STATE OF MICHIGAN

COURT OF APPEALS

GARY LECLAIR, Next Friend of JILL LECLAIR, a minor, Plaintiffs-Appellees, v ALLSTATE INSURANCE CO., Defendant-Appellant.	UNPUBLISHED August 9, 2005 No. 261083 Genesee Circuit Court LC No. 03-075714-CK
MORGAN WOLVERTON, Plaintiff-Appellee, v ALLSTATE INSURANCE CO., Defendant-Appellant.	 No. 261084 Genesee Circuit Court LC No. 03-077865-CK

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In these consolidated cases,[1] defendant Allstate Insurance Co. (defendant) appeals as of right the circuit court order permitting plaintiffs' third-party no fault claims for uninsured motorist benefits to proceed to arbitration, and denying defendant summary disposition of plaintiff Wolverton's serious impairment claim on the basis that factual questions remained. We affirm in both cases.

[1] These cases were consolidated in the circuit court, and this Court consolidated them for appeal on its own motion.

I

Defendant Allstate issued an auto insurance policy to the parents[2] of plaintiff Jill LeClair that provided uninsured motorist benefits and was in effect on July 21, 2002. On that date, plaintiff LeClair was driving on I-69 in Clinton County and plaintiff Wolverton was a passenger, when an unidentified vehicle caused the LeClair vehicle to go off the road and roll over. Plaintiff LeClair's complaint alleged that the unidentified vehicle negligently pulled in front of her "causing physical contact with the vehicle she was occupying." The unidentified vehicle fled the scene and was never identified.

The police arrived on the scene and investigated the accident. Defendant was notified of the accident as required under the policy, and given opportunity to inspect the LeClair vehicle.

Contained in the policy's uninsured motorists coverage section, Part V, is the following arbitration provision:

> **If We Cannot Agree**
>
> If the insured person or **we** do not agree on that person's right to receive any damages or the amount, then at the written request of the insured person the disagreement will be settled by arbitration. A demand for arbitration must be filed within 3 years from the date of the accident, or coverage under this part will not be afforded.[3]

Before filing her complaint for declaratory judgment, breach of contract, and damages in circuit court, plaintiff LeClair demanded arbitration under the policy's arbitration provision. Defendant refused LeClair's pre-suit demand for arbitration on the basis that there was a coverage issue because there was no evidence of physical contact between the unidentified vehicle and the LeClair vehicle.

LeClair filed her complaint for declaratory judgment and damages on February 24, 2003, alleging that defendant breached "its obligation to pay uninsured motorist coverage on the basis that there was no physical contact" between the unidentified vehicle and the LeClair vehicle. LeClair's complaint alleged that as a result of the accident she suffered a fracture of vertebra C-

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[2] Plaintiff Gary LeClair is Jill LeClair's father and next friend. In this opinion, "plaintiff LeClair" refers to Jill LeClair.

[3] Defendant cited only this arbitration provision (Part V, p 20) in its appellate brief. This was also the only provision regarding arbitration the parties (both plaintiffs and defendant) relied on below.

In a reply brief to LeClair's appellate brief, defendant for the first time raises an amendatory provision contained in an endorsement, which provision and endorsement were not before the circuit court. This issue is discussed *infra.*

5, a closed head injury, dental injuries, multiple contusions, scarring, and that her injuries constituted a serious impairment.[4]

Plaintiff Wolverton (nee Wainwright) filed a separate suit against defendant, on December 1, 2003, alleging that as a result of the accident she suffered serious and permanent injuries, including "fractures of the upper left extremity requiring surgery and sequelae along with injuries to the spine and musculoskeletal system and sequelae," and breach of contract.

On defendant's motion, the circuit court ordered the two cases consolidated.

Plaintiff LeClair again demanded arbitration on September 2, 2004. Defendant filed motions for summary disposition on September 3, 2004, on the basis of the then-newly issued decision in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), a "serious impairment" case. Defendant's motions asserted that neither plaintiff could meet the no-fault act's tort injury threshold.

Plaintiff LeClair filed a response to defendant's summary disposition motion, and on the same date filed a countermotion to enforce the arbitration provision of the policy. LeClair's countermotion asserted that she had demanded arbitration by letter dated September 2, 2004, and that Allstate had not responded to that letter. LeClair's countermotion further asserted:

> [T]he arbitration agreement in the policy is enforceable in accordance with MCLA 600.5001. Further, MCR 3.602(B) states that proceedings to compel or to stay arbitration (1) in a pending action and application to the court or an order under this rule must be made by motion . . .
>
> Once a determination of a physical contact between the vehicles is made, the court should order arbitration in accordance with the policy.
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> Plaintiff agrees that the question of whether or not coverage exists is properly before the court on its declaratory judgment matter. The question, however, as to the Plaintiff's ability to recover by showing her injury exceeds the Michigan threshold requirement is one that should be made by the arbitrators and not the court or a jury. The scope of arbitration is determined by contract of parties and arbitrability of issue is a matter for traditional determination. Detroit Auto Ins. Exchange v Straw 96 Mich App 773 (1980).
>
> Under the insurance contract the arbitrators determine[] the Plaintiff's right to receive any damages or the amount of the damages. The question of coverage is

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[4] LeClair's complaint, and her appellate brief, refer to a provision stating, "If the insured person and we do not agree on that person's right to receive any damage or the amount of that person's damages, then the disagreement will be resolved in a court of competent jurisdiction." As defendant points out in its appellate reply brief, there is no such provision in the insurance policy at issue.

> not one the arbitrators may decide. It is for that reason that the declaratory judgment must first proceed and once a determination of coverage is available, the arbitration provision should then be enforced.

Defendant's response to LeClair's countermotion to enforce arbitration, unlike its earlier statements, did not assert that there was no coverage under the policy, nor did it assert that the arbitration provision did not apply, it only argued that she waived her right to arbitrate by litigating in circuit court.

Plaintiff Wolverton requested arbitration for the first time in her response to defendant's motion for summary disposition, filed on January 14, 2005.[5]

The circuit court concluded:

> Now, let's deal with the arbitration part.
>
> It [sic] easier for me on Ms. LeClair's case because, well, frankly, as I—I was thinking long and hard about that waiver issue and I noted how Ms. LeClair vaguely addressed it in the complaint, and then I noticed how she specifically addressed it in September of 2003 [sic 2004], and I had wished that she had brought a motion asking that the Court order it into arbitration, and so I was puzzled on whether or not it was a waiver situation, but I think if, as you agree, arbitration was requested before she filed the complaint, that it is not a waiver situation. So I think we're going to have to order Ms. LeClair into arbitration.
>
> And because this is a consolidated lawsuit, Wolverton's claim for arbitration is far weaker, but I'm reluctant to bifurcate all this, so I think it's just wiser that she get to go in on LeClair's coattails.

The circuit court permitted both plaintiffs' claims to proceed to arbitration, and denied defendant's summary disposition of Wolverton's serious impairment claim. These appeals ensued.

II

Defendant first contends that plaintiffs waived their right to arbitration under the policy. Defendant maintains that where plaintiffs litigated their claims in the circuit court, extensively engaging in the judicial process through pre-trial discovery and case evaluation, and only then

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[5] The hearing on defendant's motions had been adjourned as a result of plaintiff Wolverton filing an emergency motion on September 17, 2004 to extend discovery, adjourn the case evaluation and defendant's motion for summary disposition and trial dates. Wolverton's emergency motion asserted that she had undergone neck surgery on September 8, 2004, had a pending consultation regarding additional surgery on her left arm, and thus required additional time to obtain recent medical records. The circuit court extended the discovery cutoff date, adjourned the hearing on defendant's motions, and extended the case evaluation and trial dates.

sought to compel arbitration, after defendant filed motions for summary disposition on the tort threshold, the circuit court reversibly erred in failing to conclude that both plaintiffs waived their rights to arbitration. We disagree.

"Whether one has waived his right to arbitration depends on the particular facts and circumstances of each case." *Madison Dist Public Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). This Court reviews de novo the question of law whether the relevant circumstances establish a waiver of the right to arbitration, and reviews for clear error the trial court's factual determinations regarding the applicable circumstances. *Madison Dist Public Schools, supra* at 588.

> Waiver of a contractual right to arbitrate is disfavored. *Salesin v State Farm Fire & Casualty Co,* 229 Mich App 346, 356; 581 NW2d 781 (1998). The 'party arguing there has been a waiver of this right bears a heavy burden of proof' and 'must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts.' *Id.,* quoting *Burns v Olde Discount Corp,* 212 Mich App 576, 582; 538 NW2d 686 (1995). This Court has noted the following guidance with respect to what actions tend to indicate a waiver of the right to arbitration.
>
> > In most jurisdictions, the right to arbitration may be waived by certain conduct, with each case decided on the basis of its particular facts and circumstances:
> >
> > "Various forms of participation by a [party] in an action have been considered by the courts in determining whether there has been a waiver of the [party]'s right to compel arbitration or to rely on arbitration as a defense to the action. It has been generally held or recognized that by such conduct as defending the action or proceeding with the trial, a [party]waives the right to arbitration of the dispute involved. A waiver of the right to arbitrration [sic] . . . has also been found from particular acts of participation by a [party], each act being considered independently as constituting a waiver. Thus, a [party] has been held to have waived the right to arbitration of the dispute involved by filing an answer without properly demanding or asserting the right to arbitration, by filing an answer containing a counterclaim . . . without demanding arbitration or by filing a counterclaim which was considered inconsistent with a previous demand for arbitration, by filing a third-party complaint or cross-claim, or by taking various other steps, including filing a notice of readiness for trial, filing a motion for summary judgment, or utilizing judicial discovery procedures." [*Hendrickson v Moghissi,* 158 Mich App 290, 299-300, quoting anno: *Defendant's participation in action as waiver of right to arbitration of dispute involved therein,* 98 ALR3d 767, § 2, pp 771-772.]

> See also *Salesin, supra* (noting that defending an action without seeking to invoke a right to compel arbitration constitutes a waiver of the right to arbitration); *North West Michigan Constr, supra* at 651-652, quoting *Henderson, supra* at 300. A party does not waive the right to arbitrate, however, by litigating an issue that is not arbitrable. *Auto Club Ins Ass'n v Lozanis,* 215 Mich App 415, 421-422; 546 NW2d 648 (1996), overruled in part on other grounds in *Perry v Sied,* 461 Mich 680, 690; 611 NW2d 516 (2000). [*Madison Dist Pub Schools, supra* at 589-590.]

A

We first address whether plaintiff LeClair waived her right to arbitration. LeClair's initial demand for arbitration preceded the filing of her complaint for declaratory judgment. Defendant conceded below that LeClair demanded arbitration in writing before filing suit in circuit court. Defendant denied this initial demand on the basis that there was a coverage issue. In light of defendant's denial of her demand for arbitration, LeClair's filing suit was not "inconsistent with" her right to arbitrate. After filing suit LeClair again demanded arbitration,[6] and she demanded arbitration for the third time in her countermotion to enforce the arbitration provision. All of LeClair's arbitration demands were timely under the policy's arbitration provision three-year from date of accident requirement. Defendant's argument that plaintiff LeClair acted inconsistently with her right to arbitration is meritless.[7] In addition, the two cases defendant cites to support its waiver argument are inapposite.[8] Neither of the cases involved

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[6] LeClair's response to defendant's motion for summary disposition asserted that she had demanded arbitration by letter dated September 2, 2004, which would be the day before defendant filed its motions for summary disposition, an assertion defendant did not contest below. LeClair did not submit a copy of the September 2, 2004 to the circuit court, but appended it to her appellate brief. As defendant notes, because LeClair did not submit the letter below, it is not properly considered on appeal.

[7] Defendant's appellate brief misleadingly states, "Not until December 8, 2004—*twenty-two months after filing suit*—did Plaintiff LeClair assert a right to arbitration in these proceedings."

> However, at the summary disposition motion hearing, defendant's counsel below agreed with LeClair's counsel, on the record, that LeClair had filed a demand for arbitration before bringing suit, and that Allstate had denied arbitration, saying there was a coverage problem. Further, also in the circuit court, defendant's reply brief to plaintiff LeClair's response to defendant's motion for summary disposition stated: "Jill LeClair **did make a written request for arbitration prior to filing suit**. Second, her complaint does make reference to the request for arbitration." [Emphasis added.]

[8] On appeal, defendant relies on two cases. In the first case, *Madison Dist Public Schools v Myers,* 247 Mich App 583, 588; 637 NW2d 526 (2001), the plaintiff school district brought suit in September 1996 against the former superintendent of schools, Myers, alleging fraud, breach of fiduciary duty and fraudulent concealment arising from Myers' severance agreement, which granted him various retirement benefits. The severance agreement contained mutual release and arbitration provisions. The defendant, Myers, countercomplained, alleging breach of contract, mutual mistake and promissory estoppel. The defendant also raised affirmative defenses,
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including the arbitration clause of the severance agreement. The plaintiff did not mention the arbitration clause in its answer to the defendant's countercomplaint.

In January 1998, the defendant, Myers, moved for summary disposition under MCR 2.116(C)(7), asserting that the release provision of the severance agreement barred the plaintiff school district's claims. The circuit court agreed, concluding that the release provision's broad language precluded any claim regarding the severance agreement, except actual enforcement of the terms of the agreement. *Id.* at 586. The circuit court also concluded that the release was valid and precluded the plaintiff school district's claims, on the grounds that the district had sought to enforce rights contrary to the settlement and release, and had failed to tender back to Myers the consideration he provided for the severance agreement. Thereafter, in June 1998, the plaintiff school district filed a demand for arbitration with the American Arbitration Association regarding reimbursement of benefits. Myers moved to stay arbitration proceedings, asserting that the district was seeking to arbitrate the same claims that the circuit court had dismissed and that the district had waived any right to arbitration by filing suit in circuit court, and by litigating the claims for 1½ years. *Id.* at 586-587. The circuit court denied Myers' motion to quash the arbitration proceedings, and ordered arbitration of all contract issues, including those in the counter-complaint. The circuit court found that the school district's prior conduct of litigation was not inconsistent with its right to arbitrate, and that Myers would suffer no prejudice resulting from arbitration proceedings because the court's grant of summary disposition under MCR 2.116(C)(7) was not a decision on the merits.

On the defendant's appeal, this Court reversed, explaining:

> With respect to the waiver issue, we first consider the disputed question whether plaintiff engaged in acts inconsistent with its right to arbitrate. The trial court found without specific explanation that plaintiff's "prior conduct of litigation was not inconsistent with the right to arbitrate." No dispute exists that for approximately twenty months before filing its demand for arbitration plaintiff pursued litigation against defendant, conducting discovery and generating two trial court files of documents. The parties vigorously dispute, however, the import or nature of plaintiff's litigation. Defendant submits that plaintiff's trial court complaint sought only damages for defendant's alleged receipt of benefits beyond those contemplated within the severance agreement, and that plaintiff's attempt to institute arbitration seeking the same relief constitutes "an attempt to take a second bite of the apple." Plaintiff explains that its trial court complaint alleged defendant's fraud in negotiating the severance agreement and tested the validity of the agreement. Plaintiff denies that litigating this preliminary issue before the trial court waived plaintiff's right to demand arbitration regarding the separate issue of enforcing the agreement according to its intended terms.
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> Plaintiff correctly states that it is proper for a trial court to consider questions concerning the existence or validity of an arbitration agreement. . . .
>
> After reviewing the trial court record, however, we are not persuaded by plaintiff's characterization of its trial court claims as challenges to the enforceability or validity of the parties' agreement to arbitrate. . . .

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* * *

Only after the trial court dismissed plaintiff's complaint, in response to defendant's motion to stay arbitration, did plaintiff suggest for the first time that its complaint tested the validity and enforceability of the parties' severance agreement.

Consequently, plaintiff's complaint involved an arbitrable claim. . . .

* * *

Because the record clearly demonstrates that for the first year and eight months of litigation plaintiff attempted "to enforce the agreement consistent with the parties' intent," we find plaintiff's pursuit of this litigation plainly inconsistent with plaintiff's long-delayed demand for arbitration to enforce the parties' agreement. Further conduct by plaintiff wholly inconsistent with its right to arbitrate includes plaintiff's (1) failure to mention arbitration as an affirmative defense in response to defendant's counterclaim, which expressly sought enforcement of the parties' agreement [citations omitted], and (2) pretrial (a) exchange of exhibit and witness lists and amendment of its witness list, (b) filing of forty-five requests for admission and "Genuiness of Documents," (c) filing of a motion and supporting brief to compel additional responses by defendant to the requests for admission, (d) participation in mediation and facilitation, and (e) participation in conducting eight witness depositions [citations omitted].

* * *

Regarding whether plaintiff had knowledge of the arbitration provision within the parties' agreement, the parties do not dispute plaintiff's awareness of the right to invoke arbitration. We additionally note that an attorney for plaintiff drafted the severance agreement.

* * *

With respect to the last waiver element . . . the trial court found that defendant had suffered no prejudice caused by plaintiff's postlitigation demand for arbitration because "the grant of Summary Disposition pursuant to MCR 2.116(C)(7) was not a decision on the merits." . . . .

The trial court mistakenly concluded that its grant of summary disposition pursuant to MCR 2.116(C)(7) did not constitute an adjudication on the merits. This Court has explained that the trial court's determination that plaintiffs entered into a binding release that bars their claims constitutes a decision on the merits. . . . .

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insurance contracts, and in neither case did the plaintiff demand arbitration **before** filing suit, which demand was denied, nor did the plaintiff again demand arbitration after filing suit and received no response.

As noted above, defendant did not argue in response to plaintiff LeClair's countermotion to enforce arbitration that there was no coverage under the policy, nor did it assert that the arbitration provision did not apply, it only argued that LeClair had waived her right to arbitrate by litigating in circuit court. Because defendant abandoned its earlier position that there was no coverage, the circuit court could properly determine that coverage existed under the policy, that the arbitration provision applied, and that the question whether LeClair suffered a serious impairment was for the arbitrators. We thus affirm the circuit court's grant of plaintiff LeClair's motion to enforce arbitration.

In a reply brief filed in this Court on July 13, 2005, defendant **for the first time** raises that the policy it issued to the LeClairs contains amendatory language, which states that both parties must agree to arbitration.[9] The copy of the insurance policy submitted to the circuit court

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> We find that after expending time and resources to defend himself in litigation against plaintiff's complaint, which sought to enforce the settlement agreement according to the parties' alleged intent, and obtaining a dismissal of plaintiff's complaint on its merits, defendant certainly would endure unfair prejudice were he forced to submit to plaintiff's long-delayed demand for arbitration. . . . Plaintiff's decision to litigate this matter aggressively for over 1½ years before resorting to arbitration plainly defeats the purpose of arbitration, which is "the final disposition of differences between parties in a faster, less expensive, more expeditious manner than is available in ordinary court proceedings." [citation omitted.]

[*Madison Dist Pub Schools, supra* at 590-600.]

The other case defendant relies on is *North West Michigan Const, Inc v Stroud*, 185 Mich App 649; 462 NW2d 804 (1990). In that case, the parties' construction contract provided that any controversies arising out of the contract were to be settled by arbitration. The defendants' answer to the plaintiff's complaint, filed in June 1988, had affirmatively pleaded that the plaintiff was required to submit its dispute to arbitration. The defendants also noted the arbitration provision in their pretrial statement, filed in December 1988. In February 1989, the defendants moved to dismiss the plaintiff's complaint on the basis of the arbitration provision. The circuit court denied the motion to dismiss, concluding that the defendants' had waived their right to assert arbitration. *Id.* at 650-651. The circuit court noted that neither party took action to invoke the arbitration provisions after the initial pleadings, and that both parties had actively participated in the litigation through discovery, pre-trial and mediation. *Id.* at 651. This Court affirmed, stating: "Under the circumstances here, the trial court did not err in finding that defendants, by their active participation in the proceedings, had waived their right to assert arbitration as a ground for dismissal." *Id.* at 652.

[9] The amendatory language in the endorsement provides:

> D. Section A. of the Arbitration provision is replaced by the following:

(continued…)

did not include the endorsement and its amendatory provisions.[10] Defendant, the drafter of the policy, concedes that it did not raise or submit this amendatory provision to the circuit court. The lower court record may not be expanded on appeal. MCR 7.210(A). We note, however, that the effect of the amendatory provision is *not* clear. The amendment begins by stating: "Section A. of the Arbitration provision is replaced by the following," but there is no Section A in the policy's arbitration provision, which is quoted *supra*.

B

We next address whether plaintiff Wolverton waived her right to arbitration.

Wolverton asserts that she, a minor, did not have a copy of the insurance policy until defendant provided it in discovery and was thus unaware of the mandatory arbitration clause. Wolverton contends that it is undisputed that she was appropriately claiming damages for injuries through the LeClair insurance policy, that defendant obviously had knowledge of its own policy, and that defendant had knowledge of plaintiff LeClair's suit and LeClair's demand for arbitration, which defendant repeatedly ignored. Plaintiff asserts that her complaint did allege that defendant breached its contract, and that defendant in discovery falsely maintained that the policy "does not provide for any arbitration in this context."[11] Wolverton argues that since

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A. If we and an **insured** do not agree:

1. Whether that **insured** is legally entitled to recover damages; or

2. As to the amount of damages which are recoverable by that insured;

from the owner or operator of an uninsured motor vehicle, then the matter may be arbitrated. However, disputes concerning coverage under this Part may not be arbitrated.

Both parties must agree to arbitration. If so agreed, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.

[10] Unlike any of the copies of the policy submitted below by LeClair and Wolverton, LeClair's appellate brief appended as an exhibit a copy of the policy that included the endorsement.

[11] Defendant stated in response to one of Wolverton's interrogatories:

11. State fully and in detail the basis of Defendant's refusal to settle Plaintiff's [Wolverton's] claim for uninsured motorist benefits and/or Arbitrate Plaintiff's claim for uninsured motorist benefits?

ANSWER:

The plaintiff [Wolverton] has never made a demand for settlement of her claim for uninsured motorist benefits. Tom Kim, on behalf of Allstate Insurance

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defendant ignored her claim, it was appropriate to, and she had no choice but to, file this breach of contract action. Wolverton asserts that once the insurance contract was produced in discovery, it was appropriate for the court to determine whether the policy provided for arbitration.

At the hearing on defendant's motions, Wolverton's counsel responded to Allstate's argument that her demand for arbitration was too late by asserting:

> MR. BATTERSBY:
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> * * *
>
> She—this was not her [Wolverton's] policy, it was the policy that covered the LeClair family, and as I read the answer by [Allstate's trial counsel] Mr. Brickley, apparently Allstate by that answer concedes that the arbitration applies to this policy. Since it was not plaintiff's policy, the only [] she found out about it was in discovery when Allstate provided a copy of the policy. Allstate never informed her that—that her dispute should be resolved by arbitration as the policy language says, and in fact, once my firm got involved in the case which wasn't until the fall of 2003, in October of 2003 we sent a letter to Allstate without having the policy knowing that she would've been covered as an occupant of the vehicle, and Allstate never answered that letter. We've never gotten a letter from Allstate at all. What we got was a letter from Mr. Brickley indicating that he was defending the LeClair matter and as a consequence he wanted to take my client's deposition. Allstate at no time ever contacted my office. So as a consequence our pre-suit department in my law firm sent the case up to me and asked me to start a lawsuit which I did.
>
> The –the plaintiff, LeClair, in fact several months ago according to Mr. Jakeway [LeClair's counsel], demanded arbitration in writing which was ignored by Allstate. They still haven't said anything to –to the LeClair claim.
>
> The terms of the policy . . . without reservation says . . . The plaintiff has three years from the date of the accident to demand in writing arbitration which would be up to July 21st, 2005.

(…continued)

> Company, made an offer to the plaintiff and the response received was the filing of this lawsuit. To date we do not know the plaintiff's demand nor have we ever been presented with a request by the plaintiff to "settle" her claim for uninsured motorist benefits. With respect to any issue of arbitration no demand has ever been made upon Allstate to arbitrate the matter and the policy of insurance which is attached does not provide for any arbitration in this context.

We note that the interrogatory excerpt before us is not dated, nor is a copy of the insurance policy attached.

> This . . . lawsuit was not filed to flaunt the policy requisites, rather it was filed because Allstate thumbed its nose at a minor plaintiff . . . .

Defendant does not dispute that it did not respond to the letter Wolverton's counsel sent Allstate before filing suit, referred to in the above colloquy.[12]

Given that Wolverton did not know of the existence of the arbitration provision before defendant produced the policy during discovery, it cannot be said that Wolverton had knowledge **when she filed suit** in December 2003 that she had a right to arbitration and, by logical extension, it cannot be said that her act of filing suit was inconsistent with her right to arbitrate.

Once she obtained a copy of the insurance policy during discovery, however, Wolverton is charged with knowledge of the arbitration provision. The record does not reveal the date defendant produced the policy, although defendant's appellate brief maintains that Wolverton had the policy for thirteen months before she first requested arbitration.[13]

Thus, the question is whether Wolverton acted inconsistently with her right to arbitrate between the time she learned of the existence of the policy's arbitration provision (when defendant produced the policy in discovery) and January 2005, when she first requested arbitration. Before Wolverton requested arbitration, in response to defendant's summary disposition motion filed on September 4, 2004, Wolverton filed an emergency motion to adjourn the summary disposition hearing and various dates and deadlines.[14] We conclude that Wolverton's filing of the emergency motion in September 2004 was not inconsistent with her right to arbitrate, under the circumstance that the principal bases of the emergency motion was that she had had neck surgery on September 8, 2004, and that she had another medical consultation pending regarding corrective surgery to her left arm.

After filing the emergency motion in September 2004, Wolverton's next filing was her response to defendant's summary disposition motion, and she demanded arbitration therein. Under these circumstances, we conclude that Wolverton did not engage in extensive litigation between the time defendant produced the policy in discovery, and January 2005, when she requested arbitration. Further, Wolverton's conduct is unlike the conduct in the cases defendant cites, discussed in n 8 *supra*. Neither of defendant's cases involved an insurance contract, nor a contract drafted by the party who, on appeal, claimed the opposing party waived arbitration.

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[12] Wolverton's counsel's letter to defendant referred to above was not submitted to the circuit court. The letter is submitted on appeal, but may not properly be considered.

[13] Neither Wolverton nor defendant state, nor does the record show, the date defendant produced the policy to Wolverton in discovery. Wolverton filed her complaint on December 21, 2003, and defendant moved to consolidate her case with LeClair's in January 2004. The circuit court consolidated the LeClair and Wolverton cases by order entered February 9, 2004, a joint pretrial conference was held on March 24, 2004, and thereafter the court entered a pretrial summary and order providing a discovery cutoff date of August 23, 2004.

[14] The court extended the discovery cutoff date to November 22, 2004 (from August 23, 2004), and adjourned the summary disposition hearing.

Further, in the instant case, unlike the cases defendant relies on, defendant Allstate denied LeClair's demands for arbitration, and did not respond to Wolverton's counsel's letter sent before Wolverton filed suit. Further, unlike the cases defendant cites, once plaintiffs in the instant case filed suit, defendant Allstate, the drafter of the policy, maintained that plaintiffs were not entitled to coverage under the policy.

Under the plain language of the insurance policy, Wolverton's request for arbitration in January 2005 occurred within three years after the July 21, 2002 accident, and was thus timely under the policy's arbitration provision.

Given these circumstances, including those involving LeClair's claim, we conclude that Wolverton's litigating during the months between acquiring a copy of the policy and her demand for arbitration was not inconsistent with her right to arbitrate, so as to undermine the circuit court's decision to permit Wolverton's claim to proceed to arbitration. See *Madison Dist Pub Schools*, *supra* at 589-590.

Given our disposition, we need not address defendant's remaining issue—that the circuit court erred in denying it summary disposition of Wolverton's serious impairment claim. That issue is for the arbitrators.

We affirm in both appeals.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder