STATE OF MICHIGAN

COURT OF APPEALS

JEANNE NICHOLSON, Legally Incapacitated Person, by her Guardian CAROLYN NICHOLSON,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee,

and

WILLOWBROOK REHABILITATION SERVICES,

Appellant.

UNPUBLISHED
March 6, 2012

No. 300592
Oakland Circuit Court
LC No. 2010-107489 - NI

WILLOWBROOK REHABILITATION SERVICES,

Plaintiff-Appellant,

v

JOSHUA A. LERNER, and COHEN, LERNER & RABINOVITZ, P.C.,

Defendants-Appellees.

No. 303885
Oakland Circuit Court
LC No. 2010-113929 - CZ

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

In Docket No. 300592, Willowbrook Rehabilitation Services (Willowbrook), appeals by leave granted[1] an order denying its motion to intervene in this action for no-fault benefits plaintiff Carolyn Nicholson brought against defendant Citizens Insurance Company (Citizens). In Docket No. 303885, plaintiff Willowbrook appeals by right an order granting summary disposition to defendants, Joshua A. Lerner and Cohen, Lerner & Rabinovitz, P.C.,[2] in Willowbrook's action for declaratory relief, unjust enrichment, tortious interference with business expectation, claim and delivery, and conversion. We affirm in both cases.

Willowbrook argues that the trial court abused its discretion in denying Willowbrook's motion to intervene in Nicholson's lawsuit against Citizens. We disagree.[3]

This Court reviews a trial court's decision to deny a motion to intervene for an abuse of discretion. *Hill v LF Transp, Inc*, 277 Mich App 500, 507; 746 NW2d 118 (2008). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). However, "[t]his Court reviews de novo a trial court's resolution of issues of law including the interpretation of statutes and court rules." *Hill*, 277 Mich App at 507.

Intervention is an action where a nonparty becomes a party in a suit already pending between others. *Id*. at 508. MCR 2.209 governs a motion to intervene in a lawsuit. MCR 2.209(A)(3) authorizes a person to intervene by right on a timely application and where "the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." This "rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Precision Pipe & Supply, Inc v Meram Constr, Inc*, 195 Mich App 153, 156; 489 NW2d 166 (1992). However, "intervention may not be proper where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action." *Id.* at 157.

While the notion of a "timely" motion to intervene has not been precisely defined, this Court has held that a motion to intervene is untimely when judgment for one of the parties has already been entered. *Dean v Dep't of Corrections*, 208 Mich App 144, 150-151; 527 NW2d 529 (1994). The *Dean* Court explained that to permit intervention after a judgment is entered would promote a bad public policy: the late intervening party would potentially reap the benefits of a favorable judgment but avoid being bound by an adverse judgment. *Id.* at 151. Here,

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[1] *Nicholson v Citizens Ins Co of America*, unpublished order of the Court of Appeals, entered June 30, 2011 (Docket No. 300592).

[2] Lerner and his law firm represent Nicholson in her lawsuit against Citizens.

[3] Nicholson asserts this Court lacks jurisdiction in Docket No. 300592 because Willowbrook is not an aggrieved party. By granting leave to appeal, this Court by implication decided this issue adversely to Nicholson. MCR 7.203(B) does not provide that the appellant must be an aggrieved party. Further, Willowbrook was aggrieved by the order denying its motion to intervene.

Willowbrook moved to intervene after Nicholson and Citizens had reached an agreement regarding payment of no-fault benefits; the case, however, was still pending. No judgment had been entered regarding whether Citizens acted unreasonably and was therefore liable for attorney fees. Hence, Willowbrook's motion to intervene was timely.

Although timely, intervention may not be proper when it would delay the action or produce "a multifariousness of parties and causes of action." *Precision Pipe*, 195 Mich App at 157. Willowbrook sought to introduce an entirely new issue: whether Lerner could properly deduct his one-third contingency fee from the amount Citizens was required to pay for services Willowbrook provided to Jeanne Nicholson. While it seems related, this issue was not actually relevant to the two main issues of the lawsuit, i.e., whether Citizens had to pay no-fault benefits and whether Citizens had to pay penalty attorney fees and interest to Nicholson. Also, there would have been further delay. Because Willowbrook was also asserting a claim for attorney fees and interest, this would raise complicated issues of whether a no-fault insurance company would have to pay attorney fees for multiple parties, whether the entire amount of attorney fees would be apportioned, and whether Willowbrook would even be eligible to receive these attorney fees. Thus, because allowing Willowbrook to intervene at that point in the lawsuit would have delayed the litigation and multiplied the issues remaining in the case, the trial court did not abuse its discretion.

We also find unpersuasive Willowbrook's argument that its interests in receiving full payment would be impaired were it not allowed to intervene. Our Supreme Court's opinion in *Miller v Citizens Ins Co*, 490 Mich 904; 804 NW2d 740 (2011), affirming in part and reversing in part this Court's judgment, 288 Mich App 424; 794 NW2d 622 (2010), stated that the plaintiff was responsible for the payment of her attorney fees pursuant to a contingent fee agreement. The trial court had approved deduction of the plaintiff's attorney fee from the amount the insurer was required to pay for medical services, which this Court and our Supreme Court affirmed. Our Supreme Court clarified, however, that the settlement between the plaintiff and the insurer, which was not agreed to by the medical provider, did not extinguish the right of the medical provider to collect the balance of its bill from the injured person who received the medical services. *Miller*, 490 Mich at 904. So, Willowbrook's claims for the remaining one-third of its bill remain viable even if it is not allowed to intervene in this lawsuit because Willowbrook's right to collect the remaining one-third of its bill from Nicholson remained intact. Hence, regardless of what happened in Nicholson's lawsuit against Citizens, the trial court did not abuse its discretion in deciding that Willowbrook's interests in receiving full payment were not being impaired.

The other interests Willowbrook argued it had in the litigation were its ability to collect penalty interest and attorney fees. MCL 500.3148(1) is the statute that governs attorney fee awards in no-fault actions and states that:

> [a]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

The second provision at issue addresses penalty interest fees. MCL 500.3142 states:

> (1) Personal protection insurance benefits are payable as loss accrues.
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> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum.

This Court held in *Lakeland Neurocare Centers v State Farm Mut Auto Ins Co*, 250 Mich App 35, 40-41; 645 NW2d 59 (2002), that a healthcare provider could collect attorney fees because the language in MCL 500.3148 does not limit the award of attorney fees to only the insured party. This Court has also held that "MCL 500.3142 does not limit the right to seek penalty interest solely to the injured person, and if the Legislature intended to limit the penalty interest provision, it could have done so." *Id.* at 39-40. Consequently, if the issue were only whether a medical provider who was a party in a lawsuit had a right to seek penalty interest or attorney fees, the trial court's decision may have constituted an abuse of discretion. But, Willowbrook was not a party to the lawsuit. Since there is no case law holding that a non-party medical provider is eligible to collect attorney fees or penalty interest, it cannot be said that the trial judge, who is "presumed to know and understand the law," *Powell Production, Inc v Jackhill Oil Co*, 250 Mich App 89, 101; 645 NW2d 697 (2002), abused her discretion in deciding that Willowbrook did not have a right to penalty interest or attorney fees that was being impaired. Moreover, the fact that Willowbrook later sued Citizens for penalty interest and attorney fees illustrates that Willowbrook's interests were not impaired by Nicholson's lawsuit against Citizens.

In docket no. 303885, Willowbrook first argues that the trial court abused its discretion in awarding Lerner a one-third attorney fee deducted from payments owed to Willowbrook and recovered through Nicholson's litigation. We disagree.

A trial court's ruling on attorney fees is reviewed for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

The resolution of this issue depends mostly on this Court's opinion in *Miller*, 288 Mich App 424; therefore, it is helpful to briefly review the factual and legal issues presented in that case. The plaintiff was the guardian of the motor vehicle accident victim who suffered severe and permanent injuries. The insurer, Citizens, denied the plaintiff's application for no-fault insurance benefits. *Miller*, 288 Mich App at 426-427. The parties eventually reached settlement regarding the no-fault benefits, and the only remaining issue involved an attorney lien. *Id.* at

428. Detroit Medical Center (DMC) moved to intervene as a plaintiff, pursuant to MCR 2.209, but the trial court denied this motion. *Id.* at 429.

On appellate review, this Court explained that on the basis of the contingency agreement between the plaintiff and his attorneys, the plaintiff's attorneys were allowed to deduct their one-third fee from the amount recovered on behalf of the injured party, including the amount paid in no-fault benefits from the defendant insurer. *Miller*, 288 Mich App at 434. The Court explained:

> Plaintiff's attorneys had a right to be paid for their services from the amount recovered from Citizens pursuant to their contingency fee agreement with plaintiff. This may appear at first blush to be unfair to the medical providers, who provided medical care only to be asked—almost required—to reduce their bills to pay, in part, for the expense of litigation. It is not unfair. As a consequence of plaintiff's attorneys' actions, Citizens, which had denied the application for benefits entirely, agreed to pay personal protection insurance benefits on [the injured person's] behalf. If Citizens had not agreed to do so, it is doubtful that [the injured person's] medical providers would have received as much in settlement of their bills because Medicaid, or [the injured person], would have been the payer. And if plaintiff had not retained attorneys to litigate this case, it might have been incumbent on each medical provider to retain counsel to litigate its claim on [the injured person's] behalf against Citizens, which would also cause them to incur the expense of litigation. [*Id.* at 436-437.]

This Court also held that the common-fund exception to the American Rule justified the attorney fee since the litigation secured payment not only for the injured person but also ensured payment to the injured person's medical providers. *Miller*, 288 Mich App at 437-438.

On November 4, 2011, our Supreme Court reversed in part and affirmed in part this Court's judgment. *Miller*, 490 Mich at 904. The Court agreed with this Court that, consistent with the contingency fee agreement, the plaintiff was responsible for his attorney fees. *Id.* Yet, the Court went on to state that this Court's "reliance on the common-fund exception to the American rule was erroneous because no common fund was created." *Id.* The Court also expressed concern that "the Court of Appeals' affirmance could be mistakenly interpreted as extinguishing the DMC's contractual right to payment for its services." *Id.* Thus, the Court held that "[t]he circuit court's order of dismissal pursuant to the settlement agreement did not have the effect of extinguishing the DMC's right to collect the remainder of the bill from plaintiff." *Id.* Thus, while the Court affirmed this Court's ruling that a plaintiff's attorney could collect its one-third contingency fee from the settlement for medical services incurred, the Court clarified that the medical provider is entitled to pursue its full claim against the legally responsible party. *Id.*

In this case, the trial court found that *Miller* applied because it presented the exact same issues regarding payment of no-fault benefits, and the insured party had to incur the expenses of litigating in order to recover no-fault benefits. The trial court's order that allowed the one-third attorney fee to be deducted from the amount recovered in litigation, based largely on *Miller*, was not an abuse of discretion. First, Willowbrook's attempt to characterize Lerner as the sole cause of this litigation is inaccurate. Both parties agree that Citizens acted unreasonably and

unlawfully in suspending Jeanne's no-fault benefits. But just because Lerner was unresponsive to Citizens's correspondences does not mean that he knew or intended that Citizens would suspend benefits, especially considering that if it did, it would be failing to follow the law. See *Cooper v Jenkins*, 282 Mich App 486, 490; 766 NW2d 671 (2009) (holding that a no-fault insurance company may not "unilaterally withhold benefits from a claimant on the basis of its perception" that it would ultimately be reimbursed or indemnified).

Moreover, even were it true that Lerner's actions likely precipitated the litigation, this does not render unfair the fee he eventually collected. From its beginning, Lerner and his firm spent a significant amount of time on this litigation, as evidenced by the numerous motions, briefs, and oral arguments that Lerner presented to the trial court. Thus, it is not as if Lerner provoked litigation and then did nothing to earn the fee. As this Court recognized in *Miller*, 288 Mich App at 436-437, allowing an attorney to collect a fee for work during litigation over no-fault benefits is fair. *Miller*, 490 Mich at 904. Moreover, Willowbrook is not left without a remedy, and retains the ability to seek payment of the remainder of its bill from Jeanne Nicholson or whoever might be legally responsible for the services Willowbrook provided to her. *Id.*

Willowbrook last argues that the trial court erred by granting Lerner and his law firm summary disposition regarding Willowbrook's claims of unjust enrichment, tortious interference with business expectancy, claim and delivery, and conversion. We disagree.

While the trial court did not indicate which court rule justified summary disposition, Lerner and his firm moved for summary disposition pursuant to MCR 2.116(C)(10). A grant or denial of a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) is reviewed by considering the "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v AP Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 120. The motion should be granted if "there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law." *Pena*, 255 Mich App at 309-310. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A plaintiff may establish a claim of unjust enrichment by showing: "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). There was no genuine issue of material fact regarding unjust enrichment. First, Lerner did not receive a benefit from Willowbrook. Rather, Lerner was paid based on a contingent fee agreement that Nicholson signed for one-third of the amount recovered in the litigation. While it is true that this attorney fee was largely paid from no-fault benefits recovered as a result of services provided by Willowbrook, because it did not agree to

accept the amount received from the settlement as full payment, Willowbrook remains free to pursue its claim against any responsible party. *Miller*, 490 Mich at 904. Thus, Willowbrook is not without recourse for the remaining one-third it claims it is still owed. And, as discussed already, it is not unfair that Lerner is paid the attorney fee he earned. *Miller*, 288 Mich App at 436-437.

There was also no genuine issue of material fact regarding Willowbrook's claim of tortious interference with a business relationship or expectancy. To sustain such a claim, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) the defendant's knowledge of the relationship or expectancy, (3) the defendant's intentional interference by inducing or causing breach or termination of the relationship or expectancy, and (4) damages resulting to the party whose relationship or expectancy was disrupted. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 90; 706 NW2d 843 (2005). The interference must be improper, meaning that it lacked justification. *Advocacy Org for Patients & Providers v Auto Club Ins*, 257 Mich App 365, 383; 670 NW2d 569 (2003). "The 'improper' interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship." *Id.*

There was no genuine issue of material fact regarding this claim, since Willowbrook was unable to demonstrate that Lerner acted improperly. "There is nothing illegal, unethical or fraudulent in filing a lawsuit, whether groundless or not." *Dalley v Dykema Gossett*, 287 Mich App 296, 324; 788 NW2d 679 (2010). Moreover, regarding the contingent fee agreement, "'Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.'" *Id.* (citation omitted). In this case, Lerner was hired to secure Jeanne's no-fault benefits, and through such actions on Jeanne's behalf, Lerner collected a fee. This is a legitimate business purpose.

Claim and delivery is a civil action that seeks to recover "possession of goods or chattels which have been unlawfully taken or unlawfully detained" and "damages sustained by the unlawful taking or unlawful detention." MCR 3.105. There was no genuine issue of material fact regarding this claim. As discussed more fully above, this Court has specifically held that an attorney in a no-fault action is allowed, pursuant to a contingency fee agreement with the insured, to be paid the fee from proceeds recovered in an action for no-fault benefits. Since Lerner was not acting unlawfully when he obtained any settlement payment or deducted his attorney fee, there was no genuine issue of material fact regarding this claim.

Lastly, under common law, conversion is any "distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). "Conversion may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party." *Dep't of Agriculture v Appletree Marketing, LLC*, 485 Mich 1, 14; 779 NW2d 237 (2010). As discussed already, Lerner was contractually and legally entitled to this one-third fee; consequently, he did not act wrongfully when exerting an act of domain over payments made by Citizens.

We affirm. As the prevailing parties, plaintiff in docket number 300592, and defendants in docket number 303885, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey