STATE OF MICHIGAN

COURT OF APPEALS

SHERYL ANN BORGER, Plaintiff-Appellant,	UNPUBLISHED April 23, 2002
v	No. 229856 Wayne Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee.	LC No. 00-015452-NF

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). The trial court ruled that the statute of limitations contained in the parties' automobile insurance policy had expired prior to plaintiff making a claim for uninsured motorist benefits; therefore, plaintiff's claim was time-barred.[1] We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff was allegedly injured in a motor vehicle accident on April 27, 1993. Plaintiff claimed that her injuries from that accident were aggravated in a second accident that occurred on August 9, 1995. At issue here are plaintiff's claims concerning the first accident, which involved an uninsured motorist. Plaintiff had automobile insurance through defendant, and she had uninsured motorist coverage under the policy. The insurance policy, as revised, contained the following language:

> 20. The following revisions have been made to Uninsured and Underinsured Motorist Coverage:
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> ***

[1] The record indicates that the trial court focused on the limitation period contained in the insurance policy and not any period of limitation as to the filing of the lawsuit. Therefore, it would be more appropriate to conclude that the case was dismissed for lack of a genuine issue of material fact, MCR 2.116(C)(10)[no factual dispute that a claim for benefits was untimely under the insurance policy, thus barring enforcement of the policy].

> c. a person seeking coverage must present a claim within the time period permitted by the statute of limitations applying to bodily injury claims in the state in which the accident occurred.

On March 22, 1996, plaintiff filed a single lawsuit against the parties allegedly at fault in both motor vehicle accidents. The uninsured motorist involved in the first accident was personally served with the complaint five days before the expiration of the three-year limitation period. The uninsured motorist failed to file an answer, and on November 14, 1996, plaintiff's counsel wrote to defendant Auto-Owners indicating that it appeared that the motorist was in fact uninsured. There is no dispute that the first time plaintiff contacted defendant regarding uninsured motorist coverage was November 14, 1996. The November 14th correspondence requested that defendant advise plaintiff's counsel what steps were necessary to submit a claim for uninsured motorist benefits.

On February 23, 1998, plaintiff's counsel again corresponded with defendant, advising it that a default judgment was going to be entered against the uninsured motorist, and that plaintiff's counsel would contact defendant about an uninsured motorist claim after the default judgment was entered. On March 25, 1998, plaintiff's counsel sent an affidavit to the uninsured motorist, requesting that he sign the affidavit establishing that he was an uninsured motorist, and the affidavit was executed shortly thereafter. The affidavit of no insurance was forwarded to defendant on April 2, 1998. The uninsured motorist subsequently filed for bankruptcy.

On May 8, 1998, defendant acknowledged the previous correspondence from plaintiff's counsel, and noted that it had handled a collision and damages claim made by plaintiff at the time of the first accident. Defendant inquired as to whether plaintiff was now making a claim for uninsured motorist benefits under plaintiff's policy.

On February 16, 1999, plaintiff's counsel again corresponded with defendant, reiterating his request for any forms or materials necessary to pursue a claim for uninsured motorist benefits. On May 25, 1999, plaintiff's counsel delivered medical records and depositions regarding plaintiff's injuries to defendant's claims adjuster. On June 30, 1999, plaintiff formally demanded the uninsured motorist policy limit of $100,000. On March 3, 2000, defendant offered plaintiff $12,500 to settle the claim, which was rejected by plaintiff on March 10, 2000. Along with plaintiff's rejection, she made a request for arbitration. Defendant did not respond to the arbitration request, and the present action was initiated on May 12, 2000, over seven years after the accident.

Defendant sought summary disposition pursuant to MCR 2.116(C)(7) on the basis that the action was time-barred because a timely claim for coverage was not made by plaintiff. The trial court agreed, ruling that the statute of limitations had expired prior to a claim, and the court rejected plaintiff's argument that there was no way to timely discover that the motorist in the first accident was uninsured. The trial court granted summary disposition pursuant to MCR 2.116(C)(7).

II. GENERAL APPLICABLE LAW

A. STANDARD OF REVIEW

As noted above, we believe that this case, on the matter of the ultimate grounds for dismissal, is more properly analyzed under MCR 2.116(C)(10).[2] However, we think it appropriate to take into consideration the principles regarding MCR 2.116(C)(7) and the statute of limitations in reviewing the underlying issues regarding the limitation period contained in the insurance policy. In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Brennan v Edward D Jones & Co,* 245 Mich App 156, 157; 626 NW2d 917 (2001). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision as to whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo. *Id.*

B. STATUTE OF LIMITATIONS

The insurance policy references the applicable statute of limitations for pursuing a claim. MCL 600.5805(9) provides that "[t]he period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." There is no dispute between the parties that MCL 600.5805(9) is applicable in the present action in determining the limitation period contained in the insurance policy. A claim "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. The statute of limitations on an insurance contract begins to run from the date an insured has a legally enforceable claim against the insurer. *Strachura v Metropolitan Life Ins Co,* 123 Mich App 190, 193; 333 NW2d 219 (1983), rev'd on other grounds 417 Mich 1100.20 (1983). Statutes of limitation are intended to provide an opposing party with a fair opportunity to defend, to relieve the court system from addressing stale claims, and to protect potential defendants from protracted fear of litigation. *Bigelow v Walraven,* 392 Mich 566, 576; 221 NW2d 328 (1974).

C. INSURANCE POLICIES

Our Supreme Court in *Frankenmuth Mutual Ins Co v Masters,* 460 Mich 105, 111-112; 595 NW2d 832 (1999), stated the general principles involved in interpreting an insurance policy.

> [W]e examine the language of the insurance policies and interpret their terms in accordance with well established Michigan principles of construction.
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> An insurance policy must be enforced in accordance with its terms. We will not hold an insurance company liable for a risk it did not assume.

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[2] MCR 2.116(C)(10) provides for summary disposition where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co,* 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties is viewed "in the light most favorable to the party opposing the motion." *Id.*

> In interpreting ambiguous terms of an insurance policy, this Court will construe the policy in favor of the insured. However, we will not create ambiguity where the terms of the contract are clear. Where there is no ambiguity, we will enforce the terms of the contract as written.
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> Furthermore, this Court will interpret the terms of an insurance contract in accordance with their "commonly used meaning." We take into account the reasonable expectations of the parties. [Citations omitted.]

III. ANALYSIS

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition because it would be unreasonable to strictly enforce the limitation period contained in the insurance policy in light of the facts of the case. Plaintiff maintains that she timely filed suit against the uninsured motorist, and that she did not even suspect that the motorist was uninsured until he failed to file an answer to the complaint. Plaintiff further asserts that it was not until April 1998, the time that the affidavit of no insurance was received, that she actually knew that the motorist was uninsured. Plaintiff contends that defendant failed to respond to the initial request in November 1996 for guidance to file the claim.

We first note that the November 1996 correspondence was made beyond the three-year limitation period. We also reject plaintiff's argument that it would be unreasonable to strictly enforce the limitation period found in the insurance policy.

In *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118, 126; 301 NW2d 275 (1981), cited by plaintiff as supporting authority, our Supreme Court stated:

> Absent any statute to the contrary, the general rule followed by most courts has been to uphold provisions in private contracts limiting the time to bring suit where the limitation is reasonable, even though the period specified is less than the applicable statute of limitations. [Citations omitted.]

Here, the applicable limitation period mirrored the limitation period found in MCL 600.5805(9), and there is no factual or legal basis to conclude that the three-year statute of limitations was unreasonably short, or to conclude that it would be unreasonable to apply the limitation period in this case. We agree with the trial court that there were avenues plaintiff could have explored during the three years after the accident in order to determine the motorist's insurance status.[3]

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[3] We note that the record is unclear regarding what transpired at the scene of the accident as to whether documents showing proof of insurance were exchanged, and whether the police report indicated the status of any insurance coverage. At the hearing on the motion for summary disposition, plaintiff's counsel, in response to the trial court's questioning as to why further inquiry was not made, simply stated that "[i]t wasn't apparent from the police report." On appeal, plaintiff makes no claim that the motorist produced a false or invalid proof of insurance, nor is it argued that the police report contained information showing that the motorist was

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In *Morley v Automobile Club of Michigan*, 458 Mich 459, 460-461; 581 NW2d 237 (1998), our Supreme Court addressed, and agreed with, a claim made by the defendant insurer that it properly denied the plaintiffs' claim for uninsured motorist benefits where the insurance policy required that the claim be made within three years of the date of the accident, and where the plaintiffs' claim was submitted after the deadline. The *Morley* Court, rejecting the plaintiff's argument that notification of the accident sufficed as a claim for the uninsured motorist benefits, stated:

> The report of the accident that the no-fault claim procedure requires could not inform the insurer of the most obviously necessary fact to trigger uninsured motorist coverage, namely, that in the insured's view the tortfeasor was uninsured. Thus, as in our case, where all the defendant knew was that it was not [the uninsured motorist's] insurer, this mere report of an accident would not give it the basis to conclude that the tortfeasor, in violation of the statute that requires automobile insurance be carried, did not have automobile no-fault insurance. [*Id.* at 468 (citations omitted).]

Here, although plaintiff timely reported the accident to defendant, there is no issue of fact that defendant was not notified of any uninsured motorist claim within the three years following the accident, nor is there any evidence that defendant was aware that the motorist was uninsured. Plaintiff makes no claim that defendant was under any obligation to discover the insurance status of the uninsured motorist.

In *Morley, supra* at 470, our Supreme Court further rejected the plaintiff's argument that the policy was ambiguous as to the exact manner a claim should be made, wherein the Court stated:

> Had they made a timely claim in any manner, this technical argument would be better received. While the contract does not spell out the manner in which a claim for benefits should be made, what cannot be in doubt is that some indication that the insured felt entitled to utilize this coverage had to be sent and that there was no timely indication in any form or manner submitted by the insureds here that they felt so entitled.

Here, it is indisputable, even assuming that the November 1996 correspondence constituted a "claim" under the insurance policy, that the first attempt to notify defendant and request uninsured motorist benefits occurred after the three-year limitation period elapsed. The insurance contract must be enforced as written if it fairly allows but one interpretation, *Morley, supra* at 465, and the policy in the present case can only be interpreted to require a claim within three years of the accident. In *Morley, id.* at 467, the Supreme Court held that because the "plaintiffs made their initial claim for uninsured motorist benefits well after the contractual time limit had expired, they were time barred from receiving uninsured motorist benefits." The holding applies equally in the present case.

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insured.

Plaintiff next contends that the discovery rule tolled plaintiff's claim until she knew that the uninsured motorist was uninsured. We disagree.

Where an element of a cause of action has occurred, but cannot be pleaded in a complaint because it is not yet discoverable with reasonable diligence, Michigan courts have applied the discovery rule. *Travelers Ins Co v Guardian Alarm Co of Michigan,* 231 Mich App 473, 479-480; 586 NW2d 760 (1998). Under the discovery rule, the statute of limitations begins to run when a plaintiff discovers or should have discovered a cause of action. *Moll v Abbott Laboratories,* 444 Mich 1, 29; 506 NW2d 816 (1993). The determination of whether a plaintiff should have discovered a cause of action involves an objective test. *Poffenbarger v Kaplan,* 224 Mich App 1, 11-12; 568 NW2d 131 (1997). A plaintiff armed with knowledge of an injury and its cause has a duty to diligently pursue the resulting legal claim. *Moll, supra* at 29.

Here, plaintiff, through the exercise of reasonable diligence, could have discovered that the motorist was uninsured within three years of the accident. We reach that conclusion as a matter of law. The record is devoid of any evidence that plaintiff made any attempts to discover the insurance status of the motorist in the three years following the accident.[4]

Finally, plaintiff contends that assuming a timely claim for uninsured motorist benefits had been made under the policy, based on the discovery rule, the filing of plaintiff's complaint outside the statute of limitations should be allowed based on equitable estoppel.[5] In light of our ruling above that the claim was not timely, we find it unnecessary to address this argument or to address the appropriate limitation period.

IV. CONCLUSION

There is no genuine issue of fact that plaintiff was time-barred under the express and unambiguous terms of the insurance policy from receiving uninsured motorist benefits. Additionally, there is no basis, as a matter of law, for allowing plaintiff to seek refuge in the discovery rule. Therefore, the trial court properly granted defendant's motion for summary disposition.

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[4] Plaintiff's reliance on *Mapes v Auto Club Ins Ass'n,* 208 Mich App 5; 527 NW2d 22 (1994), depublished at 450 Mich 917 (1995), is misplaced because the case was depublished, and because the motorist in that case was insured at the time of the accident, but the insurer became insolvent three years after the accident, and this Court found that an uninsured motorist claim accrued at the time of the insolvency and not the time of the accident. Here, there is no evidence that the motorist was insured at the time of the accident; therefore, an uninsured motorist claim accrued at that time.

[5] To the extent that plaintiff's argument regarding equitable estoppel is made outside the context of the final issue presented, we reject the argument. Equitable estoppel rests on broad principles of justice. *Moore v First Security Casualty Co,* 224 Mich App 370, 376; 568 NW2d 841 (1997). Plaintiff argues estoppel based on defendant's actions in reviewing plaintiff's medical records and making a settlement offer; however, these actions were after the untimely claim and did not constitute an effort by defendant to deceptively delay a timely claim. It would be unreasonable to conclude that defendant's actions waived any defenses in future litigation.

Affirmed.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald