STATE OF MICHIGAN

COURT OF APPEALS

HEALING PLACE, LTD., HEALING PLACE AT NORTH OAKLAND MEDICAL CENTER, ANOTHER STEP FORWARD, NEW START, INC., and MITCHELL DITTMAN, Guardian of LINDA WALLACE, a legally incapacitated individual,

Plaintiffs-Appellants,

v

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, a Michigan Insurance Corporation,

Defendant-Appellee.

UNPUBLISHED
March 15, 2007

No. 272438
LC No. 05-063954-NF

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's grant of summary disposition to defendant in this action involving the reduction of no-fault benefits paid by defendant insurer to plaintiff healthcare providers on behalf of plaintiff Linda Wallace.[1] We reverse and remand for proceedings consistent with this opinion.

Wallace sustained various serious injuries,[2] including a traumatic brain injury, in a motor vehicle accident[3] on July 17, 1997.[4] The accident occurred in Ohio, and Wallace was treated in a

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[1] DOB 4/22/64.

[2] The other injuries included multiple lacerations, bruises, and contusions, a right hip fracture, a right femur fracture, and a jaw injury, but the closed head injury is the most relevant to these proceedings.

[3] The accident involved only one vehicle. The driver and front seat passenger died as a result of their injuries. Wallace was the back seat passenger.

[4] Wallace was injured in a second accident on December 14, 1999. In that accident her head
(continued…)

hospital there for eleven days, and then was transferred to a hospital nearer her home in Michigan. She was discharged from inpatient treatment on August 13, 1997, and for the following four years was treated in various inpatient and outpatient programs. On February 12, 2001, Wallace was admitted to the hospital program of The Healing Place (THP), a subsidiary of New Start (NS); defendant paid $1250 per day for this program. Roman Frankel, Ph.D. and Executive Director of THP, describes THP as a "dual-diagnosis program providing services to patients with Brain Injury Trauma and Psychiatric disorders." On April 2, 2002, Wallace was transitioned from the hospital program to the apartment program, and THP began billing defendant $500 per day.

Late in 2003, defendant scheduled three independent medical examinations of plaintiff: Dr. Norman Fichtenberg completed his evaluation on November 7, 2003; Dr. Elliott Luby completed his examination on October 29, 2003; Dr. Jennifer Doble completed her examination on November 12, 2003. Defendant did not cease payment of Wallace's medical expenses, but did decrease the amount paid, apparently based on the three medical examinations. As of January 18, 2005, when plaintiffs filed the complaint in the underlying matter, plaintiffs allege a total of $213,708 in unpaid reasonable medical expenses had accrued.

Plaintiffs' complaint alleged breach of contract for defendant's failure to pay some medical expenses, and requested a declaratory judgment confirming defendant's obligation to pay continuing no-fault benefits. Relevant to this proceeding, defendant asserted in its answer that the claims were barred because they were not reasonable. Defendant filed a motion to compel Wallace to submit to an independent medical examination. The court granted the motion, and Dr. Doble completed her second examination of Wallace on September 15, 2005.

Dr. Doble stated in her 2005 report:

> My last IME I had recommended that the patient be in a program such as Eisenhower Center[5] where the patient's [sic] are employed within the context of the program and then progress to community level employment. It is not mentioned in the records that I reviewed from New Start that there is even such sheltered work program available through their programming. Again I would recommend that the patient be in a program such as mentioned previously that provides sheltered work programming for the immediate future and a progression to community based employment within 1 year.

On December 12, 2005, defendant filed a motion for summary disposition under MCR 2.116 (C)(10), asserting there existed no genuine issue of material fact as to the appropriateness of Eisenhower Center as a treatment option for Wallace.

To begin the motion hearing, the trial court summarized the parties' positions:

(…continued)

struck the steering wheel, and she suffered three fractured ribs as well as contusions of the left knee and elbow. There was apparently a third accident in March, 2003, but no details are included in the record.

[5] Eisenhower Center's rate is $275 per day, but not all costs are inclusive.

> The Defendant argues that Plaintiff's claim should be dismissed, because the law allows a no fault insurer to choose the least expensive adequate means of fulfilling the statutory obligation to provide for the injured person's reasonable and necessary care, recovery or rehabilitation and they refer me to the Kitchen vs. State Farm case.
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> . . .
>
> The Plaintiff has responded by asserting fact issues exist as to the reasonableness and the necessity of the treatment provided to Miss Wallace by her care providers, in that there is no legal authority that allows insurers to arbitrarily set its reimbursement rate for medical services at the lowest conceivable rate.
>
> . . .
>
> Defendant has replied by asserting it has produced evidence that the Eisenhower Center would be appropriate for Miss Wallace at this point . . . and the Plaintiff has failed to refute that evidence.

After hearing arguments, the court noted that "[t]he issue before the Court is whether the alternative program offered by Defendant for Linda Wallace is reasonable." And the court concluded:

> Based on the evidence that has been presented, I'm satisfied that summary disposition here in the Defendant's favor is appropriate, because I find that the Plaintiff has failed to provide any timely efforts to refute Dr. Doble's testimony in her recent deposition that Wallace no longer needs THP for its dual licensure program and that she needs a less intensive program like Eisenhower Center.

Plaintiffs filed a timely motion for reconsideration, arguing that the court incorrectly applied the standard of review, accepted defendant's unsupported factual allegations, improperly placed the burden of proof on the plaintiffs, gave improper weight to the testimony of defendant's expert, granted the motion before discovery was completed, and incorrectly applied *Kitchen v State Farm, Ins Co*, 202 Mich App 55, 58; 507 NW2d 781 (1993).

Plaintiffs' argument for reconsideration rested on a report from neuropsychologist Dr. David Drasnin. Dr. Drasnin examined Wallace in February, 2006, but the report was not completed until March 28, 2006. Plaintiffs asserted the report was new evidence. The trial court disagreed, finding that because plaintiffs could have informed the trial court at or before the motion hearing that another examination had been performed, although the report was not then available, the report was not new evidence. The trial court found that it did not abuse its discretion in denying a motion that rested on a legal theory and facts that could have been pled or argued before the original order. *Charbeneau v Wayne Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

The court added that even if it did consider the new evidence, the outcome would not change: "even if Plaintiff had raised this issue with the court at the appropriate time, Dr. Drasnin's report merely states that Ms. Wallace's continued participation in her current rehabilitation program *is advised*, not that Ms. Wallace should or must remain in the same program." [emphasis in original]

Plaintiffs argue on appeal that the trial court incorrectly applied the legal standard for a motion brought under MCR 2.116(C)(10), that the trial court erred in finding no genuine issues of material fact, and that that trial court's ruling impermissibly gives no-fault insurers authority to direct the medical care and treatment of their claimants.

We find that the dispositive issue here is whether summary disposition for a defendant insurer is appropriate in a no-fault benefits action where a trial court concludes that a plaintiff claimant has failed to prove the reasonableness of challenged expenses. And we hold that it is not appropriate.

The trial court's decision essentially reads *Kitchen v State Farm, Ins Co*, 202 Mich App 55; 507 NW2d 781 (1993), to mean that a defendant no-fault insurer may decide the level of care that is necessary for a plaintiff claimant, and then choose the least expensive provider of that level of care. But that is not what *Kitchen* says.

In that case, this Court found that "as long as it [the insurer] satisfies its statutory obligation to pay for all reasonable charges incurred for those products, services, and accommodations reasonably necessary to meet [the claimant's] needs, defendant should be allowed to choose the least expensive adequate means of providing those items." *Kitchen, supra* at 58. While *Kitchen* does allow an insurer to choose the least expensive adequate means of providing necessary care, it does not allow an insurer to unilaterally determine what care is reasonably necessary. Even in light of *Kitchen*, it is clear that inquiry into reasonableness and necessity still must come before any pure cost analysis. See *Payne v Farm Bureau Ins*, 263 Mich App 521, 528; 688 NW2d 327 (2004) ("Thus [reading *Kitchen* with *Williams v AAA Michigan*, 250 Mich App 249; 646 NW2d 476 (2002)], it is obvious that resolution of the issue of reasonable accommodation is factually driven.")

Kitchen does not in any way undermine the fact that under the No-Fault Act, an insurer is liable for medical expenses that are reasonable and necessary. Here, because the services offered by THP and by EC differ, there is no simple comparison to be made between the two, but rather a more detailed inquiry is required to assess how the services offered match up to the needs of this patient. In addition, because the two providers use different fee structures, an inclusive approach at THP and a more a la carte approach at EC, the cost comparison is not a simple matter either. The evidence the trial court relied on in granting summary disposition to defendant is not sufficient to resolve either the comparison of services offered or the cost comparison.

We further note that the trial court's statement that plaintiffs had not provided any evidence to rebut Dr. Doble's testimony is not entirely accurate. The trial judge stated "although the Plaintiff contends THP would be better, I'm satisfied there's no evidentiary support for that position, except for the reports from 1998 and 2003." Dr. Doble's testimony does not correlate on a point by point basis with the 2003 reports of the two other independent medical examinations. For example, Dr. Fichtenberg's report included the point that Wallace required the services of a licensed substance abuse program; Dr. Doble's report did not indicate that this treatment is no longer required. But EC is not a licensed substance abuse program.

The burden of proof of reasonableness lies with the plaintiff. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49-50; 457 NW2d 637 (1990). This Court has found that

> While the question whether expenses are reasonable and reasonably necessary is generally one of fact for the jury, 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. at* 55 (internal citations omitted)]

However, this Court also limited the capacity to decide the question as a matter of law to cases where the plaintiff has proved reasonableness: "Thus, if 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." *Id.* It does not follow that the trial court is free to decide the issue as a matter of law where a plaintiff has failed to prove reasonableness, or where a defendant has characterized an alternative as reasonable. Where such is the case, a trier of fact must decide what is reasonable.

Because the trial court here essentially decided as a matter of law that plaintiff had failed to prove the unreasonableness of defendant's suggested treatment option, the trial court overstepped its discretion. The question of reasonableness should have gone to a trier of fact. Summary disposition was inappropriate.

Likewise, we find that denial of plaintiffs' motion for reconsideration was improper. Plaintiffs supported the motion with a report prepared by one of Wallace's treating physicians, Dr. Drasnin. The trial court stated that this "report merely states that Ms. Wallace's continued participation in her current rehabilitation program *is advised*." Removing the "merely" from that assessment highlights the fact that Dr. Drasnin did recommend that Wallace remain in her current rehabilitation program.

The trial court also noted that because plaintiffs could have mentioned during the hearing on the summary disposition motion that this report would be forthcoming, it did not qualify as new evidence. However, the report was not available until after the trial judge issued the order granting defendant's motion, so the trial court could have considered it as new evidence. Even if the trial court had correctly found there was no genuine issue of material fact at the time of the summary disposition motion hearing, Dr. Drasnin's report supports plaintiffs' claim that there are questions of fact as to the reasonableness of EC, and the motion for reconsideration should have been granted.

The trial court characterized the issue before it in the motion hearing as: "whether the alternative program offered by Defendant for Linda Wallace is reasonable." The basis of our opinion here is that we find that the trial court framed the issue too narrowly. A trial court may not, on a summary disposition motion that will result in a change in the character of care provided to a no-fault claimant, limit its inquiry to the adequacy of a treatment option suggested by the no-fault insurer, relying only on the opinion of one medical examiner, hired by the insurer. If a trial court might do so, the insurer would have far more authority to direct patient care than the No-Fault Act, or even *Kitchen,* allows. To hold otherwise would give no-fault insurers unacceptable discretion to unilaterally make appreciable changes in the character of a patient's care under the guise of cost-effectiveness.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter