STATE OF MICHIGAN

COURT OF APPEALS

CHARLOTTE CHALKO,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTO INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 9, 2009

No. 278215
Muskegon Circuit Court
LC No. 06-044301-NF

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority opinion that plaintiff was not entitled to summary disposition or a directed verdict on the issue of coverage for her attendant care. I disagree with the majority that the trial court properly refused to give any of plaintiff's requested jury instructions on the issue of benefits for conditions or services that are required due to the combination of an injury arising out of the accident and an injury or illness not arising out of the accident. These instructions concerned the central, if not sole, issue in the case and plaintiff's requested instructions properly stated the law. Moreover, defendant's position is inconsistent with our State's no-fault scheme and no-fault insurers' fiduciary duties. Defendant's approach would place the burden of care on victims, their families, or the taxpayers who fund government-provided health care rather than on the no-fault insurers who receive payments of premiums in exchange for provision of such benefits.

This is an action for first-party Personal Injury Protection ("PIP") benefits, specifically 24-hour attendant care benefits pursuant to MCL 500.3107. Prior to the June 29, 2001 accident, plaintiff was morbidly obese and had some degree of pulmonary problems. However, she was ambulatory and required few, if any, attendant care services. In the accident, plaintiff suffered a catastrophic compound ankle fracture that could not be fully repaired. Plaintiff claimed and testified that she never regained any significant ability to ambulate after the accident, that as a result of her ankle fracture she became essentially bedridden, and that she eventually required 24-hour per day attendant care as a result. Defendant did not contest the need for 24-hour per day attendant care, as plaintiff was unable to ambulate to the bathroom, get herself out of the house in the event of a fire or other emergency, or even to reposition herself in bed as needed. However, defendant asserted that the broken ankle alone necessitated only two hours per day of attendant care to help plaintiff with her placement and removal of her leg brace. Defendant asserted that the other 22 hours per day of attendant care were required only due to plaintiff's

morbid obesity and naturally progressing pulmonary problems and, therefore, PIP coverage did not apply.

On appeal, plaintiff raises two issues. First, plaintiff argues that she was entitled to summary disposition or a directed verdict on the issue of coverage for her attendant care. I agree with the majority that there was a question of fact on this issue given the differing testimony of the parties' respective medical witnesses.

Defendant introduced medical evidence from two hired experts. The pulmonologist retained by defendant, who never actually examined plaintiff, testified after a review of her records that, in his view, plaintiff's need for attendant care was due exclusively to her pulmonary problems and that those pulmonary problems would have naturally evolved to the point at which plaintiff needed 24-hour care regardless of the auto accident. The physiatrist retained by defendant, who examined the plaintiff on a single occasion, testified that plaintiff only required two hours of attendant care related solely to her ankle fracture and that this entailed assisting plaintiff with placing, adjusting and removing her leg brace. The physiatrist agreed that plaintiff would be unable to get herself out of the house in the event of an emergency, or take care of other needs, but testified that he treated other patients with severe ankle fractures and that they are able to crawl out of the house if necessary and meet their other needs. He opined that it was plaintiff's obesity and pulmonary problems that would prevent her from crawling out of the house or caring for herself as needed.

Plaintiff introduced contrary medical evidence from her treating family physician, who had treated her for many years both before and after the accident. He testified that prior to the auto accident, plaintiff required no attendant care and that her present level of attendant care was due to the limitations created by the *combination* of her inability to stand due to the ankle fracture along with her preexisting obesity and pulmonary problems. Plaintiff's physician also testified that plaintiff's immobility caused by the car accident greatly aggravated her preexisting pulmonary and obesity problems and that if the accident had not occurred she would not have required attendant care. In sum, he testified that had plaintiff not broken her ankle in the accident, she would not have required any attendant care services.

Given this conflicting testimony, there was plainly a question of fact for the jury as to the extent of coverage owed by defendant. I, therefore, do not agree with plaintiff's claims that she should have received summary disposition or a directed verdict on this issue

Plaintiff's second issue on appeal is that the trial court's erroneous failure to give the jury any of her requested causation instructions constituted reversible error. I agree.

> We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. [*Case v Consumers Power Co*, 463 Mich 1, 6; 651 NW2d 178 (2000).]

Whether an instruction is accurate and applicable based on the characteristics of a case is reviewed for an abuse of discretion. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

Plaintiff offered two theories of causation as to her right to PIP coverage for the 24-hour attendant care. First, she argued that she was entitled to coverage for services that were required due to the combination of the ankle fracture—which indisputably was caused by the accident—and her preexisting health problems, regardless of whether the accident worsened those problems as such. In other words, plaintiff argued that she should not be refused benefits simply because her preexisting condition increased the extent to which the auto accident injury disabled her. Plaintiff's second theory was that even if her need for attendant care was due solely to the worsening of her obesity and pulmonary problems, she was still entitled to PIP coverage because, as her doctor opined, the reason her weight and her pulmonary health degenerated was the fact that after the accident she became bedridden as a result of the ankle fracture.

While plaintiff was not entitled to a directed verdict, she was entitled to have her claims evaluated by the jury upon proper instructions given the facts of the case. However, she was denied this right when the trial court failed to adequately instruct the jury on the central issue of causation. Plaintiff asked the trial court for three instructions on this issue, a Special Instruction, M Civ JI 50.10, and M Civ JI 50.11. The Special Instruction requested by plaintiff read:

> Plaintiff's morbid obesity is not an accidental injury that arose out of the automobile accident. State Farm is therefore not liable for any expenses that are solely for plaintiff's obesity or any other medical condition caused only by her obesity. However, State Farm is responsible for any expenses for conditions that are caused by a combination of her obesity and her accident-related injuries.

M Civ JI 50.10, colloquially known as the "eggshell plaintiff" instruction, provides:

> You are instructed that the defendant takes the plaintiff as he/she finds him/her. If you find that plaintiff was unusually susceptible to injury that will not relieve the defendant from liability for any and all damages resulting to plaintiff as a proximate result of defendant's negligence.

M Civ JI 50.11, which deals with aggravation of preexisting conditions, provides:

> If an injury suffered by plaintiff is a combined product of both a preexisting [disease/injury/state of health] and the effects of defendant's negligent conduct, it is your duty to determine and award damages caused by defendant's conduct alone. You must separate the damages caused by defendant's conduct alone. You must separate the damages caused by defendant's conduct from the condition which was preexisting if it is possible to do so.
>
> However, if after careful consideration, you are unable to separate the damages caused by defendant's conduct from those which were preexisting, then the entire amount of plaintiff's damages must be assessed against the defendant.

The trial court, for reasons not clearly set out in the record,[1] did not give any of these instructions.[2] However, the trial court did give the jury an instruction requested by the defense on the last day of trial which read: "Plaintiff's morbid obesity is not an accidental bodily injury that arose out of the automobile accident."

The fundamental issue at trial was whether plaintiff's undisputed need for 24-hour care flowed solely from the accident, did not flow from the accident at all, or flowed in part from the accident. Equally important, if the need for the attendant care flowed in part from the accident, it raised the question of whether the need for such services could be discretely segregated into the number of hours required due to one condition versus the other or whether the two conditions combined in such a fashion that while neither condition on its own would have required the services, when combined, they required the 24-hour care and the need for that care was due to the combination.

The need for an accurate instruction regarding multiple causative factors was magnified by defendant's closing argument, in which the jury was told that the question they must answer was whether "the problems she finds herself in today, the 24-hour attendant care, is it related to *only* the ankle fracture (emphasis added)." In addition, during closing argument, defense counsel displayed and highlighted the special instruction he had requested which eliminated plaintiff's claim that her obesity had worsened as a result of her immobility since the accident: "I instruct you that Plaintiff's morbid obesity is not an accidental bodily injury that arose out of the automobile accident, as a matter of law."[3]

The majority takes the position that because M Civ JI 50.11 is a negligence instruction, it was inapplicable and that absent some requested modification, the trial court properly declined to include it. This view ignores that this Court is required to consider the instructions "as a whole." *Case, supra.* When one looks at the jury instructions in their entirety, it is clear that they improperly "omit material issues, defenses, or theories" that were supported by the evidence. *Id.* Moreover, M Civ JI 50.11 is not in the "negligence" section of the model jury instructions, but instead in the "damages" section and so can be readily adapted to non-negligence cases. Though the trial court's decision not to include that specific instruction

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[1] Apparently, the arguments concerning these instructions were held in chambers and not on the record. The trial court directed that the parties preserve any instructional issues while the jury was deliberating. Plaintiff's counsel did object to the failure of the court to give any of the three requested instructions.

[2] The trial court's refusal to give M Civ JI 50.10 was curious given that in opening statement, the defense conceded its applicability stating, "The judge is going to instruct you, and we agree, and State Farm accepted the responsibility, that because of these preexisting conditions, her morbid obesity, that it posed a unique problem for her with this ankle fracture, and that State Farm was obligated and accepted the obligation *to take her as they find her* (emphasis added)."

[3] Since the discussions concerning instructions took place in chambers, it is difficult to discern the trial court's analysis that led to this instruction, particularly in light of plaintiff's treating physician's testimony that her obesity had worsened as a result of the accident.

would have been reasonable had it given one of plaintiff's other requested causation instructions, the fact that the trial court declined to give any of the requested instructions, including M Civ JI 50.11, deprived plaintiff of her right to have the jury properly instructed on the central issue of causation. Moreover, given the trial court's failure to provide any reason in the record for this complete denial, I cannot conclude that the trial court acted within the range of reasonable outcomes.

It is clear that first party no-fault insurance does provide for coverage for services that result from a combination of conditions so long as one of those conditions is an auto accident injury. In *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 761 NW2d 454 (2008), this Court affirmed a verdict for the plaintiff where the plaintiff argued that the auto accident injury was not the sole factor causing his disability, but that his preexisting ailments would not have prevented him from working had he not also suffered the injuries the accident. In that case, we held benefits were due where "it was plaintiff's closed head injury from his motor vehicle accident *interacting with* plaintiff's susceptible diabetes condition that kept him from working (emphasis added)." *Id.* at 739.

Defendant suggests that since the standard "arising out of" instruction in M Civ JI 35.02 was given, none of plaintiff's requested instructions were necessary to fairly and adequately explain plaintiff's claim and the relevant law to the jury. However, the "arising out of" instruction speaks only to whether "plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle." Here, there was no question that plaintiff suffered an injury arising out the use of a motor vehicle, i.e. her catastrophic ankle fracture. The issue for the jury, which M Civ JI 35.02 does not adequately address, is whether a claimant is entitled to PIP coverage for care required due to a combination of the auto-related injury and some other medical condition.

In response to plaintiff's claim of error, defendant makes two additional arguments. First, defendant cites *Williams v DAIIE*, 169 Mich App 301, 304; 425 NW2d 534 (1988), for the principal that injuries compensable under PIP coverage must be "attributable to a single identifiable event or accident" and suggests this means that plaintiff's need for services must arise solely from the accident. Not only is *Williams* not controlling precedent, MCR 7.215(J)(1), but the quote is taken completely out of context. The *Williams* court took this quotation from *Wheeler v Tucker Freight Lines*, 125 Mich App 123; 336 NW2d 14 (1983). In *Wheeler*, there was no auto accident or discrete injury-causing event at all. Rather, the plaintiff claimed that years of truck driving had caused him to have low back problems and, since the cause of those problems related to use of an auto, he should be covered by PIP. This Court held that the given "the underlying purpose of the no-fault act" the term "accidental bodily injury" required a discrete injury causing event, rather than "a series of events spanning many years of driving . . . not attributable to a single accident." *Id.* at 127-128. See also *Mollitor v Associated Truck Lines*, 140 Mich App 431, 439; 364 NW2d 344 (1985) (noting that the purpose of the restrictive language in *Wheeler* was to assure that the injury did not merely arise from the repetitive practice of operating an automobile, but from a specific event or events "having an identifiable spatial and temporal location").

Moreover, even if this Court finds *Williams* persuasive, it supports plaintiff's position. In *Williams*, the plaintiff was seeking wage loss benefits due to an auto accident in August 1982. However, the plaintiff had already been off work for more than a year for a preexisting back

injury and this Court found that the plaintiff had not submitted any evidence raising "any genuine issue of material fact with respect to *whether, but for the automobile accident, plaintiff would have returned to work*." *Williams*, *supra* at 305 (emphasis added). Following from *Williams*, the proper test when multiple conditions exist that are causally related to the need for PIP services is whether "but for the automobile accident injury" the plaintiff would not have required the subject services. In this case, plaintiff's accident of June 29, 2001 clearly satisfies *Williams*, *Wheeler* and *Mollitor*. Thus, the question becomes whether, but for that accident, plaintiff would require the attendant care services she indisputably now requires.

Second, defendant misapplies language from *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521; 697 NW2d 895 (2005), in which the Supreme Court held that normal food expenses are not compensable under PIP where an individual is cared for at home. *Griffith* held that to be covered, the services must be related to care, treatment or rehabilitation such that unless the food in question is a diet specifically related to care for the injuries or provided in an institutional setting, the accident is not a "but for" cause of the provision of the food. *Id.* at 535-536. This does not mean, however, that any item or service a person used pre-injury is automatically treated as outside the scope of PIP benefits. As noted in *Begin v Mich Bell Tel Co*, ___ Mch ___; ___ NW2d ___ (Docket No. 279891, issued June 25, 2009), slip op p 6, the provision of items or services after injury that a person used before she was injured will still covered by PIP if the claimant's needs for the service or item are "different from those of an uninjured person." Whether "a product, service or accommodation an injured person uses both before and after a motor vehicle accident" is an allowable expense under no fault "depend[s]on the particular facts and circumstances involved." *Id.* at ___, slip op p 7.

In *Scott v State Farm Mut Automobile Ins Co*, 278 Mich App 578; 751 NW2d 51 (2008), this Court held that the plaintiff had created a question of material fact regarding whether the cost of cholesterol medication was covered by her PIP policy where her doctor testified that her ability to exercise was reduced by the muskuloskelatal injuries from her auto accident and her ability to control her eating was reduced by the head injury she suffered in that accident. In that case, this Court reaffirmed the view that the "arising out of" test is satisfied by "almost any causal relationship." *Id.* at 585. The Supreme Court declined leave to appeal that decision and Chief Justice Kelly's concurrence specifically approved the "almost any causal relationship" language. *Scott v State Farm Mut Automobile Ins Co*, ___ Mich ___; ___NW2d ___ (Docket No. 136502, issued June 5, 2009), slip op pp 1-3. In the instant case, plaintiff offered evidence of much more than "almost any causal connection" by introducing expert medical testimony that had she not suffered the catastrophic ankle fracture, she would never have required 24-hour attendant care. Her physician's testimony established a significant, though not exclusive, causal connection of the need for attendant care with the injury suffered in the auto accident.

Defendant insurer is attempting to alter the no-fault scheme by eliminating the insurer's duty to pay for services that grow out of a combination of auto-related and non-auto related conditions. Defendant wants to pay only for those services that are due exclusively to injuries caused in the accident and not due to the combination of those injuries with other conditions. This would elevate PIP causation to a level above and beyond even proximate cause by requiring the auto accident injury to be the "sole cause" of the need for services while M Civ JI 15.03 tells us that "a cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence."

Requiring that the care be provided only insofar as required by the auto accident standing alone or in the context of an otherwise perfectly healthy person is inconsistent with the Legislature's intent when it adopted the no-fault act. As noted by Justice Riley, writing for a unanimous Court in *Putkamer v Transamerica Ins*, 454 Mich 626, 631; 554 NW2d 683 (1997), "[t]he no-fault act is remedial in nature and is to be liberally construed in favor of the persons who are intended to benefit from it." The "persons who are intended to benefit from it" are people injured in auto accidents and their dependents. Thus, the statute is to be "liberally construed in favor of" persons injured in automobile accidents and their dependents.

Here, where there was evidence to support plaintiff's position that the services were required based on a combination of medical conditions, at least one of which occurred in the auto accident, plaintiff's requested instructions were accurate and applicable. Given that the jury's analysis of the multiple causes of plaintiff's need for attendant care services was the central, if not the sole, issue in the case, the trial court's refusal to give any of the requested instructions constituted reversible error, particularly in light of the defense's arguments on causation, because it resulted in a failure to "adequately and fairly" present "the theories of the parties and the applicable law." *Case*, *supra*; see also *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006), quoting *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996) (Holding that "a court 'by definition abuses its discretion when it makes an error of law.'"). The trial court should have given plaintiff's requested special instruction or, alternatively, fashioned an appropriate modification of M Civ JI 50.11 or 50.10.

Reversal and remand for new trial is required given the trial court's failure to instruct the jury on the what the law provided if they concluded as fact-finders that plaintiff's need for attendant care was due to a combination of medical conditions some, but not all of which are auto-accident related.

For these reasons, I respectfully dissent.

/s/ Douglas B. Shapiro