STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED December 21, 2021
v	No. 355532 Ingham Circuit Court
PROTECTIVE INSURANCE COMPANY, Defendant-Appellant.	LC No. 19-000629-NF

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

In this recoupment action under the no-fault act, MCL 500.3101 *et seq*., defendant appeals as of right the trial court's order denying its motion for summary disposition and granting plaintiff's motion for summary disposition. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a collision at the intersection of Waverly Road and Delta River Drive in Lansing on October 27, 2014, the facts of which are not in dispute. Plaintiff insured a Buick Lacrosse that was being driven northbound on Waverly Road. A motorcycle driven by Robert Rader, whose personal protection insurance (PIP) benefits are the subject of this action, was traveling eastbound on Delta River Drive. Rader ran the red light at the corner of Delta River Drive and Waverly Road, his motorcycle struck the Buick Lacrosse in the intersection, he was thrown from the motorcycle, and his body collided with a third vehicle that was waiting at the light traveling westbound on Delta River Road. The third vehicle was a FedEx van insured by defendant. Rader suffered injuries as a result of the accident and plaintiff paid Rader's PIP benefits.

On August 21, 2019, plaintiff filed a complaint against defendant. Plaintiff asserted that it had paid $1,264,428.36 in PIP benefits to Rader and because the vehicle insured by defendant was "involved" in the accident and shared the same priority level under the no-fault act as plaintiff, defendant is liable to plaintiff for half of the PIP benefits it had paid. Plaintiff further alleged that

it was entitled to a declaratory judgment that defendant was liable for 50% of Rader's no-fault benefit payments. Defendant denied all of the relevant allegations.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (10) contending that its insured van was not "involved" in the accident under the no-fault act, it was not obligated to pay a portion of Rader's PIP benefits, and plaintiff's claim was barred by the statute of limitations and the doctrine of laches. Plaintiff responded that the FedEx van was "involved" in the accident because a victim's body contacted the van, the statute of limitations for recoupment actions is six years and was not violated in this case, and the doctrine of laches did not apply. Plaintiff also moved for summary disposition in its favor under MCR 2.116(I)(2), and argued that the court should award it costs, interest, and attorney fees.

After an October 22, 2020 hearing on the parties' cross-motions for summary disposition, the trial court ruled that the FedEx van was involved in the accident, defendant was liable for half of Rader's PIP benefits, the appropriate statute of limitations is six years and did not bar plaintiff's claim, and the doctrine of laches was inapplicable. The trial court thus granted summary disposition in favor of plaintiff, and also ordered defendant to pay attorney fees, costs, and interest to plaintiff. This appeal followed.

II. INVOLVEMENT IN THE ACCIDENT

Defendant first argues that the trial court erred by granting summary disposition in favor of plaintiff because defendant's insured vehicle was not "involved" in the accident under MCL 500.3114(5). We disagree.

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009). Defendant brought its motion for summary disposition under MCR 2.116(C)(7) and (10). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by a statute of limitations. Whether a statute of limitations applies in a case is a question of law this Court reviews de novo. *Ferndale v Florence Cement Co*, 269 Mich App 452, 457; 712 NW2d 522 (2006). When deciding a motion under MCR 2.116(C)(7), a trial court considers all documentary evidence, accepting as true all well-pleaded allegations and construing them favorably to the plaintiff. *Patterson v Kleiman*, 447 Mich 429, 433; 526 NW2d 879 (1994).

"A motion made under MCR 2.116(C)(10) tests the factual sufficiency of a claim, and when the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law." *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). "In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party." *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 102; 804 NW2d 569 (2010). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).

"The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party,

is entitled to judgment as a matter of law." *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 590; 794 NW2d 76 (2010). "Summary disposition may be granted in favor of an opposing party under MCR 2.116(I)(2) if there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law." *City of Holland v Consumers Energy Co*, 308 Mich App 675, 681-682; 866 NW2d 871 (2015).

Questions of statutory interpretation are reviewed de novo. *Eggleston v Bio-Med Applications of Detroit Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The Michigan Supreme Court explained in *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001):

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [Citations omitted.]

MCL 500.3114(5) provides, in pertinent part:

> (5) Subject to subsections (6) and (7),[1] a person who suffers accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident. [Footnote added.]

[1] MCL 500.3114(6) governs insurer priority when a policyholder declines to purchase PIP coverage; MCL 500.3114(7) provides that when two or more insurers are liable and under the same level of priority, the coverage limit is equal to the highest coverage limit among the policies.

MCL 500.3114(5) is applicable when there is an accident between a motorcycle and a motor vehicle.[2] *Hmeidan v State Farm Mut Auto Ins Co*, 326 Mich App 467, 479; 928 NW2d 258 (2018). Motorcyclists are not required to maintain PIP coverage, while owners of motor vehicles are required to do so. *Id.*; MCL 500.3101(1). Despite the fact that motorcyclists are not required to maintain PIP coverage, the no-fault act nonetheless provides motorcyclists with the right to recover PIP benefits when they are involved in accidents with motor vehicles. *Hmeidan*, 326 Mich App at 480.

While motorcyclists are entitled to PIP benefits when "involved" in an accident with a motor vehicle, the no-fault act does not define "involved" or what it means to be "involved in the accident." The parties dispute the appropriate test for whether a vehicle was involved in an accident and, likewise, whether the FedEx van insured by defendant was involved in the accident under the no-fault act. Plaintiff argues that the test for whether a vehicle was involved in an accident is simply whether a victim or his or her vehicle made contact with that vehicle, as stated in *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 339; 671 NW2d 132 (2003). Defendant, on the other hand argues that the appropriate test for whether a vehicle was involved in an accident is whether its role was active rather than passive, as stated in *Bachman v Progressive Cas Ins Co*, 135 Mich App 641, 644; 354 NW2d 292 (1984) and *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995).

Defendant confuses two similar, yet distinct, lines of cases under the no-fault act regarding whether a vehicle was involved in an accident. Defendant relies on a line of cases that have a particular context for the phrase "involved in the accident"—cases in which a first vehicle takes some action which causes a second vehicle to react without contacting it, and as a result that second vehicle has a one-vehicle accident or collides with a person or a third vehicle. *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392, 398; 838 NW2d 910 (2013). Under such circumstances, to be involved in an accident, a vehicle must take some action which causes another vehicle to react and cause a collision. *Id.* A vehicle is passive and not involved in an accident when the second vehicle's driver needlessly reacts or overreacts, causing the collision. *Id.*

Defendant argues that the FedEx van was not involved in the accident because it was not an active contributor to the accident—the van was passively stopped and waiting at a red light when it was hit by Rader's body. But, again, defendant proffers the wrong test. Any consideration of active versus passive involvement is not applicable in this case because Rader's body contacted the FedEx van. *Auto Club Ins Ass'n*, 258 Mich App at 339-340. This Court has not directly addressed in a published opinion the issue whether a vehicle is involved in an accident when a motorcyclist's body, but not the motorcycle, strikes that vehicle. However, this Court noted in *Auto Club Ins Ass'n* that there are no cases suggesting "that a vehicle that actually collided with the injured person . . . was not 'involved' in the accident." *Id.* at 339. Moreover, this Court has held that analysis under *Turner*, 448 Mich at 39 concerning active involvement is only required for liability "when there is no physical contact between the injured party and the vehicle." *Id.*

[2] Under the no-fault act, a "motor vehicle" is defined as, "a vehicle, including a trailer, that is operated or designed for operation on a public highway by power other than muscular power and has more than 2 wheels." MCL 500.3101(3)(*i*).

Regardless of a vehicle's fault in contributing to a collision or its lack of movement during an accident, a vehicle becomes involved in an accident when it is struck by an accident victim. *Id*. at 340.

Applying the above to this case, it is apparent that the FedEx van was involved in the accident and defendant is liable for half of Rader's PIP benefits. It is undisputed that Rader was ejected from his motorcycle and his body collided with the FedEx van. An analysis of whether the FedEx van had an active or passive role in the accident is inapplicable because there was contact between the FedEx van and Rader's body. Under *Auto Club Ins Ass'n*, the contact between Rader's body and the FedEx van means the FedEx van was involved in the accident. Thus, defendant is liable for half of Rader's PIP benefits under MCL 500.3114(5). The trial court therefore did not err when it concluded the FedEx van was involved in the accident as a matter of law and granted summary disposition in favor of plaintiff.

III. ATTORNEY FEES

Defendant next argues that the trial court erred by ordering defendant to pay plaintiff's attorney fees, interest, and costs. We disagree.

To preserve a challenge to an award of attorney fees and costs, a party must raise in the trial court the specific legal grounds on which it seeks appellate review. *Ayotte v Dep't of Health & Human Servs*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350666); slip op at 5. Defendant did not raise in the trial court its challenge to the award of attorney fees, interest, and costs, so the issue is unpreserved.

Unpreserved issues are reviewed for plain error affecting substantial rights. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id*.

A court may order an insurer to pay attorney fees under the no-fault act "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). Under the no-fault act, PIP benefits are payable as losses accrue, and payment is overdue if the insurer fails to pay benefits within 30 days of receiving reasonable proof of the loss. MCL 500.3142(1)-(2). Once a plaintiff has established benefits were overdue, there is a rebuttable presumption that the defendant unreasonably delayed in paying. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). The defendant bears the burden of justifying its refusal to or delay in paying benefits. *Id*.

Benefits are not considered overdue and attorney fees are not recoverable when the benefits are subject to a legitimate dispute over whether the insurer is required to pay them. *Moore v Secura Ins*, 482 Mich 507, 519; 759 NW2d 833 (2008). If the trial court finds a defendant was not required to pay benefits under the no-fault act, it is, of course, reasonable for the insurer to have withheld benefit payments. *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 516; 791 NW2d 747 (2010). On the other hand, if the trier of fact determines benefits were due, that does not automatically mean that an insurer acted unreasonably in withholding payment. *Brown v Home-Owners Ins Co*, 298 Mich App 678, 691; 828 NW2d 400 (2012). Ultimately, it is for the trial court to evaluate the

circumstances on a case-by-case basis whether an insurer was reasonable in withholding benefits at the time the decision was made. *Id*.

In *Perkins v Auto-Owners Ins Co*, 301 Mich App 658, 668-669; 837 NW2d 32 (2013) an issue was raised as to whether the accident victim's motorcycle insurer had to file a certification with the state under MCL 500.3163 in order for its insured motorcyclist to be eligible for PIP benefits, with the defendant arguing that PIP benefits were not recoverable without a certification. *Id*. at 662-663. This Court held that the defendant's argument was meritless because the structure of the no-fault act makes clear that motorcyclists are eligible for PIP benefits when involved in an accident with a motor vehicle regardless of whether the motorcyclist had PIP coverage. *Id*. at 665-667. This Court concluded that the defendant did not, as it claimed, raise a legitimate question of statutory construction and thus affirmed the award of attorney fees to the plaintiff. *Id*.

Like in *Perkins*, defendant's proposed interpretation of the no-fault act here is not supported by the text of the statute. Defendant's argument essentially takes an undefined term within the no-fault act and attempts to shoehorn an inapplicable test into its proposed definition. Defendant does not show how its interpretation of "involved in the accident" makes sense within the framework of the no-fault act. For instance, defendant draws the distinction that this court has held that a vehicle is involved in an accident when it is struck by a motorcycle whose rider has been ejected, but has not held a vehicle is involved in an accident when it is struck by a rider who was ejected from his motorcycle. Although technically a distinction, this is a distinction without much of a difference in the overall context of the no-fault act and § 3114. And defendant has not shown how such a distinction informs the term "involved in the accident" or that such a reading is supported by the text or structure of the no-fault act.

As noted above, there are no published opinions defining involvement in an accident when a motorcycle rider is ejected and hits a stationary vehicle. But that does not mean defendant can argue for any definition and avoid being assessed attorney fees—it is still required to raise only colorable arguments. *Perkins*, 301 Mich App at 669. As this Court pointed out:

> To conclude that Auto–Owners in this case has presented a legitimate question of statutory interpretation would effectively require us to adopt a principle that any time an insurer raises a question of first impression under the no-fault act, that question, as a matter of law, presents a legitimate question of statutory interpretation. We are unwilling to do that. [*Id.*]

Similarly, in this case, defendant's argument that a vehicle is not involved in an accident when it is struck by the body of an accident victim is not supported by the text of the no-fault act and lacks merit. The trial court did not plainly err by awarding plaintiff attorney fees, interest, and costs because defendant failed to raise a legitimate question of statutory interpretation and defendant

therefore cannot show that it was prejudiced by an error affecting the outcome of the lower court proceedings.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly