STATE OF MICHIGAN

COURT OF APPEALS

BARBARA CONVERSE, Guardian and Conservator of CATHERINE CURTIS, a Legally Incapacitated Person, Plaintiff-Appellant,	UNPUBLISHED March 3, 2011
v	No. 293303 Calhoun Circuit Court
AUTO CLUB GROUP INSURANCE COMPANY, Defendant-Appellee.	LC No. 2005-004426-NO

Before: BECKERING, P.J., and TALBOT and OWENS JJ.

BECKERING, P.J. (*concurring in part in result only and dissenting in part*).

I concur in result only with respect to the majority's conclusion that the trial court did not err by granting summary disposition of plaintiff's fraud and negligence claims. I write separately because I respectfully disagree with the majority's conclusion that defendants were entitled to partial summary disposition of plaintiff's breach of contract claim under the one-year back rule set forth in MCL 500.3145(1). I also disagree that plaintiff failed to state a claim upon which relief can be granted under the Michigan Consumer Protection Act (MCPA), MCL 500.2001 *et seq*. I would reverse the trial court's orders as to these claims accordingly.

I. APPLICATION OF THE ONE-YEAR BACK RULE

In her breach of contract claim, plaintiff alleges that defendant breached its obligation, under the policy of insurance and the no-fault act, MCL 500.3142, to pay all personal protection insurance (PIP) benefits owed to or on behalf of plaintiff. The trial court held that plaintiff was limited, by the one-year back rule set forth in MCL 500.3145(1), to recovery of any unpaid benefits accruing on or after December 9, 2004. In upholding the trial court's decision, the majority essentially holds that, because plaintiff's complaint was timely filed under the no-fault act, Curtis is not entitled to the legal protections afforded to her by MCL 600.5851(1) as a person disabled by insanity as a result of the accident, and therefore, that the one-year back rule set forth in MCL 500.3145(1) applies to limit her ability to recover no-fault benefits she claims are owed to her. I respectfully disagree.

MCL 600.5851(1) provides in relevant part:

> if the person first entitled to . . . bring an action under this act is under 18 years of age *or insane at the time the action accrues*, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise to . . . bring the action although the period of limitations has run. [Emphasis added.]

It is undisputed that, as a consequence of the severe head injury she sustained in the May 11, 1987, motor vehicle accident underlying her no-fault claims, Curtis meets the definition of insanity set forth in MCL 600.5851(2). MCL 600.5851(3) provides that the "insanity must exist at the time the claim accrues" to permit tolling of the limitations period on that basis. The no-fault act provides that "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue, not when the injury occurs but as the allowable expenses, work loss or survivors' loss is incurred." MCL 500.3110(4); see also, *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 483-484; 673 NW2d 739 (2003). Therefore, Curtis's claim for PIP benefits accrued at the time she incurred allowable expenses necessitated by the injuries she suffered as a result of the accident. Because it is undisputed that Curtis has been in a persistent vegetative state since the accident, her claim for PIP benefits for allowable expenses, necessarily accrued after the point at which she became insane under MCL 600.5851(2). Further, where, as here, a person is rendered insane by the wrong committed against them, he or she is under a disability with regard to the prosecuting of legal actions arising from that wrong. *Emery v Chesapeake & Ohio Railway Co*, 372 Mich 663, 667-668; 127 NW2d 826 (1964). Consequently, Curtis's claims for no-fault benefits fall within the savings provision set forth in MCL 600.5851(1). There is no basis in law or fact for concluding otherwise.

Under MCL 600.5851(1), Curtis, or her representative, has until one-year after her disability has been removed, through death or otherwise, to bring an action for PIP benefits. See, *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 345; 791 NW2d 897 (2010) (MARKMAN, J., dissenting) quoting *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 73; 718 NW2d 784 (MARKMAN, J., concurring); *Sallee v Auto Club Ins Ass'n*, 190 Mich App 305, 307; 475 NW2d 828 (1991); *DeVito v Blenc*, 47 Mich App 524, 529; 209 NW2d 728 (1973). "Until" means "up to the time that or when, . . . onward to or till." *Random House Webster's College Dictionary* (2001), p 1342. Plainly, then, Curtis has any time from the time of the wrong "up to" or "onward to" one year after the disability is removed to file her claims. There is no assertion here that plaintiff's claims were not timely filed.

In *Univ of Mich Regents*, 487 Mich at 298, our Supreme Court held that:

> MCL 600.5851(1) does not create its own independent cause of action. It must be read together with the statute under which the plaintiff seeks to recover. In no-fault cases, for example, MCL 600.5851(1) must be read together with MCL 500.3145(1). Doing so, the statutes grant infants and incompetent persons one year after their disability is removed to "bring the action" "for recovery of personal protection insurance benefits . . . for accidental bodily injury. . . ." On the basis of its language, *MCL 600.5851(1) supersedes all limitations in MCL 500.3145(1), including the one-year-back rule's limitation on the period of recovery.* [Emphasis added.]

And, "the 'action' and 'claim' preserved by MCL 600.5851(1) include the right to collect damages." *Id.* at 299. Accordingly, claims for PIP benefits brought by claimants afforded the protection of the tolling provision set forth in MCL 600.5851(1), are not subject to the one-year back limitation set forth in MCL 500.3145(1). *Id*. at 302. Rather, as to these plaintiffs, the one-year back rule is superseded by the protections afforded by MCL 600.5851(1). *Id*. at 298. Stated differently, the provisions of MCL 600.5851(1) "preserving a plaintiff's right to bring an action also preserve the plaintiff's right to recover damages incurred more than one year before suit is filed." *Id*. at 302. Therefore, Curtis's claim for breach of contract seeking to recover PIP benefits simply is not subject to the one-year back rule set forth in MCL 500.3145(1). This is true regardless of whether application of MCL 600.5851(1) is required to render the filing of plaintiff's claim timely, because MCL 600.5851(1) also independently protects Curtis's right to collect damages arising from her claims, free from the restriction of the one-year back rule set forth in MCL 500.3145(1). *Univ of Mich Regents*, 487 Mich at 298-299.

The majority holds that whenever a no-fault claim on behalf of a disabled person protected by MCL 600.5851(1) is filed within the limitations period set by MCL 500.3145(1), MCL 600.5851(1) does not apply to protect the disabled person's right to collect damages. This reading of the interplay between MCL 500.3145(1) and MCL 600.5851(1) eviscerates our Supreme Court's holding in *Univ of Mich Regents*. Further, it produces the incongruous result that a claim brought on behalf of a disabled person that is timely filed under the no-fault act is subject to the one-year back rule limiting the recovery of damages, while the same claim filed well after the limitations period in the no-fault act has expired, but within the time afforded for the filing of such claim by MCL 600.5851(1), is not subject to the one-year back rule. In this way, the majority applies MCL 500.3145(1) to abrogate the claims of infants and the incompetent, *Kilda v Braman*, 278 Mich App 60, 71-72; 748 NW2d 244 (2008), in contravention of the purposes of MCL 600.5851(1) and the case law interpreting and applying it. "This result is untenable." *Id*. at 74. As this Court explained in *Kilda*, the purpose of MCL 600.5851(1) is to prevent the abrogation of the legal rights of persons who are legally incapable of enforcing them. *Id.* at 71, 73-74. And, as our Supreme Court plainly explained in *Univ of Mich Regents*, 489 Mich at 299, MCL 600.5851(1) preserves not only a disabled plaintiff's right to bring an action or claim, but also preserves the disabled plaintiff's right to recover the resulting damages incurred, regardless whether they were incurred more than one year before suit is filed. *Id.* at 299, 302. Under *Univ of Mich Regents*, the one-year back rule simply does not apply to limit Curtis's recovery of no-fault benefits, whenever they are filed and so long as they are timely filed. *Id.* Therefore, I would reverse the trial court's grant of partial summary disposition of plaintiff's breach of contract claim on the basis of application of the one-year back rule.

II. PLAINTIFF'S MCPA CLAIMS

Plaintiff asserts claims under the MCPA arising from alleged deceptive practices by defendant occurring from July 29, 1992, to the filing of her complaint on December 9, 2005. MCL 445.911(7) of the MCPA provides in pertinent part:

> An action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a transaction involving the method, act,

or practice which is the subject of the action, whichever period of time ends at a later date.

The majority correctly concludes that plaintiff's MCPA claim was timely filed. However, it then reads into the limitations period a one-year back rule akin to that provided by MCL 500.3145(1). Clearly, though, MCL 445.911(7) contains no such limitation on damages. By its plain language, MCL 445.911(7) affords plaintiff one year "after the last payment in a transaction involving the method, act, or practice which is the subject of the action" *in which to file her action for damages* arising from the entire period in which the insurer utilized the deceptive method, act or practice. Unlike MCL 500.3145,[1] MCL 445.911 does not contain any temporal limit, beyond the confines of the limitations period itself, on the recovery of damages. MCL 445.911(2) provides that "a person who suffers a loss as a result of a violation of this act may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorney fees." Thus, so long as a plaintiff's action is timely filed under MCL 445.911(7), that plaintiff is entitled to recover actual damages suffered as a result of the violative conduct. The MCPA contains no provision akin to the no-fault act's one-year back rule. And, as previously discussed, the no fault act's one-year back rule, set forth in MCL 500.3145, does not apply in this case. *Univ of Mich Regents*, 487 Mich at 302. Therefore, the majority's conclusion that plaintiff is barred from recovering for claims arising before December 9, 2004, is in error.[2]

The majority correctly notes that plaintiff may not bring a claim under the MCPA arising from alleged deceptive insurance practices occurring after March 28, 2001. MCL 445.904(3).[3] However, plaintiff's claims for conduct arising before March 28, 2001, remain viable to the extent that they were timely filed. *Smith v Global Life Ins Co*, 460 Mich 446, 467; 597 NW2d 28 (1999); *Grant v AAA Michigan/Wisconsin*, 272 Mich App 145, 149; 724 NW2d 498 (2006). By the plain language of MCL 445.904(3) and MCL 445.911(2) and (7), plaintiff can assert claims under the MCPA seeking to recover her actual damages resulting from methods, practices or acts

---

[1] MCL 500.3145(1) specifically provides that, "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."

[2] That this is so is further emphasized by the fact that MCL 445.911(7) permits a plaintiff to file suit within 6 years after the occurrence of complained-of method, act, or practice or within 1 year after the last payment in a transaction involving the complained-of method, act, or practice, *whichever period of time ends at a later date*. The majority's interpretation and application of this provision would graft a one-year back rule into MCL 445.911(7) in all cases in which there is a payment to or from a plaintiff resulting from the complained-of method, act or practice. There is no basis in the language employed in MCL 445.911(7) for such an interpretation.

[3] MCL 445.904(3) was added as an amendment, effective March 28, 2001, and provides: "This act does not apply to create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956 [], MCL 500.2001 to 500.2093."

violative of the MCPA based on conduct by defendant occurring from December 5, 1999, (six years prior to the filing of the complaint) to March 28, 2001, (the effective date of MCL 445.904(3)).

The trial court concluded that, as a matter of law, a plaintiff may not challenge the propriety of defendant's actions denying her no-fault benefits under the MCPA. Plainly, that conclusion is legally erroneous. *Smith*, 460 Mich at 467 ("private actions are permitted against an insurer pursuant to § 11 of the MCPA . . ."); *Grant*, 272 Mich App at 149 ("plaintiff was permitted to raise an MCPA claim [arising from the denial of no-fault benefits] under *Smith* . . ."). Further, the majority's alternative basis for upholding the trial court's grant of summary disposition of plaintiff's MCPA claim is contrary to the plain language of MCL 445.911(2) and (7) and our Supreme Court's holding in *Univ of Mich Regents*, 487 Mich at 302. Therefore, I would reverse the trial court's order dismissing plaintiff's MCPA claim in its entirety pursuant to MCR 2.116(C)(8). I would hold that plaintiff stated a claim on which relief can be granted under the MCPA arising from alleged deceptive conduct by defendant occurring between December 9, 1999, and March 28, 2001.

/s/ Jane M. Beckering