

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1244**

Kris Brown,  
Appellant,

vs.

CommonSense Mortgage, et al.,  
Defendants,

Midwest Family Mutual Insurance Company,  
Respondent.

**Filed April 27, 2010  
Affirmed  
Toussaint, Chief Judge**

Hennepin County District Court  
File No. 27-CV-08-6077

Vincent J. Moccio, Kate E. Jaycox, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis,  
Minnesota (for appellant)

Michael J. Tomsche, Matthew R. Smith, Tomsche, Sonnesyn & Tomsche, P.A., Golden  
Valley, Minnesota (for respondent)

Considered and decided by Toussaint, Chief Judge; Kalitowski, Judge; and  
Randall, Judge.\*

---

\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**TOUSSAINT**, Chief Judge

Appellant Kris Brown challenges the summary judgment granted to respondent Midwest Family Mutual Insurance Company, arguing that her tort claims against it were not untimely. Because all policies of respondent provided that an action must be brought within two years of the loss and appellant brought her action more than two years after her loss, we affirm.

### FACTS

In 2003, appellant purchased a home for \$185,182 and insured it with Minnesota FAIR Plan (FAIR) for its cash value. FAIR does not provide replacement value coverage. In 2004, when appellant went to CommonSense Mortgage to refinance her home for approximately an additional \$20,000, she learned from Matthew Huebsch, the broker assigned to her, that a lender would require replacement value coverage. Huebsch referred appellant to Julie Smith, an independent insurance agent with Insurance Specialists Team. Smith spoke to an underwriter with respondent, who told her that respondent would not issue a policy to appellant. Smith relayed this information to Huebsch and appellant.

Smith also provided Huebsch with two documents. One was a computer printout of an insurance application on which Smith had filled in the limit of liability on the dwelling as \$179,000 and an estimated total premium of \$937. The application included a box marked with an X before the words “COVERAGE IS NOT BOUND.” Smith had

covered this X and placed an X in the box before the words “INSURANCE BINDER,” which preceded other language: “IF THE BINDER BOX TO THE LEFT IS COMPLETED, THE FOLLOWING CONDITIONS APPLY: THIS COMPANY BINDS THE KIND(S) OF INSURANCE STIPULATED ON THIS APPLICATION. THIS INSURANCE IS SUBJECT TO THE TERMS, CONDITIONS AND LIMITATIONS OF THE POLICY(IES) IN CURRENT USE BY THE COMPANY.” The other document was an insurance binder that said it “IS A TEMPORARY INSURANCE CONTRACT, SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS FORM.” The language on the reverse side says the insurance provided by the binder “is subject to the terms, conditions and limitations of the policy(ies) in current use by the Company.” Every policy then in current use by respondent provided that any action against respondent had to begin within two years of the insured’s loss.

Huebsch told appellant the insurance requirement was satisfied and submitted the binder Smith had sent him. Appellant believed FAIR was providing the increased insurance, and her refinancing closed. When she later learned that her insurance was insufficient, she attempted to obtain other insurance but was unsuccessful.

Appellant’s home burned down in March 2005. She submitted a claim to FAIR, which she believed to be her insurer at the time of the fire. FAIR denied coverage on the ground that its investigation showed appellant had set fire to her home. In August 2005, appellant also notified respondent that she would be making a claim. On August 23, 2005, respondent sent appellant a reservation of rights letter that quoted its policy: “No

action can be brought against us [respondent] unless . . . the action is started within two years after the date of loss.” In September 2005, respondent denied coverage on the ground that there was no insurance contract between itself and appellant. In its letter, respondent pointed out that appellant should have known she had no coverage with it because she had been told that respondent declined to provide her with replacement coverage, she had never paid respondent a premium, and she had continued to pay for and renew her FAIR coverage.

In October 2005, respondent erroneously sent appellant a bill for premiums for the first two years of a policy, which she paid. The day respondent received her payment, it sent a refund check explaining that the bill had been erroneously generated by the file established to track respondent’s investigation of the fire appellant reported and reiterating that appellant had no policy with respondent.

In 2006, appellant successfully sued FAIR. Following a jury trial, she received \$189,714.37: \$128,000 for the cash value of the home; \$48,839.21 for personal expenses; and \$12,875.16 for alternate living expenses.

In 2008, almost three years after the fire, appellant brought this action against respondent, CommonSense Mortgage, Huebsch, Insurance Specialists, and Smith.<sup>1</sup> She alleged claims of “common law fraud and intentional misrepresentation” against all defendants; “negligent misrepresentation” against all defendants; “breach of assumed

---

<sup>1</sup> She also sued LendSmart Mortgage LLC, allegedly the successor to CommonSense Mortgage, which moved for summary judgment and was granted summary judgment on the ground that it is not the successor to CommonSense Mortgage.

duty” and “breach of fiduciary duty” against Huebsch and CommonSense Mortgage; “breach of fiduciary duty” against Insurance Specialists, Smith, and respondent; and “breach of contract” against respondent.

The complaint also asserted: “The MFM binder issued by [respondent] through its authorized agents . . . was a binding contract of insurance for the benefit of [appellant].” Respondent accepted this assertion for purposes of its summary judgment motion; Insurance Specialists and Smith also moved for summary judgment. The district court granted respondent’s motion and denied the motion of Insurance Specialists and Smith.

Appellant challenges the summary judgment, arguing that her tort claims against respondent are not time-barred.<sup>2</sup>

## D E C I S I O N

“[Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Star Ctr., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. App. 2002). An appellate court reviews district court interpretations of statutes and of insurance contracts de novo. *Stewart v. Illinois Farmers Ins. Co.*, 727 N.W.2d 679, 683 (Minn. 2007).

