# STATE OF MICHIGAN

# COURT OF APPEALS

WAIL BITTIRS,

Plaintiff-Appellee,

v

AUTO CLUB GROUP INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 23, 2016

No. 325089
Macomb Circuit Court
LC No. 2013-002932-NI

Before: SERVITTO, P.J., and SAAD and O'BRIEN, JJ.

PER CURIAM.

In this action for benefits under the no-fault act, MCL 500.3101 *et seq.*, defendant Auto Club Group Ins. Co. appeals by leave granted the trial court's order denying defendant's motion for partial summary disposition. We reverse and remand for the trial court to enter summary disposition in favor of defendant pursuant to MCR 2.116(C)(7).

Plaintiff Wail Bittirs fell and injured his leg while entering a motor vehicle outside of his home on March 31, 2012. Plaintiff, not owning a vehicle at the time and living with his father, determined that his father's policy with defendant was the highest priority insurer. On February 26 and March 7, 2013, Joelle James, an assistant to plaintiff's attorney, made telephone calls to defendant's office attempting to open a claim on behalf of plaintiff. Plaintiff also called on March 7, 2013. Both Joelle and plaintiff were informed that plaintiff would have to fill out an application for benefits to open a claim. An adjuster for defendant, Carol Finney, sent a fax to Joelle for plaintiff to fill out and return on March 7, 2013. The forms provided by Finney included a claim number, plaintiff's name as the claimant, the father of plaintiff as the insured, and the date of the accident. The forms were never completed and returned by plaintiff.

On July 23, 2013, plaintiff filed the instant suit alleging that defendant had inappropriately failed to pay plaintiff's no-fault claim. Defendant moved for summary disposition, arguing that plaintiff's claim was filed more than one year after the accident, without any written notice, in violation of MCL 500.3145(1). Plaintiff responded that he had substantially complied with the statute considering both his and Joelle's oral notice to defendant and Finney's written receipt of such notice or, alternatively, that defendant had waived the right to require written notice because defendant had indicated to plaintiff that a claim had been opened already in the forms provided by Finney. The trial court denied defendant's motion,

finding that questions of fact existed as to whether plaintiff's notice was in substantial compliance with MCL 500.3145(1) and whether defendant was equitably estopped from asserting a right to written notice under the statute or had waived that right. After the trial court denied defendant's subsequent motion for reconsideration, we granted leave to consider an interlocutory appeal of the trial court's decision and stayed the trial court proceedings during the pendency of this appeal.

"This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law." *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). Because a motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim, when reviewing the trial court's decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "review[s] the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Coblentz v Novi*, 475 Mich 558, 567–568; 719 NW2d 73 (2006).

MCR 2.116(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). "Whether a cause of action is barred by a statute of limitations is a question of law, which we review de novo." *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

Defendant argues that the trial court should have granted its motion for summary disposition, because plaintiff's claim was barred by MCL 500.3145(1). Specifically, defendant contends that plaintiff failed to provide written notice of his injuries within one year of his accident, as required by the above statute. We agree that plaintiff failed to provide the required written notice within one year.

MCL 500.3145(1) states, 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 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 . . . . The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

"[T]his section is a one-year statute of limitations, with a provision enabling claimants to extend the period for recovery of personal protection insurance benefits up to one additional year by giving notice." *Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121, 126; 290 NW2d 408 (1980). Because plaintiff did not file his suit until July 23, 2013, which is more than one year after the injury occurred on March 31, 2012, plaintiff must have given proper written notice to the insurer in order to comply with the requirements of MCL 500.3145(1) to not have his suit barred.

"Statutes of limitations are entitled to be fairly construed, so as to advance the policy they are designed to promote, and should not be defeated by an overstrict construction." *Dozier*, 95 Mich App at 128 (internal citations and quotations omitted). Further,

> The purpose of the statute of limitation is to compel action within a reasonable time so the opposing party has a fair opportunity to defend, to protect against stale claims, and to protect defendants from protracted fear of litigation. The purpose of the notice provision is to provide time for defendant to investigate and to appropriate funds for settlement. [*Lansing Gen Hos, Osteopathic v Gomez*, 114 Mich App 814, 824; 319 NW2d 683 (1982).]

"[T]his Court [has] found that substantial compliance will suffice for giving the written notice of personal injury." *Walden v Auto Owners Ins Co*, 105 Mich App 528, 534; 307 NW2d 367 (1981). In *Walden*, this Court found that where an independent agent prepares a written notice based upon the claimant's oral recital of the facts and thereafter submits the written notice to the insurer, the written notice, even if somewhat incomplete, substantially complied with the written notice provision in MCL 500.3145. *Id*.

Substantial compliance exists where the notice "does in fact apprise the insurer of the need to investigate and to determine the amount of possible liability of the insurer's fund." *Dozier*, 95 Mich App at 128. The notice "must be specific enough to inform the insurer of the nature of the loss. It must give sufficient information that the insurer knows or has reason to know that there has been a compensable loss." *Mousa v State Auto Ins Cos*, 185 Mich App 293, 295; 460 NW2d 310 (1990). However, this Court held in *Keller v Losinski*, 92 Mich App 468, 471-473; 285 NW2d 334 (1979), that oral notice *alone* is never enough to fulfill MCL 500.3145(1).

The present case can be easily distinguished from the aforementioned cases permitting substantial compliance with MCL 500.3145(1), because all of those cases had at least *some* writing provided by plaintiff. In the present case, it is undisputed that plaintiff did not provide any written notice to defendant. As such, plaintiff's claim was in violation of the clear and unambiguous requirement of MCL 500.3145(1). See *Keller*, 92 Mich App at 471-473.

The trial court also held, however, that questions of fact existed as to whether defendant should be either equitably estopped from asserting a requirement for written notice or had waived the right to assert such a requirement. We disagree.

"A trial court's decision concerning equitable issues is reviewed de novo[.]" *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004). " 'Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts.' " *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006), quoting *Conel Dev, Inc v River Rouge Savings Bank*, 84 Mich App 415, 422-423; 269 NW2d 621 (1978). Meanwhile, "[w]aiver is the voluntary and intentional relinquishment of a known right." *Varran ex rel Varran v Granneman*, ___ Mich App ___, ___; ___ NW2d ___ (2015), slip op at 16 (Docket Nos. 321866/322437).

The undisputed facts reveal that Finney responded to the oral notification by faxing a letter and forms to plaintiff's counsel, specifically requesting further information, and directing plaintiff to fill out and return the forms. These actions do not indicate that defendant, through Finney, explicitly or implicitly exhibited an intention to waive the written notice requirement. Indeed, the correspondence indicates that defendant was lacking sufficient information to open a claim. These actions also do not exhibit negligent or intentional inducement required for equitable estoppel, *Casey*, 273 Mich App at 399. Thus, plaintiff's claim was barred by the statute of limitations, MCL 500.3145(1), and summary disposition of plaintiff's claims against defendant should have been granted in favor of defendant.

Reversed and remanded for the trial court to enter summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Henry William Saad
/s/ Colleen A. O'Brien