STATE OF MICHIGAN

COURT OF APPEALS

LAKEBIA GOSSETT,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 20, 2011

No. 297988
Wayne Circuit Court
LC No. 08-016746-NF

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

In this first-party, no-fault case, defendant appeals by right the circuit court's order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was injured in a car accident on July 9, 2008. She sought personal injury protection (PIP) benefits from defendant, the insurer of the owner (and driver) of the car in which she was riding at the time of the accident. Defendant declined to pay the benefits, asserting that it was not the insurer of first priority under MCL 500.3114. Accordingly, plaintiff filed this suit. The issue of defendant's priority is not currently at issue. Rather, defendant challenges whether the benefits claimed by plaintiff were reasonable and necessary under MCL 500.3107.

PIP benefits are generally payable for reasonable expenses incurred for treatment necessary for a car accident victim's physical injuries and rehabilitation, for lost income from work the person would have performed in the first three years after the accident, and for replacement services for "ordinary and necessary services" the injured person would have performed to benefit the person and his or her dependents during the first three years. MCL 500.3107(1)(a)-(c). Payable medical expenses are defined specifically as "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations . . . ." MCL 500.3107(1)(a).

The definitive case addressing allowable expenses under the no-fault act is *Nasser v Auto Club Ins Ass'n*, 435 Mich 33; 457 NW2d 637 (1990). As the *Nasser* Court explained, "'The statute requires that three factors be met before an item is an 'allowable expense': 1) the charge must be reasonable, 2) the expense must be reasonably necessary, and 3) the expense must be incurred.'" *Id.* at 50, quoting *Manley v DAIIE*, 425 Mich 140, 169; 388 NW2d 216 (1986)

(BOYLE, J., concurring in part). The plaintiff bears the burden to prove both (1) that the claimed charge for a specific expense was reasonable, and (2) that the claimed expenses "'*were reasonably necessary to [his or] her recovery from injuries caused by the automobile accident*.'" *Nasser*, 435 Mich at 49-50, quoting *Nelson v DAIIE*, 137 Mich App 226, 231; 359 NW2d 536 (1984) (emphasis in *Nasser*).

Plaintiff moved for summary disposition on this issue under MCR 2.116(C)(10), arguing that no genuine issue of material fact existed with regard to whether the claimed benefits—which primarily included medical treatment and attendant care services—were reasonable and necessary. She presented her emergency room records and the opinion of Dr. Anthony Emmer, who concluded in October 2008 that plaintiff's ongoing complaints of disabling headaches were "due to the result of downward forces applied to [her] head as she impacted the windshield," which "appear[ed] to have resulted in high cervical-skull based soft tissue injury." Emmer opined that, as a result of the July 9, 2008 accident, plaintiff was unable to work and needed a nurse's aide or family member to care for her daily personal needs, perform housework, and help with childcare. Plaintiff also provided her own her own affidavit, in which she averred that she remained disabled and in need of attendant care assistance. An accompanying affidavit from Robert Ancell, Ph.D., described a reasonable hourly rate for the type of services prescribed by Emmer. The circuit court granted plaintiff's motion and entered a judgment in her favor, concluding that defendant had not provided sufficient rebuttal evidence to show that a genuine issue of fact existed with regard to the reasonableness or necessity of plaintiff's claims.

We review de novo the circuit court's decision on a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 263-264; 715 NW2d 914 (2006). The moving party "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), and "must support its position with affidavits, depositions, admissions, or other documentary evidence," *St Clair Medical*, 270 Mich App at 264; see also MCR 2.116(G)(5). Once the moving party has done so, "the burden shifts to the opposing party to show that a genuine issue of material fact exists" by offering documentary evidence "set[ting] forth specific facts to show that there is a genuine issue for trial." *St Clair Medical*, 270 Mich App at 264. The pleadings and other evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Brown*, 478 Mich at 551-552.

Defendant correctly notes that "the question whether expenses are reasonable and reasonably necessary is generally one of fact for the jury[.]" *Nasser*, 435 Mich at 55. Nonetheless, "it may in some cases be possible for the court to decide the question of the reasonableness or necessity of particular expenses as a matter of law[.]" *Id.* "[I]f it could be 'said with certainty' that an expense was both reasonable and necessary, the court could make the decision as a matter of law. As always, the determination would be made after viewing the evidence in the light most favorable to the nonmoving party." *Id.* (citation omitted).

Defendant argues that this is not the type of case in which the circuit court could have concluded "with certainty" that plaintiff's claims were reasonable and necessary. Instead, defendant asserts that plaintiff's past, similar symptoms from other car accidents, the discrepancies among plaintiff's descriptions of the 2008 accident and her current symptoms, and

the weak nature of the medical evidence all combined to create genuine issues of material fact with regard to the reasonableness and necessity of the expenses. However, in light of defendant's failure to bear its burden as the party opposing the motion, we disagree.

Defendant provided little documentary evidence to counter plaintiff's claims. It primarily offered records of injuries that plaintiff had suffered in accidents that occurred on March 28, 1996, and June 13, 1998. The 1996 accident caused rib fractures, sprains to the cervical spinal ligaments, and left shoulder rotator cuff tendonitis. After the 1996 accident, plaintiff reported symptoms similar to those she described to Emmer after the 2008 accident, including headaches, pain, neck stiffness, blurred vision, depression, and difficulty with memory. The 1998 accident appears to have been more minor. Plaintiff reported pain in her neck one day after the accident and was diagnosed with mild cervical strain. Defendant argues that these past symptoms cast doubt on whether plaintiff's current complaints were caused by the 2008 accident. But we disagree that the records created a genuine issue of material fact on this point. The records provided no specific evidence that plaintiff suffered continuing symptoms—let alone continuing headaches, which were the primary reason for plaintiff's alleged need for treatment and attendant care in the present case. With specific regard to the more serious 1996 accident, as of June 19, 1997, although plaintiff had reported ongoing limitations to her activities as a result of shoulder and rib pain, she denied ongoing neck pain or headaches and a neurologist opined that there was no evidence of head injury or residual impairment.

Defendant also argues that the weaknesses in plaintiff's evidence, themselves, created genuine issues of material fact with regard to the reasonableness and necessity of her claims. First, defendant argues that plaintiff's ongoing claims are questionable because she relies only on her own affidavit and on Emmer's conclusion—reached in October 2008, three months after the accident and one and one half years before the court's final ruling—that ongoing attendant care was necessary as a result of the 2008 accident. But defendant offers no authority to suggest that, as a matter of law, such evidence was insufficient to support plaintiff's claims. Critically, defendant offered no expert or other opinion to rebut plaintiff's claimed need for services. Although defendant was denied the opportunity to conduct an independent medical examination of plaintiff, it could have submitted plaintiff's existing records for expert evaluation, as plaintiff suggests. Quite simply, defendant offered *no* evidence to counter plaintiff's and Emmer's assertions of continuing disability.

Defendant also incorrectly asserts that Emmer's opinion was not based on any objective findings. To the contrary, plaintiff was indeed diagnosed with a likely head injury when she was treated by Beaumont Hospital physicians after the accident, and an MRI of October 17, 2008, revealed "[m]ild straightening of the normal cervical lordosis, attributed to muscle spasticity," some cervical disc bulging, and some disc herniation, causing "ventral impression upon the thecal sac without cord compression." Defendant offered no evidence to support its assertion that the diagnostic tests and diagnoses (including what those tests and diagnoses *did not* show) were inconsistent with Emmer's conclusion, after an examination, that plaintiff had suffered "high cervical-skull based soft tissue injury" caused when her head hit the windshield. Defendant also offered no authority to support its suggestion that Emmer could not rely on plaintiff's medical records and current symptoms to conclude that she had been in need of attendant care services from the date of the accident.

Defendant lastly argues that discrepancies and credibility issues inherent in plaintiff's own statements and testimony were sufficient to create genuine issues of fact for trial. Again, we disagree. Defendant claims, for example, that plaintiff changed her story about whether her head hit the windshield during the accident and whether she lost consciousness. Contrary to defendant's initial assertion, medical records from both of her July 2008 visits to the emergency room reflect that her head broke the windshield. The July 9, 2008, nursing record includes the notation, "head broke windshield." And the July 25, 2008, physician record notes, "hit the [right] side of her head . . . glass shattered." Defendant's argument that the July 9, 2008, record included no mention of plaintiff's head hitting the windshield is therefore clearly mistaken. With regard to whether plaintiff lost consciousness during the accident, defendant emphasizes that the July 9, 2008, hospital record states that plaintiff did not suffer loss of consciousness. But plaintiff testified at her June 16, 2009, deposition that she did not remember getting out of the car; she only remembered being in the ambulance and waking up at the hospital. As defendant suggests, this may amount to a genuine discrepancy. But any discrepancy in this regard was minor, particularly given that plaintiff admitted at her deposition that she remembered her head hitting the windshield and the paramedics speaking to her. Indeed, plaintiff never actually stated during the deposition that she *did* lose consciousness. She merely testified that she had no specific memory of getting out of the car and "woke up" in the hospital after the ambulance ride. We cannot conclude that these minor differences in plaintiff's recollections of the accident were sufficient to establish a genuine issue of material fact necessitating trial.

Defendant also observes that plaintiff told Emmer that she could not recall specific details of the accident beyond her memory that her vehicle was hit by a car that ran a yield sign, that she looked back at her son after her head hit the windshield, and that she was then in the hospital. Yet defendant claims that plaintiff "clearly remembered the collision when she initially described it to emergency room personnel." Again, any discrepancy in this regard was quite minor and was insufficient to create a genuine issue of fact for trial. We note that the only additional information in the emergency room records was plaintiff's apparent memory, as noted by the physician (but not actually attributed to plaintiff), that she was "restrained" by a seatbelt and that the airbag deployed.

Finally, defendant notes that plaintiff denied "ever hav[ing] memory problems before [the 2008 accident," but complained of difficulty with concentration and memory after the 1996 accident. Defendant also stresses that plaintiff reported to Emmer that, within 48 hours after the accident of July 9, 2008, she was experiencing intermittent ear pain, blurred vision, and depression, but she did not report these symptoms to hospital personnel on either July 9, or July 25, 2008. Defendant appears to be correct on these points. Still, we are not convinced that such inconsistencies were sufficient to defeat plaintiff's motion for summary disposition. In particular, none of the inconsistencies dealt with to plaintiff's consistent, primary complaints of head and neck pain, which are the central reasons she claims to require attendant care. Even more significantly, as noted earlier, defendant has failed to sufficiently rebut plaintiff's motion for summary disposition or show that the evidence offered by plaintiff was insufficient to support her motion as a matter of law. For example, defendant correctly notes that in *Nasser*, the circuit court erred by granting summary disposition for the plaintiff under MCR 2.116(C)(10) because questions of fact remained to be resolved at trial. *Nasser*, 435 Mich at 57. But the facts of *Nasser* are distinguishable from those of the instant case. In *Nasser*, the insurer presented a medical expert's opinions that the plaintiff was "able to return to work and in need of no further

treatment" and that "all three instances of hospitalization and much of the treatment and testing performed on [the] plaintiff had been unnecessary." *Id.* at 38-39. Defendant provided no such rebuttal evidence here.

Under the particular circumstances of this case, we cannot conclude that defendant bore its burden of establishing the existence of a genuine issue of material fact for trial. See *St Clair Medical*, 270 Mich App at 264. Instead, we must agree with the circuit court's observation that defendant ignored the medical evidence to its own detriment by continuing to focus primarily on the issue of priority, thus resulting in a paucity of evidence to challenge plaintiff's medical claims by the time of the hearings on plaintiff's motion for summary disposition. Indeed, most of defendant's arguments merely invited the trier of fact to speculate that the expenses claimed by plaintiff may not have been reasonable or necessary. "[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Companies*, 199 Mich App 482, 486; 502 NW2d 742 (1993). For these reasons, and under these particular facts, we conclude that the circuit court did not err by granting summary disposition in favor of plaintiff.[1]

Affirmed. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

[1] Defendant also argues for the first time on appeal that the circuit court erred because it failed to make separate findings of reasonableness and necessity with regard to each of plaintiff's individual claimed expenses. However, defendant never requested such findings in the court below. Further, we fail to see how such findings would have advanced defendant's position in this case, particularly given defendant's overall assertion that plaintiff's ongoing injuries, if any, were unrelated to the accident. The expenses claimed by plaintiff were relatively straightforward; they consisted of fairly standard medical and diagnostic bills, minimal medical mileage and prescription costs, and daily attendant care services at a rate within the reasonable range established by the expert affidavit plaintiff provided. Defendant never argued that any of these particular charges were unreasonable.