STATE OF MICHIGAN

COURT OF APPEALS

Estate of JOSEPH J. FAVAZZA, JR.

GRACE NORDSTROM, Personal Representative for the Estate of JOSEPH J. FAVAZZA, JR.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 17, 2011

No. 294705
Saginaw Circuit Court
LC No. 06-062957-NF

Before: MURPHY, C.J., and WHITBECK and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals the order of the circuit court denying her motion for summary disposition and granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

The decedent, Joseph Favazza, Jr., was injured in 1998 when the vehicle he was driving struck a cement barrier at high speed. Favazza believed that his chest impacted the steering wheel, and testified that he experienced difficulty breathing while in the emergency room following the accident. After his release from the hospital, and up until his death, Favazza went to the emergency room a number of times when he found himself out of breath after exertion. Although Favazza testified that he did not have difficulty breathing after exertion prior to his accident, there is significant evidence that at the time he suffered from chronic obstructive pulmonary disease (COPD) and emphysema from years of smoking. The parties do not dispute that Favazza suffered from COPD, emphysema and had phrenic nerve damage, the latter of which was caused by the auto accident.

At issue before the trial court was whether the phrenic nerve damage caused or impacted Favazza's severe breathlessness. Specifically, plaintiff argued that the medical evidence established that the functioning of Favazza's diaphragm was negatively impacted when his phrenic nerve was injured in the accident, and that this underlay the breathlessness for which he

sought treatment. Defendant, on the other hand, argued that it paid Favazza's medical bills until his physician stated that his breathlessness was not related to the accident. Defendant asserted that his treatment was by a pulmonologist for his COPD and emphysema, and that there was no treatment rendered for a phrenic nerve condition.

The trial court granted defendant's motion for summary disposition, concluding that plaintiff failed to present expert medical testimony adequate to support a finding that Favazza's breathing difficulties arose out of the automobile accident. The trial court noted that one expert (Hyzy) stated that there was a possibility of muscle weakness as a result of the trauma of the accident, but concluded that this was speculation and conjecture insufficient to survive summary disposition. The trial court also noted that Summer, a treater of Favazza's, stated that the condition was a progression of COPD. Subsequently, the trial court denied plaintiff's motion for reconsideration, concluding that an affidavit that plaintiff presented could have been presented prior to the summary disposition motion, and that plaintiff did not otherwise timely object to evidence submitted by defendant.

II. ANALYSIS

We review de novo a trial court's decision on a motion for summary disposition. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When considering a motion brought under MCR 2.116(C)(10), the court views the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The no-fault insurance act, MCL 500.3101 *et seq.*, requires insurers to pay PIP benefits to those who sustain an injury "arising out of the . . . use of a motor vehicle as a motor vehicle." MCL 500.3105(1). Once an insurer is liable under MCL 500.3105, it must pay the expenses for "reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a); see *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 532; 697 NW2d 895 (2005). "Arising out of" does not mean proximate cause in the strict legal sense, and does not require a finding that the injury was directly and proximately caused by the use of the vehicle. *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 585-586; 751 NW2d 51 (2008).[1] However, the relationship must be more than merely incidental or

[1] We recognize that the Supreme Court has grappled with the statement in *Scott* that "arising out of" means "almost any causal connection or relationship will do." *Scott*, 278 Mich App at 585-586, quoting *Bradley v Detroit Automobile Inter-Ins Exch*, 130 Mich App 34, 42; 343 NW2d 506 (1983) and *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 313-314; 282 NW2d 301

fortuitous. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 8; 423 NW2d 913 (1988), citing *Thorton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986). Whether an injury arose from the use of a motor vehicle depends on the unique facts of each case and must be made on a case-by-case basis. *Kochoian*, 168 Mich App at 9.

We first point out that there is no dispute between the parties that the phrenic nerve damage was caused by the 1998 accident. The dispute lies in whether the injury—severe shortness of breath—was caused by the phrenic nerve damage, or whether it was solely attributable to Favazza's COPD and emphysema. On this latter point, the record consists in large part of conflicting medical evidence. The pulmonologist who began treating Favazza for breathlessness in February 1999 indicated in 2004 that this condition was caused by COPD and emphysema, which were not the result of an automobile accident. Another doctor wrote defendant in January 2006, stating that he believed that very severe emphysema was the reason that Favazza experienced shortness of breath. This doctor opined that Favazza's lung condition was not related to the auto accident, but that the accident may have coincided with the time when the emphysema worsened. A specialist in pulmonary and critical care medicine at the University of Michigan Medical Center who evaluated Favazza for defendant testified that Favazza's phrenic nerve remained intact and that his diaphragm was functioning adequately. This doctor believed that Favazza's breathing and diaphragm issues resulted from severe COPD and emphysema.

However, a doctor who evaluated Favazza at the Mayo Clinic in April 2007 concluded that a phrenic nerve injury resulting in a loss of movement of the diaphragm, the COPD, and emphysema combined to give Favazza difficulty breathing. Based on Favazza's report that he did not have difficulty breathing before the 1998 accident and had chest injuries in the area of the phrenic nerve during the accident, this doctor concluded that the nerve was damaged at that time. The pulmonologist who began treating Favazza in February 1999, but who had not seen him in four years, reviewed the Mayo Clinic records and did not disagree with that doctor's diagnosis. Similarly, a neurologist who was treating Favazza in April and August 2006 believed that Favazza's shortness of breath stemmed from phrenic nerve injury caused by the automobile accident. This doctor further opined that the severity of his difficulty breathing was beyond what would be expected from COPD alone.

In light of this evidence, we conclude that the expert testimony evidences a genuine issue of material fact regarding whether Favazza's presenting complaint—breathlessness—was caused by his lung disease, by his non-functioning diaphragm related to nerves damaged in the 1998 accident, or by an interaction of both. The motor vehicle accident need only be one of the causes of the injury, as there may be other independent causes. *Scott*, 278 Mich App at 585. Thus, the court erred in granting summary disposition to defendant. However, summary disposition in favor of plaintiff is also unwarranted for the same reasons.

(1979). See *Scott v State Farm Ins*, 482 Mich 1074; 758 NW2d 249 (2008) (vacating in part this incorrect statement of law in *Scott*) and *Scott v State Farm Ins*, 483 Mich 1032, 1032-1033; 766 NW2d 273 (2009) (On reconsideration, vacating its prior order and denying leave to appeal). We need not address this issue for we do not rely on that statement from *Scott* for any part of our decision.

We have considered defendant's argument that Favazza's severe breathlessness was not a result of phrenic nerve damage, but from an exacerbation of his COPD and emphysema. For example, Favazza testified that he believed his Las Vegas hospitalization (the largest medical bill in dispute) resulted from "overdoing it" in the casinos. However, Favazza also testified that he never experienced such severe shortness of breath until after the accident. Thus, if a jury believes plaintiff's version of events, it could reasonably conclude that the accident caused—at least in part—the severe shortness of breath that required this and other hospitalization and treatments. In other words, even if we accept as true defendant's argument that phrenic nerve damage cannot be treated, that does not mean that the phrenic nerve damage did not in whole or in part cause Favazza to have more severe shortness of breath than he would have had if he suffered only from COPD and emphysema. And, if the jury makes such a finding, defendant would properly be held liable for the outstanding medical expenses since defendant admits that the phrenic nerve damage was caused by the accident. *Putmaker v Transamerica Ins Corp*, 454 Mich 626, 634; 563 NW2d 683 (1997).

Our conclusion, of course, does not foreclose defendant from arguing either that (1) Favazza's severe shortness of breath was caused only by the COPD and emphysema, not the phrenic nerve damage; or (2) that, to the extent the medical bills for treatment and care can be segregated between treatment for COPD and emphysema and any care or exams for phrenic nerve damage (for example, pulmonologist bills versus neurology bills), defendant is not responsible for the COPD and emphysema bills. We simply conclude that it is for the trier of fact to resolve these issues based on the conflicting evidence.

We affirm the denial of plaintiff's motion for summary disposition, reverse the grant of defendant's motion for summary disposition, and remand for further proceedings consistent with this opinion.[2] We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Christopher M. Murray

[2] In light of our analysis of the circuit court's handling of the underlying motion, we need not address whether it erred in denying the motion for reconsideration.