

STATE OF MICHIGAN
COURT OF APPEALS

ALAN JESPERSON,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

FOR PUBLICATION

September 16, 2014

9:00 a.m.

No. 315942

Macomb Circuit Court

LC No. 2010-005127-NI

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

BOONSTRA, P.J.

In this action for unpaid first-party no-fault benefits, plaintiff appeals as of right the February 19, 2013 order of the trial court granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On May 12, 2009, Matthew Badelalla, an employee of Jet's Pizza, was driving a 1993 Toyota Camry owned by his mother, Mary Basha, while delivering pizzas. Plaintiff was operating a motorcycle, and stopped on 18 Mile Road at an intersection with Mound Road in Sterling Heights. While stopped, plaintiff's motorcycle was struck from behind by Badelalla's slow-moving vehicle. The impact caused plaintiff's motorcycle to fall to plaintiff's left side. Plaintiff jumped off of the motorcycle and was able to land on his feet without falling to the ground. His motorcycle suffered \$2,000 in damage, but was still drivable. Plaintiff reported no injuries and received no medical treatment at the scene, and drove his motorcycle back to work. Plaintiff had no complaints of injury the day of the accident. However, plaintiff alleged that he developed back and shoulder pain as a result of the accident, eventually resulting in surgeries on his right shoulder, neck, and back. Plaintiff's treating physician indicated that he had restricted plaintiff from returning to work and that plaintiff would likely never return to his same position as a carpenter at the Ford Sterling Axle Plant.

On June 2, 2010, more than one year after the accident, defendant was provided with notice that plaintiff had been injured and that defendant was the highest priority no-fault insurer. An employee of defendant stated during her deposition that defendant had paid plaintiff \$21,714.87 in medical expenses for doctor visits and physical therapy. Defendant's first payment to plaintiff was made on July 23, 2010.

On December 1, 2010, plaintiff filed suit against Badelalla, Basha, and Jet's Pizza, alleging that Badelalla's negligence caused plaintiff's injury, Basha negligently allowed Badelalla to drive her car, and Jet's Pizza was vicariously liable for the actions of Badelalla. After failing to respond to the summons and complaint, an order of default was entered against Badelalla and Basha on January 19, 2011.

At some point after plaintiff filed the complaint, defendant stopped paying benefits to plaintiff. Plaintiff then moved the trial court to allow him to amend his original complaint to add a first-party no-fault claim against defendant. The trial court entered an order allowing plaintiff to file an amended complaint to add defendant to the suit. In response to the trial court's order, plaintiff filed his amended complaint alleging that defendant had violated the no-fault act by refusing to pay plaintiff's benefits. Defendant filed an answer and affirmative defenses. Among the affirmative defenses asserted by defendant was the following:

3. That since notice was given, or payment has been previously made, Plaintiff may not recover benefits for any alleged expenses incurred more than one (1) year before the date on which the action was commenced, pursuant to MCL 500.3145(1).

While thus referencing MCL 500.3145(1) and the one-year-back rule that is reflected in that statutory provision, defendant did not assert an affirmative defense that specifically referenced the separate statute of limitations provision that is also reflected in MCL 500.3145(1).

The matter proceeded through discovery relative to both plaintiff's first-party and third-party no-fault claims, but the trial court eventually entered an order severing the claims for trial, with the trial on plaintiff's third-party no-fault claims against Jet's Pizza to take place first and the trial on plaintiff's first-party no-fault claims against defendant to take place thereafter. Plaintiff's third-party no-fault claims against Jet's Pizza proceeded to trial before a jury. On December 6, 2012, the jury returned a verdict of no cause of action, explicitly deciding that plaintiff was injured but that Jet's Pizza did not proximately cause plaintiff's injuries.

Shortly after the disposition of the third-party no-fault claim, defendant filed two separate motions for summary disposition against plaintiff on this first-party no-fault claim. The first motion, filed on January 22, 2013, pursuant to MCR 2.116(C)(7) and (10), asserted that a motorcycle is not a motor vehicle under the no-fault act and therefore does not fall under the act's protection, and further that the jury verdict on the third-party no-fault claim conclusively determined that Badelalla's vehicle was not "involved" in the accident.

One week later, on January 29, 2013, defendant filed a second motion for summary disposition under MCR 2.116(C)(7) and (10). In that motion, defendant argued that plaintiff's claim was barred by the statute of limitations provision of MCL 500.3145(1). Specifically, defendant argued that MCL 500.3145(1) barred a claim for first-party no-fault benefits filed more than one year after the date of the accident, absent certain conditions. According to defendant, because the accident occurred on May 12, 2009, and the amended complaint asserting a first-party no-fault claim against defendant was not filed until May 16, 2011, plaintiff could not survive summary disposition unless he had provided written notice or received payment from defendant within one year of the accident. Notice, however, was not provided until June 2, 2010,

and a payment from defendant was not received until July 23, 2010, both more than one year after the accident.

Plaintiff responded to defendant's motions on February 12, 2013. Plaintiff argued that defendant had waived the statute of limitations defense by failing to assert it in its first responsive pleading as an affirmative defense. Plaintiff also argued that he had not violated the statute of limitations because defendant's July 23, 2010 payment of benefits revived his claim, and that MCL 500.3145(1) did not require any payments to be made within one year of the accident; it instead provides an exception to the statute of limitations when an insurer has at any time made a payment on a claim.

On February 19, 2013, the trial court heard defendant's motions for summary disposition. During the hearing, defendant acknowledged that the caselaw was sparse on the precise statute of limitations issue before the court. But defendant argued, based on the language of the statute, that a payment was required to be made within one year of the accident in order to fulfill the requirements of the second exception found in MCL 500.3145(1). Defendant also argued that it had not waived the statute of limitations defense. While defendant had not identified that specific defense in its first responsive pleading, it had cited the statute containing the limitations provision, although it had cited it in asserting the one-year-back rule. Defendant argued that citation to the statute should be enough to provide plaintiff with notice of defendant's intent to use the affirmative defense, and that, if it was not, then defendant requested that it be allowed to amend its pleading to include the affirmative defense, which the trial court can permit within its discretion.

The trial court found defendant's position to be persuasive. Therefore, because plaintiff had not provided notice or received a payment within one year of the accident, the statute of limitations had run and summary disposition was proper in favor of defendant. The trial court did not address the waiver issue. On February 20, 2013, the trial court entered an order granting defendant's motion for summary disposition, on statute of limitations grounds, "for the reasons stated on the record." The trial court did not rule on defendant's earlier-filed motion for summary disposition.

Plaintiff moved for reconsideration. The trial court denied that motion, stating that its determination was supported by the plain language of the statute and this Court's decision in *Velazquez v MEEMIC*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2006 (Docket No. 264776).¹ Specifically, the trial court reasoned that:

In light of the plain language of MCL 500.3145(1) and the Court of Appeals' decision in *Velazquez, supra*, the Court was — and remains — convinced that an insurer must either (1) be given notice within one year after the accident, or (2) have paid benefits within one year of the accident, in order for an insured to be

¹ Unpublished opinions of this Court are not binding precedent, but may be persuasive authority. MCR 7.215(C)(1).

entitled to bring suit under the No-Fault Act. Accordingly, plaintiff's motion for reconsideration is properly denied.

This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision regarding a motion for summary disposition *de novo*. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008) (citation omitted). "Subrule (C)(7) permits summary disposition where the claim is barred by an applicable statute of limitations." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). In considering a motion under MCR 2.116(C)(7), "[w]e consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001), citing MCR 2.116(G)(5). For purposes of MCR 2.116(C)(7), this Court must consider the provided documentary evidence in a light most favorable to the nonmoving party. *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Further, "[t]his Court reviews *de novo* questions of law involving statutory interpretation." *Michigan Mun Liability and Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999).

III. INTERPRETATION OF MCL 500.3145(1)

Plaintiff argues that the trial court erred in grafting a temporal limitation onto the portion of MCL 500.3145(1) at issue, and in concluding that plaintiff's claim was barred by the limitations period it prescribes. That is, plaintiff maintains that where an insurer has made a payment of benefits, the one-year statute of limitations provision of the statute does not apply even if the payment was not made within one year of the accident. We disagree.

Recently, in *In re Harper*, 302 Mich App 349, 354-355; 839 NW2d 44 (2013), this Court set out the proper process for interpreting statutory law:

The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). A statutory provision must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks and citation omitted). Only when the statutory language is ambiguous may a court consider evidence outside the words of the statute to determine the Legislature's intent. *Sun Valley Foods Co v Ward*, 460 Mich. 230, 236; 596 NW2d 119 (1999). However, "[a]n ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute, as used in its particular context, has more than one common and

accepted meaning.” *Papas [v Michigan Gaming Control Bd]*, 257 Mich App [647,] 658; 669 NW2d 326 [(2003)].

Therefore, the starting point of this Court’s analysis is the plain language of the statute. MCL 500.3145(1) states in pertinent part that:

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 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 insurance 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 statute begins by establishing a general rule that an action for first-party personal protection insurance benefits “may not be commenced later than 1 year after the date of the accident causing the injury.” MCL 500.3145(1). However, the statute then provides two exceptions to the general rule, under which a suit may be brought more than one year after the date of the accident. The first exception is where “written notice of injury as provided herein has been given to the insurer within 1 year after the accident.” The second exception is where “the insurer has previously made a payment of personal protection insurance benefits for the injury.” Although the first exception explicitly requires that notice have been provided within one year of the accident, the second exception requires that the insurer have “previously” made a payment of insurance benefits.²

The question then becomes what the adverb “previously” means in the context of this statutory language. As the parties note, no published authority exists that is precisely on point in deciding this issue, nor has the Legislature provided a definition of the word “previously,” as used in this statute. In such situations, words and phrases in a statute should be read in context and given their ordinary meanings. *Harper*, 302 Mich App at 354-355. A reviewing Court may consult a dictionary as an aid to interpretation. *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). The word “previously” means “coming or occurring before something else; prior[.]” *Random House Webster’s College Dictionary* (2d ed, 2000), 1049. The pertinent issue before this Court is what the “something else” is before which the payment by an insurer must have come or occurred. Plaintiff essentially argues that the “something else” is simply the filing

² After stating the general one-year limitations period and the two referenced exceptions, the statute then states the one-year-back rule that limits a claimant from recovering benefits “for any portion of the loss incurred more than 1 year before the date on which the action was commenced.” Neither the first exception to the general limitations period nor the one-year-back rule is at issue in this case.

of plaintiff's first-party claim against defendant³ ; defendant argues to the contrary, and the trial court found, that the "something else" is the expiration of one year following the accident. We agree with defendant and the trial court.

MCL 500.3145(1)'s two exceptions to its one-year limitations period are clearly separated by the word "or." The word "or" is a disjunctive term indicating a choice between alternatives. See *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). In the context of this statute, those alternatives are the two exceptions referenced above. Since the first exception is inapplicable in this case, our interpretation of the plain language of the statute is facilitated by removing the language of the first exception, such that the relevant statutory language becomes:

An action for recovery of personal protection insurance benefits . . . may not be commenced later than 1 year after the date of the accident causing the injury . . . unless the insurer has previously made a payment of personal protection insurance benefits for the injury. [MCL 500.3145(1).]

We conclude from this plain statutory language that the Legislature intended that the word "previously" mean previous to "1 year after the date of the accident causing injury." This interpretation is supported by the fact that the Legislature juxtaposed "previously" with "1 year after the date of the accident causing injury," which language thus appears much closer in proximity to the word "previously" than does the Legislature's earlier reference to the commencement of "[a]n action." This interpretation also is supported by two principles of statutory construction: our directive to avoid interpretations that result in absurd consequences, and our directive to avoid interpretations that render portions of a statute nugatory. See *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008); *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). To hold, as plaintiff suggests, that any payment made by an insurer would revive a stale claim, no matter how much time has elapsed, would render an absurd result by allowing, potentially, even decades-old claims to be asserted. Further, such an interpretation would essentially eliminate the limitations

³ We note that plaintiff's first-party no-fault claim against defendant was added by way of an amended complaint in a previously-filed action for third-party no-fault benefits against Badelalla, Basha, and Jet's Pizza. The date of filing of plaintiff's original complaint does not control, however, because the action at that time was for third-party no-fault benefits and thus was not "[a]n action for recovery of personal protection insurance benefits." MCL 500.3145(1). See *McCormick v Carrier*, 487 Mich 180, 280; 795 NW2d 517 (2010) (explaining the difference between first-party and third-party benefits); see also *Hunt v Citizens Ins Co*, 183 Mich App 660, 666; 455 NW2d 384 (1990), citing *Taulbee v Mosley*, 127 Mich App 45, 47-48; 338 NW2d 547 (1983) (holding that the filing of a third-party claim against other parties does not toll the limitations period of MCL 500.3145(1) with regard to a defendant, against whom first-party claims were asserted, that is added to the original suit by amended complaint). In any event, even plaintiff's original complaint seeking third-party no-fault benefits was filed more than "1 year after the date of the accident causing injury." MCL 500.3145(1).

period of MCL 500.3145(1) in cases where an insurer has ever paid anything on a claim, rather than providing a limited exception that allows for the filing of suit more than one year after the accident in certain circumstances. We decline to adopt plaintiff's preferred interpretation, which we find would be in contravention of the "Legislative purpose in the No-Fault Act in encouraging claimants to bring their claims to court within a reasonable time and the reciprocal obligations of insurers to adjust and pay claims seasonably" and to "protect against stale claims and protracted litigations." *Pendergast v American Fidelity Fire Ins Co*, 118 Mich App 838, 841-842; 325 NW2d 602 (1982).

In reaching this conclusion, we are not unmindful of the fact that in crafting the first exception the Legislature chose language that expressly required written notice of injury "within 1 year after the accident," whereas in crafting the second exception it chose to use the word "previously." However, in the context of this statute, we conclude that the two phraseologies mean precisely the same thing. The Legislature was not required to use identical terminology in crafting the two exceptions, particularly when doing so in the context of a single statutory sentence would be repetitive. We conclude in this circumstance that the Legislature did not intend different temporal meanings in the two exceptions, but instead intended that the second exception's use of the word "previously" conveyed the same temporal meaning as did the quoted language of the first exception.

We therefore hold that MCL 500.3145(1) allows for suit to be filed more than one year after the date of the accident causing injury only if the insurer has either received notice of the injury within one year of the accident *or* made a payment of personal protection insurance benefits for the injury within one year of the accident.

IV. WAIVER OF AFFIRMATIVE DEFENSE

Plaintiff also argues that, even if the statute of limitations bars his claim, defendant has waived the defense by failing to assert it in its first responsive pleading. We disagree.

A party generally must raise an affirmative defense in his first responsive pleading or it is waived. *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645, 648; 620 NW2d 310 (2000). MCR 2.111(F)(3) provides:

Affirmative Defenses. Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting

(a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery;

(b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part;

(c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.

In this case, defendant asserted an affirmative defense citing to MCL 500.3145(1) but referencing only the one-year-back rule contained in that statute. Specifically, defendant stated: “That since notice was given, or payment has been previously made, Plaintiff may not recover benefits for any alleged expenses incurred more than one (1) year before the date on which the action was commenced, pursuant to MCL 500.3145(1).” At the summary disposition motion hearing, defendant argued that its citation to the statute should be enough to provide plaintiff with notice of defendant’s intent to rely on the affirmative defenses of the statute, including the statute of limitations provision, and that, if it was not, then defendant requested that it be allowed to amend its pleading to include the affirmative defense, which the trial court can permit within its discretion. The trial court did not specifically rule on the waiver issue, or on the alternative request to amend, but granted summary disposition to defendant as described above.

“[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.” *Stanke*, 200 Mich App at 317. Given defendant’s citation to MCL 500.3145(1) in its affirmative defenses, plaintiff arguably was made aware of the limitations period of that statute and not unfairly surprised by defendant’s assertion of the defense. *Stanke*, 200 Mich App at 317. However, the fact is that defendant did not reference the statute of limitations in any fashion, and instead specifically described its affirmative defense as relating to the one-year-back provision of the statute, thereby arguably suggesting that it was not citing the statute for any other purpose.

However, leave to amend pleadings should be freely granted to a nonprevailing party at summary disposition, unless such amendment would be futile or otherwise unjustified. *Lewandowski v Nuclear Mgt*, 272 Mich App 120, 127; 724 NW2d 718, 723 (2006). Thus, had the trial court found that defendant had failed to plead the statute of limitations defense with sufficient clarity, it could have, in its discretion, granted defendant leave to amend its pleading, in which case the result would be the same—the limitations period of MCL 500.3145(1) would still bar plaintiff’s claim. Given the trial court’s discretion to simply allow amendment of the pleading, and in the interest of judicial efficiency, we see no need to remand the case for the trial court to do just that. Accordingly, we find no waiver of the affirmative defense of statute of limitations.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter