STATE OF MICHIGAN

COURT OF APPEALS

BRENETTA MILHOUSE

Plaintiff-Appellant,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, GERALD K. SITKO, AUTO CLUB INSURANCE COMPANY, d/b/a AAA MICHIGAN, and AUTO CLUB GROUP INSURANCE COMPANY, d/b/a AAA MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
December 22, 2005

No. 257701
Wayne Circuit Court
LC No. 02-235991-CK

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's order granting summary disposition for defendants under MCR 2.116(C)(7), (8), and (10). We affirm.

Plaintiff first argues that the trial court erred by ordering reformation of the insurance contract at issue. This Court reviews for an abuse of discretion a trial court's determination whether a mutual mistake justifies reformation of a contract. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26, 31; 331 NW2d 203 (1982); *Farm Bureau Mut Ins Co of Michigan v Buckallew*, 262 Mich App 169, 177; 685 NW2d 675 (2004), vacated on other grounds 471 Mich 940 (2004).

"Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties." *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995). It is undisputed that the parties' actual intent in this case was that defendant Michigan Basic Property Insurance Association ("Michigan Basic") provide insurance coverage for plaintiff's property located at 9150 Kensington, not 9150 Oldtown as the policy mistakenly reflects. Plaintiff argues that any mistake was on behalf of defendants and that no mutual mistake occurred. An insured, however, is held to have knowledge of the terms contained in an insurance policy and is obligated to read the policy and raise questions concerning coverage within a reasonable time after the policy is issued. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 324; 575

NW2d 324 (1998); *Bruner v League General Ins Co*, 164 Mich App 28, 31; 416 NW2d 318 (1987). Therefore, plaintiff is held to have knowledge that the policy reflected the incorrect address.

Plaintiff contends that any mistake on her behalf occurred after the contract was formed and that no mutual mistake occurred with respect to the formation of the contract. *Heath Delivery Service v Michigan Mut Liability Co*, 257 Mich 482; 241 NW 191 (1932), however, precludes plaintiff's argument. In that case, the plaintiff and the defendant insurance company entered into an agreement for the defendant to provide insurance coverage on 20 of the plaintiff's vehicles. The policy inadvertently failed to include two of the plaintiff's trailers, one of which was subsequently involved in a collision. *Id*. at 484-485. The Court determined that reformation of the contract was proper because it was undisputed that the parties agreed that the policy should cover all 20 vehicles. *Id*. at 485. The Court stated that, "[w]here through fault of the insurer an insurance policy does not cover the person or property intended, it may be reformed." *Id*. at 486. In response to the defendant's argument that the plaintiff was not entitled to reformation because he was negligent in failing to read the policy and ensure that it covered the intended vehicles, the Court stated that failure to read the policy does not always prevent reformation of a contract. *Id*. The Court stated that the rule requiring a party to read a contract cannot apply where the undisputed testimony evidences the parties' agreement, the executed contract does not reflect that agreement, and the defendant received compensation for the true contract. *Id*.

Under *Heath Delivery Service*, the trial court did not abuse its discretion by ordering reformation of the insurance contract. No dispute exists that the parties intended that 9150 Kensington be insured, and the policy erroneously reflected a different address. Plaintiff's failure to notice the incorrect address did not bar the contract's reformation because Michigan Basic received compensation in the form of premium payments for the intended contract. Accordingly, the trial court properly ordered reformation of the contract to reflect the correct address.

Plaintiff also argues that the trial court erroneously granted summary disposition on the basis that her complaint was not timely filed. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations and offers supporting documentation. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). This Court considers affidavits, depositions, admissions, and other documentary evidence when reviewing a motion under MCR 2.116(C)(7) if the supporting materials are admissible into evidence. *Id*. Absent a disputed fact, the determination whether a statute of limitation bars a cause of action is a question of law that this Court reviews de novo. *Ward v Rooney-Gandy*, 265 Mich App 515, 517; 696 NW2d 64, reversed on other grounds, __ Mich __; 705 NW2d 686 (2005).

Plaintiff initially contends that the six-year statute of limitations for breach of contract actions under MCL 600.5807(8) applies rather than the one-year limitations period set forth in the policy. The Michigan Supreme Court recently stated, however, that "an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written

unless the provision would violate law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). Plaintiff does not argue and it is not apparent that the one-year contractual limitations period violates law or public policy. Therefore, the one-year contractual limitations period governs.

Plaintiff also argues that the one-year limitations period had not expired when she filed her complaint on October 9, 2002. The policy required plaintiff to file her complaint within one-year after the date of loss. Plaintiff admits that although she did not discover the damage until March 2001, the damage occurred around January 19, 2001. Because the policy provided that the limitations period began to run on the date of loss rather than the date that the damage was discovered, the limitations period began to run on approximately January 19, 2001.[1] Thus, plaintiff's contention that the limitations period began to run in March 2001 is erroneous.

Much of the dispute regarding this issue concerns tolling of the limitations period and the specific time frames within the limitations period that were tolled. Michigan Basic concedes that the limitations period was tolled from the date that plaintiff provided notice of her claim until the date the claim was denied, and from the date of plaintiff's appeal of the denial of her claim until the date the denial was upheld on appeal. Both parties agree that plaintiff provided notice of her claim on April 20, 2001, and that Michigan Basic denied the claim on October 10, 2001. The parties also agree that the limitations period was tolled during this time. The parties disagree, however, regarding the date on which the limitations period again began to run. Plaintiff argues that because Michigan Basic's denial of her claim was not final until the internal appellate procedure concluded on January 8, 2002, the limitations period was tolled from the date that she provided notice of her claim, April 20, 2001, until January 8, 2002.

Plaintiff fails to recognize that two different tolling periods occurred after she notified Michigan Basic of her loss on April 20, 2001. Plaintiff correctly notes that the limitations period was tolled from the date that she provided notice of her loss until Michigan Basic formally denied liability. See *Hamdi v Michigan Basic Property Ins Ass'n*, 190 Mich App 333, 335; 475 NW2d 467 (1991).[2] After a claim is denied, however, a second and separate tolling period

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[1] The trial court determined that the date of loss was January 18, 2001, based on plaintiff's representation in her claim form. The record does not contain the claim form upon which the trial court relied. Thus, we rely on plaintiff's representation in her brief on appeal that the loss occurred "sometime around January 19, 2001." In any event, the one-day discrepancy between the two dates does not affect the outcome.

[2] We note that pursuant to our Supreme Court's decision in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), the application of a judicially created tolling period is questionable. That case involved the judicial tolling doctrine of *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), which was overruled by *Devillers* under which the one-year statutory limitations period for recovery of personal protection insurance benefits under MCL 500.3145(1) is tolled from the time that a claim is filed until the date that an insurer formally denies a claim. *Devillers, supra* at 564. The *Devillers* Court overruled this judicially created tolling doctrine, stating that "[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 [the Michigan Supreme Court]." *Id*. at 582. Although *Devillers* did not
(continued…)

commences on the date that an insured files an internal appeal until the appeal is formally denied. *Id*. at 336. Plaintiff fails to acknowledge that the limitations period began to run after her claim was initially denied until her appeal was filed. According to *Hamdi*, however, two separate tolling periods exist, rather than one longer tolling period, when an insured pursues an appeal of a denied claim. *Id*. at 336-338.

Accordingly, under the above guidelines, plaintiff's complaint was not timely filed within one year after the date of loss. Ninety-one days elapsed between January 19, 2001, the date of loss, and April 20, 2001, the date on which plaintiff notified Michigan Basic of her claim. The limitations period was then tolled until October 10, 2001, when Michigan Basic denied the claim. Accepting as true plaintiff's argument that she appealed the denial on October 19, 2001, the limitations period was again tolled as of that date and began to run again when the denial was upheld on January 8, 2002. Thus, approximately 374 days elapsed, which were not tolled, between the date of loss and the filing of plaintiff's complaint on October 9, 2004. Therefore, the trial court did not err by determining that plaintiff failed to file her complaint within the applicable contractual limitations period.

Plaintiff also argues that the limitations period was equitably tolled because of the misconduct of Michigan Basic in failing to issue an insurance contract, denying plaintiff's appeals, and accepting and refusing to refund plaintiff's insurance premiums. Plaintiff's authority does not support her position. In *Mason v Letts*, 14 Mich App 330, 333; 165 NW2d 481 (1968), this Court held that the plaintiff's estoppel argument was unavailing because she failed to allege and show "intentional or negligent fraud" on behalf of the defendants. Likewise, plaintiff here has not alleged fraud on behalf of Michigan Basic. Plaintiff also relies on *Geromette v General Motors Corp*, 609 F2d 1200, 1203 (CA 6, 1979), in which the court determined that no basis for tolling the statutes of limitation existed on equitable grounds because no conduct on the part of the defendant prevented the plaintiff from asserting her rights. In the instant case, Michigan Basic did not engage in conduct that prevented plaintiff from asserting her rights. In addition, *Cronin v Minster Press*, 56 Mich App 471, 481-482; 224 NW2d 336 (1974) is inapplicable because no conflict of interest occurred in the instant case. Therefore, plaintiff failed to show that the limitations period should have been equitably tolled because of misconduct on behalf of Michigan Basic.

Plaintiff next argues that the trial court erred by granting summary disposition for defendants on her claim under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone. *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179

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involve the tolling doctrine at issue in the instant case, the *Devillers* Court disagreed with *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976), overruled by *Rory*, *supra*, at 470, and *In re Certified Question (Ford Motor Co v Lumbermens Mut Cas Co)*, 413 Mich 22; 319 NW2d 320 (1982), upon which this Court relied in *Hamdi*. However, Michigan Basic did not challenge the tolling of the limitations period, and continues to concede on appeal that the contractual limitations period was subject to tolling. Thus, *Devillers* does not affect the outcome of this case.

(2005). A motion under subrule (C)(8) is properly granted if no factual development could justify recovery under the plaintiff's claim. *Id.*

Plaintiff premised her MCPA claim on MCL 445.911. Defendants argued that MCL 445.904(3) specifically exempts this case from the purview of the MCPA, and the trial court granted summary disposition on that basis. Plaintiff argued in the trial court, as she does on appeal, that the facts of this case clearly establish that defendants engaged in conduct violating the MCPA and chapter 20 of the Insurance Code. She relies on *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).

MCL 445.904(1) of the MCPA provides:

> This act does not apply to either of the following:
>
> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

In *Smith, supra* at 465, the Court held that the above provision exempts insurance sales from the MCPA because such transactions are "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." At the time the Court decided *Smith*, however, MCL 445.904(2) provided:

> Except for the purposes of an action filed by a person under [MCL 445.911], this act does not apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by:
>
> (a) Chapter 20 of the insurance code of 1956, Act No. 218 of the Public Acts of 1956, as amended, being sections 500.2001 to 500.2093 of the Michigan Compiled Laws.

Thus, the *Smith* Court held:

> Although [MCL 445.904(1)(a)] generally provides that transactions or conduct "specifically authorized" are exempt from the provisions of the MCPA, [MCL 445.904(2)] provides an exception to that exemption by permitting private actions pursuant to [MCL 445.911] arising out of misconduct made unlawful by chapter 20 of the Insurance Code. Therefore, the exemptions provided by [MCL 445.904(1)(a) and (2)(a)] are inapplicable to plaintiff's MCPA claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 of the Insurance Code. [*Smith, supra* at 467.]

Accordingly, the *Smith* Court held that the plaintiff could pursue her MCPA claims against the defendant insurance company under MCL 445.911. *Id.* at 467-468.

In relying on *Smith*, plaintiff fails to recognize the amendment of MCL 445.904 that the Legislature enacted after *Smith* was decided. Pursuant to 2000 PA 432, MCL 445.904 was

amended, effective March 28, 2001, to eliminate the ability to bring a MCPA claim against an insurance company under MCL 445.911. MCL 445.904(3) now provides:

> This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093.

Accordingly, 2000 PA 432 eliminated a plaintiff's ability to enforce the provisions of the MCPA against insurance companies through MCL 445.911, as the *Smith* Court held. Thus, the MCPA no longer applies to insurance companies.

Defendants moved for summary disposition relying on the amendment, and the trial court granted the motions. Although it is possible that plaintiff's cause of action accrued before the amendment took effect, we are not presented with that question on appeal. Rather, plaintiff argues that she should have been permitted to amend her complaint to allege a violation of chapter 20 of the Insurance Code. Although plaintiff mentioned amending her complaint in a pleading and at oral argument, she failed to file a motion to file an amended complaint to assert such a violation. Leave to amend a complaint "shall be freely given when justice so requires," and the grant or denial of leave to amend a complaint is within a trial court's discretion. MCR 2.118(A)(2); *Grzesick v Cepela*, 237 Mich App 554, 563; 603 NW2d 809 (1999). Considering that plaintiff never filed a motion for leave to amend her complaint and failed to rebut defendants' argument that the amendment of MCL 445.904 barred her claim, we cannot conclude that the trial court abused its discretion by disallowing an amendment.

Moreover, plaintiff indicated at oral argument that amending her complaint to allege a violation of the Insurance Code rather than the MCPA would remedy any pleading error. Chapter 20 of the Insurance Code, however, is the UTPA, which regulates the trade practices of insurance companies in Michigan. MCL 500.2001; *Smith v Globe Life Ins Co*, 223 Mich App 264, 283; 565 NW2d 877 (1997), aff'd in part and rev'd in part on other grounds, *Smith*, *supra* at 449, 467-468. Courts of this state have previously held that no private cause of action exists for violation of the UTPA. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 440 n 7; 491 NW2d 545 (1992); *Crossley v Allstate Ins Co*, 155 Mich App 694, 697; 400 NW2d 625 (1986); *Safie Enterprises, Inc v Nationwide Mut Fire Ins Co*, 146 Mich App 483, 494; 381 NW2d 747 (1985). Therefore, any amendment to assert a violation of chapter 20 of the Insurance Code and exclude reference to the MCPA would have been unavailing.

Plaintiff next contends that the trial court erred by granting summary disposition for defendants Auto Club Insurance Company, d/b/a AAA Michigan, Auto Club Group Insurance Company, d/b/a AAA Michigan (collectively "AAA"), and Gerald K. Sitko, on her breach of fiduciary duty and negligence claims. A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31.

Plaintiff argues that Sitko owed her a duty to turn over to Michigan Basic all premiums that plaintiff paid him. Plaintiff also contends that Sitko owed her a duty to use reasonable care to prevent the misapplication of her premiums to the wrong property. She argues that AAA is vicariously liable for Sitko's actions. We agree with the trial court that the fact that the declarations page reflected the incorrect address is inconsequential, given that the trial court properly ordered reformation of the contract to reflect the correct address. Had plaintiff timely filed her cause of action, the error regarding the incorrect address would not have barred recovery.

In any event, the facts fail to show any breach of fiduciary duty or negligence by Sitko. A negligence claim requires breach of a duty owed to the plaintiff. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 469; 646 NW2d 455 (2002). In addition, a claim for breach of fiduciary duty requires that the plaintiff have reasonably reposed faith, confidence, and trust in the fiduciary. *Id*. Even assuming that a fiduciary relationship existed between plaintiff and Sitko, plaintiff has failed to show any breach of duty on behalf of Sitko. Regarding the one premium payment that Michigan Basic denied receiving, Sitko claimed to have forwarded the payment to Michigan Basic. The particular payment at issue, which plaintiff paid to Sitko on March 5, 2001, is irrelevant in any event because the damage occurred around January 19, 2001, and all of plaintiff's premiums had been paid to Michigan Basic as of that date. Moreover, regarding the incorrect address, it is undisputed that Sitko forwarded to Michigan Basic an insurance application reflecting the correct address to be insured. After forwarding the application, Sitko had no further contact with plaintiff until March 5, 2001, when plaintiff gave to Sitko a payment for the Michigan Basic policy. Thus, Sitko breached no duty owed to plaintiff, and AAA was not vicariously liable for any breach on behalf of Sitko.

Given our conclusion that the trial court properly granted summary disposition to Michigan Basic on the basis that plaintiff failed to file her complaint within the contractual limitations period, plaintiff's remaining issue on appeal is moot.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray