S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MARILYN GALENSKI, Plaintiff-Appellee,	UNPUBLISHED May 11, 2006
v ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	No. 255604 Wayne Circuit Court LC No. 02-218041

Before: Sawyer, P.J., and Wilder and Hood*, JJ.

PER CURIAM.

In this action to recover uninsured motorist benefits, defendant appeals as of right from an order of judgment awarding plaintiff $50,000.00 in stipulated damages inclusive of costs, interest and attorney fees. We reverse.

I

On October 23, 1998, in Wayne County, Michigan, plaintiff was a passenger in a vehicle driven by her daughter, Margaret Andrews, when Andrews' vehicle was struck from behind by a car driven by an uninsured motorist.[1] At the time of the accident, plaintiff was an Indiana resident and Andrews was a Michigan resident. Both plaintiff and Andrews were insured by defendant; plaintiff was insured by a policy issued in Indiana; and, Andrews was insured pursuant to a policy issued in Michigan. It is undisputed that on November 6, 1998, plaintiff applied for Michigan personal injury protection (PIP) benefits. However, the parties disputed, among other things, whether plaintiff first sought benefits from her own Indiana policy or from Andrews' Michigan policy. Plaintiff also submitted a claim for uninsured motorist benefits pursuant to her Indiana policy in February 2002. Defendant denied the claim. Concluding that plaintiff's claim exceeded the three-year limitation period for claims under Andrews' policy and

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[1] In a separate action, plaintiff obtained a default judgment against the uninsured motorist. That action is not relevant to this appeal.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the two-year limitation period for uninsured motorist claims under Indiana law,[2] defendant relied on "the other insurance" provision contained within its contract with plaintiff to assert that plaintiff had not exhausted the benefits available under Andrews' policy. That provision states:

> **If There Is Other Insurance**
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> If the insured person was in, on, getting into or out of, or on or off of a vehicle you do not own which is insured for uninsured motorists, underinsured motorists, or similar type coverage under another policy, coverage under Uninsured Motorists Insurance, Part 3, of this policy will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limits, we will pay up to your policy limit, but only after the other insurance has been exhausted. No insured person may recover duplicate benefits for the same element of loss under Uninsured Motorists Insurance, Part 3, of this policy and the other insurance.

Plaintiff initiated an action in Wayne County circuit court. Her first amended complaint alleged breach of contract, arguing that her failure to make a timely claim under Andrews' policy did not bar a claim for benefits under her policy.[3] Defendant's motion for summary disposition was filed pursuant to MCR 2.116(C)(10) and asserted that the plain language of the contract barred plaintiff's claim as a matter of law. Defendant also moved for dismissal pursuant to the doctrine of forum non conveniens arguing that Indiana law should apply to the contract, that plaintiff was an Indiana resident, and further, that all the involved personnel were located in Indiana. On July 29, 2003, the trial court denied defendant's motion without prejudice. Without addressing defendant's forum non conveniens argument, the trial court addressed the parties central dispute, whether plaintiff should be required to exhaust remedies under a contract to which she was not a party and the benefits of which she alleged she was unaware. Defendant argued that plaintiff's awareness of Andrews' uninsured motorists benefits could be imputed in light of plaintiff's claim for PIP benefits under Andrews' policy in 1998, and the trial court allowed defendant to submit additional evidence on this point. Defendant filed a supplemental motion for summary disposition, attaching both policies and plaintiff's November 16, 1998 application for PIP benefits. In response, plaintiff argued: (1) defendant had not proven that plaintiff was legally entitled to uninsured motorists benefits under Andrews' policy, and therefore, there was no evidence of any actual benefits plaintiff could be required to exhaust; (2) alternatively, any available benefits under Andrews' uninsured motorists policy were exhausted because these benefits were affirmatively denied by defendant upon plaintiff's timely request for

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[2] For this proposition defendant cites *Bocek v Inter-Insurance Exch of Chicago Motor Club*, 175 Ind App 69; 369 NE2d 1093 (1977) and Ind Code 34-11-2-4, which provides that the statute of limitations for personal injury is two years. Whether Indiana law provides for a two-year limitation period for uninsured motorist claims is not dispositive to this appeal.

[3] Plaintiff's amended complaint does not appear in the lower court file, nor is it shown on the lower court's docket entries. Nevertheless, it is apparent from defendant's amended answer and motion for summary disposition that plaintiff in fact asserts a breach of contract claim.

benefits under her own policy; and finally, (3) plaintiff had not claimed benefits under Andrews' policy, rather, the PIP benefits were received pursuant to plaintiff's policy.

On January 14, 2004, the trial court denied defendant's motion for summary disposition "for reasons stated on the record."[4] This Court denied defendant's interlocutory application for leave to appeal.[5] Thereafter, on April 30, 2004, the trial court entered a stipulated order of judgment resolving the case and stipulating plaintiff's total damages to be $70,000. Plaintiff agreed to a setoff of $20,000, which represented the amount of uninsured motorists coverage available under Andrews' policy, thus plaintiff was awarded a net amount of $50,000. The trial court further ordered "that the right of appeal of Defendant on the question of coverage, including the issues raised by the Application for Leave to Appeal, be preserved."[6] Defendant now appeals.

II

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Graves v American Acceptance Mortgage Corp (On Rehearing),* 469 Mich 608, 613; 677 NW2d 829 (2004). A summary disposition motion pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell,* 246 Mich App 244, 246; 631 NW2d 760 (2001).

III

Defendant first argues that the trial court improperly awarded plaintiff damages when the plain language of her policy required her to first exhaust the uninsured motorist benefits available under Andrews' policy. Defendant contends that plaintiff never truly exhausted Andrews' policy limits when plaintiff failed to timely submit a demand for arbitration within the three-year limitation period provided for in Andrews' policy, and such failure automatically operated to deny her benefits.

Under Michigan law, uninsured motorist benefits clauses of auto insurance contracts are construed using the general rules of contract interpretation without reference to Michigan's no-fault act, which does not require uninsured motorist benefits coverage. *Twichel v MIC Gen Ins Corp,* 469 Mich 524, 533; 676 NW2d 616 (2004).[7] The primary goal of contract interpretation is to honor the intent of the parties. *Klapp v United Ins Group Agency,* 468 Mich 459, 473; 663

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[4] A transcript of the hearing does not appear in the record.

[5] *Galenski v Allstate Ins Co,* unpublished order of the Court of Appeals, entered April 15, 2004 (Docket No. 253501).

[6] The trial court did not address the forum non conveniens argument and defendant does not raise this issue on appeal, thus, we consider the claim abandoned. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

[7] Because neither party argues that Indiana contract interpretation law applies, we apply Michigan law of contract interpretation throughout this opinion.

NW2d 447 (2003). To this end, when possible, an insurance contract should be enforced according to the plain language of its terms. When a contract's terms are ambiguous, however, its meaning is a question of fact for the jury. *Id.* at 469.

As we noted, *supra*, plaintiff's policy provides in relevant part that:

> "this policy will be excess… *the insured person is legally entitled to recover damages in excess of the other policy limits," and that "we will pay up to your policy limit, but only after the other insurance has been exhausted."*

Andrews' policy provides

> **If We Cannot Agree**
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> 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 . . . . [Emphasis added.]

Reading these two provisions together, we conclude plaintiff's contract plainly requires exhaustion of benefits as a condition precedent to defendant's performance and that under the circumstances of this case, plaintiff failed to satisfy the condition precedent. Specifically, under the "other insurance" provision contained within plaintiff's policy, to collect uninsured motorist benefits, the following had to be established: (1) that plaintiff was an "insured person" (2) that plaintiff was in . . . a vehicle, that she did not own, (3) that the vehicle was insured for uninsured motorist benefits (or comparable insurance), and (5) that any coverage for plaintiff under Part 3 of plaintiff's Uninsured Motorists Insurance, *was excess coverage*. This provision unambiguously provides that "excess coverage" means "when the insured person is legally entitled to *recover damages in excess* of the *other* policy limits, we will pay up to your policy limit, *but only after* the other insurance has been exhausted." The reference to exhaustion operates to both define the limits of defendant's uninsured motorist benefits liability and create a duty of exhaustion as a condition precedent to any and all performance of the contract by defendant, in light of the phrase "but only after." Further, to the extent plaintiff argues that summary disposition was properly granted because defendant failed to establish she was "legally entitled" to benefits under *Andrews'* policy, her interpretation of the provision is incorrect. The provision plainly provides that excess coverage under *plaintiff's* policy is available when she is legally entitled to recover damages in excess of the *other* policy limits. Accordingly, plaintiff's policy restricts her recovery to uninsured motorist benefits in excess of the limits recoverable under Andrews' policy.

We agree with defendant's contention that plaintiff is not entitled to excess coverage under her policy because she failed to submit a claim within the three-year limitation period under Andrew's policy, and reject plaintiff's contention that she cannot be bound to the three-year limitation period because she was not a party to defendant's and Andrews' agreement. Although plaintiff was not a party to this agreement, as a third-party beneficiary of the promises made by defendant in the agreement, plaintiff *stands in the shoes of the promisee* and may only enforce the rights the promisee possessed under the contract against the promisor. *Rudolph*

Steiner Sch of Ann Arbor v Ann Arbor Charter Twp, 237 Mich App 721, 738; 605 NW2d 18 (1999); *Riemersma v Riemersma*, 29 Mich App 485, 487; 185 NW2d 556 (1971); See also *Koppers Co v Garling & Langlois*, 594 F2d 1094, 1098 (CA 6, 1979), citing MCL 600.1405. Stated differently, "[a] third-party beneficiary may not accept the benefits of a contract made in his behalf and reject the burdens." *Chrysler Corp v Smith*, 297 Mich 438, 451; 298 NW 87 (1941), overruled on other grounds 355 Mich 103 (1959); see also *Koenig v City of South Haven*, 460 Mich 667, 676; 597 NW2d 99 (1999) (Taylor, J.) (a third-party beneficiary's rights under the contract are subject to the limitations of the contract).

The provision in Andrews' policy requiring that a demand for arbitration must be filed within three years of the date of the accident is clear and unambiguous, and thus binding on plaintiff. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465-466; 581 NW2d 237 (1998) (Taylor, J.) (determining that a claim for uninsured motorist benefits be made within three years from the date of the accident was unambiguous and thus enforceable). The unrefuted evidence shows plaintiff did not submit a timely demand for arbitration to pursue any right to benefits under Andrews' policy. Plaintiff's failure to timely file a demand for arbitration barred any recovery under Andrews' policy. Thus, plaintiff failed to comply with the condition in her policy requiring her to exhaust Andrews' policy limits.

We also reject plaintiff's contention that despite her failure to file a claim for benefits under Andrews' policy, she nonetheless exhausted any benefits under that policy when defendant denied her February 2002 claim. Plaintiff argues that because she received $0.00, she exhausted Andrews' policy. Again, we disagree.

Plaintiff's policy does not define the term "exhaust." Terms which are not explicitly defined in the contract should be afforded their commonly understood meanings and a court may refer to dictionary definitions to discern common meanings. *Twichel, supra* at 534. Random House Webster's College Dictionary (2nd ed), p 457, defines the term "exhaust" as "to draw out or drain off completely."[8] Giving the term "exhaust" its commonly understood meaning, we conclude that plaintiff's inaction, i.e. failing to file a timely demand for arbitration, is insufficient to satisfy the condition precedent requiring her to exhaust Andrews' policy. In this regard, we find Justice Taylor's opinion in *Morley* applicable to the facts of this case:

> . . . . [I]nsurance contracts require a claim to be made for benefits before entitlement can be established.
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> 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. '[U]ntil a specific claim is made, an insurer has no way of knowing

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[8] Defendant cites a similar definition in the Oxford Dictionary and Thesaurus, (1996 ed), which defines "exhaustion " as "the action or process of draining or emptying something, a state of being depleted or emptied."

> 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 n 6 (internal citations omitted).]

Because the record in this case shows that defendant was unable to consider the merits of plaintiff's claim for uninsured motorist benefits under Andrews' policy and no damages were awarded pursuant thereto, we conclude plaintiff has not exhausted the benefits available under Andrews' policy. Therefore, even when viewing the evidence in a light most favorable to plaintiff as the nonmovant, plaintiff's inaction and the language of plaintiff's policy bar her recovery of uninsured motorist benefits under the excess coverage provisions. The trial court erred when it denied defendant's motion for summary disposition.[9]

Reversed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood

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[9] Given our conclusion that plaintiff was not entitled to recover benefits pursuant to the terms of the parties' contract, we need not address defendant's alternative argument that plaintiff's claim for uninsured motorist benefits was time-barred under Indiana law.