STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN INTERNATIONAL GROUP; COMMERCE & INDUSTRY INSURANCE COMPANY,

Plaintiff-Appellant,

v

LIBERTY MUTUAL INSURANCE COMPANY and STATE FARM INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
December 29, 1998

No. 206871
Kalamazoo Circuit Court
LC No. 96-003694 CK

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

In this automobile no-fault case, plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(7) (action barred by statute of limitations). We affirm.

I

This case arises out of an accident involving multiple motor vehicles, one of which was carrying a liquid hazardous substance which spilled, causing environmental contamination. Plaintiff was the no-fault insurance carrier providing coverage on this vehicle and, pursuant to its policy, plaintiff paid in excess of one million dollars to remediate the resultant contamination. Plaintiff subsequently sought pro rata recoupment of its costs from defendants, the insurers of the other vehicles allegedly involved in the accident.[1] Both defendants moved for summary disposition of plaintiff's claim pursuant to MCR 2.116(C)(7), relying on the one year statute of limitations contained in § 3145(2) of the no-fault act, MCL 500.3145(2); MSA 24.13145(2).[2] The trial court granted summary disposition to both defendants on this basis, and denied plaintiff's motion for rehearing/reconsideration.

II

Plaintiff raises three issues on appeal: (1) whether § 3145(2) governs plaintiff's action; (2) if § 3145(2) applies, whether defendants are estopped from asserting it; and (3) if § 3145(2) applies, whether the statute of limitations was tolled. The context of these issues is best understood in light of the pleadings filed and arguments made in the trial court.

Plaintiff's complaint recited its "NO-FAULT PROPERTY CLAIM," alleging its entitlement to recover pro-rata shares from defendants pursuant to § 3125 of the no-fault act, which provides the order of priority of recovery of property protection insurance benefits among insurers of vehicles involved in accidents causing property damage. MCL 500.3125; MSA 24.13125. Plaintiff's complaint prayed for relief on a pro rata basis as required by §§ 3115 and 3125 of the no-fault act.[3] Answers filed on behalf of both defendants incorporated affirmative defenses which included, among others, reliance on the statute of limitations contained in § 3145(2).

Defendants' motions for summary disposition and briefs in support asserted the statute of limitations defense of § 3145(2) and cited as authority *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1; 489 NW2d 115 (1992). Plaintiff's response to the motions for summary disposition and its response brief acknowledged the parties' agreement that § 3145(2) provided the appropriate statute of limitations for "these property loss claims," but argued that (1) the statute of limitations was tolled and (2) the language of *USF&G* to the contrary is mere dicta. At this point, there was no mention of the doctrine of equitable estoppel in any of the pleadings filed by the parties.

Oral argument on the motions for summary disposition was brief. There was no dispute regarding the applicability of § 3145(2). Rather, the bulk of the discussion centered on the tolling issue and the precedential effect of the *USF&G* opinion. There was passing mention of estoppel, but only because the trial court raised the issue; plaintiff did not rely on estoppel as a defense to the motions. The court granted defendants' motions for summary disposition, finding that the one-year limitations period of § 3145(2) had run before plaintiff filed suit and that, pursuant to *USF&G*, there could be no tolling of the statute.

Plaintiff filed a motion for reconsideration which raised for the first time an estoppel argument, and also claimed, for the first time, that § 3145(2) was "mistakenly applied" and that its claim was not for first party property loss but for recoupment. Plaintiff's motion was denied without argument.

III

On appeal, we review de novo the trial court's decision to grant summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Pickney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). When reviewing a motion granted pursuant to MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff. *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

IV

Plaintiff's first argument on appeal is that the statute of limitations found in § 3145(2) applies only to first-party claims for property protections benefits under § 3121 of the no-fault act, and not to recoupment actions under §§ 3115 and 3125 of the act. This claim has not been preserved for appellate review.

It is clear that throughout the proceedings below until plaintiff filed its motion for rehearing/reconsideration, everyone involved assumed the applicability of § 3145(2): plaintiff's complaint references its "NO-FAULT PROPERTY CLAIM;" defendants' affirmative defenses, motions for summary disposition and briefs in support unequivocally rely on the statute of limitations contained in § 3145(2); and, most telling, plaintiff's response to the motions contains the following language:

> . . . Defendants suggest that Section 3145 of the No-Fault Act provides the appropriate statute of limitations for these property loss claims. *It is on this point that all sides are in agreement*. [emphasis added.]

During argument on the motions for summary disposition the parties proceeded on the same assumption, arguing primarily about whether the limitations period had been tolled. It was only after the trial court granted summary disposition to defendants that plaintiff claimed in its motion for rehearing/reconsideration[4] that § 3145(2) does not apply, notwithstanding its concession to the contrary in its response to the motions for summary disposition.[5]

In this factual and procedural contest, plaintiff cannot seek appellate redress. It is well settled that, as a general rule, an issue is not properly preserved if it is not raised before and addressed by the trial court. *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997). Moreover, plaintiff has taken essentially contrary positions in this case regarding the applicability of the one-year statute of limitations of § 3145(2): it conceded the applicability of this limitations period in written pleadings and did not contest its applicability at oral argument. Review of plaintiff's appellate claim to the contrary is not permissible under these circumstances. *Id*.

V

Plaintiff next argues that even if the one-year statute of limitations contained in § 3145(2) applies, defendants are estopped from asserting it. For all of the reasons set out in § IV of this opinion, we find that plaintiff has failed to preserve this issue for appellate review.

VI

Plaintiff's final argument is that even if § 3145(2) applies to this action, the statute of limitations was tolled. Plaintiff argues strenuously, as it did in the trial court, that the language of *USF&G, supra*, is mere dicta as it relates to tolling the one-year limitations period at issue here (thus acknowledging by implication that if the language regarding tolling is part of the holding of *USF&G*, it precludes a finding

of tolling in this case.) A recent opinion of this Court lays to rest any lingering doubt regarding the holding of *USF&G*.

In *Secura Ins Co v Auto-Owners Ins Co*, ___ Mich App ___, ___ NW2d ___ (Docket No. 205256, issued 11/20/98), this Court correctly explained that the controlling issue in *USF&G* was whether notice letters could toll the running of the § 3145(2) statute of limitations and that its conclusion that there could be no tolling under § 3145(2) was the holding of the case, not mere dicta. Until the Legislature or our Supreme Court determines otherwise, *Secura Ins Co* is the last word on the issue. Accordingly, there can be no tolling in this case.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra

[1] Defendant State Farm denied that the vehicle it insured was "involved" in the accident, as that term is defined by § 3125 of the no-fault act, MCL 500.3125; MSA 24.13125.

[2] The accident occurred on December 8, 1995 and plaintiff filed suit on December 19, 1996.

[3] MCL 500.3115; MSA 24.13115, MCL 500.3125; MSA 24.13125.

[4] We note that plaintiff does not argue on appeal that the trial court erred in denying the motion for reconsideration/rehearing, only that it mistakenly applied § 3145(2).

[5] Plaintiff's motion for rehearing/reconsideration does not mention its earlier concession of the applicability of § 3145(2).