# STATE OF MICHIGAN

# COURT OF APPEALS

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| FARMERS INSURANCE EXCHANGE, as subrogee of ANDREW GUTIERREZ,<br><br>Plaintiff-Appellant,<br><br>v<br><br>JODIE ANN ROLL,<br><br>Defendant-Appellee. | UNPUBLISHED<br>November 3, 2005<br><br><br><br>No. 256140<br>Lapeer Circuit Court<br>LC No. 02-031829-ND |

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of defendant's motion for summary disposition. We reverse and remand.

## I. FACTS

This case stems from an accident involving a flatbed truck that crashed into an electrical utility pole, sending it careening into a house. Plaintiff insurance company paid for the damages, pursuant to its homeowner's insurance policy and then sought reimbursement from defendant Jodie Roll (defendant), the driver of the vehicle. She claimed the existence of her no-fault car insurance policy as a complete defense, but did not attach that policy or even identify the name of her insurance company. It would appear as if the identity of her insurance company may have been concealed by her attorneys (who were hired by that insurance company to defend her in this suit) both before and after the one year no-fault statute of limitations period expired. Defendant then claimed that she could not be sued because of her no-fault policy and, because the limitations period had expired, her insurance company could not be substituted for her either.

Defendant filed a motion for summary disposition, claiming that her no-fault insurance gave a complete defense to property damage liability and that her insurance company (Modern) could not be substituted for her because the one year statute of limitations under the no-fault act had passed. The trial court agreed and dismissed the case. Plaintiff's motion for reconsideration was denied.

## II. NO-FAULT POLICY

Plaintiff argues that the trial court erred when it granted defendant summary disposition because of her valid no-fault insurance policy. Under the plain language of MCR 2.113(F), defendant was required to attach a copy of the no-fault insurance policy she relied on for her affirmative defense to property liability from her car accident. Plaintiff asserts that because defendant failed to do so, her affirmative defense based on the existence of that no-fault policy must fail. We agree.

A. Standard of Review

A motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

A motion for summary disposition is granted when, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "When deciding a motion for summary disposition under [MCR 2.116](C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

The moving party must identify what issues have no facts in dispute and has the initial burden of supporting his position. *Reed v Reed*, 265 Mich App 131, 140; 693 NW2d 825 (2005). "[T]he party opposing the motion must then demonstrate with supporting evidence that a genuine and material issue of disputed fact exists." *Id*. at 141. If the burden would be on the nonmoving party at trial, then there must be more than just allegations in pleadings; there must be documentary evidence of specific facts demonstrating a genuine issue for trial. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996).

B. Analysis

Under the Michigan no-fault insurance act, "in an action in which the plaintiff seeks property protection benefits arising out of the ownership, maintenance, or use of a motor vehicle the insurer, and not the insured, is the proper party defendant to the action." *Matti Awdish, Inc v Williams*, 117 Mich App 270, 275; 323 NW2d 666 (1982). See MCL 500.3121(1) (setting forth general liability of insurer for accidental damage to property under automobile property protection insurance).

Rules for statutory construction also apply to construction of court rules. *Goodwin v Schulte*, 115 Mich App 402, 407; 320 NW2d 391 (1982). The primary source for the meaning of a statute is the plain language of the statute. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

By its plain language, MCR 2.113(F) requires "(1) If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the

pleading as an exhibit unless the instrument" meets one of four exceptions that neither party claims are applicable to this case.[1]

An affirmative defense claiming complete protection from liability due to the existence of a no-fault insurance policy seems to fit within the plain language of the rule. Such a defense is based on a written instrument, a no-fault insurance contract. But that defense is not based on the wording of a specific provision within the instrument. Rather, it is based on the existence of the instrument itself.

Defendant here claimed, as a complete defense, the existence of Michigan no-fault insurance coverage for the truck in question. Therefore, under the plain language of the rule, she should have attached a copy of the written instrument, the no-fault insurance contract, that formed the basis for this defense. Since she did not, she is precluded from pleading the existence of her no-fault insurance as a defense.

## III. ESTOPPEL

Plaintiff also argues that the doctrine of equitable estoppel should have been applied to preclude defendant's no-fault insurer from relying on the expiration of the one-year limitations period applicable to a claim for property protection benefits. We agree.

### A. Standard of Review

A motion for summary disposition is reviewed de novo on appeal. *Dressel, supra* at 561. A motion for summary disposition is granted when, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "When deciding a motion for summary disposition under [MCR 2.116](C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Scalise, supra* at 10.

The moving party must identify what issues have no facts in dispute and has the initial burden of supporting his position. *Reed v Reed*, 265 Mich App 131, 140; 693 NW2d 825 (2005). "[T]he party opposing the motion must then demonstrate with supporting evidence that a genuine and material issue of disputed fact exists." *Id*. at 141. If the burden would be on the nonmoving party at trial, then there must be more than just allegations in pleadings; there must be documentary evidence of specific facts demonstrating a genuine issue for trial. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996).

### B. Analysis

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[1] As a historical note, the predecessor rule to this one had an exception for insurance policies that was specifically eliminated from the current version of the rule. See 1985 Staff Comment to MCR 2.113 (noting elimination of "exception for insurance policies from the general rule that written instruments on which a claim or defense is based must be attached").

The trial court erred when it granted summary disposition for defendant and denied plaintiff the opportunity to substitute Modern for defendant. As stated previously, it appears that defendant's counsel, who was hired by Modern, may have concealed Modern's identity, information plaintiff was entitled to, for the sole reason of delaying plaintiff from filing suit against Modern until after the one-year limitations period for property claims as provided by Michigan's no-fault insurance laws. Therefore, Modern should be estopped from using the statute of limitations as a defense against being substituted for defendant in this action.

Under the Michigan no-fault insurance act, property damage claims involving motor vehicle accidents "shall not be commenced later than 1 year after the accident." MCL 500.3145(2).

Equitable estoppel operates as a "judicially created exception to the general rule that statutes of limitations run without interruption." *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). Essentially, it is a waiver doctrine "that extends the applicable period of filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar." *Id*. Michigan Courts recognize estoppel in the context of statutes of limitations where there is intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action. *Id*. To invoke the doctrine "one generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party." *Id*.

The first and third factors are clearly applicable in this case. Defendant and her attorneys knew Modern was her no-fault insurance company and yet this identity appears not to have been disclosed. Modern's name was not included in any of the pleadings, even though their defense completely relied on the existence of its policy. The insurance policy was not attached to the pleadings, even though, as discussed in Issue I, MCR 2.113(F). Michigan court rules require such attachment. Even though it was clear from plaintiff's complaint that plaintiff was attempting to name an unknown "John Doe" insurance company as a party to the suit, defendant's counsel answered all claims referencing an unknown insurance company.[2] It appears defendant's counsel repeatedly refused to answer plaintiff's queries directly asking for the name. Our examination of the record discloses that it took five months of queries and a court order to make defendant's counsel finally reveal this vital piece of information to plaintiff.

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[2] The "John Doe" insurance company referred to in plaintiff's complaint is characterized as the insurance company for Beard, not defendant, because plaintiff apparently was unaware at the time that the vehicle, if it had insurance at all, was insured through defendant. It would seem to this Court as if defendant's counsel knew, or should have known from talking with defendant, that the vehicle was insured solely through defendant's no-fault insurance carrier. However, defendant responded to the "John Doe" claims that "this Defendant is without sufficient information to neither admit nor deny the allegations . . . and therefore, leaves Plaintiff to its proofs." We find these to border on being misrepresentations.

It is true that only the omission from the answer and the first two calls to defendant's attorneys were within the limitations period, but the pattern of behavior is clear. It would appear that defendant's attorneys relied on Modern's policy as their sole defense, yet nowhere in the answer did they identify Modern.

While the first and third factors of equitable estoppel are met, whether the second factor is met is not as clear cut. Prior cases have generally only found equitable estoppel in situations where an insurer's conduct led an insured to believe they would be covered, induced them not to sue, and then the insurer let the limitations period pass, changed position, and then denied coverage while claiming a lawsuit was barred by the statute of limitations. *Cincinnati Ins*, *supra*. This case is somewhat different. It is not that plaintiff was prevented from suing Modern based on a belief that the claim would be handled, but rather plaintiff was prevented from suing Modern because plaintiff did not know Modern's identity. What is similar here is that the apparent concealment was intended to prevent the filing of a lawsuit within the limitations period. In that respect, one could say that defendant's counsel expected that plaintiff would "rely" on the concealment because defendant's counsel knew that plaintiff did not know Modern's identity and had no sure way to find out beyond asking defendant.

In fairness, a case against such "reliance" might be made when one considers that plaintiff is a sophisticated insurance company and, as such, is presumed to be well aware of Michigan insurance law. *Home Ins Co v Rosquin*, 90 Mich App 682, 686; 282 NW2d 446 (1979). One might contend that plaintiff ought to be fully aware of the one-year statute of limitations under the no-fault act, and should have acted accordingly. But the facts in this case are an unusual departure from a typical auto accident.

First, though it was caused by a vehicle, the damage was damage to a house, not to another vehicle. It included damage to a power line that caused severe electrical damage to a residence. As plaintiff claimed, resolving all of the related issues, making repairs, and coming up with a final cost calculation would take longer than it would to evaluate the property damage done to another motor vehicle.

Second, the owner of the vehicle, a vehicle owned by a business, did not carry insurance on the vehicle, but instead had his employee insure it with her own personal policy. This is an atypical situation, something plaintiff, even as an experienced insurer, could not reasonably have expected. At the very least, discovering this and sorting out who carried no-fault insurance, if anyone, makes for a complication that reasonably would add additional time to plaintiff's attempts to locate a no-fault insurer. This was further aggravated by the apparently undisputed fact that Beard, the owner of the truck in question, never replied to a single one of plaintiff's inquiries.

Finally, the police report of the incident did not identify an insurer, only the name "Richard Clark Jr[.]," and did not give any contact information for that individual. Here, as defendant points out, plaintiff could have guessed that he was an insurance agent and looked him up on Michigan's on-line insurance agent search engine. While there was no contact information there either, and there was also more than one Richard Clark in Michigan, the correct Richard Clark entry did at least list his city and he may have been listed in the phone book, though there is no evidence on record indicating whether his number was listed or not. Plaintiff, perhaps cynically, offered that even if it had followed that lead, Clark likely would have been as

uncooperative as all of the other parties in league with Modern in this case. Regardless, plaintiff should have made the effort, fruitless though it may have been. Nevertheless, taking the facts in the light most favorable to the plaintiff, we conclude that this one lead was insufficient to establish the identity of defendant's insurer.

The facts in this case, taken together, create multiple, independent delays not likely seen in a typical auto accident case. There were circumstances that made it difficult to ascertain, independent of assistance from defendant, the name of defendant's no-fault insurance company. It appears that this case may have involved concealment of the name of defendant's no-fault insurance company with the only reasonably imaginable purpose being to prevent plaintiff from filing suit against that company before the limitations period expired.

"The purpose of statutes of limitation is to deny a remedy to a party who has been unreasonably negligent in asserting his rights." *Smith v Dep't of Treasury*, 163 Mich App 179, 183; 414 NW2d 374 (1987). There are multiple rationales underlying statutes of limitations: "prompt recovery of damages," punishment of "plaintiffs who have not been industrious in pursuing their claims," protection against stale claims, relief for "defendants of the prolonged fear of litigation," prevention of fraudulent claims, and the general inconvenience of delay. *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982).

Regardless of what additional steps plaintiff should have taken to discover the name of defendant's no-fault insurer, plaintiff did file this suit well within the limitations period. If plaintiff could have determined Modern's identity from defendant's answers to plaintiff's complaint or had defendant's counsel responded to plaintiff's calls the day before the limitations period expired, plaintiff would have been able to name Modern as a defendant in this case. To bar Modern from using the statute of limitations as a defense would be consistent with the interests of justice.

Any delay here was caused solely by the actions of agents for Modern. Plaintiff tried to include the appropriate no-fault insurer from the beginning, referencing a "John Doe" insurance company in the original complaint, three months before the one-year limitations period expired. Additionally, Modern was fully aware of the accident soon after it happened, and it was informed of the lawsuit days after defendant was served. Finally, as one could infer from the actions taken by defendant's attorneys, apparently to conceal Modern's identity from plaintiff, Modern already had counsel involved in this suit, watching out for its interests. Therefore, there is no prejudice to Modern in allowing a suit against it to go forward despite the expiration of the limitations period. Accordingly, we conclude that Modern (through defendant's counsel acting on its behalf) expected plaintiff to rely on its misconduct and, thus, Modern should have been estopped from raising a statute of limitations defense.

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

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette