STATE OF MICHIGAN

COURT OF APPEALS

LAKELAND NEUROCARE CENTERS, as assignee of VINCENT BEAN,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION, MICHIGAN ASSIGNED CLAIMS PLAN, MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY, and UNNAMED ASSIGNEE OF THE MICHIGAN ASSIGNED CLAIMS PLAN and/or MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees.

UNPUBLISHED
June 11, 2020

No. 350165
Court of Claims
LC No. 19-000027-MZ

Before: CAMERON, P.J., and BOONSTRA and LETICA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's May 7, 2019 order granting summary disposition in favor of defendants State of Michigan and Michigan Department of Transportation (collectively, MDOT or the MDOT defendants) under MCR 2.116(C)(7), and the July 22, 2019 order granting summary disposition in favor of the remaining defendants under MCR 2.116(C)(10).[1] We affirm.

[1] The unnamed assignee defendant was dismissed from the proceedings below. The remaining defendants in this case fall into two groups, with the MDOT defendants in one group and defendants Michigan Assigned Claims Plan and Michigan Automobile Insurance Placement Facility (collectively, MACP or the MACP defendants) in the other.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On January 29, 2018, Vincent Bean was allegedly struck by an MDOT snowplow while riding a bicycle on the highway. Bean was injured and received healthcare services from plaintiff. Bean assigned to plaintiff his rights to recover benefits under the no-fault act, MCL 500.30101 *et seq*. Bean was not covered by an applicable automobile insurance policy at the time of the accident. Neither Bean nor plaintiff filed a claim with the MDOT defendants or the third-party administrator of MDOT's self-insured insurance plan.

On February 28, 2018, plaintiff submitted a claim for personal injury protection (PIP) benefits on behalf of Bean to MACP. On March 14, 2018, MACP informed plaintiff in writing that it could not process the claim because it had identified two potentially responsible higher-priority insurance carriers, i.e., MDOT's self-insurance plan and the snowplow driver's personal no-fault insurance plan. The letter advised plaintiff to file a claim with MDOT and with the driver's personal insurance carrier, and stated that MACP would process plaintiff's claim if it provided proof that those insurance carriers had denied plaintiff's claims. Plaintiff did not file claims with either of those insurance carriers or make any further contact with MACP.

On February 5, 2019, plaintiff filed in the court of claims a notice of intent to file a claim, and it filed its complaint the following day. The MDOT defendants moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that plaintiff's claims were barred by the one-year statutory notice provision set forth in MCL 600.6431 as well as the notice provision and limitation period set forth in MCL 500.3145(1). The MACP defendants also moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that there was no genuine issue of material fact regarding whether MACP was responsible for providing PIP benefits to Bean, because two higher-priority insurers had been identified.

In response, plaintiff argued that its claim had accrued on the date it began treating Bean, i.e., February 7, 2018, and therefore that its notice and complaint had been filed within one year of the claim's accrual. Further, plaintiff argued that in any event it had substantially complied with the applicable statutory notice provisions by orally informing MDOT of its intent to sue. Specifically, plaintiff contended that its billing specialist, Kimberly Taylor, called the Attorney General's (AG's) office on February 5, 2018 and spoke to an unidentified person. Taylor stated in an affidavit that she had informed this unnamed person of Bean's accident, the involvement of an MDOT snowplow, and plaintiff's intent to begin treating Bean. According to Taylor, the unidentified person at the AG's office informed her that the state would only pay a maximum of $1,000 per claim. Plaintiff argued that this phone conversation provided sufficient notice to MDOT within the one-year statutory notice period; further, plaintiff argued that the AG's office had represented that no insurance applicable to Bean's injury existed, and that it had exercised due diligence in seeking to discover the existence of a higher priority insurer. Plaintiff also argued that defendants should be estopped from making their arguments because plaintiff had been misled by the misrepresentations of the unnamed AG's office employee.

MDOT replied and provided the trial court with the affidavit of a claims examiner for the third-party administrator of Michigan's self-insured insurance plan. The claims examiner stated that no records existed of any claims, demands, or notices filed by plaintiff or Bean before the filing of plaintiff's complaint. MACP also replied and pointed out that plaintiff had received

correspondence indicating the existence of two higher-priority insurers, and had never provided proof that those insurers had denied a claim for PIP benefits.

The trial court granted both motions without oral argument. Regarding MDOT, the trial court held that the deadlines set forth in MCL 600.6431 for providing notice of an intent to sue and for filing claims against state government agencies, and the one-year notice requirement set forth in MCL 500.3145(1), had passed before plaintiff provided notice. It rejected plaintiff's argument that its claim did not accrue until it began treating Bean. It also held that Taylor's oral contact with the AG's office was not sufficient to satisfy the notice requirement of MCL 500.3145(1). Finally, it declined to apply the equitable doctrine of estoppel to avoid the plain language of the relevant statutory provisions. The court therefore held that summary disposition in favor of MDOT was appropriate under MCR 2.116(C)(7).

Regarding MACP, the trial court held that plaintiff had not exercised due diligence to show that a higher priority insurer could not have been identified at the time it requested PIP benefits from MACP. The trial court noted that the police report identified the driver, and stated that he was driving an MDOT snowplow. It was undisputed that plaintiff had never contacted the driver of the snowplow to inquire into his personal insurance, despite knowing his identity, and that plaintiff never sought benefits from MDOT's self-insured insurance plan, despite both of these insurers being identified in correspondence from MACP. The trial court concluded that plaintiff "could have identified a higher-priority insurer had it used reasonable efforts and due diligence in its search, but failed to do so." Accordingly, the trial court granted summary disposition in favor of MACP under MCR 2.116(C)(10).

This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). "Subrule (C)(7) permits summary disposition when the claim is barred by an applicable statute of limitations." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). In considering a motion under MCR 2.116(C)(7), "[w]e consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 N.2d 678 (2001), citing MCR 2.116(G)(5). Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Rivera v SVRC Indus, Inc*, 327 Mich App 446, 453; 934 NW2d 286 (2019), citing *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (199). This Court must consider documentary evidence in a light most favorable to the nonmoving party. *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012); *Dextrom*, 287 Mich App at 416. We review de novo questions of law involving statutory interpretation. *Michigan Municipal Liability & Prop Pool v. Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App.183, 189, 597 NW2d 187 (1999).

III. SUMMARY DISPOSITION—MDOT DEFENDANTS

Plaintiff argues that the trial court erred by granting MDOT's motion for summary disposition under MCR 2.116(C)(7), because its notice of intent and complaint were timely filed, or because MDOT should have been estopped from arguing that plaintiff's claims were untimely. We disagree.

MCL 600.6431(1) provides, in relevant part, that "a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies." Additionally, MCL 500.3145(1) provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for an accidental bodily injury may not be commenced later than 1 year after the date of the accident that caused the injury unless written notice of injury as provided in subsection (4) has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury.

As stated, plaintiff filed its notice of intent and complaint more than one year after Bean's accident. Nonetheless, plaintiff argues that its notice and complaint were timely filed because, although Bean's claim for PIP benefits began to accrue on the date of the accident, he "continued to accrue benefits at the time he received treatment" from plaintiff, and "his claim for those particular no-fault benefits began accruing on that date." In other words, plaintiff maintains that although Bean was injured earlier, his claim for benefits arising from his medical treatment by plaintiff did not accrue until plaintiff provided that medical treatment. We disagree. Generally, a claim for personal injury "accrues" when "all of the elements are present and can be properly pleaded in a complaint." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 385; 738 NW2d 664 (2007). Bean was allegedly injured by the actions of MDOT's employee on January 29, 2018, and plaintiff admits that Bean's claim accrued at that time. As an assignee, plaintiff stands in the same position as Bean. *Crossley v Allstate Ins Co*, 139 Mich App 464, 470 362 NW2d 760 (1984). Further, the no-fault act "specifically provides that the action accrues at the time of the accident." See *Sallee v Auto Club Ins Ass'n*, 190 Mich App 305, 308; 475 NW2d 828 (1991). Plaintiff's claim for PIP benefits therefore "accrued" at the time Bean was injured, not once he received medical treatment.

Plaintiff's citation to MCL 500.3145(2) for the proposition that a claim for PIP benefits "accrues" as each medical procedure is provided is simply incorrect. MCL 500.3145(2) provides that "*if the notice has been given or a payment has been made*," an action may be commenced within one year of the most recent allowable expense incurred; it does not support plaintiff's position that notice was in fact filed or provided in a timely manner. We conclude that the trial

court did not err by holding that the plain language of the relevant statutory notice periods barred plaintiff's claim.[2]

Additionally, the trial court did not err by failing to hold that plaintiff "substantially complied" with the notice requirements, or that defendants should be equitably estopped from arguing otherwise due to the alleged misrepresentations of an unnamed individual in the AG's office. The plain language of both MCL 600.6431 and MCL 500.3145 require *written* notice; plaintiff could not reasonably have believed that an oral conversation over the phone sufficed to provide this notice. Oral notice alone is never enough to fulfill the notice requirements of MCL 500.3145(1). *Keller v Losinski*, 92 Mich App 468, 471-473; 285 NW2d 334 (1979). And plaintiff does not allege that the unnamed person at the AG's office represented that plaintiff had fulfilled its duty to provide notice by merely providing oral information over the phone. Rather, plaintiff argues that this phone conversation convinced Taylor that no insurance was available from the state of Michigan. Plaintiff, of course, received contradictory information from MACP in March 2018, yet made no further investigation into the matter. Nor did it file written notice at any point within a year after the accident to preserve a possible claim, even assuming that it was convinced that the state of Michigan, despite requiring every private citizen driver to carry such insurance, possessed no insurance that would pay PIP benefits. Under these circumstances, the trial court did not err by failing to hold that plaintiff "substantially complied" with the notice requirements or by declining to apply the equitable doctrine of estoppel to prevent MDOT from raising a statutory notice defense. See *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 552; 487 NW2d 499 (1992) ("The doctrine of estoppel should be applied only when the facts are unquestionable and the wrong to be prevented undoubted.").

IV. SUMMARY DISPOSITION—MACP DEFENDANTS

Plaintiff also argues that the trial court erred by granting summary disposition in favor of MACP, because it exercised due diligence in attempting to locate a higher-priority insurer before submitting its claim to MACP, and no such insurer could be located. We disagree.

Under the no-fault act, a person injured by a motor vehicle generally must seek PIP benefits from his own insurer, or, if not insured under a no-fault insurance policy, from other potential insurers if they can be identified. See *Spencer v Citizens Ins Co*, 239 Mich App 291, 301; 608 NW2d 113 (2000), MCL 500.3114(1), MCL 500.3115.[3] A person who, although not covered by an applicable policy, is injured "while not an occupant of a motor vehicle" is entitled to PIP

[2] We decline to address the MDOT defendants' alternative argument that the 6-month statutory notice period found in MCL 600.6431(3) controls here, simply because plaintiff is not entitled to relief even under the longer notice period used by the trial court.

[3] MCL 500.3115 has since been substantially amended, as were many other portions of the no-fault act, by 2019 PA 21 and 22, each effective June 11, 2019. The accident at issue in this case, and the proceedings below, occurred before the amendment, and no party argues that the amendments apply retroactively. See *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012). References to statutory sections throughout this opinion refer to those in effect at the time of the accident.

benefits under insurance of the owner or operator of the vehicle involved in the accident. *Spencer*, 239 Mich App at 301; see also MCL 500.3115. Under certain limited circumstances, an injured person may obtain PIP benefits through the MACP, i.e., if

> (a) No personal protection insurance is applicable to the injury.
>
> (b) No personal protection insurance applicable to the injury can be identified.
>
> (c) No personal protection insurance applicable to the injury can be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss.
>
> (d) The only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. [MCL 500.3172(1).]

MACP is "the insurer of last priority." *Spencer*, 239 Mich App at 301. The use of the verb phrase "can be" in MCL 500.3172(1)(b) "relates to an *ability* to identify a responsible insurer, as opposed merely to whether such an insurer has in fact been identified." *WA Foote Mem Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159, 171 n 6; 909 NW2d 38 (2017), vacated in part on other grounds 504 Mich 985 (2019).

In this case, the trial court held that MACP was not liable for the payment of PIP benefits because two higher-priority insurers could have been identified: Michigan's self-insurance plan and the snowplow driver's personal no-fault automobile insurance policy, i.e., the insurance policies of both the owner and the operator of the snowplow that allegedly struck Bean. *Spencer*, 239 Mich App at 301. Plaintiff argues that at the time it submitted a claim for benefits, no other insurer had been identified, and that MACP was therefore required to promptly assign his claim and begin paying benefits, notwithstanding the existence of other policies. We disagree.

Plaintiff relies on *Spencer*. In *Spencer*, the injured plaintiff did not possess his own no-fault insurance policy or reside with a relative who possessed such a policy; further, "although [the] plaintiff would have been entitled to coverage under the vehicle owner's or operator's policy pursuant to § 3115, at the time of the accident and for some time thereafter, *the identities of the owner and driver of the vehicle that struck plaintiff remained unknown*." *Spencer*, 239 Mich App at 302 (emphasis added). The plaintiff therefore sought PIP benefits from MACP. MACP assigned his claim to the defendant insurer, who began paying PIP benefits. *Id*. at 295. Later, the driver of the vehicle that struck the plaintiff, and that vehicle's insurer, were identified. *Id*. The defendant insurer sought to be relieved of its obligation to pay PIP benefits; however, this Court held that the defendant's remedy lay in seeking reimbursement from the other insurer, not in ceasing payment of benefits to the injured person. *Id*. at 305. In other words, once the plaintiff's proper claim for assigned-claim benefits was accepted and an insurer assigned, the identification of another higher-priority insurer did not relieve the assigned insurer of its obligation to pay benefits. *Id*. The *Spencer* panel noted that the statutory scheme regarding assigned claims contemplated that an assigned insurer could seek reimbursement for any appropriate third parties, including "subsequently identified higher priority insurers." *Id*. at 307; see also MCL 500.3172, MCL 500.3175.

Spencer is inapplicable here. Indeed, nothing in *Spencer* requires MACP to assign a claim simply because a claimant states that it has not identified a higher-priority insurer. MACP was permitted to review plaintiff's claim and make an initial determination of whether Bean was entitled to benefits from "the insurer of last priority." MCL 500.3173a. And unlike in *Spencer*, both the owner and operator of the motor vehicle involved in the accident in this case were easily identifiable from the police report, a fact that MACP promptly shared with plaintiff. The trial court did not err by rejecting plaintiff's argument that MACP was required to assign its claim and seek reimbursement from the other higher-priority insurers when those insurers were readily identifiable at the time the claim was filed.

We agree with the trial court that plaintiff did not demonstrate sufficient due diligence in seeking to identify higher-priority insurers. Again, the name of the driver and the fact that the snowplow was owned by MDOT were stated in the police report. At a minimum, even assuming for the moment that plaintiff's call to the AG's office represented due diligence regarding that insurer, plaintiff presents no evidence that it made any attempt to determine whether the operator of the motor vehicle involved in the accident was covered by an applicable policy. And, for the reasons already discussed, we are not inclined to find that a simple phone call and conversation with an unnamed person at the AG's office suffices as a duly diligent search for a higher priority insurer. The trial court did not err by determining that plaintiff did not show reasonable diligence in seeking to identify whether an owner, registrant, or operator the vehicle involved in the accident was covered by an applicable policy of insurance. MCL 500.3115(1).

Finally, plaintiff again argues estoppel, based on alleged misrepresentations of the unnamed person who allegedly answered the phone at the AG's office. We adopt the reasoning we employed in the previous section concerning this argument, and add that plaintiff's reliance on this alleged statement (regarding the existence of insurance from the state of Michigan) was simply not reasonable, especially after it received contrary information from MACP during the course of processing plaintiff's claim. Equitable estoppel requires reasonable reliance on a false representation of a material fact, *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998), and has no application to the facts of this case.

Affirmed.

/s/ Thomas C. Cameron
/s/ Mark T. Boonstra
/s/ Anica Letica