STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER HARWOOD,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee,

and

CLYDE ANTHONY OWENS,

Defendant.

UNPUBLISHED
January 10, 2006

No. 263500
Wayne Circuit Court
LC No. 04-433378-CK

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

PER CURIAM.

Plaintiff appeals of right from a trial court opinion and order granting summary disposition in favor of defendant State Farm Mutual Automobile Insurance Company,[1] with regard to plaintiff's claim for uninsured motorist benefits. We affirm.

I

On November 20, 2001, plaintiff, a Detroit Police Officer, initiated a traffic stop when he witnessed Clyde Anthony Owens disregarding a red traffic signal. Upon being asked to exit the vehicle, Owens grabbed plaintiff's arm, accelerated his vehicle, and pulled plaintiff down the road. Owens was uninsured at the time. Plaintiff was injured and sought recovery of uninsured motorist benefits under his policy with defendant. Defendant refused to pay on the basis that plaintiff failed to comply with the terms of the policy.

[1] State Farm Mutual Automobile Insurance Company named Clyde Anthony Owens as a non-party at fault. Owens is not a party to this appeal, thus, the use of the term defendant, in this opinion, refers solely to State Farm.

On October 27, 2004, plaintiff filed a complaint, and alleged breach of contract because defendant refused to pay plaintiff uninsured motorist benefits. Subsequently, defendant filed a motion for summary disposition, and argued that the claim is barred pursuant to the terms of the policy because: (1) plaintiff failed to name Owens as a party; (2) plaintiff received worker's compensation benefits and disability benefits from the city of Detroit; (3) under the terms of the policy a cause of action against defendant was prohibited until thirty days after defendant received insured's notice of filing the lawsuit, and plaintiff failed to provide notice until the lawsuit was filed; (4) under the terms of the policy plaintiff cannot seek benefits for a loss that was incurred more than one year before the action was brought and the action was not brought until three years after the accident; (5) the "fireman's rule,"[2]; and (6) plaintiff has sustained no permanent serious disfigurement.

Thereafter, plaintiff filed a first amended complaint adding Owens to the complaint. Plaintiff also filed a brief in response to defendant's motion for summary disposition and argued that: (1) he complied with the terms of the agreement; (2) as a matter of law plaintiff's workers' compensation carrier is not entitled to reimbursement from defendant's payment of plaintiff's uninsured motorist claim; (3) the claim is timely; (4) plaintiff's wife provided defendant with notice of the collision and claim for uninsured motorist benefits in the summer of 2004, which is more than thirty days prior to the commencement of the action; (5) plaintiff's claim is not barred by the "fireman's rule"; and (6) plaintiff has sustained a serious permanent disfigurement.

After a hearing and further briefing, the trial court issued an opinion and order granting defendant's motion for summary disposition, finding that plaintiff did not provide defendant with written notice thirty days prior to the initiation of the lawsuit. The trial court also denied defendant's motion to amend his complaint as moot.

II

Plaintiff's first argument on appeal is that the trial court erred in granting defendant's motion for summary disposition. We disagree.

We review de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597

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[2] Before the Legislature enacted the statutory "firefighters' rule" pursuant to 1998 PA 389, Michigan recognized the common-law "fireman's rule," which precluded a firefighter or police officer from recovering damages from a private party for negligence that required the safety officer's assistance at the scene. See *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347, 367-368; 415 NW2d 178 (1987). The firefighters' rule generally waives the duty of care that third parties owe safety officers. *Roberts v Vaughn*, 459 Mich 282, 285; 587 NW2d 249 (1998). Michigan courts recognized several exceptions to this rule. *Harris-Fields v Syze*, 461 Mich 188, 191-192; 600 NW2d 611 (1999). The Legislature abolished the common-law firefighters' rule, however, when it enacted 1998 PA 389. The statute replaced the common-law rule with a statutory scheme that generally incorporated the common-law exceptions, but expanded the circumstances under which a safety officer could recover for damages sustained while on duty beyond the narrow, common-law rule. See MCL 600.2965 to MCL 600.2967.

NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). The moving party must specifically identify the matters which have no disputed factual issues, MCR 2.116(G)(4); *Maiden, supra* at 120; *Reed v Reed*, 265 Mich App 131, 140; 694 NW2d 65 (2005), and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Id.*

The trial court granted defendant's motion for summary disposition finding that plaintiff failed to provide defendant with written notice of the accident or loss thirty days prior to filing his complaint. Defendant contends, on appeal, that plaintiff was provided actual notice, thus, summary disposition was not proper.

In *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005), our Supreme Court provided the following with regard to uninsured motorist insurance:

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Uninsured motorist coverage is optional--it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act. [Footnotes omitted.]

Defendant denied plaintiff's claim for failure to comply with the terms of the contract. One basis for the denial was plaintiff's failure to provide defendant with written notification of the accident or loss thirty days prior to bringing an action against defendant. Defendant claims, and plaintiff does not seem to dispute, that the first written notice was a letter from plaintiff's attorney to defendant dated October 1, 2004. The complaint was filed on October 27, 2004. Plaintiff argues that defendant was on notice and submitted an affidavit supporting that plaintiff's wife called and notified the insurance company more than thirty days prior to the complaint being filed.

We disagree with plaintiff as the policy unambiguously requires written notice of the accident or loss, and provides that plaintiff has no right of action against defendant until thirty days after providing this written notice. With regard to notice for an accident or loss, the policy provides:

> The *insured* must give us or one of our agents written notice of the accident or *loss* as soon as reasonable possible. The notice must give us:
>
> a. your name; and

b. the names and addresses of all the *persons* involved; and

c. the hour, date, place and facts of the accident or *loss*; and

d. the names and addresses of witnesses.

This provision unambiguously requires written notification of accident or loss and requires specific information. The policy further provides, with regard to suits against defendant, that:

> There is no right of action against us:
>
> * * *
>
> c. under uninsured motor vehicle, any physical damage, death, dismemberment and loss of sight coverages, until 30 days after we get *insured's* notice of accident or *loss*.

This provision unambiguously requires that the notice described above be received more than thirty days prior the initiation of an action against defendant.

"Insurance polices *are* subject to the same contract construction principles that apply to any other species of contract." *Rory, supra* at 461 (emphasis in original). "'The primary goal in the construction or interpretation of a contract is to honor the intent of the parties[.]" *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003), quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). "The language of the parties' contract is the best way to determine what the parties intended." *Klapp, supra* at 476. The contractual language is to be given its ordinary and plain meaning. *Hall v Equitable Life Assur Soc of US*, 295 Mich 404, 408; 295 NW 204 (1940). An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. *Klapp, supra* at 467. "Unless a contract provision violates law or one of the traditional [contract] defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory, supra* at 461. "The judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Id*. A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. *Mayor of the City of Lansing v Public Service Comm*, 470 Mich 154, 165 n 6, 166; 680 NW2d 840 (2004).

Plaintiff clearly did not comply with the unambiguous language of the contract. Even viewed in a light most favorable to plaintiff, his submissions only support verbal notice, not written, thus, summary disposition was properly granted in this regard.

Plaintiff also argues that, even if he failed to provide the required notice, his claim should not be barred because defendant suffered no prejudice. We again disagree.

Plaintiff cites to *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998), in support of his contention that defendant must show prejudice. In *Koski* our Supreme Court provided 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." In the present case, the time frame was thirty days prior to filing a lawsuit, which was not an issue with respect to immediate notice or a reasonable time. The question in this case was with regard to unambiguous language and an unambiguous thirty day period. We are required to construe and apply unambiguous contract provisions as written, and pursuant to the same contract construction principles that apply to other species of contract. *Rory, supra* at 461. Lack of prejudice is not a traditional defense to the enforceability of a contract. For these reasons, we find, on review de novo, that summary disposition was properly granted in favor of defendant.

III

Defendant next argues that the trial court erred in denying his motion for leave to file a first amended complaint. We disagree as the amendment would have been futile.

This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). MCR 2.118(A)(2) states: "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Further, our Supreme Court has provided that:

> A motion to amend ordinarily should be granted, and denied only for particularized reasons:
>
> "In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be 'freely given.'" [*Ben P Fyke & Sons, Inc v Gunter Co,* 390 Mich 649, 656; 213 NW2d 134 (1973), quoting *Foman v Davis*, 371 US 178, 182; 83 S Ct 227; 9 L Ed 2d 222 (1962).]

"On a motion to amend, a court should ignore the substantive merits of a claim or defense unless it is legally insufficient on its face and, thus, . . . it would be 'futile' to allow the amendment." *Fyke*, *supra* at 660. Where a plaintiff merely restates or slightly elaborates on counts or allegations already pleaded, an amendment is futile. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998).

Because plaintiff's amended complaint does not change the fact that plaintiff did not provide notice as required by the policy, plaintiff's amended complaint would have been futile. Thus, we find that the trial court did not abuse its discretion in denying plaintiff's motion to amend.

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder