STATE OF MICHIGAN

COURT OF APPEALS

LAKE STATES INSURANCE COMPANY,

Plaintiff-Appellee,

v

BLUE CROSS & BLUE SHIELD OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
December 28, 2001

No. 219992
Huron Circuit Court
LC No. 97-000245-CZ

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying defendant's motion for summary disposition and granting plaintiff's motion for summary disposition. We reverse and remand.

This case arises out of an accident in which Paul Lutz was struck by an automobile while riding his bicycle on May 29, 1992. Lutz, who was then ten years old, suffered very severe injuries as a result. Lutz was discharged to his parents' home in February 1993, where he continues to receive home health care services provided by Olsten Health Services. Defendant is Lutz's medical insurer and plaintiff is the issuer of the automobile insurance for the vehicle that struck Lutz. Plaintiff also provided automobile insurance for the Lutzes and the automobile insurance policy had a coordinated medical benefits provision. Under defendant's policy, defendant would pay for "skilled care" services, as defined in the policy. In December 1996, defendant denied coverage for services by Olsten Health Services, contending that the services did not meet the skilled care level of service payable under defendant's policy.

Plaintiff, in the meantime, paid for the nursing care services, which exceeded $425,000, and filed a declaratory judgment action on September 11, 1997. Both parties subsequently moved for summary disposition, with the issue being whether Olsten's services qualified as "skilled care" within the meaning of defendant's policy. The trial court ruled that Lutz was homebound and that he was receiving care from skilled health care providers determined by a physician as necessary to the care of the insured. The trial court found that defendant had no basis for denying coverage, and granted plaintiff's motion for summary disposition.

Defendant first argues that the trial court abused its discretion when it ruled on the parties' cross-motions for summary disposition after a hearing at which defense counsel failed to appear and the trial court heard argument from plaintiff's counsel. This Court reviews a trial court's decision to rule on a party's motion for summary disposition without hearing oral argument for an abuse of discretion. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

MCR 2.119(E)(3) authorizes a trial court to exercise its discretion to limit or dispense with oral arguments on a motion where the trial court has before it a fully developed record of the parties' respective positions. *American Transmission, Inc v Channel 7 of Detroit*, 239 Mich App 695, 709; 609 NW2d 607 (2000); *Fast Air, supra*, at 550. Here, the trial court expressly stated that it had read the parties' briefs, reviewed the deposition transcripts, and understood the factual and legal matters involved in the dispute. Defense counsel properly noticed the hearing and the trial court attempted to locate defense counsel before holding the hearing in defense counsel's absence. The trial court did not abuse its discretion in proceeding with the hearing under these circumstances. *Asmus v Barrett*, 30 Mich App 570, 577; 186 NW2d 819 (1971).

Defendant next argues that the trial court erred in granting plaintiff's motion for summary disposition where genuine issues of material fact existed. This Court reviews de novo a trial court's ruling regarding a motion for summary disposition. *Henderson v State Farm and Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). If a word or phrase in an insurance contract is unambiguous and no reasonable person could differ with respect to application of the term or phrase to the undisputed material facts, then summary disposition under MCR 2.116(C)(10) should be granted to the proper party. *Id.* If reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists and summary disposition is not appropriate. *Id.*

In the present case, the issues presented below, and on appeal, are whether Paul Lutz is "confined to the home" as defined in defendant's policy and whether the services provided to him are "skilled care" within the meaning of the policy. The policy states in pertinent part:

> **Home Health Care Services**
>
> **This program provides an alternative to long-term hospital care by offering coverage for care and services in the patient's home.**
>
> The services described below must be:
>
> > prescribed by the attending physician,
> >
> > provided and billed by a participating home health care agency, **and**
> >
> > medically necessary ("Medically Necessary" is defined in "Section 2: the Language of Health Care.")
>
> The following criteria for the program must be met:

> The doctor certifies that the patient is confined to the home because of the illness.
>
> > This means that transporting the patient to a health care facility (doctor's office or hospital, **except** for outpatient physical therapy) for care and services would be very difficult due to the nature or degree of the illness.
>
> The doctor prescribes home health care services and submits a detailed treatment plan to the home health care agency.
>
> The agency accepts the patient into its program.
>
> **Services Which are Payable**
>
> The following services must be provided by health care professionals employed by the home health care agency or by providers who participate with the agency in this program. The agency must bill BCBSM for the services. They are:
>
> * * *
>
> Skilled nursing care:
>
> > The care must be provided or supervised by a registered nurse employed by the home health care agency.

Skilled care is defined in the policy as:

> A level of care that can be given only by a licensed nurse to ensure the medical safety of the patient and the desired medical result. Such care must be:
>
> > ordered by the attending physician,
> >
> > medically necessary according to generally accepted standards of medical practice, and
> >
> > provided by a registered nurse (RN) or a licensed practical nurse (LPN) supervised by a registered nurse or physician.

With respect to the question whether Paul Lutz is "confined to the home" within the meaning of defendant's policy, we find that a material factual dispute exists based on the evidence submitted by both parties. Deposition testimony given by Dr. Francis Nwanko and Dr. Charles McEwen supports defendant's position that Lutz is not "confined to the home" because their testimony indicated that Lutz was transported to medical appointments on infrequent occasions (one or two times a year) and that the home health care agency nurses wheeled Lutz outside to provide him the benefits of fresh air and sunshine. Dr. McEwen specifically did not agree that a patient who is taken outside regularly for the benefits of fresh air and sunshine still satisfied the definition of "confined to the home" under defendant's policy.

Plaintiff certainly presented evidence supporting its position that Lutz is "confined to the home" within the meaning of the policy, specifically through Lutz's treating physicians, Dr. Bhaskar Devanagondi, Dr. Bilugali Sundara, and Dr. John Buday, as well as the deposition testimony of Olsten Health Services' pediatric case manager Janet Weller. Because both parties have presented substantively admissible evidence in support of their positions regarding whether Lutz is "confined to the home" within the meaning of defendant's policy, the trial court erred in granting summary disposition in favor of plaintiff under MCR 2.116(C)(10). The trier of fact must decide this issue.

With respect to the question whether the care provided to Lutz is "skilled care" as defined in the policy, we again find that there is a question of fact based on the evidence submitted by both parties. Here, Lutz's mother, who is neither a registered nurse nor a licensed practical nurse, provided most, although not all, of his care in the home. Further, there was a great deal of evidence that Mrs. Lutz is medically sophisticated in that she educated herself and was adept with her son's care. Dr. Nwanko testified that although the treating physician ordered Lutz's nursing care, it was not medically necessary in keeping with accepted standards of medical practice and as required by the definition of "skilled care" as defined in the defendant's policy. Dr. Nwanko concluded that if Mrs. Lutz, a layperson, could provide adequate care for her son, then the care received by, provided to, or required for the patient could not meet the level of care as described in the policy.

Plaintiff, on the other hand, provided evidence, specifically through the testimony of Lutz's treating physicians, that Lutz required skilled care. Further, services which are payable under the policy include "skilled nursing care", that is, the "care must be provided *or supervised* by a registered nurse employed by the home health care agency." Therefore, while Mrs. Lutz is not a registered nurse or a licensed practical nurse, the policy indicates that if a registered nurse supervises her, then the care might be covered under the policy. However, because there are conflicting accounts as to whether the care provided to Lutz was medically necessary and whether Mrs. Lutz's care can properly be defined as "skilled nursing care," there are material factual disputes that must be resolved by the trier of fact.

Accordingly, we find that the trial court erred in granting summary disposition to plaintiff under MCR 2.116(C)(10) because there are material factual disputes as stated above that must be resolved by the trier of fact.

In light of our resolution of defendant's second issue, we need not address the last two issues raised by defendant, which were not, in any event, raised in the trial court.

Reversed and remanded for further proceedings. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen