STATE OF MICHIGAN

COURT OF APPEALS

HOWARD MELROSE, as conservator and guardian for the ESTATE OF BETHANY D. MELROSE,

Plaintiff-Appellee,

v

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

and

NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE, and NATIONWIDE PROPERTY,

Defendants.

UNPUBLISHED
October 22, 2020

No. 352843
Genesee Circuit Court
LC No. 19-113455-NF

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's grant of a preliminary injunction, which maintains the status quo of the payment of no-fault personal injury protection (PIP) benefits pending resolution of the parties' dispute over defendant reducing the amount of such PIP benefits. We affirm.

Bethany Melrose ("plaintiff") was seriously injured in an automobile accident in 1984. She has been treated for over 34 years by Dr. Owen Perlman. According to Dr. Perlman, plaintiff suffered a traumatic brain injury, a spinal injury, and prolonged depression and anxiety. He further states that she suffers from impaired speech, compromised attention, concentration, and memory.

He also states that her brain injury has resulted in ongoing cognitive deficits, including an organic mood disorder with anxiety, depression, and personality disorder. He also opines that her injuries make it very difficult to have reliable executive functioning. He also noted that her functioning has deteriorated over the years. He has prescribed various services, including attendant home care through C and N Home Care for at least 12 hours per day, physical therapy twice a week, occupational therapy from 6 to 10 hours a week, and counseling twice weekly. He also opines that the severity of plaintiff's condition requires a "sophisticated level of attendant care services" that is beyond those normally provided by an unskilled home health aide, which he described as "high-tech aide care." Plaintiff had received services through NeuroRestorative Michigan. Because of staffing issues, plaintiff's care was ultimately changed to the aforementioned C and N Home Care in 2019.

In June 2019, Dr. Saad Naaman conducted an independent medical examination of plaintiff. He opined that, although plaintiff did require attendant care services, she did not require high-tech services. Dr. Naaman also opined that plaintiff's occupational therapy could be reduced to three hours per week, her physical therapy to two hours per week, and her psychology visits to once a week. Dr. Perlman opined that these reductions "will most likely cause [plaintiff] great harm." Defendant then indicated that it would reduce benefits, including the rate it was willing to pay for services. Plaintiff's guardian averred that he is unable to find necessary services at the rate defendant is now willing to pay.

This dispute then arose regarding the services that defendant is willing to pay for and at what rate. Plaintiff sought to have the services restored to their previous levels. Plaintiff moved for a preliminary injunction to keep services at their preexisting levels until the litigation was resolved. Following a hearing, the trial court determined that plaintiff was likely to prevail and that she would suffer irreparable injury if the injunction was not granted. Accordingly, the trial court granted a preliminary injunction requiring defendant to reinstate payments for plaintiff's preexisting benefits pending the outcome of the litigation.

Defendant principally relies upon this Court's decision in *Bratton v Detroit Automobile Inter-Ins Exch*, 120 Mich App 73; 327 NW2d 396 (1982). Defendant argues that the trial court erroneously distinguished this case from *Bratton*. We disagree. There is a significant difference between *Bratton* and the current case. In *Bratton*, the issuance of a preliminary injunction would have altered the status quo by granting the plaintiff, at least on a temporary basis, the relief sought. That is, in *Bratton* the plaintiffs were denied PIP benefits, sued for the payment of those benefits, and sought a preliminary injunction to require the payment of benefits until the dispute was resolved. *Id*. at 76-77. By contrast, in the present case, plaintiff sought to maintain the payment of benefits while the dispute over defendant's attempt to reduce those benefits was litigated, thus maintaining the status quo until the resolution of the dispute.

We review the decision to grant an injunction for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). An abuse of discretion occurs if the decision "falls outside the range of principled outcomes." *Id.*

The *Bratton* Court gave three basic reasons why it deemed a preliminary injunction inappropriate in that case. First, the Court reasoned that the defendant would suffer irreparable

harm by an injunction because if it ultimately prevailed, it would be unable to recoup the benefits it would have been required to erroneously pay:

> If payment were made to plaintiffs and DAIIE was successful in defending the actions, it would be unable to recover the benefits it paid to the plaintiffs. This would distort considerably the status quo which existed prior to the plaintiffs' commencing their actions. [120 Mich App at 80.]

A similar concern arguably exists in the case at bar, namely that if defendant ultimately prevails it may not be able to recover the additional benefits paid during the pendency of this dispute. But, unlike in *Bratton*, by denying the injunction, the status quo that would be considerably distorted is that the benefits, which had been paid for many years, would be reduced during the pendency of the action. Indeed, this consideration would actually weigh in favor of plaintiff. That is, if the benefits were reduced during the pendency of the dispute, plaintiff would be unable to pay to continue the services that she is receiving and those services could not be reinstated retroactively.

The *Bratton* Court's second reason is that a preliminary injunction would grant the plaintiffs the very relief that they sought. 120 Mich App at 80-81. First, we do not find that argument particularly persuasive even in the context of the *Bratton* case. Second, it does not apply to our case. Indeed, if anything, the denial of an injunction would grant defendant the very relief it seeks—a reduction in the payment for services.

The *Bratton* Court's final reason is that the plaintiff had an adequate remedy at law:

> Finally, the injunctions were improper because plaintiffs had an adequate legal remedy. MCL 500.3142; MSA 24.13142 states that PIP benefits are payable within 30 days of when proof of the loss is submitted to the insurer. Where the insurer fails to pay the claimed benefits, the insured has one year within which he may commence an action against the insurer. MCL 500.3145; MSA 24.13145. If the insured prevails in his action, the trial court may award attorney fees and interest at 12% per annum. The Legislature has established a comprehensive procedure which allows an insured, who has been denied benefits, to recover those benefits. The Legislature did not provide for the payment of PIP benefits while the insured's action was pending. We also decline to do so. [120 Mich App at 81.]

Plaintiff would not have an adequate legal remedy if she is unable to pay to continue the services that she is receiving.

Finally, we find wisdom in Judge T. M. BURNS' concurring opinion in *Bratton* where, although he ultimately agreed that a preliminary injunction was inappropriate in that case, he declined to foreclose the possibility of preliminary injunctions being issued in other cases:

> But I do not believe that such a temporary injunction is improper under all circumstances. As I stated earlier, an insurance company has far more power than an individual claiming benefits. Absent some legislative solution to this problem, if we foreclose preliminary injunctions in this situation, we would be allowing the insurance companies a strong battering ram to prevent many plaintiffs from

> recovering. This injustice becomes poignant where the plaintiff is impoverished and very badly needs the money not only to continue the suit but to survive. [120 Mich App at 83.]

Injunctive relief is only appropriate where (1) "there is no adequate remedy at law," (2) "there exists a real and imminent danger of irreparable injury," and (3) justice so requires. *Pontiac Fire Fighters*, 481 Mich at 8. This Court summarized the factors to be considered in granting a preliminary injunction in *Alliance for Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998):

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

As for the first factor, the likelihood of success on the merits, defendant discusses this more in conjunction with its separate argument that the trial court, in granting the preliminary injunction effectively granted summary disposition in favor of plaintiff. Defendant argues that the trial court improperly conflated plaintiff's likelihood of success on the merits with the chance that plaintiff would succeed on summary disposition. We are not convinced that the trial court's conclusion that plaintiff would likely succeed on the merits was a mistake because plaintiff presented extensive evidence that her care was necessary to preserve her health and well-being and that reducing her care would endanger her or cause her health to decline.

To the extent that defendant argues the trial court improperly conflated preliminary injunction and summary disposition standards, we reject the argument because defendant contributed to any error. A party may not appeal an error that the party created. *Clohset v No Name Corp*, 302 Mich App 550, 555; 840 NW2d 375 (2013). A party may not take a position before this Court that is contrary to a position the party took before the lower court. *Grant v AAA Mich/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006).

In this case, defendant stated during oral argument, "If your Honor feels that our evidence that has been entered in is not—is—is—that just alone on that she—they would survive motion [sic] for summary disposition, they would win that, then your Honor should issue a preliminary injunction." However, defendant did not believe that plaintiff would survive a motion for summary disposition on the basis of the evidence it had provided. Because defendant argued that the trial court should grant plaintiff's motion if she would survive a motion for summary disposition, defendant cannot be permitted to make a contrary argument on appeal.

Regardless, the trial court did not make a summary-disposition ruling. The trial court was required to determine whether plaintiff was likely to succeed on the merits. See *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 647; 825 NW2d 616 (2012). It found that plaintiff was likely to prevail on a motion for summary disposition and would likely prevail before a jury.

The trial court's finding that plaintiff was likely to succeed on the merits was not clearly erroneous. Under the no-fault act, an insurer is liable to pay benefits for bodily injuries arising out of the use of a motor vehicle. MCL 500.3105(1). These expenses are limited to "allowable expenses." MCL 500.3107(1)(a). To be an allowable expense

> (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable. [*Douglas v Allstate Ins Co*, 492 Mich 241, 259; 821 NW2d 472 (2012).]

What constitutes care is broader than merely recovery or rehabilitation designed to restore a person to a preinjury state. *Id*. at 260. A doctor's recommendation may establish what services were in fact reasonably necessary. *Id*. at 265-266. Additionally, the compensation that a caregiver actually received for attendant-care services "is highly probative of what constitutes a reasonable charge for her services." *Id*. at 277.

In this case, plaintiff's claim was that defendant was required to reimburse plaintiff for all reasonably necessary services but it had not paid her benefits. Plaintiff established that she had suffered a brain injury in 1984, which resulted in several conditions including impaired speech, and compromised attention, concentration, and memory. Dr. Perlman had treated plaintiff for these issues for 34 years. He prescribed, among other services, home care services by C and N Home Care, attendant care for at least 12 hours a day, physical therapy twice weekly, occupational therapy "as long as it does not duplicate treatment" for 6 to 10 hours a week, and counseling twice weekly. Dr. Perlman opined that, because of the severity and extent of plaintiff's cognitive and emotional issues, she "require[d] a sophisticated level of attendant care services, i.e., a level that is beyond that of the unskilled home health aide." Various professionals opined that these services were necessary to prevent plaintiff from suffering additional health problems, and that removing them would risk plaintiff's safety and lead to plaintiff suffering unwarranted medical issues. Plaintiff had previously received caregiver services of more than $40 an hour. C and N provided care for $32 an hour.

In contrast, defendant's witness, Dr. Naaman conducted an independent medical examination of plaintiff on one occasion. He opined that plaintiff required 12 hours of attendant care but not high-tech attendant care services. He additionally recommended decreasing her occupational therapy, physical therapy, and psychological therapy. Dr. Naaman had issued his opinion after only consulting with plaintiff, who was legally incapacitated. Dr. Chapman opined that "it was unrealistic to obtain a reliable history from [plaintiff], an incompetent person, without garnering reliable input from her parents or case manager."

Plaintiff's history of actual services and the recommendations of her doctor were highly probative of what constituted reasonable services and the reasonable cost of those services. While the opinion of defendant's doctor provided an issue of fact, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff was likely to prevail on the merits on the basis of the evidence she and defendant presented.

Turning to the second factor, we already discussed the fact that plaintiff would likely be unable to continue the services at her current level if defendant reduced the amount it was paying

for those services, which plaintiff's providers have opined would result in harm. This flows into the third factor, which requires a comparison of harm to the parties if the preliminary injunction is granted or is not granted. As we acknowledged, defendant may face a financial loss if it is ultimately determined that it may reduce the benefit and is unable to recover the amount paid during the pendency of the litigation. But concerns regarding physical safety are generally more pressing than concerns regarding economic loss. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 53-54; 649 NW2d 783 (2002) (discussing the rationale supporting the economic loss doctrine). As the trial court observed in this case, the care that plaintiff had been receiving for over 30 years established a baseline for what care plaintiff needed. As for the fourth factor, the trial court found that public interests supported not denying plaintiff a continuation of those services based upon market surveys.

Affirmed. Plaintiff may tax costs.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Jane M. Beckering