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STATE OF MICHIGAN

COURT OF APPEALS

LM GENERAL INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED December 16, 2021
v	No. 353697 Wayne Circuit Court
HARTFORD INSURANCE COMPANY, Defendant,	LC No. 19-006793-CZ
and	
TRUMBULL INSURANCE COMPANY, Defendant-Appellee.	

Before: GLEICHER, P.J., and CAVANAGH and LETICA, JJ.

LETICA, J. (*dissenting*).

I respectfully dissent as this Court has held that when a plaintiff insurance company mistakenly pays no-fault benefits when another insurance company had the obligation to pay them due to its higher priority under the no-fault statute, the plaintiff's claim for reimbursement is one of subrogation and the limitations in MCL 500.3145(1) apply. *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343-344, 347; 715 NW2d 324 (2006). Plaintiff LM General Insurance Company (LM General) identified itself as Fectoria Hana's (Hana's) subrogee when it filed its complaint. As Hana's subrogee, LM General possessed the same rights as Hana and the trial court properly granted defendant Trumbull Insurance Company's (Trumbull's) motion for partial summary disposition and limited LM General's recovery under the one-year-back rule.

I. FACTUAL BACKGROUND

Hana was in a motor vehicle accident on July 28, 2016. On July 27, 2017, Hana filed a separate no-fault action for personal injury protection (PIP) benefits naming LM Automobile

Insurance Company and Hartford Insurance Company (Hartford) as defendants.[1] Hana alleged that defendant, presumably LM General, had paid some PIP benefits after the accident, "but has now wrongfully continued to deny payment . . . ." Hana specifically sought: (1) "[j]udgment against the [d]efendant in whatever amount the [p]laintiff is found to be entitled for her unpaid benefits including costs, interest and [p]laintiff's actual attorney fees," (2) an adjudication of "the [d]efendant's liability for No-Fault Benefits payable to [p]laintiff," (3) a determination of "the total amount due and payable to the [p]laintiff by this [d]efendant pursuant to PIP [b]enefits," and (4) costs. On October 28, 2018, the trial court entered an order granting summary disposition to LM General. The order does not indicate the basis for summary disposition, but it mentioned that no response had been filed to LM General's motion, and, therefore, it found that Hana consented to the trial court granting summary disposition on the basis requested by LM General.[2] During the instant action, LM General asserted that it had requested summary disposition in Hana's separate lawsuit on the basis that Hartford was first in priority to pay Hana's PIP benefits. LM General supported its assertion with an email from Hartford's counsel that conceded Hartford was first in priority. The email further reflected that Hartford's counsel asked LM General's counsel's to "send over an order" and added that Hartford's counsel did not have Hana's attorney's email and that attorney should be included in order to "stip you guys out."[3] A few days after the order granting summary disposition to LM General was entered, Hana and Hartford stipulated to an order dismissing Hana's lawsuit with prejudice as to Hartford, the remaining defendant.[4]

Over five months later, on May 8, 2019, LM General, as Hana's subrogee, filed a complaint, naming Hartford as the defendant. LM General generally described Hana's prior action and alleged that Hartford had failed to reimburse LM General for PIP benefits totaling $210,321.59 that it had paid to Hana despite Hartford being first in priority. LM General then asked the court to order: (1) Hartford was in the highest priority, (2) Hartford had to reimburse LM General "for all amounts that may be owed . . . in addition to loss adjustment costs, interest[] and attorney[] fees pursuant to MCL 500.3172,"[5] or (3) any additional relief that the court deemed appropriate.

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[1]While LM General initially named Hartford as the defendant in its complaint in this case, Trumbull Insurance Company (Trumbull) answered the complaint and the parties subsequently stipulated to substituting Trumbull as the proper party defendant and amending the caption.

[2] Neither party provided a copy of LM's summary disposition motion in Hana's case; however, the trial court was the same in both actions.

[3] As recognized by the majority, LM General neither filed a cross-claim for reimbursement nor sought to have a judgment entered directing Hartford to reimburse LM General for PIP benefits it had paid for Hana.

[4] See *Hana v The Hartford Ins Co*, unpublished order of the Wayne Circuit Court, issued December 3, 2018 (Docket No. 2017-011268-NF). Judicial notice of this public document is appropriate under MRE 201. See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015).

[5] MCL 500.3172 applies when the Michigan Automobile Insurance Placement Facility assigns an insurer to provide PIP benefits to a claimant. This Court has held that the insurer's statutory right

Trumbull answered the complaint and then moved for partial summary disposition under the one-year-back rule in light of the fact that LM General sought to recover expenses it had incurred on Hana's behalf more than a year before LM General filed its complaint. LM General responded that its suit was not time-barred. The trial court commented to LM General's counsel that the unpublished case he had provided was inapt and that this case involved a rather straightforward application of the one-year-back rule. The trial court then granted partial summary disposition to Trumbull as to any expenses that LM General had incurred before May 8, 2018.

LM General filed a motion for reconsideration, arguing that it was not subject to the one-year-back rule and its suit was proper under MCL 600.5809, which permits "an action to enforce a noncontractual money obligation" to be filed within 10 years if that obligation is "founded upon a judgment or decree rendered in a court of record of this state . . . ." The trial court denied LM General's motion for reconsideration.

The parties later stipulated to $778.87 as the amount LM General had incurred after May 8, 2018, and the trial court entered a final judgment in LM General's favor.

II. DISCUSSION

On appeal, LM General maintains that the trial court erred by granting partial summary disposition to Trumbull on the basis of the one-year-back rule because LM General was not seeking to recover PIP benefits under the no-fault act. Instead, LM General argues, it was simply seeking to enforce the trial court's judgment in Hana's earlier action that held Trumbull to be of higher priority than LM General. LM General relies on MCL 600.5809(3) and argues that, as an enforcement action, this action is subject only to a 10-year limitations period, not the one-year-back rule.

A. STANDARDS OF REVIEW

Issues of statutory interpretation and a trial court's decision on a motion for summary disposition are reviewed de novo. *In re Estate of Koch*, 322 Mich App 383, 392; 912 NW2d 205 (2017).

> A motion brought pursuant to MCR 2.116(C)(10)[6] tests the factual sufficiency of a claim. When considering such a motion, a trial court must consider all evidence

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to reimbursement from the defaulting insurer after paying PIP benefits under the assigned claims plan is independent of the insured and is not based on a subrogation theory. *Allen v Farm Bureau Ins Co*, 210 Mich App 591, 596-597; 534 NW2d 177 (1995). Moreover, the two-year limitation period in MCL 500.3175(3), not the one-year rule, applies in such cases. *Id*. at 597-599.

[6] Although Trumbull moved for summary disposition under MCR 2.116(C)(7) and (10), the trial court did not identify either court rule in its order granting partial summary disposition. Because the one-year-back rule is not a statute of limitations, I assume that the trial court relied on MCR 2.116(C)(10). See *Linden v Citizens Ins Co of America*, 308 Mich App 89, 97-99; 862 NW2d 438 (2014) (differentiating between the "statute of limitations" in the first sentence of

> submitted by the parties in the light most favorable to the party opposing the motion. A court may only grant the motion when 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. 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. [*Highfield Beach at Lake Mich v Sanderson*, 331 Mich App 636, 653; 954 NW2d 231 (2020) (quotation marks and citations omitted).]

B. ANALYSIS

The trial court granted partial summary disposition to Trumbull as to any loss that LM General incurred more than one year before it filed its complaint on the basis of the one-year-back rule in MCL 500.3145. When LM General filed its complaint, MCL 500.3145(1) read:

> An action for recovery of [PIP] 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 [PIP] 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 first two sentences of MCL 500.3145(1) impose a one-year statute of limitations on the commencement of an action for PIP benefits, while the third sentence, commonly referred to as the one-year-back rule, limits the damages that may be recovered even if the one-year statute of limitations is satisfied. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005); *Linden v Citizens Ins Co of America*, 308 Mich App 89, 97-99; 862 NW2d 438 (2014). When a secondary insurer pays PIP benefits that another insurer was obligated to pay, the secondary insurer has a cause of action against the primary insurer as the insured's subrogee. *Titan Ins Co,* 270 Mich App at 343. "A subrogee acquires no greater rights than those possessed by his subrogor and the subrogated insurer is merely substituted for his insured." *Id*. at 343-344 (quotation marks and citation omitted).

On appeal, LM General recognizes that if this general rule applied, the trial court ruled correctly.[7] LM General, however, contends that the general rule does not apply because "[t]his is

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MCL 500.3145(1) and the "limitation on damages" that is referred to as the one-year-back rule); *Black's Law Dictionary* (11th ed) (defining "statute of limitations" as "[a] law that bars *claims* after a specified period . . . [.]") (emphasis added).

[7] The Supreme Court recently ordered an opinion of this Court that followed *Titan* to be vacated and reconsidered in light of *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, ___ Mich ___; ___ NW2d ___ (2020). *Ravenell v Auto Club Ins Ass'n*, ___ Mich ___; 964 NW2d 577

not a no-fault insurer's new action for equitable subrogation to recover benefits mistakenly paid." Rather this "is a subrogation action to enforce a prior order of the court." Stated otherwise, Hana's entitlement to PIP benefits was determined in Hana's 2017 suit and LM General, as Hana's subrogee, seeks to enforce the earlier order that determined Trumbull was the highest priority insurer under MCL 600.5809, which provides:

> (1) A person shall not bring or maintain an action to enforce a noncontractual money obligation unless, after the claim first accrued to the person or to someone through whom he or she claims, the person commences the action within the applicable period of time prescribed by this section.
>
> (2) The period of limitations is 2 years for an action for the recovery of a penalty or forfeiture based on a penal statute brought in the name of the people of this state.
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> (3) Except as provided in subsection (4), the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record of this state, or in a court of record of the United States or of another state of the United States, from the time of the rendition of the judgment or decree. The period of limitations is 6 years for an action founded upon a judgment or decree rendered in a court not of record of this state, or of another state, from the time of the rendition of the judgment or decree. A judgment entered in the district court of this state before May 25, 1973, is a judgment of a court not of record. A judgment entered in the district court of this state on or after May 25, 1973, except a judgment entered in the small claims division of the district court, is a judgment of a court of record. Within the applicable period of limitations prescribed by this subsection, an action may be brought upon the judgment or decree for a new judgment or decree. The new judgment or decree is subject to this subsection.
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> (4) For an action to enforce a support order that is enforceable under the support and parenting time enforcement act, Act No. 295 of the Public Acts of 1982, being sections 552.601 to 552.650 of the Michigan Compiled Laws, the period of limitations is 10 years from the date that the last support payment is due under the support order regardless of whether or not the last payment is made.

LM General's initial hurdle is that it first raised this contention in its motion for reconsideration. Therefore, it is not properly preserved for appeal. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich 513, 519; 773 NW2d 758 (2009). This Court, however, "may review an unpreserved issue if it is an issue of law for which all the relevant facts are available." *Id.* (citation omitted).

Assuming that is true here because Trumbull agrees that it was first in priority, LM General's next hurdle is establishing that the order granting summary disposition to it in Hana's earlier suit was a "judgment" or "decree." The majority does not directly address LM General's

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(2021). However, despite the policy statements contained in *Esurance*, it did not address the issues presented here.

argument; instead, it notes that in hindsight LM General "should have demanded entry of a judgment" in Hana's earlier suit. Thus, the majority appears to recognize that the order granting LM's motion for summary disposition was not a judgment.

LM General is correct that an action to enforce a judgment for no-fault benefits is not an action pursued through the no-fault act. "When a party breaches a substantive obligation arising out of a legal judgment, that breach gives rise to an independent cause of action. The harmed party then acquires the right to bring an action to enforce the judgment." *Dorko v Dorko*, 504 Mich 68, 77; 934 NW2d 644 (2019). Thus, if a party breaches a substantive obligation arising out of a judgment with an underlying basis in PIP benefits, the harmed party acquires a right to bring an action to enforce the no-fault judgment *independent* of the no-fault act. *Id*. Because such an action is not brought under the no-fault act, it is not subject to the one-year-back rule.

Although an action to enforce a previous no-fault judgment is not subject to the one-year-back rule, LM General's argument that this is an action to enforce a prior judgment is unpersuasive. In the previous action brought by Hana, the trial court did not indicate the basis on which it was granting summary disposition. The court merely indicated it was granting LM General's motion. See *Hana v The Hartford Ins Co*, unpublished order of the Wayne Circuit Court, entered November 28, 2018 (Docket No. 2017-011268-NF). Even so, the parties agree that the only issue the trial court resolved with its order granting summary disposition was that Trumbull (Hartford) was higher in priority than LM General to pay Hana's no-fault benefits. That being so, LM General is not seeking to merely enforce the previous judgment[8] as it alone would be insufficient to provide the monetary relief LM General seeks. In order to be entitled to the relief LM General seeks, it would have to satisfy a number of additional requirements provided for in the no-fault act. Specifically, LM General would have to establish that the expenses it paid were allowable expenses under MCL 500.3107(1)(a). To be allowable expenses, they must have been reasonable in amount and reasonably necessary for Hana's care, recovery, or rehabilitation. MCL 500.3107(1)(a). Because LM General must prove such facts before it is entitled to recover PIP benefits it paid to Hana from Trumbull, LM General's action is not one to enforce a previous judgment; instead, it is "[a]n action for recovery of [PIP] benefits payable under" the no-fault act. MCL 500.3145(1). Stated another way, Trumbull has not breached a substantive obligation to compensate LM General for the PIP benefits LM General paid to Hana that was imposed by a previous judgment. *Dorko*, 504 Mich at 77. Instead, Trumbull is alleged to have breached a substantive obligation imposed by the no-fault act itself. Accordingly, LM General does not have a cause of action independent of the no-fault act, *Dorko*, 504 Mich at 77, and the one-year-back rule applies to LM General's action. Thus, LM General "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." MCL 500.3145(1). Because there is no genuine issue of material fact that LM General commenced this action on May 8, 2019, the trial court properly granted partial summary disposition to Trumbull under MCR 2.116(C)(10) as to any loss LM General incurred before May 8, 2018. *Highfield Beach*, 331 Mich App at 653.

[8] See footnote 4.

The majority disagrees, concluding that *Allstate Ins Co v State Farm Mut Auto Ins Co*, 321 Mich App 543; 909 NW2d 495 (2017), controls the outcome here. But that case is distinguishable as it involved a statutory right to reimbursement by an insurer assigned through the Michigan Assigned Claims Plan that was pursued under a separate statutory statute of limitations. *Id*. at 546-548. And this Court specifically recognized that the applicable statute "does not limit the damages that may be recovered in a timely action," unlike the one-year-back rule . *Id*. at 546-548, 562.

In the majority's view, this is a reimbursement action outside the no-fault act that does not serve the purpose of the one-year-back rule. But our caselaw is clear that this is a subrogation action for PIP benefits for a claimant under the no-fault act. *Titan Ins Co*, 270 Mich App at 344-345; *Amerisure Cos v State Farm Mut Auto Ins Co*, 222 Mich App 97, 103; 564 NW2d 65 (1997); *Fed Kemper Ins Co v Western Ins Cos*, 97 Mich App 204, 209; 293 NW2d 765 (1980). But see *Madden v Employers Ins of Wausau*, 168 Mich App 33; 424 NW2d 21 (1988). I follow *Titan* and *Amerisure* as required by MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.").

For these reasons, I would affirm the trial court's order granting partial summary disposition to Trumbull.

/s/ Anica Letica