STATE OF MICHIGAN

COURT OF APPEALS

MARLO MILLER,

Plaintiff-Appellant,

v

ASSIGNED CLAIMS FACILITY,

Defendant-Appellee.

November 3, 1993

No. 154660
LC No. 92-208181-CK

Before: Brennan, P.J.,and Corrigan and Anderson*, JJ.

PER CURIAM.

In this action for first-party no-fault benefits, plaintiff appeals from the grant of summary disposition to defendant pursuant to MCR 2.116(C)(7) (statute of limitations). Plaintiff was injured in a motorcycle accident on September 9, 1977 but did not file his first-party claim for benefits until January 17, 1992. We affirm.

At the time of the accident, plaintiff was a passenger on a motorcycle that was struck by an uninsured automobile. Plaintiff was seriously injured. No one in plaintiff's household had automobile insurance; instead, Medicaid covered plaintiff's medical expenses. In January 1992, plaintiff filed a claim with the Assigned Claims Facility, pursuant to MCL 500.3171; MSA 24.13171. The claim was denied as untimely on February 19, 1992. Plaintiff then filed suit in circuit court. Defendant moved for summary disposition on the grounds that plaintiff's claim was barred by the one-year statute of limitations in the no-fault act, MCL 500.3145; MSA 24.13145. Anticipating plaintiff's claim that an insanity disability tolled the statute, MCL 600.5851(1); MSA 27AA.5851(1), defendant furnished plaintiff's 1977-1978 medical records to support its claim that no material factual issue existed about the removal of plaintiff's disability of insanity.

The 1977-78 medical records showed that plaintiff had suffered a fractured leg, a concussion and a closed-head injury in the accident. Although comatose for about two weeks, plaintiff was successfully treated at Henry Ford Hospital and discharged on October 1, 1977. Two neurosurgeons' records reflect that plaintiff returned on October 20, 1977 for his first post-discharge visit; they noted that plaintiff's neurological condition had progressively improved and described plaintiff as "awake, alert and well-oriented." From a neurological standpoint, the doctors saw no need to restrict his activities. Another memorandum dated December 20, 1977 from the same two neurosurgeons found plaintiff had "no motor or sensory deficit."

At some point, plaintiff's mother apparently complained about plaintiff's violent outbursts. A January 27, 1978 hospital record reports that testing did not reflect any cerebral lesion. Instead, the psychologist opined that family factors were "much more important" in plaintiff's "temper outbursts." On the basis of testing in January 1978, the psychologist described plaintiff's intelligence as low normal (IQ 86). His performance on various tests administered at that time ranged from mildly impaired, to normal, to above normal.

On February 16, 1978, two neurosurgeons who saw plaintiff in another follow-up visit described plaintiff's head injury as "almost completely resolved", his behavior as "completely oriented" and his intellectual abilities as "almost normal for his age." They also saw no reason to restrict plaintiff's activities. In all, five professionals who treated plaintiff between September 1977 and February 1978 indisputably concluded that plaintiff was alert and well-oriented.

*Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff, in response, offered his mother's conclusory affidavit and an expert's neuropsychological assessment done in May 1992 for litigation purposes. Although plaintiff's 1992 IQ tests showed only a five point deviation from the 1978 tests, the expert stated that plaintiff suffered cognitive residuals "which clearly interfere with his ability to understand his medical needs and legal rights," and "the patient was clearly even less able to act in his own best interest since the time of the accident in 1977 and thereafter."[1]

The circuit judge granted summary disposition to defendant on grounds that the documentary evidence was "unambiguous and unequivocal" that plaintiff was not insane within the meaning of the statute. We agree. The applicable standard of review under MCR 2.116(C)(7) requires us to accept all plaintiff's well-pleaded allegations as true and to construe them most favorably to the plaintiff. Beauregard-Bezou v Pierce, 194 Mich App 388, 390-391; 487 NW2d 792 (1992); Bonner Estate v Chicago Title Co, 194 Mich App 462, 469; 487 NW2d 807 (1992). In reviewing a (C)(7) motion, the court must consider all affidavits, pleadings, depositions, admissions and documentary evidence filed or submitted by the parties. The motion should not be granted unless no factual development could provide a basis for recovery. Harrison v Director, Dept of Corrections, 194 Mich App 446, 449; 487 789 (1992); MCR 2.116(C)(7); MCR 2.116(G)(5).

MCL 600.5851; MSA 27A.5851 provides:

> (1) [I]f the person first entitled to . . . bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person . . . shall have 1 year after the disability is removed through death or otherwise, to . . . bring the action although the period of limitations has run.

Tolling provisions, like statutes of limitation, are a legislative creation. Lausman v Benton Twp, 169 Mich App 625, 629; 426 NW2d 729 (1988), remanded on other grounds 429 Mich 851; 412 NW2d 199 (1987), citing Mair v Consumers Power Co, 419 Mich 74, 85; 348 NW2d 256 (1984). To toll the running of a period of limitation means to show facts removing its bar of the action. Id., citing Buscaino v Rhodes, 385 Mich 474, 481; 189 NW2d 202 (1971). The general savings provisions of the Revised Judicature Act apply to causes of action created by Michigan statutes. Lambert v Calhoun, 394 Mich 179, 192; 229 NW2d 332 (1975).

The general savings provision of MCL 600.5851(1); MSA 27A.5851(1) is applicable to the one-year period imposed by the no-fault statute, MCL 600.3145; MSA 24.13145. Hogan v Allstate Ins Co, 124 Mich App 465, 467; 335 NW2d 6 (1983); Hartman v Allstate Ins Co, 106 Mich App 731, 743-744; 308 NW2d 625 (1981); Rawlins v Aetna Casualty & Surety Co, 92 Mich App 268, 277; 284 NW2d 782 (1979).

"Insanity" in this context means:

> a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane. [MCL 600.5851(2); MSA 27A.5851(2)]

This Court has divided on whether an opinion of a mental health professional suffices to raise a question of fact when the plaintiff asserts insanity in response to a statute of limitations defense. In Carver v Ford Motor Co, 108 Mich App 359; 310 NW2d 47 (1981), plaintiff filed a products liability action on behalf of herself and her three-year-old son, who had been severely injured in a car fire more than five years earlier. In response to a defense motion for summary disposition, she submitted an affidavit from a psychologist that she had suffered a "depressive reaction" to her son's injury and had been unable to comprehend her attorney's advice or "act[] upon it in any rational way throughout this period of time." Id. at 360-361. This Court held that the affidavit "was sufficient to oppose the defendant's motion and submit the issue to a jury."

In Hooper v Hill Lewis, 191 Mich App 312, 316; 477 NW2d 114 (1991), the plaintiff filed a legal malpractice suit two years and three months after discharging the defendants as his attorneys. This Court affirmed the grant of summary disposition to the defendants, stating:

> Appellant alternatively claims that summary disposition was premature because further factual development was required to determine if plaintiff's mental disturbance constituted insanity for purposes of the tolling statute, MCL 600.5851; MSA 27A.5851. We reject this argument. Plaintiff presented the affidavit of his expert as evidence of his insanity. The trial court considered the affidavit and found that plaintiff's claim of a "mental disturbance" was inadequate to toll the statute. No further factual development was necessary to reach this result. [Id. at 316.]

The Hooper decision is controlling under Administrative Order 1990-6, 436 Mich lxxxiv (1990), extended by Administrative Order 1991-11, 439 Mich xlv (1992); Administrative Order 1992-8, 441 Mich lii (1993); Administrative Order 1993-4, 442 Mich xlix (1993). See also, Vasher v Exxon Co, ___ Mich App ___; ___ NW2d ___ (decided July 19, 1993, No. 140366) (plaintiff's documentary evidence showed no actual controversy as to whether plaintiff was actually deranged at the time the claim accrued.)

Although this Court has accorded liberal treatment to insanity tolling claims, see, e.g., Meiers-Post v Schafer, 170 Mich App 174; 427 NW2d 606 (1988); Makarow v Volkswagon of America, Inc, 157 Mich App 401; 403 NW2d 563 (1987), the issue is not invariably one for the trier of fact. See, e.g. Hill v Clark Equipment Co, 42 Mich App 405; 202 NW2d 530 (1972). The circuit court properly assessed all the evidence in deciding that no factual development could provide a basis for plaintiff to recover. No genuine issue existed about plaintiff's mental condition in February, 1978. Neither the affidavit of the plaintiff's mother nor the expert's opinion, both speculatively assessing plaintiff's mental condition as of February, 1978, could negate the overwhelming documentary evidence that defendant had recovered from his disability and had failed to file suit within one year thereafter.

We also agree with ther circuit court that the expert, on the basis of the 1992 testing, was ill qualified to render an opinion about plaintiff's mental competence in February 1978, a judgment about events not a day before, not a month before, but fourteen years earlier.

On these proofs, reasonable minds could not differ about the question whether plaintiff's insanity disability had ended. Such questionable devices will not permit plaintiff to avoid summary disposition, especially where the mother's and the expert's affidavits are at odds with plaintiff's actual historical conduct as depicted in the medical records. See, e.g., Gamet v Jenks, 38 Mich App 719, 726; 197 NW2d 160 (1972).

In Daubert v Merrill Dow Pharmaceuticals, Inc, ___ US ___; 113 S Ct 2786, 2798; 125 L Ed 2d 469 (1993), the Court noted that federal courts remain "free to direct a judgment" if "the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true." The circuit court appropriately determined that the scintilla of evidence plaintiff presented regarding his alleged incompetence was "insufficient to allow a reasonable juror to conclude" that plaintiff was, in fact, insane within the meaning of the statute.

Affirmed.

/s/ Thomas J. Brennan
/s/ Maura D. Corrigan
/s/ Robert C. Anderson

[1] We also note that the psychologist's speculative conclusion is hardly consistent with the 1992 testing data. The 1992 data indicates, for example, that the plaintiff has low average intelligence. He had intact skills in reading (70th percentile, 11.4 grade level), math (70th percentile), spelling (68th percentile), gross language abilities, attention and concentration, and verbal memory. He had cognitive weaknesses in speed of information processing, verbal learning, visual memory and delayed recall of verbal and visual information, etc. We also observe no significant difference in the results of intelligence tests administered in 1978 and 1992.