STATE OF MICHIGAN

COURT OF APPEALS

HEALING PLACE AT NORTH OAKLAND MEDICAL CENTER, HEALING PLACE, LTD, NEW START, INC, and EDGAR NAYLOR, Plaintiff-Appellants, v ALLSTATE INSURANCE COMPANY, Defendant-Appellee.	FOR PUBLICATION October 23, 2007 9:00 a.m. No. 272960 Oakland Circuit Court LC No. 2005-065333-NF

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

WILDER, P.J.

In this dispute concerning first-party no-fault automobile personal protection insurance benefits, plaintiffs appeal of right the trial court's grant of summary disposition to defendant Allstate. The key issue is whether the services at issue were "lawfully render[ed]" per MCL 500.3157. We affirm.

I

A

In 1995, while plaintiff Edgar Naylor was riding a bicycle, he was struck by a car. At the time, Naylor had automobile insurance through Allstate. As a result of the accident, Naylor allegedly suffered a brain injury or "closed head injury." In addition to problems allegedly caused by the brain injury, Naylor had a substance abuse problem that predated the accident. After the accident, Naylor received treatment from plaintiffs New Start, Inc and The Healing Place, Ltd.

In 2004, after serving a prison sentence of several years, Naylor admitted himself to the program offered by New Start, The Healing Place and The Healing Place at North Oakland Medical Center (THP at NOMC), wherein, in 2004 and 2005, he received various services as part of an integrated treatment for brain injury, psychiatric disorders and substance abuse.

Plaintiffs[1] then submitted claims to Allstate for first-party no-fault automobile personal protection insurance benefits for those services. Allstate denied the claims.

B

In October 2004, plaintiffs commenced this action for breach of contract and declaratory relief. In June 2006, Allstate moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiffs were not properly licensed to render the treatment they gave, and that the services were therefore not "lawfully render[ed]" per MCL 500.3157. Accordingly, Allstate argued, the services were not compensable as personal protection insurance benefits. Allstate also argued that because Naylor's substance abuse problems predated the accident, they were not related to the accident. Finally, Allstate argued that the fees sought were not reasonable.

In ruling on Allstate's motion, the trial court first noted that plaintiffs had the burden to prove that the services were reasonably necessary for Naylor's care and yet did not present any evidence of the nature of the services rendered. Absent such evidence, the trial court concluded, there can be no finding of liability. The trial court also concluded that plaintiffs failed to prove that the services were lawfully rendered. For these reasons, the trial court granted Allstate's motion under MCR 2.116(C)(10).

II

We review summary dispositions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). To the extent that this dispute requires us to interpret the parties' insurance contract, the proper interpretation of a contract is a question of law, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *Randolph v Reisig*, 272 Mich App 331, 333; 727 NW2d 388 (2006), reviewed de novo, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). To the extent that this dispute requires us to engage in statutory interpretation, the interpretation of a statute is also a question of law, reviewed de novo. *Newton v Bank West*, 262 Mich App 434, 437; 686 NW2d 491 (2004).

> "Summary disposition under either MCR 2.116(C)(8) or (C)(10) presents an issue of law for [the Court's] determination and, thus, [the Court] review[s] a trial court's ruling on a motion for summary disposition de novo." *Ormsby v Capital Welding, Inc,* 471 Mich 45, 52; 684 NW2d 320 (2004) (internal quotation marks and citation omitted). Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under 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, *Dressel v Ameribank,* 468 Mich. 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law,

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[1] Hereinafter, we shall use "plaintiffs" to refer collectively to New Start, The Healing Place, and THP at NOMC.

Miller v Purcell, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank,* 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999). But such materials "shall only be considered to the extent that [they] would be admissible as evidence . . . ." MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club,* 466 Mich 155, 163; 645 NW2d 643 (2002); *Campbell v Kovich,* 273 Mich App 227, 230; 731 NW2d 112 (2006).

III

A

Under 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 and 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." In *Cherry v State Farm Mut Automobile Ins Co*, 195 Mich App 316, 320; 489 NW2d 788 (1992), the Court read § 500.3107 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."

As established by *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49-50; 457 NW2d 637 (1990), it is plaintiffs' burden to prove that the services provided by New Start, The Healing Place and THP at NOMC were compensable. In its motion for summary disposition, Allstate argued that the services provided by plaintiffs were not "lawfully render[ed]," MCL 500.3157, and thus not compensable, because New Start, The Healing Place and THP at NOMC were not licensed to perform the services rendered. Specifically, Allstate argued that THP at NOMC was required to be licensed as a psychiatric hospital unit, that The Healing Place had no license at all, and that New Start provided services requiring a license to operate an adult foster care facility. Allstate also argued that plaintiff failed to show that the services rendered were reasonable and necessary.

In support of its motion, Allstate presented both documentary evidence and deposition testimony. Allstate's documentary evidence established that THP at NOMC held a residential substance abuse services license and was not licensed as a psychiatric unit, that New Start was licensed as an outpatient substance abuse program and not an adult foster care facility, and that a New Start representative sent a letter to Naylor's parole officer intimating if not representing that

THP and New Start held licensure that they did not hold. Allstate also presented the deposition testimony of Dr. Thomas Kane and Roman Frankel establishing that the services rendered were in the nature of psychiatric and adult foster care (i.e., outside of the operative licensure). This evidence was sufficient to meet Allstate's burden as the moving party. Despite their ultimate burden under *Nasser* to prove that the services rendered were compensable, plaintiffs presented only a paucity of evidence to rebut Allstate's arguments.

B

We hold, on the existing record and as a matter of law, that the services provided by plaintiffs were not "lawfully render[ed]," MCL 500.3157, because New Start, The Healing Place and THP at NOMC were not licensed to perform the services rendered. The relevant inquiry in determining whether a particular service was lawfully rendered for purposes of MCL 500.3157 depends on a construction of the statutory language "lawfully rendering treatment[.]" MCL 500.3157. "'Well established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue.'" *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006), quoting *Bloomfield Charter Twp v Oakland Co Clerk,* 253 Mich App 1, 10; 654 NW2d 610 (2002). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; 730 NW2d 757 (2006), citing *Willett, supra* at 48. "When the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *McManamon, supra* at 136. "This Court does not interpret a statute in a way that renders any statutory language surplusage . . . ." *Id.*, citing *Pohutski v City of Allen Park,* 465 Mich 675, 684; 641 NW2d 219 (2002).

MCL 500.3157 provides: "[*A] physician, hospital, clinic or other person or institution lawfully rendering treatment* to an injured person . . . may charge a reasonable amount . . . ." (Emphasis added.) The statute focuses on natural persons (such as physicians) *or* institutions. We find no basis in the language of this section to conclude that the phrase "lawfully rendering treatment" permits an institution providing treatment to avoid licensure on the basis that a natural person providing the treatment at the institution is licensed. Similarly, the fact that an institution is licensed would not permit an unlicensed individual to provide treatment at the institution's facility. In our judgment, the plain language of MCL 500.3157 requires that before compensation for providing reasonable and necessary services can be obtained, the provider of treatment, whether a natural person or an institution, must be licensed in order to be "lawfully rendering treatment." If both the individual and the institution were each required to be licensed and either was not, the "lawfully render[ed]" requirement is unsatisfied.

Examination of other Michigan statutes sheds light on the no-fault statute's "lawfully render[ed]" requirement. MCL 550.1502 states: "services rendered by a specialty certified registered nurse within the scope of the certification and nursing license . . . can be lawfully rendered by the nurse. . . ." Similarly MCL 450.225 provides a "legally authorized to render" requirement: "A corporation . . . shall not render professional services . . . except through . . . agents who are duly *licensed* or otherwise *legally authorized to render* the professional services . . . ." (Emphases added).

Both MCL 450.225 and MCL 550.1502 have a requirement similar to the "lawfully render[ed]" requirement of MCL 500.3157, that specifically states or suggests that the agent who renders the service must be licensed in order to satisfy the requirement. In contrast, MCL 500.3157 does not expressly state or suggest that the agent must be licensed in order to satisfy the "lawfully render[ed]" requirement. Rather, MCL 500.3157 focuses on either the agent or the institution "lawfully rendering" treatment.

In short, under MCL 500.3157, if both the individual and the institution were each required to be licensed and either was not, the "lawfully render[ed]" requirement is unsatisfied.

C

The dissent relies on *Miller v Allstate Ins Co (On Remand)*, ____ Mich App ____, ____; ____ NW2d ____ (2007). We find *Miller* distinguishable, because it considered only whether mere defects in corporate structure would render treatment provided by the incorrectly-incorporated entity not "lawfully render[ed]" under MCL 500.3157.

D

Because we find that the trial court correctly granted summary disposition on the basis that the services in question were not "lawfully render[ed]," plaintiffs' remaining issues are moot. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

V

For the foregoing reasons, we affirm the trial court's summary disposition in Allstate's favor.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

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HEALING PLACE AT NORTH OAKLAND MEDICAL CENTER, HEALING PLACE, LTD, NEW START, INC, and EDGAR NAYLOR,

Plaintiffs-Appellants,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
October 23, 2007

No. 272960
Oakland Circuit Court
LC No. 2005-065333-NF

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

SMOLENSKI, P.J. (*dissenting*).

Because I conclude that the trial court erred when it granted summary disposition in favor of defendant, I respectfully dissent.

In the present case, plaintiffs alleged that they were entitled to compensation for services provided to defendant's insured. Under 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 to the requirements imposed by MCL 500.3107(1)(a), MCL 500.3157 provides that,

> [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. . . .

In *Cherry v State Farm Mutual Auto Ins Co*, 195 Mich App 316, 320; 489 NW2d 788 (1992), the Court read MCL 500.3107 in conjunction with MCL 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." Hence, in order for a charge to be compensable as a no-fault benefit, the charge must be reasonable, reasonably necessary for an injured person's care, recovery, or rehabilitation and must be lawfully rendered.

In its motion for summary disposition, defendant argued that The Healing Place at North Oakland Medical Center (THP at NOMC) was required to be licensed as a psychiatric hospital unit, that The Healing Place, Ltd (The Healing Place) had no license at all and that New Start,

Inc (New Start) provided services, which required a license to operate an adult foster care facility. Defendant further argued that, because these entities did not have the requisite licenses, the services rendered by those entities were unlawful within the meaning of MCL 500.3157 and, therefore, not compensable. The trial court agreed with defendant.

Although plaintiffs bore the ultimate burden to prove that their charges were compensable under MCL 500.3107, see *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49-50; 457 NW2d 637 (1990), because defendant was the moving party, it had the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(3). In order to meet that burden, at a minimum, defendant had to present evidence that the entities at issue provided services to Naylor under circumstances that required those entities to possess a specific type of license and that the entities did not possess the required license.

In its motion for summary disposition, defendant alleged that New Start provided services to Naylor as an adult foster care facility. Further, defendant alleged that New Start did not have a license to operate an adult foster care facility. In order to constitute an adult foster care facility, New Start must provide foster care to adults who are aged, mentally ill, developmentally disabled, or physically handicapped in such a way that they require ongoing supervision, but do not require continuous nursing care. MCL 400.703(4). Furthermore, foster care is defined as "the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation." MCL 400.704(6).

To support its claim that New Start unlawfully operated an adult foster care facility, defendant attached a copy of a residential substance abuse license issued to THP at NOMC. However, this license alone does not establish that New Start does not possess a license to operate an adult foster care facility. Defendant also attached a letter from a staff member at New Start to Naylor's parole officer that states that Naylor had been admitted to the inpatient hospital-based program run by The Healing Place, but had since matriculated and was now participating in the community-based and day treatment programs provided by New Start. While this letter indicates that Naylor was receiving some services from New Start, it does not specify the nature of those services, the location of those services or the circumstance under which the services were provided. As such, these documents were insufficient to establish that New Start provided services as an adult foster care facility without a license.

In its reply to plaintiffs' response, defendant also cited to and attached the deposition testimony of Dr. Thomas Kane, who was a contract psychiatrist with New Start from 2003 to May 2004. Kane testified that, to his knowledge, New Start supervised the treatment of a person named Barbara Clark and also stated that he *assumed* that New Start provided hygiene, grooming, maintenance and medication services to all of its patients. Defendant did not explain how Barbara Clark's treatment was relevant to this case and failed to explain how Kane's assumptions about the services provided during the period of his contractual relationship with New Start established the nature of the services provided by New Start after Kane terminated his

relationship with New Start. Finally, defendant cited the testimony of Roman Frankel, who apparently is an owner of at least one of the entities at issue.[1] According to defendant, Frankel testified that New Start's staff was on call 24 hours per day. However, the attached pages of the deposition contain no such testimony.[2]

Defendant also failed to provide any evidence concerning the services provided by The Healing Place and how the provision of those services was unlawful. Although defendant attached the letter from New Start that indicated that Naylor had been admitted to a hospital-based inpatient program run by The Healing Place, the letter is by itself inadequate to establish the nature and circumstances under which the services were provided and whether those services were provided without a license. In a footnote in its reply brief, defendant does argue that The Healing Place is interchangeable with New Start and may be the entity that runs the apartment based program, but failed to attach any evidence in support of that assertion.[3]

Based on the evidence presented by defendant in support of its motion for summary disposition, I conclude that defendant failed to meet its initial burden to produce evidence from which the trial court could determine that New Start and The Healing Place unlawfully provided services to Naylor. *Quinto*, *supra* at 362. Because defendant failed to meet its initial burden of production, plaintiff was not required to rebut defendant's evidence and defendant was not entitled to summary disposition of the claims by those entities on that basis.

Defendant also claimed that THP at NOMC provided services to Naylor as a psychiatric unit without having a license to operate as a psychiatric unit. In order to establish this, defendant needed to present evidence that THP at NOMC operated as a "unit of a general hospital, which provides inpatient services for individuals with serious mental illness or serious emotional disturbance." MCL 330.1100c(9). In support of this claim, defendant presented evidence that defendant had a serious mental illness and was admitted to The Healing Place's inpatient hospital-based program. In addition, defendant attached invoices, which clearly indicate that Naylor was a resident patient of the facility and received some psychiatric services while admitted to the program. Frankel also testified that The Healing Place provided various levels of care and that the "hospital" charged a per diem rate that included neuropsychological and

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[1] The relationship between New Start, The Healing Place and THP at NOMC and the programs that they operated are not described in the record or the parties' briefs.

[2] In the portion of Frankel's testimony attached to defendant's motion for summary disposition, Frankel stated that New Start was the administrative arm of The Healing Place, but did provide some patient services. However, there is no testimony that explains specifically what those services were.

[3] Plaintiffs presented the affidavit of Julius Ballew, who was employed by the Department of Social Services as an adult foster care licensing consultant. In his affidavit, Ballew stated that he was familiar with community-based apartments used for the rehabilitation of brain injured individuals and concluded that The Healing Place was a community based apartment program. However, even if defendant could rely on this affidavit to satisfy its initial burden of production, this averment alone would not be enough to establish that the apartment facility provided services that required it to be licensed as an adult foster care facility.

neuropsychiatric assessments, nursing care, room and board, transportation services and some group therapies. Further, Frankel stated that the facility was licensed as a residential substance abuse program. This evidence was sufficient to support an inference that THP at NOMC operated as a psychiatric unit even though it only had a license to operate as a residential substance abuse program. Nevertheless, even assuming that THP at NOMC was operating as a psychiatric unit without the requisite license, this fact does not necessarily entitle defendant to summary disposition of THP at NOMC's claims.

In *Miller v Allstate Ins Co (On Remand)*, 275 Mich App 649; ___ NW2d ___ (2007), the Court examined whether a defect in the corporate form of an entity that provided services to an injured person insured by Allstate rendered the provision of services unlawful within the meaning of MCL 500.3157. In holding that the defect did not render the services unlawful, the Court reasoned:

> While the language of MCL 500.3157 speaks of a clinic or institution lawfully rendering treatment, treatment is invariably and necessarily performed or rendered by employees and personnel; the *treatment itself* has nothing to do with corporate formation issues. Moreover, the inclusion of "physician, hospital, clinic or other person or institution" in the statutory language is chiefly for purposes of identifying those entities and persons that "may charge a reasonable amount for the products, services and accommodations rendered." MCL 500.3157. While Allstate argues that the Legislature included entities (hospitals, clinics, and institutions) in the statute because the entities need to be lawfully rendering treatment independent from any consideration of whether individual employees or agents who actually treat patients are doing so, we read the inclusion of the entities in the statutory language as merely indicating that those entities can be paid by insurers for services provided at their institutions. Of course, each of these entities must be lawfully rendering treatment, but, again, the treatment is rendered through their personnel. Furthermore, the Legislature's focus on the lawfulness of rendering treatment as opposed to the lawfulness of an entity's corporate structure indicates the Legislature's desire not to burden individuals seeking medical treatment, ostensibly covered by insurance, from having to engage in an extensive and in depth review and analysis regarding an entity's formation and related incorporation issues. The purpose and goal of the no-fault act was to provide accident victims with adequate, assured, and prompt reparation for their losses. *Nelson v Transamerica Ins Services*, 441 Mich 508, 514; 495 NW2d 370 (1992). This goal would be defeated by interpreting MCL 500.3157 as advocated by Allstate. [*Miller*, *supra* at 657-658.]

Although the holding in *Miller* applied to defects in corporate structure, I conclude that the reasoning applies equally to issues involving the licensing of entities.

The stated purpose behind establishing licensing requirement for psychiatric units is to ensure that the units "provide the facilities and the ancillary supporting services necessary to maintain a high quality of patient care." MCL 330.1134(1). Hence, the focus of the license for a psychiatric unit is not on the individual provision of a particular service, but rather on broader issues that may affect the provision of the services. Entities such as THP at NOMC can only provide services through their agents. Thus, whether a particular service is being properly

provided will more directly depend on the skill and training of the agent acting on behalf of the entity. Further, the fact that an entity has a psychiatric unit license does not relieve the individual agents of their obligation to have the requisite license to perform the actual services rendered. For these reasons, I conclude that the lack of a license to operate as a psychiatric unit does not necessarily render the services actually provided by THP at NOMC unlawful. Instead, as in *Miller*, *supra*, I would hold that the relevant inquiry in determining whether a particular service was lawfully rendered for purposes of MCL 500.3157 depends on whether the individual performing the actual service is properly licensed. Because there is no evidence that the actual services performed by the agents of THP at NOMC were performed without proper licensing, I conclude that defendant was not entitled to summary disposition on this basis.

I also disagree with defendant's argument that summary disposition was appropriate because plaintiffs failed to present evidence that the entities actually rendered compensable services. Defendant apparently conceded that each of the entities provided some services to Naylor. Indeed, defendant only argued that the services were: (1) not related to the injuries caused by the accident, (2) not lawfully rendered and (3) not reasonable. Because defendant did not challenge whether the services were actually provided to Naylor, plaintiff cannot be faulted for failing to present evidence that the services were rendered. Therefore, to the extent that the trial court determined that summary disposition was appropriate because plaintiffs failed to present evidence of the services provided, I would conclude that it erred.

Defendant also argued that summary disposition was appropriate because plaintiffs only treated Naylor for conditions that preexisted the injuries from the car accident. In support of this argument, defendant attached records that indicate that Naylor had suffered a closed head injury as a child and had a substance abuse problem before the accident in question. However, the medical records also indicate that Naylor had decreased impulse control after the automobile accident that may have exacerbated his substance abuse problem. In addition, the records indicate that the closed head injury he suffered in the accident may have increased his mental deficits. Hence, there is a question of fact as to whether the services provided were reasonably necessary to treat Naylor for the injuries he suffered during the car accident as required by MCL 500.3107(1)(a).

Finally, defendant argued that plaintiffs' fees were unreasonable. Although the trial court did not address this issue, on de novo review, I would conclude that this argument is unavailing. Defendant failed to present any evidence concerning the reasonableness of the fees plaintiffs charged for the services provided to Naylor. Instead, defendant merely argued that plaintiffs would have to prove that their fees were reasonable and noted that plaintiffs had not presented any evidence that the fees were reasonable. However, as noted above, defendant has the initial burden to provide evidence from which the trial court could conclude that the fees were unreasonable. See *Quinto*, *supra* at 362. Absent the presentation of such evidence, defendant is not entitled to summary disposition on the issue of reasonableness. See MCR 2.116(G)(4). Furthermore, although defendant would not be liable for any medical expense to the extent that the expense was unreasonable, see *Nasser*, *supra* at 49, defendant would still be liable for the reasonable cost of the necessary services provided to Naylor. Therefore, this would not warrant outright dismissal of plaintiffs' claims.

For these reasons, I conclude that the trial court erred when it determined that defendant was entitled to summary disposition in its favor. Therefore, I would reverse and remand this case for further proceedings.

/s/ Michael R. Smolenski