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BARBARA CONVERSE, Guardian and Conservator of CATHERINE CURTIS, a Legally Incapacitated Person, Plaintiff-Appellant,	UNPUBLISHED March 3, 2011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.

PER CURIAM.

Barbara Converse contests the grant of partial summary disposition in favor of Auto Club Group Insurance Company (ACIA) regarding her claims for payment of no-fault benefits. We affirm.

We review a "decision on a motion for summary disposition de novo."[1] "In making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it."[2] "A movant is entitled to summary disposition under MCR 2.116(C)(8) if "the opposing party has failed to state a claim on which relief can be granted."[3] "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint."[4] "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving

[1] *Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 474; 760 NW2d 526 (2008).

[2] *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

[3] *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005).

[4] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

party is entitled to judgment as a matter of law."[5] Questions of law and equitable estoppel issues are also reviewed de novo.[6]

Converse contends that the trial court erred in dismissing her negligence claim by having determined it was merely a contract claim clothed in negligence language. Converse asserts that the trial court's decision is directly contrary to pronouncements by our Supreme Court.[7] The gravamen of the cited Michigan Supreme Court decisions is that where negligence claims are pleaded as causes of action separate and distinct from a breach of contract claim, such negligence claims should not be summarily dismissed.[8] In other words, "If the defendant has breached a legal duty owed to the plaintiff apart from the contract of insurance, then there may be liability in tort."[9]

The first step is to determine whether Converse's negligence claim amounts to an action "on the [insurance] policy." If the claim is an action "on the policy," a separate cause of action is not sustainable.[10] The complaint alleges the failure of ACIA to inform and disclose to Converse the benefits that were available to her under the insurance contract. A reading of the complaint reveals that Converse does not allege that ACIA "breached a legal duty owed [to her] apart from the contract of insurance."[11] Because "mere allegations of failure to discharge obligations under [an] insurance contract [is] not [] actionable in tort,"[12] Converse's negligence claim was not a cause of action which existed separate and distinct from her breach of contract claim.[13] As Converse's negligence claim was "on the policy," it was properly dismissed by the trial court.[14]

Converse also argues that the trial court erred when it dismissed her claim under the Michigan Consumer Protection Act (MCPA) based on its determination that the no-fault act provides an exclusive remedy for causes of action arising in a motor vehicle accident context.

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[5] *Coblentz v City of Novi*, 475 Mich 558, 568; 719 NW2d 73 (2006).

[6] *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 283, 293; 705 NW2d 355 (2005).

[7] *Cooper v Auto Club Ins Ass'n*, 481 Mich 399; 751 NW2d 443 (2008), amended 482 Mich 1201 (2008); *Hearn v Rickenbacker*, 428 Mich 32; 400 NW2d 90 (1987).

[8] *Id.* at 35, 39-40; *Cooper*, 481 Mich at 410.

[9] *Hearn*, 428 Mich at 39.

[10] *Id*. at 36-39.

[11] *Id*. at 39.

[12] *Cooper*, 481 Mich at 410; *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 422-423; 295 NW2d 50 (1980).

[13] *Hearn*, 428 Mich at 41.

[14] *Id*. at 36-39.

All of Converse's MCPA allegations involve violations of chapter 20 of the insurance code, which is comprised of the Unfair Trade Practices Act (UTPA).[15] Specifically, MCL 445.904(3) provides that the MCPA "does not apply to or 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, 1956 PA 218, MCL 500.2001 to 500.2093." This statutory language was added in an amendment effective March 28, 2001.[16] Because "the MCPA no longer applies to insurance companies,"[17] any cause of action for claims accruing after March 28, 2001, clearly cannot be sustained.[18]

With regard to claims accruing before March 28, 2001, private actions against an insurer were permitted pursuant to MCL 445.911 of the MCPA arising out of misconduct made unlawful by chapter 20 of the insurance code.[19] But, "[a]n 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."[20] The claims made by Converse stem from methods, practices and the alleged inadequate payment of benefits occurring from July 29, 1992, essentially up to the filing of her complaint on December 9, 2005. We note that the statutory wording does not provide an option regarding whether the six-year period or the one-year period may be used in determining the viability of a claim. Rather, the statutory language clearly dictates that we apply "whichever period of time ends at a later date." This necessitates our restricting Converse's claims to those that were incurred "no[] more than 1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action." Converse is contesting a series of practices that continued and resulted in payments as late as December 2005. Because we are constrained by the statute to consider the "period of time that ends at a later date" her claims are limited by the statutory language to those within one year immediately preceding December 2005.[21] Commensurately, because any cause of action for claims accruing after March 28, 2001, cannot be sustained, the

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[15] MCL 500.2001 *et seq*.

[16] MCL 445.904.

[17] *McLiechey v Bristol West Ins Co*, 408 F Supp 2d 516, 523-524 (WD Mich, 2006) (quotation marks omitted).

[18] MCL 445.904.

[19] *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 145-147; 724 NW2d 498 (2006).

[20] MCL 445.911(7).

[21] MCL 445.911(7).

trial court properly dismissed Converse's MCPA claim.[22] "This Court will affirm where the trial court came to the right result even if for the wrong reason."[23]

Converse next contends that the trial court improperly weighed evidence, made credibility determinations, and failed to view the evidence in a light most favorable to her when it dismissed her fraud and silent fraud claims, finding a lack of justifiable reliance. Our Supreme Court set forth the elements of fraud in an insurance context as requiring: "(1) that the insurer made a material representation; (2) that it was false; (3) that when the representation was made, the insurer knew that it was false, or the insurer made it recklessly without any knowledge of its truth and as a positive assertion; (4) that the insurer made the statement with the intention that it would be acted upon by the insureds; (5) that the insureds acted in reliance upon the statement; and (6) that the insureds consequently suffered injury."[24] To establish fraud or silent fraud, a "[p]laintiff must . . . show that any reliance on defendant's representations was reasonable."[25] "There can be no fraud where a person has the means to determine that a representation is not true."[26]

The trial court correctly concluded that there was no genuine issue of material fact regarding whether Converse reasonably relied on ACIA's alleged representations.[27] The record demonstrates that Converse complained about ACIA on three separate occasions to the insurance commission, and was put on notice by the commission "to seek out a lawyer." Converse also acknowledged having contact with attorneys throughout the years to assist her with various matters relating the services to be provided to her daughter. The alleged representations by ACIA'S agents did not involve information that was primarily or exclusively within ACIA's control, but "concerned what benefits were available" to her under the no-fault act.[28] Because Converse consulted with attorneys, complained to the insurance commission, negotiated directly with the insurer, had access to information and, thus, had available to her the means to ascertain the accuracy or truth of ACIA's statements, she was unable to demonstrate that she reasonably relied on ACIA's representations.[29] In addition, because the alleged representations occurred during the claims handling and negotiation process, the reliance element is not established "because during these processes the parties are in an obvious adversarial position and generally

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[22] MCL 445.904(3); MCL 445.911(7).

[23] *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009) (citation omitted).

[24] *Cooper*, 481 Mich at 414.

[25] *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005).

[26] *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

[27] *Coblentz*, 475 Mich at 567-568.

[28] *Nieves*, 204 Mich App at 464-465.

[29] *Coblentz*, 475 Mich at 567-568.

deal with each other at arm's length."[30] Converse's claims of fraud and silent fraud were, therefore, properly dismissed by the trial court.

Converse next contends that the trial court erred by applying the one-year-back rule to her breach of contract claim rather than allowing a jury to decide the issues of fraud and equitable estoppel. Because we find that the fraud claims were properly dismissed, that aspect of her appellate argument on this issue is without merit. Addressing her argument regarding equitable estoppel, we note that Converse has not indicated in her appellate brief the law she is relying on or how an equitable estoppel defense is available in this case. "An appellant may not merely announce [her] position and leave it to this Court to discover and rationalize the basis for the claims, nor may [the] appellant give issues cursory treatment with little or no citation to supporting authority."[31] "An appellant's failure to properly address the merits of [her] assertion of error constitutes abandonment of the issue."[32] Despite this failure we note that, because the doctrine of equitable estoppel requires justifiable reliance, which has not been demonstrated, this claim is also without merit.[33]

Converse also asserts that the trial court's decision to apply the one-year-back rule to her breach of contract claim should be reversed because of a recent decision by the Michigan Supreme Court.[34] The statutory provision in the cited case on which Converse relies provides that "the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run."[35] Specifically, in discussing the interplay between the no-fault act and the disability savings provision, our Supreme Court stated:

> 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 . . . ." On the basis of its language, MCL

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[30] *Cooper*, 481 Mich at 415.

[31] *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (citations omitted); see also MCR 7.212(C)(7).

[32] *Id*.

[33] *AFSCME Int'l Union*, 267 Mich App at 293.

[34] *Regents of Univ of Mich v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010).

[35] MCL 600.5851(1).

> 600.5851(1), supersedes all limitations in MCL 500.3145(1), including the one-year-back rule's limitation on the period of recovery.[36]

We find that Converse's reliance on this ruling is mistaken, as the circumstances in this case do not fall within the purview of this statute.

> In general,
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> > the purpose of statutes tolling the period of limitations for persons to whom a legal disability is attributed "is to allow protected classes of persons an opportunity to be made whole once their disabilities have been removed". . . . "[t]he purpose of a savings or tolling statute for persons under a disability is to protect the legal rights of those who are unable to assert their own rights and to mitigate the difficulties of preparing and maintaining a civil suit while the plaintiff is under a disability."[37]

In other words, MCL 600.5851(1), as a savings provision, is designed to "prevent[] the abrogation of the claims of infants and the incompetent."[38]

We note that it is unnecessary to apply the savings provision to Converse's claims as the limitations period has not expired. As recognized by our Supreme Court, "MCL 600.5851(1) does not create its own independent cause of action."[39] "Rather, it must be read together with the statute under which the plaintiff seeks to recover."[40] The relevant portion of the no-fault act to be read in conjunction with the savings provision, states:

> 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.*

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[36] *Regents of Univ of Mich*, 487 Mich at 298.

[37] *Klida v Braman*, 278 Mich App 60, 71; 748 NW2d 244 (2008) (citations omitted).

[38] *Id.* at 72 (citation omitted).

[39] *Regents of Univ of Mich*, 487 Mich at 298.

[40] *Id.*

> 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.[41]

In this instance, ACIA has been paying benefits to Converse over a number of years on behalf of Curtis. It is undisputed that ACIA made payments to Converse as late as December 2005, when this action was initiated. According to the no-fault act's language permitting an "action may be commenced at any time within 1 year after the most recent allowable expense . . . has been incurred" the limitations period has not run and, therefore, there is no need to apply the savings provision. The savings provision language specifically provides for one year "after the disability is removed" to "bring the action although the period of limitations has run," reinforcing that its function is to operate as an exception to applicable statutes of limitation.[42] Simply put, because the claim was not barred by the statute of limitations, there is no reason to utilize the savings provision.

Because a claim for benefits accruing more than one-year before the commencement of this action cannot be sustained,[43] the trial court correctly applied the one-year back rule to the breach of contract claim.[44]

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens

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[41] MCL 500.3145(1) (emphasis added).

[42] MCL 600.5851(1); *Hatcher v State Farm Mut Auto Ins Co*, 269 Mich App 596, 604; 712 NW2d 744 (2005).

[43] See e.g. *Vega v Lakeland Hosp at Niles and St. Joseph, Inc*, 479 Mich 243, 248; 736 NW2d 561 (2007); *Honig v Liddy*, 199 Mich App 1, 4; 500 NW2d 745 (1993).

[44] MCL 500.3145(1).