London*, 174 Mich App 395, 398; 435 NW2d 498 (1989). An insured’s noncompliance, however, will not necessarily preclude coverage. The insurer must also show that it was prejudiced because of the insured’s delayed or lack of notice. *Wehner v Foster*, 331 Mich 113, 117; 49 NW2d 877 (1951); *Koski, supra*. An insurer may be prejudiced if it was denied an opportunity to investigate the facts and circumstances affecting the question of liability and the extent of such liability. *Wehner, supra* at 119. There is prejudice if the insurer could not make a prompt investigation while the facts were fresh in the mind of the parties and witnesses, and before any physical evidence and effects of the accident were obliterated. *Id.* at 120. In hit-and-run situations, the policy required plaintiff to report the accident within twenty-four hours to the police and to file a statement with defendant within thirty days of the accident. Plaintiff never filed a police report and he did not file a statement with defendant within thirty days of the alleged accident. Plaintiff did not report the accident to defendant until fourteen months after the accident occurred. The policy further provided that plaintiff’s claim would not be invalid for failure to give prompt notice of the accident if: (1) plaintiff shows that it was not reasonably possible for him to give defendant prompt notice; and (2) plaintiff gave proper notice of the accident as soon as was reasonably possible. Plaintiff has not satisfied these two conditions; he provided no reasonable explanation for his delay in giving notice. As a result of plaintiff’s delay, defendant was prejudiced. Defendant was denied the opportunity to investigate the circumstance of the accident and locate and interview the driver of the car and other potential witnesses. Defendant was also denied the opportunity to examine plaintiff’s alleged injuries. This is important because plaintiff had re-injured his left wrist and had surgery between the time the alleged hit-and-run occurred and the time that plaintiff filed a claim with defendant. Consequently, plaintiff was not entitled to coverage under the policy.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra