STATE OF MICHIGAN

COURT OF APPEALS

JAFFER ODEH, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED March 13, 2014
v	No. 309647 Wayne Circuit Court
AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellee/Cross-Appellant.	LC No. 10-001691-NF

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Jaffer Odeh, appeals as of right the trial court order granting summary disposition to defendant, Auto Club Insurance Association, regarding this action to recover no-fault benefits for attendant care and case management services resulting from a 1998 motor vehicle accident in which plaintiff was involved. We affirm.

I. FACTUAL BACKGROUND

On May 24, 1998, plaintiff was 17 years old when he was in a car accident. He sustained an injury to his C6 and C7 cervical spinal cord, and became an incomplete quadriplegic. He filed a claim with the defendant insurance company and received no-fault benefits. Plaintiff initiated this instant action on May 13, 2009, claiming that he was entitled to payment for family attendant care services and case management services, but that defendant had kept the availability of those hidden from him back in 1998.[1]

Defendant filed seven motions for summary disposition alleging, *inter alia*, that the one-year back rule, MCL 500.3145(1), limited plaintiff's recovery only to damages for the year preceding the lawsuit. Plaintiff responded that because defendant undertook the duty of

[1] Plaintiff initially filed his claim in the United States District Court for the Northern District of Ohio, which was eventually transferred to the United States District Court for the Eastern District of Michigan. That suit was dismissed on plaintiff's request, and plaintiff subsequently filed suit in Wayne Circuit Court on February 9, 2010.

explaining benefits, but did so in an incomplete fashion, defendant is equitably stopped from asserting the application of the one-year-back rule. The trial court initially agreed that there were factual issues regarding the one-year-back rule, but granted defendant's motions for summary disposition pertaining to plaintiff's negligence claim and insurance bad faith. Thus, the only remaining claim was breach of contract.

Defendant subsequently filed a motion for summary disposition based on plaintiff's equitable estoppel defense, and a motion for partial summary disposition based on the one-year-back rule. Defendant contends that plaintiff's assertion of the attorney-client privilege, regarding whether his attorneys informed him about the attendant care benefits, precluded him from arguing that he never knew about them. Defendant argues that it would be unfair to allow plaintiff to assert lack of knowledge under an equitable estoppel theory while he was preventing defendant from discovering if indeed plaintiff had gained such knowledge. Despite plaintiff's arguments that he was entitled to attorney-client privilege and testimony that he and his mother did not know of such benefits, the trial court ultimately granted defendant's motion for summary disposition on plaintiff's claim of equitable estoppel. Plaintiff now appeals.

II. ONE-YEAR-BACK-RULE

A. STANDARD OF REVIEW

We review de novo a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Equitable issues are reviewed de novo, but we review for clear error the court's findings of fact supporting its decision." *AFSCME v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005). "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

B. ANALYSIS

"To assert a no-fault claim, an insured must demonstrate that the insured is entitled to benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle without regard to fault, and that the insurer is obligated under an insurance contract to pay those benefits, but failed to do so timely." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 407; 751 NW2d 443 (2008) (quotation marks and citation omitted). While several statutory provisions apply in the no-fault context, at issue in this case is MCL 500.3145(1), which includes what is referred to as the "one-year-back rule." The statute provides:

> (1) 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 therefore, 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.]

As the Michigan Supreme Court has recognized, this statute "contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered[.]" *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 207; 815 NW2d 412 (2012). At issue in this case is the latter restriction, the one-year-back rule, which restricts a plaintiff's recovery "only to losses that have been incurred during the year before the filing of the action." *Id.*; see also *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005).

In *Devillers*, 473 Mich at 582-583, the Court recognized that the one-year-back rule constitutes a "plainly expressed legislative intent that recovery of PIP benefits be limited to losses incurred within the year prior to the filing of the lawsuit." In renouncing the application of the judicial tolling doctrine in the no-fault context, the Court observed that although a plaintiff "may well find himself in a bind . . . should that claimant delay the commencement of an action (as permitted by § 3145) more than one year beyond the accident leading to the injury, our observation is simply this: the Legislature has made it so." *Id.* at 583.[2] In response to the dissent, the Court stated that "statutes are to be enforced as *written*, unless, of course, a statute violates the Constitution" and that "if a court is free to cast aside, under the guise of equity, a plain statute such as § 3145(1) simply because the court views the statute as 'unfair,' then our system of government ceases to function as a representative democracy." *Id.* at 588, 591.

Thus, MCL 500.3145(1) must be enforced as written. *Henry Ford Health Sys v Titan Ins Co*, 275 Mich App 643, 647; 741 NW2d 393 (2007). However, the Court did not completely foreclose all equitable considerations. The Court stated:

> Although courts undoubtedly possess equitable power, such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake. A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking, as [the dissent] implies.
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> Section 3145(1) plainly provides that an insured 'may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.' There has been no allegation of fraud, mutual mistake,

[2] The Court further stated: "Section 3145(1) specifically states that a 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,' and this Court lacks the authority to say otherwise." *Id.* at 590 n 65.

> or any other 'unusual circumstance' in the present case. Accordingly, there is no basis to invoke the Court's equitable power. [The dissent errs] in assuming that equity may trump an unambiguous and constitutionally valid statutory enactment. [*Devillers*, 473 Mich at 589-591.]

We have recognized that the Court in *Devillers* cautioned "that courts should be reluctant to apply equitable estoppel 'absent intentional or negligent conduct designed to induce a plaintiff from bringing a timely action.'" *Henry Ford Health Sys*, 275 Mich App at 647 n 1, quoting *Devillers*, 473 Mich at 590 n 64 (quotation marks omitted).

In the instant case, plaintiff's accident occurred on May 24, 1998. He did not file the present complaint until May 13, 2009.[3] Barring equitable considerations, plaintiff would be limited to recovering damages only for the period of May 13, 2008, to May 13, 2009. MCL 500.3145(1). On appeal, plaintiff contends that the trial court erred in granting defendant's motion for partial summary disposition based on the one-year-back rule because genuine issues of material fact existed regarding equitable estoppel.

"Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006) (quotation marks and citation omitted); *AFSCME v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005); see also *McNeel v Farm Bureau Gen Ins Co of Michigan*, 289 Mich App 76, 117; 795 NW2d 205 (2010). It is not a cause of action, but may be used as a defense. *Casey*, 273 Mich App at 399. "The doctrine of estoppel should be applied only where the facts are unquestionable and the wrong to be prevented undoubted." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 552; 487 NW2d 499 (1992); see also *Tucker v Eaton*, 426 Mich 179, 188; 393 NW2d 827 (1986). "Silence or inaction alone is insufficient to invoke estoppel absent a legal or equitable duty to disclose." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 445-446; 761 NW2d 846 (2008). In other words, "[s]ilence or inaction may form the basis for an equitable estoppel only where the silent party had a duty or obligation to speak or take action." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 141; 602 NW2d 390 (1999).

The issue before us is not whether plaintiff and his attorneys properly asserted attorney-client privilege. Instead, the issue is how this assertion affects equitable considerations. During deposition testimony, plaintiff and his prior attorneys repeatedly asserted attorney-client privilege, which plaintiff refused to waive. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 420; 807 NW2d 77 (2011) (quotation marks and citation omitted) ("Although either [the attorney or the client] can assert the privilege, only the client may waive the privilege.").[4] Attorney

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[3] This is the date he filed suit in the United States District Court for the Northern District of Ohio. Defendant does not dispute that this is the proper start date.

[4] Plaintiff continually alludes to the fact that after claiming that it would refrain from doing so, defendant asked for privileged communications during depositions. Contrary to plaintiff's characterization, defendant actually stated: "I'm not asking at this point for privileged

James Harvey testified that he came into contact with plaintiff during the course of his legal work in 2000. However, he refused to answer (or was prevented from answering based on objections): why plaintiff came to see him, whether he communicated with plaintiff's family (although he conceded he spoke with plaintiff's father), what plaintiff's father told Harvey, whether plaintiff's father was seeking legal advice, whether plaintiff made a claim for no-fault benefits with the Auto Club Insurance Association, whether Harvey investigated whether there was a no-fault claim at issue, whether plaintiff showed Harvey any communications from AAA, whether Harvey contacted any attendant care providers, and whether Harvey informed plaintiff of the benefits he was entitled to under the no-fault act. During the course of Harvey's deposition, plaintiff clearly stated that he was not waiving the privilege.

Attorney Mark Schreier generally conceded that he sent a letter to AAA purporting to represent plaintiff regarding transportation needs and a ramp at plaintiff's residence. However, he declined to answer (or was prevented from answering): if it was Schreier's practice with spinal cord injured clients to inform them of other related benefits, the purpose of his representation of plaintiff, whether he counseled plaintiff regarding attendant care and case management services, whether he would have allowed plaintiff to be unknowing of his entitlement to attendant care benefits, and whether he would have helped plaintiff if Schreier had seen a need for medical attendant care. During Schreier's deposition, plaintiff clearly communicated that he was not waiving attorney-client privilege.

Plaintiff's claim that these questions solicited privileged information is not meritless. See *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 450; 528 NW2d 778 (1995) (privilege "attaches only to confidential communications by the client to its adviser that are made for the purpose of obtaining legal advice."). Yet, plaintiff placed his knowledge of benefits at issue when he asserted equitable estoppel in an attempt to subvert the one-year-back rule. To prevent defendant from exploring the sources who may have informed plaintiff of his benefits is hardly equitable. Moreover, as stated above, "[t]he doctrine of estoppel should be applied only where the facts are unquestionable and the wrong to be prevented undoubted." *Kamalnat*, 194 Mich App at 552.[5]

Plaintiff, however, insists that there was sufficient evidence that he lacked knowledge of such benefits, as he testified that no one from AAA informed him about attendant care benefits or case management services, and his mother testified that no one from AAA ever called her and explained plaintiff's benefits. Yet, plaintiff—17 years old at the time of the accident—testified that his father primarily dealt with AAA and took charge of the situation, as plaintiff was focused on recovering. In fact, plaintiff did not remember or know if he had read anything AAA provided to him or his family. When asked whether plaintiff had contacted AAA, he replied: "I

information. They can pose their objections at the time of the deposition and we can address those if we have to."

[5] Plaintiff characterizes the result of such a ruling as a waiver of his attorney-client privilege, which he argues cannot occur because he did not use it as a sword. Yet, the trial court's ruling did not force plaintiff to waive privilege. Rather, it simply recognized that with incomplete information regarding what plaintiff was told about his benefits, he could not establish equitable estoppel.

don't know. It's possible I spoke to them about a number of things. I don't know." Plaintiff highlights no evidence regarding his father's knowledge of benefits. Furthermore, plaintiff received attendant care payments when he was in college, albeit not for a family member's care, and a no-fault pamphlet in 2006 informing him of the potential attendant care payments. Moreover, at issue is whether plaintiff "justifiably relie[d]" and any acts or omissions of defendant. *Casey*, 273 Mich App at 399. Reliance was not justified if plaintiff knew from other sources—including his attorneys—that he was entitled to such benefits. See *City of Grosse Pointe Park v Michigan Muni Liab & Prop Pool*, 473 Mich 188, 224; 702 NW2d 106 (2005) (emphasis in original) (even assuming the other elements of equitable estoppel had been established, the plaintiff's "equitable estoppel claim must fail because its reliance was not *justifiable*.").

Plaintiff also emphasizes the importance of attorney-client privilege and the purported effect of the trial court's ruling, which was to pressure him to waive that privilege. However, such arguments divorce the issue from its context. In the context of the one-year-back rule, MCL 500.3145(1) plainly communicates the Legislature's intent that damages should be limited, without reserve, to one year before the lawsuit was initiated. As the Michigan Supreme Court warned, courts are not permitted under the guise of equity to cast aside a constitutionally valid and plainly written statute. *Devillers*, 473 Mich at 591. While a trial court may invoke its equitable power, that narrow exception is not implicated in the instant case, as plaintiff asserted privilege and prevented defendant from obtaining information that possibly could preclude equity favoring plaintiff. *Henry Ford Health Sys*, 275 Mich App at 647 n 1.

To hold otherwise would eviscerate the plain language of MCL 500.3145(1), as a mere assertion that defendant failed to inform a plaintiff of the full panoply of benefits would obliterate the one-year-back rule.[6] Such a holding is untenable, as failing to inform or pay benefits is the reason plaintiffs may bring suit under MCL 500.3145(1), and is hardly an "unusual circumstance[.]" *Devillers*, 473 Mich at 589-591 (quotation marks omitted) (a court's equitable power is reserved for "unusual circumstances such as fraud or mutual mistake.").

As the Michigan Supreme Court observed, while a plaintiff "may well find himself in a bind . . . the Legislature has made it so." *Devillers*, 473 Mich at 583.

III. CONCLUSION

[6] We also note that while plaintiff contends that defendant assumed the duty to explain benefits to him fully, the only claim left on appeal is breach of contract. Plaintiff has failed to address how his assumption of duty theory fits within a breach of contract claim. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation marks and citation omitted) (it is not the responsibility of "this Court to discover and rationalize the basis for [plaintiff's] claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.").

The trial court properly granted partial summary disposition based on the one-year-back rule in defendant's favor. We affirm.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan