NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5968-11T4

NICHOLAS SIMPSON and COLLEEN SIMPSON, his wife,

Plaintiffs-Respondents,

v.

GALLAGHER BASSETT INSURANCE SERVICES, INCORPORATED and ARCH INSURANCE COMPANY,

Defendants-Appellants.

Submitted May 21, 2013 – Decided September 24, 2013

Before Judges Lihotz and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1408-12.

Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys for appellants (Jeffrey J. Czuba, of counsel; Mr. Czuba and Thaddeus J. Hubert, IV, on the briefs).

Bafundo, Porter, Borbi & Clancy, LLC, attorneys for respondents (John D. Borbi, on the brief).

PER CURIAM

This appeal requires us to determine whether equitable tolling of the statute of limitations, as allowed by Price v. New Jersey Manufacturers Insurance Co., 182 N.J. 519 (2005),

applies where there is no evidence that the insured detrimentally relied on an insurer's investigation of a claim before the limitations period expired. We conclude that equitable tolling is not justified. Consequently, the trial court erred in denying defendants' motion to dismiss as time-barred plaintiffs' complaint seeking to compel underinsured motorist (UIM) arbitration.

I.

We discern the following facts from the record. Plaintiff Nicholas Simpson was injured in a motor vehicle accident on July 31, 2004. Simpson[1] had UIM coverage with defendant Arch Insurance Company (Arch). Although the insurance policy is not included in the record, plaintiffs allege Simpson was operating a vehicle "owned by Exceptional Medical Transport [(Exceptional)] and insured by Arch Insurance Company." Although the parties describe defendant Gallagher Basset Insurance Services (Gallagher) as Arch's third-party administrator (TPA), Gallagher stated it "administers the insurance program for Exceptional Medical Transportation, a division of the McNeil Liability Program." It also stated it was "the third-party administrator for McNeil Liability

[1] Nicholas Simpson's wife Colleen is also a plaintiff, therefore, for clarity when referring to Nicholas Simpson separately, we use Simpson.

Program[.]"[2] Simpson also had $100,000 in personal UIM coverage with State Farm Indemnity Company.

Simpson settled his claim against the tortfeasor.[3] Plaintiffs eventually filed a verified complaint and order to show cause to compel UIM arbitration on March 29, 2012, almost eight years after the accident. In response to defendants' motion to dismiss, plaintiffs argued the statute of limitations should be equitably tolled, based on Gallagher's numerous communications to plaintiffs' lawyer at the time.

We therefore turn to the facts upon which plaintiffs base their claim of equitable tolling. At some point in 2006 or 2007, plaintiffs or their attorney apparently filed a claim with Arch. We express uncertainty because no notice of claim is included in the record. However, the record includes a March 23, 2007 letter from Gallagher to Richard S. Kaser of Kaser & McHugh, P.A. Gallagher stated it was a TPA "handling claims for Exceptional," and "[n]otice of your representation came to this office via receipt of the claim assignment from our client on

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[2] Suffice it to say that the precise contractual relationship among the parties is unclear. Conceivably, Gallagher, on behalf of Exceptional as opposed to Arch, administers claims against a self-insured retention or deductible for which Exceptional is responsible. We simply do not know.

[3] The record does not indicate when the settlement was entered, or its amount.

March 22, 2007."[4] The claim letter included an information request, stating:

> In order to give proper consideration to your client's claims, we request your cooperation in providing us with the following information:
>
> 1. A recorded statement of facts regarding the occurrence and detailing the damage from your client.
>
> 2. A list of specials and supporting documentation.
>
> 3. A medical report from the treating physician.
>
> 4. Your theory of liability.
>
> 5. A list of names and numbers of any witnesses to the incident.

[4] The record includes a certification from plaintiffs' current counsel that lacks the required statement that it is true and acknowledging the potential for punishment if it is not. See R. 1:4-4 and 1:6-6. Plaintiffs' complaint in support of the order to show cause was verified not by plaintiffs, but by plaintiffs' current counsel. Aside from the fact counsel asserted various facts apparently not within his personal knowledge, the verification is inappropriately made "to the best of [his] knowledge[.]" See Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 454 (App. Div. 1998) (stating factual assertions based merely upon "information and belief" are inadequate); Lippmann v. Hydro-Space Tech., Inc., 77 N.J. Super. 497, 504 (App. Div. 1962) (stating verification "to the best of the knowledge and belief of your deponent" is defective). As we discuss at some length, the record includes numerous communications from Gallagher to Kaser that, according to the record, Kaser ignored. We draw no conclusions regarding Kaser's behavior on this record, as we acknowledge it includes no certification from him to explain his activities in this matter.

> 6. A diagram and[/]or pictures of the accident location.
>
> 7. Police and/or other incident report if applicable.
>
> Upon receipt of the above requested information and completion of our investigation, we will advise you of our position with regards to your client's claims for injury.

Plaintiffs do not dispute that Kaser received the letter and many others. Nor do they present any cognizable evidence that Kaser responded. Current counsel asserted, "[t]hroughout the last three years, Mr. Kaser and the adjuster from Gallagher . . . have been corresponding, exchanging medical documentation and exchanging insurance coverage information for the purpose of the UIM claim." However, no responses or communications <u>from</u> Kaser are included in the record; only unanswered correspondence <u>to</u> Kaser.

A Gallagher claims representative wrote to Kaser on January 16, 2008, to state he had been assigned to Simpson's claim; asked Kaser to direct communications to him; and asked Kaser to contact him by telephone to discuss the case. Apparently having not received a response, the representative wrote to Kaser on March 5, 2008. He requested:

> At your earliest, would you please provide this adjuster with a status on your client's claim? In addition, would you please provide this adjuster with any and all

> medical records to support your client's claim for injury? There is very limited information in our claim file as it pertains to your client's injuries and treatment, yet there is a notation concerning a $41,000.00 workers' compensation lien.

Having still received no response, the representative sent a third request, by certified mail, roughly three months later. Fourth and fifth requests were sent in November 2008 and February 2009. A return receipt confirmed delivery of the last letter.

A new claims representative assumed the file in 2009. She introduced herself by letter on July 7, 2009, and stated she needed a medical update. She asked Kaser whether Simpson was still being actively treated for the injuries he sustained in the accident; and to describe his treatment plan. She asked Kaser to contact her to advise when she could "expect to receive your demand for settlement and so we can discuss settlement consideration of this matter." Additionally, because her review of Simpson's file revealed he was involved in a prior accident in 1994, the representative asked for related medical records, employment records, and insurance records, so Gallagher could "properly evaluate this claim and reserve [its] exposure[.]" The claims representative also wrote to State Farm to seek a copy of Simpson's personal UIM endorsement, to determine priorities of coverage between Arch and State Farm.

Gallagher's representative tried to reach Kaser again in November 2009. She asked Kaser for Simpson's medical treatment records, his theory of liability, any relevant photographs or diagrams, the nature of plaintiff's injury, and other information. In the meantime, Gallagher exchanged correspondence with State Farm.

On June 1, 2010, a little over a month before the six-year anniversary of the accident, a Gallagher representative wrote to Kaser requesting him to "promptly provide copies of all medical reports, as well as any liens, so that proper consideration may be given to" plaintiffs' claim. She informed Kaser that once Gallagher "obtained all damages information, as well as [plaintiffs'] State Farm policy, . . . [it] will advise your office of our final position on this matter." Two days after the statute of limitations expired, the representative sent Kaser a follow-up letter dated August 2, 2010, again asking him to "provide copies of all medical reports, so [Gallagher] may give consideration to [plaintiffs' UIM] claim." The same day, Gallagher asked State Farm to provide "the policy declaration pages and forms and endorsements for any automobile policies in [plaintiffs'] household . . . so we may review all [UIM] and 'other insurance' provisions to determine if our coverage is primary, concurrent, or excess."

The record does not include any other correspondence from Gallagher to Kaser. As noted, the record includes no responses from Kaser to Gallagher. State Farm responded to Gallagher in October 2010, enclosing the requested materials and asserting that its coverage would not come into play, because Arch's UIM coverage exceeded State Farm's.

At some point, plaintiffs retained their current counsel. According to counsel's "verification," he obtained the file from Kaser and "immediately placed Gallagher . . . on notice of the UIM claim, and demanded UIM [a]rbitration immediately." Counsel asserted that during a telephone conversation at an unspecified time, Gallagher's claim representative advised him that Gallagher was denying the claim because the limitations period expired on July 31, 2010. The "verified" complaint and order to show cause followed, as did defendants' motion to dismiss.

The trial court agreed with plaintiffs that under Price, supra, defendants were equitably estopped from asserting the statute of limitations. The trial judge explained:

> [T]here's no doubt your people [i.e., defendants] were asking for medical information. There's no doubt your people were not getting what you wanted. No question about that. However, does that allow . . . the carrier to now disclaim coverage under the statute of limitation[s] when these letters are in the file that say, "We're here handling your . . . [UIM] claim."

> I think not. I think it falls under Price. I am going to grant the [o]rder to [s]how [c]ause compelling this to go to arbitration.

The court entered an order, and this appeal followed.

II.

Whether a cause of action is barred by the statute of limitations is a legal question subject to our de novo review. See Estate of Hainthaler v. Zurich Commercial Ins., 387 N.J. Super. 318, 325 (App. Div.) (citations omitted), certif. denied, 188 N.J. 577 (2006). There is no question that plaintiffs' complaint was filed after the six-year limitations period applicable to UIM claims. See Green v. Selective Ins. Co. of Am., 144 N.J. 344, 354 (1996).

The issue before us is whether the limitations period should have been equitably tolled; or, put another way, whether defendants should be equitably estopped from asserting the limitations period, because of Gallagher's actions. "The application of the equitable doctrine of estoppel has been left to the discretion of the trial courts." Patel v. Navitlal, 265 N.J. Super. 402, 411 (Ch. Div. 1992) (citing Faustin v. Lewis, 85 N.J. 507 (1981) and Kasin v. Kasin, 81 N.J. 85 (1979)). However, we owe no deference to a trial court's discretionary

decision if not made pursuant to applicable standards. Gotlib v. Gotlib, 399 N.J. Super. 295, 308-09 (App. Div. 2008).

Plaintiffs rely on Price in support of their claim that equitable tolling applies. Defendants argue that Price is distinguishable. We agree with defendants and turn first to a review of Price.

In Price, supra, the plaintiff's attorney first notified the carrier, New Jersey Manufacturers Insurance Company (NJM), of an uninsured motorist (UM) claim on February 12, 1998, about two-and-a-half years after the accident. 182 N.J. at 522. In numerous instances over the next three-and-a-half years, NJM sought, and obtained from Price's counsel, information that was necessary to assist it in evaluating Price's claim, including obtaining an independent medical examination of Price. Id. at 522-23. In one letter, Price's counsel advised NJM he had sued the tortfeasor to protect NJM's subrogation interest, and expressed his desire to proceed with the UM claim. Id. at 522. NJM later authorized counsel to dismiss the suit against the tortfeasor. Ibid.

NJM submitted another request for information on August 21, 2001, nine days before the expiration of the six-year statute of limitations, when NJM asked for the insured's complete workers' compensation file, the plaintiff's employer's policy language,

and the original MRI films. Id. at 525-26. Plaintiff's counsel responded with most of the requested information on September 20, 2001, and continued thereafter to forward information pertinent to the claim. Id. at 526. It was not until October 28, 2002, "more than a year after the statute would have otherwise run, that NJM notified plaintiff that the statute of limitations barred his claim." Ibid.

On November 22, 2002, Price filed a complaint and order to show cause seeking to compel UM arbitration. Id. at 523. NJM argued it was not required to participate because Price never formally requested coverage nor demanded arbitration before the statute of limitations expired on August 30, 2001. Ibid. The trial court rejected NJM's defense, finding "'NJM's course of conduct had lulled [the] plaintiff's attorney into a false sense of having timely made a UM . . . claim.'" Id. at 523 (quoting the trial court). We agreed, with one judge dissenting, Price v. New Jersey Manufacturers Insurance Co., 368 N.J. Super. 356 (App. Div. 2004), and the Supreme Court affirmed.

The Court noted that it "has applied equitable principles to conclude that the statute should yield to other considerations . . . . Flexible applications of procedural statutes of limitations may be based on equitable principles such as the discovery rule, or estoppel." Id. at 524-25

(citations omitted). The Court found equitable tolling was justified based on consideration of both the plaintiff's and the defendant's conduct, as well as the plaintiff's reliance.

The Court reviewed the exchange of information between the parties:

> The undisputed facts here support an equitable tolling of the statute of limitations. Plaintiff's attorney first notified NJM on February 12, 1998, that plaintiff "would be presenting a [UM] claim," and on June 29, 1998, he wrote that plaintiff "would like to proceed with [his] [UM] claim[s]." In the latter letter he enclosed various documents to permit NJM "to begin to evaluate this claim." In addition, plaintiff informed NJM that he filed a lawsuit against the tortfeasor to protect the interest of NJM. A NJM claims representative wrote to plaintiff's counsel on October 8, 1998, that she was now handling plaintiff's claim and requested "copies of all medical bills and reports on [plaintiff] as they become available." During the next several years, NJM received various information necessary to evaluate plaintiff's claim, including a medical examination of plaintiff.
>
> Plaintiff met each of NJM's requests. In fact, NJM's last request was dated August 21, 2001, nine days before the expiration of the statute of limitations. At that time, NJM asked for the complete workers' compensation file, plaintiff's employer's "policy language regarding their UM limits and exposure to his loss," and the original MRI films. Plaintiff's counsel responded with most of the requested information on September 20, 2001, and thereafter continued to forward, upon receipt, information relative to the claim. It was

> not until October 28, 2002, more than a year after the statute would have otherwise run, that NJM notified plaintiff that the statute of limitations barred his claim.
>
> [Id. at 525-26.]

The Court predicated its decision on the finding that the plaintiff relied on NJM's actions. The Court rejected NJM's argument that the trial court should have held a plenary hearing where plaintiff would have been required to demonstrate reliance on NJM's conduct. The Court reasoned that NJM did not dispute the plaintiff's factual assertions before the trial court, and it was too late to do so. Id. at 528. Rather, the Court concluded that "the record amply supports the trial court's finding that NJM's conduct lulled plaintiff and his counsel into believing that the [UM] claim had been properly filed. Plaintiff reasonably relied on NJM's conduct in failing to file a complaint or to request arbitration within the statute of limitations." Id. at 527.

Detrimental reliance is an essential element of equitable estoppel. Miller v. Miller, 97 N.J. 154, 163 (1984). Moreover, the estopped party must have acted "intentionally or under such circumstances that it was both natural and probable that it would induce action." Ibid. Relying on Price, we have recognized that "a defendant may be denied the benefit of a statute of limitations where, by its inequitable conduct, it has

caused a plaintiff to withhold filing a complaint until after the statute has run." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 171 (App. Div. 2007) (emphasis added); see also Villalobos v. Fava, 342 N.J. Super. 38, 50 (App. Div.) ("Typically the doctrine [of equitable tolling] is applied 'where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."), certif. denied, 170 N.J. 210 (2001).

The Price Court also grounded its decision on the insurer's covenant of good faith and fair dealing implied in every insurance contract. Price, supra, 182 N.J. at 526 (citations omitted). Concluding NJM violated this implied duty, the Court explained that NJM "was required to act in a fair manner and inform plaintiff if there were any deficiencies in his claim or if he needed to file a request for arbitration by a certain date." Ibid. The Court observed it was "not reasonable for NJM to sit back, request and receive various documents over a three and one-half year period, and then deny plaintiff's claim because he failed to file a complaint in Superior Court or request arbitration prior to the running of the six-year statute of limitations." Ibid. (emphasis added). The court noted that NJM acknowledged it was not prejudiced by Price's late claim,

and "[m]ost importantly, the result here is not repugnant to the policies served by the statute of limitations." Id. at 527.

In reaching its conclusion, the Court expressly avoided the suggestion that insurers are invariably required to notify an insured in advance that they intend to raise a statute of limitations defense. Id. at 528. Instead, NJM was equitably estopped "because during its investigation NJM acted as though plaintiff's claim had been filed, and it failed to inform plaintiff that its investigation did not toll the running of the applicable statute of limitations." Ibid. This result "merely reflects a desire for the fair exchange of information between the insured and the insurer to satisfy the covenant of good faith and fair dealing implicit in every contract." Ibid. See also Cruz-Diaz v. Hendricks, 409 N.J. Super. 268, 279-80 (App. Div.) ("It is not the insurer's burden to ensure that the claimant knows exactly when his time for filing will expire. Although the insurer may not 'lull' the insured into believing that he has time to file, its only duty is to act in good faith."), certif. denied, 200 N.J. 548 (2009).

Simply put, this case is not like Price, and the equitable considerations that warranted relief from the harsh consequences of the statute of limitations in that case are simply not present here. Unlike Price, where the insured responded to the

insurer's numerous requests for information, there is no evidence that plaintiffs' former counsel ever responded to Gallagher's repeated requests, despite its statement that it required the information to assess plaintiffs' entitlement to coverage. Plaintiffs also ignored Gallagher's information requests and its request for a settlement demand.

Plaintiffs may not avail themselves of the relief of equitable tolling when there is no showing they acted with diligence in response to Gallagher's request. "Equitable tolling affords relief from inflexible, harsh or unfair application of a statute of limitations, but it requires the exercise of reasonable insight and diligence by a person seeking its protection." Villalobos, supra, 342 N.J. Super. at 52.

Plaintiffs have presented no evidence that they were lulled into believing their claim was properly and timely filed. Nor have they presented evidence that they detrimentally relied on defendants' repeated information requests, or interpreted those requests as evidence their claim was accepted. Moreover, detrimental reliance would be implausible, as plaintiffs presented no information to Gallagher to justify a reasonable belief that it had established its entitlement to coverage.

Plaintiffs' allegations were also insufficient to establish a breach of the covenant of good faith and fair dealing. As the Price Court held, defendants were not contractually bound to advise plaintiffs when the limitations period would expire. Unlike NJM, which failed to advise Price that his claim was deficient despite his submitted information, Price, supra, 182 N.J. at 525, Gallagher advised plaintiffs it needed the requested information to process the claim. Also, Price understood NJM was duly acting on its claim, triggering NJM's good faith duty to advise Price otherwise. Ibid. By contrast, there is no evidence that plaintiffs understood Gallagher had accepted the claim, nor was there any basis for Gallagher to presume such an understanding on plaintiffs' part. Thus, no good faith duty to notify was triggered.

Plaintiffs also misplace reliance on Bowler v. Fidelity & Casualty Co. of New York, 53 N.J. 313 (1969). In that case, an insurer ceased disability insurance payments to plaintiff although it possessed clear evidence demonstrating the insured's entitlement; the insurer "lapsed into silence," and did not inform the insured of its decision to deny coverage; allowing the statute of limitations to expire. Id. at 326. The Court found under the circumstances that the insurer breached the covenant of good faith and fair dealing. Id. at 327-28. Bowler

is inapposite, most significantly because plaintiffs have not established that defendants possessed information establishing their right to recovery. Defendants were not silent. Gallagher repeatedly communicated to plaintiffs, seeking information. Rather, plaintiffs were the non-responsive parties.

Reversed.