STATE OF MICHIGAN

COURT OF APPEALS

NEW START, INC., THE HEALING PLACE, LTD., ANOTHER STEP FORWARD, and THE HEALING PLACE AT NORTH OAKLAND MEDICAL CENTER,

Plaintiffs/Counter Defendants-Appellants,

v

BRISTOL WEST INSURANCE COMPANY,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
April 24, 2007

No. 274085
Wayne Circuit Court
LC No. 05-522357-NF

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Frank Parrish was injured in an automobile accident in December 2002, and received rehabilitative treatment from plaintiffs from November 2003 to February 2004. In July 2005, plaintiffs filed this action against defendant, Parrish's no-fault insurer, to recover the cost of the rehabilitative treatment as a no-fault benefit. The trial court determined that plaintiffs' claims were barred by the one-year-back rule, MCL 500.3145(1), and granted defendant's motion for summary disposition.

We review a trial court's decision on a motion for summary disposition de novo. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). Although the parties dispute whether defendant's motion should be considered under MCR 2.116(C)(8) or (10), we conclude that the appropriate subrule to apply is MCR 2.116(C)(7) (claim barred by statute of limitations). See *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). In considering a motion under MCR 2.116(C)(7), we consider the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor, unless specifically contradicted by any documentary evidence that is submitted. *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994); *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002).

MCL 500.3145(1) provides the following time limitations on actions to recover PIP no-fault 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*. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005), the Supreme Court overruled its previous decision in *Lewis v DAIIE*, 426 Mich 93, 101-103; 393 NW2d 167 (1986), and held that the one-year-back provision "must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have had it written." The Court rejected the judicial tolling doctrine adopted in *Lewis* as contrary to the plain statutory language. *Devillers*, *supra* at 581-583. In view of the Supreme Court's broad rejection of the judicial tolling doctrine in *Devillers*, we conclude that the trial court properly dismissed plaintiffs' action against defendant, because it sought recovery for losses sustained more than one year before plaintiffs filed the action.

Plaintiffs also contend that they should be permitted to maintain an independent action for fraud and misrepresentation based on defendant's fraudulent representation of its intent to pay. Although an action for fraud can be based on an unfulfilled promise to perform in the future if the promise was made with a present undisclosed intent not to perform, *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005), plaintiffs have not presented any evidence that defendant made a promise to pay with an intent not to perform when the promise was made. Indeed, plaintiffs allege that defendant promised to pay the expenses upon submission of requested documentation showing that the expenses were not covered by Parrish's health insurance, but plaintiffs do not claim that the requested documentation was ever submitted. Further, the mere fact that defendant ultimately failed to pay the expenses does not support an inference that it deliberately misrepresented its intent.

More importantly, plaintiffs cannot evade the one-year-back rule by attempting to recast their claim for PIP benefits as a different cause of action. In *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 149; 724 NW2d 498 (2006), the plaintiff asserted a claim against her no-fault insurer under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. This Court held that the unambiguous one-year-back rule, MCL 500.3145(1), precluded the claim, notwithstanding the MCPA label, because the relief sought was the payment of no-fault benefits. *Id*. at 149. Similarly, plaintiffs here seek payment of no-fault benefits that

they believe they are entitled under Parrish's no-fault policy. Therefore, their claim is precluded by MCL 500.3145(1).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello