STATE OF MICHIGAN

COURT OF APPEALS

VICKI SZELESI and MEDICAL REHABILITATION PHYSICIANS, P.C. d/b/a MICHIGAN SPINE & PAIN, UNIVERSAL HEALTH GROUP, INC., and AMERICAN SURGICAL CENTERS I, INC., d/b/a AMERICAN SURGICAL CENTERS, Michigan Corporations, Plaintiffs-Appellees,	UNPUBLISHED April 10, 2014
v	No. 311279 Wayne Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	LC No. 07-731618-NF

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

In this no-fault insurance action, defendant appeals the trial court's ruling that granted damages to plaintiffs pursuant to MCL 500.3107 and MCL 500.3157. For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

A. FACTS

In June 2004, plaintiff Szelesi was involved in a car accident, and sustained injuries to her neck, shoulders, and back. In particular, she suffered from pain and a lack of mobility in these areas. From 2004 to 2005, Szelesi received medical treatment for these problems, most of which was paid for by defendant.

Szelesi's condition, however, did not improve, and she continued to suffer pain and limited mobility in her neck, back, and shoulders. In 2007, she visited Dr. Marvin Bleiberg, a

board-certified physician specializing in physical medicine and rehabilitation,[1] at Michigan Spine and Pain, an office where patients are evaluated and treated for various orthopedic and neurological problems.[2] Dr. Bleiberg examined Szelesi and recorded that she complained of pain in her back, neck, and shoulders, and exhibited a limited range of motion in her shoulders, perhaps due to problems with one of her rotator cuffs.[3] In addition to regular physical therapy, Dr. Bleiberg suggested that Szelesi undergo manipulations under anesthesia (MUA) to assist in her recovery. MUAs are a process by which a patient is given anesthesia and rendered unconscious, or nearly so, which allows a doctor or physical therapist to massage and stretch the patient's muscles without resistance from the patient. It appears that MUA is a generally accepted procedure, and not experimental: Blue Cross/Blue Shield covers certain MUA procedures, and MUAs possess their own CPT codes for an insurance provider's reference.[4]

Szelesi received MUA treatment from Dr. Bleiberg on three separate occasions at plaintiff American Surgical Centers[5] in November 2007. Dr. Bleiberg's post-procedure reports indicate that the MUAs reduced Szelesi's pain levels in her back and shoulders, and increased her mobility in both areas.[6]

However, the MUA treatments did not fully alleviate Szelesi's shoulder injuries—she still experienced pain in her shoulders and occasionally in her neck as well. At the suggestion of Dr. Bleiberg, she visited a radiologist in November 2007, who performed a variety of radiological imaging tests on her. The test results indicated that Szelesi had a hole in her right rotator cuff. In December 2007, she took her results to Dr. Jerome Ciullo, a specialist in shoulder surgery. He agreed that she had a hole in her rotator cuff, based on his examination of the test results and his own assessment of her right shoulder. Dr. Ciullo recommended surgery to correct the problem. Szelesi did not act on his recommendation until November 2009, and Dr.

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[1] Dr. Bleiberg described "physical medicine" as "a combination of conservative care, orthopedics and conservative care neurology. . . ."

[2] Dr. Bleiberg is the founder and medical director of Michigan Spine and Pain.

[3] Dr. Jerome Ciullo, plaintiffs' expert witness on shoulder surgery, described a rotator cuff as being the "bump of bone" located on the shoulder blade. He stated that the "muscles that go from your shoulder blade to this bump of bone, when they tighten they'll rotate your arm . . . they're a set of muscles that circle the shoulder, which makes it a cuff, and they move the shoulder."

[4] In addition, the record includes a letter from the American Medical Association, which states that MUAs of the spine, shoulder joint, and hip joint "do not represent experimental or emerging technology." Dr. Bleiberg also testified that Medicare covers MUA procedures; and defendant's witness Dr. Steven Geiringer stated that MUAs were not an experimental treatment for specific injuries, but disputed that plaintiff Szelesi had such injuries.

[5] American Surgical Centers is a separate facility used by Dr. Bleiberg to treat his patients. Dr. Bleiberg testified that he had no ownership interest in the entity.

[6] Szelesi and Dr. Bleiberg later testified to the same.

Ciullo then performed the surgery. After the operation, Szelesi fell and re-injured herself, which required Dr. Ciullo to repeat the shoulder surgery in April 2010.

When defendant received billing statements for Dr. Bleiberg's MUA-related services from Michigan Spine and Pain, and American Surgical Centers, it refused to pay either party on the basis of its own audit of the services, which concluded that they were not necessary to assist in Szelesi's recovery. Defendant also refused to compensate Dr. Cuillo for the shoulder surgery on the same basis.

B. PROCEDURAL HISTORY

Plaintiffs then sued defendant for the payments in the Wayne Circuit Court, which conducted a bench trial in August 2010.[7] The trial involved extensive deposition testimony from multiple doctors on the efficacy and necessity of the two procedures at issue: (1) MUAs and (2) the shoulder surgery. Plaintiffs' experts (Drs. Bleiberg and Ciullo) testified that both procedures were necessary and effective, in that Szelesi exhibited improvement after each procedure was performed. They also claimed that the underlying injuries in her neck, shoulder, and back were likely the result of her 2004 accident.[8] By contrast, defendant's experts asserted that both treatments were unnecessary for Szelesi.[9] But in some instances, said experts' additional testimony seemed to undermine and contradict this assessment. One of defendant's experts on MUAs, osteopathic physician and surgeon Dr. Stanley Sczcienski, stated that a physician had to physically examine a patient to determine whether the patient needed a MUA. Yet, he also explained that he had never personally examined Szelesi, which, by his own admission, would be necessary to determine whether Szelesi needed MUA treatment. In addition, defendant's expert on shoulder surgery, orthopedic surgeon Dr. William Kohen,[10] stated that on the basis of

[7] This is apparently the second lawsuit plaintiff Szelesi has brought against defendant, though it seems the events of the first lawsuit are irrelevant to this case, as neither party makes an effort to explain the first lawsuit's allegedly complex procedural history.

[8] Dr. Ciullo, testifying as to the injury in Szelesi's shoulder that he treated, did not state that he was certain the shoulder injury was caused by Szelesi's 2004 accident, but that he believed the accident was a likely explanation, given his own examination of Szelesi and the medical records provided to him.

[9] The strongest condemnation of the MUA procedure came from defense expert Dr. Steven Geiringer, a physician faculty member at Wayne State University. Geiringer stated that, on the basis of his review of medical literature, MUAs were only necessary to correct two specific conditions, neither of which, in Geiringer's opinion, Szelesi possessed. Geiringer personally examined Szelesi in July 2009.

[10] Dr. Kohen personally examined Szelesi in July 2010, after Dr. Cuillo performed the shoulder surgery.

Szelesi's medical records, Szelesi's shoulder injury was likely caused by the 2004 accident, and that surgery was needed to correct it.[11]

After assessing this voluminous testimony, the trial court made and explained its holding from the bench in December 2011, and instructed the parties to present monetary amounts for a formal order. Shortly after the court made this holding, defendant and plaintiff Michigan Spine and Pain entered into an agreement in January 2012, seemingly on unrelated cases in the 52nd District Court, that specified: "[Michigan Spine and Pain] shall not be paid on any pending claim that has been submitted to Allstate Insurance Company up to the present date." The trial court issued a written order on February 1, 2012, detailing the specific costs Allstate was required to pay in accordance with the December 2011 ruling. This judgment was subsequently vacated and replaced by a revised order in April 2012. Defendant then made a motion for judgment notwithstanding the verdict (JNOV) in June 2012, which the trial court rejected.

Defendant now appeals to our Court, and makes the following assertions: (1) its January 2012 agreement with Michigan Spine and Pain invalidates the trial court's monetary judgment in favor of Michigan Spine and Pain; (2) the trial court should have held an evidentiary hearing pursuant to MRE 702 on whether MUA is an "appropriate and recognized" medical treatment for Szelesi's conditions; (3) the trial court erred when it determined that the MUAs were "reasonable and necessary" for plaintiff's treatment/recovery under MCL 500.3107(1); (4) the judgment for American Surgical Centers was not "reasonable" as required by MCL 500.3107(1); (5) the trial court improperly awarded interest pursuant to MCL 500.3142 on benefits claimed by Michigan Spine & Pain and American Surgical Centers; and (6) the trial court improperly determined that Allstate should pay Dr. Cuillo for the shoulder surgery. Plaintiffs argue that the trial court's ruling should be upheld.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for JNOV is reviewed de novo on appeal. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005). "When reviewing the denial of a motion for JNOV, the appellate court views the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine if a party was entitled to judgment as a matter of law." *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009). The trial court's findings of fact are reviewed for clear error, "which occurs when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Douglas v Allstate Ins Co*, 492 Mich 241, 256–257; 821 NW2d 472 (2012) (citations omitted). Questions of contract interpretation are reviewed de novo,[12] as are matters of statutory interpretation.[13]

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[11] Dr. Kohen stressed that his opinion was speculation, because his review of Szelesi's condition was limited to his post-surgical exam and the specific medical records relevant to this case.

[12] *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

[13] *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 60; 718 NW2d 784 (2006).

III. ANALYSIS

A. THE JANUARY 2012 AGREEMENT

"The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. We must enforce the clear and unambiguous language of a contract as it is written." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012) (citations omitted). When interpreting the words of a contract, we "give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory*, 473 Mich at 464. "We cannot read words into the plain language of a contract." *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 628; 839 NW2d 693 (2013).

Here, defendant claims that the January 2012 contract it signed with plaintiff Michigan Spine and Pain settled Michigan Spine and Pain's claims for compensation related to Szelesi's treatment. As such, defendant argues that the trial court's award of damages to Michigan Spine and Pain should be reversed.

This assertion is incorrect, because it would require us to ignore "the plain language used [in the January 2012 contract]"[14] and to interpret those words in a fashion that is contrary to "their plain and ordinary meaning."[15] The agreement never mentions cases pending in the Wayne Circuit Court, nor does it renounce claimed payments for services rendered to plaintiff Szelesi. Instead, it mentions that "the parties stipulate to a dismissal with prejudice of the [sic] any and all cases pending in the 52nd District Court"[16] and that "[Michigan Spine and Pain] shall not submit for payment any invoice to Allstate Insurance Company for a period of two years from this date with the exception of services rendered to Estancia Sweat, Sandra White, and Julie Craft."

The absence of the terms "Wayne Circuit Court" and "Szelesi" from the January 2012 contract is not dispositive, but it raises a number of questions that undermine defendant's interpretation of the document. Why, in a bargained-for (not boilerplate) contract, did Allstate include the name of a specific Michigan district court—in the first paragraph, no less—and the specific names of individual patients treated by Michigan Spine and Pain, and yet not include the terms "Wayne Circuit Court" (where this lawsuit took place) and "Szelesi" (the patient on whom the services at issue were performed)? Why would Allstate, a large and sophisticated business organization with enormous bargaining power, have made such an oversight? The obvious answer to these questions, to which defendant offers no convincing response, is that the January 2012 contract was not intended to include the fees arising from Szelesi's treatment.

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[14] *Greenville Lafayette*, 296 Mich App at 291.

[15] *Rory*, 473 Mich at 464.

[16] The 52nd District Court is located in Oakland County, and is a separate and distinct entity from the Wayne Circuit Court, the trial court that heard this case.

Perhaps aware of the weakness of its claim, defendant stresses that the contract also states: "[Michigan Spine and Pain] shall not be paid on any pending claim that has been submitted to Allstate Insurance Company up to that present date." Defendant then supplies a dictionary definition of "pending," and asserts that because the trial court did not issue its written order until February 1, 2012, the monetary judgment for Michigan Spine and Pain contained in that order is preempted by this agreement.

Indeed, the dictionary defines "pending" as "remaining undecided; awaiting decision." Black's Law Dictionary (9th ed). This case, however was not "remaining undecided" or "awaiting decision" in January 2012—in fact, the trial court issued its holding from the bench in December 2011, finding defendant liable for damages to Michigan Spine and Pain for the MUA treatment it provided to Szelesi. The trial court's February 2012 order (later amended and vacated) merely provided the specific monetary amount of those already awarded damages, which were apparently submitted by the parties.

Defendant's attempt to shoehorn this case into an agreement that plainly addresses other matters is thus completely unavailing, and provides no basis to reverse the monetary judgment made by the trial court in favor of Michigan Spine and Pain.

B. MCL 500.3107 AND "ALLOWABLE EXPENSES"

MCL 500.3107(1) states that "personal protection insurance benefits are payable for the following": "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). The Michigan Supreme Court recently explained that the "plain language of this provision imposes four requirements that a PIP claimant must prove before recovering benefits for allowable expenses: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable." *Douglas*, 492 Mich at 259.[17] No-fault insurers are only required to pay benefits "'for accidental bodily injury' arising out of an automobile accident." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005).

Expenses for "recovery" or "rehabilitation" are "costs expended in order to bring an insured to a condition of health or ability sufficient to resume his preinjury life." *Douglas*, 492 Mich at 259–260. "Reasonably necessary" expenses are assessed using an objective standard—namely, one that looks to actual necessity, not just an individual's subjective belief "that a service is necessary for an injured person's care, recovery, or rehabilitation." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 160; 802 NW2d 281 (2011). It is generally the province of the factfinder to determine whether a service is reasonably necessary, but "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 157–158. "Incurred expenses" require an insurer to pay a

[17] Despite defendant's participation in *Douglas* and the seminal nature of that case in interpreting MCL 500.3107(1), it inexplicably fails to cite *Douglas* in its brief.

claimant only "upon submission of evidence that services were *actually rendered* and of the *actual cost expended*." *Douglas*, 492 Mich at 266–267 (emphasis original). And finally, those costs must be "reasonable,"[18] which is a separate and distinct requirement from the "customary" rates mandated by MCL 500.3157, and is a status determined by the trier of fact. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 379; 670 NW2d 569 (2003). Each particular medical expense claimed by a plaintiff must be "reasonably necessary" and meet the criteria outlined above. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 51; 457 NW2d 637 (1990).

Here, plaintiffs demonstrated that the MUAs and shoulder surgery were "reasonably necessary" under MCL 500.3107(1).[19] Both procedures were "costs expended" to alleviate Szelesi's neck, back, and shoulder pain, and "bring [her] to a condition of health or ability sufficient to resume [her] preinjury life." *Douglas*, 492 Mich at 259–260. These treatments and the expenses associated with them were objectively "necessary for [Szelesi's] care, recovery, or rehabilitation," in that the trial court heard testimony from plaintiffs' medical experts (in addition to Szelesi herself) that the procedures were both necessary and effective, as they improved Szelesi's range of mobility and reduced her pain. *Krohn*, 490 Mich at 160. The expenses were "incurred" because the medical services were "actually rendered" and there was "actual cost expended." *Douglas*, 492 Mich at 266–267 (emphasis removed). And those charges appear "reasonable," in that they do not seem exorbitant, are documented and explained, and were determined as such by the trier of fact. *Advocacy Org*, 257 Mich App at 379.[20]

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[18] See *Douglas*, 492 Mich at 274–275.

[19] In its brief, defendant separates its claims on the MUA treatments (which it alleges were not "reasonably necessary" per MCL 500.3107) and the shoulder surgery (which it merely states it should not be liable for because the shoulder injury might not have been caused by the accident). This bifurcation reflects an ignorance of recent Michigan case law, which clearly states that in order for a procedure to be "reasonably necessary" under MCL 500.3107, a plaintiff must show that the treated injury is causally linked to the accident for which the insurer provides coverage. *Griffith*, 472 Mich at 527 ("[t]hus, in addition to the requirement under MCL 500.3105(1) that benefits be 'for accidental bodily injury,' MCL 500.3107(1)(a) circumscribes benefits to those expenses consisting only of items or services that are reasonably necessary 'for an injured person's care, recovery, or rehabilitation'"). We therefore group the two claims together, but only address causal connection as to the shoulder surgery, which is the only procedure on which defendant raises the issue of causation.

[20] Defendant's assertions that American Surgical Centers failed to document or explain its charges, and that those charges are thus unreasonable per MCL 500.3107(1), are belied by the record. American Surgical Centers provided an itemized list of expenses associated with each MUA, and the total amount of the charges is less than $20,000. (The trial court awarded even less in damages: $6,173.45.) Defendant's response is to once again restate trial testimony the trial court found unhelpful, and accuse the trial court of engaging in "speculation" as to whether the charges were reasonable. Defendant then engages in speculation itself, and offers its own unsubstantiated and unavailing explanation for minor inconsistencies in American Surgical

Defendant does not substantively refute the above, and instead rehashes the testimony of one of its expert witnesses, which it claims the trial court "ignored." This assertion is inaccurate—the trial court heard the testimony, and obviously did not find it convincing. As noted, plaintiffs demonstrated the factors MCL 500.3107(1) requires them to show when asserting that the MUAs and shoulder surgery are "allowable expense[s]." And there is no indication that the trial court erred when it so held. *Douglas*, 492 Mich at 256. It heard testimony from multiple medical experts,[21] and reviewed an extensive record complete with medical diagnoses and test results, billing statements, and descriptions of services rendered.

Defendant also makes the unsupported assertion that there is no causal link between the 2004 accident and plaintiff Szelesi's shoulder surgery. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In any event, the trial court heard testimony from Drs. Ciullo and Kohen, who both stated that, on the basis of the medical records before them and their examination of Szelesi, that Szelesi's shoulder injuries were likely caused by the 2004 car accident.[22]

Accordingly, we affirm the trial court's holding that the MUAs and shoulder surgery provided to plaintiff Szelesi by plaintiffs Michigan Spine and Pain, American Surgical Centers, and Dr. Ciullo are an "allowable expense" per MCL 500.3107(1).

C. MCL 500.3142 AND INTEREST PAYMENTS

Centers' billing statements. The trial court found the billing statements convincing and sufficient evidence of the reasonableness of the charges per MCL 500.3107, and there is no indication that it erred in doing so.

[21] Defendant claims that the trial court should have held a formal evidentiary hearing on whether MUAs are "generally accepted" by the medical community as a valid treatment. MRE 702 requires the trial court to "ensure that any expert testimony or scientific evidence . . . is reliable." *Krohn*, 490 Mich at 167. The exercise of this "gatekeeper role" is at the trial court's discretion, but a trial judge may "neither abandon this obligation nor perform the function inadequately." *Id*. (internal quotation marks omitted). Specifically, the trial court "must . . . ensure that expert testimony is based on sufficient facts or data, the product of reliable principles and methods, and that the witness has applied the principles and methods reliably to the facts of the case." *Id*.

That is exactly what the trial court did here: it heard extensive testimony on MUAs from three doctors (two of whom testified for defendant). And, as noted, plaintiffs submitted considerable evidence that MUAs are "generally accepted" as a valid treatment by the medical community for the aliments Szelesi possessed—evidence that defendant did not refute. It would have been an enormous waste of judicial resources to replicate this already extensive testimony in a formal evidentiary hearing.

[22] As noted, both physicians stressed that these opinions are speculation, as their review was limited to the medical records provided to them (which might not have been Szelesi's complete medical record), and their own personal examinations of Szelesi.

MCL 500.3142 explains when PIP benefits become overdue, and when interest must be added to those payments, if necessary. In full, it reads:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
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> (3) An overdue payment bears simple interest at the rate of 12% per annum. [MCL 500.3142.]

"No-fault penalty interest is intended to penalize an insurer that is dilatory in paying a claim." *Williams v AAA Michigan*, 250 Mich App 249, 265; 646 NW2d 476 (2002). "To recover interest, a plaintiff is not required to prove that the defendant acted arbitrarily or unreasonably delayed in payment of benefits. Instead, the statute only requires that the insured present the insurer with reasonable proof of loss. If the insurer does not pay the claim within 30 days after receiving this proof, it becomes liable for interest." *Regents of Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719, 735; 650 NW2d 129 (2002) (citations and internal quotation marks omitted). We review for clear error "a trial court's finding whether a communication qualifies as reasonable proof of the fact or amount of a claim." *Williams*, 250 Mich App at 265.

Here, defendant unconvincingly claims that plaintiff American Surgical Centers is not entitled to interest under MCL 500.3142 because plaintiff did not "elicit[] . . . testimony" as to "when Allstate received reasonable proof of the fact and of the amount of loss sustained." Actually, defendant's own adjuster testified that Allstate received bills from American Surgical Centers in late November 2007.[23] The adjuster testified that the bills were then forwarded to Allstate's special investigations unit, which initiated an investigation and denied the claims in October 2008. The trial court did not clearly err when it determined that this bill submission and sequence of events constituted "reasonable proof of the fact and amount of loss" required by MCL 500.3142.

IV. CONCLUSION

[23] Plaintiffs' billing statements and defendant's October 2008 rejection of them are also included in the record.

Accordingly, we reject defendant's claims and affirm the ruling of the trial court in all respects.

Affirmed.

/s/ Cynthia D. Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra