STATE OF MICHIGAN

COURT OF APPEALS

JASON SMITH, Plaintiff-Appellee,	UNPUBLISHED June 21, 2011
v	No. 297229 Wayne Circuit Court
FARMERS INSURANCE EXCHANGE, Defendant-Appellant.	LC No. 09-014545-NO

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying its motion for summary disposition and dismissing the case. We affirm, albeit for reasons different from those expressed by the trial court.

Defendant, an insurer, contracted with plaintiff to provide automobile insurance. The policy included both the coverage required under Michigan's no-fault act, MCL 500.3101 *et seq.*, and optional additional coverage for damage caused by uninsured motorists. Plaintiff filed this lawsuit after defendant denied uninsured-motorist (UIM) benefits in connection with an automobile accident. The trial court denied defendant's motion for summary disposition.[1] Defendant now argues that plaintiff was not entitled to UIM benefits because he did not comply with policy terms requiring him to notify defendant within 30 days of the automobile accident that a hit-and-run driver was involved and that an uninsured-motorist claim was to be filed. We disagree with defendant's argument. Rather, because defendant did not demonstrate that it was actually prejudiced as a matter of law by the lack of notice, a genuine issue of material fact remained and summary disposition was inappropriate. *DeFrain v State Farm Mut Auto Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 294505, issued March 10, 2011, slip op at 2-4).

[1] The court stated: "My review of the policy indicates that it does not require the plaintiff to file an uninsured motorist claim within any particular period of time. In addition to that, I'm of the opinion that the motion is not supported by the proper documentary evidence . . . . So based on that, again the motion is being denied."

Appellate courts review de novo a trial court's decision whether to grant a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). A motion brought under MCR 2.116(C)(10) tests whether there are genuine controversies regarding the material facts of the case; if not, the moving party is entitled to judgment as a matter of law. *Id*. at 552. "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. at 551-552.

"[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo. In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

The parties' insurance policy contained the following clauses:

WHAT TO DO IN CASE OF ACCIDENT

Notice

In the event of an **accident,** or loss, notice must be given to us promptly. The notice must give the time place and circumstances of the **accident,** or loss, including the names and addresses of injured persons and witnesses.

Other Duties

A person claiming any coverage of this policy must also:

* * *

6. Notify police within 24 hours and us within 30 days if a hit-and-run motorist is involved and an uninsured motorist claim is to be filed. [Boldface in original.]

Thus, the policy required plaintiff to notify defendant within 30 days "if a hit-and-run motorist is involved" and "an uninsured motorist claim is to be filed." Plaintiff arguably did notify defendant within 30 days that a hit-and-run motorist was involved. The accident occurred on March 14, 2007. Well under 30 days later, on April 1, 2007, plaintiff submitted to defendant a Michigan Motor Vehicle No-Fault Insurance Law Application for Benefits. On the application, plaintiff briefly described the accident and attached a copy of the police report. According to the police report, five cars were involved in the accident and the at-fault driver of the fifth car fled the scene. Plaintiff questioned whether a fifth car had been involved, stating that he "never noticed a 5th car driving away fleeing the accident." He added: "Even though the police report states a 5th car, my girlfriend who was with me is no where [sic] to be found in the police report, so there could be more mistakes in the police report." Because the police report specifically noted a hit-and-run driver who fled the scene, however, plaintiff at least created a genuine issue of fact with regard to whether he notified defendant within 30 days of the accident that such a driver was involved.

However, plaintiff's application did not mention any intent to file a UIM claim. Indeed, as noted, at the time he filed the application, plaintiff himself questioned whether a hit-and-run driver was even involved. Plaintiff did not refer to a potential UIM claim until October 2, 2008—well over a year after the accident—when an attorney sent defendant a letter stating that

he had been "retained by Jason Smith to pursue a claim for uninsured motorist benefits" arising out of the March 14, 2007, accident.

Plaintiff argues that correspondence sent to him by defendant nine days after the accident, on March 23, 2007, acknowledged a potential UIM claim. However, this argument is not supported by the correspondence. The correspondence confirmed receipt of plaintiff's "claim" (apparently an initial phone call or other notice of injury predating submission of plaintiff's application for no-fault benefits) and included information and an application directed solely at no-fault benefits. Plaintiff argues, nonetheless, that because defendant acknowledged plaintiff's "claim" without specifying whether the claim was for no-fault benefits, UIM benefits, or both, a genuine issue of fact existed with regard to whether defendant was on notice that plaintiff would file a UIM claim. We disagree. Plaintiff does not actually allege that he informed defendant of his intent to file a UIM claim within 30 days of the accident. Moreover, defendant's correspondence—which discusses only no-fault benefits and was sent before plaintiff submitted the police report noting a hit-and-run driver—alone provides no proof that defendant was aware of any such intent.[2] Accordingly, we agree with defendant that there is no genuine issue of material fact with regard to whether plaintiff failed to notify defendant within 30 days of the accident that "an uninsured motorist claim [wa]s to be filed"; there is no evidence that plaintiff provided the timely notice.

Nonetheless, this area of law is squarely controlled by this Court's recent decision in *DeFrain*, which specified that an additional element must be present to justify an insurer's decision to deny UIM benefits under these circumstances: the insurer must have been prejudiced by the lack of notice. *DeFrain*, ___ Mich App at ___ (slip op at 2). The *DeFrain* Court, in part, considered contract language similar to the language at issue here. *Id.* The *DeFrain* contract required a UIM claimant to "'report an accident involving a "hit-and-run" motor vehicle to the police within 24 hours and to ***us*** within 30 days[.]'" *Id.* (emphasis in original contract language). The Court concluded that, although the claimant did not comply with this requirement, the insurer was not entitled to deny UIM benefits as a matter of law. *Id.* Rather, it would have to show that it was prejudiced by the lack of notice. *Id.* The *DeFrain* Court relied on *Koski v Allstate Ins Co*, 456 Mich 439, 441-442; 572 NW2d 636 (1998), in which the Supreme Court considered a homeowner's insurance policy that premised benefits on the claimant's duty to forward to the insurer any legal papers relating to the accident. The *Koski* Court held that, despite the general rule that

> one who sues for performance of a contractual obligation must prove that all contractual conditions prerequisite to performance have been satisfied . . . , 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

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[2] See *Morley v Auto Club of Michigan*, 458 Mich 459, 470; 581 NW2d 237 (1998), observing in the context of UIM benefits that "an insured must make a specific claim for benefits sought."

> immediately or within a reasonable time must establish actual prejudice to its position. [*Id.* at 444.]

The *DeFrain* Court concluded that the *Koski* prejudice requirement remains controlling with regard to notice provisions, also citing *Bradley v State Farm Mut Auto Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292716, issued September 28, 2010). *DeFrain*, ___ Mich App at ___ (slip op at 3-4). In *Bradley*, this Court held that *Koski* "carved out a narrow prejudice requirement relative to all insurance contracts . . . ." *Bradley*, ___ Mich App at ___ (slip op at 3).

Here, although defendant nominally addressed the purpose of the notice requirement—to allow the insurer to locate and investigate the at-fault driver early in the process—at the hearing on its motion for summary disposition, defendant did not document actual prejudice in this case. Therefore, at a minimum, a genuine issue of fact remains with regard to this issue, and summary disposition in defendant's favor is inappropriate.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto