STATE OF MICHIGAN

COURT OF APPEALS

AMERISURE COMPANIES, Subrogee of Trucking Services, Inc,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
February 28, 1997
9:05 a.m.

No. 189879
Kent Circuit Court
LC No. 94-004579-CZ

Before: Fitzgerald, P.J., and MacKenzie and A.P. Hathaway,* JJ.

PER CURIAM.

Plaintiff, Amerisure Companies, appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) and MCL 500.3145(1): MSA 24.13145(1) in favor of defendant State Farm Insurance Company. The trial court determined that plaintiff's claim for reimbursement of no-fault personal injury protection benefits mistakenly paid to Leroy Rister was barred. We affirm.[1]

On July 21, 1992, Leroy Rister was injured while descending from his semi-truck tractor. Rister applied to plaintiff for personal protection insurance benefits under a no-fault policy issued to Trucking Services, Inc. Plaintiff, unaware that Rister had a personal automobile insured by defendant, paid $97,580.74 to Rister in personal injury protection benefits under the belief that Rister was an employee of Trucking Services at the time he was injured.

In April 1993, plaintiff learned that Rister was not an employee of Trucking Services, but rather an independent contractor. Plaintiff, however, did not send notice to defendant that it intended to seek contribution and/or indemnification from defendant until January 19, 1994. Plaintiff, as subrogee of Trucking Services, filed the instant suit on November 22, 1994, seeking to recover the amount of personal injury protection benefits paid to Rister that should have been paid by defendant, the primary insurer.

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

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendant moved for summary disposition, claiming that the action was barred by the one-year statute of limitations contained in MCL 500.3145(1); MSA 24.13145(1), which provides in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing 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.

The trial court, citing *Michigan Mutual Ins Co v Home Mutual Ins Co*, 108 Mich App 274; 310 NW2d 362 (1981), agreed with defendant's claim that the action was one for subrogation and was barred under § 3145(1). The court rejected plaintiff's argument that the action was one for reimbursement of money paid by mistake to which the general six-year statute of limitations embodied in MCL 600.5813; MSA 27A.5813 would apply.

The issue presented is whether the one-year statute of limitations in § 3145 applies when an insurer is suing another insurer on the basis that it paid benefits by mistake for which the defendant insurer was liable. In *Michigan Mutual, supra*, Ray Eastham was injured while riding a motorcycle in September 1976. At the time of his injury, Eastham was separated from his wife and living with his father. Eastham's father owned a car insured by the plaintiff. At the time the plaintiff paid personal protection insurance benefits to Eastham, it was unaware that Eastham's wife owned a car insured by the defendant. In March or April of 1978, the plaintiff learned that Eastham was still legally married and immediately demanded reimbursement from the defendant. After the defendant refused to reimburse the plaintiff, the plaintiff filed suit in April 1980.

The plaintiff characterized its suit as one of quasi-contract and argued that the general six-year statute of limitations applied. This Court disagreed and characterized the plaintiff's action as one of subrogation, reasoning that after the plaintiff paid benefits to Eastham, it became subrogated to Eastham's rights, but acquired no greater rights than Eastham. *Id.* at 278. This Court held that the plaintiff's claim was therefore governed by the no-fault one-year statute of limitations set forth in § 3145(1). This Court held that the plaintiff had notice on April 21, 1978, of its potential claim against the defendant, and held that the plaintiff's claim was barred because the claim was not filed until April 28, 1980, over two years later.

Michigan Mutual based its decision on a line of cases beginning with *Home Ins Co v Rosquin*, 90 Mich App 682; 282 NW2d 446 (1979), and followed by *Keller v Losinski*, 92 Mich App 468; 285 NW2d 334 (1979), and *Federal Kemper Ins Co v Western Ins Cos*, 97 Mich App 204; 293 NW2d 765 (1980). A common link between these cases is that in each case the plaintiff failed to file suit against the defendant insurer within one year from the time it knew of its potential cause of action against the defendant.

This Court, however, diverged from the above line of cases in *Madden v Employers Ins of Wausau*, 168 Mich App 33; 424 NW2d 21 (1988)(Marilyn Kelly, dissenting). In *Madden*,

Michael Madden was injured on March 6, 1983, in an automobile accident as a passenger in a car that he did not own. Madden filed an application for personal injury protection benefits with Wausau, the driver's no-fault insurer. Madden indicated that he did not own an automobile and that he did not have any family members residing in his household who owned an automobile. Madden's attorney verified in an affidavit that Madden had no other benefits available to him, and Wausau made payments to Madden.

Eventually a dispute arose and Madden filed suit against Wausau in March 1984. In December 1984, Madden revealed during a deposition that he was living with his brother at the time of the accident. Madden's brother owned a car insured by Lake States. In February 1985, Madden's brother confirmed this fact. Wausau demanded payment, which Lake States denied. Wausau filed a third-party indemnification complaint against Lake States in May 1985.

The *Madden* court found Judge Allen's dissent in *Keller, supra*, to be persuasive. In his dissent, evaluating a similar set of facts, Judge Allen opined that the action between the insurers was one to recover monies paid under a mistake of fact, not an action to recover sums due for economic losses under automobile no-fault. The mistake of fact was the belief that the injured party had no insurance other than the plaintiff's coverage at the time of injury. Judge Allen characterized the action as one of indemnity. *Id.* at 474-475.

The *Madden* Court decided that Wausau's action was not a subrogation action, but rather an action for return of money paid due to a mistake of fact. The Court found that the no-fault one-year statute of limitations applied only to actions to recover personal injury protection benefits, and not to an action for money paid by mistake, even if the mistake was due to a lack of investigation. The Court held that the general six-year statute of limitations governed Wausau's claim. *Id.* at 40.

More recently, in *Citizens Ins Co v American Community Mutual Ins Co*, 197 Mich App 707, 710; 495 NW2d 798 (1993), this Court cited *Federal Kemper, supra*, in support of the rule that an insurer's subrogation action is barred by the statute of limitations if the insured's action would be so barred, unless circumstances make that result inequitable.

Neither *Michigan Mutual* nor *Madden* are binding precedent.[2] However, we find the *Michigan Mutual* line of cases to be better-reasoned and therefore choose to follow it. Consequently, we hold that the one-year limitations period of § 3145 of the no-fault act governs actions between no-fault insurers for recovery of monies mistakenly paid by the secondary insurer. Such actions are ones of subrogation and, as such, plaintiff acquired no greater rights than Rister had against defendant. Because Rister's right against defendant was to maintain a cause of action for payment of personal injury protection benefits, plaintiff's subrogation action squarely falls within the parameters of § 3145 of the no-fault act.

Under § 3145 and *Michigan Mutual*, plaintiff was required to file its subrogated claim for personal injury protection benefits within one year after the date of the accident or after the date it had notice of its potential claim against defendant, whichever was later. *Id.*, 108 Mich App 280. The accident occurred on July 21, 1992. Plaintiff had notice that Rister considered himself an independent contractor in April 1993. Plaintiff did not file its claim until November 1994.

Therefore, the complaint was filed over one year after the limitations period in MCL 500.3145(1); MSA 24.13145(1) expired. Section 3145(1) would have barred Rister's claim for benefits, and, consequently, it barred plaintiff's subrogation claim as well.[3]

Affirmed. Defendant being the prevailing part, it may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Amy Patricia Hathaway

[1] Although not so labeled, defendant's motion for summary disposition was granted on the ground that the claim was barred because of the expiration of the statute of limitations. MCR 2.116(C)(7).

[2] These cases were decided before Administrative Order 1990-6 took effect, requiring panels of this Court to follow opinions published on or after November 1, 1990.

[3] In light of our resolution of this matter, the remaining issues raised by plaintiff are irrelevant and need not be addressed.