

STATE OF MICHIGAN
COURT OF APPEALS

GAYLON C. KOUTZ,

Plaintiff/Counterdefendant-
Appellee,

v

FARM BUREAU INSURANCE,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED
November 17, 2005

No. 255903
Gratiot Circuit Court
LC No. 03-007990-CK

Before: Donofrio, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right, following the trial court's denial of its motion for summary disposition and granting of plaintiff's motion for summary disposition. The trial court ordered defendant to pay plaintiff \$11,606.95 in wage loss benefits, twelve percent interest per year "from October 16, 2002 through the present," and \$2,500 in attorney fees. We reverse.

Plaintiff was involved in an automobile accident on June 29, 2001, in which he fractured his ankle, rendering him unable to perform his seasonal work as a whitewasher. Defendant paid plaintiff a weekly wage loss benefit based on plaintiff's earnings for the previous years. On November 3, 2001, plaintiff suffered a stroke that was unrelated to the accident. Defendant stopped paying wage loss benefits on December 18, 2001. In April 2002, plaintiff informed defendant that he was disputing the amount of wage loss benefits paid because plaintiff was a seasonal worker who was injured during his entire season yet defendant paid plaintiff as if his earnings were earned over the course of an entire year. Defendant eventually denied plaintiff's claim on January 14, 2003, stating that plaintiff did not submit requested documentation or file suit by December 18, 2002 and, therefore, plaintiff was barred from recovering any additional benefits.

Plaintiff filed this suit on March 31, 2003. The trial court denied defendant's motion for summary disposition, concluding that the one-year-back provision was tolled from April 10, 2002, when plaintiff informed defendant of the dispute, to January 14, 2003, when defendant formally denied plaintiff's claim. Because of our Supreme Court's recent decision in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), we reverse the trial court's decision and conclude that plaintiff is barred from recovering any additional wage loss benefits.

In pertinent part, MCL 500.3145(1) 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. 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. . . .

In *Devillers, supra* at 581-584, our Supreme Court overruled *Lewis v DAIE*, 426 Mich 93; 393 NW2d 167 (1986), in which the Court had held that the one-year-back provision was tolled from the time a plaintiff makes a claim for benefits until the insurance company formally denies the claim. In *Devillers*, the Court determined that the plain language of the statute states that a claimant's recovery is limited to "losses incurred one year or less before the date on which the action was commenced." *Id.* at 582. Plaintiff's losses occurred from June 29, 2001, until December 18, 2001, the last day defendant made a wage loss benefit payment. Because plaintiff's complaint was not filed until March 31, 2003, plaintiff cannot recover for the alleged underpayment of wage loss benefits.

Additionally, although *Devillers* had not been decided when the trial court made its decision, the Court, in *Devillers*, held that the decision was to be applied retroactively. *Id.* at 586. Specifically, the Court stated, "our decision in this case is to be given retroactive effect as usual and is applicable to all pending cases in which a challenge to *Lewis's* judicial tolling approach has been raised and preserved." *Id.* at 587. Defendant raised and preserved the issue in the lower court, therefore, *Devillers* applies to this case.

Plaintiff argues that defendant should be equitably estopped from raising the statute of limitations and one-year-back rule set forth in MCL 500.3145(1). However, to prevail on a claim that he is entitled to equitable tolling, plaintiff must show that "defendant induced [him] to refrain from bringing an action within the period fixed by the statute." *Secura Ins Co v Auto-Owners Ins Co*, 232 Mich App 656, 661; 591 NW2d 420 (1998), *aff'd* 461 Mich 382 (2000). In one of its initial correspondences to plaintiff, defendant indicated that plaintiff's last wage benefit was paid on December 18, 2001, and that "per the statute you have one year from that date to commence an action." Also, defendant never indicated to plaintiff that it would be honoring the claim, only that it needed additional paperwork before it could make its decision. When defendant did not receive the paperwork by the time the statutory period had expired, defendant properly indicated that it was denying the claim because the statute had run. Therefore, plaintiff has not shown anything defendant did to induce him to not bring his action within the statutory period.

Plaintiff also asserts that the savings provision of the Revised Judicature Act, MCL 600.5851(1) should be applied on the basis of his insanity. However, MCL 600.5851(1) does not apply to actions brought under the no-fault act. *Cameron v Auto Club Ins Ass'n*, 263 Mich App 95, 97; 687 NW2d 354 (2004).

Therefore, we conclude that plaintiff's complaint was not filed in accordance with the one-year-back provision and that the trial court erred in awarding plaintiff additional wage loss benefits, interest, and attorney fees. Because this issue is dispositive of the case, we decline to address defendant's remaining issues on appeal.

Reversed and remanded for entry of summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly