MAY 29 1987

STATE OF MICHIGAN

COURT OF APPEALS

FRANK J. KELLEY, Attorney General,
on behalf of the MICHIGAN DEPARTMENT
OF SOCIAL SERVICES, as subrogee of
ELZIE EAREGOOD, CHAD JASON WONSEY,
ARDITH WONSEY and JAMES WONSEY,

MAY 5 1987

Plaintiff,

-v-

No. 85936

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, an Illinois Company,

Defendant and Third-Party
Plaintiff-Appellant,

-v-

NATIONAL IDEMNITY COMPANY, a foreign
corporation,

Third-Party Defendant-Appellee,

and

FARM BUREAU MUTUAL INSURANCE COMPANY OF
MICHIGAN, a Michigan corporation;
COMMUNITY SERVICE INSURANCE COMPANY, a
Michigan corporation; FARM BUREAU
MARKETING CORPORATION OF MICHIGAN; and
the COMMUNITY SERVICE CORPORATION,

Third-Party Defendants.

_______________________________________/

BEFORE: R.M. Maher, P.J., and D.E. Holbrook, Jr. and M.R. Stempien*, JJ.

M.R. STEMPIEN, J.

In this third-party claim, defendant/third-party plaintiff State Farm Mutual Automobile Insurance Company (hereinafter State Farm) appeals as of right from the June 17, 1985, order granting the motion for accelerated judgment of third-party defendant National Indemnity Company (hereinafter NICO) entered against State Farm's [illegible]

James Wonsey was driving a car owned by Larry Woodby, d/b/a New Venture Auto Sales. Ardith Wonsey, Chad Jason Wonsey, and Elzie Earegood were passengers. A car driven by an uninsured motorist, Brenda Short, struck the Woodby car. The Wonseys and Earegood received injuries, including fractures, which required hospitalization and medical care.

Woodby had a garage liability insurance policy, issued by NICO, which included no-fault insurance coverage on the automobile. However, before the accident, on November 16, 1980, NICO attempted to cancel the policy. Because of the accident, the Wonseys and Earegood were entitled to personal protection insurance benefits under the policy, pursuant to MCL 500.3107; MSA 24.13107.

The Wonseys presented their claims to NICO. At this point, the parties disagree on certain facts. State Farm seems to imply that both the Wonseys and Earegood submitted claims to NICO. However, NICO states in its brief that only the Wonseys presented claims to NICO. NICO says that the Earegood claim was not presented to NICO until April 16, 1982, when State Farm's counsel orally told NICO about the Earegood claim. We rely upon NICO's position based upon the affidavit of a regional claim supervisor which asserts that a search of NICO's records revealed no notice of a no-fault claim on behalf of Earegood.

NICO denied no-fault coverage, relying on its attempted cancellation. Consequently, on January 12, 1981, the Wonseys filed a declaratory action against NICO and Farm Bureau Mutual Insurance Company of Michigan, Community Service Insurance Company, Farm Bureau Marketing Corporation of Michigan, and the

been purchased from the Flint office of the Farm Bureau Insurance Group.

On March 16, 1981, Earegood died as a result of his injuries. No personal representative was ever appointed for the estate of Earegood. On April 22, 1981, the Michigan Department of Social Services (hereinafter DSS) paid Earegood's hospital expenses, totaling $41,576.21, pursuant to its Medicaid program.

On or about August 19, 1981, the claims of the Wonseys and Earegood were assigned to State Farm through the assigned claims plan pursuant to MCL 500.3172; MSA 24.13172. This statute allows a claim to be assigned to a different insurance company if a personal protection insurance policy applicable to an accident cannot be identified, or if there is a dispute between two or more insurers concerning their obligations. State Farm refused to pay the claim, however, adopting the Wonseys' position that the NICO policy was in effect. Nonetheless, on October 2, 1981, State Farm's claims superintendent, Thomas Orn, wrote a letter to NICO's attorney, Guy H. Hill, volunteering to make the payments if NICO would sign an agreement promising to reimburse State Farm should the pending declaratory action be resolved against NICO. There is no indication whether NICO ever signed such an agreement.

On October 26, 1981, plaintiff filed this action in the Ingham Circuit Court. DSS sought to recover from State Farm $8,949.75 that DSS had paid for Ardith Wonsey's medical expenses, $11,216.19 that DSS had paid for Chad Wonsey's medical expenses, $109.76 that DSS had paid for James Wonsey's medical expenses, and $41,576.21 that DSS had paid for Earegood's expenses. All

December 9, 1981, the circuit court ordered State Farm to pay personal protection insurance benefits to the Wonseys until the suit was resolved, and ordered NICO to reimburse State Farm should the court eventually find that the NICO policy was in effect on December 15, 1980.

In late May of 1982, settlement was reached between DSS and State Farm. State Farm agreed to reimburse DSS. On May 21, 1982, State Farm filed a third-party complaint in the Ingham Circuit Court action against NICO and Farm Bureau, claiming it was entitled to indemnification and reimbursement for any payments to DSS for the Wonseys' or Earegood's claims. On June 1, 1982, State Farm paid $41,688.65, which represented the total medical expenses of Earegood, to DSS.

On June 28, 1982, NICO filed its answer to State Farm's third-party complaint. In its affirmative defenses, NICO admitted that State Farm is a subrogee of Earegood, but claimed that State Farm was barred from bringing the third-party complaint for Earegood's medical expenses by MCL 500.3145(1); MSA 24.13145(1), because the third-party complaint was filed more than one year after the accident and neither Earegood, DSS, nor State Farm had given NICO notice of the Earegood claim before the one year was up. We note that NICO could not assert this defense in regard to the Wonsey claims for which State Farm wanted reimbursement because the Wonseys had filed their declaratory judgment action within one year after the accident.

On July 2, 1982, Farm Bureau filed its answer to State Farm's third-party complaint. In its affirmative defense, it also claimed that the third-party complaint was barred with

limitations defense, State Farm asserted that its third-party complaint was not barred, because the October 2, 1981 letter from Orn to Hill constituted notice in accordance with MCL 500.3145(1); MSA 24.13145(1). State Farm also asserted that on April 16, 1982 during negotiations in the declaratory judgment action, counsel for the Wonseys and counsel for all the defendants, including NICO, discussed the Earegood claim and thus NICO's right to written notice was waived.

On September 6, 1983, a consent judgment was entered in the declaratory judgment action. The consent judgment provided that the NICO insurance policy was in effect at the time of the accident, and that NICO would pay the Wonseys and State Farm $128,750 in settlement. NICO was to contribute $100,000 and Farm Bureau was to contribute $28,750; State Farm was to receive $60,000 and the Wonseys were to receive $68,750. This payment by NICO and Farm Bureau to State Farm and the Wonseys was to be in full settlement of all disputes between the parties. The consent judgment further provided that NICO was responsible for all future medical expenses incurred by the Wonseys after July 27, 1983, the date the consent judgment was agreed upon by the parties. However, NICO retained the right to assert all defenses under the policy, including the statute of limitations defense of the no-fault statute, MCL 500.3145; MSA 24.13145. A release was executed.

On October 31, 1983, Farm Bureau filed a motion for accelerated judgment or in the alternative, a motion for summary judgment pursuant to GCR 1963, 117.2(1) and 117.2(3) [now MCR 2.116(C)(8) and (C)(10)]. In support of accelerated judgment,

Earegood's claim. In support of the motion for summary judgment under GCR 1963, 117.2(1) [now MCR 2.116(C)(8)], Farm Bureau asserted the statute of limitations defense. In support of its motion for summary judgment under 117.2(3), Farm Bureau claimed that there was no genuine issue of material fact and that Farm Bureau was entitled to judgment as a matter of law, since NICO admitted in the consent judgment that its policy was in effect on December 15, 1980, and Farm Bureau's underwriting manager stated by affidavit that Farm Bureau's records showed that Farm Bureau had not issued an insurance policy to the Wonseys. Thus, Farm Bureau argued there was no issue of fact that Farm Bureau was not liable.

On February 1, 1984, NICO filed a motion for accelerated judgment pursuant to GCR 1963, 116.1(5) [now MCR 2.116(C)(7)] or in the alternative for summary judgment under GCR 1963, 117.2(3) [now MCR 2.116(C)(10)]. NICO adopted substantially all of Farm Bureau's arguments. NICO attached an affidavit of Larry W. Lewer, in which Lewer stated he had searched the records of NICO and had found no written notice of Earegood's claim.

On February 27, 1984, State Farm filed a brief in opposition to NICO's and Farm Bureau's motions for accelerated and summary judgment. State Farm argued that it could use the statute of limitations tolling provision of MCL 600.5852; MSA 27A.5852, and thus its third-party complaint was not barred. State Farm subsequently filed a motion for summary judgment under GCR 1963, 117.2(2) [now MCR 2.116(C)(9)], claiming that NICO had failed to state a valid defense to the third-party complaint, or

since the statute, by its terms applied only to actions by an estate. NICO argued that since the purpose of the statute was to aid persons who are unable to file suit within the time of a particular statute of limitations, it did not apply to State Farm, since State Farm was never under a disability. Farm Bureau was subsequently dismissed from the lawsuit by the parties' stipulation.

In a written opinion issued May 21, 1985, the trial court agreed with NICO that State Farm could not take advantage of the tolling provision of MCL 600.5852; MSA 27A.5852. The trial court based its conclusion on the wording of the statute. The trial court reasoned that the rules of statutory construction provide that words shall be construed and understood according to the common and approved usage of the language, and that the statute was unambiguous in allowing only an executor or administrator of an estate to sue late. The trial court noted that the policy of the tolling statute was to extend that period of limitations where a disability exists which causes confusion and delay in pursuing a claim, and that this policy would not be advanced by allowing State Farm to use the statute. The trial court found that Orn's letter to Hill did not constitute notice under MCL 500.3145(1); MSA 24.13145(1), and thus did not toll the statute of limitations. Finally, the trial court found that NICO did not waive its right to assert the statute of limitations defense when it orally received notice of the Earegood claim on April 16, 1982, during the negotiations in the declaratory judgment action. Accordingly, the trial court denied State Farm's motion for summary judgment and granted NICO's motion for

"If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by or against the executor or administrator of the deceased person or the claim may be proved as a debt against the estate of the deceased person, as the case may be, at any time within 2 years after letters testamentary or letters of administration are granted, although the period of limitations has run * * *. But no executor or administrator shall bring an action under this provision unless he commences it within 3 years after the period of limitations has run." (Footnote omitted).

This provision has been held by this Court to apply to the no-fault statute of limitations of MCL 500.3145(1); MSA 24.13145(1), and tolls the one-year period of limitations for bringing an action against an insurer for payment of automobile no-fault personal protection benefits. Taulbee v Mosley, 127 Mich App 45, 48-49; 338 NW2d 547 (1983), lv den 418 Mich 975 (1984); Epps v Transit Casualty Co, 120 Mich App 279, 280; 327 NW2d 321 (1982).

The trial court ruled that the action was barred by the no-fault statute of limitations, and that the death saving provision did not apply. The trial court reasoned that the language of the death saving provision was clear and unambiguous as applying only to executors and administrators of decedents' estates. Further, the trial court reasoned that the policy of the statute, namely, to benefit the estate, would not be served by allowing State Farm to take advantage of the statutory provision. On appeal, NICO's arguments parallel the trial court's reasoning. NICO agrees that State Farm is subrogated to the rights of DSS which in turn was subrogated to the rights of Earegood, but NICO contends that the third-party complaint is barred by the one-year limitations period contained in the no-fault statute. We disagree with them.

We believe that Federal Kemper Ins Co v Isaacson,

personal representative of the estate of a deceased to use the tolling provision of MCL 600.5856; MSA 27A.5856. This Court stated:

> "As subrogee, plaintiff stands in the shoes of the subrogor and acquires no greater rights than those possessed by the subrogor. Federal Kemper Ins Co v The Western Ins Co, 97 Mich App 204, 210; 293 NW2d 765 (1980), quoting Northwestern Mutual Ins Co v Jackson Vibrators, 402 F2d 37, 40 (CA 6, 1968). Black's Law Dictionary (4th ed) defines subrogation as '[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, * * * so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities."
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> * * *
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> "As subrogee of the estate, plaintiff stands in the same position, with all the same rights, as its subrogor with respect to the action brought against defendant Isaacson. Since RJA §5856 would clearly have tolled the running of the period of limitation had a subsequent suit been brought by the estate, we hold that the tolling statute does apply to the present case." Federal Kemper, supra, 182-184.

Although Federal Kemper had not been decided by this Court when the trial court issued its opinion, this fact does not bar us from reversing the trial court.

NICO claims that the policy of MCL 600.5852; MSA 27A.5852 is to allow persons who are disabled from bringing a suit within the statute of limitations and that State Farm is not such a disabled person. While this may be true, we believe that since State Farm is a subrogee of the deceased Earegood, State Farm is entitled to all the rights that Earegood had.

NICO also argues that since the death saving provision does not contain language referring to "[others] claiming under [the executor or administrator]", unlike similar language contained in MCL 600.5851(1); MSA 27A.5851(1), the Legislature intended that only an executor or administrator may have the right to bring suit late under the death saving provision

its third-party complaint was not barred. We disagree with State Farm on this issue even though it does not affect our ultimate disposition of this case.

The notice provision of MCL 500.3145(1); MSA 24.13145(1), specifically states: "The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury".

In Dozier v State Farm Mutual Automobile Ins Co, 95 Mich App 121; 290 NW2d 408 (1980), lv den 409 Mich 911 (1980), this Court considered whether a letter complied with the notice provision. In that case, the notice consisted of a letter to the insurer from the insured's attorney some three weeks after an accident. The letter did not comply with the statute because it failed to indicate the insured plaintiff's full name, her address, and the nature and place of her injuries. However, the letter did prompt a reply from the insurer which acknowledged receipt of the information and advised the plaintiff's attorney to forward all "specials" regarding the law. This Court held that substantial compliance with the written notice provision which in fact apprises the insurer of the need to investigate and to determine the amount of possible liability of the insurer's fund is sufficient compliance with the notice provision, MCL 500.3145(1); MSA 24.13145(1). Dozier, supra, p 128.

In Heikkinen v Aetna Casualty & Surety Co, 124 Mich App 459; 335 NW2d 3 (1981), this Court repeated the holding of Dozier, namely, that the notice should be presented "in a form, or under circumstances, designed to in fact apprise the insurer

the Gilmore Insurance Agency, which was owned and operated by one Charles Gilmore. Through this agency, Gilmore acted as an agent for Aetna. In addition to his work as an insurance agent, Gilmore prepared income tax returns. After her husband's death, Mrs. Heikkinen was not aware that she might be entitled to benefits under the insurance policy and did not give any notice about the accident to Aetna. Heikkinen, supra, p 461. However, in early 1977, Gilmore prepared Mrs. Heikkinen's income tax return. Mrs. Heikkinen gave Gilmore a copy of Mr. Heikkinen's death certificate which Gilmore needed to complete the income tax returns. Id. 461. Mrs. Heikkinen finally filed suit for insurance benefits over one year after the accident. Id., 462. She contended that the death certificate provided Aetna with notice of her claim. This Court found that although all the requirements of MCL 500.3145(1); MSA 24.13145(1) were met in the death certificate, the death certificate, alone, did not in fact apprise the insurer of the need to investigate and to determine the amount of possible liability of its fund. Id., 464.

Likewise, in this case, the letter did not sufficiently inform NICO of the need to investigate and to determine the possible amount of liability of NICO's fund with respect to Earegood's claim. In the first place, the letter was written on behalf of the Wonseys. The only reference to Earegood is in the caption, where his name and claim number are stated. The letter did not provide Earegood's address, the nature of his injury, or the place and time of his injury. In no place in the letter did Orn intimate that a similar claim was being made on behalf of Earegood. The letter referred to Attorney Hanflik's "people" and

In light of our disposition of the first issue, the trial court's decision and order granting NICO's motion for accelerated judgment is reversed. State Farm's motion for summary judgment is hereby granted, and State Farm is entitled to recover the $41,880.65 it paid to DSS.

/s/ Richard M. Maher
/s/ Donald E. Holbrook, Jr.
/s/ Marvin R. Stempien