STATE OF MICHIGAN

COURT OF APPEALS

CHARLOTTE JACKSON, Personal Representative of the Estate of Alvin Cook,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 5, 2004

No. 246388
Wayne Circuit Court
LC No. 01-116994-NF

Before: Murphy, P.J., and Griffin and White, JJ.

GRIFFIN, J. (*dissenting*).

Plaintiff sues defendant for breach of contract over defendant's refusal to pay uninsured motorist benefits arising out of a hit-and-run accident in which plaintiff's decedent was killed. The issue on appeal is whether the provision in the parties' insurance contract requiring the person making a claim to report a hit-and-run accident to defendant within 30 days is enforceable. I would hold that the contractual notice provision is enforceable and, therefore, affirm the lower court's grant of summary disposition in favor of defendant. MCR 2.116(C)(10).

I

Plaintiff frames her first issue as follows: "Whether under Michigan law State Farm's insurance contract's 30 day notice provision is ambiguous as to the estate, impossible to perform by the estate, and/or unenforceable as unconscionable?"

In regard to the alleged ambiguity of the notice provision, plaintiff argues that because plaintiff's decedent was killed instantly at the scene, "Mr. Cook did not live 30 days so as to live long enough to notify the defendant of his uninsured motorist claim." Further, plaintiff asserts "Certainly, if the defendant wanted the 'estate' or 'personal representative' to notify the defendant within 30 days, it would have used the proper language." In essence, plaintiff argues that the notice provision contained in the policy does not contemplate the death of an insured in a hit-and-run accident. I disagree and would hold that the notice provision is not ambiguous. *Morley v Auto Club of Michigan*, 458 Mich 459; 581 NW2d 237 (1998); *Hellebuyck v Farm Bureau General Ins Co of Michigan*, 262 Mich App 250, 254; ____ NW2d ____ (2004).

In dispute is the following section of the parties' insurance contract:

> "REPORTING A CLAIM – INSURED'S DUTIES." "The *person* making claim . . . under the uninsured motor vehicle coverage" [shall] "report a 'hit-and-run' accident . . . to us within 30 days."

The insurance contract at issue specifically defines "person" as: "person – means a human being." Plaintiff's argument that, until a personal representative is appointed, a "person" cannot give notice of the claim, was rejected by our Court in an analogous context in *Halton v Fawcett*, 259 Mich App 699, 704; 675 NW2d 880 (2003). In construing the substantially similar medical malpractice statutory notice provision, we held in *Halton* as follows:

> In sum, the word "person" refers to a human being, whether in their individual or representative capacity. Plaintiff is the same human being who is responsible for the notice of intent and the filing of the lawsuit. Therefore, the statutory requirement that the person who files the suit must have previously given notice of intent is satisfied. To impose a requirement that the appointment to the position of personal representative be made before the serving of the notice of intent would create a statutory requirement that simply does not exist and for which the courts have no authority to impose."

Although *Halton, supra*, involved the notice requirement by a "person" for medical malpractice, its reasoning is applicable to the present case involving a contractual notice provision.

Unlike the majority, I view the 30-day notice provision as plain and unambiguous. As a condition precedent, "*the person making claim*" under the insurance policy must report the hit-and-run accident to defendant within thirty days. Here, it is undisputed that plaintiff is "the person making claim," and that she failed to comply with the notice provision. The majority finds ambiguity in the notice provision on the basis that the class of allowable claimants is unclear: "The policy is thus ambiguous regarding who may be the 'person making claim' and therefore who has the obligation to provide notice." Contrary to the majority's position, the questions of (1) notice, and (2) the universe of allowable claimants, are two separate issues. Irrespective of whether "the person making claim" under the policy is a proper claimant, that person must give notice of the accident to defendant for that person's claim to proceed. The notice provision, itself, as a condition precedent, is not ambiguous.

Next, plaintiff raises the related argument that it was impossible for the estate to comply with the 30-day notice requirement because the personal representative was not appointed within the 30-day period. Again, for the reason stated in *Halton, supra*, plaintiff, Charlotte Jackson, is a "person" (irrespective of her appointment as personal representative), and the same human being who ultimately filed a claim under the contract. Therefore, she was required to give notice pursuant to the contractual notice provisions.

Last, plaintiff argues that the contractual notice provision is unenforceable because it is unconscionable. In this regard, plaintiff argues a disparity in relative bargaining power of the parties, and contends that the notice provision is substantially unreasonable. As to the relative bargaining strength of the parties, I note that because uninsured motorist benefits are not required by statute, *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993), the

parties are free to contract for the terms, if any, of uninsured motorist benefits. Plaintiff has not alleged that the numerous auto insurance companies that do business in the state of Michigan fail to offer a choice of the terms of uninsured motorist benefits. Similarly, plaintiff has not cited authority for her argument that the 30-day notice provision for hit-and-run accidents is unreasonable.[1] On the contrary, in *Reynolds v Allstate Ins Co*, 123 Mich App 488; 332 NW2d 583 (1983), we held that a 60-day notice provision contained in a statute for claims made under the standard homeowners insurance policy was reasonable. Plaintiff has failed to bring to our attention any authority from Michigan or other jurisdictions in support of her position. In this regard, it is well settled that issues which are insufficiently briefed are deemed abandoned on appeal. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002). "A party may not leave it to this Court to search for authority to sustain or reject its position." *Consumers Power Co v Public Service Com'n*, 181 Mich App 261, 268; 448 NW2d 806 (1989).

II

Plaintiff's second issue is "Whether the notice provision of State Farm's policy which in effect acted as limitations period was tolled until the estate was formed?"

On this issue, plaintiff confuses the contractual notice provision (which is a condition precedent for bringing suit) with statutory tolling provisions for the bringing of a wrongful death action. In the present case, defendant did not argue, and the lower court did not rule, that the statute of limitations had run. Compare *Rory v Continental Ins Co*, ____ Mich App ____; ____ NW2d ____ (2004) (Docket No. 242847, released July 6, 2004), with *Aldalali v Underwriters at Lloyd's, London*, 174 Mich App 395; 435 NW2d 498 (1989). Rather, summary disposition was granted on the basis that a condition precedent to bringing suit – the 30-day notice provision following a hit-and-run accident – was not satisfied by plaintiff. See *Continental Studios v American Auto Ins* Co, 340 Mich 6; 64 NW2d 615 (1954). For this reason, the authorities cited by plaintiff are not applicable.

III

Finally, plaintiff argues that the 30-day notice provision contained in the policy can be enforced only if defendant can prove actual prejudice. Plaintiff cites *Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971), for her argument that "prejudice to [the] liability insurer is a material element in determining whether notice of accident or suit is reasonably given, and [the] burden is on insurer to demonstrate such prejudice." However, *Wendel, supra*, involved a statutory homeowners insurance policy which provided that, following the filing of a lawsuit, the summons and complaint shall be "immediately forwarded" to the insurer. The Supreme Court interpreted this unspecific provision to require the insured to deliver the summons and complaint within a "reasonable" time to his insurance carrier and that prejudice to the insurer is a material element in determining whether notice was given within a reasonable time.

---

[1] At oral argument, defense counsel argued that the 30-day notice provision was reasonable for hit-and-run accidents in view of the inherent difficulties of investigating such accidents after the fact.

Wendel is distinguishable on the basis that it does not involve a condition precedent to the filing of an action against an insurer, but, rather, when reasonable notice of a pending lawsuit is given to the insurance carrier. Furthermore, the present case does not involve any statutory obligations; instead, it entails a matter of contractual interpretation. In this regard, we stated the following in *Mate v Wolverine Mutual Ins Co*, 233 Mich App 14, 19-20; 592 NW2d 379 (1998):

> Underinsurance automobile insurance protection is not required by law and therefore is optional insurance offered by some, but not all, Michigan automobile insurance companies. Because such insurance is not mandated by statute, the scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts. *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 10-11; 512 NW2d 324 (1993). As the Supreme Court stated in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993), regarding substantially similar uninsured motorists benefits:
>
> > PIP [personal protection insurance] benefits are mandated by statute under the no-fault act, MCL 500.3105; MSA 24.13105, and, therefore, the statute is the "rule book" for deciding the issues involved in questions regarding awarding those benefits. On the other hand, the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute. Therefore, *because uninsured motorist benefits are not required by statute, interpretation of the policy dictates under what circumstances those benefits will be awarded.* [Emphasis added.]

Because we are dealing solely with an issue of contractual interpretation, we construe and enforce the plain and unambiguous terms of the contract. Because a condition precedent of the contract was not satisfied, the optional contractual coverage of uninsured motorist benefits is not available to the plaintiff, and her remedies are limited to statutory no-fault personal protection insurance (PIP) benefits. See, generally, *Bradley v Mid-Century Ins Co*, 409 Mich 1, 53; 294 NW2d 141 (1980), overruled on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 56-63; 664 NW2d 776 (2003).

For these reasons, I respectfully dissent and would affirm.

/s/ Richard Allen Griffin