STATE OF MICHIGAN

COURT OF APPEALS

J & N KOETS, INC,

Plaintiff/Counter Defendant,

v

THOMAS REDMOND,

Defendant/Counter Plaintiff

and

KATHY FORD,

Defendant/Counter Plaintiff/Third-Party Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 10, 2016

No. 326955
Kent Circuit Court
LC No. 12-001656-CK

Before: SERVITTO, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Appellant, Kathy Ford, appeals as of right the trial court's April 2, 2015 stipulated order requiring her to pay J & N Koets, Inc. $52,859.54 in damages. On appeal, Ford challenges the trial court's July 17, 2012 order granting summary disposition to appellee, Auto-Owners Insurance Company, pursuant to MCR 2.116(C)(7) (claimed barred by statute of limitations) and (C)(10) (no genuine issue of material fact). We affirm.

I. BACKGROUND

This case arises out of skunk spray damage that occurred to a home owned by Ford and rented by Thomas Redmond, Ford's now-deceased uncle. On March 2, 2006, a skunk either sprayed directly into the home or sprayed a dog that later entered the home. Either way, remediation services became necessary to rid the home of the odor. According to Ford, she contacted Young Insurance Agency, the insurance agency where she contracted for the insurance at the heart of this dispute, the following morning and was told to proceed with remediation

services. She did so, hiring J & N Koets, Inc. that same day. After hiring J & N Koets, but before the remediation services were completed, Ford claims that she also contacted "Auto-Owners directly" and was "told by Auto-Owners that the loss was covered, and was told . . . to continue with remediation." At some point thereafter, Ford received an invoice from J & N Koets and forwarded it to Young Insurance Agency and Auto-Owners. Approximately seven months after the damage occurred, in September 2006, Auto-Owners formally denied Ford's claim.

One year after the claim was formally denied, Ford sent a letter to Auto-Owners explaining that it was "brought to [her] attention through phone messages" that J & N Koets had not yet been paid for the remediation services and warning of the "penalties for an insurance company unreasonably delaying payment." Auto-Owners replied, maintaining its original denial of Ford's claim. After the costs of the remediation services remained unpaid, J & N Koets eventually filed this lawsuit against Ford, and a stipulated judgment was eventually entered between the two in the amount of $52,859.54. Ford also filed a two-count third-party complaint against Auto-Owners. In Count I, entitled "Breach of Contract," Ford alleged that "[t]he refusal by Auto-Owners to pay J & N Koets' costs constitutes a breach by Auto-Owners of its policy of insurance with Ms. Ford." In Count II, entitled "Implied Contract," Ford alleged that "[b]y informing Ms. Ford that it would pay for the odor remediation at issue, Auto-Owners induced her to undertake an obligation on its representation that she would be reimbursed the costs of said obligation, thereby creating an obligation to reimburse, as promised."

Auto-Owners responded with a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). Primarily, Auto-Owners argued that it was entitled to summary disposition because Ford's claims were barred under either the insurance agreement's one-year limitation period or the statutory one-year limitation period under MCL 500.2833(1)(q). Ford responded that Count I of her complaint should not be dismissed because the one-year limitation period in the insurance agreement was unenforceable for constitutional, statutory, and public policy reasons. She argued that Count II of her complaint should not be dismissed because it sounded in promissory estoppel or implied contract and was thus governed by a six-year statute of limitations. The trial court agreed with Auto-Owners and granted summary disposition in its favor pursuant to MCR 2.116(C)(7) and (C)(10). After unsuccessfully pursuing an interlocutory appeal of that decision before this Court, *J & N Koets, Inc v Redmond*, unpublished order of the Court of Appeals, entered October 17, 2013 (Docket No. 311909), and the Michigan Supreme Court, *J & N Koets v Redmond*, 495 Mich 978; 855 NW2d 203 (2014), Ford entered into the stipulated judgment with J & N Koets as discussed above. This appeal followed.

II. ANALYSIS

On appeal, Ford raises a variety of arguments challenging the trial court's July 17, 2012 order granting summary disposition to Auto-Owners. Addressing each, we conclude that the trial court properly granted summary disposition to Auto-Owners pursuant to MCR 2.116(C)(7) and (C)(10).

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). "Issues of statutory construction and contract interpretation are also reviewed de novo." *Klida v Braman*,

278 Mich App 60, 62; 748 NW2d 244 (2008). Unpreserved issues are not ordinarily subject to review. *Burns v Detroit (On Remand)*, 253 Mich App 608, 614; 660 NW2d 85 (2002).

Summary disposition pursuant to MCR 2.116(C)(7) is appropriate when the undisputed facts establish that a plaintiff's claim is barred under the applicable statute of limitations. *Kincaid*, 300 Mich App at 522. Thus, if there is no factual dispute, whether a plaintiff's claim is barred by the applicable statute of limitations is a matter of law for the court to decide. *Id*. If the parties present evidence that establishes a question of fact concerning the applicable statute of limitations, summary disposition is inappropriate, and the factual dispute must be submitted to the factfinder. *Id*. at 523.

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Barnes v Farmers Ins Exch*, 308 Mich App 1, 5; 862 NW2d 681 (2014). "Summary disposition is proper if 'there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.' " *Id*., quoting MCR 2.116(C)(10). "A genuine issue of material fact exists when the evidence submitted might permit inferences contrary to the facts as asserted by the movant." *Dillard v Schlussel*, 308 Mich App 429, 445; 865 NW2d 648 (2014) (citation and internal quotation marks omitted). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Barnes*, 308 Mich App at 5.

"[I]nsurance policies *are* subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) (emphasis in original). When interpreting insurance policies, "the court's role is to 'determine what the agreement was and effectuate the intent of the parties.' " *Hunt v Drielick*, 496 Mich 366, 372; 852 NW2d 562 (2014), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Courts must construe and apply unambiguous insurance policy provisions as written unless the provision violates law or a traditional contract defense applies. *Rory*, 473 Mich at 461. "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Id*.

In this case, it is undisputed that the insurance agreement includes a one-year limitation period on all lawsuits against Auto-Owners: "**We** may not be sued unless there is full compliance with all the terms of this policy. **Suit** must be brought within one year after the loss or damage occurs." However, in light of our ruling in *Randolph*, 229 Mich App at 106-107, this provision is void because it does not provide for tolling while the insurance claim is being investigated as required by MCL 500.2833(1)(q). That statute provides as follows:

> (1) Each fire insurance policy issued or delivered in this state shall contain the following provisions:
>
> * * *

> (q) That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.

If an insurance policy either lacks or is incompatible with the required provisions set forth in MCL 500.2833(1)(q), this Court has held that the statutorily required one-year limitation period applies. *Randolph*, 229 Mich App at 106-107; see also *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012). Thus, while the insurance agreement's one-year limitation period is void, it is nevertheless replaced by the statutory one-year limitation period under *Randolph*. Because Ford's lawsuit against Auto-Owners was filed long after the one-year period expired, her claim is barred by the applicable statute of limitations. Assuming it is true that Ford notified Auto-Owners of the damage immediately after it occurred, i.e., in March 2006, the one-year limitation period expired in September 2007, one year after Ford's claim was formally denied. Ford did not file this lawsuit until five years later, in 2012. Accordingly, we conclude that Ford's lawsuit against Auto-Owners is barred by the applicable statute of limitations. Ford raises a plethora of meritless arguments against this conclusion.

First, she claims that, constitutionally, her lawsuit against Auto-Owners was not ripe for review until J & N Koets sued her. We disagree. Ford provides no authority in support of this assertion. Thus, it is abandoned. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Additionally, we find the factual predicate for her argument disingenuous at best. She claims that she could not have known whether J & N Koets, the company who provided the remediation services, would pursue payment for its services until it sued her. Aside from the lack of persuasiveness of such a claim, the record also reflects that J & N Koets contacted Ford by telephone on multiple occasions, sent her an invoice, and demanded payment through its attorneys—all of which occurred after Auto-Owners denied coverage.

Ford also claims that the six-year statute of limitations for contract actions should apply in this case rather than the one-year statute of limitations described in MCL 500.2833(1)(q). We disagree. As we have recognized before, "there is absolutely no authority that would allow application of the general six-year contract statute of limitations to this insurance policy." *Randolph*, 229 Mich App at 107. Ford claims that "*Randolph* is, however, 'no longer good law [in part] in light of' subsequent decisions by the Supreme Court and is, therefore, no longer to be followed." This is unsupported and untrue. To support this claim, Ford does not, for example, cite *any* authority that supports her position. Instead, she claims that "[w]hen *Randolph* was decided, bad habits of interpretation still lingered" and cites to *People v Hernandez-Garcia*, 477 Mich 1039, 1040, n 2; 728 NW2d 406 (2007), a criminal case involving the momentary-innocent-possession defense to a charge of carrying a concealed weapon. Simply claiming that this Court had bad habits and citing completely irrelevant caselaw does not persuade us to alter our conclusion, a conclusion based on our *binding*, MCR 7.215(J)(1), and often-relied-on, see, e.g., *Thill v State Farm Fire & Cas Ins Co*, unpublished opinion of the Court of Appeals, issued December 15, 2015 (Docket No. 323339), p 2, decision in *Randolph*.

Next, Ford claims that this Court "must recognize that, because limitations on the judicial power, including the doctrine of ripeness, are 'deeply entrenched' in fundamental Michigan law,

they reflect a public policy which is offended by enforcing this case's limitation provision any sooner than [J & N Koets] sued Ms. Ford." We disagree. Because Ford failed to adequately develop this argument, we deem it abandoned. *Peterson Novelties, Inc*, 259 Mich App at 14. Furthermore, we reject Ford's claim that public policy supports allowing insureds to wait five years after an insurance claim was denied to challenge that denial simply because they have not been sued by the service provider.

Even if the one-year limitation applies, Ford contends, part of Count I and Count II as a whole are still timely. She claims that Count I is timely because it is more than a "suit" as defined by the insurance agreement—it is something else that "seeks a declaration that insurer must do something in the future." Therefore, Ford concludes, because the insurance agreement's one-year limitation period only applies to a "suit," her non-suit part of Count I is timely. We disagree. First, this argument is unpreserved and need not be addressed. *Burns*, 253 Mich App at 615. Second, we are not convinced that each count in a complaint constitutes multiple suits, and Ford cites no authority to the contrary. Further, the insurance agreement's one-year limitation period is void under *Randolph* and replaced by that required under MCL 500.2833(1)(q) as stated above. That statutory one-year limitation period applies to "action[s] under the policy[.]" Thus, while apparently not a "suit" under the insurance agreement, the non-suit part of Count I is nevertheless "an action under the policy" for purposes of MCL 500.2833(1)(q). It follows that it, too, is barred by the statutory one-year limitation period for the same reasons. Finally, it is also important to note that Ford's argument relies on an insurer's "duty to defendant" against "allegations which even arguably come within the policy coverage." As supporting authority, Ford cites to *Polkow v Citizens Ins Co of America*, 438 Mich 174, 180; 476 NW2d 382 (1991), but that case involved an insurance policy that included a duty-to-defend clause involving the lawsuit at issue. Ford does not indicate, and we are unable to find, a duty-to-defend clause in the insurance agreement that would apply under the circumstances of this case.

As it relates to Count II of her complaint, Ford argues that it is also timely because it sounds in promissory estoppel. We disagree. At the outset, Count II is based entirely on an alleged promise made by Auto-Owners or Young Insurance Agency that Auto-Owners would pay for the remediation services independent of its obligations under the insurance agreement. Promissory estoppel cannot be utilized to circumvent a clear and definite written contract. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). Moreover, "summary disposition cannot be avoided by a party's conclusory assertions in an affidavit that conflict with the actual historical conduct of the party." *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004). Thus, because the only support for Ford's promissory estoppel claim is her self-serving affidavit, where she states that Auto-Owners promised to pay for the remediation services independent of the insurance agreement, her promissory estoppel claim must fail.

In any event, Ford's argument that her promissory estoppel claim is timely lacks merit. "Promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions." *Crown Tech Park v D&N Bank, FSB*, 242 Mich App 538, 548, n 4; 619 NW2d 66 (2000). "The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) that in fact produced reliance or forbearance

of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak*, 235 Mich App at 686-687. The first element requires a "definite and clear" promise, *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995), and Ford has failed to present sufficient evidence of a "definite and clear" promise by Auto-Owners to pay for the remediation services independent of the insurance agreement to avoid summary disposition. Furthermore, there is nothing in the record to support a conclusion that Auto-Owners reasonably expected its or Young Insurance Agency's alleged "promises" would induce Ford to obtain remediation services but disregard her obligations under the insurance agreement before and after her claim was denied. Additionally, any reliance by Ford was unreasonable as a matter of law. See *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 415; 751 NW2d 443 (2008) (stating that "insureds' claims that they have reasonably relied on misrepresentations that clearly contradict the terms of their insurance policies must fail."). Finally, there is nothing to suggest that this is a circumstance where the promise must be enforced if injustice is to be avoided. Ford appears to primarily rely on *Hearn v Richenbacker*, 428 Mich 32, 38-41; 400 NW2d 90 (1987), and *Huhtala v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640 (1977), in support of her promissory estoppel claim, but that reliance is misplaced because, as stated above, her promissory estoppel claim fails as a matter of law. Furthermore, each of those cases are distinguishable from this matter in substantial ways. *Hearn* involved a fraud and negligence lawsuit against an independent insurance agency for what amounted to, in essence, conversion of the insured's premium payments under the insurance agreement. 428 Mich at 38-39. *Huhtala* involved a promissory estoppel lawsuit against an insurance company by a passenger who was *not* covered under any insurance agreement entered into by the company. 401 Mich at 122. The circumstances of this case are not even remotely similar.

For the sake of thoroughness, we would also note that, if Count II of Ford's claim is actually one of implied contract as it is titled, rather than promissory estoppel as she now claims, it nevertheless fails as a matter of law as well. Ford cannot show that a contract implied in law exists because she alleges that a promise was made by Auto-Owners and because it is undisputed that Auto-Owners did not receive a benefit from allegedly promising to pay Ford's remediation expenses independent of the insurance agreement. See *In re McKim*, 238 Mich App 453, 457; 606 NW2d 30 (1999) (explaining that a contract implied in law is one where "no promise was ever made or intended" and where both parties receive a benefit). She also cannot show a contract implied in fact because there was no mutuality of agreement in light of Auto-Owners denial of coverage and because there was no mutuality of obligation as, under this alleged new promise, Ford had no obligation whatsoever. See *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989) (stating that mutuality of agreement and mutuality of obligation are required for an implied in fact contract).

III. CONCLUSION

Accordingly, because we conclude that the trial court properly granted summary disposition to Auto-Owners pursuant to MCR 2.116(C)(7) and (C)(10), we affirm the trial court's April 2, 2015 stipulated judgment as well as its July 17, 2012 order granting summary disposition.

Affirmed. Auto-Owners, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien