STATE OF MICHIGAN

COURT OF APPEALS

JACQUELINE VISNER,

Plaintiff-Appellant,

v

ANNETT MARIE HARRIS, JEFFREY TODD HARRIS and PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
December 6, 2012

No. 307506
Tuscola Circuit Court
LC No. 09-025546-NI

JACQUELINE VISNER,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

No. 307507
Tuscola Circuit Court
LC No. 10-026117-NF

Before: SAWYER, P.J., and SAAD and METER, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right from the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendants Pioneer State Mutual Insurance Company and State Farm Mutual Automobile Insurance Company. For the reasons set forth below, we affirm.

Plaintiff was struck by a vehicle while standing in her driveway on August 20, 2008. She suffered serious injuries. Neither the operator of the vehicle nor the vehicle itself was covered by an insurance policy. At the time, plaintiff was listed as a "named driver" on an insurance policy issued by defendant Pioneer, but the insurance policy only listed her then-fiancé as a "named insured." Under the terms of the insurance contract, defendant Pioneer was only liable to provide statutory no-fault personal protection insurance (PIP) benefits to a "named insured"

on the insurance policy. Nevertheless, plaintiff timely provided notice of her injuries to defendant Pioneer, and defendant Pioneer began paying PIP benefits to plaintiff. In February 2010, however, defendant Pioneer realized that it was not liable for PIP benefits under the terms of the insurance policy because plaintiff was not a "named insured." Accordingly, defendant Pioneer ceased paying PIP benefits to plaintiff.

In June 2010, plaintiff provided notice of her injuries to the Assigned Claims Facility (ACF). The ACF denied liability for PIP benefits because it had not received notice within one year of the incident. The ACF assigned defendant State Farm to defend this action on its behalf.

Ultimately, the trial court granted defendant Pioneer's motion for summary disposition under MCR 2.116(C)(10), holding that it was not liable for PIP benefits under the plain terms of the insurance policy. The trial court also granted defendant State Farm's motion for summary disposition under MCR 2.116(C)(10), holding that it was not liable for PIP benefits because plaintiff failed to provide notice to the ACF within one year of the incident.

We review de novo a grant or denial of summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). For a (C)(10) motion, the trial court must consider the "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." *Id*. at 120. "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." *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). Statutory interpretation also presents a question of law reviewed de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

Plaintiff first argues that the trial court erroneously held that defendant State Farm was not liable for PIP benefits because she failed to provide notice to the ACF within one year of the incident. Plaintiff contends that her notice to the ACF was timely despite the fact that the notice was provided 22 months after the incident, in apparent violation of MCL 500.3145. We disagree.

MCL 500.3145 provides:

> (1) 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. 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 therefor, 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.
>
> (2) An action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident.

This statute provides two separate rules: the "one-year-back rule" and the one-year notice provision. The term "one-year-back rule" is regularly used in Michigan courts. See e.g., *Henry Ford Health Sys v Titan Ins Co*, 275 Mich App 643, 646; 741 NW2d 393 (2007). The term "one-year notice provision" will be used to refer to the statutory one-year limitation period. *Goethals v Farm Bureau Ins*, 471 Mich 892; 688 NW2d 78 (2004). The one-year-back rule "precludes an action to recover benefits for any portion of a loss incurred more than one year before the date on which the action was commenced." *Henry Ford Health Sys*, 275 Mich App at 646. The one-year notice provision completely bars any action to recover benefits if notice is not provided to the insurer within one year of the accident. *Goethals*, 471 Mich at 892.

At the time relevant to this case, MCL 500.3174 provided, in relevant part:

> A person claiming through an assigned claims plan shall notify the facility of his claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. . . .[1]

MCL 500.3174 and MCL 500.3145(1), when read together, provide that a claimant must provide notice to the ACF within one year of the accident. See, e.g., *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 225-226; 779 NW2d 304 (2009) (identifying MCL 500.3145 as applying to ACF claims). If the claimant fails to provide notice to the ACF within one year of the accident, the claimant cannot maintain an action for PIP benefits. See, generally, *id*.; see also *Dolson v Secretary of State*, 83 Mich App 596, 598, 600; 269 NW2d 239 (1978). In other words, the ACF is effectively placed in the same position as a private insurer, so the one-year notice provision applies with equal force to private insurers and the ACF. See, generally, *id*. at 600.

Here, it is not disputed that plaintiff failed to provide notice to the ACF within one year of the incident. In particular, plaintiff provided notice to the ACF in June 2010, and the incident occurred in August 2008. This is a difference of about 22 months. Thus, plaintiff's claim for no-fault PIP benefits is barred by the one-year notice provision of MCL 500.3145. *Goethals*, 471 Mich at 892.

Plaintiff asserts that the one-year notice provision should be tolled because she provided notice to a different insurer (defendant Pioneer) within one year of the incident. In support of this assertion, plaintiff identifies a 1981 Attorney General opinion: OAG, 1981, No 6016

[1] 2012 PA 204 amended this statute, but the amendments are minor and do not relate to the issues in this case.

(December 1, 1981). We first note that Attorney General opinions are not binding on this Court. *Lysogorski v Bridgeport Twp*, 256 Mich App 297, 301; 662 NW2d 108 (2003). More importantly, the Attorney General opinion identified by plaintiff addresses the one-year-back rule, not the one-year notice provision at issue in this case. In addition, the Attorney General in that opinion relied on this Court's decision in *Richards v American Fellowship Mut Ins Co*, 84 Mich App 629; 270 NW2d 670 (1978). However, *Richards* was overruled by *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). For these reasons, the Attorney General opinion does not control the outcome of this case.

The facts of this case are similar to the facts of *Allen v Farm Bureau Ins Co*, 210 Mich App 591; 534 NW2d 177 (1995). In *Allen*, the plaintiff could not identify a private insurer responsible for no-fault benefits, so he provided notice to the ACF and commenced a lawsuit within one year of his accident. *Id*. at 593. After the one-year notice period had expired, however, the insurer-assignee of the ACF identified a private insurer that was responsible for no-fault benefits and plaintiff added the private insurer to his lawsuit for wage-loss benefits. *Id*. at 593-594. The trial court ultimately dismissed the plaintiff's action against the private insurer because the plaintiff had not provided notice to the private insurer within one year of the accident. See *id*. at 599. This Court affirmed. *Id*. at 599-600. The *Allen* Court agreed with the ultimate holding of *Hunt v Citizens Ins Co*, 183 Mich App 660; 455 NW2d 384 (1990),[2] in which the panel concluded that "the period of limitation in [MCL 500.3145(1)] was not tolled where . . . the injured party filed a claim through the [ACF] of the no-fault act within the one-year limitation period, but failed to notify the higher priority insurer within the limitation period." *Allen*, 210 Mich App at 599, citing *Hunt*, 183 Mich App at 666.

The only distinction between *Allen* and the instant case is that the plaintiff in *Allen* provided timely notice to the ACF and untimely notice to the private insurer, whereas plaintiff here provided timely notice to a private insurer but untimely notice to the ACF. However, this is a distinction without a difference because the ACF is entitled to the same one-year notice as a private insurer. See, e.g., *Bronson Methodist Hosp*, 286 Mich App at 225-226. Accordingly, we affirm the trial court's grant of summary disposition with respect to defendant State Farm.

Next, plaintiff argues that the trial court erroneously held that there was no genuine issue of material fact with respect to whether she was a "named insured" of defendant Pioneer. Plaintiff contends that she was entitled to PIP and uninsured motorist (UM) benefits under the terms of the insurance policy. We disagree.

In Michigan, an "owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance[.]" MCL 500.3101(1). Under MCL 500.3114(1), "a personal protection insurance policy described in section 3101(1) 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." In other words, MCL 500.3114(1) requires an insurer to provide PIP benefits to the "named insured," the spouse of the named insured, and household relatives of

[2] The *Allen* Court disagreed with other aspects of *Hunt.*

the named insured. See *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 532; 740 NW2d 503 (2007).

Unambiguous provisions in an insurance contract must be enforced as written. See *Rory v Continental Ins Co*, 473 Mich 457, 468-470; 703 NW2d 23 (2005). "[M]erely listing a person as a designated driver on a no-fault policy does not make the person a 'named insured.'" *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 253; 535 NW2d 207 (1995). To determine whether a person is a "named insured," a court must examine the language of the insurance policy. See, e.g., *id*. at 252-254. Similarly, to determine whether a person is entitled to UM benefits, a court must examine the language of the insurance policy. *Klida v Braman*, 278 Mich App 60, 62; 748 NW2d 244 (2008).

In this case, the insurance policy was consistent with state law, specifying that a person was entitled to PIP benefits if the person was the named insured, the spouse of the named insured, or a relative domiciled in the same household as the named insured.[3] In addition, while UM benefits are not required by state law, *id*., the insurance contract provided that a person was entitled to UM benefits to the same extent that a person was entitled to PIP benefits.

The policy provided that plaintiff's then-fiancé was the "named insured." Plaintiff was not a spouse of her then-fiancé, nor was plaintiff related to her then-fiancé by blood, marriage, or adoption. Therefore, plaintiff was not entitled to PIP or UM benefits under the plain terms of the insurance contract, and defendant Pioneer was not obligated to pay these benefits to plaintiff. The trial court correctly reached this result.

Plaintiff contends that documentary exhibits presented to the trial court established a question of fact with respect to whether she was a named insured.[4] However, plaintiff provides no support for her contention that documents created after an accident that do not purport to specifically and retroactively alter the insurance policy by adding a named insured can somehow confer "named insured" status in contradiction of the plain language of the insurance contract. In fact, governing case law suggests the opposite: whether a person is a "named insured" is determined entirely by reference to the insurance contract. *Harwood*, 211 Mich App at 252-254. We therefore conclude that the trial court correctly granted defendant Pioneer's motion for summary disposition.

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[3] The insurance contract provided that defendant Pioneer is liable for PIP benefits for a "named insured" or "family member" of a named insured. The insurance contract defined "family member" as a "resident of the same household" who is related to the named insured by "blood, marriage or adoption." Thus, it appears that the term "family member" was essentially equivalent to "a relative . . . domiciled in the same household" as the named insured.

[4] For example, a "cancellation request/policy release" form lists "John Heist & Jackie Visner" in the box labeled "insured name and address."

Plaintiff lastly argues that defendant Pioneer should be prohibited from terminating PIP benefits under the doctrine of equitable estoppel. Plaintiff asserts that she detrimentally relied on defendant Pioneer's payments in not providing notice to the ACF within one year of the incident.

We first note that this issue was not raised below, so it is not preserved for appellate review. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). In any event, this Court has previously held under a materially similar factual scenario that an estoppel argument is meritless if the claimant had access to the same set of facts as the insurer. *Sisk-Rathburn v Farm Bureau Gen Ins Co*, 279 Mich App 425, 428-430; 760 NW2d 878 (2008). Plaintiff has not claimed that she did not have access to the insurance policy that provided the means to determine that she was not a "named insured." Because plaintiff had the same access to the relevant facts as defendant Pioneer, the estoppel argument fails. *Id*.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter