IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANNA C. OTTENI,	§	
	§	
Defendant Below,	§	
Appellant,	§	No. 560, 1999
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware in and
JOSEPHINE BALAGUER,	§	for New Castle County
	§	C.A. No. 97C-01-045
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 13, 2000
Decided: July 13, 2000

Before VEASEY, Chief Justice, WALSH, and BERGER, Justices.

O R D E R

This 13th day of July 2000, upon consideration of the briefs of the parties, it appears that:

(1) This is an appeal from a Superior Court denial of a motion for a new trial. The defendant-below/appellant, Anna Otteni ("Otteni") contends that the Superior Court erred in admitting evidence of PIP coverage at trial and refusing to grant a new trial to correct that error.

(2) Plaintiff-below/appellee, Josephine Balaguer ("Balaguer"), was involved in two automobile accidents in 1995. The first was with Susanne Hart ("Hart") on January 14, and the second was with Otteni approximately five months later, on June 13. At the time of both accidents, Balaguer had personal

injury protection ("PIP") insurance with Colonial Insurance Company ("Colonial"). Her pertinent coverage was $15,000 in personal damages for up to two years following an accident. Balaguer obtained extensive medical treatment from several sources for her combined injuries.

(3) In 1999, Balaguer sued Hart and Otteni. During trial, Balaguer sought to introduce evidence of various medical bills totaling $12,865 from five separate providers. Hart objected to the admission of one of these bills on the basis that it was subject to PIP coverage and, therefore, not admissible under 21 *Del. C.* § 2118(h). The trial court, however, not being convinced that the bill was covered by PIP, decided at that time to submit the bill to the jury, subject to post-trial determination.

(4) The jury returned a verdict awarding Balaguer $56,500 from Hart and $25,000 from Otteni. Both defendants moved for a new trial on the ground that all five medical bills had been improperly admitted under 21 *Del. C.* § 2118(h). Prior to the trial court's decision, Balaguer settled with Hart. The trial court denied Otteni's motion for a new trial, stating "I am still not convinced that [the medical bills] should have been covered by PIP" and even if they were covered, "It is clear, based upon the verdict, the nature of the case, the type of impact and injuries, and the jury award of $56,500 against Hart, that the medical bills that covered the knee operation were meant to be assessed against Hart and

not Otteni." The trial court had commented in a previous letter to the parties that the cost of retrying this matter would probably exceed the costs of the medical expenses.

(5) Otteni asserts that the medical bills were admitted into evidence in violation of 21 *Del. C.* § 2118(h) and that their admission created prejudice. Balaguer provides several responses: (i) that Otteni did not properly object to the admission of the bills; (ii) that Otteni cannot on appeal raise new arguments against the admission of the bills; and (iii) that most of the bills related to the first accident and, thus, were not prejudicial as to Otteni.

(6) The trial court found that Otteni raised timely objections to the improper admission of the bills. While this conclusion is questionable (only one of the four sets of medical bills was objected to on PIP grounds at the time of their admission, and that objection was made by Hart), it does not appear that, in response to the motions for a new trial, Balaguer ever challenged the timeliness of Otteni's objections. She focused instead on substantive arguments based on the medical opinion at trial of the status of the respective health care providers. Balaguer may not now, on appeal, assert a timeliness challenge to Otteni's claim.

(7) Moving to the substance of Otteni's appeal, we find that at least some of the medical bills at issue were eligible for payment under PIP. The first

bill, that of First State Orthopedics, should have been paid under the PIP coverage for the first accident. Dr. Raisis, Balaguer's orthopaedic surgeon, testified that the injury to her left knee for which she was being treated at First State Orthopedics was related to the first accident. In addition, Dr. Ciarlo, Balaguer's family physician, testified that the injury was unrelated to the second accident. Since the bill was eligible for coverage in the first accident and that coverage had not been exhausted, its admission was barred under 21 *Del. C.* § 2118(h).

(8) Almost 90 percent of the bill from Lantana Chiropractic fell within the two year period for PIP coverage for the second accident. The trial court found that the coverage for the second accident had already been exhausted, so the bill was not subject to exclusion under 21 *Del. C.* § 2118(h). On appeal, however, Otteni argues that the PIP coverage for the second accident became exhausted prematurely because Colonial improperly applied bills arising from the first accident (*e.g.*, the First State Orthopedics bill) to the second accident's coverage. If the First State Orthopedics bill were backed out, the argument goes, there would be enough coverage remaining to cover the Lantana bill. The end result would be that the Lantana Chiropractic bill would then be barred from evidence under 21 *Del. C.* § 2118.

(9) Balaguer argues that Colonial's misapplication of payments should not be considered on appeal because it was never presented to the trial court. But this issue was apparently considered by the trial court when it inquired whether second accident coverage was exhausted and counsel for Hart replied that the evidence was unclear as to Colonial's allocation of payments between the two accidents. Accordingly, this argument is properly before this Court on appeal. *See* Supr. Ct. R. 8.

(10) Otteni, in support of her misallocation argument, seeks to refer to Colonial's PIP Log, which had not been introduced at trial. We cannot consider Colonial's PIP log for the second accident because Otteni failed to introduce it at trial and it is, thus, not part of the record on appeal. *See* Supr. Ct. R. 8. We can consider, however, the testimony of Dr. Raisis and Dr. Cairlo along with Balaguer's admission that "none of these [First State Orthopedics] bills were connected to the second accident by expert medical testimony." We, therefore, have a sufficient basis to conclude that the Latana Chiropractic bill should not have been admitted under 21 *Del. C.* § 2118(h).

(11) Although we hold that the trial court erred by admitting the First State Orthopedics and Lantana Chiropractic medical bills, the record is unclear whether these bills are attributable solely to the first or second accident, or to both. It is also unclear whether the error with regard to the first two medical

bills is so egregious that a new trial is required, particularly in view of the fact that Hart, against whom the larger verdict was entered, settled with Balaguer after trial. For these reasons, we believe that this action should be remanded to the trial court for a determination in the first instance on the following factual issues: (i) whether the remaining three bills are attributable solely to the first or second accident or to both and, consequently, whether their admission was proper; and (ii) to what extent Otteni was prejudiced by the improper admission of some or all of the medical bills, and, if so, whether the appropriate remedy is a new a trial or merely an adjustment of damages.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, REVERSED and REMANDED for proceedings consistent with this order. Jurisdiction is not retained.

BY THE COURT:

s/Joseph T. Walsh
Justice