If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

SHANTI TURNER, Plaintiff-Appellant,	UNPUBLISHED June 17, 2021
v AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee.	No. 352904 Oakland Circuit Court LC No. 2018-170705-NF

Before: GLEICHER, P.J., and CAVANAGH and LETICA, JJ.

PER CURIAM.

Plaintiff appeals as of right an opinion and order granting defendant’s motion for summary disposition in this first-party no-fault action. We affirm.

Plaintiff claims that she was injured in a motor vehicle accident that occurred on December 21, 2017, in Birmingham, Michigan. She filed this first-party no-fault action against defendant on December 21, 2018, alleging that defendant “was the insurer under the Michigan No-Fault Insurance Laws for the vehicle [p]laintiff [was] driving.” Plaintiff asserted that defendant had failed to pay no-fault benefits to which she was entitled, and plaintiff sought recovery of such no-fault benefits from defendant.

On January 28, 2019, defendant filed an answer to the complaint and a notice of affirmative defenses. Defendant’s answer repeatedly asserted that plaintiff had sued the wrong no-fault insurer. In response to paragraph 2 of the complaint, defendant’s answer stated, in relevant part: “Defendant states further that Auto-Owners Insurance Company is not the appropriate insurance company or party to this lawsuit. The subject policy was written by Home-Owners Insurance Company and the caption needs to be amended to reflect the appropriate insurance company.” In response to paragraph 4 of the complaint, defendant’s answer stated, in relevant part, “Defendant further states that Home-Owners Insurance Company insured the vehicle the [p]laintiff was driving on the date of the loss.” Defendant made the same statement in response to paragraph 6 of the complaint. In paragraph 18 of its notice of affirmative defenses, defendant stated: “Auto-Owners is an improper party to this action as it did not issue the subject insurance policy. Home-[O]wners is the only proper party to this action.”

Despite these repeated assertions by defendant, plaintiff took no immediate action to seek leave to amend the complaint to substitute Home-Owners for defendant. The case proceeded to discovery for several months.

On October 22, 2019, defendant filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendant argued that plaintiff was not insured under any no-fault policy issued by defendant. Rather, plaintiff was insured by Home-Owners. Defendant and Home-Owners are separate and distinct entities, even though they are both subsidiaries of Auto-Owners Insurance Group ("AOIG"). Plaintiff had no claim against defendant because she was not insured by it. The separate corporate forms of defendant and Home-Owners must be respected. Plaintiff should have sued Home-Owners, which issued the no-fault policy to her. Also, plaintiff's claim was barred by res judicata and collateral estoppel because a healthcare provider, Ferndale Family Pharmacy ("the Pharmacy"), as plaintiff's assignee, sued defendant for no-fault benefits in the 19th District Court, Case No. 19-31544-GC; defendant sought summary disposition in that case on the ground that Home-Owners rather than defendant issued the no-fault policy; and the district court granted summary disposition to defendant and dismissed the Pharmacy's complaint. Plaintiff and the Pharmacy were in privity because the Pharmacy was plaintiff's assignee.

On December 18, 2019, plaintiff filed a response in opposition to defendant's motion for summary disposition. Plaintiff asked for leave to amend the complaint to name Home-Owners as the proper entity being sued. Plaintiff also asked for waiver of the one-year-back rule of MCL 500.3145(2) because, without such a waiver, plaintiff's claim would be "eviscerated" by the one-year-back rule. Plaintiff further said there were factual issues requiring denial of the summary disposition motion, but she did not identify those factual issues.

On January 16, 2020, the trial court issued a one-page opinion and order granting defendant's motion for summary disposition. The opinion and order stated, in relevant part: "There is no genuine issue of material fact that [d]efendant Auto-Owners did not insure [p]laintiff at the time of the accident. The proper [d]efendant that should have been named in this case is Home-Owners, the insurance company that issued a policy to [p]laintiff." The court did not grant plaintiff's request for leave to amend the complaint to substitute Home-Owners for defendant.

On February 28, 2020, plaintiff filed a claim of appeal. On June 22, 2020, plaintiff filed a motion to remand. Plaintiff asked for a remand so that she could present additional exhibits and facts regarding the relationship between defendant and Home-Owners. Plaintiff asserted that defendant and Home-Owners were not distinct legal entities and that the trial court should have allowed her to amend her complaint to correct a misnomer in naming the proper defendant. Plaintiff provided as exhibits screenshots of Internet webpages, including Google search results related to defendant and Home-Owners, information from AOIG's webpage, and search results from the Department of Licensing and Regulatory Affairs (LARA) regarding defendant, Home-Owners, and AOIG.

On July 2, 2020, defendant filed a response opposing plaintiff's motion to remand. Defendant argued that plaintiff already had an opportunity to present facts and arguments on these points when responding to defendant's motion for summary disposition.

On August 12, 2020, this Court entered an order denying plaintiff's motion to remand "without prejudice to a case call panel of this Court determining that remand is necessary once the case is submitted on a session calendar." *Turner v Auto-Owners Ins Co*, unpublished order of the Court of Appeals, entered August 12, 2020 (Docket No. 352904).

Plaintiff first argues on appeal that the trial court erred in granting summary disposition to defendant under MCR 2.116(C)(10) on the ground that plaintiff was insured by Home-Owners rather than by defendant. Plaintiff challenges the evidence defendant offered in support of its summary disposition motion and disputes the separate corporate identities of defendant and Home-Owners. Plaintiff's arguments are unavailing.

An issue must be raised in or decided by the trial court in order to be preserved for appeal. *Glasker-Davis v Auvenshine*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 345238); slip op at 3. "Furthermore, so long as the issue itself is not novel, a party is generally free to make a more sophisticated or fully-developed argument on appeal than was made in the trial court." *Id*. Although plaintiff filed a response opposing defendant's motion for summary disposition, plaintiff did not raise the arguments she asserts on appeal; she did not challenge below the evidence that defendant submitted in support of its summary disposition motion or provide any argument disputing the separate corporate identities of defendant and Home-Owners. In short, plaintiff on appeal is not merely making a more sophisticated or fully-developed argument than was made below; instead, she is raising novel issues that were not raised at all below. Nor did the trial court address any such arguments, given plaintiff's failure to make them. Hence, these issues are unpreserved for appeal.

A trial court's decision on a motion for summary disposition is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

> A motion under MCR 2.116(C)(10) . . . tests the *factual sufficiency* of a claim. When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*Id*. at 160 (quotation marks and citations omitted).]

However, because the issues are unpreserved, any review is limited to plain error affecting plaintiff's substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). Plaintiff must show that an error occurred, that the error was clear or obvious, and that the error affected substantial rights. *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). Generally, an error affects substantial rights if it is prejudicial, i.e., it affected the outcome of the case. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

Courts are to examine MCL 500.3114 in determining the priority of insurers liable for no-fault benefits. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 254; 819 NW2d 68 (2012). MCL 500.3114(1) provides that a no-fault policy "applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household,

if the injury arises from a motor vehicle accident." "The phrase 'the person named in the policy' is synonymous with the term 'the named insured.' " *Corwin*, 296 Mich App at 255.

> [N]o-fault insurance policies for the injured person's household are first in order of priority of responsibility for payment of no-fault benefits. Therefore, a person who sustains accidental bodily injury while the occupant of a motor vehicle must first look to no-fault insurance policies within his or her household for no-fault [personal injury protection] benefits. [*Id*. (quotation marks, ellipsis, and citations omitted).]

At the time of the accident in this case, plaintiff was the named insured on a no-fault policy issued by Home-Owners, not by defendant. This is demonstrated by the Home-Owners policy declarations page appended to defendant's motion for summary disposition. Plaintiff notes that defendant failed to produce the entire policy, but the declarations page itself shows that plaintiff's no-fault insurer was Home-Owners. Plaintiff says that she might have purchased two no-fault policies, one each from Home-Owners and defendant, but there is no evidence that she did so and no explanation for why plaintiff would buy more than one policy. Speculation is insufficient to avoid summary disposition. *Ghaffari v Turner Constr Co*, 268 Mich App 460, 464; 708 NW2d 448 (2005).

Defendant acknowledges that it and Home-Owners have the same corporate parent, AOIG, and that defendant and Home-Owners have the same address, telephone number, and resident agent. Defendant further notes that Home-Owners uses defendant as a third-party administrator to adjust claims asserted against Home-Owners. But defendant maintains that it and Home-Owners are legally distinct entities. Defendant appended to its motion for summary disposition a document showing that defendant and Home-Owners have different registration numbers from the National Association of Insurance Commissioners (NAIC).

For the first time on appeal, plaintiff challenges the admissibility of this document, asserting that it constitutes hearsay and was not properly authenticated as a business record. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Generally, hearsay is inadmissible except as provided by the Michigan Rules of Evidence. MRE 802; *In re Utrera*, 281 Mich App at 18. MRE 803(6) provides a hearsay exception for business records, i.e., records of regularly conducted activity. Although evidence presented at the summary disposition stage "must be substantively admissible, it does not have to be in admissible form." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). A party need not lay a proper foundation for the admission of documents at the summary disposition stage, as long as a plausible basis for admission exists. *Id*. Plaintiff's challenge to the admissibility of the NAIC document focuses on form rather than substance. Plaintiff has not established that the content of the document is inadmissible. Plaintiff identifies no basis to doubt that a proper foundation could be laid for admission, as a record of regularly conducted activity, MRE 803(6), of a document showing that defendant and Home-Owners have separate NAIC registration numbers. "A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position. Failure to adequately brief an issue constitutes abandonment." *Seifeddine v Jaber*, 327 Mich App 514, 519-520; 934 NW2d 64 (2019) (citation omitted). Plaintiff has failed to establish a plain error that affected the outcome of the trial court's summary disposition ruling.

"It is a well-recognized principle that separate corporate entities will be respected. Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities." *Seasword v Hilti, Inc*, 449 Mich 542, 547; 537 NW2d 221 (1995) (citation omitted). The record contains no evidence contradicting the notion that defendant and Home-Owners are separate entities that share a corporate parent. Plaintiff does not claim that there has been an abuse of corporate form, nor is there evidence of such abuse. Therefore, the separate corporate identities of defendant and Home-Owners should be respected.

In the portion of her reply brief on appeal addressing this issue, plaintiff relies on documents produced for the first time on appeal that seem to comprise computer printouts of plaintiff's search results on the LARA website. Plaintiff argues on the basis of these new documents that defendant, Home-Owners, and AOIG lack a valid corporate existence in Michigan and that this somehow means that defendant and Home-Owners are not distinct legal entities. But plaintiff did not rely on those documents or make such an argument on the basis of those documents in the portion of her principal brief on appeal addressing this issue, instead leaving her discussion of those documents to her request for a remand in a separate issue. In other words, plaintiff's principal brief on appeal used those documents to support her request for a remand, not to seek outright reversal in the present issue as she does in her reply brief on appeal. "Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007).

Further, these new documents produced by plaintiff on appeal are not in the lower court record. "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). And the new documents that plaintiff has produced on appeal appear to be computer printouts from the LARA website purportedly showing that a search using the names of defendant, Home-Owners, and AOIG did not generate any results. Plaintiff has not adequately explained why a document apparently showing her search results on a website qualifies as proof that defendant, Home-Owners, and AOIG lack a valid existence in Michigan or that defendant and Home-Owners are not distinct entities. Plaintiff cannot rely on this Court to make her arguments. See *Seifeddine*, 327 Mich App at 521. Plaintiff's failure to adequately brief the issue constitutes abandonment. *Id*. Plaintiff has not shown a plain error that affected the outcome of the trial court's summary disposition ruling.

Overall, plaintiff has failed to demonstrate a genuine issue of material fact regarding whether she was insured by defendant. The evidence in the record shows that plaintiff was insured by Home-Owners rather than by defendant. The trial court therefore properly granted summary disposition to defendant under MCR 2.116(C)(10). Plaintiff has not met her burden of showing an outcome-determinative plain error that would entitle her to relief on her unpreserved arguments.

In light of our conclusion that the trial court properly granted summary disposition to defendant under MCR 2.116(C)(10), we need not address the parties' arguments on appeal regarding whether summary disposition in favor of defendant would have been proper under MCR 2.116(C)(7) and (8).

Plaintiff next argues that the trial court abused its discretion in denying plaintiff's request for leave to amend her complaint to substitute Home-Owners for defendant. We disagree.

A trial court's decision whether to allow an amendment of a pleading is reviewed for an abuse of discretion. *Kincaid v Flint*, 311 Mich App 76, 94; 874 NW2d 193 (2015). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Id*.

When a motion for summary disposition is filed under MCR 2.116(C)(8), (9), or (10), the trial court "shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). MCR 2.118(A)(1) provides, "A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading." MCR 2.116(A)(2) states: "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Particularized reasons that would justify denial of a motion to amend a complaint include "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, or futility." *Kincaid*, 311 Mich App at 94.

Amendment of plaintiff's complaint to add Home-Owners as a defendant would be futile. Under the one-year-back rule of MCL 500.3145(2), "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." Plaintiff admitted below that her claim for no-fault benefits against Home-Owners would be "eviscerated" by the one-year-back rule unless the one-year-back rule is waived or deemed inapplicable. No legal basis exists to relieve plaintiff from the application of the one-year-back rule. It is true that, under MCR 2.118(D), "[a]n amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." But "the relation-back doctrine does not apply to the addition of new parties." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 203; 920 NW2d 148 (2018) (quotation marks and citation omitted). Therefore, because an amendment adding Home-Owners would not relate back to the filing of the original complaint, plaintiff's claim against Home-Owners would, by plaintiff's own admission, be eviscerated by the one-year-back rule, thus rendering plaintiff's requested amendment futile.

This case does not fall within the so-called misnomer doctrine by which an amendment may relate back to the filing of the original action. "The misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties, for example, where the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name." *Miller v Chapman Contracting*, 477 Mich 102, 106-107; 730 NW2d 462 (2007) (quotation marks, brackets, ellipsis, and citations omitted). When "the plaintiff seeks to substitute or add a wholly new and different party to the proceedings, the misnomer doctrine is inapplicable." *Id*. at 107. This case does not involve an inconsequential deficiency or technicality in the naming of a party. Plaintiff sued the wrong insurer and is now seeking to add a wholly new and different party. Also, the extent of a plaintiff's fault in pursuing an action against the wrong entity is a factor in determining whether the misnomer doctrine applies. See *Cobb v Mid-Continent Tel Serv Corp*, 90 Mich App 349, 354; 282 NW2d 317 (1979). Defendant notified plaintiff at the

outset of the case that she had sued the wrong entity and that Home-Owners was her no-fault insurer, but plaintiff took no action to seek leave to amend the complaint for almost a year, waiting until after defendant moved for summary disposition on this ground before asking for leave to amend the complaint. Plaintiff may not use the misnomer doctrine as a shield given that she was not diligent in seeking a timely amendment. Plaintiff was on notice from the outset of the case that defendant was not the proper entity to sue, but plaintiff failed to act. For all of these reasons, the misnomer doctrine is inapplicable.

Plaintiff's reliance on *Matti Awdish, Inc v Williams*, 117 Mich App 270; 323 NW2d 666 (1982), is misplaced. In that case, the plaintiff alleged that the defendant's "negligent operation of a motor vehicle resulted in extensive property damage to [the plaintiff's] business premises and the loss of merchandise through theft." *Id*. at 272. The defendant's insurer, Farmer's Insurance Group ("Farmer's"), was not named as a party in the case. *Id*. This Court held that the plaintiff should have sued Farmer's because the insurer rather than the insured is the proper defendant in an action to recover no-fault property protection benefits. *Id*. at 275-277. But this Court further ruled that, although the one-year limitation period had expired for suing Farmer's, the plaintiff should be allowed to amend the complaint to add Farmer's as a defendant. *Id*. at 277-279. This Court noted that "mere knowledge of a lawsuit on the part of a potential party does not preclude that party from asserting a statute of limitations defense if it is added as a party defendant." *Id*. at 278. In that case, however, there was far more than mere knowledge of the lawsuit. *Id*. Farmer's "literally conducted the defense for" the defendant. *Id*. at 278-279. The law firm for Farmer's sought summary judgment on behalf of the defendant only after the limitation period had expired, which this Court deemed a "clever tactic" that was taken with "malice aforethought." *Id*. at 278.

> Moreover, based on existing precedent, it could not be said to have been obvious that the insurer was the proper party defendant to a suit seeking no-fault benefits for economic loss, and conversely, that the insured was an improper party. Thus, this is not a simple case of lack of diligence or negligence on the part of [the plaintiff's] counsel. In view of these considerations we see no injustice in requiring [Farmer's] to defend against [the plaintiff's] complaint on its merits. [*Id*. at 279.]

This Court further explained:

> The instant case does not involve a true misnomer problem because defendant cannot be considered the agent of the insurer. However, as noted above, given the fact that the insurer actually controlled the defense in this action, the policy behind recognizing a statute of limitations defense—the foreclosure of stale claims—is wholly inapplicable. Not only did the insurer have notice of the action, it ran the defense. As such, it can hardly claim that it would be unfairly forced to litigate a stale claim if the applicable limitations period were deemed tolled. [*Id*.]

The present case differs from *Matti Awdish*. Unlike in *Matti Awdish*, this case did not involve any uncertainty in the law regarding who should be sued. And in sharp contrast to *Matti Awdish*, this case *does* involve a lack of diligence on the part of plaintiff's counsel. Defendant stated in its responsive pleadings at the outset of the case that plaintiff had sued the wrong insurer and that Home-Owners was plaintiff's insurer and would be the proper defendant in this case. Yet plaintiff's counsel waited almost a year to request leave to amend the complaint to substitute

Home-Owners for defendant. Also, unlike *Matti Awdish*, the present case involves the one-year-back rule, and our Supreme Court has now held that the one-year-back rule is not subject to judicial tolling. See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 583; 702 NW2d 539 (2005). Overall, *Matti Awdish* does not support plaintiff's request to amend the complaint to add Home-Owners.

Finally, plaintiff renews her request to remand the case to the trial court. We deny plaintiff's request.

Whether to grant a request to remand is within the discretion of this Court. *People v Hernandez*, 443 Mich 1, 14-15; 503 NW2d 629 (1993), abrogated on other grounds by *People v Mitchell*, 454 Mich 145 (1997).

Plaintiff requests a remand on the basis of the same arguments and evidence on which she relied in her previously filed motion to remand, which this Court denied without prejudice. Nothing has changed since the denial of that motion; her request for a remand is again denied.

In order to obtain a remand to the trial court, a party must show "that the issue is one that is of record and that must be initially decided by the trial court[,]" MCR 7.211(C)(1)(a)(*i*), or "that development of a factual record is required for appellate consideration of the issue[,]" MCR 7.211(C)(1)(a)(*ii*). "Subsection (*i*) clearly requires that remand be necessary because the underlying issue is one that the trial court must resolve before appellate adjudication. Subsection (*ii*) clearly requires that remand be necessary because further factual development is needed before the case is ripe for appellate adjudication." *People v Jackson*, 487 Mich 783, 798; 790 NW2d 340 (2010).

Plaintiff is not entitled to a remand under either ground set forth in MCR 7.211(C)(1)(a). In its summary disposition ruling, the trial court already decided the issue of whether defendant was plaintiff's no-fault insurer. The trial court's opinion and order stated, in relevant part: "There is no genuine issue of material fact that [d]efendant Auto-Owners did not insure [p]laintiff at the time of the accident. The proper [d]efendant that should have been named in this case is Home-Owners, the insurance company that issued a policy to [p]laintiff." Moreover, a factual record was already developed when defendant filed its motion for summary disposition and plaintiff responded to the motion. The parties were afforded a full opportunity to present whatever evidence they wished to present at that time. The case is ripe for appellate adjudication without a remand.

Plaintiff asks for a remand because she wants to present evidence that she believes supports her new argument on appeal that defendant and Home-Owners are not separate entities. As explained earlier, plaintiff's appellate argument on this point is unpreserved. A request for a remand may not be used to evade preservation requirements. See *Hernandez*, 443 Mich at 16 ("An issue that initially should be decided by the trial court is different from an issue that must be raised first in the trial court to be preserved for appeal."). Plaintiff's request for a remand is denied.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Anica Letica