STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MADDEN,

Plaintiff and
Counter-Defendant,

v No. 96143

JAY F. TRUCKS, Individually;
LAW OFFICES OF HUGHES & TRUCKS,
P.C., DAVID A. NELSON, Individually,
and DAVID A. NELSON, P.C.,

Defendants,

and

EMPLOYERS INSURANCE OF WAUSAU,

Defendants, Counter-
Plaintiffs and Third-Party
Plaintiffs-Appellants,

v

LAKE STATES MUTUAL INSURANCE
COMPANY,

Third-Party
Defendant-Appellee,

v

JAY F. TRUCKS, Individually, LAW
OFFICES OF HUGHES & TRUCKS, P.C.,
DAVID A. NELSON, Individually, and
DAVID A. NELSON, P.C.,

Third-Party Defendants
to Employers Insurance of
Wausau's Counter-Complaint.

BEFORE: M.J. Kelly, P.J., G.R. McDonald and J.D. Payant*, JJ.

J.D. PAYANT, J.

Employers Insurance of Wausau ("Wausau") appeals as of right from an order dismissing its third-party complaint against Lake States Mutual Insurance Company ("Lake States") under MCR 2.116(C)(7). The trial court found that Wausau's third-party complaint was time-barred by the one-year limitation period contained in MCL 500.3145(1); MSA 24.13145(1). We reverse the order of the circuit court.

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*Circuit Judge, sitting on the Court of Appeals by assignment.

On March 6, 1983, plaintiff Michael Madden was injured in a one-car automobile accident while riding as a passenger in a car he did not own. Madden filed an application for personal injury protection benefits with Wausau, the driver's insurance company. Madden indicated on the application that he did not own an automobile and there were no family members residing in his household who owned an automobile.

Wausau wrote a letter to Madden's attorney, David A. Nelson, questioning whether Madden did, in fact, have benefits available to him. Nelson responded in a letter that Madden did not have benefits available to him other than through Wausau. Wausau requested an affidavit verifying that Madden had no other available benefits. Nelson provided an affidavit stating that to the best of his information and belief, Madden had no insurance available to him other than through Wausau. Wausau began making personal injury protection payments to Madden totaling in excess of $18,000.

Eventually, a dispute arose over certain claimed benefits. On March 23, 1984, Madden filed suit against Wausau. In December of 1984, Madden revealed during a deposition that at the time of the accident he was living with his brother. Madden's brother owned a car that was insured at the time of the accident by Lake States. Madden's brother and sister-in-law were deposed in February, 1985. They indicated that on the day of the accident Madden was living with them at the address that Madden had given on his application for benefits that he filed with Wausau. They also indicated that they owned an automobile that was insured by Lake States at the time of the accident.

On February 27, 1985, Wausau gave Lake States notice of a claim against Lake States. On March 7, 1985, an application for benefits was filed with Lake States on plaintiff's behalf. Coverage was denied on March 8, 1985 and March 12, 1985.

On April 4, 1985, Wausau sought leave of the trial court to add Lake States as a third-party defendant. Leave was granted, and a third-party complaint was filed on May 17, 1985.

In addition, Wausau counterclaimed against Madden. Madden then filed an amended complaint adding Jay F. Trucks, Law Offices of Hughes & Trucks, P.C., David A. Nelson, individually and David A. Nelson, P.C. as party defendants. In addition, Madden, as counter-defendant to Wausau's counterclaim, filed a third-party complaint against Jay F. Trucks, Law Offices of Hughes & Trucks, P.C., David A. Nelson, individually and David A. Nelson, P.C.

Both Wausau and Lake States filed summary disposition motions. Wausau's motion for summary disposition against Madden was denied. The trial court found that there was a genuine issue of fact as to whether Madden was domiciled with his brother and sister-in-law at the time of the accident. Lake States' motion for summary disposition against Wausau was granted on the basis that the action was barred by the statute of limitations contained in MCL 500.3145(1); MSA 24.13145(1). Ultimately, Madden settled his claim for $15,000 which was paid by Wausau while preserving its right to indemnification or contribution against Lake States. All other claims were dismissed with prejudice.

Under the no-fault act contained in the Insurance Code of 1956, there is a one-year statute of limitations period in which a claimant may file suit against an insurer to recover personal protection insurance benefits. Section 3145 of the code provides as follows:

> "An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later that 1 year after the date of the accident causing the injury unless written notice of injury as provided herein 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." MCL 500.3145; MSA 24.13145.

The issue in the present case is whether the above statute of limitations applies when an insurer is suing another insurer on the basis that it paid benefits by mistake for which the defendant-insurer was liable. Therefore, we note initially that the cases cited by Lake States involving individual claimants are inapplicable to resolution of the issue of whether section 3145 applies to suits between insurance companies.

One of this Court's first opportunities to review this issue was in Home Ins Co v Rosquin, 90 Mich App 682; 282 NW2d 446 (1979), lv den 408 Mich 855 (1980). In Home Ins Co, an accident occurred in December, 1974. Plaintiff paid benefits to the owner of the insured building and filed suit against the drivers of the automobiles that damaged the building. In April, 1975, plaintiff learned that the automobiles had insurance coverage that should have provided benefits to the building owner. However, the automobile insurers refused to pay benefits and in May, 1976, plaintiff amended its previously-filed complaint to include the other insurers. This Court held that the one-year statute of limitations period in section 3145 barred plaintiff's claim against the insurers of the automobiles. However, in a footnote, this Court said, "If plaintiff did not know who the defendants' insurers were or could not have discovered, after reasonable effort, who the insurers were, we might have been persuaded to adopt a different result." Home Ins Co, supra, 686 n 3.

The issue next arose in Keller v Losinski, 92 Mich App 468; 285 NW2d 334 (1979), where an injured person filed suit against one no-fault insurer, who in turn made a claim against another no-fault insurer. However, the accident occurred in March, 1975, and the claim by one insurer against the other insurer was not made until April, 1977. Two members of the panel held that the claim between insurers was barred by the one-year statute of limitations period in §3145. The insurance company-claimant argued that §3145 did not apply because its claim was for indemnification rather than for recovery of personal injury protection benefits. However, that argument was rejected by the majority which treated the claim as one of subrogation in which the insurer's rights could not be expanded past the insured's rights and consequently the insurer was barred by the one-year statute of limitations of §3145.

Judge Allen dissented on the basis that he believed section 3145 did not apply to a suit between two insurers, one of which paid the policy holder under the mistaken belief that the

injured party had no other insurance. Judge Allen was persuaded by the argument that such a suit was an action for indemnity rather than an action for personal injury protection benefits. Thus, the limitation period began to run either on the date the mistake was discovered or on the date the payment was made. The dissent stressed that the insurance company that paid benefits was not at fault for erroneously believing that its policyholder had no other insurance.

In Federal Kemper Ins Co v Western Ins Cos, 97 Mich App 204; 293 NW2d 765 (1980), a person was injured while he was a passenger in a vehicle insured by plaintiff. Plaintiff asserted that defendant was also potentially liable because defendant insured the injured person's brother, with whom the injured person resided. Although the accident occurred in 1973, plaintiff did not file suit against defendant until 1976. Citing Home Ins Co, this Court held that plaintiff's claim for subrogation was barred by the one-year statute of limitations period contained in section 3145. This Court noted that plaintiff knew all along that defendant was denying liability, but waited almost three years to file suit. Such an action would have barred the injured person's ability to recover. Since the subrogated insurer has no greater rights than its insured, the action was time-barred.

Home Ins Co and Federal Kemper Ins Co, were followed in Michigan Mutual Ins Co v Home Mutual Ins Co, 108 Mich App 274; 310 NW2d 362 (1981). As in both of those cases, the plaintiff in Michigan Mutual Ins Co knew of its potential claim against defendant in April, 1978, but did not file suit until April, 1980. This Court held that plaintiff's suit was time-barred by section 1345.

We find the conclusion and most of the reasoning in Judge Allen's dissent in Keller to be persuasive although we disagree that the doctrine of indemnity as used in tort law was applicable. The cause of action brought by Wausau against Lake States was for recoupment of money paid by mistake. It should not be characterized as subrogation, nor should it be

characterized as indemnity as used in tort law. It is indemnity in the sense of seeking a return of money paid by mistake. It is clear in our law that payments of money, although voluntarily made, if made under a mistake of a material fact, may be recovered, even if the mistake be due to a lack of investigation. Montgomery Ward Co v Williams, 330 Mich 275; 47 NW2d 607 (1951).

Section 3145 applies only to actions to recover personal injury protection benefits and does not apply to an action for recovery of money paid by mistake. The recovery of money paid by mistake is a common law cause of action that was not abrogated by the no-fault act. Adams v Auto Club Ins Ass'n, 154 Mich App 186, 195; 397 NW2d 262 (1986). Therefore, a suit to recover money paid by mistake is not governed by the one-year statute of limitations period contained in §3145.

The next question is what statute of limitations governs in a case of a first insurer bringing an action against a second insurer for benefits that were mistakenly paid by the first insurer and which should have been paid by the second. As the Revised Judicature Act does not contain a specific statute of limitations to cover such a situation, the general six-year statute of MCL 600.5813; MSA 27A.5813 governing actions not covered by specific statutes of limitations is applicable. Wausau commenced suit against Lake States well within the six-year period.

Equity dictates this result. The purpose of the no-fault statute is to establish a scheme whereby a person injured in a motor vehicle accident would promptly receive payments of his claim for economic losses from an insurer who received compensation, in the form of premiums, to assume the risk of having to pay the claim. Madden received payment of his claim to his satisfaction. The purpose of the no-fault statute will be fulfilled when an adjudication has been made that the insurance company that received the premiums in return for accepting the risks pays those benefits according to the priorities set forth in MCL 500.3114(1); MSA 24.13114(1) and MCL 500.3114(4); MSA 24.13114(4).

Wausau also argues that (1) the statute of limitations period contained in §3145 was tolled and (2) the statute of limitations period in §3145 did not begin to run until Wausau discovered or should have discovered the existence of its cause of action against Lake States. Since we hold that the §3145 statute of limitations period does not apply to the present case, we will not address these issues.

The order of the circuit court dismissing Wausau's third-party complaint against Lake States is REVERSED and this case is REMANDED for reinstatement of Wausau's complaint.

/s/ Gary R. McDonald
/s/ John D. Payant

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Before: M.J. Kelly, P.J., G.R. McDonald and J.D. Payant*, JJ.

M. J. Kelly, P.J. (Dissenting).

I respectfully dissent.

The fact situation presented here is not distinguishable from that in Michigan Mutual Ins v Home Mutual, 108 Mich App 274; 310 NW2d 362 (1981). Here, as in Michigan Mutual, a no-fault insurer paid personal protection insurance benefits and then subsequently became aware of a second contract of insurance with a higher priority. On these facts this Court held that plaintiff insurer was essentially bringing a subrogation action subject to the one-year limitation period. MCL 500.3145[1]; MSA 24.13145(1).

*Circuit judge, sitting on the Court of Appeals by assignment.

As the author of the prior opinion, I am not persuaded that the reasoning is no longer viable. I would affirm.

/s/ Michael J. Kelly