STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY, as subrogee of ELOPAK, INC., and ELOPAK SCOTT, L.L.C.,

Plaintiff-Appellant,

v

AMERISURE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 29, 2005

No. 254034
Oakland Circuit Court
LC No. 2002-043846-CZ

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Defendant's insured, Scott Equipment Company (Scott), is a subsidiary of Elopak-Scott, L.L.C. (Elopak-Scott), which is a subsidiary of plaintiff's insured, Elopak, Inc. (Elopak). Elopak-Scott hired a controller who embezzled funds from Scott. Both Scott and Elopak filed claims of loss with their respective insurers. Defendant denied coverage on the ground that the controller was not Scott's employee within the meaning of its policy. Although plaintiff maintained that it was obligated to cover only a pro-rata share of the entire loss, it fully compensated Elopak for the loss, and then brought this action against defendant, as subrogee of Elopak, to recover defendant's alleged pro-rata share. Defendant moved for summary disposition, arguing that plaintiff's suit was filed after the expiration of the two-year contractual limitations period in defendant's policy. The trial court agreed and granted the motion.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Although the trial court granted summary disposition under MCR 2.116(C)(7), that subrule applies only to statutory limitation periods, not contractual limitation periods. Where a trial court grants summary disposition under the wrong subrule, this Court may review the issue under the correct subrule, in this case MCR 2.116(C)(10) (no genuine issue of material fact). *Computer Network, Inc v AM General Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). Summary disposition should be granted if there

is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4).

Plaintiff generally argues that its action states an independent claim against defendant for contribution or subrogation and, therefore, is governed by the six-year limitations period in MCL 600.5807(8), not the two-year contractual limitation period. Michigan law recognizes that contribution actions between insurers are predicated on the theory of equitable subrogation. *Frankenmuth Mut Ins Co, Inc v Continental Ins Co*, 450 Mich 429, 440 (Cavanagh, J., concurring), 446 (Levin, J., dissenting); 537 NW2d 879 (1995); *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 119; 393 NW2d 479 (1986). The common-law doctrine of contribution enables an insurer who has paid an insured's entire loss to obtain another insurer's pro-rata share of the loss. *Arco Industries Corp v American Motorists Ins Co*, 232 Mich App 146, 160-161; 594 NW2d 61 (1998); *Keene Corp v Ins Co of North America*, 215 US App DC 156; 667 F2d 1034 (1981). In doing so, the paying insurer becomes subrogated to the insured's right to coverage from the non-paying insurer. Our Supreme Court has explained that

> [e]quitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a "mere volunteer." [*Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 59; 658 NW2d 460 (2003), quoting *Commercial Union Ins Co, supra* at 117 (opinion by Williams, C.J.) (citations omitted).]

Although the parties disagree over the proper characterization of plaintiff's action, it is clear that plaintiff's sole basis for relief from defendant is rooted in contribution and subrogation theories. Plaintiff claims that it paid an amount that defendant should have paid to its insured, and that defendant must therefore now pay that amount to plaintiff.

Plaintiff emphasizes that it has no privity of contract with defendant and, therefore, its contribution action cannot be considered an action "on the policy," subject to the policy's limitation period. This argument runs counter to the basic and well-established principle that a subrogee steps into the shoes of the subrogor, and is entitled to no greater rights than its subrogor. Therefore, plaintiff is subject to the same time constraints as Scott, and the trial court correctly determined that the action was untimely.

The trial court appropriately relied on *Fremont Mutual Ins Co v Michigan Basic Property Ins Ass'n*, 171 Mich App 500; 430 NW2d 764 (1988). In *Fremont*, the plaintiff and defendant both issued fire insurance policies on the same property. When the property was damaged by fire, the plaintiff covered its insureds' loss and filed suit for proration against the defendant. *Id.* at 501. The defendant argued that the plaintiff's action was barred by the one-year limitations period set forth in MCL 500.2832 (now repealed), Michigan's standard fire insurance policy. *Id.* at 502. The plaintiff argued that its claim for contribution was not subject to the same limitation period for an insured's action against the insurer. *Id.* This Court disagreed, stating:

> Plaintiff's claim against defendant, filed some 3-1/2 years after the fire and after defendant's refusal to pay, is derivative of plaintiff's payment to Kingslien, whom defendant had insured. Because there is no privity of contract

> between the plaintiff and defendant insurers, plaintiff's action is clearly "one on the policy," governed by the one-year limitation period contained therein. [*Id.*]

Although this Court did not explicitly discuss the subrogation doctrine, its discussion of the derivative nature of the contribution action clearly invokes the underlying subrogation principles. Because the plaintiff was, in essence, stepping into its insureds' shoes and asserting the insureds' rights under the defendant's policy, it was subject to the same one-year limitations period. Likewise, plaintiff in the instant case is substituting itself for the insured, and claiming the same rights enjoyed by the insured, subject to the same restrictions. Plaintiff argues that the absence of privity of contract renders those restrictions inapplicable, but this argument disregards the fact that, without the contractual relationship between defendant and the insured, plaintiff would have no basis for asserting a contribution action.

The cases on which plaintiff relies, *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126; 485 NW2d 695 (1992), *Titan Ins Co v Farmers Ins Exchange*, 241 Mich App 258; 615 NW2d 774 (2000), and *Citizens Ins Co of America v Buck*, 216 Mich App 217; 548 NW2d 680 (1996), are distinguishable, because none of those cases involved a subrogee claiming relief from a contractual limitations period in a subrogor's insurance contract. Plaintiff suggests that *Buck* generally holds that insurance subrogation actions are governed by the six-year statute of limitations in MCL 600.5807, but this suggestion misinterprets the analysis in *Buck*. The Court in *Buck* determined that the plaintiff insurer, as subrogee, stepped into its insured's shoes; therefore, it was in the position of an insured suing for uninsured motorist benefits, and subject to the six-year limitations period, rather than the three-year period for wrongful death actions under MCL 600.2922. *Id.* at 225-226. The reasoning in *Buck* actually supports the trial court's decision in the instant case, because it underscores the principle that the subrogee acquires the rights of the subrogor, whatever they might be in the particular situation.

Plaintiff argues that it cannot be bound by the contractual limitations period, because it was a stranger to the insurance policy, and thus unaware that it imposed a two-year limitations period. This argument is contrary to the basic principle that a subrogee stands in the shoes of the subrogor. The law is well-settled that an insured must be held to knowledge of the terms and conditions contained in the insured's policy of insurance, even if the insured may not have read it. *Russell v State Farm Mutual Auto Ins Co*, 47 Mich App 677, 679; 209 NW2d 815 (1973); *Universal Underwriters Co v VanKirk*, 26 Mich App 254, 259; 182 NW2d 354 (1970); *Scanlon v Western Fire Ins Co*, 4 Mich App 234, 238; 144 NW2d 677 (1966). Consequently, plaintiff must also be held to the same knowledge. Plaintiff has not cited any authority stating that this principle does not apply when the plaintiff is not the insured, but its subrogee. A party who fails to cite authority in support of its position on appeal waives the argument. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Plaintiff also argues that the trial court erred in making a factual finding that it knew, or should have known, that defendant's policy contained a two-year limitations period. However, the insured is held to that knowledge as a matter of law, irrespective of actual knowledge.

Plaintiff also argues that even if it is subject to the two-year limitations period, that period was tolled when Scott filed its claim of loss, and did not begin to run again, because defendant never formally denied coverage. Plaintiff's argument is based on the judicial tolling doctrine, first recognized in *Tom Thomas Organization, Inc v Reliance Ins Co*, 396 Mich 588, 597; 242 NW2d 396 (1976), but recently abrogated in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702

NW2d 539 (2005). We acknowledge that the *Devillers* decision involved tolling of the statutory limitations period for no-fault actions in MCL 500.3145(1). However, the decision in *Devillers* was based on the well-established principle that unambiguous statutory language must be enforced as written. *Devillers*, *supra* at 581. See, e.g., *McClements v Ford Motor Co*, 473 Mich 373, 385; 702 NW2d 166 (2005). This principle is fully analogous to the equally well-established principle that unambiguous contractual language must be enforced as written. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991); *Wausau Underwriters Ins Co v Ajax Paving Industries, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003). Indeed, the Court in *Devillers* acknowledged the common basis of these principles by broadly stating that *Tom Thomas* and *Lewis* were wrongly decided because "[s]tatutory—*or contractual*—language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court." *Devillers*, *supra* at 582 (emphasis added). But even if judicial tolling were still recognized, it does not aid plaintiff here. Defendant unequivocally stated in its August 28, 2000, letter to Scott that it was denying coverage. Therefore, plaintiff's action, brought in September 2002, was untimely.

Plaintiff argues that "equitable considerations" preclude application of the contractual limitations period, because it is unfair to require an insurer to comply with all provisions of a competing insurer's policy in order to pursue a contribution action. We are not persuaded that applying the limitations period in the instant case leads to an inequitable result, where plaintiff had access to the policy through its insured's subsidiary and plaintiff itself is a sophisticated entity in the insurance industry.

Finally, plaintiff contends that the trial court erred by not giving it an opportunity to amend its complaint. This issue is waived on appeal because it was not raised in the statement of questions presented. *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 309; 600 NW2d 664 (1999); MCR 7.212(C)(5). Furthermore, plaintiff filed its claim of appeal before the trial court decided plaintiff's motion to amend. Once a claim of appeal is filed, the trial court may not set aside or amend the judgment or order appealed from except by order of this Court, or other circumstances not applicable here. MCR 7.208(A). The trial court recognized that it did not have authority to decide plaintiff's motion to amend because plaintiff filed an appeal while the motion was still pending. Accordingly, it issued an order indicating that plaintiff's request to file an amended complaint would be taken under advisement pending a decision by this Court.[1] Under the circumstances, it would be premature for this Court to address plaintiff's request to amend its complaint. Plaintiff will have the opportunity to pursue this issue after this appeal is decided.

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[1] Plaintiff originally filed an appeal as of right. After the briefs were filed, it became apparent that the order appealed from was not a final order because plaintiff had filed a postjudgment motion to amend its complaint, which was still pending in the trial court. On August 10, 2005, this Court entered an order treating plaintiff's appeal as a delayed application for leave to appeal and granting it. *Citizens Ins Co v Amerisure Ins Co*, unpublished order of the Court of Appeals, entered August 10, 2005 (Docket No. 254034).

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood