STATE OF MICHIGAN

COURT OF APPEALS

ROBIN GILLESPIE and SUSAN GILLESPIE, Plaintiffs-Appellants,	UNPUBLISHED July 27, 2006
v	No. 268649 Lenawee Circuit Court
FARM BUREAU MUTUAL INSURANCE COMPANY, Defendant-Appellee.	LC No. 03-001375-CK

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition. Relying on *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), the trial court determined that plaintiffs' action for underinsured motorist (UIM) coverage was barred because it was not brought within one year after the date of the accident. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Robin Gillespie was involved in a motor vehicle collision on November 10, 2001. He was driving his father's vehicle, which was insured by defendant. The policy included optional UIM coverage. Significantly, a provision in the policy states that "[n]o claimant may bring a legal action against the company more than one year after the date of the accident."

In June 2002, plaintiffs notified defendant of their intent to pursue a UIM claim and submitted a letter from the insurer of the other driver involved in the collision offering to pay the policy limits. In response, defendant requested additional information concerning the other driver's policy and collectibility. Defendant sent forms to plaintiffs' attorney and to the other driver, but did not receive all of the requested information from the other driver until December 12, 2002. Defendant subsequently informed plaintiff's attorney that it appeared that the other driver was uncollectible and that defendant would have waived its subrogation rights and allowed plaintiffs to settle, but because the one-year period for bringing an action against defendant had expired, it was denying the claim.

Plaintiffs filed the present action on November 7, 2003,[1] alleging claims for declaratory relief, bad faith, estoppel, breach of contract, violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, violation of public policy, and punitive damages. Relying on *Rory, supra*, the trial court granted defendant's motion and dismissed plaintiffs' complaint in its entirety.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

In *Rory*, our Supreme Court considered whether a court may refuse to enforce a one-year contractual limitations period in an insurance policy providing uninsured motorist coverage on the basis that the provision was unfair, unreasonable, and an unenforceable adhesion contract. The Court concluded that a judicial assessment of reasonableness is an invalid basis for refusing to enforce an unambiguous contractual limitations period. *Id.*, p 470. Such a provision is to be enforced unless it violates the law or public policy. *Id*. Only traditional contract defenses, including duress, waiver, estoppel, fraud, or unconscionability, may be used to avoid enforcement of the provision. *Id.*, p 470 n 23. The Court observed that pursuant to MCL 500.2236(5), the Legislature has assigned the responsibility of evaluating the reasonableness of insurance policy provisions to the Commissioner of Insurance.[2] *Id*., p 475.

With respect to the dismissal of plaintiffs' claims for declaratory relief and breach of contract, plaintiffs argue that there is an ambiguity in the insurance policy because of a conflict between the one-year limitation provision and "exhaustion of limits" and "consent to settlements" clauses.

Plaintiffs are correct that an insurance contract is ambiguous if provisions of the same contract irreconcilably conflict with each other. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). However, plaintiffs have not shown a conflict in the provisions. Their argument is essentially that the one-year limitation period is so short that it is nearly impossible to comply and that the insured's ability to comply may be impeded by actions of the insurer over which the insured has no control. This is a "reasonableness" challenge disguised as an ambiguity argument. Plaintiffs have not shown an ambiguity, and do not offer a persuasive reason for reversing the trial court's dismissal of these claims.

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[1] Plaintiffs concede that the doctrine of judicial tolling, pursuant to which a limitation period was tolled from the time of notice of the loss until the claim was denied, does not render their claim timely. See *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976), overruled in part on other grounds in *Rory, supra* at 470.

[2] The notice and order issued by the Commissioner of Insurance on April 4, 2006, Notice and Order of Prohibition 06-008-M, which prohibits insurance policy forms that limit the time to file a claim or commence suite for underinsured motorist benefits to less than three years, by its own terms, is inapplicable to the present policy. The policy was in use before the order and no subsequent filing has been made indicating that the policy has been revised since April 4, 2006.

With respect to plaintiffs' claim for bad faith, they argue that "bad faith" is a tort claim that is not subject to the contractual limitations period and is not addressed in *Rory, supra*. However, our Supreme Court has declined to recognize a separate tort cause of action for bad-faith breach of an insurance contract. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 422-423; 295 NW2d 50 (1980); *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 604, 608; 374 NW2d 905 (1985). Plaintiffs cite *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 136; 393 NW2d 161 (1986), and *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 472 Mich 353; 696 NW2d 681 (2005). These cases involve an insurer's failure to settle claims brought against the insured, thus exposing the insured to a judgment in excess of the policy limits. They do not support a cause of action involving an insurer's obligation to settle a claim brought by the insured, as in this matter.

Plaintiffs mention that their claim for punitive damages was not subject to dismissal. However, plaintiffs do not offer any argument on this point, and this Court need not address it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Plaintiffs also argue that the court erred in dismissing their MCPA claim. However, plaintiffs waived any error in this regard by expressly conceding in the trial court that dismissal of this claim was appropriate. An appellant cannot contribute to error by plan or design and then argue error on appeal. *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991).

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra