STATE OF MICHIGAN

COURT OF APPEALS

TYROSH BROWN, Plaintiff-Appellant,	UNPUBLISHED December 18, 2012
v	No. 308478 Kent Circuit Court
AAA MICHIGAN INSURANCE, Defendant-Appellee.	LC No. 11-005465-CB

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff had a homeowner's insurance policy (the "Policy") with defendant that was in effect at the time that plaintiff claimed a property loss due to theft in May of 2005. Plaintiff's mother contacted defendant to make the claim on May 11, 2005. Defendant attempted to adjust the claim. An extended period passed, during which time the parties engaged in off-and-on discussions, plaintiff purportedly failed at times to communicate with defendant, defendant provided claim forms that apparently were never completed, and defendant closed and re-opened its file on more than one occasion, only to again be asked by plaintiff or his mother about the claim. During at least a portion of this time, plaintiff apparently was in confinement, and defendant's communications occurred with plaintiff's mother.

Defendant maintains that on November 26, 2008, a settlement offer was "communicated" to plaintiff, which was less than his demand. Defendant claims that plaintiff was "advised" that the offer was final and that any "additional sums" were denied. Plaintiff initiated litigation on June 15, 2011.[1] Defendant moved for summary disposition, pursuant to MCR 2.116(C)(7) and

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[1] The record reflects that plaintiff may have first initiated suit in 2010, but failed to accomplish service of process on defendant at that time, and then filed the instant litigation in 2011.

(C)(10)[2], based upon the applicable one-year period of limitations. Plaintiff did not respond to, or appear for, the hearing on that motion. The trial court granted summary disposition in favor of defendant, under both MCR 2.116(C)(7) and (C)(10), on statute of limitations grounds. Plaintiff now appeals.

II. STANDARD OF REVIEW

As an initial matter, we note that plaintiff's *pro per* brief on appeal does not conform to the requirements of MCR 7.212(C) in many ways. Most notably, there is no citation to authority and he does not state the legal basis for his claim. On appeal, argument must be supported by citation of appropriate authority. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626; 750 NW2d 228; MCR 7.212(C)(7). Failure to address the merits of an assertion of error on appeal constitutes abandonment of the issue. *Woods*, 277 Mich App at 626-627 (citation omitted). Nevertheless, because we conclude that the issue presented requires our consideration, and because the issue raised is one of law and the record is factually sufficient, we address plaintiff's claim. MCR 7.216(A)(7); *VanBuren Twp v Garter Belt Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003) (citation omitted).

The issue of whether the trial court properly granted summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008) (citation omitted). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Summary disposition is properly granted pursuant to MCR 2.116(C)(7) when, after considering the evidence in the light most favorable to the nonmoving party, there is no factual dispute and the claim is barred by a statute of limitations. *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008) (citation omitted). Summary disposition pursuant to MCR 2.116(C)(10) is proper if, when considering the evidence in the light most favorable to the nonmoving party, "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. 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 could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. STATUTE OF LIMITATIONS

Defendant's argument is simple: plaintiff made a claim under the Policy on May 11 2005; a one-year statute of limitations applied; the statute was tolled from the time of the claim

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[2] While MCR 2.116(C)(7) appears to be the primary basis for defendant's statute of limitations argument, defendant's additional reliance on MCR 2.116(C)(10) appears premised on the Affidavit of Marcia Peoples, a claims specialist who was employed by defendant, and who was assigned by defendant to adjust and process plaintiff's claim. The language quoted above derives from Ms. People's affidavit.

to the time the claim was formally denied; defendant formally denied the claim on November 26, 2008; plaintiff did not file suit within one year thereafter. Hence, plaintiff's claim is time-barred.

Without the benefit of any opposition to defendant's summary disposition motion, the trial court concluded that a precise computation of time for purposes of assessing the statute of limitations issue would be "utterly pointless because no matter how you add up the time in this case, no matter what sort of beneficial tolling rules you might apply, the bottom line is Mr. Brown is nowhere near being in time with this law suit." The trial court therefore granted summary disposition to defendant.

While plaintiff's claim may (or may not) be barred by the statute of limitations,[3] or otherwise defective, and while we acknowledge the difficulties that appear to have been presented by plaintiff's lack of diligence in communicating with defendant and in documenting his claim, we conclude that the issues are not as simple as they may appear, and that the record does not, at least at this juncture, support an award of summary disposition.

A. THE POLICY

Initially, we note that the Policy reflects the following with regard to the applicable statute of limitations:

> **10. SUIT AGAINST US**
>
> **We** may not be sued unless there is full compliance with all the terms of this Policy. Suit must be brought within one year after the loss or damage occurs. [Emphasis in original.]

On its face, therefore, the Policy does not include any language providing for a tolling of the limitations period.

[3] We confine our analysis to those addressed in this opinion. We do not address other factors that may impact a statute of limitations analysis, such as whether the tolling of the limitations period may have ceased, perhaps temporarily, at such times as defendant closed plaintiff's claim, or whether (or for how long) the tolling re-commenced at such times as defendant re-opened plaintiff's claim. But see *Smitham v State Farm Fire & Cas Co*, ___ Mich App ___; ___ NW2d ___; WL 3238102 (2012), slip op at 9 (finding "questionable" the defendant insurer's calculation because it "assumes that the period from the initial denial to the reopening of the claim (323 days) should be counted against the one-year period. However, where an insurer denies a claim and then agrees to reopen it, the initial denial is effectively withdrawn."). *Id.* at 9 (footnotes omitted), citing *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 86-87; 795 NW2d 205 (2010). In any event, those issues, and others, are best addressed first by the trial court.

B. APPLICABILITY OF THE TOLLING PROVISION OF MCL 500.2833

Yet, MCL 500.2833(1)(q) provides as follows:

> That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. *The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability*. [Emphasis added.]

We note that MCL 500.2833 governs fire insurance policies. The Policy in question, while inclusive of coverage for loss due to fire, is a homeowner's policy that more broadly provides coverage for loss deriving from property damage or bodily injury resulting from causes other than and in addition to fire. In this instance, plaintiff's claimed loss related not to a fire, but to a claimed theft.

A threshold issue, therefore, for the resolution of which we have found no authority, is whether MCL 500.2833 applies to an action brought under a policy regarding a claim for a non-fire loss, where the policy includes, but is not limited to, coverage for loss due to fire. We need not decide that issue, however, in the context of this appeal, because defendant appears to concede that MCL 500.2833 applies to the Policy.[4]

Where it applies, that section is mandatory. *Randolph v State Farm Fire & Cas Co*, 229 Mich App 102, 105; 580 NW2d 903 (1998). A policy must "specify" the language of MCL 500.2933(1)(q), and a policy provision that is contrary to MCL 500.2933(1)(q) is absolutely void and unenforceable. *Smitham v State Farm Fire & Cas Co*, ___ Mich App ___; ___ NW2d ___; WL 3238102 (2012), slip op at 7-8. The general policy conditions of the Policy in question further state:

> **11. CONFORMITY WITH STATUTES**
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> If the terms of this Policy are in conflict with the statutes of the State in which this Policy is issued, they shall be as set forth in the statutes of that State. [Emphasis in original.]

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[4] We note that *Smitham* also presented a claimed loss due to theft, and this Court applied MCL 500.2833. Slip op at 1. However, as the Court noted in that case, it similarly did not confront the issue that we identify here, since "[a]lthough this cases addresses the loss of personal property due to theft, the parties agree that plaintiff's insurance policy was a fire insurance policy, and that MCL 500.2833(1)(q) controls here." *Id.* at 3, n 6. While it does not appear that the parties have "agreed" on that point in the instant case, defendant not only does not contest it, but instead presents an argument that is *based* on the application of the tolling provision of MCL 500.2833(1)(q).

For these reasons, we therefore assume, for purposes of this appeal, that MCL 500.2833(1)(q) controls here.

C. WHAT CONSTITUTES A "FORMAL DENIAL" OF A CLAIM SO AS TO END THE TOLLING OF THE STATUTE?

In applying the tolling provision of MCL 500.2833(1)(q), the question ultimately to be decided is whether defendant's claimed November 26, 2008 communication to plaintiff constituted a "formal denial" of plaintiff's claim, such that the tolling of the limitations period ceased. If it did, as the trial court found, plaintiff's claim is time-barred. If it did not, then it remains conceivable that such tolling continued thereafter.

In answering that question, we look for guidance to this Court's prior decisions. In *Smitham*, the plaintiff submitted a claim of loss to the defendant insurer for stolen property. *Id.* at 1. The defendant initially denied the claim, and then reopened the claim almost a year later. *Id.* at 1-2. Eventually, the defendant sent a letter to the plaintiff denying all liability for plaintiff's claim. *Id.* at 2. However, the defendant subsequently issued a check to the plaintiff for $4,700.00. *Id.* The plaintiff cashed the check, and later filed suit, alleging that the defendant had breached the insurance contract by underpaying the plaintiff's claim. *Id.* The defendant responded by moving for summary disposition, alleging, *inter alia*, that the plaintiff's claim was barred by the statute of limitations and that the tolling provision of MCL 500.2833(1)(q) did not render the plaintiff's claim timely. *Id.* The trial court granted the defendant motion.

1. KNOWLEDGE OF PAYMENT/SETTLEMENT OFFER AMOUNT IS INSUFFICIENT

This Court in *Smitham*, relying on *Jimenez v Allstate Indemnity Co*, 765 F Supp 2d 986 (ED Mich, 2011),[5] as well as *Bourke v North River Ins Co*, 117 Mich App 461; 324 NW2d 52 (1982), concluded that the insurer had not shown plaintiff's claim to be untimely, and reversed the trial court's grant of summary disposition in favor of the insurer. *Smitham*, slip op at 4-5. This Court noted in part that:

> defendant's argument assumes that Smitham's awareness of the amount of defendant's payment is sufficient to end the tolling period. Pursuant to MCL 500.2833(1)(q), tolling begins with the notice of loss and ends when the insurer formally denies the claim. Moreover, "under this state's jurisprudence, a 'formal denial' must be explicit and direct." *An insured's awareness of the amount of the payment, by itself, does not establish a formal denial of the claim.* [*Id.* at 9 (footnotes omitted)(emphasis added).]

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[5] Although the decisions of lower federal courts may be persuasive, they are not binding on state courts. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NM2d 325 (2004). However, decisions of lower federal courts can be "highly persuasive" when interpreting a federal constitutional right. See *Abdur-Ra'oof v MDOC*, 221 Mich App 585, 589; 562 NW2d 251 (1997).

In the instant case, there was no *payment* as such; rather, there was only a settlement *offer*. But just as *Smitham* established that an insured's knowledge of the amount of *payment* – by itself – is insufficient to establish a formal denial of a claim, so too must an insured's knowledge of the amount of a settlement *offer* – by itself – be similarly insufficient.

2. DENIAL OF "FURTHER" LIABILITY MAY SUFFICE

A related preliminary question arises as to whether, in making a "final" settlement offer that denies any "additional sums" over the amount of the offer, an insurer has "formally denied" a claim under MCL 500.2833(1)(q). We note that there exists authority to the effect that a formal denial of liability need not necessarily deny *all* liability; rather, a sufficiently clear denial of *further* liability may suffice, at least under some circumstances, to end the tolling of the statute of limitations. Defendant thus argues that plaintiff "will find no help in" *Smitham*, which found it "reasonable" to "[c]onclud[e] that tolling may occur with respect to an action for underpayment of a claim," because "an insurer may end the tolling period by explicitly indicating that the insurer is denying all liability in excess of what it has paid." *Smitham*, slip op at 8. Further:

> As suggested in *Jimenez*, the insurer re-triggers the running of the one-year period by *"notify[ing] the insured in no uncertain terms that it is denying all liability in excess of what [it] has paid, thereby placing the insured on clear notice that the limitation period has resumed running."* [*Id.* at 9 (footnotes omitted)(emphasis added).]

Of course, notwithstanding defendant's characterization, this was not the *holding* of *Smitham*. Rather, the statement was dictum.[6] "[S]tatements concerning a principal of law not essential to the determination of the case are obiter dictum and lack the force of an adjudication." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985).

But *Jimenez*, in turn, relied on *Bourke* as "demonstrat[ing] that denial of liability is broader than denial of coverage, and includes underpayment of a claim. In other words, a denial of liability includes a denial of *further* liability above the amount offered for the loss." *Jimenez*, 765 F.Supp.2d at 991 (emphasis in original).

3. PAYMENT v SETTLEMENT OFFER

However, these statements, in both *Smitham* and *Jimenez*, again were made in cases where an insurer had made a *payment* to its insured, not just a settlement *offer*. *Smitham* and *Jimenez* therefore do not directly answer the question that is presented here, i.e., whether a

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[6] We note that *Smitham* (and *Jimenez* in part) turned on an issue that is not presented here, i.e., the policies in those cases characterized the "formal denial" requirement as a *condition* of tolling, rather than as the time on which tolling would cease. However, those cases remain helpful tools in our analysis.

formal denial of "additional sums" over and above a settlement *offer* can comprise a "formal denial" of a claim, pursuant to MCL 500.2833(1)(q).

That question was more directly presented in *Bourke*, where the insurer had made a settlement *offer* (not a payment) and allegedly denied the balance of the claim. *Jimenez* indeed relied on *Bourke* as "demonstrating" that a denial of "further liability" (over and above a settlement *offer*) was sufficient for a "formal denial."[7] But, as discussed *infra*, the decision in *Bourke* actually turned on other grounds, and the Court in *Bourke* thus also did not directly answer this question. We therefore are not persuaded at this juncture that a denial of liability for amounts in excess of a settlement *offer* is necessarily the functional equivalent of a denial of liability in excess of a *payment*.[8]

We nonetheless find it unnecessary to decide this issue because, on the record before us, we find that defendant did not carry its burden of showing that plaintiff's claim was barred by the statute of limitations and/or that defendant was entitled to judgment as a matter of law. *RDM Holdings, LTD*, 281 Mich App at 687; *Latham*, 480 Mich at 111.

4. MUST BE DEFINITE AND EXPLICIT, AND MORE THAN A VERBAL DENIAL BY AN ADJUSTER

The ultimate question remains whether the alleged November 26, 2008 "communication" to plaintiff conveyed sufficient information to constitute a "formal denial" of plaintiff's claim. It is a well-established principal of Michigan jurisprudence that "formal denials" of insurance claims, although not required to always be in writing, must be "definite" and "explicit," so as to

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[7] The court in *Jimenez* interpreted *Bourke* in this manner because a second insurance company had obtained summary disposition in *Bourke*, based on its letter denying amounts above its settlement offer, which letter had been deemed sufficient to constitute a "formal denial." However, that summary disposition award was not before this Court in *Bourke*. The court in *Jimenez* simply contrasted the sufficient "formal denial" by one insurance company with the insufficient denial by a second insurance company (both of which occurred in the context of a settlement offer in *Bourke*), and concluded that "*[p]resumably* then, had North River been as formal as Travelers was in its decision to pay no more than $500, the plaintiffs' action against North River would also have been barred." *Id.* at 991 (emphasis added).

[8] As the *Jimenez* court noted, in unpublished cases this Court has found that an insurance company who has paid a portion of plaintiff's claim can avoid "indefinite tolling of the limitations period" by explicitly telling the insured "that it is formally denying liability or otherwise expressly indicat[ing] that no future payments will be made." 756 F Supp at 995, citing *Johnson v Parker & Sons Roofing & Chimney, Inc*, unpublished opinion per curiam of the Court of Appeals, decided February 22, 2007 (Docket No. 271777); *Barbarich v Civic Property & Cas Co*, unpublished opinion per curiam of the Court of Appeals, decided August 1, 2006 (Docket No. 264986). However, defendant has not provided, and this Court's research has not uncovered, an example of this principle being applied to statements accompanying settlement offers during settlement negotiations.

"unequivocally impress upon the insured the need to pursue further relief in court." *Smitham*, slip op at 9; *Bourke*, 117 Mich App at 470; *McNeel*, 289 Mich App at 111 (K. F. Kelly, J., dissenting), citing *Mt Carmel Mercy Hosp v Allstate Ins Co*, 194 Mich App 580, 587; 487 NW2d 849 (1992), and *Mousa v State Auto Ins Cos*, 185 Mich App 293, 295; 460 NW2d 310 (1990). Moreover, to constitute a "formal denial" sufficient to end the tolling of the statute of limitations, "something more than a verbal denial by a single adjuster is required." *Bourke*, 117 Mich App at 470.[9]

5. THE RECORD EVIDENCE IS INSUFFICIENT TO CONFIRM A "FORMAL DENIAL"

Here, defendant alleges, and the trial court found, that defendant's offer of settlement constituted a formal denial of the remainder of plaintiff's claim, thus ending the tolling period of MCL 500.2833(1)(q). However, the only record evidence from which we can discern any information about the settlement offer is the Affidavit of Marcia Peoples. As noted, Ms. People's affidavit merely states, in a conclusory fashion, that a settlement offer was "communicated" to plaintiff on November 26, 2008, and that plaintiff was "advised that the offer that was made to him on November 26, 2008 was a final offer, and that any additional sums demanded by plaintiff were denied." It does not convey *who* made the communication, *how* it was made or, with any degree of specificity, the *verbiage* that was used. There is no other evidence, written or otherwise, reflecting the substance of the communication.

Moreover, the affidavit is that of a "claims specialist" employed by defendant, who was "assigned adjustment and processing" of plaintiff's claim. As noted, this Court has held that verbal denials from a single adjuster are insufficient to end the tolling period. *Bourke*, 117 Mich App at 470. Under the circumstances before us, given the dearth of record evidence as to the specifics of the November 26, 2008 communication, and applying this Court's holding in *Bourke*, we are unable to conclude, even assuming that a denial of liability for sums over and above a settlement offer can be constitute a "formal denial" of a claim, that the denial here was sufficiently "direct" and "explicit" as to "unequivocally impress upon [plaintiff] the need to pursue further relief in court," and to therefore constitute such a "formal denial" pursuant to MCL 500.2833(1)(q). *Smitham*, slip op at 5.

In reaching this conclusion, we are cognizant of the fact that defendant's affidavit is unrebutted. However, defendant still had the initial burden of demonstrating, as a matter of law, that no genuine issue of material fact existed as to its denial of liability. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *RDM Holdings, LTD*, 281 Mich App at 687; *Latham*, 480 Mich at 111. A trial court is not obligated to grant summary disposition to the moving party in the absence of

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[9] We recognize that *Bourke* predates November 1, 1990, and therefore is not precedentially binding on us. MCR 7.215(J)(1). However, *Bourke* has been cited and relied upon by this Court as recently as in *Smitham*. Moreover, defendant's position (that it effected a "formal denial" by denying amounts above its settlement offer) ultimately is premised on *Bourke*, as interpreted by *Jimenez*, and as then applied in *Smitham*. Therefore, we see no reason to depart from *Bourke*'s additional requirement that a "formal denial" must be "something more than a verbal denial by a single adjuster." *Id*. at 470.

rebuttal documentary evidence. *White v Taylor Distributing Co*, 275 Mich App 615, 626, 628; 739 NW2d 132 (2007).

IV. CONCLUSION

On the record before us, considering the evidence in the light most favorable to plaintiff, and applying the standards set forth in *Bourke*, we are constrained to conclude that the trial court improperly granted summary disposition to defendant pursuant to MCR 2.116(C)(7) and (10), because the record does not adequately demonstrate the absence of a genuine issue of material fact as to whether the November 26, 2008 offer of settlement made to plaintiff met the requirements of a "formal denial" ending the tolling of the statute of limitations pursuant to MCL 500.2833(1)(q).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra