STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION,

Plaintiff-Appellee,

v

STATE OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
December 10, 2020

No. 352044
Court of Claims
LC No. 19-000112-MZ

Before: LETICA, P.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

Defendant-appellant, State of Michigan, appeals an order denying its motion for summary disposition under MCR 2.116(C)(7) (claim barred by governmental immunity). We affirm.

I. BACKGROUND

This matter arises out of plaintiff-appellee, Auto Club Insurance Association, paying personal protection insurance benefits ("PIP benefits") to a claimant following an accident that occurred on July 20, 2014. At the time of the accident, the claimant was a passenger on a motorcycle. The accident also involved two motor vehicles, one of which was insured through a policy with Auto Club. The other vehicle was owned by the State, which was self-insured. The claimant submitted claims for PIP benefits, and both Auto Club and the State were in equal priority to pay the benefits. Auto Club and ASU Group, a third-party administrator that handles "claims for [PIP] benefits where the State of Michigan is acting as an insurer," both opened claim files concerning the claimant. Auto Club and ASU Group ultimately agreed that Auto Club would "take the lead" with respect to paying the claims and that the State would compensate Auto Club for its portion of the claims.

On April 11, 2017, Kimberlee Hanes, a claims' examiner for ASU Group, sent two e-mails to representatives for Auto Club. Hanes questioned whether the claimant had submitted to an independent medical examination ("IME"), and one of the e-mails indicated that Hanes would schedule an IME in the event that an examination had not already been scheduled. Hanes expressed that additional payments would not be made until the State received "confirmation" that the claimant still required treatment and "that there [was] still a problem." Auto Club did not

provide any IME reports, and there is no evidence that an IME was scheduled. The State did not make any additional payments to Auto Club, but ASU Group did not close the claimant's file.

On June 7, 2017, the claimant filed a claim for first-party benefits in Washtenaw Circuit Court. Auto Club and ASU Group were both named as defendants. However, ASU Group was later dismissed from the action for reasons that are not clear from the record. On October 12, 2018, Auto Club and the claimant reached a settlement in the amount of $245,000 for past, present, and future benefits. After Auto Club was unable to obtain recoupment from the State, Auto Club filed an action in the Court of Claims, alleging that it was in equal priority with the State and that, as a result, the State had an obligation to pay 50 percent of "the insurance burden[.]" In lieu of filing an answer to the complaint, the State moved for summary disposition under MCR 2.116(C)(7). The State argued that dismissal was proper because Auto Club had failed to comply with MCL 600.6431(1) and either file a notice of intent or file its claim within one year after the claim accrued. According to the State, Auto Club's claim accrued no later than April 11, 2017. Auto Club opposed the motion, arguing that it complied with MCL 600.6431(1) because its claim did not accrue until October 12, 2018.

The trial court denied the State's motion for summary disposition, concluding that the April 11, 2017 e-mails did not constitute "unequivocal denials of any future payments." Instead, the trial court concluded that the e-mails "were demands for further information in order to allow the State to make a full determination as to whether continued benefits were required for the underlying claimant." The trial court further concluded that Auto Club's action accrued on October 12, 2018, when the settlement was reached in the Washtenaw County action. Because the claim was filed within the one-year notice requirement under MCL 600.6431(1), the trial court denied the State's motion for summary disposition. This appeal followed.

II. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's ruling on a motion for summary disposition. This Court also reviews de novo questions of law." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011) (citations omitted). As noted by our Supreme Court in *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 179; 931 NW2d 539 (2019),

> if a plaintiff fails to comply with MCL 600.6431, his or her claims against a governmental agency are barred by governmental immunity. This Court reviews de novo a lower court's decision to grant summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity. When a motion is filed under this subrule, the court must consider not only the pleadings, but also any affidavits, depositions, admissions or documentary evidence that is filed or submitted by the parties. Further, whether MCL 600.6431 requires dismissal of a plaintiff's claim for failure to provide the designated notice raises questions of statutory interpretation, which we . . . review de novo. [Quotation marks and citations omitted.]

III. ANALYSIS

The State argues that the trial court erred by denying its motion for summary disposition based on the trial court's conclusion that Auto Club complied with MCL 600.6431(1). We disagree.

Although the State is generally immune, "the government may voluntarily subject itself to liability, which also means that it may place conditions or limitations on the liability imposed. For example, the Legislature may impose procedural requirements on a plaintiff's available remedies, such as a statutory limitations period or notice obligation." *Mays v Governor*, ___ Mich ___, ___; ___ NW2d ___ (2020) (Docket No. 157335); slip op at 17 (citations omitted). As relevant to this appeal, "MCL 600.6431 establishes conditions precedent for avoiding governmental immunity. In other words, if a plaintiff fails to comply with MCL 600.6431, his or her claims against a governmental agency are barred by governmental immunity." *Bauserman*, 503 Mich at 179 (quotation marks and citations omitted).

Under MCL 600.6431(1), in order for a claim to be maintained against the State, the plaintiff is required to file "in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state" "within 1 year after [the] claim has accrued[.]"[1] With respect to when a claim accrues, our Supreme Court in *Mays*, ___ Mich at ___; slip op at 18, stated the following:

> [f]or purposes of statutory limitations periods, our Legislature has stated that a claim accrues "at the time the wrong upon which the claim is based was done," MCL 600.5827, and this Court has clarified that "the wrong . . . is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty," *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017) (quotation marks and citation omitted). A claim does not accrue until each element of the cause of action, including some form of damages, exists. See *Henry v Dow Chem Co*, 319 Mich App 704, 720; 905 NW2d 422 (2017), rev'd in part on other grounds 501 Mich 965 (2018). Thus, determining the time when [the] plaintiffs' claims accrued requires us to determine when [the] plaintiffs were first harmed. See *id*.

In this case, the State argues that Auto Club's claim accrued no later than April 11, 2017. We disagree. The April 11, 2017 e-mails only reflect that Hanes was trying to determine whether an IME had been conducted or scheduled so that the State could receive "confirmation" that the claimant still required treatment and "that there [was] still a problem." The e-mails did not indicate that the State would no longer pay Auto Club if an IME report was not provided. Rather, one of the e-mails indicated that, if an IME had not been scheduled, Hanes would schedule an examination and would "determine at that time what [was] still needed from the incident of

[1] Statutes are interpreted according to their plain meaning. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). " '[O]r' is a disjunctive term, indicating a choice between two alternatives[.]" *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010).

7/20/14." Consequently, the April 11, 2017 e-mails did not constitute a denial of additional payment by the State. Rather, as noted by the trial court, Hanes was asking for additional information to determine whether the claimant was still entitled to PIP benefits given that it had been almost three years since the accident.

Furthermore, Hanes's affidavit and notes after April 11, 2017, do not support that the State never intended to make additional payments. Indeed, the notes between June 2017 and March 2018 reflect that the State was not willing to make more payments until additional information was received. On April 4, 2018, Hanes noted that she had spoken with the attorney who was representing Auto Club in the Washtenaw County litigation. Although Hanes expressed frustration with the fact that the claimant had not submitted to an IME, counsel for Auto Club informed Hanes that an IME was being "done" and that the report would be provided to Hanes. Hanes's notes reflect that the matter was discussed with the State on April 5, 2018, and that Hanes was not provided with any "additional information" in the months of May, June, July, and August 2018. On September 18, 2018, Hanes noted that she had received an e-mail from counsel for Auto Club, who wanted to discuss whether the State would "commit to paying half" if the Washtenaw County case settled. Hanes indicated "we will not," but instructed counsel to contact the Attorney General's Office to discuss the matter. Hanes's notes after September 18, 2018, reflect that counsel for Auto Club had spoken with "the State" but that Hanes had not received any additional information from the State or from the Attorney General's Office. On October 12, 2018, Auto Club and the claimant reached a settlement in the Washtenaw County action, and Auto Club's efforts to recoup funds from the State in June and early July 2019 were unsuccessful.

In sum, there is no evidence that the State denied liability or altogether refused to provide any additional payments to Auto Club before the Washtenaw County lawsuit settled in October 2018. Instead, the evidence supports that the State wanted additional information so that it could determine whether the claimant was still entitled to PIP benefits; because the State did not receive the information, payments were not made after March 2017. Therefore, the undisputed evidence establishes that the harm did not occur until after Auto Club settled the lawsuit with the claimant in October 2018. When the complaint was filed on July 16, 2019, it had only been nine months since the settlement was reached. Because there is no factual dispute, we conclude that Auto Club complied with MCL 600.6431(1). Thus, the trial court did not err by denying the State's motion for summary disposition under MCR 2.116(C)(7).[2]

Affirmed.

/s/ Anica Letica
/s/ Michael J. Riordan
/s/ Thomas C. Cameron

[2] Given this holding, we need not consider the parties' other arguments. See *Attorney Gen v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005) (holding that this Court need not decide moot issues).