# STATE OF MICHIGAN

# COURT OF APPEALS

MICHAEL DEMERY,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant,

and

MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION,

Appellant.

UNPUBLISHED
June 3, 2014

No. 310731
Oakland Circuit Court
LC No. 2011-117189-NF

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

Appellant Michigan Catastrophic Claims Association (MCCA) appeals by leave granted from an order compelling discovery. The order (1) required MCCA to produce the actuarial models it used to determine the present and future dollar values of claims and (2) granted plaintiff's motion to compel the depositions of MCCA executive director Gloria Freeland and an MCCA claims representative.[1] We reverse.

Plaintiff suffered injuries in an automobile accident in February 2003. Among other injuries, plaintiff lost his left arm below the elbow and suffered a traumatic brain injury that resulted in ongoing impairments. In 2004, plaintiff sued defendant, his no-fault insurer, for attendant-care costs. Plaintiff prevailed in the 2004 case and as a result was paid 24-hour attendant-care benefits at a rate of $30 an hour until February 2008, when defendant reduced the rate to $11 an hour. Plaintiff filed a second action to recover attendant-care benefits in 2009. Plaintiff prevailed but this Court reversed and remanded. *Demery v Auto Club Ins Ass'n*,

[1] Although the parties to this appeal refer to certain other items in their appellate briefs, the order encompasses only the actuarial models and the depositions.

unpublished opinion per curiam of the Court of Appeals, issued August 30, 2011 (Docket No. 297189).

In February 2011, plaintiff filed the present action, seeking to recover 24-hour attendant-care benefits at a rate of $30 an hour. The circuit court consolidated the current case with the 2009 case. In late 2011, plaintiff moved to compel defendant to produce certain documents. The circuit court granted plaintiff's motion to compel, and defendant filed an emergency application for leave to appeal, which this Court denied. *Demery v Auto Club Ins Ass'n*, unpublished order of the Court of Appeals, issued March 7, 2012 (Docket No. 308911).

In early 2012, plaintiff served a subpoena demanding the production of 8 types of documents from MCCA.[2] MCCA provided certain materials, and the transcript of the hearing and the final order makes clear that the dispute ultimately concerned only the actuarial models and the two depositions as mentioned above.

Plaintiff claimed in its motion to compel discovery that a letter from MCCA in another case proved that the actuarial models were relevant to his lawsuit. In that letter, MCCA indicated that it used an actuarial model to determine the discounted present value of a proposed $12 increase in benefits. MCCA explained in its response to plaintiff's motion to compel discovery that the actuarial models are not used to determine the value of individual claims but are used "to project the number of persons who will sustain catastrophic injuries in motor vehicle accidents in the next year and the amount of money needed in today's dollars to pay those claims in the future, based on historical data." MCCA attached to its motion for reconsideration an affidavit of actuary Roger Hayne, who repeated this explanation. Hayne indicated that the model is used to estimate the amount of money needed in the present for future claims.

MCCA claimed that the actuarial models were irrelevant to plaintiff's claim. It claimed that the desired depositions were also irrelevant and were being sought solely for harassment purposes. MCCA emphasized that it was not a party to the litigation and possessed no independent information concerning plaintiff's claims or defendant's defenses.

The trial court granted the motion to compel, stating, in part:

> Uh, this is not my first case that I've had, um, where the MCCA is involved. And the MCCA can say we're not adjusting it, we're not adjusting it, but every time I have a case, uh, with certain insurance companies the MCCA is somewhat calling the shots and the -- and the insurance company does have to okay something with the MCCA, and I have settlement conferences; and the MCCA is -- is making calls and that's why I demand that the MCCA now be here for the settlement conferences. So you can say to me all day long that the MCCA is not adjusting it but they have some input somewhere . . . .

[2] MCCA is a nonprofit association of no-fault insurers created by statute to indemnify no-fault personal protection insurance losses that exceed specified amounts. MCL 500.3104.

The trial court denied MCCA's motion for reconsideration and for a stay pending appeal, but this Court later granted the stay.

We review for an abuse of discretion a trial court's decision to compel discovery. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). A trial court abuses its discretion when the court chooses an outcome falling outside the range of principled outcomes. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). In general, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party . . . ." MCR 2.302(B)(1). "However, a trial court should also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Cabrera*, 265 Mich App at 407. We review for an abuse of discretion a trial court's denial of a motion for reconsideration. *In re Beglinger Trust*, 221 Mich App 273; 561 NW2d 130 (1997).

Plaintiff's theory of the case is that defendant did not fairly review his claim and that MCCA is instructing or influencing defendant to deny plaintiff's claim for attendant-care benefits. We cannot see how the actuarial models have any bearing on this theory. Actuarial models used to predict the amount of future claims in order to ensure a sufficient fund from which to pay those claims are unrelated to processing and adjusting plaintiff's claim. That an actuarial model can be used, and has been used, to estimate the present cost of a future claim has no bearing upon whether plaintiff needs attendant care, the skill level of the needed caregiver, and the fair market value of the caregiver's services. In granting discovery of these models, the trial court made no findings to support its implied conclusion that the actuarial models were relevant in this manner. Rather, because the trial court felt that "the MCCA is somewhat calling the shots," without any analysis, it leapt to the conclusion that discovery of the actuarial models was warranted. The record shows no principled basis for granting discovery, and the trial court abused its discretion in ordering that MCCA produce the actuarial models.

With regard to the depositions of Freeland and an MCCA claims representative, plaintiff argues for relevance by citing the deposition testimony of one of defendant's claims managers, who agreed that MCCA "needs to be involved" when attendant-care rates are adjusted up or down. However, this "involvement" is mandated by statute; indeed, member insurance companies are required to report to MCCA any claim that "may reasonably be anticipated to involve the association . . . ." MCLA 500.3104(7)(b). The claims manager herself went on to state that "[the MCCA] guidelines . . . require[] us as part of the reimbursement process and reporting process that we have to [sic]." MCLA 500.3104(7)(g) indicates that, in some instances, MCCA may take over the adjustment of a claim. MCCA attached to its motion for reconsideration an affidavit from Freeland in which she states that MCCA had not in fact exercised its right to take over the adjustment of plaintiff's claim. Moreover, plaintiff has produced insufficient evidence that MCCA did take over the adjustment. Section 10.08 of the MCCA's Plan of Operation states, in part:

> If, in the judgment of the Board, a claims procedure or practice of a member is inadequate to properly service the liabilities of the Association or jeopardizes the interests of the Association, the Association may, at the member's expense, undertake or contract with another person (including another member) to adjust,

> or assist in the adjustment of, a claim or claims for the member creating a potential liability to the Association.

There is simply no evidence here of MCCA's Board of Directors having made the decision to take over or assist in the adjustment of plaintiff's claim. The mere fact that defendant and MCCA are complying with statutory reporting requirements and also with *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 18-21; 795 NW2d 101 (2009), is insufficient to show that MCCA is adjusting the claim. Accordingly, we conclude that the trial court abused its discretion in ordering the depositions at issue.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter