

STATE OF MICHIGAN
COURT OF APPEALS

LORETTA LEGGETT,

Plaintiff-Appellant,

V

MARK TABACCHINI and STATE FARM
MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Defendants-Appellees.

UNPUBLISHED
February 20, 2014

No. 311600
Wayne Circuit Court
LC No. 10-007430-CZ

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals by right the order granting defendants' motion for summary disposition of her breach of contract and fraud claims. We affirm.

This action arises from plaintiff's automobile accident on October 25, 2004 involving her 1996 Ford Taurus, which was insured by defendant State Farm. After the accident, plaintiff learned that the insurance policy did not include uninsured motorist coverage. Plaintiff alleged that she had requested full coverage for the Taurus, which she believed included uninsured motorist coverage. Plaintiff brought claims of breach of contract, professional negligence, and fraud against the agent who sold her the policy, defendant Tabacchini, and claims of vicarious liability and fraud against the insurer, defendant State Farm.

On appeal, plaintiff first argues that the trial court erred in ruling that plaintiff's breach of contract claim was barred by the applicable statute of limitations.¹ We disagree. "This Court

¹ Plaintiff acknowledges that she filed suit seeking uninsured motorist coverage arising from the 2004 accident on August 9, 2006, and the trial court granted defendant State Farm's motion for summary disposition. Despite this dismissal, the parties do not address the applicability of res judicata, and we do not address it. Plaintiff was involved in a second motor vehicle accident in 2009. She filed suit against defendant State Farm, and the lawsuit settled in April 2010. In June 2010, plaintiff filed this litigation, alleging that it was premised on the 2009 accident. She later amended her complaint to clarify that the 2004 accident was the subject matter of this case.

reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). This Court also reviews de novo whether a statutory limitations period bars an action. *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006). When the undisputed facts demonstrate that the plaintiff's claim is barred by the applicable statute of limitations, summary disposition is appropriate. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). "Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute." *Id.*

The statutory limitations period for breach of contract actions, including insurance contracts, is six years. MCL 600.5807(8).

In Michigan, a breach of contract claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when the damage results." MCL 600.5827. To determine the "wrong upon which the claim is based," the parties' contract must be examined. *Scherer v Hellstrom*, 270 Mich App 458, 463; 716 NW2d 307 (2006). . . . In general, "a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2003). [*Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458; 761 NW2d 846 (2008).]

Although plaintiff agrees that the applicable limitations period is six years, she argues that the trial court erred in finding that her breach of contract action against defendant Tabacchini was barred because the court utilized the wrong date of accrual for her claim. The trial court found that plaintiff sustained her alleged loss on December 5, 2003, when she entered into the insurance contract with State Farm and the uninsured motorist coverage she purportedly requested was not included in her policy. Plaintiff argues that she sustained her loss when she was involved in an automobile accident on October 25, 2004, and learned that Tabacchini had failed to include the uninsured motorist coverage she had requested. Plaintiff relies on *Tenneco*, 281 Mich App at 458, which she states held that a breach of an insurance contract occurs not when the contract is entered into but when the insured suffers a loss allegedly covered by the insurance policy. Plaintiff misstates the *Tenneco* holding. The *Tenneco* Court held that a breach of contract claim accrues when the wrong occurs. "With respect to an insurer's promise to defend its insured from suits, a breach occurs when the insurer refuses to defend an action against its insured." *Id.* In other words, when an insurer fails to meet its contractual obligation, a wrong occurs.

Here, Tabacchini did not fail to meet a contractual obligation to defend plaintiff in an action brought against her. Rather, Tabacchini allegedly failed to include coverage in the insurance policy that plaintiff expected to be included. This alleged wrong occurred at the time the contract was executed on December 5, 2003. Because plaintiff filed her complaint in this action on June 29, 2010, more than six years after the alleged wrong occurred, plaintiff's breach of contract claim against Tabacchini is time barred.

Plaintiff next argues that the trial court erred in granting summary disposition of her fraud claims. We disagree. The trial court held that plaintiff's fraud claims were based upon mere

speculation and granted defendants' motion regarding these counts pursuant to MCR 2.116(C)(8) and (10). Summary disposition under MCR 2.116(C)(8) may be granted on the ground that the opposing party has failed to state a claim upon which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005); *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). A mere possibility that the claim might be supported by evidence at trial is insufficient. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006). This Court's review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009).

Plaintiff alleged in her amended complaint that defendants Tabacchini and State Farm committed fraud by attempting to cover up that she actually had uninsured motorist benefits, or had requested such benefits for her Ford Taurus, by concealing or destroying documents relating to her policy. The elements of fraud are:

(1) that the defendant made a material representation; (2) that it was false; (3) that the defendant made the representation knowing that it was false or made it recklessly without knowledge of its truth; (4) that the defendant intended that the plaintiff would act on the representation; (5) that the plaintiff relied on the representation; and (6) that the plaintiff suffered injury as a result of having relied on the representation. [*Lucas v Awaad*, 299 Mich App 345, 363; 830 NW2d 141 (2013).]

Plaintiff alleged that the misrepresentation occurred when Tabacchini told her after the accident that he made a mistake by not including uninsured motorist benefits in her policy and that he would fix it. According to plaintiff, instead of correcting the mistake, Tabacchini, at State Farm's direction, destroyed all of the documents relating to her policy, and State Farm continued to assert during 2006 litigation that plaintiff did not have uninsured motorist benefits. Plaintiff claimed to have relied upon defendants' alleged misrepresentations to her detriment by not appealing the dismissal of her 2006 action to obtain those benefits and by not bringing a negligence action against Tabacchini because she lacked the requisite proof. To support her claim, plaintiff relied upon her expert's testimony that it was customary for insurers to keep insurance documents for several years, the fact that she had insured nine vehicles with uninsured motorist benefits over her years of insuring vehicles through Tabacchini, and that Tabacchini had testified that he advised his clients to include such coverage in their policies. Lastly, plaintiff argues that this fraud was ongoing as defendants continually failed to provide her with the documentation related to her policy for her Ford Taurus.

The trial court found that plaintiff's allegations were based upon pure speculation. We agree that plaintiff was not able to support her allegation that documents were fraudulently destroyed or concealed pertaining to the policy at issue. In fact, defendants have provided testimony that contradicts plaintiff's contention regarding the documents. Tabacchini testified that, pursuant to office policy, all of the records and documents relating to plaintiff's insurance policy had been destroyed. Despite plaintiff's belief that the documents pertaining to the policy at issue exist, such belief is based upon pure conjecture and speculation. Since plaintiff cannot

establish fraud, she also cannot establish that fraud is or has been ongoing. A plaintiff's own speculation and conjecture is insufficient to oppose a motion for summary disposition brought pursuant to MCR 2.116(C)(10). *Libralter Plastics v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Accordingly, the trial court did not err in finding that plaintiff failed to establish a claim of fraud.

Affirmed. Defendants may tax costs. MCR 7.219.

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood

/s/ Deborah A. Servitto