

STATE OF MICHIGAN
COURT OF APPEALS

COMMUNITY RESOURCE CONSULTANTS,
INC.,

UNPUBLISHED
March 1, 2011

Plaintiff-Appellee,

V

No. 293932
Macomb Circuit Court
LC No. 2004-002536-CK

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant.

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

K. F. KELLY, J. (*dissenting.*)

I respectfully dissent. The trial court clearly erred in refusing to address, and thereby effectively denying, defendant State Farm Mutual Automobile Insurance Company's motion for directed verdict with regard to plaintiff's claims under the no-fault act, MCL 500.3101 *et seq.* Because a new trial is required due to the errors of the trial court in abdicating its responsibility to address the one-year-back rule, MCL 500.3145(1), it is unnecessary to address the other issues on appeal. I would reverse and remand.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

On June 17, 2004, plaintiff Community Resource Consultants, Inc. sued defendant seeking to recover payment for case management services that plaintiff rendered to defendant's insured, Wilma Judkins. Attached to the complaint was an "Affidavit of Account" claiming an unpaid balance of \$7,694.40 for services plaintiff allegedly rendered to Judkins. The affidavit of account was signed and sworn to by Charles E. Roberts, plaintiff's president and treasurer. Defendant timely answered the complaint and asserted as an affirmative defense:

That the Plaintiff's complaint is barred in whole or in part by the one-year-back rule and/or the one year statute of limitations of the Michigan No-Fault Act and, therefore, the Plaintiff's complaint must be dismissed.

In addition, defendant's counsel submitted a "Counter-Affidavit in Opposition to Account Stated" averring:

That the Affiant is informed and believes that the Plaintiff's claim is outside the scope of the Michigan No-Fault Act and, in fact contrary to that Act and, therefore, is not compensable and the "Account Stated" is inaccurate and improperly premises [sic] as a matter of law.

Over the following several months, plaintiff filed 14 additional cases for unpaid services provided to other of defendant's insureds.¹ Defendant timely answered each complaint and again asserted the one-year-back rule as an affirmative defense. All 15 cases were eventually consolidated under one caption and docket number on August 18, 2005.

Trial commenced on August 29, 2006 and lasted eight days. The case was not generally presented in terms of each of the 15 consolidated cases, but rather by category.² Relevant to the issue of the motion directed verdict, in defendant's opening statement, counsel informed the jury that he would introduce a tape recording of Roberts stating "[plaintiff] will be continuing to submit bills, maintain integrity under the one-year-back rule." This statement was subsequently confirmed in Roberts' testimony. Plaintiff continually emphasized through Roberts and its other witnesses' testimony that "up until" approximately two years preceding the trial, defendant had not disputed any of the claimed billings.

During his testimony, Roberts utilized a "summary chart" of what he sought as damages for services rendered by plaintiff, but unpaid by defendant. No detail was provided until one week after trial began. During the afternoon of September 5, 2006, plaintiff offered exhibit 17. This exhibit consisted of 31 pages of what plaintiff claimed were past due billings that detailed the foundation for Roberts' use of the "summary chart." These billings contained amounts billed both before and after June 17, 2003.³ The trial court admitted the exhibit over objection.

At the conclusion of plaintiff's proofs, the trial court would not entertain any motions for directed verdict stating "[a]ll motions are reserved. We talked about that."⁴ After both parties

¹ On June 17, 2004, plaintiff filed complaints in Macomb County Circuit Court, including Docket Nos. 2004-002561-CK, 2004-002563-CK, 2004-002564-CK, 2004-002566-CK, 2004-2565-CK, 2004-2567-CK, and 2004-002568-CK. On July 23, 2004, plaintiff filed additional complaints in Macomb County Circuit Court, including Docket Nos.: 2004-003095-CK and 2004-003096-CK. On January 27, 2005, plaintiff filed Docket Nos. 2005-00346-CK and 2005-00347-CK. On March 28, 2005, plaintiff filed Docket No. 2005-001227-CK. On April 25, 2005, plaintiff filed Docket Nos. 2005-001646-CK and 2005-001649-CK.

² By way of example only: whether general types of case management services were "reasonable and necessary" under the no-fault act; whether secretarial services were properly billed at the case management rate of \$105 rather than a rate reflective of their actual pay of \$12.50 per hour; whether files were "double billed," etc.

³ One year "back" from the date of filing case the instant case.

⁴ Throughout the course of these proceedings, the trial judge continually expressed concern over how long the trial was taking, as he had pre-scheduled plans to go out of the country.

had rested, defendant moved for a directed verdict pursuant to the one-year-back rule and addressed whether the defense had been properly preserved:

Mr. Hewson (attorney for the defense): The directed verdict on the one-year-back rule, we have this debate about whether or not I was precluded from raising a legal argument after the plaintiff has put his proofs in. The plaintiff did not submit exhibit 17, the copies of his exhibit, until 3:00 on Tuesday afternoon.

The Court: May I make this addition?

Mr. Hewson: I'm sorry.

The Court: You said after the plaintiff put his case in, it was raised after the entire testimony was in, plaintiff and defendant's case.

Mr. Hewson: But you took my motions under advisement.

The Court: No, but in regards to the one-year-back rule, you didn't raise that until we were back in conference after the testimony portion was over. Am I right?

Mr. Hewson: That no, is not correct. *But the Court took all of my motions for directed verdict under advisement at the close of plaintiff's proofs so we could move forward and finish the proofs.* I didn't waive any directed verdict motions. [Emphasis added.]

The trial court proceeded to hear the motion, taking it under advisement, "but for the time being preclude[d] . . . defendant from referring" to the one-year-back rule, effectively denying the motion. As a consequence, the jury was permitted to evaluate all the submitted past due billings, including those which were clearly prohibited by MCL 500.3145(1).

As noted by the majority, the jury returned verdicts in favor of plaintiff for 14 of the 15 past due accounts, awarding plaintiff \$205,649.52 for services rendered and \$24,681.94 in statutory interest.⁵ It is impossible to determine from the verdict which past due accounts were awarded or whether individual billings were awarded in full or discounted. One judgment was

⁵ No damages were awarded on the Missie Graham account. Julianne Budden Bronsink testified that she is a licensed attorney and was appointed as a successor guardian for Graham by the Kent County Circuit Court. In that role, she determined that plaintiff's services were unnecessary and duplicative given that a case manager was already assigned and active as Graham's case manager; and that defendant had fully paid for those services. She further testified that plaintiff's case manager for Graham was "unprofessional" and was ultimately forced to prohibit any contact between plaintiff's employee and her ward. In her opinion, plaintiff should not be paid for any of plaintiff's claimed services to Graham and had communicated the same to defendant.

entered by the trial court. Defendant successfully moved for judgment notwithstanding the verdict (JNOV), arguing based upon the Supreme Court's decisions in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006),⁶ and *Devilleers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), that the trial court erred in failing to consider the one-year-back rule and presenting to the jury bills concerning services rendered by plaintiff more than a year before the complaints were filed. As set forth in the majority, this Court reversed and remanded the case for further proceedings. *Community Resource Consultants, Inc v State Farm Mut Auto Ins Co*, unpublished opinion of the Court of Appeals, entered April 7, 2009 (Docket No. 281966), slip op 1. After remand, the trial court reinstated the jury verdict.

II. STANDARD OF REVIEW

We review de novo the trial court's decision on a motion for a directed verdict. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). "We review all the evidence presented up to the time of the motion in a light most favorable to the nonmoving party, to determine whether a question of fact existed." *Silberstein*, 278 Mich App at 455. "A party may move for a directed verdict at the close of the evidence offered by the opponent." MCR 2.515; *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59; 631 NW2d 686 (2001). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006).

III. DIRECTED VERDICT

Defendant argues that the trial court erred in effectively denying its motion for directed verdict based on the one-year-back rule in MCL 500.3145(1) and, as a result, defendant was prejudiced. I agree.

In deciding whether to grant a motion for a directed verdict, the trial court must view the testimony and all legitimate inferences from the testimony in the light most favorable to the nonmoving party to determine whether a prima facie case was established. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). If no factual question exists, the trial court may grant a directed verdict. *Mich Mut Ins Co v CNA Ins Cos*, 181 Mich App 376, 380; 448 NW2d 854 (1989).

The one-year-back provision of the no-fault act is contained in MCL 500.3145 and provides, in relevant part:

⁶ Overruled on other grounds in *Regents of Univ of Michigan v Titan Ins Co*, 487 Mich 289, 302; ___ NW2d ___ (2010) (concluding that that the one-year-back rule is inapplicable when a state entity is a plaintiff).

(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. . . .* [Emphasis added.]

In *Devillers*, our Supreme Court found this bar on recovery to be clear and unambiguous holding:

[A]though a no-fault action to recover PIP benefits may be *filed* more than one year after the accident and more than one year after a particular loss has been incurred . . . § 3145(1) nevertheless limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action. [473 Mich at 574 (emphasis in original).]

Our Supreme Court further held that the “one-year-back rule of MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have had it written.” *Id.* at 586.

Here, defendant deferred its motions for directed verdict until the close of proofs pursuant to the order of the trial court. It then argued that the one-year-back rule of MCL 500.3145(1) precluded plaintiff's recovery, citing in support the Supreme Court's decisions in *Cameron* and *Deviller*. Defendant also provided copies of the cases to the trial court. Plaintiff objected to defendant referring to the one-year-back rule to the jury. It did not contest the purpose or relevance of the rule, or that its application would result in the reduction of its claimed damages. Rather, it opposed the motion because defendant “refused or failed to file a motion for summary disposition on the one-year-back rule” and was therefore equitably estopped from asserting the defense, and because defendant had continually been aware of the “four to five year time frame detailing the exact dates of service[.]” In response, defendant argued:

[T]he motion for directed verdict is not to allow the case to go to the jury. You don't have to argue the one-year-back rule. *What I'm asking the Court to do is apply the law.* If you apply the law, then the arithmetic necessary to deduct the ninety-six thousand two hundred and twenty nine dollars for the plaintiff's claim is simple. I've already done it. *All you have to do is go through the bills they have presented.* Counsel has not cited you to one case, one Court Rule, one anything, that says the failure to file a motion for summary disposition precludes directed verdict.

His proofs, whether he presented bills in the past during the course of discovery, has nothing to do with the evidence he presents at trial. Until he presents it as an

exhibit, there is no way to know what he's going to ask this jury for. *And until he presented those things on Tuesday afternoon, I had no idea that he would have the temerity to suggest to the Court and this jury, that damages that are outside of the one year prior to the time that he filed his lawsuit would be presented to the jury.* [Emphasis added.]

The trial court took the matter under advisement, but precluded defendant from referring to the one-year-back rule effectively denying the motion. Defendant argues that this effective denial was clear error of law. I agree. Plaintiff is not entitled to recover for any portion of its losses incurred more than one year preceding the filing of the complaint. MCL 500.3145(1); *Cameron*, 476 Mich at 63; *Devillers*, 473 Mich at 574.

