STATE OF MICHIGAN

COURT OF APPEALS

CHERYL CRUMP, Guardian of JAMES W. WARREN,

Plaintiff-Appellant/Cross-Appellee,

and

JOHN CRUMP,

Plaintiff,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
December 6, 2005

No. 256558
Genesee Circuit Court

LC No. 02-072839-NF

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In this no-fault case, plaintiff, Guardian of James Warren, appeals the trial court's grant of defendant's motion in limine to prevent plaintiff from introducing numerous documents at trial. We affirm.

This case arises out of plaintiff's claim that defendant underpaid attendant care services benefits when she cared for Warren, who was injured in a motor vehicle accident in 1974. Specifically, plaintiff alleged in her complaint that defendant breached the insurance contract when it failed to pay adequate benefits and that defendant fraudulently refused to pay a reasonable hourly wage for attendant care services. Plaintiff also sought declaratory relief and asked the trial court to determine the amount of attendant care benefits, medical expenses, interest, and attorney fees defendant owes.

During discovery, plaintiff asked defendant to produce documents generated in connection with an internal State Farm survey called "Advancing Claims Excellence" (ACE). Defendant produced the ACE documents, but filed a motion in limine to prevent plaintiff from introducing them at trial on the grounds that the documents are privileged and irrelevant to plaintiff's claim. The trial court conducted an *in camera* review of the documents and ultimately

ruled that the papers prepared for the ACE study are privileged as self-evaluative audits under MCL 500.221, but declined to rule on the relevancy issue.

Plaintiff filed a delayed application for leave to appeal the trial court's order that excluded the ACE documents and this Court granted the application on December 21, 2004. Thereafter, on January 7, 2005, defendant filed a motion to stay the trial pending a decision on appeal regarding the admissibility of the ACE documents. Defendant maintained that if the court conducted a trial and the Court of Appeals decided the evidentiary issue in plaintiff's favor, the court would have to conduct a new trial. According to defendant, not only would this result in a waste of judicial resources, it would unfairly permit plaintiff a second trial despite her insistence on going forward with trial without the ACE documents. Defendant further asserted that it was inconsistent for plaintiff to argue in the Court of Appeals that the ACE documents are vital to her case while simultaneously objecting to a stay of trial during which she would not be permitted to refer to those documents. In response, plaintiff objected to a stay and argued that she would be prejudiced by further delay of the trial because "justice delayed is justice denied." (Emphasis deleted.)

The trial court heard oral argument on the motion on January 18, 2005, denied defendant's motion for stay and, thereafter, defendant filed a motion for stay in the Court of Appeals, and this Court also denied the motion.

Here, plaintiff asks us to reverse the trial court's decision to exclude the ACE documents at trial. Therefore, plaintiff requests a new trial that would allow her to present the documents to the jury. However, it is undisputed that plaintiff urged the trial court to commence her trial without the ACE documents so that she could receive a speedy jury award. Indeed, while the jury rejected her fraud claim, the jury awarded plaintiff attendant care services benefits that it determined defendant underpaid.[1] Clearly, plaintiff could have consented to a stay and could have sought to expedite her appeal to accelerate the appellate process. Plaintiff will not be heard to argue that she was so prejudiced by the trial court's exclusion of the ACE documents when she knowingly insisted that the court proceed to trial without them.[2] Simply stated, "[a] litigant may not harbor error, to which he or she consented, as an appellate parachute." *In re Gazella*,

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[1] Plaintiff has also filed a claim of appeal (Docket No. 263406) with regard to the jury verdict, in which she has indicated an intent to again argue that she was denied a fair trial when the trial court declined to admit the ACE documents.

[2] In light of our ruling, we need not decide the issue, but note that the ACE documents presented to this Court appear to have been created during an internal review of State Farm's catastrophic claims handling procedures for purely business reasons: to improve employee efficiency and cost-effectiveness. These documents do not appear to fall within the plain requirements of the self-evaluative privilege, MCL 500.221, which applies to documents prepared "for the purpose of identifying or preventing noncompliance with laws, regulations, orders or industry or professional standards."

264 Mich App 668, 679; 692 NW2d 708 (2005).[3] By opposing a stay and insisting on going to trial, plaintiff has waived any claim of prejudice regarding these documents.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey

[3] Moreover, it is also undisputed that none of the ACE documents refer to Warren's claim file or how defendant paid plaintiff's attendant care services benefits. At most, the ACE documents show an intent by State Farm to become more profitable and to curtail unnecessary claims expenses. Significantly, nothing in the documents shows that State Farm fraudulently misrepresented facts to Warren or Crump, or that State Farm discovered fraudulent or illegal conduct in Warren's claim file, or that State Farm's alleged failure to pay Crump an adequate wage was the result of an internal corporate decision to underpay benefits to family members who provide attendant care services. Indeed, though plaintiff had access to over 77,000 ACE documents, she never made an offer of proof to the trial court that one or more of the ACE documents revealed fraudulent conduct relevant to Warren's claim or Crump's allegations and plaintiff's counsel confirmed this point during oral argument.