

STATE OF MICHIGAN
COURT OF APPEALS

TRACY CHAMBERLAIN, Individually and as
Next Friend of VINCENT CHAMBERLAIN, a
Minor,

UNPUBLISHED
January 13, 2005

Plaintiff-Appellant,

v

SAFECO INSURANCE COMPANY,

No. 250246
Wayne Circuit Court
LC No. 02-219137-CK

Defendant-Appellee.

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

In this action for breach of an insurance contract, plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(7) and (10). We affirm.

Plaintiff submitted a claim for theft loss under a homeowner's insurance policy issued by defendant. After defendant denied the claim, plaintiff commenced this action. Defendant moved for summary disposition, alleging that it was not liable because (1) plaintiff's action was not timely filed, (2) coverage was not available for theft committed by an insured, and (3) plaintiff was barred from pursuing her claim by having earlier settled a dispute involving the allegedly stolen property, thereby impairing defendant's subrogation rights. The trial court agreed that defendant was entitled to summary disposition with respect to each of the grounds asserted and, therefore, granted defendant's motion. This appeal followed.

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

Here, the burden was on plaintiff, as the nonmoving party, to establish, through affidavits, depositions, admissions, or other documentary evidence, that a genuine issue of disputed material fact exists. *Id.* at 361-362. Plaintiff could not rest on the allegations or denials contained in her pleadings, but was required to come forward with evidence of specific facts to

establish the existence of a material factual dispute preventing summary disposition. *Id.* at 362-363, 371. Only “substantively admissible evidence actually proffered” may be considered. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

The affidavit submitted by plaintiff is devoid of factual allegations and, instead, is based only upon information and belief. Plaintiff’s affidavit is insufficient to create a question of material fact precluding summary disposition. MCR 2.114(B)(2)(b) states that, “*except as to an affidavit,*” a pleading may be verified upon information and belief (emphasis added). MCR 2.119(B)(1) provides that an affidavit supporting or opposing a motion must:

- (a) be made on personal knowledge;
- (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
- (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

The requirement of personal knowledge “is not satisfied with an affidavit which is based solely on ‘information and belief.’” *Durant v Stahlin*, 375 Mich 628, 639; 135 NW2d 392 (1965). “Such affidavit does not set forth with particularity facts that are admissible in evidence.” *Id.* Because plaintiff’s only affidavit is devoid of factual allegations and is based upon information and belief, it may not be considered in determining whether a disputed question of material fact exists.

Plaintiff also argues that it was improper for the trial court to consider the insurance policy submitted by defendant because it was submitted only four days before the hearing on defendant’s motion. MCR 2.116(G)(1)(a)(ii) provides that, unless a different schedule is set by the court, a “response” to a motion for summary disposition must be filed at least seven days before the hearing. In this case, however, defendant, as the moving party, filed the applicable policy with a supplemental brief, not with a “response” to a motion for summary disposition. Neither MCR 2.116(G) (governing summary disposition), nor MCR 2.119(C) (governing general motion practice) explicitly address supplemental briefs. Even if the policy was not timely submitted, however, it is apparent that plaintiff was not prejudiced. The relevant portion of the theft exclusion is nearly identical to the language in the earlier policy that defendant submitted, so plaintiff had notice of its substance. Further, plaintiff conceded the applicability of the later policy at the hearing. Under these circumstances, to the extent that the filing was not timely, it did not result in a miscarriage of justice and, therefore, is not a ground for reversal. See MCR 2.613(A).

The policy in effect at the time of plaintiff’s alleged loss explicitly excluded coverage for theft “committed by an ‘insured.’” The properly submitted evidence demonstrates that Gary Chamberlain, Sr., the principal insured, either sold or gave away the contents of his home after plaintiff and her son moved out. Whether the property was then sold, destroyed, or taken by the Browns, Chamberlain’s sons, or others is irrelevant. There is no record evidence that the property was taken, sold, or destroyed without Chamberlain’s permission. To the extent that it was not his property to dispose of, this would show that he was the person who committed the alleged theft. Thus, the trial court properly concluded that plaintiff’s alleged loss is excluded by

the insurance policy. While this issue is dispositive, we will briefly address plaintiff's remaining claims.

Concerning whether the claim was untimely filed, the policy requires that suit be filed within one year of the loss. Under Michigan law, this contractual time limit is tolled after a claim is filed until the insurance company makes a final decision. *Saad v Citizens Ins Co*, 227 Mich App 649, 650, 652; 576 NW2d 438 (1998).

According to an affidavit submitted by defendant, plaintiff first reported the alleged theft on September 23, 2000, approximately nine months after the alleged loss. Plaintiff's file was closed in January 2001 because plaintiff failed to provide requested documentation of her alleged loss. The file was re-opened on August 22, 2001, at plaintiff's request, and denied on January 8, 2002. This action was then commenced almost five months later, on June 5, 2002. Even if the periods during which plaintiff's claim was pending and the file closed are excluded, the submitted evidence establishes that plaintiff's suit was not filed within one year after the date of the alleged loss. Although plaintiff asserts that she probably notified defendant of her alleged loss in January 2000, when she changed the policy to her name, she failed to submit any evidence factually supporting her claim that she actually reported her alleged loss or made a claim on that date.

Plaintiff's reliance on an internal memorandum prepared by one of defendant's employees for the proposition that the one-year period did not begin to run until the date the claim was denied is misplaced. There is no evidence that the employee intended to waive or modify the one-year contractual provision, or that she had the authority to do so.¹ More significantly, there is no evidence that plaintiff was aware of this internal memorandum until it was received during discovery. Thus, plaintiff could not have relied on it, and, accordingly, there is no basis for concluding that defendant is estopped from enforcing the contractual one-year limitation. Therefore, the trial court did not err in concluding that summary disposition was warranted because plaintiff's action was not timely filed.

With regard to subrogation, the insurance policy contains a "condition" stating that defendant "may require an assignment of rights of recovery for a loss to the extent that payment is made by us," and that, "[i]f an assignment is sought, an 'insured' will . . . do nothing after a loss to prejudice such rights."

In the present case, plaintiff filed a petition in probate court to determine ownership of the disputed assets. In addition to addressing Chamberlain's life insurance policy, the petition specifically alleged that "immediately subsequent to the death of the decedent, the decedent's children and Loretta and Michael Brown, persons holding his Power of Attorney at the time of his death, removed every item of personal property from the marital home." Plaintiff specifically

¹ Defendant's employee cannot unilaterally waive the policy's time limitations. See *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369-380; 666 NW2d 251 (2003). This is particularly true where the insurance policy contains a provision requiring that any modifications be made in writing.

alleged that “the personal property removed from the marital home was the property of the spouse, TRACY A. CHAMBERLAIN or the Estate.” Plaintiff made the same theft allegations in her petition to enjoin the distribution of the proceeds of Chamberlain’s life insurance policy. Plaintiff later settled her claims in exchange for approximately \$17,000. As part of the settlement, plaintiff “STIPULATED AND AGREED that any and all other claims or cross-claims that *have been brought or could have been brought in probate court* by or on behalf of Tracy Chamberlain, Gary C. Chamberlain, Jr. or Corey Chamberlain against Tracy Chamberlain, Gary C. Chamberlain, Jr. or Corey Chamberlain *shall be released or dismissed with prejudice.*” [Emphasis added.]

By its clear terms, the stipulation released plaintiff’s pending claims against Gary and Corey concerning the alleged theft, and thereby interfered with defendant’s right of subrogation to any cause of action that plaintiff might have had against Gary and Corey. *Stolaruk Corp v Central Nat’l Ins Co of Omaha*, 206 Mich App 444, 448-450; 522 NW2d 670 (1994). Therefore, the trial court correctly held that plaintiff was barred from pursuing an action under the policy to recover for her alleged theft loss.

Plaintiff points out that Gary testified in his deposition that the stipulation “was for the life insurance,” not the items that he was accused of taking. However, the language of the stipulation is clear and unambiguous, particularly given that a claim concerning the allegedly stolen property was actually pending in probate court against Gary and Corey. Therefore, parol evidence concerning the parties’ alleged intent is not admissible to vary the terms of the stipulation. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

Next, with regard to whether plaintiff’s minor son is bound by the trial court’s rulings, defendant concedes that the trial court did not rule that plaintiff’s son had impaired defendant’s right of subrogation. But because plaintiff failed to preserve this issue by raising it below, our review is limited to plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000); see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The parties fail to cite any authority concerning whether the statutory tolling provision for minors, MCL 600.5851(1), has any effect on a contractual limitation period. Nevertheless, plaintiff filed suit on her son’s behalf and, on July 17, 2002, was formally appointed as his next friend. See MCR 2.201(E)(1)(b) and (2)(a)(i); see also MCR 3.202(A). Therefore, even if plaintiff’s son could have waited until he became an adult to sue in his own name, he is bound by the outcome of this action. The trial court did not commit plain error in including plaintiff’s son within the scope of its ruling that any claim for theft was barred by the exclusion applicable to theft committed by an insured.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder