STATE OF MICHIGAN

COURT OF APPEALS

CAROLYN ANN BROOKS,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTO INSURANCE COMPANY and AUTO CLUB INSURANCE ASSOCIATION, a/k/a ACIA,

Defendants-Appellees.

UNPUBLISHED
November 19, 2002

No. 231898
Wayne Circuit Court
LC No. 99-904671-CK

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition of her claims. Plaintiff sought declaratory relief to compel defendants Auto Club Insurance Association (ACIA) and/or State Farm Mutual Insurance Company (State Farm) to proceed with arbitration of her claim for uninsured motorist coverage. We affirm.

On February 18, 1993, plaintiff sustained injuries while traveling as a passenger in a motor vehicle that collided with another motor vehicle, which was uninsured. Plaintiff's State Farm insurance policy provides uninsured motorist coverage of $100,000 per person and $300,000 per occurrence for bodily injury that a named insured is legally entitled to collect from the owner of an uninsured motor vehicle. However, if the named insured sustains bodily injury while an occupant of a vehicle not owned by the named insured and the driver of the vehicle is insured under another policy, State Farm limits its uninsured motorist coverage by the following policy provision:

> **If There Is Other Coverage**
>
> ***
>
> 3. If the ***insured*** sustains ***bodily injury*** while ***occupying*** a vehicle not owned by ***you, your spouse*** or ***any relative***, and;
>
> a. such vehicle is described on the declarations page of another policy providing uninsured motor vehicle coverage, or

> b. its driver, other than ***you, your spouse*** or ***any relative***, is an ***insured*** under another policy,
>
> this coverage applies:
>
> a. as excess to any uninsured motor vehicle coverage which applies to the vehicle or driver, but
>
> b. only in the amount by which it exceeds the primary coverage.

Under the terms of the State Farm policy, the insured must give State Farm written notice of the accident and pertinent details as soon as reasonably possible. The policy also provides that a person making a claim for uninsured motorist coverage must "send [State Farm] a copy of all suit papers at once when the party liable for the accident is sued for these damages." Upon written request of the insured, State Farm is required to arbitrate whether the insured is entitled to collect damages from the owner or driver of the uninsured vehicle and the amount of the damages.

The driver of the vehicle in which plaintiff was injured was insured by ACIA. The driver's ACIA policy also provides uninsured motorist coverage of $100,000 per person and $300,000 per occurrence. The policy provides uninsured motorist coverage to an occupant of the driver's vehicle, if the damage is caused by an accident arising out of the use of an uninsured vehicle and an insured person is legally entitled to recover from the owner or operator of the uninsured vehicle.[1] An insured person, as defined in the ACIA policy, includes any person occupying the named insured's vehicle. The ACIA policy also contains an arbitration clause. However, the policy specifies that the insured person must file a demand within three years of the date of the accident to invoke arbitration.

On November 7, 1994, plaintiff brought a tort action against the uninsured motorist and the driver. The driver was voluntarily dismissed from the suit and on April 5, 1996, the trial court entered a default judgment in the amount of $125,000 against the uninsured motorist.

On July 29, 1998, more than five years after the accident, plaintiff made a written request for State Farm to arbitrate her claim for uninsured motorist benefits. State Farm denied her request. On February 16, 1999, plaintiff made a demand upon ACIA to arbitrate her claim for uninsured motorist coverage via the complaint in this case. Both defendants moved for summary

---

[1] ACIA's policy provides:

> Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay damages for bodily injury which: is caused by accident; and arises out of the ownership, operation, maintenance or use of an uninsured motor vehicle; and results in death, serious impairment of body function or permanent serious disfigurement; and an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle.

disposition under MCR 2.116(C)(10), and the trial court granted summary disposition in favor of both defendants.[2]

I. Plaintiff's Claim against State Farm

Plaintiff contends that the trial court erred in granting summary disposition of her claim against State Farm. We review a trial court's grant of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In addition, the interpretation and construction of an insurance contract is an issue of law which we review de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

We need not address plaintiff's arguments that the "other insurance" clause contained in the policy is ambiguous, unconscionable, and violates the Uniform Trade Practices Act because we conclude that plaintiff's failure to comply with the insurance contract's notice provisions precludes plaintiff from recovering under her State Farm policy. We note that the trial court did not grant summary disposition to State Farm on this basis. However, we review the propriety of summary disposition de novo and may affirm the trial court's decision on this alternative basis. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *Koster v June's Trucking*, 244 Mich App 162, 168; 625 NW2d 82 (2000); *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998); *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998).

One of the arguments advanced by State Farm below was that plaintiff failed to provide timely notice to State Farm of her claim for uninsured motorist benefits and her lawsuit against the uninsured motorist, as required under the policy.

State Farm's policy includes the following notice provisions:

1. Notice to Us of an Accident or Loss

> The ***insured*** must give us or one of our agents written notice of the accident or ***loss*** as soon as reasonably possible. The notice must give us:
>
> a. ***your*** name; and
> b. the names and addresses of all ***persons*** involved and
> c. the hour, date, place and facts of the accident or ***loss***; and
> d. the names and addresses of witnesses.
>
> ***
>
> **5. Other Duties Under . . . Uninsured Motor Vehicle . . . Coverages**
>
> The ***person*** making claim also shall:

[2] ACIA also moved for summary disposition under MCR 2.116(C)(8). Because the trial court looked beyond the pleadings in ruling on the motions for summary disposition, we review the trial court's decision under MCR 2.116(C)(10).

> a. give us all the details about the death, injury, treatment and other information we need to determine the amount payable.
>
> ***
>
> d. under the no-fault and uninsured motor vehicle coverages, send us a copy of all suit papers at once when the party liable for the accident is sued for these damages.

Plaintiff filed suit against the uninsured driver on November 7, 1994 and the default judgment was entered on April 5, 1996. Plaintiff notified State Farm of her claim for uninsured motorist benefits on July 28, 1998. It is undisputed that plaintiff failed to provide State Farm with notice of and copies of papers related to the suit against the uninsured motorist until more than five years after the accident and more than two years after the entry of the default judgment in that action. Accordingly, there is no question of fact that plaintiff failed to comply with the contract provision which required plaintiff to provide notice of her lawsuit "at once."

Plaintiff's failure to comply with a notice provision does not relieve State Farm of its obligation to provide coverage unless State Farm was prejudiced by the lateness of the notice. *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998). Although plaintiff argues that State Farm suffered no prejudice because State Farm possesses subrogation rights against the uninsured motorist,[3] any claim by State Farm to seek reimbursement from ACIA is time-barred under the terms of the ACIA policy which requires a claim for uninsured motorist benefits to be made within three years of the date of the accident. See *Citizens Ins Co of America v American Community Mut Ins Co*, 197 Mich App 707, 710; 495 NW2d 798 (1992). Because the accident occurred on February 18, 1993, plaintiff had until February 18, 1996 to claim uninsured motorist benefits under the ACIA policy. It is undisputed that plaintiff did not seek uninsured motorist

---

[3] The policy provides, in pertinent part:

> 3. Our Right to Recover Our Payments
>
> * * *
>
> b. Under uninsured motor vehicle coverage, we are subrogated to the extent of our payments to the proceeds of any settlement the injured person recovers from any party liable for the bodily injury.
>
> c. If the person to or for whom we have made payment has not recovered from the party at fault, he or she shall:
>
> (1) under personal injury protection, property protection and uninsured motor vehicle coverages:
>
> (a) keep these rights in trust for us; and,
> (b) execute any legal papers we need[.]

benefits from ACIA until almost six years after the accident. If plaintiff had timely notified State Farm of her suit against the uninsured motorist, State Farm would have had the opportunity to involve ACIA in this matter. *Id.*. Further, plaintiff's failure to notify State Farm until after entry of the default judgment deprived State Farm of the opportunity to participate in the action. *Koski, supra* at 444-445. Thus, there is no genuine issue of material fact that plaintiff's failure to comply with the notice provisions contained in the policy deprived State Farm of the opportunity to seek reimbursement from ACIA, to investigate the claim, to cross-examine witnesses, and to present its own evidence relative to liability and damages. *Koski, supra* at 444-445.

We reject plaintiff's argument that the filing of her claim for first-party benefits with State Farm on the day after the accident was sufficient to provide notice of potential additional claims, including a claim for uninsured motorist benefits. *Morley, supra* at 467-468. There is no indication in the record that plaintiff's claim for first-party benefits mentioned a possible uninsured motorist claim. Thus, plaintiff did not timely notify State Farm of a possible uninsured motorist claim. *Id.*. Regardless, as discussed *supra*, plaintiff failed to provide timely notice of her lawsuit against the uninsured motorist by sending State Farm a "copy of all suit papers at once" when plaintiff initiated suit against the uninsured motorist. Therefore, State Farm was released from any obligation of coverage under the policy, *Koski, supra* at 447-448, and State Farm was entitled to judgment as a matter of law.

II. Plaintiff's Claim against ACIA

Plaintiff also contends that the trial court erred in granting summary disposition of her claim against ACIA. ACIA moved for summary disposition, and the trial court granted the motion, on the ground that plaintiff failed to file her claim for benefits within three years of the accident as required under the policy. On appeal, plaintiff first argues that the three-year period in which to file a claim contained in the ACIA policy does not apply to her because she was not a party to the insurance contract. We disagree.

Uninsured motorist insurance coverage is optional and is not mandated by the No-Fault Act. *Rohlman v Hawkeye-Security Ins*, 442 Mich 520, 525; 502 NW2d 310 (1993). Accordingly, the insurance policy, as a contractual agreement between the parties, governs the coverage, and thus, is subject to the rules of contract interpretation. *Rohlman, supra* at 524-525. Under Michigan contract law, the rights of third-party beneficiaries are subject to the limitations of the contract. MCL 600.1405; *Koenig v City of South Haven*, 460 Mich 667, 676; 597 NW2d 99 (1999) (Taylor, J). A plaintiff seeking benefits as a non-party to the contract "has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." MCL 600.1405; *Ohio Farmers v Shamie (On Remand),* 243 Mich App 232, 240-241; 622 NW2d 85 (2000); *Cenovski, Inc v Mich Mut Ins*, 200 Mich App 725, 728; 504 NW2d 722 (1993).

Plaintiff was an occupant of the driver's vehicle and the driver was insured by ACIA. The ACIA policy provides coverage for certain damages arising out of automobile accidents involving an uninsured motorist. Plaintiff alleged in her complaint that she is a third party beneficiary of the ACIA policy, and ACIA acknowledged that plaintiff qualifies as an "insured" under the policy. See *Koenig, supra* at 676-677, 680; MCL 600.1405(2)(b).

A third-party beneficiary's rights under the contract do not exceed those of the contracting party. *Koenig, supra* at 676; MCL 600.1405. Accordingly, in order to benefit from the ACIA policy, plaintiff must comply with the terms of ACIA's policy. The ACIA policy provides, in pertinent part:

> If **we** do not agree with the **insured person(s):**
>
> > that they are legally entitled to recover damages from the owner or the operator of an **uninsured motor vehicle**; or
> >
> > as to the amount of payment;
>
> either they or **we** must demand, in writing, that the issues excluding matters of coverage, be determined by arbitration. A Demand For Arbitration must be filed within 3 years from the date of the accident or **we** will not pay damages under this Part. Unless otherwise agreed by the express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, or whether or not a **motor vehicle** is an **uninsured motor vehicle** are not subject to arbitration and suit must be filed within 3 years from the date of the accident.

The provision that a demand for arbitration must be filed within three years of the date of the accident is clear and unambiguous. *Wilkie v Auto-Owners Ins Co*, 245 Mich App 521, 524; 629 NW2d 86 (2001).[4] Accordingly, we enforce the contract as written. *Morley, supra* at 465, citing *Bianchi v Auto Club of Michigan*, 437 Mich 65, 70-71; 467 NW2d 17 (1991); *Wilkie, supra* at 524. Plaintiff was required to claim uninsured motorist benefits from ACIA within three years of the accident in order to receive benefits. Because it is undisputed that plaintiff did not seek uninsured motorist benefits until more than five years after the accident, plaintiff is barred from recovery under the ACIA policy. Thus, summary disposition of plaintiff's claim was proper.[5]

---

[4] See *Morley, supra* at 465-466, where the Michigan Supreme Court interpreted the same clause and found the language to be unambiguous.

[5] There is no indication in the record that plaintiff made a claim for uninsured motorist benefits before making a demand for arbitration. "[I]nsurance contracts require a claim to be made for benefits before entitlement can be established." *Morley, supra* at 466. Thus, pursuant to the ACIA policy, a claim must also be made within three years of the date of the accident. "Obviously [the arbitration clause] must mean the conditions precedent to arbitration, i.e., claim and denial, are intended to take place before arbitration or suit is filed." *Morley, supra* at 467 n 6. "[T]he insurer could not disagree with the insureds until a request for benefits was made. . . . " *Morley, supra* at 466. "[U]ntil a specific claim is made, an insurer has no way of knowing what expenses have been incurred, whether those expenses are covered losses and, indeed, whether the insured will file a claim at all." *Morley, supra* at 466-467, quoting *Welton v Carriers Ins Co,* 421 Mich 571, 579; 365 NW2d 170 (1984).

Plaintiff also argues that her claim for benefits under the uninsured motorist provision of the ACIA policy did not accrue until she learned of the uninsured status of the other driver. We disagree. The plain language of the policy does not support plaintiff's position, and this Court has declined to impose a discovery rule in such cases. *Sallee v Auto Club Ins*, 190 Mich App 305, 307-308; 475 NW2d 828 (1991). Because plaintiff made her claim for benefits under ACIA's policy on February 16, 1999, nearly six years after the February 18, 1993 accident, she is not entitled to uninsured motorist benefits under the ACIA policy.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald