STATE OF MICHIGAN

COURT OF APPEALS

JAWAD A. SHAH, M.D., PC, INSIGHT IMAGING, PC, STERLING ANESTHESIA, PLLC, ALLIANCE ANESTHESIA, PLLC, PRECISION SURGICAL ASSOCIATES, PC, INTEGRATED HOSPITAL SPECIALISTS, PC, ASSOCIATED SURGICAL CENTER OF DEARBORN, LLC,

Plaintiffs-Appellants,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 29, 2020

No. 351156
Oakland Circuit Court
LC No. 2018-170783-NF

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

In this cause of action filed by healthcare providers against a no-fault insurer seeking payment for billed expenses, plaintiffs appeal as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(7) and MCR 2.116(C)(10). Plaintiffs argue on appeal that the trial court erred in granting summary disposition to defendant because (1) plaintiffs' assignor complied with the notice provisions of MCL 500.3145(1); and (2) defendant waived, and was estopped from raising, the issue of written notice. For the reasons stated below, we reverse the trial court's summary disposition order and remand the case for further proceedings.

I. STATEMENT OF FACTS

Defendant's insured, Tina Fulkerth, was involved in a motor vehicle accident on February 26, 2015. Defendant received news of the accident on March 9, 2015, from a claims adjuster with

National General Insurance,[1] who apprised defendant of property loss, but provided no information regarding whether Fulkerth was injured in the accident. On March 11, 2015, Taylor Frederick, a claims representative in defendant's property damage department, engaged in a telephone call with Fulkerth. In a claim file opened for Fulkerth, Frederick noted, "This claim is for PIP only," and as for a description of the injury, Frederick documented: "Neck pains."[2] At her deposition, Frederick testified that while she does not recall her conversation with Fulkerth, "based on that entry and my note, [Fulkerth] told me she was injured." Frederick also testified that Fulkerth relayed to Frederick her version of the accident. Frederick confirmed that after speaking with Fulkerth, she knew Fulkerth's name, knew where she lived, and knew how and when the accident happened that led to Fulkerth's alleged injuries. Frederick ordered a copy of the police report of the accident, which she received on March 13, 2015, and she recalled reviewing it at that time. Frederick routed the information to defendant's personal injury protection (PIP) department for follow up. Employees of defendant's PIP department attempted to call Fulkerth on three more occasions without success, and sent a follow-up letter on March 17, 2015, to which Fulkerth did not respond. Defendant closed Fulkerth's claim file on April 8, 2015, for failure to communicate and failure to initiate a PIP claim.

It appears that Fulkerth first sought treatment in December 2017 for the injuries allegedly caused by the accident.[3] On December 20, 2018, Fulkerth executed an assignment in favor of plaintiffs authorizing them to collect no-fault benefits from defendant for the healthcare services they provided her. Subsequently, plaintiffs filed the underlying lawsuit against defendant on December 28, 2018, seeking to recover payment for their treatment of Fulkerth's injuries that allegedly arose out of the motor vehicle accident.

In May 2019, defendant filed a motion for summary disposition under MCR 2.116(C)(7) (statute of limitations), MCR 2.116(C)(8) (failure to state a claim), and MCR 2.116(C)(10) (no genuine issue of material fact). The hearing on defendant's motion was adjourned several times over the next few months, and the parties' deposition of Frederick on September 30, 2019, triggered another round of briefing. As it pertains to the instant appeal, plaintiffs eventually argued

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[1] Fulkerth was driving her grandmother's car at the time of the accident, and National General Insurance was her grandmother's insurer.

[2] At her deposition, Frederick testified that her job at the time was to review claims, whether by directing a phone call or reviewing the mail. She did not have file ownership; rather, whenever anybody had a call come in or presented some form of information, she was taking down the information as it was rolling in. If the information received indicated that the nature of the file did not fall within the parameters of the property damage area, it was then her responsibility to assign the file to the department that would be best suited to handle it. She testified that as she was handling only property damage claims, she would assign a claim to another department only if it made sense for her to do so, based on the information she received. She did not assign every claim that came to her to a PIP adjuster.

[3] After closing Fulkerth's claim file, defendant heard nothing about Fulkerth's potential claim until June 2017, when it received a letter from her former attorney at Michigan Auto Law asking defendant to send him Fulkerth's entire PIP claim file.

that the notes prepared by Frederick after her March 11, 2015 telephone call with Fulkerth, indicating the time and place of the motor vehicle accident as well as the nature of Fulkerth's injuries, constituted sufficient written notice under MCL 500.3145(1). Plaintiffs additionally argued that, because defendant was given all the information required for notice under MCL 500.3145(1), never sent out a written application for benefits, and conducted its business solely by telephone, defendant had either waived the written-notice requirement or was estopped from arguing that it required a written application for benefits.

Contrariwise, defendant argued that Fulkerth could no longer bring a claim for PIP benefits because she failed to begin it within one year of the date of the accident that allegedly caused her injuries or to extend that statutory limitations period by providing notice in the time and manner required by MCL 500.3145(1). Defendant insisted that the oral notice provided by Fulkerth to Frederick on March 11, 2015, was insufficient to meet the written-notice requirements of MCL 500.3145(1). Defendant further argued that plaintiffs failed to specify how the concepts of waiver or equitable estoppel applied to the case at bar, had waived both issues by failing to plead them in their complaint, and, with regard to equitable estoppel, had failed to demonstrate any actual misrepresentations made by defendant. Defendant concluded that Fulkerth no longer had a right to PIP benefits, and, therefore, that plaintiffs' claim to such benefits as Fulkerth's assignees was also barred.

Dispensing with oral argument as authorized by MCR 2.119(E)(3), the trial court found plaintiffs to be assignees of Fulkerth. Accordingly, plaintiffs' claim would be barred if Fulkerth's was barred. It further held that because neither Fulkerth nor someone acting in her behalf provided the requisite written notice, MCL 500.3145(1) barred her claim for PIP benefits. In addition, the trial court concluded that plaintiffs failed to demonstrate that defendant had waived compliance with the written-notice requirement or that estoppel was applicable. The trial court entered an order granting defendant's motion for summary disposition, and this appeal followed.

II. DISCUSSION

Plaintiffs argue that the trial court erred in granting summary disposition to defendant on the basis of Fulkerth's failure to provide written notice of her injuries to defendant as required under MCL 500.3145(1). Specifically, plaintiffs claim that defendant received the content required for notice under MCL 500.3145(1) from a telephone call between Fulkerth and Frederick within the year after Fulkerth's accident. Plaintiffs further contend that Frederick's act of entering the information obtained from this call into an on-screen report, and routing this report to defendant's PIP department, fulfilled the statutory requirement to have written notice given by an individual in behalf of Fulkerth. Because Frederick submitted this report and a copy of the law enforcement accident report to defendant's PIP department, defendant received written notice that substantially complied with MCL 500.3145(1) and was sufficient to preserve Fulkerth's claim. We agree.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(7), concluding that failure to meet the notice requirements of MCL 500.3145(1) barred plaintiffs' claim for no-fault benefits, and under MCR 2.116(C)(10), concluding that plaintiffs failed to establish that defendant waived the written-notice requirement or that equitable estoppel applied. "Appellate review of the grant or denial of a summary disposition motion is de novo, and

the court views the evidence in the light most favorable to the party opposing the motion." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A motion for summary disposition under MCR 2.116(C)(7) evaluates whether "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . [a] statute of limitations . . . ." MCR 2.116(C)(7). A trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Bryant v Oakpoint Villa Nursing Ctr*, 471 Mich 411, 419; 684 NW2d 864 (2004). "In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 271; 792 NW2d 798 (2010). "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

"Questions of statutory interpretation are also reviewed de novo." *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). "The trial court's factual findings will not be reversed unless they are clearly erroneous, i.e., if this Court is left with the definite and firm conviction that a mistake has been made." *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005).

As a preliminary matter, neither party disputes the trial court's determination that plaintiffs were assignees of Fulkerth with regard to the right to payment of PIP benefits that were past or presently due under the no-fault act. "[A]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." *Prof Rehab Ass'n v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). Therefore, if Fulkerth was entitled to payment of PIP benefits, then plaintiffs, as assignees, possess whatever rights Fulkerth had to recover the benefits.

At the time of Fulkerth's accident and the filing of plaintiffs' complaint,[4] MCL 500.3145(1) stated:

> 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

[4] MCL 500.3145(1) was amended effective June 11, 2019. See 2019 PA 21 and 2019 PA 22. Fulkerth's accident, and the filing of plaintiffs' complaint, occurred before this amendment.

> 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.

"[U]nder MCL 500.3145(1), a claim for PIP benefits must be filed within one year after the accident causing the injury unless either of two exceptions applies: (1) the insurer was properly notified of the injury, or (2) the insurer had previously paid PIP benefits for the same injury." *Perkovic v Zurich American Ins Co*, 500 Mich 44, 50; 893 NW2d 322 (2017). It is undisputed that plaintiffs' claim for Fulkerth's PIP benefits was filed over two years after the accident causing her injury and that defendant has not previously paid any PIP benefits for injuries allegedly arising out of this accident. Therefore, plaintiffs' claim is barred by MCL 500.3145(1) unless defendant was properly notified of Fulkerth's injury within the meaning of the statute. Clear statutory language must be enforced as written. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). "[W]hen a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case." *Basic Prop Ins Ass'n v OFIR*, 288 Mich App 552, 559; 808 NW2d 456 (2010).

The plain statutory language of MCL 500.3145(1) sets forth the requisite substance of the notice, and method of notice, necessary to preserve a claim for PIP benefits. *Perkovic*, 500 Mich at 53-54. A sufficient notice must substantively contain "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." MCL 500.3145(1). An insurer is properly notified if the necessary content is given to the insurer, or an authorized agent of the insurer, by either the claimant directly or "by someone in his behalf." *Perkovic*, 500 Mich at 53. "[I]n his behalf," as distinguished from the common phrase "on his behalf," is interpreted broadly: "[T]he provision of notice need only have been in plaintiff's interest to satisfy MCL 500.3145(1)[,]" and a claimant does not need to be aware that notice was transmitted to an insurer in order for notice to be provided in his behalf. *Id* at 53, 55. Furthermore, by explicitly designating the requisite substance and method of notice, MCL 500.3145(1) by extension does not impose any additional requirements for the notice beyond those clearly in the statutory language. *Perkovic*, 500 Mich at 56 ("In sum, the plain language of this sentence regarding the provision of notice does not impose any unarticulated requirements as to the form of the notice, such as an explicit request for no-fault benefits."). Thus, "[t]he provision does not mandate any particular format for this notice, nor does it require language explicitly indicating a possible claim for benefits." *Id*. at 54. Moreover, while the statute requires that the notice be "in writing," there is no statutory limitation with respect to *who* must be the one to create the writing; instead, as *Perkovic* makes clear, the writing may be created by someone other than the claimant. And finally, "[t]he no-fault insurance act is remedial in nature and must be liberally construed in favor of persons intended to benefit thereby." *In re Geror*, 286 Mich App 132, 134-35; 779 NW2d 316 (2009) (quotation marks and citation omitted).

The record in the case at bar shows that defendant possessed written notice that substantially complied with the requirements of MCL 500.3145(1). Less than a month after the accident, Frederick generated an on-screen record of her conversation with Fulkerth that contained the name of the claimant (and that she was the wife of defendant's named insured), the location of the accident (Dryden), and the nature of her injuries ("Neck pains"). In addition, the police report obtained by Frederick and forwarded to defendant's PIP department, along with Frederick's

record, provided Fulkerth's address, the time of the accident (11:45), and a more precise location for the accident (the intersection of Main Street and Mill Street). The record further shows that defendant's PIP department acted on this information by attempting to contact Fulkerth by telephone. When that did not work, defendant's PIP department sent Fulkerth a letter informing her that it had "received [her] Personal Injury claim" and wished to discuss "[her] loss and coverages available under [her] policy." Lastly, the record suggests that defendant closed Fulkerth's file, not because it lacked any of the statutorily required information, but because Fulkerth had not indicated an intent to immediately file a claim. Plaintiffs' argue that the record shows that Fulkerth fulfilled the purpose of MCL 500.3145(1) by substantially complying with its requirements.

Defendant does not argue that it lacked any of the statutorily required information. The thrust of defendant's argument is that in *Perkovic*, the Michigan Supreme Court refocused attention on the plain language of MCL 500.3145(1) and rejected the line of cases that considered MCL 500.3145(1) fulfilled if the presumed "purpose" of the notice requirement was met, even if the statutory language was not. See *Perkovic*, 500 Mich at 52-53. The question in *Perkovic* was whether medical bills sent to the insurer by the medical center that had treated the plaintiff for injuries suffered in a motor vehicle accident were sufficient to satisfy the notice requirement of MCL 500.3145(1). This Court, although acknowledging that the bills contained all of the information required by the statute, held nevertheless that they did not constitute notice because they had not been sent by the plaintiff, at the plaintiff's request, or even with the plaintiff's knowledge, and they were not accompanied by a letter indicating the plaintiff's intent to file a PIP claim. *Perkovic v Zurich American Ins Co*, 312 Mich App 244, 246-247, 258; 876 NW2d 839 (2015), rev'd *Perkovic*, 500 Mich 44 (2017). For these reasons, this Court concluded that the medical bills did not fulfill the purpose of alerting the insurer "to the possible pendency of a no-fault claim." *Id*. at 258.

In reversing, the Supreme Court rejected this "purpose of the statute" reasoning in favor of compliance with the plain language of the statue, which called for none of the things that this Court had found fatally lacking. The *Perkovic* Court rightly refocused attention on the plain language of the statute. However, although defendant claims to stress the plain language of the statute, it focuses more on how the notice requirements are met than on whether they are met. In other words, defendant asserts that it is not enough that it possessed the information required by MCL 500.3145(1), it contends that that information must have come to it in specific ways.

Defendant contends that Frederick's written record does not fulfill the statute's notice requirement because "an oral statement written down by a State Farm employee is not 'written notice . . .given to the insurer,' and "Frederick, as State Farm's claims representative, was not acting 'in [Fulkerth's] behalf.' " Neither argument is availing. The *Perkovic* Court indicated that an insurer is properly notified if the content required by MCL 500.3145(1) is given to the insurer by either the claimant directly or "by someone in his behalf." *Perkovic*, 500 Mich at 53; see also *Walden v Auto Owners Ins Co*, 105 Mich App 528, 533;307 NW2d 367 (1981) (indicating that who transcribed the report of an accident into written form is irrelevant for purposes of the notice

requirement).[5] In the present case, although Fulkerth did not report the accident, she directly and timely provided to defendant a description of the accident, the place of the accident, and the nature of her injuries. The information she provided sufficed for defendant to open a PIP claim file and to attempt to re-contact Fulkerth to discuss her options. That Fulkerth did not elect to file a claim at that time does not render her notice somehow ineffective.[6]

Further, defendant's argument that Frederick was not acting "in behalf of" Fulkerth when she recorded information from her conversation with Fulkerth and transmitted it to defendant's PIP department assumes that representatives of insurance companies cannot simultaneously act on behalf of their employers and in the interests of their insureds, even in the absence of a dispute. The circumstances surrounding Fulkerth's contact with Frederick disincline us to adopt such an assumption in this case.

Viewing the evidence in the light most favorable to plaintiffs, and keeping in mind the remedial nature of the no-fault act, *In re Geror*, 286 Mich App at 134-35, we hold that, under the circumstances of this case, Fulkerth satisfied the notice requirements of MCL 500.3145(1). Therefore, plaintiffs' claim is not barred by the no-fault act's one-year statute of limitations. This is not a case where there was no written notice or where the notice lacked any of the statutorily required content. Accordingly, the trial court erred by granting summary disposition to defendant pursuant to MCR 2.116(C)(7). In light of our disposition of this issue, we need not consider plaintiffs' argument that defendant waived MCL 500.3145(1)'s written-notice requirement or that equitable estoppel applies.

Reversed and remanded for further proceedings consistent with this decision. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Jane M. Beckering

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[5] Issued before November 1, 1990, *Walden* lacks precedential effect. MCR 7.215(J)(1). However, the reasoning in such decisions may be persuasive. See *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 444 n 4; 773 NW2d 29 (2009). In *Walden*, following an automobile accident, the plaintiff went to the office of his insurance agent to report the collision, and the agency prepared an auto accident notice form and transmitted it to the defendant insurance company. The insurance company argued that the requisite written notice was legally insufficient because it was completed by the insurance agency and not the plaintiff himself. *Walden*, 284 Mich App at 532. This Court rejected the defendant's argument, deeming it an "unnecessary, overly technical, literal construction and application" of MCL 500.3145(1). *Id*. at 532-533. This Court noted, "we fail to discern any logical nexus between who literally transcribed the report into written form and the attainment [of the statute's] objectives." *Id*. at 533.

[6] As noted in *Perkovic*, "[t]he statute contains no temporal requirement that the insured be claiming benefits at the time the notice of injury is transmitted to the insurer." *Perkovic*, 500 Mich at 54.