---

<sup>2</sup> Appellant does not challenge the district court’s determination that her contract claim against respondent is time-barred.

The insurance binder states that it “IS A TEMPORARY INSURANCE CONTRACT, SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS FORM.” The language on the reverse side says the insurance provided by the binder “is subject to the terms, conditions and limitations of the policy(ies) in current use by the Company.”

It is undisputed that: (1) the application and language on the binder says they are subject to the limitations in respondent’s current policies; (2) all respondent policies in use in 2004 provided a two-years-from-the-date-of-loss limitation for bringing actions against respondent; (3) appellant was informed of this provision in August 2005, when respondent sent her its notice of reservation of rights; (4) appellant’s loss occurred in March 2005; and (5) appellant’s complaint is dated January 16, 2008. “When an insurance clause requires *suit* to be brought within a certain period, failure to bring *suit* within that period bars suit if the limitation clause does not conflict with a specific statute and is not unreasonable in length.” *L & H Transp., Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223, 226 (Minn. 1987) (citing *Henning Nelson Const. Co. v. Fireman’s Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 645 (Minn. 1986)).

Appellant does not argue that the two-year limitation of the policy is unreasonable or in conflict with a statute. In fact, that limitation is imposed by statute. *See* Minn. Stat. § 65A.01, subd. 3 (2008) (“No suit or action on this [standard fire-insurance] policy for the recovery of any claim shall be sustainable in any court of law . . . unless commenced within two years after inception of the loss.”). Thus, the language in the binder appellant

claims is a contract of insurance precludes any action more than two years after the date of loss.

Appellant argues that the policy limitation does not apply to her tort claims, which are subject to a six-year statute of limitations. *See* Minn. Stat. § 541.05, subds. 5, 6 (2008). No published Minnesota case addresses this point, but *Modern Carpet Indus., Inc., v. Factory Ins. Ass'n*, 186 S.E.2d 586, 587 (Ga. Ct. App. 1971), while not dispositive, is instructive. *Modern Carpet* involved a policy limitation of one year after a loss and an insured who brought an action approximately a year and a half after a loss. 186 S.E.2d at 587. “[R]egardless of the form of the action, if the source of the right claimed has evolved from the written contract of insurance, the limitations contained in it supersede any other general statutory limitations.” *Id.* at 587. The court rejected the insured’s argument that the limitation did not apply to his statutory claim of bad-faith refusal to pay because that claim was subject to a 20-year statute of limitations. *Id.*

None of the three cases on which appellant relies addresses her argument. *See City of Coon Rapids v. Suburban Eng'g, Inc.*, 283 Minn. 151, 155-56, 167 N.W.2d 493, 495-96 (1969) (concerning when, not whether, limitation period on action for fraud in construction began to run); *Estate of Riedel v. Life Care Ret. Cmtys.*, 505 N.W.2d 78, 80 (Minn. App. 1993) (concerning when breach of contract action accrues, thus starting statutory limitation period); *Hydra-Mac, Inc. v. Onan Corp.*, 430 N.W.2d 846, 852-54 (Minn. App. 1988) (concerning whether statute of limitations defense on breach of warranty claim is waived by making promises to repair until statute has run and whether

failure to investigate when there is no reason to suspect fraud tolls statute of limitations on fraud claim), *aff'd in part, rev'd in part*, 450 N.W.2d 913 (Minn. 1990). Appellant's argument that the limitation provided by the policy does not apply to tort claims lacks any support in case law.

Moreover, statutory law also refutes it. *See* Minn. Stat. § 65A.03, subd. 1 (2008) (“Binders or other contracts for temporary insurance . . . shall be deemed to include all the terms of [the] standard fire insurance policy. . . .”); Minn. Stat. § 65A.01, subd. 3 (“No suit or action on this [standard fire-insurance] policy for the recovery of any claim shall be sustainable in any court of law . . . unless commenced within two years after inception of the loss.”). Nothing in the statute restricts “suit or action” to contract claims or excludes tort claims, and this court may not supply “what the legislature purposely omits or inadvertently overlooks.” *Flaherty v. Indep. Sch. Dist. No. 2144*, 577 N.W.2d 229, 235 (Minn. App. 1998), *review denied* (Minn. June 17, 1998).

Appellant argues that Minn. Stat. § 65A.01, subd. 3, does not apply to her tort claims because they are not claims “on this policy.”<sup>3</sup> But the policy she alleged to exist was appellant's sole basis for bringing any claims against respondent. She does not explain what basis she would have for claims against respondent other than its having insured her.

---

<sup>3</sup> Appellant argues in the alternative that, even if her tort claims against respondent are considered claims “on this policy,” her claims against Smith are not claims “on this policy.” But Smith's motion for summary judgment was denied; appellant's claims against her are still before the district court and are not relevant to this appeal.

Appellant's claims against respondent were properly dismissed as untimely; the district court did not err in granting respondent's summary judgment motion.<sup>4</sup>

**Affirmed.**

---

<sup>4</sup> The district court observed in a footnote that, because appellant admitted in her complaint that she did not know of respondent's binder when her refinancing closed, she could not have relied on it when she refinanced, and her misrepresentation claim failed for lack of reliance. Neither party addressed this issue, and appellant argues that it presents a genuine issue of material fact, which the district court improperly resolved. But, because the issue is irrelevant to the district court's dismissal of appellant's claims against respondent as untimely, the footnote observation was merely dicta, and we do not address it.