STATE OF MICHIGAN

COURT OF APPEALS

FEDERAL KEMPER INSURANCE COMPANY, an Illinois corporation, doing business in Michigan,

Plaintiff-Appellee,

v No. 121403

KENNETH RUOHONEN,

Defendant,

and

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY, a Michigan corporation,

Defendant-Appellee,

and

UNITED STATES FIDELITY & GUARANTY COMPANY, a Maryland corporation, doing business in Michigan,

Defendant-Appellant.

Before: Cynar, P.J., and Weaver and Griffin, JJ.

PER CURIAM.

Kenneth Ruohonen was severely injured in an auto accident.[1] At the time of the injury Ruohonen had two no-fault automobile insurance policies, as well as a health insurance policy. The two automobile insurance companies, Federal Kemper and United States Fidelity and Guaranty Co. (USF&G), were each paying fifty percent of Ruohonen's medical expenses. Federal Kemper filed a complaint for declaratory judgment seeking a ruling that USF&G and Ruohonen's health insurance company, American Community Mutual Insurance Co., were liable for Ruohonen's medical expenses, and also seeking reimbursement for funds it had paid to or on behalf of Ruohonen.

The case was submitted on stipulated facts. The trial court found that USF&G's policy was the primary coverage and ruled that USF&G must reimburse Federal Kemper for the medical

and hospital expenses it had paid on behalf of Ruohonen. The trial court subsequently denied USF&G's motion for judgment and motion for new trial.

United States Fidelity and Guaranty Co. now appeals, and we affirm.

I

The first issue appellant raise is whether a coordination of benefits clause in a no-fault insurance policy is effective against a noncoordinated benefits no-fault policy of equal priority.

Federal Kemper and USF&G are equal priority no-fault carriers. However, Federal Kemper's policy contained a coordination of benefits provision, while USF&G's did not. Appellant argues it and Federal Kemper should apportion payment of benefits on an equal basis, as they are of equal priority under §3114 of the no-fault act. MCL 500.3114(1); MSA 24.13114(1).

The question that faces this Court is whether §3109a of the no-fault act, MCL 500.3109a; MSA 24.13109(1)[2] requires the Court to give effect to Federal Kemper's coordination of benefits provision.

This Court has previously held that a noncoordinated benefits no-fault policy constitutes "other health and accident coverage" within the meaning of §3109a. Auto-Owners Ins Co v Farm Bureau Mutual Ins Co, 171 Mich App 46; 429 NW2d 637 (1988). We follow that panel's conclusion that as between equal priority no-fault policies, one without coordinated benefits is primarily liable over one with coordinated benefits.

This result is consistent with the purposes of §3109a, which are (1) to contain both auto insurance and health care costs, while eliminating duplicative recovery, and (2) to vest in the insured, rather than the insurer, the option of coordinating benefits. Federal Kemper Ins Co v Health Ins Administration, Inc, 424 Mich 537; 383 NW2d 590 (1986).

We find no merit in appellant's arguments to the contrary, and conclude that the trial court did not err in ruling that USF&G's policy provided the primary coverage.

II

Appellant next asserts that portions of plaintiff's claims are barred by the statute of limitations, MCL 500.3145; MSA 24.13145.

Appellant failed to raise this issue at the trial court. A statute of limitations defense is an affirmative defense which must be asserted in the party's responsive pleading or in a motion for summary disposition filed before the responsive pleading. MCR 2.111(f)(3)(a). Failure to so plead waives the issue and precludes appellate review. Tomiak v Hamtramck School Dist, 426 Mich 678;397 NW2d 770 (1986).

Finding no reversible error, we affirm.

/s/ Walter P. Cynar
/s/ Elizabeth A. Weaver
/s/ Richard Allen Griffin

[1] Ruohonen was pinned between two parked cars when a third vehicle collided with one of the parked cars. None of these vehicles was owned or insured by Ruohonen.

[2] MCL 500.3109a: MSA 24.13109(1) reads as follows:

> An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.