STATE OF MICHIGAN

COURT OF APPEALS

REATHEL A. ALLEN,

Plaintiff-Appellant,

v

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
April 13, 1999

No. 200392
Ingham Circuit Court
LC No. 90-065461 CK

Before: Jansen, P.J., and Holbrook, Jr. and MacKenzie, JJ.

PER CURIAM.

Plaintiff is the guardian and conservator of the estate of Kay Brown, who became legally incapacitated after she suffered closed head injuries in an automobile accident while driving an uninsured vehicle. Plaintiff filed this action to preserve a personal protection insurance (PIP) benefits claim that was assigned to defendant pursuant to MCL 500.3172; MSA 24.13172, the assigned claims act. Plaintiff appeals as of right from a judgment that allowed defendant to deny Brown's claim for PIP benefits because she was the owner of the uninsured vehicle. See MCL 500.3113(b); MSA 24.13113(b) and MCL 500.3173; MSA 24.13173. We affirm.

Plaintiff contends that defendant should have been precluded from asserting that Brown was the owner of the vehicle on grounds of waiver, equitable estoppel, laches, mandatory joinder principles, and prejudice. This contention is based on defendant's argument in a separate declaratory judgment action brought by defendant against League General Insurance Company, the insurer of Brown's estranged husband, claiming that Brown was entitled to benefits under her husband's policy.[1] In that action, defendant argued that Brown was not the owner of the uninsured vehicle because, although she had purchased the car days before the accident, she had not yet received the car's title or had it registered in her name. Ultimately, this Court issued an unpublished memorandum opinion holding that Brown was the car's owner, effectively absolving League General from any obligation to pay PIP benefits on Brown's behalf. *Farm Bureau Mut Ins Co v League General Ins Co*, unpublished memorandum opinion of the Court of Appeals, Docket Nos. 149902, 153695, issued 1/13/95. After the Supreme Court denied leave to appeal, the trial court in this case concluded that defendant was not precluded

from claiming that Brown was the car's owner and ruled that defendant could deny Brown PIP benefits based on her ownership of the uninsured car.

Plaintiff argues that the trial court erred by concluding that defendant had neither waived nor was equitably estopped from asserting its right to contest ownership of the vehicle. We disagree. Subject to two broad classes of exceptions, the doctrines of waiver and estoppel are generally not available to force an insurer to cover a loss never assumed under the terms of its contract or policy with the insured. *Lee v Evergreen Regency Cooperative*, 151 Mich App 281, 285-287; 390 NW2d 183 (1986), citing *Ruddock v Detroit Life Ins Co*, 209 Mich 638; 117 NW 242 (1920). The first exception, involving insurers who reject coverage claims and fail to defend the insured in an underlying action, is inapplicable here because plaintiff was no longer a party in the declaratory judgment action against League General. The second exception, involving cases where the inequity suffered by the insured as a result of misrepresentations regarding a policy by the insurer outweighs the inequity of forcing it to pay an uncovered risk, is also inapplicable because defendant neither had a contract or policy with plaintiff nor made any misrepresentations. Although plaintiff argues that *Smith v Grange Mut Fire Ins Co of Michigan*, 234 Mich 119, 122-123; 208 NW 145 (1926), and *Burton v Wolverine Mut Ins Co*, 213 Mich App 514, 515-520; 540 NW2d 480 (1995), support the proposition that defendant should be barred from contesting the ownership issue because it failed to fully apprise her of all its defenses, we conclude that this case is distinguishable and adopt the reasoning set forth by the trial court:

> In *Smith*, the insured's property burned and she was prosecuted for arson. The insurance company's initial position was that the insured was excluded from coverage due to the alleged arson. The insured asserted during the criminal trial that the prosecution had failed to show the issuance of a binding policy because it appeared that the company's president had failed to sign the policy. The insured was acquitted.
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> Despite the acquittal, the insurance company refused to cover the loss, asserting that the insured was estopped from claiming that the policy was enforceable in light of her previous contention that the policy was invalid. The insured brought a declaratory action seeking coverage. The Supreme Court ultimately held that the insurance company was estopped from asserting at that late date that the policy was unenforceable.
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> The Court is of the opinion that *Smith* is distinguishable because it involved a direct contractual relationship between the insured and the insurer, where in the present case [defendant] could have been obligated to Brown only under the assigned claims statute. Moreover, [defendant] put Plaintiff on notice from the outset that she was not eligible for [personal protection insurance] PIP benefits because of her ownership of the uninsured vehicle. Finally, a factual question existed for some time regarding whether Brown was indeed the owner of the vehicle. [Defendant] adopted the position that Brown was the owner after discovery was conducted and the court in the declaratory action resolved that issue. In contrast in *Smith*, the insurance company could have promptly determined whether its president had endorsed the insurance policy.

> In *Burton*, [*supra* at 515-520,] the insurance company notified the insured that his policy would be canceled in three weeks because of a misrepresentation regarding his driving record. Within that three-week period, the insured was involved in an accident. When he filed an insurance claim, the company stated it was rescinding the policy ab initio.
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> The Court of Appeals held that although the insurance company had the right to rescind the policy ab initio, it had waived that right when it notified the insured that his policy would terminate in three weeks. The Court's primary reason for this decision was that the insured had been induced by the cancellation notice to believe he would have coverage for three weeks, and he had failed to obtain other insurance in the interim.
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> [Defendant] on the other hand, did not induce Plaintiff into believing that she would ultimately have PIP benefits, and although [defendant] initially adopted the position that Brown was not the owner of the vehicle, Plaintiff was aware that Brown could eventually be declared the owner, thereby precluding her from PIP benefits.

Finally, we note that plaintiff's failure to show that she was left in a "worse position than . . . when coverage was initially denied" precludes a finding that these doctrines are applicable in this case. *Smit v State Farm Mut Automobile Ins Co*, 207 Mich App 674, 684; 525 NW2d 528 (1994). Therefore, we conclude that the trial court correctly held that the doctrines of waiver and estoppel did not preclude defendant from contesting the ownership of the uninsured car.

Plaintiff also argues that the trial court should have concluded that MCR 2.205(A) and MCL 500.3172(3); MSA 24.13172(3) required the mandatory joinder of plaintiff as a party to the declaratory judgment action between defendant and League General. The pertinent provision of MCL 500.3172(3); MSA 24.13172(3), provides:

> If the obligation to provide personal protection insurance benefits 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, and if a method of voluntary payment of benefits cannot be agreed upon among or between the disputing insurers, all of the following shall apply:
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> (d) The insurer to whom the claim is assigned *shall join as parties defendant each insurer* disputing either the obligation to provide personal protection insurance benefits or the equitable distribution of the loss among the insurers. [Emphasis added.]

The purpose of statutory construction is to ascertain and give effect to the Legislature's intent. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). Although judicial interpretation is not permitted if the plain and ordinary meaning of a statute's language is clear, it is

permissible when reasonable minds may differ regarding its meaning. *Id*. In addition, although effect should be given to every word of a statute, *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994), anything not part of the Legislature's intent, as ascertained through the act itself, must not be read into the statute. *In re Marin*, 198 Mich App 560, 564; 499 NW2d 400 (1993). Although plaintiff argues that the "spirit" of MCL 500.3172(3)(d); MSA 24.13172(3)(d) mandated her joinder in the declaratory judgment action, the language of the provision only provides for the mandatory joinder of insurers. We decline to read anything into the statute that is not evident from the Act itself. MCL 500.100 *et seq.*; MSA 24.110 *et seq.*; *Marin, supra* at 564.

With regard to MCR 2.205(A), that subrule provides:

> Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

In *United Services Automobile Ass'n v Nothelfer*, 195 Mich App 87, 89-90; 489 NW2d 150 (1992), this Court explained:

> Because joinder is mandatory under MCR 2.205(A), rather than permissive, joinder is required for the benefit of the *defendant* and thereby places on the defendant the burden of objecting to misjoinder. Thus, the defendant must make a timely assertion of the position that separate suits violate the rule prohibiting the splitting of actions, modernly known as the joinder rule. If the defendant fails to make such a timely assertion, he waives his right to make such a claim; in effect, the defendant "acquiesces in splitting causes of action by not raising timely objection."

Notwithstanding that this rule provides that "joinder is required for the benefit of the defendant," we conclude that it was plaintiff's obligation to "make a timely assertion of [her] position that separate suits violate the rule prohibiting the splitting of actions" because she is seeking the benefit of MCR 2.205(A). *Id*. at 89-90. Because the actions were originally consolidated and only severed upon her request, we conclude that plaintiff has waived any right to object to non-joinder.

Plaintiff also argues that defendant should have been precluded under the doctrine of laches from arguing that Brown owned the vehicle and that the trial court misinterpreted *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982), by concluding that laches may only be applied to bar the enforcement of a claim against a defendant. Our Supreme Court has explained that the controlling question in determining the application of the doctrine of laches is whether a defendant has been prejudiced by a plaintiff's delay in bringing his suit. *Chesnow v Nadell*, 330 Mich 487, 490; 47 NW2d 666 (1951). This Court has also explained that:

> Laches is an *affirmative defense* which depends not merely upon the lapse of time but principally on the requisite of intervening circumstances which would render inequitable any grant of relief to the dilatory *plaintiff*. For one to successfully assert the *defense* of laches, it must be shown that there was a passage of time combined with some prejudice to the party asserting the *defense* of laches. Laches is concerned mainly with the question of the inequity of permitting a *claim* to be enforced and depends on whether the *plaintiff* has been wanting in due diligence. [*In re Crawford Estate*, 115 Mich App 19, 25-26; 320 NW2d 276 (1982) (emphasis added) (citations omitted.)]

Plaintiff's only cited authority is *Lothian, supra*, which she cites for the proposition that laches is imposed when "a change in condition would make it inequitable to enforce a claim against the defendant." Given this Court's explanation in *Crawford, supra*, at 25-26, and plaintiff's failure to provide any authority supporting the proposition that laches may be applied to bar a defense, we conclude that the trial court did not err by concluding that laches was inapplicable.

Finally, plaintiff argues that the trial court erred by failing to conclude that several policy considerations based on allegations of presumed, assumed, and actual prejudice, precluded defendant from arguing that Brown owned the vehicle. This argument is without merit. The trial court properly concluded that plaintiff failed to show any evidence of prejudice resulting from defendant's actions.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie

[1] During a scheduling conference in defendant's case against League General, the circuit court consolidated plaintiff's claim against defendant with defendant's claim against League General. Within days, however, plaintiff requested that the cases be severed, and the court did so after defendant agreed to the request.