STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY LACASCIO,

Plaintiff-Appellee,

v

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
October 17, 2019

No. 344950
Macomb Circuit Court
LC No. 2017-000299-NF

Before: FORT HOOD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

In this action for personal protection insurance (PIP) benefits, defendant appeals by delayed leave granted[1] the trial court's opinion and order denying summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

Plaintiff was severely injured as a pedestrian when he was struck by a car. He suffered multiple injuries requiring a lengthy hospitalization, multiple surgeries and extensive rehabilitation. By statute, defendant is the no-fault insurer designated to provide plaintiff PIP benefits because defendant insured plaintiff's father, i.e., a resident relative. See MCL 500.3114(1).

On February 8, 2017, defendant denied plaintiff's claim and cancelled his father's insurance policy because it concluded that plaintiff made false statements intended to materially defraud defendant.[2] Plaintiff filed suit. The trial court denied defendant's motion for summary

[1] *Lacascio v Farm Bureau Mut Ins Co of Mich*, unpublished order of the Court of Appeals, entered October 23, 2018 (Docket No. 344950).

[2] In the context of plaintiff's entire claim, the alleged misrepresentations concerned a *de minimis* amount of benefits. Specifically, defendant alleges that on a few occasions plaintiff drove himself on days that his girlfriend claimed attendant care payments for multiple services, one of

disposition, finding that there was a genuine issue of material fact whether plaintiff intended to defraud defendant. Defendant appealed from that denial.

II. ANALYSIS

Defendant argues that it is entitled to summary disposition under the fraud-exclusion clause in plaintiff's father's policy. Plaintiff counters that the clause does not apply in this case because his claim for PIP benefits is governed exclusively by statute. We agree with plaintiff and therefore affirm the trial court on that basis.[3] See *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 449; 886 NW2d 445 (2015) ("We will affirm a trial court's decision on a motion for summary disposition if it reached the correct result, even if our reasoning differs.").

The general rule is that an injured person seeks PIP benefits from his or her own no-fault insurer. *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 696; 671 NW2d 89 (2003); *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191, 202; 393 NW2d 833 (1986). However, when the injured person does not have a policy, the no-fault act's priority provisions determine which insurer provides PIP coverage, i.e., the priority provisions give "the right to claim personal protection insurance benefits from a specific insurer." *Belcher v Aetna Cas and Sur Co*, 409 Mich 231, 252; 293 NW2d 594 (1980). In those instances, the claim is governed not by the insurance policy but "solely by statute." See *Harris v Auto Club Ins Ass'n*, 494 Mich 462, 472; 835 NW2d 356 (2013). Accordingly, in *Shelton v Auto-Owners Insurance Co*, 318 Mich App 648; 899 NW2d 744 (2017), we held that the policy's fraud-exclusion clause did not apply to persons whose coverage flowed from the priority provisions of the no-fault act rather than from a contract between the injured party and the insurer.

In *Meemic Ins Co v Fortson*, 324 Mich App 467; 922 NW2d 154 (2018),[4] we addressed the precise scenario presented in this case, i.e., whether a fraud-exclusion clause applied to a resident relative of the named insured. In that case, the injured person sought PIP benefits under his parents' no-fault policy pursuant to MCL 500.3114(1), which provides in pertinent part that "a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled

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which was driving, and that in his examination under oath (EUO), though not his deposition, plaintiff denied being able to drive. Defendant also alleges that plaintiff did not always use his cane as he stated in his EUO, that he once carried a heavy object on his uninjured shoulder and once was paid $60 by a neighbor for pulling weeds even though he claimed and his doctors prescribed that he could not return to work.

[3] We review de novo a trial court's decision on a motion for summary disposition. See *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). Questions of statutory interpretation also are reviewed de novo. *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 694; 671 NW2d 89 (2003).

[4] The Supreme Court has granted leave to appeal in *Fortson*, *Meemic Ins Co v Fortson*, 503 Mich 1031 (2019), but we remain bound by our published decision, MCR 7.215(C)(2). And we agree with the decision in *Fortson*.

in the same household, if the injury arises from a motor vehicle accident." Relevant to this appeal, we held that the policy's fraud-exclusion clause did not apply to the son even though he was an "insured person" as defined by the policy. *Fortson*, 324 Mich App at 477-478. We reasoned that, regardless of the policy's coverage, the son would

> be statutorily entitled to benefits under his parents' no-fault policy by virtue of the fact that he is a relative of his parents and was domiciled with them. In other words, if the policy did not define a resident relative as an "insured person," then [the defendant-insurance company] would be required *by statute* to pay [the son] benefits and would be unable to terminate his coverage because of fraud committed by a policyholder with regard to his claim. [*Id*. at 478.]

Thus, we rejected that an insurer, "by duplicating statutory benefits in a no-fault policy," could rely on a fraud-exclusion clause to avoid having to pay benefits mandated by statute. *Id*. at 478-479. We concluded, "Because MCL 500.3114(1) mandates coverage for a resident relative domiciled with a policyholder, the fraud-exclusion provision, as applied to [the son's] claim, is invalid because it conflicts with [the son's] statutory right to receive benefits under MCL 500.3114(1)." *Id*. at 478-479.[5]

Fortson is on all fours with the present case.[6] Like the claimant in *Fortson*, plaintiff was required by MCL 500.3114(1) to seek benefits under his father's no-fault policy. As such, his claim is governed by statute, not the policy. Thus, defendant cannot rely on the fraud-exclusion clause to bar plaintiff's claim for PIP benefits. It is immaterial that defendant sought to duplicate MCL 500.3114(1) in its policy by defining "insured" to include the named insured's family members. And, although defendant cancelled the policy as to plaintiff's father,[7] plaintiff's claim is unaffected because it was made before the policy was cancelled. See *id*. at 476, 479, 480.

In its reply brief, defendant argues that even if the exclusion clause does not apply, it is nonetheless entitled to summary disposition under a theory of "common law affirmative defense of fraud." This is the first time that defendant has expressly made this argument, and therefore it could be considered unpreserved. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431

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[5] Defendant cites dicta from *Shelton* for the proposition that a resident relative is subject to the policy terms even if not a named insured. *Shelton* did not so hold; the claimant in that case was not a resident relative and so that question was neither at issue nor ruled upon. See *Shelton*, 318 Mich App at 652.

[6] Defendant argues that this case is distinguishable from *Fortson* because it claims that plaintiff participated in the alleged fraud, whereas in *Fortson* the fraud was committed by the named insureds. Further, defendant bases this allegation on plaintiff's girlfriend's testimony that plaintiff helped her fill out the attendant care and replacement services forms. There is a question of fact as to that claim, however; plaintiff testified that he did not participate in filling out the forms signed solely by his girlfriend and that he did not review the forms prior to submission.

[7] Whether defendant properly cancelled the policy is not before us.

(2008) ("[G]enerally a failure to timely raise an issue waives review of that issue on appeal.") (cleaned up). See also *Shelton*, 318 Mich App at 660 ("Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief.") (cleaned up). In any event, defendant's argument is unavailing. Defendant relies on caselaw providing the required elements to void *an insurance policy* on the basis of a material misrepresentation. See *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424; 864 NW2d 609 (2014); *Mina v Gen Star Indem Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997). As discussed, however, plaintiff's claim for PIP benefits is not governed by the insurance policy. Thus, the caselaw allowing defendant to void an insurance policy under certain circumstances is not applicable to this case.[8]

Defendant also argues on appeal that the trial court abused its discretion in denying its claim for attorney fees. The court did not expressly address defendant's claim for attorney fees, given its ruling that there was a question of fact as to whether plaintiff committed fraud. Because we affirm the denial of summary disposition, the present claim for attorney fees is moot. At the conclusion of the case, however, either party may seek attorney fees as provide by law.

Affirmed. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro

[8] As we noted in *Shelton*, a no-fault insurer may deny a claim that it believes to be fraudulent. See *Shelton*, 318 Mich App at 655. A unilateral denial is, however, not the end of the matter, but rather merely the initiation of a disagreement that, if suit is brought, must ultimately be resolved by a court.