# STATE OF MICHIGAN

# COURT OF APPEALS

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HELEN ANTHONY,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY,

Defendant-Appellee.

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UNPUBLISHED
October 19, 2006

No. 270000
Wayne Circuit Court
LC No. 05-508122-NF

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order denying plaintiff's motion for partial summary disposition, granting defendant's motion for summary disposition, and dismissing plaintiff's complaint. We affirm in part, reverse in part, and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed this action to recover attendant care benefits that she claims are necessitated by an automobile accident that occurred more than 11 years earlier. On December 1, 1993, plaintiff (then 68 years old) was injured in a head-on motor vehicle collision. Plaintiff presented evidence that she sought and received attendant care benefits from defendant for attendant care and replacement services performed by her husband, daughter, and son-in-law from December 24, 1993, through January 20, 1994. After that time, plaintiff continued to require assistance, which was provided by her husband, but plaintiff did not seek benefits for those services. In early 2005, plaintiff's husband was injured, and he was unable to care for plaintiff while he recuperated. Plaintiff's doctor, Dr. Lewis Rosenbaum, ordered that plaintiff receive 24-hour attendant care on a daily basis. Dr. Rosenbaum stated that injuries to plaintiff's left ankle from the 1993 accident "continue to debilitate her to the present day. In fact, the weakness is such that it greatly jeopardizes her safety and ability to walk without falling." Dr. Rosenbaum explained that the injury to plaintiff's left leg caused her to overcompensate in the use of her right leg, which caused accelerated cartilage breakdown and arthritic progression. He opined that "this present condition is related to the injuries she suffered in her 1993 automobile accident." Due to plaintiff's worsening condition and her husband's inability to continue caring for her needs, Dr. Rosenbaum concluded that it was medically necessary for plaintiff to receive 24-hour attendant care. Plaintiff received care in an assisted living facility. She filed this action seeking recovery of future attendant care benefits and benefits for the year preceding the commencement of the action.

Defendant moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that plaintiff's claim was barred by the doctrine of laches. It contended that it was never placed on notice of plaintiff's ambulatory problems and had been deprived of the opportunity to investigate, assess, and determine causation. The trial court determined that plaintiff's decision not to request the benefits until there was a need for assisted living was prejudicial to defendant and, accordingly, granted its motion for summary disposition. Although the trial court did not expressly refer to laches, its reference to prejudice indicates that laches was the basis for its decision, and that the motion was granted under MCR. 2.116(C)(10).

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 120. In evaluating a motion for summary disposition under MCR 2.116(C)(10), 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. *Maiden*, *supra* 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*.

Plaintiff argues that the trial court erred in applying the doctrine of laches because, in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), our Supreme Court indicated that equitable considerations should not play a role in interpreting an unambiguous statute such as MCL 500.3145. Although plaintiff did not raise this argument below, this Court may consider it because it concerns an issue of law and the necessary facts have been presented. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

MCL 500.3145(1) provides a one-year back rule for recovering personal protection insurance benefits:

> 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. . . .

Under this statute, an action may be filed more than a year after an accident, but recovery is limited to losses incurred within the year preceding the filing of the action. *Devillers*, *supra* at 574.

In *Devillers*, the plaintiff relied on the doctrine of judicial tolling to extend the one-year limitation on recovery. *Id*. at 565-566. Under prior case law, the one-year period was deemed tolled from the time a claim for benefits was filed until the insurer formally denied liability. *Id*. at 567-581. Our Supreme Court overruled these prior cases and stated that the judiciary was charged with enforcing the statute as it was written. *Id*. at 582-583, 588. The majority rejected

the view "that a court's equitable power is an omnipresent and unassailable judicial trump card that can be used to rewrite a constitutionally valid statute simply because a particular judge considers the statute to be 'unfair.'" *Id*. at 588.

Laches, like judicial tolling, is a "tool of equity." *Wayne Co v Wayne Co Retirement Commission*, 267 Mich App 230, 252; 704 NW2d 117 (2005). Just as our Supreme Court concluded that the exercise of equitable power in the form of judicial tolling is unwarranted in light of MCL 500.3145(1), the equitable doctrine of laches also should not be applied to change the limitations contained in the statute. Plaintiff provided written notice of injury within a year of the accident and was entitled to bring an action for benefits for losses incurred within the year preceding the filing of the complaint. If the Legislature intended to place further limits on the time between an accident and the commencement of an action, it should have done so. Under *Devillers*, it is inappropriate for a court to use its equitable powers to place additional limits.

We are not persuaded that defendant's remaining arguments provide an alternative basis for affirmance.

Defendant's argument that plaintiff's claim was time-barred under MCL 500.3145(1) is without merit. Plaintiff provided defendant with timely notice of the injury to her left ankle and leg. She presented evidence that she requested and received attendant care benefits. Defendant asserts that the lawsuit was the first time it "received any notice for the specific claim of attendant care benefits due to currently acquired ambulatory problems." Defendant seems to argue that plaintiff's claim for attendant care benefits in 2005 was untimely because she did not notify it, within a year of the accident, of the ambulatory difficulties that she would later experience. Defendant's interpretation requires prognostication of one's future condition and needs. The statute only requires timely notification of the injury, which occurred in this case.

Neither party was entitled to summary disposition on the issue of causation. "[A] no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident. . . ." *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005). Only those injuries that are caused by the insured's use of a motor vehicle trigger an insurer's liability under the no-fault act. *Id*. Thus, if plaintiff's need for attendant care was attributable to degenerative changes or other conditions that were not causally connected to her injuries in the accident, defendant would not be liable. Here, plaintiff presented Dr. Rosenbaum's opinion that linked plaintiff's ambulatory difficulties to the accident. Although defendant did not request an independent medical examination and did not present a medical opinion to contradict Dr. Rosenbaum's opinion, medical records indicate that plaintiff improved to some degree after the accident and contain references to plaintiff falling several times after the accident and before she filed this action. Because the evidence established a genuine issue of material fact regarding causation, the issue of causation should be decided by the trier of fact.

Finally, defendant briefly discusses whether the trial court correctly determined that plaintiff's claim for "room and board" was not actionable. Although this argument was raised in defendant's motion, the trial court did not address it. The record is inadequate to determine to what extent plaintiff is seeking room and board as opposed to attendant care benefits. To the extent that plaintiff establishes that the expenses are reasonably necessary for her care, recovery, or rehabilitation as a result of the injuries she sustained in the 1993 motor vehicle accident, she is

entitled to recover for the accommodations necessitated by the injury, as well as food costs if care is provided in an institutional setting. *Griffith*, *supra* at 530-538.

The trial court's order is reversed to the extent that it granted summary disposition in favor of defendant and affirmed to the extent that it denied plaintiff's motion for partial summary disposition.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens