

STATE OF MICHIGAN
COURT OF APPEALS

SHARON L. STROZEWSKI, as Next Friend of
AMYRUTH L. COOPER and LORALEE A.
COOPER,

UNPUBLISHED
May 28, 2009

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

No. 261736
Washtenaw Circuit Court
LC No. 03-000367-NF

Defendant-Appellant.

ON REMAND

Before: Murphy, P.J., and Meter and Davis, JJ.

METER, J. (*concurring in part and dissenting in part*).

I concur in the majority's analysis concerning the proper claimant in this case. However, I respectfully dissent from the majority's analysis concerning the fraud issue, but only because I believe that I am bound to do so, given the holding in *Johnson v Wausau Ins Co*, ___ Mich App ___, ___ NW2d ___, 2009 WL 763426 (2009).¹ In *Johnson*, 2009 WL 763426 at 1-2, the plaintiff, a caretaker for a person injured in an automobile accident, alleged that an agent for the defendant insurance company misrepresented the amount of benefits to which she was entitled. This Court noted that "family members are entitled to reasonable compensation for the services they provide at home to an injured person" and that "there appears to be no dispute" that the plaintiff and another caretaker, Dorothy Bencheck (who became the injured person's legal guardian), were entitled to greater compensation than they had been receiving. *Id.* at 3 (internal citation and quotation marks omitted). However, citing *Cooper v Auto Club Ins Ass'n*, 481 Mich 399; 751 NW2d 443 (2008), this Court concluded that the plaintiff did not have an actionable fraud claim because she could not establish *reasonable* reliance on the alleged misrepresentations. *Johnson, supra*, 2009 WL 763426 at 4-5. The Court stated:

Even assuming that Abdey [the insurance agent] made a fraudulent misrepresentation when he, in response to Bencheck's inquiries about additional benefits, told her that additional benefits were not available to her or when, in the

¹ Although Westlaw currently refers to this opinion as unpublished, it was approved for publication on May 12, 2009.

absence of such an inquiry, he failed to inform Bencheck and plaintiff that additional benefits were available to them, plaintiff cannot establish that either she or Bencheck relied upon the fraudulent misrepresentation. *Abdey's representation did not involve information or facts that were exclusively or primarily in the control of defendant. Rather, Abdey's misrepresentation concerned what benefits were available to plaintiff and Bencheck for their care of Eastman under the no-fault act. Plaintiff and Bencheck had means, i.e., consultation with a lawyer, to determine whether Abdey's representation was true.* Indeed, soon after plaintiff learned that additional benefits might be available for her care of Eastman, she consulted a lawyer and the present case was initiated soon thereafter. Plaintiff does not claim, nor is there even the slightest hint of evidence, that defendant in any way prevented her or Bencheck from determining the truthfulness of Abdey's representation. *Because plaintiff and Bencheck had the means to determine the accuracy of Abdey's representation, plaintiff is not able to establish that either she or Bencheck relied on Abdey's representation.* Accordingly, plaintiff's claim for fraud fails.

Because plaintiff cannot establish a claim for fraud and because the one-year-back rule bars plaintiff's no-fault claim for benefits that accrued before July 20, 2005, the trial court did not err in granting defendant's motion for partial summary disposition. We therefore affirm the trial court's order granting the motion. [*Johnson, supra*, 2009 WL 763426 at 5; emphasis added.]

The instant case is not distinguishable in any meaningful way from *Johnson* because, just like in *Johnson*, plaintiff here “had means, i.e., consultation with a lawyer, to determine whether” the alleged misrepresentations by defendant were true. The alleged misrepresentations at issue in this case were, as in *Johnson*, related to the rate of compensation allowed for caregivers.

Moreover, the issue of reasonable reliance is squarely before us in this appeal. This case comes to us in a unique procedural posture. A judgment was entered that “resolved the issues as to the amounts to which plaintiffs [sic] are entitled for the various time periods involved,” subject only to “appellate resolution of the legal issues raised in the . . . motions for partial summary disposition to determine the extent of defendant’s liability.” The judgment set forth various amounts due, depending on the resolution of the legal issues, and stated that defendant “expressly preserved” its right to appeal “[a]ll issues raised by either party in defendant’s three motions for partial summary disposition and plaintiffs’ [sic] response to same.” In a pleading dated November 17, 2004, defendant clearly argued that plaintiff could not establish reasonable reliance because she had the means – “retaining an attorney” – to determine whether defendant’s representations were true. Defendant pointed out that “early on, on at least two occasions, [plaintiff] retained an attorney to help her with her daughters’ no-fault claims.” The issue of reasonable reliance was therefore one of the appealable matters contemplated by the judgment.

Moreover, defendant adequately raised the issue of reasonable reliance in its December 30, 2008, supplemental brief on remand filed with this Court. While it was raised in the context of discussing the possible fraudulent concealment of the fraud claim, defendant nevertheless did clearly argue that plaintiff “could not reasonably rely on [defendant’s] alleged representations concerning benefits payable” because “[p]laintiff did, in fact, retain an attorney in connection

with the probate proceedings which were brought to enable [p]laintiff to negotiate with [defendant] as to no-fault benefits.”

Accordingly, the issue of reasonable reliance is before us, and, under MCR 7.215(J)(1), this Court is bound to follow the precedent concerning reasonable reliance that was established in *Johnson*. However, MCR 7.215(J)(2) states: “A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision.”

I do not agree with the *Johnson* opinion because I believe that it places an unreasonable burden on individuals who are relying on insurance agents for accurate information. While it may technically be true that a person receiving information from an insurance company concerning benefits payable for attendant-care services is able to verify the accuracy of the information through consultation with an attorney, I do not believe that such a consultation should be a required step in the claims-handling process. As stated in *Cooper, supra*, 481 Mich 399 at 415-416,

when the process involves information and facts that are exclusively or primarily within the insurers' perceived expertise in insurance matters, or facts obtained by the insurer[s] in the course of [their] investigation, and unknown to the insureds, the insureds can more reasonably argue that they relied on the insurers' misrepresentations. [Internal citations and quotations marks omitted.]

In my opinion, questions regarding available rates are “primarily within the insurers’ perceived expertise in insurance matters,” and I therefore disagree with the *Johnson* panel’s analysis of the reasonable-reliance issue.

Thus, I dissent in the instant case and find no actionable claim for fraud, but I do so *solely* because I feel constrained to do so under MCR 7.215(J)(1).² I would welcome the convening of a conflict panel to reassess the decision in *Johnson*. See MCR 7.215(J)(3).

I concur in part and dissent in part.

/s/ Patrick M. Meter

² I find that plaintiff’s remaining arguments on appeal, whereby she asserts that she is entitled to additional damages even if her fraud claim is deemed not actionable, are either moot or without merit.