The majority concedes that defendant correctly asserts that based on the one-year-back rule plaintiff would not be entitled to payment for any losses incurred before the filing of the complaint in this case. It nonetheless reaches a result not permitted under the law holding that “defendant fails to sufficiently argue this issue on appeal.” I respectfully disagree. In my view, defendant more than adequately addresses the issue. From the briefs and exhibits filed on appeal, it is abundantly clear that defendant is claiming the trial court erred in denying the motion for directed verdict. Defendant cited the applicable law, attached exhibit 17 delineating pre and post-June 17, 2003 billings and filed the complete transcripts of the lengthy trial. The majority further concedes that these final billing statements for defendant’s insureds were admitted at trial and contain the date services were rendered, a description of the service, and the amount due. We also have the original record from the trial court to review. An appellant has the burden of providing “the reviewing court with a record that verifies the basis of any argument on which reversal or other claim for appellate relief is predicated.” *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). Defendant has met this burden. Moreover, this Court may review an issue if failure to consider it would result in manifest injustice. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). Manifest injustice results if the defect constitutes plain error requiring a new trial or pertains to a basic and controlling issue. *Internat'l Union, UAW v Dorsey*, 268 Mich App 313, 324; 708 NW2d 717 (2005), rev'd in part on other grounds 474 Mich 1097; 711 NW2d 79 (2006). Based on this record, it is painfully obvious that the trial court plainly erred. The error flies in the face of our Supreme Court’s explicit directive that the “one-year-back rule of MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it[.]” *Devillers*, 473 Mich at 586. Defendant was prejudiced by the trial court’s error; it directly pertains to a basic issue in controversy. A new trial is warranted.

The majority also complains that “while the trial court consolidated the 15 cases, there were originally separate complaints filed with respect to each client, [] defendant fails to inform this Court regarding the filing dates of the relevant complaints to enable this Court to determine a cut-off date regarding payment of benefits for each client in this case.” This issue was never raised in the trial court and was never decided by the trial court. As such, it is unreserved. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Moreover, I am at a loss as to why this is even relevant at this stage of appellate proceedings; rather it was an issue that should have been addressed by the trial court in a timely manner instead of taking the motion “under advisement” and submitting the matter to the jury without addressing the issue as was its duty and responsibility as a trial court. This is particularly true in light of the jury

verdict. The jury did not award plaintiff all its claimed damages and it is impossible to tell which billing items the jury awarded. Thus, even if there was a “sum certain” presented by defendant at this stage of the appellate proceedings, it cannot simply be deducted from the verdict as it presently stands. Even plaintiff’s counsel recognized the problem with the trial court’s failure to rule on the motion for directed verdict:

[W]hat is the Court to do with this one-year-back rule if the jury comes back with any number, whatever the number might be – one hundred, two hundred, three hundred, four hundred – how is the jury then, or the judge then, to implement a decision on the one-year-back rule, not knowing what the basis of the jury’s decision was?

This is *precisely* why the remedy here is a new trial. It is impossible to determine if the jury awarded any or all damages outside the one-year-back period; declined to award certain damages within the one-year-back period; or, awarded damages for all overdue billings but reduced the claimed hourly rate of \$105 to some other number.

In addition, the filing dates are easily ascertainable and are set forth in footnote 1 above. Moreover, “a circuit judge may take judicial notice of the files and records of the court in which he sits.” *Knowlton v City of Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959); see also *People v Sinclair*, 387 Mich 91, 103; 194 NW2d 878 (1972). But more importantly, even if the trial court was somehow unaware of the filing dates for the consolidated cases it was trying, which I find difficult to believe, the trial court was required to view the evidence and all legitimate inferences from the evidence in the light most favorable to the nonmoving party. *Locke*, 446 Mich at 223. If the June 17, 2004 filing date of the Wilma Judkins case was the only filing date the trial court was aware of, then in the light most favorable to plaintiff, the June 17, 2004 filing date would be the one the trial court should have utilized, despite the later filing of other cases. I would also note that the trial court, the parties and this Court have treated the case as one single case. But, instead of filing one case with multiple counts, plaintiff filed 15 different actions, several on the same day. Each case alleged that plaintiff provided case management services to defendant’s insureds and defendant refused to pay. As the cases were processed, a series of orders “consolidating” different cases were entered until all of the cases were consolidated. The parties were the same; the case carried only one docket number; the case was presented and defended as one claim alleging multiple unpaid accounts; and there was only one judgment.

The majority also evades the application of the one-year-back rule by chastising defendant for (1) failing to raise the one-year-back rule during pretrial proceedings or during trial; (2) failing to raise the issue in a motion for summary disposition, with documentation to support the motion; (3) failing to timely raise the issue; (4) failing to present evidence in support of its affirmative defense; and (5) failing to file a motion with adequate specificity. I disagree with, and the record does not support, the majority’s criticisms. The defense was properly pleaded as an affirmative defense. Filing a motion for summary disposition is not a prerequisite

for relying on a properly pleaded affirmative defense.⁷ During trial, plaintiff's offer to "maintain integrity with the one year back rule" was referred to by defendant in opening statements and confirmed by Roberts, plaintiff's president and treasurer. The motion was brought as soon as the trial court permitted it.⁸ With regard to the failure of defendant to present evidence in support of its motion, I can only note that *this was a motion for directed verdict*. MCR 2.515. As such, it tests the sufficiency of the *plaintiff's* proofs as a matter of law; defendant relied upon plaintiff's exhibit 17 in support of its motion. Nor, in my view, did the motion lack specificity. Defendant cited the applicable statute, relied upon evidence presented at trial, and provided relevant case law to the trial court. Distilled to its essence, plaintiff contends, and the majority appears to agree, that defendant is equitably estopped from relying on the one-year-back rule. However, permitting the judiciary to provide a plaintiff with equitable relief from the application of the one-year-back-rule is expressly disallowed. *Devillers*, 473 Mich at 586.

The majority notes that at the hearing on defendant's motion for directed verdict, defendant asserted that two different amounts, \$92,262 and \$96,229, were precluded by the one-year-back rule and that in its motion for JNOV, defendant argued that the judgment should be reduced in the amount of \$83,313.80 based on the one-year-back rule. The differences in the amounts requested by defendant are irrelevant here given the trial court's total abdication of its duty to address the motion and the resulting jury verdict. In fact, the purpose of requiring a trial court to decide such motions as a matter of law is to resolve such issues. And, it must be noted that even the majority does not have any difficulty with determining what billings are outside the one-year-back period. It is incomprehensible why the trial court did not simply rule on the motion.

The past due accounts that were submitted to the jury were in clear violation of the one-year-back rule and it was a matter of law for the trial court to rule on. Even were they properly submitted for the jury's consideration as a factual dispute to be resolved, the trial court compounded the problem presented here: the jury was never told about the one-year-back rule, the trial court prohibited defendant from mentioning it and was not instructed on the statute.

The trial court should have timely ruled on the applicability of the one-year-back rule as it related to plaintiff's exhibit 17 and determined which billings were excluded. The trial court clearly erred and its refusal and failure to address defendant's motion for directed verdict

⁷ Taking this point of the majority to its logical conclusion, plaintiff did not object, deny or otherwise complain about the affirmative defense. Plaintiff did not move for summary disposition pursuant to MCR 2.116(C)(9) nor did plaintiff seek to limit the issue in the pretrial scheduling order under MCR 2.401. Under the majority's reasoning, plaintiff has waived its right to object to the defense. Clearly, such a circumstance is simply not supportable in our court rules and case law.

⁸ I fail to see how defendant can be blamed for the trial court's refusal to hear argument on the issue until the proofs were completed, particularly in light of its statement "all motions are reserved. We talked about it." Any error in this regard is attributable to the trial court.

reversibly corrupted the integrity of the jury's verdict. And, the error simply cannot be corrected at this point in time. As this Court previously held, it is impossible "to evaluate whether the one-year back rule can be applied with any certainty to the jury's verdict, given that the jury did not award plaintiff all of its requested damages." *Community Resource Consultants, Inc*, slip op p 4 n 2.

I would reverse and remand for a new trial.

/s/ Kirsten Frank Kelly