STATE OF MICHIGAN

COURT OF APPEALS

ARLON ELSER and SHIRLEY ANN ELSER, Plaintiffs-Appellants, v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	UNPUBLISHED May 24, 2005 No. 260351 Calhoun Circuit Court LC No. 04-001668-NF

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

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

On May 26, 2001, plaintiffs were injured in a collision with an uninsured motorist. Defendant paid $50,000 on Arlon Elser's claim for uninsured motorist benefits and $6,000 on Shirley Elser's claim. Plaintiffs, however, sought additional uninsured motorist benefits, and on May 12, 2004, they filed suit solely against defendant.[1]

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiffs failed to follow the procedures set forth in the insurance policy in that they failed to join the uninsured driver as a defendant. In the meantime, plaintiffs filed a separate action against the errant driver and obtained a default judgment in the amount of $160,000. Defendant first learned of this action only after the default judgment was entered.

The trial court held that plaintiffs were contractually obligated to join the driver in the instant case and to act within the applicable limitations period. The trial court also held that even if the late-filed separate action were proper, it could not cure the initial failure to join the driver because plaintiffs failed in their contractual obligation to provide notice of this action to defendant.

[1] Plaintiffs also included a count for declaratory relief with respect to PIP benefits. The parties stipulated to the dismissal of that count.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

The parties' policy included the following provisions for uninsured-motorist benefits:

> Two questions must be decided by agreement between the insured and us:
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> 1. Is the insured legally entitled to collect damages from the owner or driver of the uninsured motor vehicle; and
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> 2. If so, in what amount?
>
> If there is no agreement, then:
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> * * *
>
> 2. If either party does not consent to arbitrate these questions . . . , the insured shall:
>
> a. file a lawsuit in the proper court against the owner or driver of the uninsured motor vehicle and us, or if such owner or driver is unknown, against us; and
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> b. upon filing, immediately give us copies of the summons and complaint filed by the insured in that action, and
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> c. secure a judgment in that action. The judgment must be the final result of an actual trial and an appeal, if an appeal is taken.
>
> 3. If the insured files suit against the owner or driver of the uninsured motor vehicle, we have the right to defend on the issues of the legal liability of and the damages owed by such owner or driver.
>
> We are not bound by any judgment against any person or organization obtained without our written consent.

"Uninsured motorist benefit clauses are construed without reference to the no-fault act because such insurance is not required under the act." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004)(citation omitted). Therefore, the insurance contract is enforced according to its terms. *Id.* at 534. The contract of insurance determines the circumstances under which benefits will be awarded. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993).

It is certainly arguable, as maintained by plaintiffs, that the terms of the insurance policy do not clearly indicate that plaintiffs were required to sue the uninsured driver and defendant at the same time and in a single lawsuit. On the other hand, plaintiffs undoubtedly violated the policy's requirement that they immediately provide copies of the summons and complaint with respect to the action against the uninsured motorist, where there is no dispute that defendant was not made aware of the action against the motorist. One of the issues that presents itself in this

case is that the action against the uninsured driver was filed outside the three-year statute of limitations and that defendant, if given notice of the suit, could have defended on behalf of the driver, raising the defense that the action was time-barred.

Plaintiffs argue that the policy does not reference a three-year limitations period; defendant argues that such a period is implicit in the policy's language. We conclude that the three-year statutory limitations period for personal-injury actions applied *for purposes of plaintiffs' suit against the driver.* MCL 600.5805(10). Regardless of the fact that a default judgment was actually entered against the uninsured motorist, defendant could have stepped in, with proper notice, and successfully sought dismissal.

The question then becomes whether the time-barred action against the driver, or the failure to timely sue the driver, resulted in the proper dismissal of plaintiffs' action in the case at bar. This issue must be analyzed in light of plaintiffs' argument that defendant suffered no prejudice, assuming policy violations on plaintiffs' part. In *Koski v Allstate Ins Co,* 456 Mich 439, 444; 572 NW2d 636 (1998), our Supreme Court stated that "it is a well-established principle that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position." Citing *Wendel v Swanberg,* 384 Mich 468; 185 NW2d 348 (1971); *Weller v Cummins,* 330 Mich 286; 47 NW2d 612 (1951); 1 Windt, Insurance Claims & Disputes (3d ed), § 3.05, p 123. The *Koski* Court's discussion of the application of "prejudice" principles was in reference to both notice-of-claim and notice-of-suit provisions, and the case itself addressed a failure to provide notice to the insurer of a suit against the insured tortfeasor. *Koski, supra* at 444-445. Accordingly, it is proper to determine here whether defendant was prejudiced by plaintiffs' violations of the policy. Thus, we return to the statute of limitations issue to decide whether defendant was prejudiced by plaintiffs' untimely suit against the uninsured motorist, having already determined that the suit against the motorist was time-barred,[2] and now placing our focus on the statute of limitations relative to defendant.

There is case law which provides that a contractual claim for uninsured motorist benefits is subject to the six-year limitations period applicable to contracts in general that is found in MCL 600.5807(8). *Jacobs v DAIIE,* 107 Mich App 424, 430; 309 NW2d 627 (1981); *DAIIE v Hafendorfer,* 38 Mich App 709, 718-719; 197 NW2d 155 (1972). Plaintiffs' suit against defendant was filed within three years; therefore, the action was timely regardless of whether the limitations period is three or six years. However, it is argued that, had defendant interceded in the action against the uninsured motorist and obtained a dismissal on the basis of the statute of limitations, any liability by defendant for uninsured motorist benefits would have evaporated. Defendant points out that the policy provides coverage where "the insured [is] legally entitled to collect damages from the owner or driver of the uninsured motor vehicle," and that, because plaintiffs were not legally entitled to collect damages from the uninsured driver in light of the

[2] This being said, the default judgment against the uninsured motorist is legally valid and enforceable as between plaintiffs and the driver.

limitations period, the expiration of the three-year statute of limitations as to the driver necessarily required a dismissal with respect to defendant.

We find *Hafendorfer, supra,* informative on this issue. There, the defendant insured was severely injured by an uninsured driver, and the insured had uninsured motorist coverage through DAIIE. The insured failed to commence an action within three years against anyone. The insurance contract provided that the insurer would pay "[a]ll sums which the insured shall be legally entitled to recover as damages[.]" *Id.* at 712. The Court had to determine whether the three-year limitations period for injuries to persons was applicable, or rather the six-year limitations period for contract actions. After extensive analysis and review of the case law, the *Hafendorfer* panel concluded:

> We agree with the decisions of these courts that the "legally entitled to recover" clause denotes only the establishment of fault on the part of the uninsured motorist and proof of the damages caused thereby. The "legally entitled" phrase does not subject insured's claim to the three-year statute of limitations.
>
> We hold that the six-year statute of limitations applies to defendant insured's claim against plaintiff insurer on the uninsured motorist clause of his insurance contract. [*Id.* at 718-719.][3]

This Court's opinion in *Hafendorfer* implicitly and necessarily encompassed the argument presented to us. Because the insured in *Hafendorfer* failed to file suit within three years, it would make no sense for the Court to entertain the issue whether the six-year limitations period on the claim for benefits applied if indeed the policy language, comparable to the language here, precluded any action by the insured for benefits where there was no maintainable suit against the underlying tortfeasor because the limitations period had run as to that tortfeasor. Because the *Hafendorfer* panel construed the phrase "legally entitled to recover" as merely meaning the "establishment of fault," the question whether the uninsured motorist here was at fault, along with the extent of any damages, can be answered in this action, despite the fact that the action against the driver was technically time-barred.

Additionally, we see no bar to a claim by defendant against the uninsured motorist premised on equitable subrogation arising out of any uninsured motorist benefits that may be paid to plaintiffs. *Citizens Ins Co of America v Buck,* 216 Mich App 217, 224-228; 548 NW2d

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[3] Defendant's reliance on *Rory v Continental Ins Co,* 262 Mich App 679; 687 NW2d 304 (2004), appeal gtd 471 Mich 904; 688 NW2d 93 (2004), is misplaced because the brief discussion of whether a three- or six-year period applied was dicta. The plaintiffs in *Rory*, like the plaintiffs here, filed a claim against the insurer within three years. More important, the language in *Rory* was directed to the question of what limitations period should be supplied as a matter of contract interpretation where the contractual limitation period set forth in the contract is unreasonably short, rather than the question of which statutory limitations period applies in the absence of a contractual limitations period.

680 (1996).[4] Aside from the doctrine of equitable subrogation, defendant has subrogation rights by way of contractual assignment language in the insurance policy. See *id.* at 226 (subrogation denotes two different kinds of rights – those transferred by way of contractual assignment and those that arise by operation of law). As noted earlier, the default judgment against the driver is valid and collectible as between plaintiffs and the driver, and therefore subject to subrogation rights held by defendant. To the extent that it can be argued that, had the suit against the driver been dismissed on the basis of defendant's presumed involvement in the action on notice given, there would have been no judgment for plaintiffs to assign to defendant, equitable subrogation, along with its six-year limitations period, would be implicated.

Moreover, there is no prejudice or injury to defendant predicated on the $160,000 default judgment entered against the uninsured driver. Defendant asserts that it is not bound by the default judgment, and plaintiffs make no claim that defendant is bound by that judgment. In fact, plaintiffs specifically and expressly agree that defendant is not bound by the judgment. More importantly, the insurance policy provides, as quoted earlier, that defendant is "not bound by any judgment against any person or organization obtained without [its] written consent." Therefore, plaintiffs are precluded from contending that the default judgment entitles them to collect certain sums from defendant in uninsured motorist benefits. Accordingly, there is a lack of prejudice.

Finally, we note the following passage from *Koski* in which the Court discussed prejudice to the insurer:

> The evidence in the instant case established that Allstate received no notification of the suit brought against plaintiff until three months after the entry of the default judgment. Moreover, nothing in the record indicates that Allstate would have refused to defend the suit, if asked, under a reservation of rights. Consequently, Allstate was deprived of any opportunity to engage in discovery, cross-examine witnesses at trial, or present its own evidence relative to liability and damages. [*Koski, supra* at 445.]

In *Koski,* the plaintiff purchased homeowners insurance from the defendant Allstate. The policy required the plaintiff to provide Allstate with any legal papers he received concerning any accident or claim. The plaintiff's minor daughter suffered serious injuries when her foot was caught under the wheels of a garden tractor owned and operated by the plaintiff. Subsequently, the daughter, through her mother – the plaintiff's wife, sued the plaintiff for money damages. The plaintiff did not notify Allstate, nor did he defend against the action, and a default judgment

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[4] The doctrine of equitable subrogation is based on the principle that a person or entity who, in order to protect a security that is held, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. *Buck, supra* at 226 (citation omitted). The *Buck* panel addressed and applied the doctrine of equitable subrogation in the context of a case involving a motor vehicle insurer seeking compensation from an uninsured tortfeasor for uninsured motorist benefits paid by the insurer to its insured. The Court noted that the applicable statute of limitations for subrogation is six years. *Id.* at 227.

was entered against the plaintiff. The plaintiff then initiated a declaratory judgment action against Allstate for indemnification of the judgment. *Id.* at 441-442. Thus, contrary to the circumstances here, the situation involved an insured tortfeasor, who was defaulted without providing notice to his insurer, seeking indemnification on the judgment from his insurer. The plaintiff sought to hold Allstate liable on a judgment that it was not given an opportunity to defend against, nor was there an opportunity to do so at a later time. Such is not the case in the action before us today.

Here, we first note that, if defendant had interjected itself into the action against the uninsured motorist, there most likely would not have been a trial in light of the statute of limitations. Furthermore, because the default judgment is not binding on defendant, and because defendant will have the full opportunity to defend its position that plaintiffs are not entitled to additional uninsured motorist benefits, defendant has not been harmed or prejudiced, as opposed to the circumstances in *Koski*.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski