STATE OF MICHIGAN

COURT OF APPEALS

LENA BROWN,

Plaintiff-Appellant,

v

ANTHONY AYERS and LEGACY MEDICAL TRANSPORTATION LLC,

Defendants,

and

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant-Cross-Plaintiff-Appellee,

and

BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY,

Defendant-Cross-Defendant-Appellee

UNPUBLISHED
December 21, 2021

No. 354730
Wayne Circuit Court
LC No. 18-013956-NI

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

PER CURIAM.

Plaintiff appeals by delayed leave granted[1] the trial court's order granting defendant/cross-plaintiff's, Citizens Insurance Company of the Midwest's (Citizens), motion for summary disposition based upon the trial court's determination that defendant/cross-defendant, Berkshire

[1] *Brown v Ayers*, unpublished order of the Court of Appeals, entered December 30, 2020 (Docket No. 354730).

Hathaway Homestate Insurance Company (Berkshire), was higher in the order of priority for the payment of plaintiff's no-fault claims than defendant Citizens. We affirm.

On January 8, 2018, plaintiff was walking on a crosswalk, when she was struck by a vehicle owned by defendant, Legacy Medical Transportation, LLC, (Legacy), and driven by defendant, Anthony Ayers (Ayers). Plaintiff did not identify any insurer for the vehicle that hit her. Therefore, on March 16, 2018, she applied for personal protection insurance (PIP) benefits with the Michigan Assigned Claims Plan (MACP). MACP assigned the claim to Citizens and Citizens initially paid over $140,000 in benefits.

On October 26, 2018, plaintiff filed a complaint against Citizens, Ayers, and Legacy seeking additional unpaid benefits. On April 15, 2019, Citizens moved the trial court to file a third-party complaint, claiming it had been advised "on or about February 21, 2019" by counsel for Ayers and Legacy that "there was no-fault insurance insuring one or both of them at the time of the Accident"[2] provided by Berkshire and that Berkshire was higher in priority for the payment of plaintiff's benefits. The trial court granted Citizens' request to file a third-party complaint against Berkshire on May 6, 2019, and additionally allowed plaintiff to file an amended complaint naming Berkshire as an additional defendant.

On June 4, 2019, Citizens moved the trial court for summary disposition under MCR 2.116(C)(10) on its cross-claim against Berkshire. Citizens argued that because Berkshire had a valid policy of insurance on the vehicle that hit plaintiff at the time of the accident, the Berkshire policy of insurance held to be the highest in priority for no-fault PIP benefits. Berkshire did not respond to the motion. It appears that Citizens and Berkshire had reached an agreement which would dismiss Citizens, but plaintiff had not agreed on language for a stipulated order doing so. The trial court ultimately granted summary disposition to Citizens, finding Berkshire higher in the order of priority for plaintiff's PIP claims than Citizens and dismissing Citizens from the complaint. This appeal followed.

This Court reviews de novo a trial court's grant or denial of summary disposition. *Sun Communities v Leroy Tp*, 241 Mich App 665, 668; 617 NW2d 42 (2000). Summary disposition is appropriate under MCR 2.116(C)(10) when the evidence, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We also review de novo legal questions, such as the interpretation and application of statutes and court rules. *State Farm Fire & Casualty Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006); *Webb v Holzheuer*, 259 Mich App 389, 391; 674 NW2d 395 (2003).

Plaintiff argues the trial court erred in granting Citizens' motion for summary disposition because its decision conflicts with Michigan law establishing that the no-fault act does not allow an assigned claims insurer to cease paying benefits simply because it subsequently discovers a

[2] The record contains no evidence of these supposed communications between Ayers' counsel and Citizens.

higher priority insurer. Plaintiff also argues the trial court erred in failing to grant plaintiff's motion for clarification regarding the gap in benefits coverage. We disagree.

Under the no-fault act, a plaintiff injured in a motor vehicle accident must generally seek no-fault benefits from his or her own no-fault insurer. MCL 500.3114(1). However, if, as in this case, the plaintiff is a pedestrian and does not have no-fault insurance, of her own or through a household member, the plaintiff may seek no-fault benefits from another insurer in the following order of priority: first, "[i]nsurers of owners or registrants of motor vehicles involved in the accident"; and second, "[i]nsurers of operators of motor vehicles involved in the accident." MCL 500.3115(1).[3] If, however, "no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, [or] the personal protection insurance applicable to the injury cannot 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" the Legislature has provided that an injured person could obtain PIP benefits through the MACP. See MCL 500.3172(1)[4]; *Spectrum Health Hosps v Michigan Assigned Claims Plan*, 330 Mich App 21, 32; 944 NW2d 412 (2019). The 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 Mich 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 other words, under *WA Foote*, it is not enough for a plaintiff to fail to identify another insurer. *Id*. Instead, he or she must have exercised diligence in attempting to identify another insurer before turning to MACP. *Id*.

Through establishment of the MACP, "the Legislature ensured that every person injured in a motor vehicle accident would have access to PIP benefits unless one of the limited exclusions in the no-fault act applies . . . ." *Id*. The MACP is considered "the insurer of last priority." *Spencer v Citizens Ins Co*, 239 Mich App 291, 301; 608 NW2d 113 (2000), and operates by assigning claims to appropriate insurers.

In this case, the MACP assigned plaintiff's claim to Citizens. As the assigned-claim insurer, Citizens was required to make "make prompt payment of loss in accordance with this act." MCL 500.3175(1). If an assigned-claim insurer subsequently ascertains a higher priority insurer, it cannot "simply refuse to pay the assigned-claim insured party further benefits." *Spencer*, 239 Mich App at 305. Rather, the assigned-claim insurer is entitled to reimbursement by the Michigan automobile insurance placement facility for the payments, and "may bring an action for reimbursement and indemnification" of the claim on behalf of the MACP. MCL 500.3175(1) and (2).

[3] MCL 500.3115 was amended effective June 11, 2019. 2019 PA 21. However, because both the events and Citizens' request for leave to file a third-party complaint occurred before the statute was amended, this analysis will utilize the pre-amendment version of the statute.

[4] MCL 500.3172 was also amended effective June 11, 2019. 2019 PA 21. We use the pre-amendment version of the statute for purposes of this appeal.

In *Spencer, supra*, this principle was made clear. In that case, the plaintiff was hit by a vehicle and sought benefits through the MACP. *Spencer*, 239 Mich App at 294-295. The MACP assigned the claim to Citizens. *Id*. at 295. Over a year later, Citizens discovered the plaintiff had sued the driver of the vehicle and, therefore, knew who the driver was. *Id*. Since the driver was insured with Allstate, plaintiff filed suit against Citizens and Allstate to determine which insurer was responsible for his claim. *Id*. We determined that Citizens could not cease paying benefits to the plaintiff just because a higher priority insurer had been discovered. *Id*. at 304. As noted above, we held that "an assigned-claim insurer that subsequently ascertains a higher priority insurer cannot thereafter simply refuse to pay the assigned-claim insured party further benefits." *Id*. at 305. Rather, the assigned-claim insurer's remedy is to seek reimbursement from the higher priority insurer. *Id*. at 305-306.

Similarly, in this case, plaintiff knew the driver and owner of the vehicle and filed a complaint against them on October 26, 2018. Ayers's name and the VIN of the vehicle were identified in the police report, and Legacy was identified using the VIN. Citizens later determined, "on or around February 21, 2019," through—according to Citizens—communications from Ayers's counsel, that Berkshire insured the vehicle. Plaintiff then sued Citizens and Berkshire to determine which insurer was responsible for her claim. *Spencer* thus would suggest the trial court was incorrect to dismiss Citizens from the case and that the proper course of action would have been to require Citizens to keep paying benefits but instruct Citizens to seek reimbursement from Berkshire.

However, there are also significant differences between *Spencer* and this case. For instance, plaintiff here allegedly attempted to find other insurance coverage before applying to the MACP. In addition, unlike in *Spencer*, both the owner and operator of the vehicle were known to plaintiff after the accident. Finally, where we held in *Spencer* that Citizens could not stop paying benefits but instead had to continue paying and then seek reimbursement from Allstate, the trial court in this case dismissed Citizens from the case and did not require them to keep paying benefits to plaintiff. Most importantly, there remains a question as to whether plaintiff was entitled to benefits through the MACP in the first place, and thus whether Citizens should ever have been involved in the litigation. Answering this question involves an inquiry into whether plaintiff exercised diligence in attempting to identify insurance for the vehicle that hit her before turning to the MACP. *WA Foote*, 321 Mich App at 171 n 6.

We have never specifically defined what constitutes diligence for purposes of MCL 500.3172(1). However, based on the record before this Court, and finding *Lakeland Neurocare v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued July 11, 2020 (Docket No. 350165),[5] persuasive on the issue, we need not define a specific standard here.

In *Lakeland*, the plaintiff, a bicyclist, was struck by a state-owned snowplow. *Lakeland*, unpub op at 2. The MACP informed the plaintiff it had identified two possible sources of coverage, but the plaintiff made no effort to contact the two entities or file an insurance claim. *Id*. Plaintiff

[5] In Michigan, unpublished cases are not legally binding, but can be considered for their persuasive value. MCR 7.215(C)(1); *Reidenbach v Kalamazoo*, 327 Mich App 174, 187; 933 NW2d 335 (2019).

called the Attorney General's office and spoke with an unnamed individual who said that the state would pay a maximum of $1,000 per claim. *Id*. We determined the plaintiff failed to exercise due diligence in seeking a higher priority insurer because both the owner and operator of the vehicle were known immediately after the accident but plaintiff failed to take any action. *Id*. at 7. The single phone call to the Attorney General's office was found to be insufficient for purposes of due diligence, and plaintiff presented "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." *Id*.

As in *Lakeland*, both the owner and operator of the vehicle that hit plaintiff were known by the time plaintiff applied for benefits through MACP. This is not a case where an at-fault driver was unknown and there was no information about the vehicle involved. See, e.g., *Frierson v West American Ins Co*, 261 Mich App 732, 737; 683 NW2d 695 (2004). Both the owner and VIN number of the vehicle were included in the police report completed on the day of the accident, and it subsequently led to the discovery of Legacy as the owner of the vehicle. Plaintiff therefore had access to that information early on.

Plaintiff did make some effort to obtain insurance information concerning the vehicle that hit her. Specifically, plaintiff asked Legacy to provide insurance information in its March 4, 2019 interrogatories. However, plaintiff did not provide the trial court with evidence of many of the alleged efforts she made to identify a higher priority insurer prior to seeking benefits from MACP. In the application submitted to MACP, plaintiff stated, "Owner of vehicle told us they had Ameriprise. They did not[.]" However, plaintiff fails to provide any evidence showing how she allegedly discovered that Amerisure was not the insurer or the vehicle. In addition, plaintiff's application to the MACP, after discovering that Amerisure was not the correct insurer is puzzling in light of the fact that plaintiff still had options to use to identify the proper insurer. Had plaintiff taken further actions after discovering that Amerisure did not provide any applicable insurance coverage, plaintiff could have discovered that Berkshire insured the vehicle, particularly when it was known that Ayers was represented by counsel within less than a year after the accident. The trial court clearly recognized this at the March 4, 2020 motion hearing:

> [*Plaintiff's counsel*]: We sent out letters, made phone calls and did everything in our power to determine the correct insurer. Simply put, we acted as soon as we could. The problem with this order, your Honor, is gonna—
>
> *The Court*: Okay but did you act though? I don't even see that you acted. You didn't act . . . . All you had to do was determine what [Ayers'] . . . insurance policy was. Take his deposition . . . . What happened to interrogatories? What happened to deposing him? You had every opportunity and you didn't. Citizens did all the work and then they brought them and, as a third-party Plaintiff. You never did.

Thus, there existed an active policy of no-fault insurance issued by Berkshire that was identifiable at an early date through reasonable diligence. Citizens, in fact, was the one who identified the Berkshire policy through discussions with Ayers' counsel less than a year after being assigned the claim by the MACP. There is no articulable reason why plaintiff could not have made such a discovery prior to filing her application with MACP or at least within a very short time after filing suit.

Plaintiff additionally argues the trial court's dismissal effectively leaves her without recourse and solely responsible for the unpaid benefits arising before March 7, 2018, because the trial court held that the one-year-back rule limits her claim against Berkshire to benefits owed after March 7, 2018. If the trial court's ruling is allowed to stand, plaintiff argues, she will be forced to pay all of the unpaid medical bills for the period between the accident and March 7, 2018, which includes a $166,000 Employee Retirement Income Security Act (ERISA) lien that the lien holder is attempting to enforce against plaintiff. This argument is ultimately unsuccessful, however, for two reasons.

First, plaintiff simply states she will be forced to pay these expenses, appearing to imply that such a scenario would be wrong. She does not develop her argument beyond that mere assertion. A party cannot simply "announce a position . . . then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Because plaintiff failed to support her argument with any legal reasoning or evidence, she has abandoned the argument and we need not consider it.

Second, even if it were not abandoned, plaintiff's argument fails in light of the analysis above, which establishes that, because she did not exercise reasonable diligence in attempting to identify insurance for the vehicle, plaintiff was not entitled to benefits through the MACP initially. Therefore, since any benefits to which plaintiff is entitled are recoverable only from Berkshire, plaintiff's argument has no traction. Addressing the issue of whether she should be responsible for the unpaid medical bills arising before March 7, 2018, would have required plaintiff to make an argument regarding the trial court's decision on the one-year-back rule, but plaintiff has made no such argument.

In sum, because a higher-priority insurer was readily identifiable at the time plaintiff filed her claim for no-fault benefits with the MACP, plaintiff did not meet the conditions required to apply for PIP benefits through the MACP. Plaintiff was never entitled to benefits through the MACP from the outset because Berkshire's policy could have been identified through the exercise of diligence. Therefore, the trial court did not err in granting summary disposition to Citizens.

Affirmed.

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