STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE HOLLOWAY,

Plaintiff-Appellant,

V

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee,

and

TRAVELERS INSURANCE COMPANY,

Defendant.

UNPUBLISHED
December 21, 2001

No. 219183
Wayne Circuit Court
LC No. 97-736025-NF

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff Lawrence Holloway appeals as of right from the circuit court order granting defendant Citizen Insurance Company of America's motion for summary disposition. We affirm.

I. Facts and Proceedings

On March 28, 1997, plaintiff was a passenger in a company vehicle being driven by a co-worker, Reuben Woolfolk, when an accident occurred in which plaintiff was injured. Despite notice to his employer[1] and the Secretary of State that he was seeking first party no fault benefits, plaintiff was unable to determine the insurer of the vehicle. Plaintiff then filed a claim for PIP benefits with the assigned claims facility of the Michigan Department of State, which, on July 19, 1997, assigned the claim to Travelers Insurance Company (Travelers). See MCL 500.3172.[2]

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[1] Plaintiff was employed by Tripp's Laundering Service. The registered owner of the vehicle was D & D Milnor Laundry Service. Apparently, both Tripp's Laundering Service and D & D Milnor Laundry Service are entities controlled by defendant's insured, Pauze Enterprises.

[2] MCL 500.3172 provides, in part:

(continued…)

On October 22, 1997, plaintiff filed a third party no fault action against Woolfolk, D & D Milnor, and Tripp's. The complaint alleged in part that plaintiff had incurred medical and other related expenses as a result of his injuries, loss of income, and expenses for ordinary and necessary replacement services. In-house counsel for defendant filed an answer to the third party no fault action on behalf of D & D Milnor and an appearance for Woolfolk. During the course of discovery in the third party no fault action, plaintiff and Travelers began to explore whether defendant was the priority insurer to which the first party no fault claim should be submitted. Eventually, plaintiff moved to add defendant as a party to this case, and on July 24, 1998 an amended complaint was filed. Defendant was served with the amended complaint shortly thereafter. After defendant was identified as the insurer of the accident vehicle, Travelers was dismissed with prejudice.[3]

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that because both the suit filed against it and its first notice of the claim were more than one year after the accident, MCL 500.3145(1) bars plaintiff's recovery. Plaintiff argued that because defendant provided a defense for D & D Milnor in the third party no fault action, defendant had at least constructive notice of plaintiff's claim for PIP benefits and that summary disposition should be denied. The trial court, relying on *Allen v Farm Bureau Ins Co*, 210 Mich App 591; 534 NW 2d 177 (1995), granted defendant's summary disposition motion.

II. Standard of Review

This Court's review of a grant of summary disposition is de novo. *Macomb County Prosecutor v Murphy*, 464 Mich 149, 167 n 14; ___ NW2d ___ (2001); *Gyarmati v Bielfield*, 245 Mich App 602, 604; ___ NW2d ___ (2001). Defendant sought summary disposition pursuant to MCR 2.116(C)(8) and (10). In granting the motion the trial court did not state which subrule it relied upon, however, because it is apparent that dismissal occurred pursuant to the statute of limitations found in MCL 500.3145(1), defendant's summary disposition claim should have been brought under MCR 2.116(C)(7).[4] It is well settled that when a defendant brings a summary disposition motion under one subpart of a court rule when it should have been brought under another subpart, this Court will review the order granting summary disposition under the correct rule. See *Wickings v Arctic Enterprises*, 244 Mich App 125, 147; 624 NW2d 197 (2000) and *Michigan Basic v Detroit Edison*, 240 Mich App 524, 529; 618 NW2d 32 (2000). See also

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(…continued)

> (1) A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through an assigned claims plan if no personal protection insurance is applicable to the injury [or] no personal protection insurance applicable to the injury can be identified, . . .

[3] The dismissal of Traveler's has not been appealed; as such, Travelers is not a party to this action.

[4] We note that the trial court did not indicate which subrule it relied on in granting defendant's motion.

Gibson v Neelis, 227 Mich App 187, 189; 575 NW2d 313. Therefore, we will analyze the trial court's grant of summary disposition as though it was granted pursuant to MCR 2.116(C)(7).

In deciding a motion for summary disposition pursuant to MCR 2.116(C)(7), all affidavits, pleadings, and other documentary evidence submitted by the parties are reviewed by the trial court in the light most favorable to the nonmoving party. The motion should only be granted if no factual development could provide a basis for recovery. *Cole v Lambroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000). See also *Brennan v Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001) and *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238; 625 NW2d 101 (2001).

III. Analysis

MCL 500.3145(1) 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 the injury unless written notice of the 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 benefits for the injury.

On appeal, plaintiff does not dispute that his action against defendant was brought after the one-year time limit provided under MCL 500.3145(1). Plaintiff also does not argue that his filing of an action against Travelers, through the assigned claims facility, tolled the one year time limit as it related to defendant. Instead, plaintiff argues that defendant had constructive notice of his claim and that he substantially complied with the notice requirement of § 3145(1). We disagree.

MCL 500.3114 (3) provides in pertinent part:

> An employee,…who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

First, plaintiff contends that the notice to his employer that he was seeking first party no fault benefits constituted notice to defendant, which pursuant to MCL 500.3114(3), was the priority insurer. Plaintiff's reliance on *Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121; 290 NW2d 408 (1980), to assert this argument is misplaced. In *Dozier*, this Court found that the plaintiff's action could proceed against the defendant insurer, despite the fact that plaintiff's letter to defendant was sent after the statute of limitation and notice periods had expired, specifically because the defendant insurer had waived its right to assert these defenses by responding to the plaintiff's letter. Specifically, the Court stated that:

> [I]n view of the defendant's acknowledgement of plaintiff's letter (rather than denial of liability or a request for additional information) and its adjuster's

> request to "forward all specials you have in your file regarding this loss" we are persuaded that *defendant waives its right to assert the insufficiency of the notice*. Since the notice provision is for the protection of the insurer, it follows that the insurer can waive the adequacy of the notice. While we do not conclude that defendant must establish prejudice in order to require strict enforcement of the notice provision, . . . we note that all of the purposes for which statutory notice is intended have been either met or *waived* in the instant case. [*Id*. at 130 (internal citations omitted) (emphasis added).]

There are important factual distinctions between *Dozier* and the case at bar. There, the plaintiff provided a letter directly to the insurance carrier. *Id*. at 123. Here, plaintiff never provided defendant with a letter indicating that he intended to seek PIP benefits; instead, plaintiff provided a letter to his employer requesting that the notice be forwarded to defendant. Since it is clear that this notice was not given to defendant as requested, no waiver occurred and *Dozier* is inapplicable here.

Second, plaintiff argues that defendant had constructive notice of his claim because it was aware of the third party no fault lawsuit against D & D Milnor and Woolfolk. Again, we disagree. To this end, we note that in *Taulbee v Mosley*, 127 Mich App 45, 47-48; 338 NW2d 547 (1983), a very similar argument was made by the plaintiff which this Court rejected:

> Plaintiff argues that the initiation of a suit against the insured driver within one year of the accident is sufficient notice to the driver's insurer under MCL 500.3145(1); MSA 24.13145(1).
>
> This Court has held that, when an action is commenced against one party, the statute of limitations is not tolled against other potential parties who have not been named as defendant in the suit. Although this rule is not absolute, this Court has applied it to cases in which the *plaintiff argued a lack of knowledge regarding the identity of an alleged tortfeasor*. We are not persuaded in this case by plaintiff's argument that, as long as the action is brought and notice is given as quickly as possible, the purposes of the no-fault statute are fulfilled. [Internal citations omitted; emphasis added.]

See also *Hunt v Citizens Ins Co*, 183 Mich App 660, 666; 455 NW2d 384 (1990).

In addition, the complaint in plaintiff's third party no fault action fails to allege that plaintiff was employed by Tripps Laundering Service at the time of the accident. Thus, service of the amended complaint on defendant was insufficient notice that plaintiff specifically claimed first party no fault benefits from defendant as the insurer of plaintiff's employer's vehicle, as opposed to some other insurer under MCL 500.3114(1) or (2).

Finally, assuming but not deciding that plaintiff was diligent in his attempts to identify the appropriate insurer, we note that this Court has routinely rejected arguments that public policy should dictate a tolling of the time limit found in § 3145(1). In *Pendergast v American Fidelity Fire Ins Co*, 118 Mich App 838, 840; 325 NW2d 602 (1982), the Court stated:

> The legislative intent is clear and unambiguous. The Courts should not enlarge nor alter the reciprocal rights and obligations of claimant and insurer under such circumstances. We note that in tort cases involving other statutes of limitations, no tolling of the statute occurs while a claimant seeks to discover, *or in the exercise of due diligence should discover*, the identity of the tortfeasor. [Internal citations and footnote omitted; emphasis added.]

See also *Allen v Farm Bureau Ins Co*, 210 Mich App 591, 600; 534 NW2d 177 (1995) and *Hunt, supra*. (Citing with approval *Pendergast, supra*.)

III. Conclusion

We find that the trial court correctly determined that this case was time barred. Accordingly, we affirm the trial court's grant of summary disposition in this case.[5]

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder

[5] We also note that, on appeal, plaintiff, in passing suggests that because defendant's insured was on notice of the accident, equitable estoppel should prevent defendant from relying on the statute of limitations found in § 3145. However, because plaintiff (1) failed to argue an estoppel theory below, (2) failed to include it in his questions presented, and (3) did not provide any supporting authority for his position, we find the issue to be both unpreserved and abandoned and therefore refuse to address it. See *Spencer v Citizens Ins Co*, 239 Mich App 291, 310; 608 NW2d 113 (2000), citing *Fast Air, Inc v Knight*, 235 Mich App 541, 541; 599 NW2d 489 (1999), *Central Cartage Co v Fewless*, 232 Mich App 517, 529; 591 NW2d 422 (1998), citing *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997), and *Allen, supra* at 600 n 1.