STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER ALBRECHT,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 26, 2012

No. 302226
Kent Circuit Court
LC No. 08-000076-NI

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

In this case involving recovery of no-fault insurance benefits, plaintiff appeals as of right the order granting defendant's motion for summary disposition. This is the second appeal in this case. Previously, the trial court granted defendant's motion for summary disposition and plaintiff appealed. This Court reversed and remanded. *Albrecht v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, entered June 22, 2010 (Docket No. 289042). We again reverse and remand.

The previous opinion of this Court summarized the facts of the case:

> This case stems from an incident where plaintiff was attempting to load pigs into a trailer that was connected to a 2005 Dodge pickup truck. At some point during this process, the trailer's loading ramp fell on plaintiff and broke her back and arm. Plaintiff and her husband, Justin, have homeowners, automobile no-fault and hospitalization insurance through defendant State Farm Mutual Automobile Insurance Company (State Farm). Assurant Health, whose policies were sold and serviced through captive State Farm agents, provided the hospitalization insurance. Kimberly Hughes was State Farm's agent (Gregg Dep, 3-4). Gregg Hughes, Kimberly's husband, was Kimberly's office manager and employee, but was also a licensed State Farm agent.
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> Plaintiff's husband telephoned Gregg Hughes and told him about the accident. Gregg Hughes then sent plaintiff a claim form, but only for the hospitalization insurance. After submitting the claim to State Farm/Assurant, plaintiff collected the maximum benefit allowed under the policy, which was $1,000. On January 3, 2008, more than 13 months after her injury, plaintiff filed her complaint against

> defendant alleging that she should also have been covered under her automobile no-fault insurance policy. Defendant filed a motion for summary disposition, arguing that the case should be dismissed pursuant to MCR 2.116(C)(7) because the action was time barred under MCL 500.3145(1). The trial court granted defendant's motion for summary disposition.
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> According to plaintiff, her husband called agent Gregg Hughes to report the accident. Justin testified that he told Gregg that "my wife had been backing up my pickup truck and my trailer into the barn to load up the hogs. She had parked the pickup truck, walked around it, and was trying to open the door and slipped and fell . . . the trailer door had fallen on her." Gregg stated that he was only told that a trailer door fell on Jennifer, but that he was never told that the trailer was attached to a motor vehicle insured by State Farm. He stated that he assumed that the trailer was either detached from the vehicle, or attached to a different vehicle that was not insured by State Farm. As a result, he only submitted the claim as a health insurance claim, and never submitted the claim as a no-fault auto insurance claim. He told plaintiff that he phoned Assurant, and that they would be sending her the claims forms. [*Albrecht*, unpub op at 1-2.]

On the previous appeal, this Court determined:

> We find that there is an issue of fact regarding Gregg's negligence in this matter. While he certainly never intentionally misled plaintiff and her husband, the matter of whether his actions served to negligently misinform plaintiff requires more factual development.
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> Therefore, the trial court erred in granting defendant's motion for summary disposition. Plaintiff's noncompliance with the one-year statute of limitations may have been affected by defendant's negligence, and if it were, then defendant should indeed be estopped from asserting the statute of limitations. Further factual development of this issue is necessary. [*Albrecht*, unpub op at 3.]

On remand, both parties moved for summary disposition, although there was limited further factual development. The trial court again granted summary disposition in favor of defendant, citing this Court's previous opinion requiring further factual development as well as plaintiff's acknowledgement that there was little more factual development and that it simply never occurred to Gregg that there may be a no-fault claim.

A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008) (citation omitted). When this Court reviews a motion for summary disposition brought pursuant to MCR 2.116(C)(7), we review pleadings as well as any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008) (citation omitted). The complaint is

accepted as true unless contradicted by evidence. *Id.* This Court considers the evidence in a light most favorable to the nonmoving party. *Id.* If there is no factual dispute, then whether plaintiff's claim is barred by a statute of limitations is a question of law for this Court to decide. *Id*. However, if there is a factual dispute, then summary disposition is not proper. *Id.*

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham*, 480 Mich at 111 (citation omitted). Summary disposition pursuant to MCR 2.116(C)(10) is proper "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The applicability of equitable doctrines is reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004) (citation omitted). Whether the law of the case doctrine applies is also reviewed de novo. *Manske v Dep't of Treasury*, 282 Mich App 464, 467; 766 NW2d 300 (2009).

Because this Court previously issued an opinion in this case, the law of the case doctrine applies, as described in *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008):

> [A] lower court may not take action on remand that is inconsistent with the judgment of the appellate court. Rather, the trial court is bound to strictly comply with the law of the case, as established by the appellate court, according to its true intent and meaning. However, the law-of-the-case doctrine only applies to issues actually decided – implicitly or explicitly – on appeal. [Internal citations and quotations omitted.]

Similarly, *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), explained how the law of the case doctrine limits an appellate court if there are any subsequent appeals:

> [I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. [Quotation and citation omitted.]

In the previous appeal, this Court determined there was an issue of material fact regarding whether defendant's negligence contributed to any failure by plaintiff to comply with the statute of limitations. *Albrecht*, unpub op at 3. This Court's opinion stated, "[p]laintiff's noncompliance with the one-year statute of limitations *may have been affected* by defendant's negligence, and *if it were*, the defendant should indeed be estopped from asserting the statute of limitations." *Albrecht*, unpub op at 3 (emphasis added). Thus, according to the law of this case, if Gregg's negligence affected plaintiff's noncompliance with the statute of limitations, then equitable estoppel applies.

As cited in the previous decision of this court, *Lothian v Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982), explained:

> Generally, to justify the application of estoppel, one must establish that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, and knowledge of the actual facts on the part of the representing or concealing party. See, 28 Am Jur 2d, Estoppel and Waiver, § 35, p 640.

Further, estoppel applies to both "intentional or negligent deception." *Id.*; See also *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 22; 592 NW2d 379 (1998).

There is no dispute that since the previous appeal, there has been no further factual development as to whether Gregg's negligence affected plaintiff's noncompliance with the one-year statute of limitations. When the facts of a case remain materially the same, "the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal." *Grievance Administrator*, 462 Mich at 259-260. This Court already decided there was a question of fact as to whether defendant's negligence affected plaintiff's noncompliance with the statute of limitations and, thus whether equitable estoppel applies. To the degree that no further facts were developed, we read this Court's prior opinion as holding that there is an issue of fact that must be decided by a trial. As this Court's previous opinion determined, any noncompliance by plaintiff with the one-year statute of limitations may have been affected by defendant's negligence, in which case equitable estoppel will apply. *Albrecht*, unpub op at 3. A question of fact based on competing evidence regarding this issue exists, and the issue is for the trier of fact to decide. Thus, the trial court erred when it granted summary disposition in favor of defendant.

Plaintiff also argues on appeal that the trial court erred in not considering when plaintiff provided notice to defendant of the accident. The parties and the trial court on remand were understandably puzzled as to the panel's holding, if any, whether either party should have been granted summary disposition based on the notice issue. Judge O'Connell, in dissent, expressed the view that plaintiff should have been granted summary disposition on that question. The majority made reference to a failure of notice in the introduction to its discussion of equitable estoppel but plainly did not set forth whether it had concluded that plaintiff had failed, beyond a question of fact, to give notice or whether it simply viewed focusing on the estoppel issue as a more efficient way of deciding the appeal. The majority did not discuss any of the testimony or other record evidence upon which a finding on notice would rest. Nor did the majority set forth any reasons why it disagreed with Judge O'Connell's dissent. Given the lack of any analysis of whether or not a question of fact as to notice existed, we conclude, after a careful review of the prior opinion and of the record, that the prior panel did not issue a ruling whether or not notice could be decided as a matter of law. Accordingly, the trial court was not precluded from considering it on remand.[1] As a matter of judicial efficiency, we have conducted a full review of

[1] Given the confusing text in the prior opinion, we do not believe that the trial court should be faulted for erring on the side of prudence.

the issue in light of the record and conclude that there are controlling questions of fact that must be determined by the trier of fact on the issue of notice. We do note, though, that this Court has previously held that where a no-fault insurer also provides other insurance policies, a written claim under one of the other policies is sufficient to constitute written notice of an injury under the no-fault act. *State Farm Mut Auto Ins Co v Ins Co of N Am*, 166 Mich App 133, 140-41; 420 NW2d 120 (1988).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro