

STATE OF MICHIGAN
COURT OF APPEALS

SHERRILL TRAVIER,

Plaintiff-Appellant,

V

AUTO CLUB GROUP INSURANCE
COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 23, 2012

No. 301122
Wayne Circuit Court
LC No. 09-027446-CK

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Michigan adheres to the common-law American rule regarding attorney fees, which requires litigants to bear the costs of their own legal counsel unless a statute, court rule, or common-law exception to the rule provides otherwise. Plaintiff Sherrill Travier urges us to adopt a common-law rule permitting recoupment of attorney fees when an insurer denies a claim in bad faith and an insured must file suit to vindicate a contractual indemnification right. This Court has previously rejected Travier's argument. Accordingly, we affirm the circuit court's grant of partial summary disposition in favor of defendant Auto Club Group Insurance Company on this claim.

A fire destroyed Travier's Lincoln Park home, which was insured under a fire insurance policy issued by Auto Club. The police immediately identified the blaze as a potential arson. Travier reported the fire to Auto Club and submitted a timely proof of loss. Several months elapsed, during which Auto Club investigated Travier's insurance claim. When no indemnity payment from Auto Club was forthcoming, Travier retained counsel. Approximately four months after Travier submitted her proof of loss, her attorney wrote to Auto Club demanding tender of the amount due pursuant to the policy, or "at the very least, a merit payment." Auto Club did not respond to this letter.

In November 2009, Travier filed suit against Auto Club, asserting claims for breach of contract and bad faith. The complaint alleged that Travier "is entitled to recover consequential damages she has sustained that were in the contemplation of the parties from the time the contract was made or which are the natural and usual consequences of a breach of a property insurance contract, including attorney fees and other costs." Before serving the complaint,

Travier's counsel wrote several additional letters to Auto Club seeking payment of Travier's claim. The claim remained unpaid.

Travier served her complaint on January 18, 2010 approximately seven months after the fire. Remarkably, Auto Club neither admitted nor denied Travier's breach of contract averments "for lack of sufficient knowledge or information and [left] plaintiff to her proofs."¹ In an amended complaint filed in February 2010, Travier reiterated her breach of contract allegations and amplified her bad faith claim, asserting that Auto Club had threatened to withhold payment on the claim unless Travier dismissed her lawsuit. In May 2010, Auto Club finally issued full payment for the actual cash value of Travier's home, as well as penalty interest.

In June 2010, Auto Club moved for summary disposition of Travier's breach of contract and bad faith claims, invoking MCR 2.116(C)(8) and (10). Travier responded with a cross-motion for summary disposition contending that Auto Club had breached the insurance contract by failing to pay her claim within 30 days after its receipt of her proof of loss, and "that a nationally-accepted exception to the 'American Rule' authorizes attorney fees when a defendant, including an insurer, acts with bad faith before or during litigation." The circuit court ruled that factual questions precluded dismissal of Travier's breach of contract action, but granted summary disposition of Travier's bad faith claim. The parties subsequently resolved their remaining differences.

Travier now challenges the circuit court's summary disposition ruling concerning her claim for attorney fees, which we review de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005).² A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Travier first contends that Auto Club adjusted her fire loss claim in bad faith, entitling her to attorney fees. Michigan does not recognize an independent tort for bad faith in the handling of an insurance claim. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 608; 374 NW2d 905 (1985). On this basis, we must reject Travier's argument that Auto Club's allegedly dilatory handling of her claim entitles her to attorney fees.

Alternatively, Travier asserts that she seeks attorney fees based on an exception to the American Rule recognized in other jurisdictions, which permits an attorney fee award when a

¹ This response "has the effect of a denial." MCR 2.111(C)(3).

² The circuit court granted summary disposition without specifying the subrule upon which it relied. Because the court considered material outside the parties' pleadings, we construe the motion as having been granted under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

policyholder must file suit to recover insurance benefits. See *Hayseeds, Inc v State Farm Fire & Cas*, 352 SE2d 73, 80 (W Va, 1986). While we sympathize with Travier’s frustration that adjustment of her claim consumed almost a full year, this Court has unequivocally rejected her attorney fee argument. In *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 424; 528 NW2d 749 (1995), we specifically held that “the American rule precludes the recovery of attorney fees incurred as the result of an insurer’s bad-faith refusal to pay a claim.” In reaching this conclusion, this Court relied on the well-established rule that attorney fees are not recoverable in breach of contract actions. See *id.* at 430-431. As this Court explained in *Burnside*, Travier’s public policy arguments in favor of an exception to the American rule “have already been addressed by the Legislature by the enactment of the [Uniform Trade Practices Act, MCL 500.2001 *et seq.*]” *Id.* at 431. We are unable to meaningfully distinguish Travier’s arguments in this case from those made by the plaintiff in *Burnside*, which this Court emphatically rebuffed.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Patrick M. Meter

/s/ Pat M. Donofrio