IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANEITA PATTERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 04C-10-079 MMJ
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: May 31, 2006
Decided: July 18, 2006

Upon Defendant's Motion for Partial Summary Judgment
DENIED

Kenneth M. Roseman, Esquire, Ciconte, Roseman & Wasserman, Wilmington, Delaware, Attorney for Plaintiff

Sherry Ruggerio Fallon, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, Attorneys for Defendant

JOHNSTON, J.

Defendant State Farm Mutual Automobile Insurance Company ("State Farm") filled a Motion for Partial Summary Judgment as to Plaintiff Aneita Patterson's claim for no-fault benefits. The no-fault benefits relate to Plaintiff's January 19, 2005 right knee surgery. This contract action for alleged personal injury protection benefits ("PIP") arises out of a motor vehicle accident that occurred on January 3, 2003. Plaintiff filed this action seeking payment of certain medical bills under the PIP portion of her automobile insurance policy.

SUMMARY JUDGMENT STANDARD

This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the non-existence of material issues of fact.[1] Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. [2] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[3] If, after discovery,

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[1] *Moore v. Sizemore,* 405 A.2d 679, 680 (Del. 1979).

[2] *Id*. at 681.

[3] Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.[4] A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.[5] The Court must evaluate the facts in the light most favorable to the non-moving party.[6] Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[7]

FACTUAL SUMMARY

The following facts are set forth in the light most favorable to Plaintiff Aneita Patterson, as the non-moving party. The motor vehicle accident occurred on January 3, 2003. On January 19, 2005, arthroscopic surgery was performed on Plaintiff's right knee. The surgery took place over 2 years after the date of the accident. The cost of the surgery was $5,494.90.

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[4] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp. v. Catrett, supra.*

[5] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[6] *Id.*

[7] *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962).

Prior to the surgery, State Farm notified Plaintiff's attorney, in writing, that the independent medical examination report, dated May 16, 2003, opined that Plaintiff had reached maximum medical improvement, and that further medical evaluation and treatment were not necessary. By letters dated May 22, 2003, July 10, 2003, August 11, 2003, March 17, 2004, April 20, 2004, and May 18, 2004, State Farm advised Plaintiff that payments for additional claims for medical treatment and evaluation would be discontinued after May 30, 2003.

By a report dated August 16, 2004, Plaintiff's physician recommended that Plaintiff undergo arthroscopic knee surgery. In a report dated June 22, 2005, Plaintiff's physician stated that Plaintiff did not have the surgery performed in 2004 "apparently because of problems getting clearance from the insurance company." The surgery eventually was performed on January 19, 2005. Plaintiff's deposition testimony states that surgery was postponed until January 2005 because "[i]t was a problem with the insurance issue."

ANALYSIS

By statute, no-fault benefits in Delaware cover "reasonable and necessary expenses incurred within two years from the date of the accident." An exception to this two-year window exists, however, "where a qualified medical practitioner shall, within two years from the date of the accident, verify in writing that surgical

or dental procedures will be necessary and are then medically ascertainable but impractical or impossible to perform during that two year period."[8]

In *Johnson v. Colonial Insurance Company,*[9] this Court considered a similar factual scenario. The *Johnson* defendant argued that summary judgment should be granted because the plaintiff's physician's records failed to indicate that the surgery was impossible of impractical within two years following the date of the accident. The *Johnson* Court ruled:

> At the time Colonial refused to relate the treatment to the accident and refused to authorize the surgery, there was either a breach of Colonial's duties under Plaintiff's policy or there was not. That is an issue to be decided by the trier of fact. Regardless of how that issue will be resolved, Plaintiff's possible recovery for costs and expenses of surgery cannot denied simply because [plaintiff's doctor] did not later verify that the surgery was impossible or impractical to perform within two years of the accident. The statutory verification that the procedure was impossible or impractical to perform within two years does not apply to this case because coverage was claimed and denied within two years of the accident. * * * Plaintiff has sworn, essentially, that Colonial's refusal to pay for the surgery was the only reason that the surgery was not performed. When the facts are viewed in the light most favorable to Plaintiff, it was Colonial's denial of coverage which caused the surgery to not be performed within two years of the accident. On this record, Colonial is not entitled to summary judgment.

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[8]21 *Del. C.* § 2118(a)(2)(h).

[9]2002 Del. Super. Lexis 405.

It is theoretically possible to distinguish the instant case from *Johnson*. In this case, Plaintiff also was covered by health insurance. Therefore, it may be that Plaintiff's health insurer could have paid for the arthroscopic surgery before Plaintiff's PIP coverage expired.

The Court, however, declines to find an exception to the ruling in *Johnson*. The finder of fact must determine whether State Farm's denial of coverage rendered the surgery impossible or impractical.

The Court notes that public policy mitigates against an inquiry into the availability of other insurance or the plaintiff's financial resources. At least in a summary judgment context, such inquiries would interject potentially irrelevant issues into every case in which treatment occurred outside the coverage period and the PIP carrier denied coverage.

CONCLUSION

Viewing the facts in the light most favorable to the non-moving party, the Court finds genuine issues of material fact exist that must be resolved by the finder of fact. **THEREFORE, Defendant's Motion for Partial Summary Judgment is hereby DENIED.**

IT IS SO ORDERED.

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The Honorable Mary M. Johnston