STATE OF MICHIGAN

COURT OF APPEALS

GREGORY ROBERT MATIGIAN and MICHIGAN SPINE AND BRAIN SURGEONS, PLLC,

Plaintiffs-Appellants,

v

MEMBER SELECT INSURANCE COMPANY,

Defendant-Appellee,

and

JUSTIN AARON MICK,

Defendant.

UNPUBLISHED
January 28, 2021

No. 352059
Macomb Circuit Court
LC No. 2018-001521-NI

Before: JANSEN, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Plaintiffs, Gregory Robert Matigian and Michigan Spine and Brain Surgeons, PLLC (MSBS),[1] appeal as of right the trial court's opinion and order granting summary disposition in favor of defendant, Member Select Insurance Company. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

This case concerns plaintiffs' attempts to obtain personal-protection-insurance (PIP) and underinsured-motorist (UIM) benefits arising from an August 22, 2016 motor-vehicle accident involving Matigian and defendant Justin Aaron Mick. On that date, Matigian, a truck driver for

[1] When referring to the individual plaintiffs, we will refer to Gregory Matigian as "Matigian" and Michigan Spine and Brain Surgeons, PLLC, as "MSBS."

Fiat Chrysler Automotive (FCA) Transport, was driving a semitractor trailer, owned by FCA Transport. He was driving to a FCA-parts facility in the course of his employment for FCA Transport, when "somebody [ran] into the trailer that [he] was pulling." The semitractor trailer was insured by Zurich Insurance.

At the same time, Matigian had an insurance policy with defendant that covered his personal automobile. Matigian's policy with defendant contains provisions related to no-fault coverage and uninsured (UM) and underinsured (UIM) motorist coverage. Also included in the policy are no-fault, UM and UIM exclusions, including exclusions for situations when an insured is occupying an employer-owned vehicle or operating an employer-owned vehicle in the course of his employment.

Plaintiffs filed an initial complaint against defendants Member Select and Mick on April 17, 2018, alleging three counts: (1) negligence on the part of Mick; (2) benefits due to Matigian under a no-fault policy issued by defendant; and (3) direct right of payment by assignment to MSBS from defendant. Defendant filed its answer to plaintiffs' complaint and asserted several affirmative defenses, including that, at the time of the accident, "Plaintiffs were occupying a motor vehicle owned by their employer, and therefore, Plaintiffs are not entitled to [PIP] benefits from this Defendant." Defendant also reserved the right to assert any other affirmative defenses.

On August 20, 2018, on stipulation and order, plaintiffs filed a first amended complaint. Defendant did not file an answer to plaintiffs' first amended complaint filed within the 14 days required by the trial court, but did, ultimately respond to that complaint and filed affirmative defenses.

Thereafter, the trial court granted MSBS's motion for leave to file an amended complaint (confusingly, called a first amended complaint despite the fact that a prior first amended complaint had been filed) to purportedly include an exhibit detailing services it had performed for Matigian since the lawsuit had been initiated. Defendant responded to the second "first amended complaint" and filed affirmative defenses.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Defendant contended that because Matigian was driving his employer-owned and insured vehicle (and in the scope of his employment) at the time of the accident at issue, he was required to obtain any PIP benefits he may be entitled to from the insurer of the employer-owned vehicle pursuant to MCL 500.3114(3). Further, defendant indicated its policy with Matigian included applicable coverage exclusions that precluded Matigian from receiving benefits from defendant.

In response, plaintiffs admitted that Matigian was in the course and scope of his employment with FCA Transport and was operating an employer-owned vehicle at the time of the accident. Plaintiffs asserted, however, that defendant waived the policy exclusions as affirmative defenses because it failed to inform Matigian that the exclusions existed and did not plead them as affirmative defenses. Thereafter, defendant amended its affirmative defenses to include defenses that plaintiffs' claims were barred by policy exclusions.

The trial court granted summary disposition in defendant's favor finding that the policy exclusions contained in defendant's policy precluded Matigian from obtaining benefits from

defendant. The trial court further concluded that MSBS, as Matigian's assignee, was not entitled to payment because Matigian's alleged injuries were excluded from coverage. The trial court was not persuaded that defendant delayed in raising the policy exclusions because plaintiffs "failed to allege in their pleadings that Matigian had actually been driving his employer's vehicle at the time of the accident."

As an initial matter, although plaintiffs' arguments on appeal concentrate on whether defendant waived its ability to raise policy exclusions as affirmative defenses or was otherwise precluded from asserting the policy exclusions as affirmative defenses, we find that the trial court could have properly granted summary disposition in defendant's favor under the language of MCL 500.3114(3). "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Michigan Dept of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

This Court reviews a trial court's decision whether to grant or deny a motion for summary disposition is reviewed de novo. *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 321 Mich App 574, 579; 909 NW2d 533 (2017), remanded on other grounds by 503 Mich 917 (2018).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (citations and quotation marks omitted).][2]

Issues of statutory interpretation are also reviewed de novo. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). This Court's primary goal when performing statutory interpretation is to determine and give effect to the intent of the Legislature. *Bonner v Brighton*, 495 Mich 209, 222; 848 NW2d 380 (2014). "When the words used in a statute or an ordinance are clear and unambiguous, they express the intent of the legislative body and must be enforced as written." *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 137; 892 NW2d 33 (2016).

MCL 500.3114 governs the priority among insurers for the payment of no-fault insurance benefits. Generally, under MCL 500.3114(1), an individual must seek no-fault benefits from his own insurer unless one of the exceptions enumerated in MCL 500.3114(2), (3), or (5) applies. *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 111; 724 NW2d 485 (2006).

Relevant to the instant matter, MCL 500.3114(3) provides:

[2] Although defendant brought its motion for summary disposition under both MCR 2.116(C)(8) and (10), the trial court considered the motion under MCR 2.116(C)(10).

> An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.

"The word 'shall' is unambiguous and is used to denote mandatory, rather than discretionary, action." *Yachcik v Yachcik*, 319 Mich App 24, 36; 900 NW2d 113 (2017) (quotation marks and citation omitted).

The evidence in this matter demonstrated that Matigian was driving a semitractor trailer owned by his employer, FCA Transport, and insured with Zurich Insurance, when the accident occurred. Because MCL 500.3114(3) contains mandatory language stating that an employee who suffers injury "while an occupant of a motor vehicle owned" by the employee's employer "*shall* receive [PIP] benefits to which the employee is entitled from the insurer of the furnished vehicle," Matigian must obtain any PIP benefits he is entitled to from the insurer of that semitractor trailer, Zurich Insurance. Therefore, the trial court properly granted summary disposition in defendant's favor in regards to PIP benefits, albeit for perhaps the wrong reason.

Next, assuming, without deciding, that the policy exclusions at issue were affirmative defenses required to be asserted in a responsive pleading pursuant to MCR 2.111(F) and that defendant failed to so assert them, we find defendant nevertheless did not waive its ability to assert the application of such exclusions.

MCR 2.111(B) requires a plaintiff to state in its complaint the allegations necessary to reasonably inform the adverse party of the claims the adverse party is called on to defend. *Kloain v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006). "[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 v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993).

In their initial and first amended complaints, plaintiffs alleged Matigian was driving his own vehicle at the time of the accident, not his employer's, and that defendant owed Matigian coverage for his injuries. Additionally, plaintiffs, relying on MCL 500.3114, alleged defendant was the no-fault benefits insurer "in the highest order of priority." At no point in either version of plaintiffs' complaints did plaintiffs allege or disclose that Matigian was driving his employer's vehicle at the time of the accident. Thus, plaintiffs failed to plead factual allegations sufficient to reasonably inform defendant that Matigian was involved in an accident while he was operating an employer-owned vehicle in the course of his employment and that its policy exclusions in this regard may be applicable. As a result, defendant was excused from raising the employer-owned-vehicle exclusion as an affirmative defense. See *Miller v Inglis*, 223 Mich App 159, 168-169; 567 NW2d 253 (1997) (indicating that because the defendant did not learn of the applicability of a defense "until discovery was underway," there was "no reason why leave to amend should not be given.").

Defendant's policy contains the following pertinent exclusion with respect to no-fault benefits:

EXCLUSIONS

1. Bodily Injury Not Covered. This insurance does not apply to bodily injury to:

***

h. you or a resident relative while occupying a motor vehicle owned or registered by your or their employer for which security is maintained as required by the Code.

The policy also contains the following exclusion with respect to underinsured motorist benefits:

EXCLUSIONS

1. Coverage under this part does not apply to bodily injury sustained by an insured person:

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d. while occupying a motor vehicle furnished by an insured person's employer and operated in the course of that insured person's employment unless the motor vehicle is your car.

While, this Court reviews a trial court's interpretation and application of an insurance policy de novo, *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004), there is no need for an interpretation of the clear, unambiguous policy exclusions set forth above. Plaintiffs assert no confusion with respect to the provisions and readily admit that at the time of the accident, Matigian was driving a vehicle owned and insured by his employer and was driving the vehicle in the course and scope of his employment. Matigian was thus precluded from seeking benefits from defendant as was MSBS as Matigian's assignee.

An assignee stands in the shoes of the assignor, acquiring the same rights and being subject to the same defenses. *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 256-257; 827 NW2d 379 (2012). In the no-fault context, this means a healthcare provider who obtains an assignment from an insured possesses the same rights the insured would have had to collect past or presently due benefits from the insurer. See *Prof Rehab Ass'n v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). Because Matigian's injuries are excluded from coverage under the policy and he is, thus, not entitled to payment of benefits, MSBS, as the assignee, is also not entitled to payment for services it provided Matigian for injuries related to the August 2016 accident.

While plaintiffs assert defendant did not advise them of the existence of the policy exclusions until its motion for summary disposition, thereby prejudicing them and depriving them of the opportunity to take different actions during the course of litigation, an insured is obligated to read his insurance policy. In *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394-395; 729 NW2d 277 (2006), this Court explained:

> It is well established that an insured is obligated to read his or her insurance policy and raise any questions about the coverage within a reasonable time after the policy is issued. Consistent with this obligation, if the insured has not read the policy, he or she is nevertheless charged with knowledge of the terms and conditions of the insurance policy.

Thus, despite plaintiffs' claim that defendant did not advise them of the existence of the employer-owned-vehicle exclusions in the policy, Matigian was obligated to read his insurance policy and, even if he did not, was still charged with knowledge of the terms and conditions of that policy, including the employer-owned-vehicle exclusions at issue. *Id*. MSBS, as Matigian's assignee, was charged with the same knowledge.

III. MEND-THE-HOLD DOCTRINE

Plaintiffs next argue that defendants could not assert that policy exclusions applied to preclude plaintiffs' claim for benefits by virtue of the "mend-the-hold" doctrine. We disagree.

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." [*CE Tackels, Inc v Fantin*, 341 Mich 119, 124; 67 NW2d 71 (1954), quoting *Ohio & Miss R Co v McCarthy*, 96 US 258, 267-268; 24 L Ed 693 (1877).]

While *CE Tackels* involved a dispute between a general contractor and subcontractor and concerned itself with an offer and acceptance in the context of contracts, Michigan courts have also estopped an insurer from asserting a defense to an action in certain situations essentially under a "mend-the-hold" principle. As our Supreme Court held in *Smith v Grange Mut Fire Ins Co of Mich*, 234 Mich 119, 122-123; 208 NW2d 145 (1926):

> This court has many times held, and it must be accepted as the settled law of this state, that, when a loss under an insurance policy has occurred and payment refused for reasons stated, good faith requires that the company shall fully apprise the insured of all the defenses it intends to rely upon, and its failure to do so is, in legal effect, a waiver, and estops it from maintaining any defenses to an action on the policy other than those of which it has thus given notice.

See also *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 695; 572 NW2d 686 (1997), quoting *Lee v Evergreen Regency Coop & Mgt Sys, Inc*, 151 Mich App 281, 285; 390 NW2d 183 (1986) ("This Court has stated that, generally, 'once an insurance company has denied coverage to an insured and stated its defenses, the company has waived or is estopped from raising new defenses.' "). However, the "doctrine may not be used to broaden policy coverage to protect an insured against risks not included in the policy or expressly excluded from the policy." *South Macomb Disposal Auth*, 225 Mich App at 695-696.

Plaintiffs assert the mend-the-hold doctrine should estop defendant from being able to raise the employer-owned-vehicle exclusions and defenses. But the policy expressly excludes PIP

coverage when the insured is occupying an employer-owned vehicle, as well as UM and UIM coverage when the insured operates an employer-owned vehicle in the course of employment. Because the mend-the-hold doctrine cannot be "used to broaden policy coverage to protect an insured against risks . . . expressly excluded from the policy," the doctrine does not apply. *Id.*

IV. EQUITABLE ESTOPPEL

Plaintiffs next argue equitable estoppel should apply to impose coverage because defendant misrepresented the terms of the policy to Matigian and failed to raise the defenses earlier in the litigation. We disagree.

> Generally, to justify the application of estoppel, one must establish that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, and knowledge of the actual facts on the part of the representing or concealing party. [*Lothian v Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982).]

Plaintiffs have failed to establish defendant misrepresented the terms of the policy to Matigian. Plaintiffs point to defendant's answer to the interrogatories in which it stated that no policy exclusions applied. But, as noted during the hearing on its motion for summary disposition, defendant, at that time, "did not have the facts that this exclusion would apply." Further, defendant asserted that although it had notice of the idea that Matigian may have been occupying an employer vehicle "[e]arly on," it was not "something that was alleged in the Complaint" and defendant did not know Matigian's status at the time of responding to the complaint. Moreover, defendant's answer to plaintiffs' initial complaint, as well as MSBS's amended complaint, contained an affirmative defense that PIP coverage was excluded because Matigian was occupying an employer-owned vehicle, at least notifying plaintiffs that the employer-owned-vehicle defense and exclusions were on defendant's radar.

Additionally, as previously indicated, Matigian was obligated to read his insurance policy and, even if he did not, he was nevertheless charged with knowledge of the terms and conditions of the insurance policy. Thus, Matigian was charged with knowledge of the employer-owned-vehicle exclusions in his personal policy, and, therefore, charged with the knowledge that he was not entitled to PIP, UM and UIM benefits from defendant.

Additionally, in *Kirschner v Process Design Assoc, Inc*, 459 Mich 587; 592 NW2d 707 (1999), our Supreme Court held that an insurer was not estopped from enforcing a policy exclusion, explaining:

> [A]pplying the doctrine of waiver and estoppel to broaden the coverage of a policy would make a contract of insurance
>
> > cover a loss it never covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make. [*Id.* at 494, quoting

Ruddock v Detroit Life Ins Co, 209 Mich 638, 654; 177 NW 242 (1920).]

Estoppel is inapplicable in this instance.[3]

Affirmed.

/s/ Kathleen Jansen
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

[3] While plaintiffs also argue in their brief that the trial court abused its discretion in setting aside the default that had been entered against defendant, plaintiffs failed to raise this issue in their statement of questions presented. An issue is waived on appeal when it is not contained in an appellant's statement of questions presented. *Seifeddine v Jaber*, 327 Mich App 514, 521; 934 NW2d 64 (2019); see also MCR 7.212(C)(5) (stating that an appellant's brief must contain "[a] statement of questions involved, stating concisely and without repetition the questions involved in the appeal.").