State of Michigan

In The

Supreme Court

Appeal from the Michigan Court of Appeals

DOREEN JOSEPH,

Plaintiff-Appellee, Supreme Court No. 142615

v

A.C.I.A.

Defendant-Appellant.

Court of Appeals No: 302508
Macomb County Circuit Court No: 09-005726-CK

DEFENDANT-APPELLANT'S REPLY BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

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THE UNMODIFIED TERM "LOSS" IN MCL 500.3145(1) INCLUDES "ALLOWABLE EXPENSES", "WORK LOSS", AND "SURVIVOR'S LOSS" BENEFITS, AS IT DOES EVERYWHERE ELSE THAT IT APPEARS IN THE NO-FAULT ACT. (Plaintiff'S Brief, Issue I.)

Plaintiff parses the term "loss" in the third sentence of MCL 500.3145(1) to include "survivor's loss" and "work loss", but not "allowable expenses". She concludes that the one-year-back rule therefore does not apply in the instant case.

Plaintiff's myopic approach to the statutory language is akin to that of the blind man holding an elephant's trunk and concluding that its appearance is that of a thick snake. Needless to say, Plaintiff's argument violates several bedrock principles of statutory construction.

To determine legislative intent, the entire Act must be read, and the interpretation to be given to a particular word in one section is to arrived at after due consideration of every other section. Weems v Chrysler Corp, 448 Mich 679, 699-700; 533 NW2d 287 (1995). The legislative intent in employing specific language is to be gleaned by reference to related provisions of the statute. Guitar v Bieniek, 402 Mich 152, 158; 262 NW2d 9 (1978). Identical language is to be given the same meaning wherever used throughout the Act. Robinson v City of Lansing, 486 Mich 1, 17; 782 NW2d 171 (2001); Paige v City of Sterling Heights, 476 Mich 495, 520; 720 NW2d 219 (2006).

The term "loss" appears in several contexts in the No-Fault Act. At times, it is used with a modifier to denote a defined or limited term or concept.[1] On the other hand, it is used no fewer

[1]"Ultimate loss", MCL 500.3104(25)(c), .3163(4); "work loss", MCL 500.3107(1)(b), (2), .3107a, .3110(4), .3115(2), .3145(1); "survivor's loss", MCL 500.3108, .3110(4), .3145(1); "loss of the use of the property", MCL 500.3121(3), (5).

than 16 times in its unmodified form.[2] In that form, the language and context make clear that it encompasses all types of "personal protection insurance benefits".

For example, §3115(2) of the Act reads as follows:

> "(2) When 2 or more insurers are in the same order of priority to provide **personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment** from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution **of the loss** among such insurers."

MCL 500.3115(2) (emphasis added). Section 3127 incorporates that provision, again using the term "loss". MCL 500.3127.

The Act also provides that "personal protection insurance benefits" are overdue 30 days after an insurer receives "reasonable proof of the fact and amount of **loss** sustained". MCL 500.3142(2) (emphasis added).

ACIA could go on and make the same demonstration for every provision other than §3145(1) in which "loss" is used in its unmodified form. Plaintiff's myopic parsing of that term in one sentence of one provision without reference to its unmistakable meaning everywhere else in the Act should be dismissed out of hand.

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[2]MCL 500.3104(7)(c), (d), .3104(25)(c), .3127, .3142(1), (2), .3148(2), .3172(1), (2), (3), (3)(d), .3175(1), (1)(a), (1)(b), .3177(1).

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I.A. THE UNAMBIGUOUS LANGUAGE OF MCL 500.3145(1) LIMITS PLAINTIFF'S RECOVERY TO LOSSES INCURRED WITHIN ONE YEAR PRIOR TO FILING SUIT. TOLLING PROVISIONS WHICH EXTEND THE TIME FOR FILING SUIT DO NOT AFFECT THAT LIMIT ON RECOVERY. (Plaintiff's Brief, p 11-15).

The most accurate way to describe Plaintiff's argument on this sub-issue is analysis by label. Rather than discussing the language of the provisions in question, Plaintiff spends her time attempting to prove that the one-year-back rule is a statute of limitations. Her incompletely articulated syllogism is as follows:

(1) MCL 600.5851(1) tolls statutes of limitations.

(2) The one-year-back rule is a statute of limitations.

(3) Therefore, §5851(1) tolls the one-year-back rule.

As will be demonstrated below, Plaintiff's argument falls with her minor premise.

Plaintiff begins her analysis with an inaccurate characterization of MCL 500.3145(1), claiming that it contains two statutes of limitations: the "notice provision" (the first sentence) and the one-year-back rule (the third sentence). Actually, neither of those is a statute of limitations. Plaintiff (intentionally or otherwise) actually omits any reference to the only sentence (the second) in the provision which <u>is</u> a statute of limitations.

Accurate analysis must begin with understanding the basic distinction between a statute of repose and a statute of limitations.

> "'[A] statute of limitations runs from the accrual of a cause of action, whereas a statute of repose runs from a different, earlier date typically related to an act of the defendant. They are fundamentally different **<u>insofar as a statute of limitations sets forth the time within which an accrued claim must be asserted in court, in contrast to a statute of repose that operates to prevent a cause of action from even accruing</u>**. . . . In other words, a statute of limitations affects only the remedy, not the right, whereas a statute of repose affects the right itself, extinguishing rights or preventing rights from arising."

Estate of Ryan v Heritage Trails Associates, Inc, 745 NW2d 724, 728-29 (Iowa 2008) (emphasis added), quoting Albrecht v General Motors Corp, 648 NW2d 87, 91-92 (Iowa 2002). Accord, e.g., Ma v Merrill, Lynch, Pierce, Fenner & Smith, Inc, 597 F3d 84, 88 n 4 (2nd Cir 2010); American Bankers Life Assurance Co v 2275 West Corp, 905 So2d 189, 191-92 (Fla App 2005); Colormatch Exteriors, Inc v Hickey, 275 Ga 249, 569 SE2d 495, 498 (2002); Coslow v General Electric Co, 877 SW2d 611, 612 (Ky 1994).

That distinction has been noted by this Court:

> """A statute of repose limits the liability of a party by setting a fixed time after . . . which the party will not be held liable for . . . injury or damage . . . . Unlike a statute of limitations, a statute of repose may bar a claim before an injury or damage occurs.''' *Frankenmuth Mut Ins Co v Marlette Homes, Inc,* 456 Mich 511, 513 n 3; 573 NW2d 611 (1998) (citation omitted)."

Ostroth v Warren Regency, GP, LLC, 474 Mich 36, 42-43 n 7, 709 NW2d 589 (2006).

The first sentence of §3145(1) is a conditional statute of repose:

> "**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."

(Emphasis added).

In terms, that sentence bars any suit to recover benefits more than one year after the accident, **even if the right to recover did not accrue until more than one year after the accident**. MCL 500.3110(4) (benefits accrue when allowable expense incurred). In other words, it can operate to bar a claim for allowable expenses before it accrues.[3]

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[3]Although the issue is not before this Court, it is questionable whether MCL 600.5851(1) would have any effect on the statute of repose, because it is not actually a "period of limitations", which runs from the time the claim accrues. That underscores the distinction between a statute (continued...)

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However, the statute of repose can be avoided if notice of the accident is provided, or if benefits are paid, within one year after the accident. If so, then the second sentence, the statute of limitations, becomes operative:

> "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."

(Emphasis added).

It is only if suit has been filed within the above-quoted period of limitations that the recovery limitation of the one-year-back rule becomes operative:

> "However, the claimant **may not recover benefits** for any portion of the loss incurred more than one year before the date on which the action was commenced."

(Emphasis added).

Contrary to Plaintiff's contrived definitional argument, that recovery limitation is not a statute of limitations. The distinction between a statute of limitations and a limit on recovery of damages was aptly articulated by Justice Brickley in Howard v GMC, 427 Mich 358; 399 NW2d 10 (1986). In that case, the issue was whether the two-year back rule in the Workers' Disability Compensation Act, MCL 418.381(2) could be waived.

The analysis posited by Justice Brickley (joined by Justice Riley) turned on whether the two-year back rule could properly be characterized as a statute of limitations. He unequivocally decided that it was not, and explained why:

> "A statute of limitations 'represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action.' *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982)."

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[3](...continued)
of limitations and a statute of repose. It also exposes as legally baseless Plaintiff's simplistic assertion that any statute that limits recovery in temporal terms is therefore a statute of limitations.

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"Thus, relying on these very basic definitions of statutes of limitations, the one- and two-year back rule statutes may not be so categorized. **Simply stated, they are not statutes that limit the period of time in which claimant may file an action. Rather, they concern the time period for which compensation may be awarded once a determination of rights thereto has been made**."

* * * *

"**The [one- and two-year back] rules** do not perform the functions traditionally associated with statutes of limitations because they **do not operate to cut off a claim, but merely limit the remedy available. They do not disallow the action or the recovery** -- a petition may be filed long after an injury and benefits may be awarded in response thereto -- **they merely limit the award once it has been granted**.

"Therefore, on the basis of the language of the rules, **we perceive no logical reason for characterizing the one- and two-year back rules as statutes of limitations**."

Id. at 384, 385, 386-87 (emphasis added).

Even prior to the decision in Cameron v ACIA, 476 Mich 55; 718 NW2d 784 (2006), overruled by University of Michigan Regents v Titan Ins Co, 487 Mich 289; 791 NW2d 897 (2010), this Court recognized that distinction:

> "Thus, although 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 (provided that notice of injury has been given to the insurer or the insurer has previously paid PIP benefits for the injury), §3145(1) nevertheless limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action."

Devillers v ACIA, 473 Mich 562, 574; 702 NW2d 539 (2005)(emphasis in original).

That recovery limitation reflects the Legislature's considered choice of a mechanism to define temporal limitations for filing suit without allowing open-ended liability on the one hand, or time-barring claims before they accrue on the other.

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This Court should note that Plaintiff effectively concedes that if the one-year-back rule is not a statute of limitations, then §5851(1) has no effect on it. The foregoing analysis therefore compels the conclusion that Plaintiff may not recover losses incurred more than one year prior to the filing of her Complaint.

I.B. MCL 500.3145(1) EMBODIES THE LEGISLATURE'S ATTEMPT TO AVOID UNLIMITED OPEN-ENDED LIABILITY FOR BENEFITS ON ONE HAND, AND A DRACONIAN TEMPORAL LIMITATION WHICH WOULD BAR CLAIMS BEFORE THEY EXIST ON THE OTHER. (Plaintiff's Brief, p 16-18).

Plaintiff's argument that ACIA is relying on "various policy arguments and references to other laws in support of its argument" (Plaintiff's Brief, p 16) betrays a misunderstanding of the point of this sub-issue. In Cameron v ACIA, supra, this Court articulated the importance of the judiciary's deference to policy choices made by the Legislature:

> "If the statute has provisions that are harsh, they undoubtedly reflect the compromises that were hammered out in the Legislature at the time mandatory coverage automobile no-fault insurance was enacted by the Michigan Legislature. Votes were cast for the statute by legislators on the basis that the compromises would be honored. It was for them, the legislators, not us, the judges, to weigh the 'competing interests' and 'chose the result' to use Justice CAVANAGH's descriptions."

476 Mich at 65.

ACIA is not arguing that this Court should overrule Regents because of what UMVARA and sister state courts have said. Rather, ACIA is merely setting forth the nature and parameters of the problems addressed and policy choices made by the Michigan Legislature in §3145(1). The only substantive reason for overruling Regents is set forth in Issue I.A. of ACIA's principal

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brief -- the express language of the statute compels it. This sub-issue merely documents the degree to which Regents rode roughshod over the Legislature's deliberate policy choices.[4]

I.C. THE CLAIM FOR BENEFITS DUE FOR SERVICES RENDERED TO A MINOR OR INCOMPETENT BELONGS TO THE CARE-GIVER, NOT TO THE MINOR OR INCOMPETENT. (Plaintiff's Brief, p 20-22).

Like the Court of Appeals in Geiger v DAIIE, 114 Mich App 283; 318 NW2d 833 (1982), Plaintiff premises her argument on only the first sentence of the statute on which she relies:

> "Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. . . . If there is doubt about **the proper person** to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interest person may apply to the circuit court for an appropriate order."

MCL 500.3112 (emphasis added).

In terms, the emphasized language compels two conclusions. The first is that there might be only one proper payee of a benefit. See Robinson v City of Detroit, 462 Mich 439, 458-59; 613 NW2d 307 (2000) ("the" evinces an intent to focus on one cause).

The second, and more important, is that the injured person might not be a proper person to receive the benefit. The very existence of §3112 demonstrates that an insurer cannot always discharge its responsibility by paying the injured person (or her guardian or conservator). If it could, then §3112 would not be necessary at all.

Thus, the language of the statute Plaintiff invokes refutes her argument that the claim for benefits always belongs to the injured person.

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[4]In that context, ACIA fully agrees with Plaintiff that, "ACIA is asserting policy issues that are the province of the Legislature." (Plaintiff's Brief, p 16). ACIA does indeed want to honor the Legislature's choices on the policy issues illustrated in this sub-issue.

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I.D. THE PRINCIPLE OF STARE DECISIS SHOULD NOT PREVENT THIS COURT FROM OVERRULING THE WRONGLY DECIDED DECISION WHICH WAS PREMISED ON ABSURD CHARACTERIZATIONS, AND WHICH USURPED THE PREROGATIVE OF THE LEGISLATURE. (Plaintiff's Brief, p 22-23).

ACIA wholeheartedly endorses Plaintiff's opening phrase on this issue:

> "*Stare decisis* should not be a concern here. . . ."

(Plaintiff's Brief, p 22). The remainder of Plaintiff's stunted and conclusory discussion does not warrant a response beyond what ACIA has already presented.

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RELIEF

Defendant-Appellant, ACIA, prays this Honorable Court to reverse the January 25, 2011, Opinion and Order and remand with instructions that Plaintiff's recovery is limited by the one-year-back rule of MCL 500.3145(1).

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