STATE OF MICHIGAN

COURT OF APPEALS

JAMI JO VERBEKE,

Plaintiff/Counterdefendant,

and

INNOVATIVE REHABILITATION SYSTEMS, INC.,

Plaintiff/Counterdefendant-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
February 28, 2008

No. 274778
Wayne Circuit Court
LC No. 04-427542-NF

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Plaintiff-appellant Innovative Rehabilitation Systems, Inc. appeals as of right the circuit court's order granting summary disposition on the basis of its finding that the one-year-back rule in MCL 500.3145(1) barred Innovative's claim for payment of first-party no-fault insurance benefits. We affirm.

I. Facts and Proceedings

On January 18, 2003, Jami Verbeke sustained a head injury in a motor vehicle accident. Verbeke obtained treatment from several health care providers, including Innovative. Within a year of the accident, Verbeke sued her no-fault insurer, defendant Allstate Insurance Company, alleging that it unreasonably failed to pay certain medical expenses. Verbeke and defendant partially settled that lawsuit in April 2004, and dismissed the case without prejudice. As part of the settlement, defendant paid Innovative for all services it provided Verbeke through April 2004.

In September 2004, Verbeke again sued defendant seeking payment of first-party no-fault benefits. Verbeke's complaint alleged that defendant wrongfully failed to pay medical expenses

related to the accident, as well as "wage loss, replacement services, attendant care, out of pocket expenses or mileage." This second litigation focused almost exclusively on services that Innovative provided between October 3, 2003 and December 21, 2004.

On August 26, 2005, defense counsel mailed Verbeke a letter, through her counsel, advising that defendant had "initiated an investigation into the demands for payment of services rendered by Innovative Rehabilitation Services," and as a result, "question[ed] whether the services billed by Innovative Rehabilitation Services are payable under Michigan no-fault law and your policy with Allstate Insurance Company." The letter continued, "To the extent that your claim for damages … relates to any alleged balances for any medical bills from Innovative Rehabilitation Systems, it is the position of Allstate that those services were not lawfully rendered . . . ." Defendant informed Verbeke that it had sent the same letter to Innovative, notifying it that defendant, and not Verbeke, "is responsible for payment for services rendered in compliance with Michigan no-fault law." The letter to Verbeke concluded as follows:

> Innovative Rehabilitation Services is hereby further advised that Allstate Insurance Company will defend its insured against any attempt to collect any amount, and will also consider all other appropriate action to prevent its insured from being pursued for collection.
>
> In fact, Allstate will waive any technical defects and allow Innovative to sue Allstate directly so that you will not even have to be a party to the litigation. In taking this position at this time, Allstate Insurance Company does not intend to waive any defenses it may have to payment of any part of the above claim, all of which defenses are hereby expressly reserved without limitation.

On September 9, 2005, defendant filed a motion seeking partial summary disposition, alleging that its August 26, 2005 letter to Verbeke eliminated the existence of a case or controversy. Defendant averred that the letter constituted "a hold harmless agreement, whereby Allstate agrees to defend and indemnify Plaintiff should Innovative choose to file suit against Plaintiff for the alleged unlawful services."[1] Verbeke did not immediately respond to defendant's motion. Instead, she filed a motion to amend her complaint to add Innovative as a party plaintiff. Verbeke's motion asserted that "[a]s a result of Defendant's 'hold harmless' offer" to Verbeke, "Innovative has now sought legal representation for its unpaid medical bills by . . . Verbeke's counsel." Verbeke's proposed amended complaint added a claim by Innovative to recover approximately $69,598.77 in services that it provided her.

Defendant opposed the proposed amendment, arguing that the motion was untimely, that Verbeke's counsel had a conflict of interest, and that the addition of Innovative would unnecessarily complicate and enlarge the scope of Verbeke's lawsuit. On November 8, 2005, the circuit court denied Verbeke's motion to amend. Verbeke filed a motion for reconsideration, and

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[1] In *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577; 543 NW2d 42 (1995), an opinion authored by former Judge, now Chief Justice, Taylor, this Court expressly approved indemnification and hold harmless agreements such as that supplied to Verbeke.

a response to defendant's motion for partial summary disposition. In her response, Verbeke asserted that she had sustained damages that fell outside the scope of the hold harmless and indemnification letter, and that the existence of these damages precluded partial summary disposition.

On November 30, 2005, the circuit court granted Verbeke's motion for reconsideration, and permitted the addition of Innovative as a party plaintiff. In the same brief written opinion, the circuit court denied defendant's motion for partial summary, reasoning, "Since the court has allowed Innovative to be joined as a party plaintiff, and has also allowed Ms. Verbeke's attorney to represent both Ms. Verbeke and Innovative, the issue of the 'hold harmless' agreement is moot because all the claims and defenses of the parties will be tried in a single action."

On October 6, 2006, Verbeke sought leave of the court to dismiss her lawsuit without prejudice or costs. She asserted that her claim "primarily involved an unpaid medical bill from Innovative Rehabilitation," that the discovery in her case had "primarily focused" on the unpaid Innovative bill, and that dismissal of her claims would permit the jury to "focus on the primarily [sic] issue, which is whether the treatment rendered by Innovative was reasonable, necessary and related." Defendant opposed Verbeke's request for dismissal, arguing that her "fraudulent" and "frivolous" claims had caused it to incur substantial costs.

At a hearing conducted on October 10, 2006, the circuit court explained that it would dismiss Verbeke's case without costs, but with prejudice. Immediately after the circuit court's bench ruling, defense counsel moved to dismiss Innovative's claims, arguing that because Innovative joined the action in February 2006, the one-year-back rule precluded all of its asserted damages, the most recent of which it incurred in December 2004.[2] Innovative's counsel objected that defendant had not provided the requisite 28 days' notice of the motion to dismiss. Innovative also contended that it qualified as a third-party beneficiary of Verbeke's insurance contract, and that defendant had notice of Innovative's claim, through Verbeke's original complaint, within the one-year time period. Innovative additionally asserted that the provision in defendant's hold harmless agreement waiving "technical defects" defeated a one-year-back rule defense. The circuit court granted defendant's motion to dismiss. In its bench ruling, the circuit court held that because Innovative's claim did not relate back to the date that Verbeke filed this action, its claims were barred by MCL 500.3145.

II. Issues Presented and Analysis

Innovative raises several challenges to the circuit court's order of dismissal. Defendant's motion to dismiss did not specifically identify pursuant to which court rule it requested dismissal, and the circuit court did not specify under which provision it found appropriate the

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[2] In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 704 NW2d 539 (2005), the Michigan Supreme Court held that MCL 500.3145(1) prevents a claimant from recovering first-party no-fault benefits for any portion of the loss incurred more than a year before the commencement of the action. Innovative filed its amended complaint on February 8, 2006, and sought benefits for services provided more than one year before that date.

dismissal of Innovative's claims. We will treat the circuit court's ruling as premised on MCR 2.116(C)(10).[3] This Court reviews de novo a circuit court's summary disposition rulings. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id*. We also review de novo a circuit court's construction of the no-fault act. *Kreiner v Fisher*, 471 Mich 109, 129; 683 NW2d 611 (2004).

Innovative first contends that the circuit court erred by ruling on defendant's motion for summary disposition in violation of the 28-day notice requirement contained in MCR 2.116(B)(2). Although Innovative correctly observes that defendant did not adhere to the court rule notice requirement, this fact does not defeat summary disposition. According to this Court, "'MCR 2.116(B)(2) does not apply to defendants who wish to move for summary disposition,' but rather 'governs plaintiffs who wish to move for immediate summary disposition upon the filing of a complaint . . . .'" *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 391-392; 651 NW2d 756 (2002), quoting *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986). The relevant notice provision appears in MCR 2.116(G)(1)(a)(i), which mandates that a party file and serve "a written motion under this rule with supporting brief and any affidavits . . . at least 21 days before the time set for the hearing." The circuit court undisputedly did not enforce the 21-day notice period, but the court adjourned the hearing to permit Innovative to review defendant's motion to dismiss, Innovative then raised several arguments against its dismissal, and Innovative thereafter filed a motion for reconsideration, in which it raised all of the positions it currently raises on appeal. Because Innovative had ample opportunity to brief and argue before the circuit court all its challenges to defendant's motion to dismiss, we cannot characterize the circuit court's disregard of the 21-day notice period as "inconsistent with substantial justice." MCR 2.613(A).

Innovative next argues that as a "medical provider," it had a "statutory right to intervene" pursuant to MCL 500.3112, and that the intervention relates back to the date of Verbeke's

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[3] Neither the involuntary dismissal provision in MCR 2.504(B), nor any other court rule besides MCR 2.116, contemplates the involuntary dismissal of Innovative's claims under the instant circumstances. With respect to the appropriate subrule of MCR 2.116(C) supporting defendant's motion for dismissal, subrule (7) does not apply because the one-year-back damage limitation rule in MCL 500.3147(1) does not constitute a period of limitation. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 61-62; 718 NW2d 784 (2006). Defense counsel implicated subrule (C)(8) when she asserted that the absence of any damages recoverable by Innovative rendered it unable "to state a claim." But because defendant attached, and the circuit court apparently considered, evidence beyond the pleadings, specifically an invoice of relevant charges claimed by Innovative, the court's ultimate dismissal is properly reviewed pursuant to subrule (C)(10). See MCR 2.116(G)(5) (providing that documentary evidence "then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)," but that "[o]nly the pleadings may be considered when the motion is based on subrule (C)(8) or (9)").

accident, pursuant to *Hartman v Ins Co of North America*, 106 Mich App 731, 746; 308 NW2d 625 (1981). Unlike the state in *Hartman*, however, Innovative did not intervene in this case, as of right or otherwise. Although Innovative could have attempted to utilize the procedure for intervention described in MCR 2.209, it elected to join Verbeke's case as a coplaintiff. Because Innovative does not qualify as an intervenor, *Hartman* does not apply to this case.[4]

Innovative further contends that because it constitutes a third-party beneficiary of Verbeke's insurance policy with defendant, the one-year-back rule cannot apply. In support of this contention, Innovative cites *Botsford General Hosp v Citizens Ins Co*, 195 Mich App 127; 489 NW2d 137 (1992). The plaintiff in *Botsford* submitted a claim for personal injury protection benefits to the Michigan Department of State's assigned claims facility, pursuant to MCL 500.3171 *et seq*. The assigned claims facility appointed the defendant Citizens to investigate the claim. *Id*. at 130-131. Meanwhile, Botsford General Hospital sought payment from the Michigan Department of Social Services for the treatment it provided the plaintiff. *Id*. at 131. The plaintiff sued Citizens, and Botsford eventually intervened. *Id*. Citizens argued on appeal that because Botsford's intervention occurred more than two years after the plaintiff filed suit, the statute of limitations barred Botsford's claims. *Id*. at 139-140. This Court found that Citizens had received proper "notice" of the claim when the plaintiff initially commenced the action, but the Court did not address the one-year-back damage limitation provision.[5] *Id*. at 140-141. *Botsford*, therefore, does not support Innovative's claim in this case that plaintiff's filing of the original action rendered timely Innovative's subsequent claims. Furthermore, our Supreme Court emphasized in *Miller v Chapman Contracting*, 477 Mich 102; 730 NW2d 462 (2007), that the relation-back doctrine in MCR 2.118(D) "does not apply to the addition of new parties." *Id*. at 106 (internal quotation omitted). Thus, as a new party to the action commenced by Verbeke, Innovative cannot utilize the relation-back doctrine to avoid the damage limitation provision of the one-year-back rule.

Innovative lastly asserts that defendant waived the one-year-back rule defense in the portion of the "hold harmless" letter to Verbeke that stated, "… Allstate will waive any technical defects and allow Innovative to sue Allstate directly so that you will not even have to be a party to the litigation." We observe, however, that the next sentence of the hold harmless letter reads, "In taking this position at this time, Allstate Insurance Company does not intend to waive any defenses it may have to payment of any part of the above claim, all of which defenses are hereby

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[4] Apart from the fact that Innovative did not intervene in this action, the plain language of MCL 500.3112, which contemplates in relevant part that if doubt exists concerning "the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order," does not afford Innovative "an unconditional right to intervene." MCR 2.209(A)(1).

[5] In *Botsford*, this Court quoted MCL 500.3145 in support of its holding, but omitted from the quoted material the following sentence: "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." *Botsford, supra* at 140-141.

expressly reserved without limitation."[6] The one-year-back rule is not a "technical defect," but a full and complete defense to a first-party no-fault claim. Innovative's reliance on the hold harmless letter is therefore unavailing.

Affirmed.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

[6] Although we have determined that the hold harmless letter does not defeat defendant's claim for summary disposition in this case, we take no position regarding defendant's obligations pursuant to the hold harmless letter in any subsequent litigation between Innovative and Verbeke.