Court of Appeals, State of Michigan

ORDER

Lillian Bunch v Auto Club Group Insurance Company

Docket No. 330166

LC No. 14-007644-NF

Kirsten Frank Kelly
Presiding Judge

Michael J. Talbot

Kurtis T. Wilder
Judges

This matter being before the Court on remand from the Michigan Supreme Court as on reconsideration granted to address the issue whether the defendant waived its right to assert a defense based on MCL 500.3106(1) by failing to plead the effect of that statute as an affirmative defense in its responsive pleading, the Court orders that the delayed application for leave to appeal remains closed. We conclude that defendant did not lose the right to assert that the exceptions in MCL 500.3106(1) do not apply in this case because such an assertion does not constitute an affirmative defense. An affirmative defense is one that "admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). Plaintiff's prima facie case required that she establish that defendant was obligated to pay no-fault benefits, which includes establishing that one of the parked vehicle exceptions in MCL 500.3105 apply. See *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635-636; 563 NW2d 683 (1997); *Shanafelt v Allstate Inc Co*, 217 Mich App 625, 632; 552 NW2d 671 (1996). A defense that plaintiff is unable to meet her burden to prove one of the exceptions applied is not an affirmative defense, i.e. one that "admits the establishment of plaintiff's prima facie case." *Stanke*, 200 Mich App at 312.

This Court retains no further jurisdiction.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 22 2016
Date

Chief Clerk