STATE OF MICHIGAN

COURT OF APPEALS

INTEGRATED COGNITIVE REHABILITATION, LLC, Plaintiff-Appellee,	UNPUBLISHED January 21, 2021
v	No. 353114 Oakland Circuit Court
ZURICH AMERICAN INSURANCE COMPANY, Defendant-Appellant.	LC No. 2018-169110-NF

Before: LETICA, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

A plaintiff seeking payment of no-fault benefits bears the burden of proving entitlement to those benefits. And when faced with a motion for summary disposition under MCR 2.116(C)(10), the plaintiff must respond with evidence to support its claim and thereby refute the opposing party's contradictory evidence. Plaintiff in this case neither supported its claim nor presented evidence to overcome summary disposition. We reverse the circuit court's contrary decision.

Denzel Harris suffered serious injuries in an automobile accident in 2011. Zurich American Insurance Company, as the insurer of first priority, has provided first-party no-fault benefits to Harris and on Harris's behalf. Integrated Cognitive Rehabilitation, LLC (ICR) provided recreational therapy to Harris for several years. ICR sought recompense from Zurich under MCL 500.3107(1)(a), which provides for the payment of personal protection insurance (PIP) benefits for "[a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." Zurich rejected ICR's claims and ICR filed suit.

Zurich filed two motions for summary disposition, one shortly after filing its answer and a second at the close of discovery. ICR's second motion sought dismissal under MCR 2.116(C)(10). "A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim." *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013) (quotation marks and citation omitted). The moving party must present evidence to support its motion, and the court must consider that

evidence "in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.* (quotation marks and citation omitted).

Zurich presented significant evidence that the recreational therapy provided by ICR was not reasonably necessary for Harris's care, recovery, or rehabilitation. Specifically, the goals of this therapy included "demonstrat[ing] leisure independence" and "correct social etiquette," and "improving leisure awareness and social skills." However, the evidence substantiated that Harris had long since met those goals and had not required recreational therapy for quite some time.

Harris earned his driver's license in 2016 or 2017, passing the test on the first try. He independently takes himself shopping, to work, and out with friends. He frequently goes bowling, shoots pool, or plays basketball with friends. Harris lives in a rented home with his girlfriend, his brother, and his brother's girlfriend, where he does his share of the housework. Harris graduated from high school and passed the placement test to enroll at Oakland Community College, although he has yet to do so. Harris has maintained employment for several years, most recently working 30 hours a week as a busser at a restaurant. Harris also writes music, does shows at bars, and plans to record a demo.

Harris received many services from ICR following his accident. Since 2017, however, ICR has provided only recreational therapy. Marquita Smith from ICR picks Harris up once a week and takes him out to dinner, bowling, or on some other recreational activity. When asked if Harris felt it was necessary to meet with Smith weekly, he responded, "It get[s] me out the house, so I want to say yeah." However, Harris admitted that he would "still get outside of the house" without Smith's participation and that Smith had not "done any activity with [him] that" he could not do on his own. Harris's own words established that ICR's recreational therapy was not reasonably necessary to his care, recovery, or rehabilitation.

Zurich further strengthened its case for summary disposition with six separate independent medical examinations conducted by three different physicians between 2014 and 2019, all declaring the services unnecessary. As early as 2014, Dr. Stephen Putnam noted that Harris "appears to be generally capable of functioning independently from strictly a neuropsychological perspective." Dr. Putnam further opined that "[t]he recreational therapy has obviously involved activities that Mr. Harris has found enjoyable but stated candidly, such services are not required." Dr. Saul Forman determined in 2014 that Harris did not require recreational therapy. In 2017, Dr. Harvey Ager also reported that Harris did not require recreational therapy. Dr. Ager reevaluated Harris in 2019. Harris expressed confusion why continuing recreational therapy was necessary. When Harris asked, "He was told it is so he can get out and socialize[.]" Dr. Ager opined, "[F]rom what he told me today, he is out frequently with his friends on his own," making recreational therapy unnecessary. Indeed, Dr. Ager could "see no need for [Harris] to be involved in weekly 'treatment' with [ICR] . . . presumably to help him get out and socialize. He has no impairment of his social skills related to the accident." Dr. Putnam's 2019 reevaluation was even stronger on this point, finding that ICR's weekly recreational therapy was "entirely inappropriate" with goals and assessments that "strain credulity." Harris had met the goals of his recreational therapy by 2014 at the latest and fell within the average to low average IQ range. This made the continuation of recreational therapy "even more inconceivable and unwarranted."

When a party seeks summary disposition under MCR 2.116(C)(10), the other party cannot simply sit back and rely on the allegations in its complaint. Rather, the nonmoving party must "present documentary evidence establishing the existence of a material factual dispute" or summary disposition will be properly granted. *Quinto v Cross & Peters Co*, 451 Mich 358, 363-363; 547 NW2d 314 (1996). "[T]he opposing party must . . . respond with affidavits or other evidentiary materials that show the existence of a genuine issue for trial." *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

But this is exactly what ICR did. The only evidence provided by ICR was prescriptions from Harris's psychiatrist for recreational therapy. These prescriptions did not explain why such therapy was necessary, let alone reasonably necessary for Harris's care, recovery, or rehabilitation. ICR further described that Harris had been "declared an incapacitated person" and appointed a guardian since his accident. Again, ICR failed to explain how this required recreational therapy or rebutted the evidence presented by Zurich.

Despite ICR's complete lack of support for its claim for PIP benefits, and Zurich's voluminous evidence that ICR's recreational therapy was not reasonably necessary for Harris's care, recovery, or rehabilitation, the circuit court denied Zurich summary disposition. This was error and we must reverse. Given our resolution of this issue, we need not consider Zurich's alternate claim that ICR lacked a timely and valid assignment to seek benefits on Harris's behalf.

We reverse and remand for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien