STATE OF MICHIGAN

COURT OF APPEALS

PHYLLIS GULLEY, as Guardian and Conservator of DARNELL HILL,

Plaintiff-Appellee,

v

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
April 25, 2006

No. 259012
Wayne Circuit Court
LC No. 03-309246-NF

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's motion for partial summary disposition, denying defendant's motion for partial summary disposition, and granting judgment in favor of plaintiff. We affirm in part, reverse in part, and remand. We affirm defendant's liability for attendant care services plaintiff incurred, vacate the judgment of the trial court awarding plaintiff personal protection insurance (PIP) benefits, and remand for entry of judgment for attendant care services plaintiff incurred from 1980 to September 30, 1993, and not more than one year prior to plaintiff filing her complaint.

Defendant first argues that the trial court erred in concluding that the "one-year back rule" provided in MCL 500.3145(1) was tolled by the insanity savings provision provided in the Revised Judicature Act (RJA), MCL 600.5851(1), and that plaintiff was entitled to PIP expenses plaintiff incurred on behalf of Darnell Hill ("Darnell"). Defendant contends that plaintiff's claims for PIP benefits were not tolled by the insanity savings provision after October 1, 1993, the effective date of the 1993 amendment to MCL 600.5851(1).

This Court reviews de novo a trial court's grant of a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Similarly, we review de novo the interpretation and application of a statute. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 132 (2003).

A no-fault action to recover PIP benefits can be filed more than one year after an accident and more than one year after a loss has been incurred if notice of the injury has been given to the insurer or if the insurer has previously paid PIP benefits for the injury. *Devillers v Auto Club Insurance Agency*, 473 Mich 562, 574; 702 NW2d 539 (2005). However, MCL 500.3145(1)

"limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action." *Id.* (emphasis in original). Furthermore, "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense . . . is incurred." *Proudfoot v State Farm Mutual Ins Co*, 469 Mich 476, 483-484; 673 NW2d 739 (2003), citing MCL 500.3110(4).

The RJA provides a general savings provision, codified at MCL 600.5851(1), which is applicable to persons who are insane. Section 5851(1) provides, in relevant part:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or *insane at the time the claim accrues, 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*. [Emphasis added.]

Under the 1915 Judicature Act, § 5851(1) stated that the savings provision applied to "any of the actions mentioned in this chapter." See *Cameron v Auto Club Ins Ass'n*, 263 Mich App 95, 99; 687 NW2d 354 (2004), lv gtd 472 Mich 899 (2005). However, the RJA was adopted by the Legislature in 1961 and the provision contained in § 5851(1) was changed from "any of the actions mentioned in this chapter" to "any action." *Id.*, citing *Lambert v Calhoun*, 394 Mich 179, 191-192; 229 NW2d 332 (1975). In *Lambert*, *supra* at 191-192, our Supreme Court noted that the change indicated that the general savings provision of the RJA was applicable to "causes of actions created by Michigan statutes." See *id.* In 1979, this Court decided *Rawlins v Aetna Casualty & Surety Co*, 92 Mich App 268; 284 NW2d 782 (1979), superseded by statute in *Cameron*, *supra* at 95. In *Rawlins*, this Court held that, as amended in 1961, § 5851(1) applied to claims brought under MCL 600.3145(1) of the no-fault act. *Rawlins*, *supra* at 277; see also *Cameron*, *supra* at 99-100. In 1993, the Legislature amended the language of § 5851(1) again from "any action" to "an action under this act." 1993 PA 78, § 1; *Cameron*, *supra* at 100.

This Court considered the pre-1993 amendment version of MCL 600.5851(1) in *Professional Rehabilitation Assoc v State Farm Mut Automobile Ins Co*, 228 Mich App 167, 171; 577 NW2d 909 (1998), and held that the general savings provision applied to toll the "one-year back rule" contained in MCL 500.3145(1). See also *Cameron*, *supra* at 101-102 (noting that *Professional Rehabilitation* was construing the pre-1993 amendment version of the general savings provision). In *Professional Rehabilitation*, the defendant insurance company denied payment to the plaintiff by letter on May 27, 1992. *Professional Rehabilitation*, *supra*. at 168. The plaintiff commenced suit on May 12, 1994, attempting to recover four separate expenses, which were incurred in 1991. *Id*. at 168-169. This Court noted, "[w]ere it not for the savings provision of the Revised Judicature Act, we would hold that plaintiff's claim was time-barred." *Id*. at 175.

This Court recently considered whether the 1993 amendments to MCL 600.5851(1) from "any action" to "an action under this act" limited the scope of its application. *Cameron*, *supra* at 100. The *Cameron* decision specifically addressed the issue regarding whether the general savings provision provided in MCL 600.5851(1) applies to toll the "one-year back rule" of the no-fault act, MCL 500.3145(1), to claims that accrued after the effective date of the amendment

to MCL 600.5851(1). *Id.* at 97. This Court held that "since the effective date of the 1993 amendment, the general savings provision of the RJA does not apply to actions commenced under the no-fault act." *Id.* at 103. We note that the effective date of the 1993 amendment to MCL 600.5851(1) is October 1, 1993. See 1993 PA 78, § 3; *id.* at 103. Further, the 1993 amendment to § 5851(1) "states that it does not apply to causes of action arising before October 1, 1993." *Cameron, supra* at 101, citing 1993 PA 78, § 4(1).

In the present case, defendant concedes that Darnell suffered a "severe brain injury" on July 2, 1977, and that his injuries caused him to suffer from insanity from July 2, 1977, until the present. Further, the record reveals that plaintiff provided Darnell with 24 hour attendant care from 1980 until the present. Thus, plaintiff's claim for PIP benefits began to accrue in 1980 when she began to provide attendant care services to Darnell. *Proudfoot, supra* at 483-484, citing MCL 500.3110(4). Moreover, the record reveals that defendant paid plaintiff for her services beginning in 1984 and continues to pay plaintiff for her services that she provides Darnell. Since defendant had made payments of PIP benefits, plaintiff had one year after the most recent allowable expense to commence an action against defendant. *Devillers, supra* at 574. Plaintiff filed her complaint on March 20, 2003, alleging that defendant underpaid her for the attendant care she provided Darnell. However, under the "one-year back rule" provided in MCL 500.3145(1), plaintiff's recovery is limited to those losses incurred one year or less before the date on which the action was commenced, *Devillers, supra* at 582, unless plaintiff can avail herself of the insanity savings provision provided in MCL 600.5851(1).

We conclude that plaintiff's claims are tolled by the insanity savings provision provided for by the pre-1993 amendment version MCL 600.5851(1) for the expenses plaintiff incurred during the time period of 1980 to September 30, 1993. *Id.* at 103. However, plaintiff is *not* entitled to avail herself of the insanity savings provision provided for in MCL 600.5851(1) for the expenses plaintiff incurred during the time period of October 1, 1993, to March 19, 2002, because these expenses accrued after the effective date of the 1993 amendment to MCL 600.5851(1). *Id.* at 101, 103. Finally, pursuant to MCL 500.3145(1), plaintiff is limited by the "one-year back rule" to those expenses incurred within the one year preceding the filing of the action. *Devillers, supra* at 574. Thus, plaintiff can recover for the expenses incurred from March 21, 2002, to March 20, 2003.

Defendant next argues that the trial court erred in concluding that plaintiff's cause of action to recover benefits for expenses incurred during Darnell's insanity is derivative of Darnell's rights under the no-fault act.

Under MCL 500.3112 "[p]ersonal protection insurance benefits are payable to or for the benefit of an injured person." This Court recently decided *Hatcher v State Farm Mutual Automobile Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No 262964, issued December 20, 2005 and published after release). This Court noted that MCL 500.3112 "confers a cause of action on the injured party and does not create and independent cause of action for the party who is legally responsible for the injured party's expenses." *Id.* at 2, citing *Geiger v Detroit Automobile Inter-Insurance Exch*, 114 Mich App 283, 287; 318 NW2d 833 (1982).

In the present case, plaintiff did not have an independent cause of action for attendant care services. Plaintiff's cause of action to bring a claim for benefits is derivative of Darnell's rights under the no-fault act. *Hatcher, supra* at 2, citing *Geiger, supra* at 287-288. Accordingly,

the trial court properly concluded that the right to bring a claim for attendant care services belongs to Darnell and that plaintiff's claims were derivative of Darnell's rights.

Plaintiff argues that the general tolling provision provided for in MCL 600.5851(1) is unconstitutional because it (1) violates the equal protection guarantees of the Michigan and federal constitutions and (2) violates plaintiff's right to due process under the Michigan and federal constitutions.

Plaintiff failed to preserve the issue by raising it in the trial court; however, we will review the issue because it involves a question of law concerning which necessary facts have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). This Court reviews constitutional questions de novo. *Co Rd Ass'n v Governor*, 260 Mich App 299, 303; 677 NW2d 340 (2004).

In *Hatcher*, *supra* at 3-6, this Court concluded that the general savings provision provided for in MCL 600.5851(1) did not violate a plaintiffs right to equal protection guarantees or a plaintiff's right to due process under either the Michigan or federal constitutions. Thus, we conclude that plaintiff's argument is without merit.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello