S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MONIQUE MARIE LICTAWA, Plaintiff-Appellant,	UNPUBLISHED March 23, 2004
v	No. 245026 Macomb Circuit Court
FARM BUREAU INSURANCE COMPANY, Defendant-Appellee.	LC No. 01-005205-NF

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition in favor of defendant on statute of limitations grounds, MCL 500.3145(1), in this action for personal protection insurance benefits under the no-fault act. We reverse.

I

Defendant is plaintiff's first party no-fault carrier for the vehicle she was driving on July 26, 2000, when she was involved in an accident. After the accident, plaintiff went to the emergency room at Mt. Clemens General Hospital. The emergency room record states that plaintiff complained of "dull pain at the L4-L5-S1 area with pain into the left buttocks," that plaintiff was given a shot of Toradol "which gave her significant relief," and given a prescription for Motrin 600 mg. to take every six hours, and told to return if not better within five days.

On July 26, 2000, plaintiff also called her Farm Bureau Insurance agent to inform her of the accident. The agent prepared a "Personal Auto Loss Report" describing the facts of the accident. On September 27, 2000, plaintiff called the agent again and reported that she had suffered injury to her back in the accident. The agent supplemented the Personal Auto Loss Report to reflect plaintiff's September 27, 2000 call.

On October 4, 2000, Pamela McDaniel, a claim representative of defendant, received the Personal Auto Loss Report. On that date, McDaniel called plaintiff and left a message on her answering machine identifying herself and the reason for her call, i.e., to discuss a potential no-fault claim. Having received no response from plaintiff by October 27, 2000, McDaniel sent plaintiff a postcard requesting that plaintiff contact her to discuss her no-fault claim. McDaniel also sent plaintiff an application for no-fault benefits and an instruction sheet, by first class mail. McDaniel received no response to either, and neither was returned to her as undelivered.

On November 30, 2000, McDaniel sent plaintiff a second application for no-fault benefits and an instruction sheet, as well as a second postcard. McDaniel received no response to either, and neither were returned as undelivered. McDaniel then closed plaintiff's claim file.

McDaniel's affidavit states that in September 2001, plaintiff called her, inquiring about no-fault benefits from her July 6, 2000 accident. This was the first contact McDaniel had from plaintiff regarding her no-fault claim. McDaniel's affidavit states that she received a letter from plaintiff dated October 4, 2001, requesting benefits. McDaniel's affidavit states that she has "never received any specific proofs of loss from the Plaintiff regarding claims relating to her July 26, 2000 accident," and that she "never received a written notice, nor any notice of specific claims for no-fault benefits sought. . . within one year of the accident date."

Plaintiff testified at deposition that, other than going to the emergency room on the date of the accident (July 26, 2000), the first time she sought medical attention for back pain she experienced as a result of the accident was "about a year after the accident," after her mother prodded her to see a doctor about the frequent back pain she had been experiencing. At that time, plaintiff saw a chiropractor. Plaintiff also testified that she called McDaniel before sending McDaniel the October 4, 2001 letter, but that the first time she provided *written* documentation to defendant as to the losses she was claiming was in her October 4, 2001 letter[1], after she had seen the chiropractor and after the chiropractor recommended that she do no lifting at all and that she not work.

Defendant refused to pay plaintiff's claim. Plaintiff filed the instant suit on December 3, 2001. Defendant filed a motion for summary disposition on statute of limitations grounds. Following an October 28, 2002 hearing, the circuit court granted defendant's motion without elaboration.

II

Plaintiff argues on appeal that her phone calls to defendant on July 26, 2000 and September 27, 2000 constituted legally adequate notice under MCL 500.3145(1), given that defendant's agent took a full statement of the facts of the accident, and a description of plaintiff's injury. Plaintiff argues that where an insured reports her injuries to the insurer within a year of the accident and makes a claim for benefits within a year of the date her medical costs accrue, her claim for benefits is timely under MCL 500.3145, subject to the one year back rule. Plaintiff notes she has not made any claim for recovery of losses outside of that one year period.

Defendant maintains on appeal that plaintiff failed to meet the clear and unambiguous requirement of MCL 500.3145 that *written* notice be given to the insurer within one year of the accident, noting that there is no dispute that plaintiff's first written notice was in October 2001. Defendant further contends that even if plaintiff's oral notice to defendant on July 26 and

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[1] This letter is not contained in the lower court record, but plaintiff testified at deposition that before sending the letter dated October 4, 2001, she had spoken to McDaniel, and that the October 4, 2001 letter thus stated that it was in follow up to their recent phone conversation.

September 27, 2000 that resulted in the Personal Auto Loss Report constituted sufficient notice under the statute, plaintiff still failed to meet the second requirement under the statute by failing to provide *specific* notice of any claimed wage loss, medical expenses or any other claim within one year of the accident. Defendant maintains that plaintiff thus failed to provide it with a basis on which to evaluate the claim and assess potential liability, adding that plaintiff also failed to exercise due diligence to notify defendant of her claims, as evidenced by her failure to respond to McDaniel's phone call and her two mailings of applications for benefits. For those reasons, defendant argues the statute of limitations was not tolled and plaintiff's claim is time-barred.

A

This Court reviews de novo the circuit court's grant of summary disposition. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a cause of action is barred by a statute of limitations is a question of law also reviewed de novo. *Ins Comm'r v Aageson Thibo Agency,* 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

MCL 500.3145(1) provides:

> 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 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 notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefore, or by someone in his behalf. 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.

The Supreme Court has stated that MCL 500.3145(1):

> contains two limitations on time of suit and one limitation on period of recovery:
>
> (1) An action for personal protection insurance (PPI) must be commenced not later than one year after the date of accident, *unless* the insured gives written notice of injury or the insurer previously paid PPI benefits for the injury.
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> (2) *If* notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.
>
> (3) Recovery is limited to losses incurred during the one year preceding commencement of the action. [*Welton v Carriers Ins Co,* 421 Mich 571, 576; 365 NW2d 170 (1984).]

Plaintiff relies on *Walden v Auto Owners Ins Co,* 105 Mich App 528, 532-534; 307 NW2d 367 (1981), which held that the plaintiff's oral notice to his insurance agent was sufficient to satisfy the notice requirement of MCL 500.3145(1):

> The issue as framed, argued and decided by the lower court was whether, as a matter of law, oral notice by a claimant to an agent, even if immediately and consequently embodied into written form by the agent and transmitted to the insurer, is legally insufficient to satisfy the statutory requirement that written notice be given to the insurer by the claimant or by someone in his behalf. In short, the defendant requested that the trial court totally ignore the "Auto Accident Notice" as ineffective to give the requisite written notice, not because it was incomplete as to the personal injury section but, rather, because it was completed by the agent and not by the plaintiff.
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> We disagree. In our opinion this is an unnecessary, overly technical, literal construction and application of the notice provision of § 3145(1).
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> [statute quoted]
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> This single statutory provision has been construed to be both a notice provision and a limitation of action provision. 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 the defendant to investigate and to appropriate funds for settlement. [Citations omitted.]
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> In light of the above objectives, we fail to discern any logical nexus between who literally transcribed the report into written form and the attainment of these objectives. The ultimate goal is that the insurer receives written notice within the year following the accident. The notice requirement is not intended to snare unwary litigants who have in good faith relied upon their agent. We detect neither a violation of the letter nor spirit of the provision by the agent being the "someone is [in] his [claimant's] behalf" who actually prepares the written notice based upon the claimant's oral recital of the facts. To rule that, as a matter of law, the agent is precluded from providing the written notice on behalf of the claimant to the insurer creates unnecessary traps and runs counter to the legislative intent to provide the insured with adequate compensation.

Plaintiff also relies on *Dozier v State Farm Mutual Auto Ins Co,* 95 Mich App 121, 130; 290 NW2d 408 (1980), which held that the insurer's acknowledgment of the plaintiff's written letter informing it of the accident, and the adjuster's request to the plaintiff to forward documentation regarding the loss, operated to waive the insurer's right to assert the insufficiency of the notice, even though the plaintiff's letter had not indicated in ordinary language the place and nature of the insured's injury. The *Dozier* Court noted:

> . . . substantial compliance with the written notice provision which does in fact apprise the insurer of the need to investigate and to determine the amount of

possible liability of the insurer's fund, is sufficient compliance under § 3145(1). [*Id.* at 128.]

B

Defendant responds that *Walden* and *Dozier, supra,* were decided before *Welton, supra*, and *Lewis v DAIIE,* 426 Mich 93; 393 NW2d 167 (1986), in which, defendant argues, the Supreme Court made clear that if the notice of injury merely informs an insurer that a claim is outstanding, the notice is insufficient under the statute. We do not agree and believe that defendant misinterprets the statute.

The issue in *Welton, supra,* was "whether the 'one year back' limit on recovery of no-fault insurance benefits contained in MCL 500.3145(1). . . should be tolled by the filing of a workers' compensation claim for the same injuries, where the same carrier insures both liabilities." 421 Mich at 574. The insurer conceded that the plaintiff's workers' compensation claim constituted timely notice of injury so that the suit could be commenced more than one year after the accident, and conceded that the action was commenced within one year of the plaintiff's most recent loss. *Welton,* 421 Mich at 576. The question remaining was whether the plaintiff was entitled to a tolling of the one year back rule. The answer to that question, said the *Welton* Court, "depends on whether we find a triggering event sufficient to have started the tolling." In concluding that "a *general notice of injury* of the type here given is insufficient to *trigger tolling*," *id.* at 579 (emphasis added), the Court stated:

> Notice of injury simply informs the insurer of "the name and address of the claimant," "the name of the person injured and the time, place and nature of his injury." MCL 500.3145(1). . . Until a specific claim is made, an insurer has no way of knowing what expenses have been incurred, whether those expenses are covered losses and, indeed, whether the insured will file a claim at all. It is therefore illogical to expect the insurer to formally "deny" an as yet unperfected claim. . . .

The issue in *Lewis v DAIIE, supra,* was "whether the 'one year back' limit on recovery of no-fault insurance benefits . . . should be *tolled* from the date a claimant makes a specific claim for benefits to the date the insurer formally denies liability, provided the claimant pursues the claim with reasonable diligence." 426 Mich at 94 (emphasis added). Pursuant to the insurer's requests, the plaintiff's attorney in *Lewis* sent the insurer a completed application for benefits listing "medical bills to date" of $3,186, and an affidavit of the plaintiff regarding his residential address at the time of the accident, both within seven months of the accident. The *Lewis* Court concluded that:

> . . . the one-year-back rule of § 3145 is tolled from the date of a specific claim for benefits to the date of a formal denial of liability. We believe this result effectively preserves the Legislature's purpose. As Justice BOYLE stated in *Welton:*
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> > Tolling the statute when the insured submits a claim for specific benefits would not appear to detract from the policies underlying the one-year limitation on recovery. By submitting a timely and

> specific claim, the insured serves the interest in preventing stale claims by allowing the insurer to assess its liability while the information supporting the claim is relatively fresh. A prompt denial of the claim would barely affect the running of the limitation period, while a lengthy investigation would simply "freeze" the situation until the claim is eventually denied. In effect, the insured would be charged with the time spent reducing his losses to a claim for specific benefits plus the time spent deciding whether to sue after the claim is denied. [*Id.,* 578-579.]

Neither *Welton,* nor *Lewis,* address the issue presented here.

C

We conclude that under *Walden, supra,* the "Personal Auto Loss Report," which was generated by plaintiff's phone calls to defendant's agent shortly after the accident in July and September 2000, constituted legally adequate notice of injury under § 3145(1). As reflected in the "Personal Auto Loss Report," plaintiff advised defendant's agent of her name and address, the name of the person injured and the time, place and nature of her injury. The "Personal Auto Loss Report" constitutes written notice to the insurer by the agent of the insured plaintiff. See § 3145(1) (providing that "[t]he notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefore, *or by someone in his behalf*." (Emphasis added.) The fact that plaintiff did not present a documented claim apart from the notice implicates only the one year back limitation. Thus, plaintiff was not obligated to file suit within one year of the accident, rather, she could commence her suit at any time within one year after the most recent loss was incurred. § 3145(1). Plaintiff's suit, filed in December 2001, was within one year of her most recent loss.

Plaintiff proceeded below acknowledging that she cannot recover any benefits for losses incurred more than one year before the commencement of her suit, i.e., incurred before December 2000. Plaintiff has not made any claim for recovery of losses outside of the one year period, and has not requested that the one-year-back rule be tolled, thus *Welton* and *Lewis,* which address under what circumstances the one-year-back rule may be tolled, and on which defendant relies, are inapplicable.

Plaintiff's claim for benefits in October 2001 was timely under § 3145(1). The circuit court's dismissal of plaintiff's complaint was error. We therefore reverse.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio