STATE OF MICHIGAN

COURT OF APPEALS

AMERISURE INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED November 29, 2011
v	No. 299754 Oakland Circuit Court
PROGRESSIVE MICHIGAN INSURANCE COMPANY, Defendant-Appellee.	LC No. 2009-104038-CK

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals by right from the grant of summary disposition to defendant pursuant to MCR 2.116(C)(7) (statute of limitations). We affirm.

Plaintiff's subrogation claim arises out of a motor vehicle accident involving the driver of a tractor trailer. Both plaintiff and defendant provided insurance coverage applicable to the accident. Following the accident, the insured contacted his insurance agent by telephone regarding the accident and also visited the insurance agency at some point. The insured's nephew and son additionally contacted the insurance agency by telephone and possibly in person. Neither the insured nor the insurance agent or anyone else on the insured's behalf sent anything in writing to defendant. Plaintiff paid the insured's claim for personal protection insurance (PIP) benefits and began an investigation into which insurer was responsible for the claims. Claims adjusters from plaintiff and defendant communicated within one year after the accident.

More than one year after the accident, plaintiff filed suit against defendant, seeking recovery of the benefits paid to the insured. Defendant moved for summary disposition on the ground that plaintiff's claim was barred by the one-year limitations period of MCL 500.3145(1). The trial court granted the motion, finding that the insured had not "substantially complied" with MCL 500.3145(1), and further that defendant was not estopped from raising the statute of limitations as a defense.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A trial court's interpretation of

the Michigan no-fault act is also reviewed de novo. *Farmers Ins Exchange v AAA of Michigan*, 256 Mich App 691, 694; 671 NW2d 89 (2003). Moreover, this Court reviews issues of equitable estoppel de novo. *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005).

II. APPLICATION OF THE LIMITATIONS PERIOD OF MCL 500.3145(1)

The Michigan no-fault act provides that insureds may seek compensation for economic losses (due to personal injury) from their insurers following an accident. MCL 500.3104 *et seq*. MCL 500.3145(1), entitled "Limitations as to actions for personal or property protection benefits; notice of injury," states:

> 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 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. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. 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.

This dispute centers on whether the limitations period of MCL 500.3145(1) has been properly extended by the actions of the insured in contacting his insurance agent. Plaintiff acquires the same rights against defendant that the insured would have had. *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 60; 658 NW2d 460 (2003). Defendant may assert any defenses that it could have asserted against the insured, including that plaintiff's claim is barred by the applicable statute of limitations. See *Fed Kemper Ins Co v Western Ins Co*, 97 Mich App 204, 210; 293 NW2d 765 (1980).

Plaintiff argues that defendant has not demonstrated actual prejudice to its position attributable to the lack of written notice of the insured's injury. This argument misapprehends the nature of MCL 500.3145(1). The statute is not merely a notice provision, but is also a limitation of actions provision. *Dozier v State Farm Automobile Ins Co*, 95 Mich App 121, 126, 128; 290 NW2d 408 (1978); *Davis v Farmers Ins Group*, 86 Mich App 45, 47; 272 NW2d 334 (1978). A notice provision is designed to provide the insurance company with knowledge of the accident so that it might make a timely investigation to protect its interests; an insurance company that seeks to avoid liability on the grounds that its insured did not comply with a notice provision must establish actual prejudice to its position. *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998). By contrast, limitation of actions provisions are intended to put an end to stale claims, end fear of litigation, and insure that claims can be settled while the evidence

is still fresh. *Davis*, 86 Mich App at 47-48. A defendant does not have to demonstrate prejudice to assert that the limitations period of MCL 500.3145(1) has run. *Davis*, 86 Mich App at 47.

Plaintiff next argues that the insured "substantially complied" with the requirements for extending the limitations period of MCL 500.3145. We disagree. Oral notice to an insurance agent, standing alone, does not fulfill the requirements of MCL 500.3145(1). In certain cases, this Court has determined that strict, technical compliance with the requirement of written notice under MCL 500.3145(1) would run counter to the Legislature's intent to provide the insured with prompt and adequate compensation for personal injuries from automobile accidents. *Lansing Gen Hosp Osteopathic v Gomez*, 114 Mich App 814; 319 NW2d 683 (1982); *Walden v Auto Owners Ins Co*, 105 Mich App 528, 534; 307 NW2d 367 (1981); *Dozier*, 95 Mich App at 128. However, plaintiff's claim bears none of the hallmarks of the "bizarre facts" and "uncommon situation[s]" that informed our decisions in *Walden* and *Gomez*. In *Walden*, we simply declined to hold, as a matter of law, that a *written* claim for PIP benefits was fatally defective because the blanks for listing injured parties and describing injuries were left blank. 105 Mich App at 530-532. Similarly, in *Gomez*, we found *written* notice sufficient to extend the limitations period for two claimants, notwithstanding the fact that one claimant was not mentioned on the claim form. 114 Mich App at 820-823. We emphasized in *Gomez* that our decision was informed by "the rather bizarre facts of the case," which included the fact that the actual injured claimants never claimed their benefits and could not be located; we concluded that the Legislature did not anticipate the situation where injured claimants would not come forward to seek recovery for their losses. *Id.* at 822. "*In such an uncommon situation*, however, we believe that substantial compliance with the written notice provision of MCL 500.3145(1) is sufficient and is consistent with the purpose of the automobile no-fault insurance act." *Id.* at 823 (emphasis added).

Plaintiff's characterization of the failure of the insurance agent to provide defendant with written notice as "an issue between [defendant] and its authorized agent" is inaccurate; in determining whether an insured substantially complied with MCL 500.3145(1), we have focused our analysis on precisely what sort of written notice reached the defendant insurers. *Gomez*, 114 Mich App at 814; *Walden*, 105 Mich App at 534; *Dozier*, 95 Mich App at 128.

Here, plaintiff has produced no evidence that defendant ever received written notice of a potential personal injury claim. The factual underpinnings of this case are very different from *Gomez*, because here the insured has in fact come forward to claim his recovery. The Legislature's goal of providing an insured with prompt and adequate recovery for personal injuries is not frustrated by the application of the written notice requirement. The absence of any written notice to defendant is simply not substantial compliance with the written notice requirement of MCL 500.3145(1).

Plaintiff also argues that defendant waived the written notice requirement of MCL 500.3145(1) through the language of its policy. However, the language of the policy makes no statement concerning a waiver on the part of defendant of asserting the defense that a particular claim is barred by the applicable statute of limitations. The policy sections cited by plaintiff simply deal with the provision of notice of a claim to the insurer. As stated above, MCL 500.3145(1) is not solely a notice provision, but is also a limitation of actions provision. *Davis*, 86 Mich App at 48. Neither of the policy passages cited by plaintiff can be read as a waiver of the statute of limitations for PIP claims by defendant.

Waiver is the voluntary, intentional relinquishment of a known right. See *Don-Ray Tool & Die, Inc v John Hancock Mut Life Ins Co*, 5 Mich App 263, 267; 146 NW2d 139 (1966). The language of defendant's policy compels the conclusion that the defendant did not voluntarily and intentionally relinquish its right to assert a statute of limitations defense. See *Benson v Home Ins Co*, 123 Mich App 626, 630; 333 NW2d 43 (1983).

III. EQUITABLE ESTOPPEL

Plaintiff's final argument is that, even if the limitations period of MCL 500.3145(1) applies, defendant should be equitably estopped from raising the limitations period as a defense. Because we hold that plaintiff cannot satisfy the requirement of justifiable reliance, we disagree.

The doctrine of equitable estoppel can be applied to preclude a party from asserting or denying a fact. *AFSCME Int'l Union*, 267 Mich App at 293. However, we will apply the doctrine only when the facts calling for it are unquestionable and the wrong to be prevented undoubted. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 552; 487 NW2d 499 (1992).

Equitable estoppel can be applied to preclude a defendant from raising the defense of the statute of limitations if the party to be estopped clearly acted to induce the plaintiff from bringing action within the limitations period. *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998). A plaintiff who seeks to estop a defendant from asserting a statute of limitations defense must show that: (1) there was a false representation or concealment of a material fact, (2) there was an expectation that the other party would rely on the misconduct, and (3) there was knowledge of the actual facts on the part of the representing or concealing party. *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997).

Here, plaintiff admits that it investigated the claim of the insured in an attempt to determine which carrier was the priority insurer of personal injury protection benefits. Plaintiff does not allege that its adjuster was somehow denied access to relevant information concerning the Progressive policy, nor that the adjuster lacked the ability to independently assess defendant's policy, nor that the adjuster somehow lacked knowledge of the Michigan no-fault act. In sum, plaintiff has not fulfilled the requirements for application of equitable estoppel.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell