Court of Appeals, State of Michigan

ORDER

Jory Magness v Frankenmuth Mutual Insurance Co

Docket No. 287369

LC No. 03-075462-NF

Kurtis T. Wilder
Presiding Judge

Peter D. O'Connell

Michael J. Talbot
Judges

On the Court's own motion, the January 19, 2010 opinion is hereby AMENDED. The opinion is amended to correct the following clerical error: the words "we agree" will replace the words "we disagree" in the last paragraph of page 3.

In all other respects, the January 19, 2010, opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

FEB 05 2010
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

JORY MAGNESS,

Plaintiff-Appellant/Cross-Appellee,

v

FRANKENMUTH MUTUAL INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant,

and

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
January 19, 2010

No. 287369
Genesee Circuit Court
LC No. 03-075462-NF

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendants, Frankenmuth Mutual Insurance Company ("Frankenmuth") and Auto Club Insurance Association ("ACIA"), in this no-fault insurance dispute. Frankenmuth cross-appeals the order setting aside the trial court's previous dismissal of plaintiff's claims pursuant to MCR 2.504(B), for plaintiff's failure to comply with various court rules and orders. We affirm in part, reverse in part and remand to the trial court.

Plaintiff first argues that the trial court erred by granting summary disposition in favor of defendant, Auto Club Insurance Association ("ACIA") because ACIA received written notice of plaintiff's injuries within a year of the accident. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Although it is not clear from the record under what rule the trial court granted summary disposition, we conclude that the appropriate subrule to apply is MCR 2.116(C)(7) because the motion was based on a violation of the statute of limitations provided in MCL 500.3145(1). See *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). In reviewing an order of dismissal pursuant to MCR 2.116(C)(7), we consider the plaintiff's well-pleaded factual allegations and

construe them in the plaintiff's favor, unless specifically contradicted by any documentary evidence that is submitted. *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994); *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002).

When construing a statute, "our purpose is to discern and give effect to the Legislature's intent." *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). We first examine the plain language of the statute, and if it is unambiguous, must enforce the statute as written. *Id*. Specifically, MCL 500.3145(1) provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefore, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

Plaintiff contends ACIA received three separate, written notices of plaintiff's claim. First, plaintiff suggests that the police report, which ACIA received less than a month following the accident, constitutes sufficient written notice. The report indicated that plaintiff was injured and transported to the hospital by ambulance. However, this document does not constitute sufficient notice under the plain language of the statute because plaintiff or someone on plaintiff's behalf did not submit the police report to ACIA. Rather, ACIA obtained the police report on its own initiative. Further, the police report did not indicate the nature of plaintiff's injury. Therefore, it did not constitute sufficient notice of plaintiff's claim under MCL 500.3145(1).

Next, plaintiff asserts that ACIA sent out an investigator, who photographed plaintiff's vehicle on March 5, 2001. However, the activities of the investigator are insufficient to constitute notice of plaintiff's injury because it was performed by ACIA with regard to the insurance claim submitted by plaintiff's mother for the collision damage, and provided no reference or indication of plaintiff having suffered an injury.

As its third example, plaintiff argues that ACIA received written notice of plaintiff's injury on February 28, 2001, when an ACIA representative completed an on-screen report regarding the accident. The on-screen report included plaintiff's name and address and indicated that plaintiff was injured and transferred to the hospital by ambulance. It lists plaintiff's injuries as a left shoulder bone bruise and vaguely references the existence of an additional injury, but

does not specify any detail. The on-screen report was generated when plaintiff's mother telephoned ACIA to report the accident and spoke with an ACIA representative.

Relying on this Court's decision in *Walden v Auto Owners Ins Co*, 105 Mich App 528; 307 NW2d 367 (1981), plaintiff maintains that his mother's verbal communication with ACIA on his behalf, and which resulted in a written record of plaintiff's injury, was sufficient to meet the statutory notice requirement. In *Walden*, the plaintiff verbally related the facts of the accident to his insurance agent, who completed an "Auto Accident Notice" form and transmitted it to the defendant insurance company. *Id*. at 530. The panel in *Walden* held that although the written notice was not transmitted from the plaintiff to the defendant, the plaintiff was determined to have complied with the statute because the plaintiff's insurance agent acted on the plaintiff's behalf in providing notice to the defendant. *Id*. at 534.

ACIA contends that the plain language of the statute requires plaintiff or someone on plaintiff's behalf, submit a written notice. Further, ACIA argues that plaintiff is attempting to improperly interpret and expand the clear statutory language to permit an insurer to generate and provide written notice to itself.

We conclude that the on-screen report constituted written notice because ACIA acted in conjunction with plaintiff's mother to create a written notice. ACIA presumes that an insurance company cannot act on behalf of the insured under the statute. However, the language of the statute does not suggest that this is impermissible. Although ACIA's agent was not required to create a written record of plaintiff's injury, because he did generate a document, written notice was provided on plaintiff's behalf sufficient to comply with the statutory requirements.

However, we find that plaintiff's claim is nevertheless barred because the written notice did not elucidate or provide information on the nature of plaintiff's injury. Plaintiff is seeking payment of medical expense benefits based solely on a traumatic brain injury. However, the on-screen report only delineated that plaintiff suffered a left shoulder bone bruise. Although the report did include a notation that plaintiff suffered additional injuries, there was no indication or information that plaintiff suffered a brain injury or head trauma. Consequently, because plaintiff did not provide any information or indication pertaining to the nature or type of injury incurred to ACIA, the notice provided was inadequate pursuant under MCL 500.3145(1) and summary disposition was properly granted.[1]

Next, plaintiff argues that the trial court's grant of summary disposition in favor of Frankenmuth was in error. We disagree. The record is unclear regarding whether summary disposition was granted under MCR 2.116(C)(8) or (C)(10). Summary disposition under either MCR 2.116(C)(8) or (C)(10) presents an issue of law that is reviewed de novo. *Ormsby v*

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[1] ACIA also contends that summary disposition was proper on the alternative ground of collateral estoppel. However, because we affirm the trial court's grant of summary disposition under MCR 2.116(C)(7), we need not address this issue.

Capital Welding, Inc, 471 Mich 45, 52; 684 NW2d 320 (2004) (internal quotation marks and citation omitted). Because the parties rely on documentary evidence, we will apply the standard of review applicable to a motion brought in accordance with MCR 2.116(C)(10). *Krass v Tri-County Security, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999). "A motion made under MCR 2.116(C)(10) tests the factual support for a claim." *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007) ("*Naylor*"). The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties, to the extent that the material would be admissible as evidence, in a light most favorable to the nonmoving party. *Id* at 56. The motion should be granted only "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Specifically, plaintiff contends that the trial court incorrectly determined that the treatment provided to plaintiff was unlawfully rendered based on the authority of *Naylor*. In accordance with MCL 500.3107(1)(a), personal protection insurance benefits are payable for all "reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." In addition, MCL 500.3157 provides: "A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the products, services and accommodations rendered." The *Naylor* Court read § 3107 in conjunction with § 3157 as requiring that only lawfully rendered treatment which encompasses compliance with relevant licensing requirements, is subject to payment as a no-fault benefit. *Naylor*, *supra* at 57.

In *Naylor*, the plaintiff allegedly suffered a brain injury, *id.* at 53, and was treated in the program offered by The Healing Place and New Start, Inc. ("New Start"), where he received various services as part of an integrated treatment for brain injury, psychiatric disorders, and substance abuse. *Id*. at 53-54. The plaintiff's claims were submitted for payment of first-party, no-fault automobile personal protection insurance benefits for the services rendered by New Start, which the defendant insurance company denied. *Id*. at 53-54. The trial court granted summary disposition because New Start and The Healing Place were not licensed to perform the provided services. *Id*. at 55.

The panel in *Naylor* concluded that the services rendered were in the nature of psychiatric services and adult foster care, which New Start and The Healing Place were not licensed to perform. *Id*. at 57-58. Specifically, this Court held that "on the existing record and as a matter of law, that the services provided by plaintiffs were not lawfully rendered, MCL 500.3157, because New Start [and] The Healing Place . . . were not licensed to perform the services rendered." *Id.* at 58. This Court noted that it is the plaintiff's burden to prove that the services provided were compensable. *Id*. at 57. Further, this Court ruled that "[i]f both the individual who provided services and the institution to which the individual belonged were each required to be licensed, and either was not, then the lawfully rendered requirement is not met." *Id*. at 60-61.

The facility at the center of the controversy in both *Naylor* and this case are identical. In addition, the same issue is involved, namely, whether the facility's services were lawfully

rendered. It is undisputed that neither The Healing Place nor New Start was licensed as either a psychiatric facility or an adult foster care facility. However, the evidence showed that plaintiff repeatedly met with a psychiatrist, neuropsychologist, and psychologist as part of his treatment plan and was involved in individual psychotherapy, cognitive rehabilitation, cognitive remediation, and group psychotherapy. Plaintiff argues that Frankenmuth did not provide any evidence to show that The Healing Place and New Start had been required to possess licensure as an adult foster care facility or as a psychiatric care facility by the relevant state agencies.

While not binding, federal court decisions interpreting state law can provide this Court with guidance. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 604; 673 NW2d 111 (2003); *Duskin v Dep't of Human Services*, 284 Mich App 400, 409 n 3; ___ NW2d ___ (2009). The issues pertaining to this case and involving several of the same defendants, was addressed in detail in *Allstate Ins Co v Frankel*, 259 FRD 274 (ED Mich, 2009). In *Allstate*, the federal court undertook an extensive review of Michigan case law and statutory language in addressing the issue of whether:

> [T]he defendant facilities . . . were required to be licensed as psychiatric units and/or adult foster care facilities in order for their services to be considered "lawfully rendered" within the meaning of Michigan's No-Fault Statute, MCL § 500.3101 *et seq.* [*Id.* at 276.]

Finding that the *Naylor* decision was "not dispositive," *id*. at 277, the court determined, in relevant part:

> (1) Defendants are entitled to no-fault insurance benefits: (a) if the services they provided were reasonably necessary for the insureds' care, recovery, or rehabilitation; and (b) the services provided were: (i) within the scope of the [facilities'] operating licenses; (ii) rendered by individuals who did not need a license to provide the services; or (iii) rendered by individuals who had the requisite license.
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> (2) Allstate must pay the individual or facility who lawfully rendered the services. For example, if an individual lawfully rendered services that the facility itself could not render because it required a license to perform that service, Allstate must pay the individual who lawfully rendered services, not the facility. [*Id.*]

In explaining its ruling and reasoning, the court relied on several previous decisions by this Court, specifically referencing *Cherry v State Farm Mut Auto Ins Co*, 195 Mich App 316; 489 NW2d 788 (1992), which:

> read § 500.3107(1)(a) in conjunction with § 500.3157 and concluded that "the Legislature intended that only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit. *Cherry*, 195 Mich App at 319-20. This language in *Cherry* did not impose a licensing requirement in all instances; it merely states that licensing requirements must be met if a license is required to provide certain services.

> [*Naylor*] shed light on the *Cherry* holding and interpreted § 500.3157 to mean "[I]f both the individual and the institution were required to be licensed and either was not, the 'lawfully render[ed]' requirement would be unsatisfied." [*Naylor*], 277 Mich App 15 59. In [*Naylor*], the court held that the services performed at THP and New Start were not lawfully rendered because THP was not licensed as a psychiatric unit, and New Start was not licensed as an adult foster care facility. *Id.* at 57-58. [*Allstate, supra* at 279.]

Notably, the court found that the reading by defendant Allstate of *Cherry* and *Naylor*, as requiring both a facility and the practitioners within it to both be licensed before services can be reimbursed as "lawfully rendered" to be too narrow a construction. *Id.* at 279-280. In addition, the court found that such an interpretation would render this Court's ruling in *Hofmann v Auto Club Ass'n*, 211 Mich App 55; 535 NW2d 529 (1995), "a nullity." *Id.* at 280.

> Citing *Hofmann*, the court noted, in relevant part:
>
> [T]he Michigan Court of Appeals said *Cherry's* holding does not mean a service is unlawfully rendered, and not subject to payment as a no-fault benefit, simply because it is excluded from the scope of a service provider's field of practice. *Hofmann*, 211 Mich App 15 64-65. The court examined each of the services rendered to determine whether it was within the statutory scope of the service provider's license. If a service was outside the scope of the license, it could still be considered lawful and payable as a no-fault benefit as long as it constituted an allowable expense under § 500.3107 of the no-fault act. *Id.* at 65-66.
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> > Nothing in the language of § 500.3107 suggests that a product or service must be provided by a licensed health-care provider in order to constitute an allowable expense. To the contrary, the focus of § 500.3107 is on whether a given product or service is "reasonably necessary . . . for an injured person's care, recovery, or rehabilitation," not whether it was provided by a licensed health-care provider.
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> *Id.* at 66; see also *Psychosocial Services Assoc, PC* [*v State Farm Mut Auto Ins Co*, 279 Mich App 334, 338-339; 761 NW2d 716 (2008)] (services might be lawfully rendered if they are excluded from the scope of the provider's licensed field, but does not constitute the practice of another field without a license) (citing *Hofmann*, 211 Mich App at 65). [*Id.* at 280.]

In determining that the ruling in *Hofmann* precluded a finding that this Court's decision in *Naylor* was dispositive, the court stated:

> Whether Defendants are entitled to no-fault insurance benefits depends on the services provided Allstate's insured. Cases such as these are entirely fact specific, and the [*Naylor*] decision does not specify what services the plaintiff there . . . received. Nor did [*Naylor*] consider services rendered by an individual connected to a facility providing services. The Court cannot hold as a matter of law that the services provided Allstate's insureds were unlawfully rendered, simply because

> the Michigan Court of Appeals reached that conclusion concerning the services rendered to Mr. Naylor. [*Id.*]

In other words, given the fact-specific nature of these types of cases, the trial court should not have, pro forma, relied on the decision in *Naylor* without first having conducted a review involving a detailed analysis of the actual services rendered and determining whether they (a) were "reasonably necessity" in accordance with § 500.3107(1)(a) and (b) the services provided were "lawfully rendered" pursuant to § 500.3157. Therefore, we find it was error for the trial court to preclude the payment of any services based solely on the holding of *Naylor* without having conducted a more detailed analysis of the services rendered in accordance with the requirements of *Cherry* and *Hofmann.* As noted by this Court:

> Only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit. However, services might be lawfully rendered even if a particular service is "excluded" from the scope of the provider's licensed field: "The purpose of the licensing statute is not to prohibit the doing of those acts that are excluded from the definition of [the field of practice], but to make it unlawful to do without a license those things that are within the definition." An excluded activity would be considered unlawful if it constituted the practice of another field without a license. However, "merely because [certain] activities may constitute the practice of [one specialized field, or even several], . . . does not thereby inevitably mean that they are not within the scope of [another]." Indeed, the P[ublic] H[ealth] A[ct] provides that its provisions "shall be liberally construed for the protection of the health, safety, and welfare of the people of this state." [*Psychosocial Services Assoc, supra* at 338-339 (citations and internal quotation marks omitted).]

Accordingly, we remand to the trial court for further review of the actual claims to determine whether the services provided were "lawfully rendered."

Plaintiff also argues that Frankenmuth lacks statutory standing to raise the licensure issue as a ground for summary disposition. However, because plaintiff failed to raise this issue in the trial court it is unpreserved and we decline to address it. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007).

Finally, defendant Frankenmuth contends on cross-appeal that the trial court abused its discretion in reinstating this case following a dismissal pursuant to MCR 2.504(B). We review for abuse of discretion a trial court's decision concerning a motion to reinstate an action. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 138; 624 NW2d 197 (2000). In this instance, the trial court reinstated plaintiff's case after having determined the initial sanction of dismissal for non-compliance with the court's orders and rules was too "harsh a remedy" that deprived plaintiff of "her day in court." Reinstatement was made contingent upon plaintiff's payment of defendant's attorney fees and costs, which occurred. This Court has previously ruled that dismissal with prejudice of a claim "is a harsh remedy" and should be "applied only in extreme circumstances." *North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 792 (1986). In addition, it is well settled that "[o]ur legal system favors disposition of litigation on

the merits." *Vicencio v Ramirez,* 211 Mich App 501, 507; 536 NW2d 280 (1995). As discussed by our Supreme Court:

> Mindful of the fact that dismissal is a harsh remedy to be invoked cautiously, the trial court should evaluate the length, circumstances, and reasons for delay in light of the need of administrative efficiency and the policy favoring the decisions of cases on their merits, considering among other factors: 1) the degree of the plaintiff's personal responsibility for the delay, 2) the amount of prejudice to the defendant caused by the delay, 3) whether there exists a lengthy history of deliberate delay, and 4) whether the imposition of lesser sanctions would not better serve the interests of justice. [*North, supra* at 662 (citations omitted).]

We do not find that the trial court abused its discretion in reconsidering its dismissal of plaintiff's case and reinstating the claims. As noted, costs were assessed and paid to compensate defendant. As such, any prejudice to defendant was alleviated and because the trial court evidently believed that reinstatement of the case would better serve the interests of justice, we cannot find an abuse of discretion.

Affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot