S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

BROE REHABILITATION SERVICES, INC.,

Intervening Plaintiff-Appellee,

and

LINDA WENDERLICH,

Plaintiff,

v

ALLSTATE INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED
April 22, 2008

No. 275587
Wayne Circuit Court
LC No. 03-317643-NI

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In this case arising under the no-fault insurance act,[1] defendant Allstate Insurance Co. (Allstate) appeals as of right the trial court's order granting intervening plaintiff Broe Rehabilitation Services, Inc. (Broe Rehabilitation) summary disposition under MCR 2.116(C)(10), and denying Allstate summary disposition under MCR 2.116(C)(6) and (7). We affirm.

I. Basic Facts And Procedural History

In May 1982, Daniel Alder was injured in a single car collision with a tree. At all relevant times, Alder was insured under the provisions of an automobile insurance policy that Allstate issued. Alder's injuries included a traumatic brain injury that required that he be provided permanent, 24-hour-a-day attendant care. Alder began living at Broe Rehabilitation in November 1987, and Broe Rehabilitation continued providing services to Alder until August 2002. The services that Broe Rehabilitation provided to Alder included residential services (room and board, and daily-living training), supervision, and rehabilitation services.

On June 2, 2003, Linda Wenderlich, guardian and conservator for Alder, filed a complaint for no-fault insurance benefits, alleging that part of Alder's reasonable and necessary

[1] MCL 500.3101 *et seq*.

expenses associated with his traumatic brain injury included legal guardianship and conservatorship expenses and fees.[2]

Allstate moved for partial summary disposition under MCR 2.116(C)(7), arguing that the no-fault insurance act's one-year back rule[3] precluded Wenderlich from recovering any benefits for losses incurred more than one year before the action was commenced. Allstate further argued that the Revised Judicature Act's (RJA) disability tolling provision[4] did not toll application of the no-fault insurance act's one-year back rule. For reasons not apparent from the record, the trial court denied Allstate's motion for partial summary disposition.

In August 2003, Broe Rehabilitation filed a complaint as an intervening plaintiff, alleging that between October 1996 and August 2002, it had incurred $240,000 in charges for reasonably necessary care, recovery, and rehabilitation services provided to Alder. According to Broe Rehabilitation, Allstate refused to pay despite the fact that Broe Rehabilitation had provided Allstate with reasonable proof of the charges incurred. Broe Rehabilitation asserted that Allstate's refusal to pay constituted a violation of its statutory[5] and contractual obligations to provide no-fault insurance benefits. Accordingly, Broe Rehabilitation requested that Allstate be found liable for the cost of all outstanding services rendered.

In February 2005, Broe Rehabilitation moved for partial summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that: the services provided to Alder were reasonably necessary for Alder's care, recovery, and rehabilitation; the charges for the services were both reasonable and customary; and the charges were in fact incurred. In its brief in support of its motion, Broe Rehabilitation clarified that this case was not a case of Allstate's absolute refusal to pay, but a case of underpayment for services rendered. Broe Rehabilitation attached to its motion a chart summarizing Allstate's payment history, which showed that Allstate regularly paid several thousand dollars less than Broe Rehabilitation billed. Broe Rehabilitation pointed out that, on occasion, Allstate would pay the full amount billed, which Broe Rehabilitation argued demonstrated the unreasonableness of Allstate's conduct. Broe Rehabilitation also attached to its motion affidavits and numerous other documents allegedly supporting that its charges were reasonable, necessary, and actually incurred, and that its services were reasonably necessary for Alder's care.

In September 2005, Allstate responded, arguing that, contrary to Broe Rehabilitation's contentions, Alder did not receive 24-hour supervision. Allstate attached to its responsive motion numerous documents allegedly supporting that Alder could not have been supervised as much as Broe Rehabilitation claimed and that the lack of supervision resulted in Alder sustaining further brain damage. Specifically, Allstate pointed to four incidents that allegedly called into question Broe Rehabilitation's supervision: (1) a June 1990 incident when Alder was severely

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[2] In September 2005, Allstate and Wenderlich stipulated to dismiss her claim without prejudice; therefore, her claim is not a subject of this appeal.

[3] MCL 500.3145(1).

[4] MCL 600.5851(1).

[5] See MCL 500.3107.

scalded while in the shower, (2) a May 1998 letter that indicated that Broe Rehabilitation was not performing bi-weekly physician-recommended blood draws, (3) a July 2000 report that again indicated that Broe Rehabilitation was not performing blood draws, and (4) a February 2002 massive seizure, which was the alleged result of Broe Rehabilitation's failure to administer prescribed medication, and during which Alder allegedly suffered further brain damage from lack of oxygen. Accordingly, Allstate asserted that summary disposition was not appropriate because there was a genuine issue of material fact regarding whether the alleged charges were actually incurred. Allstate additionally argued that Broe Rehabilitation, a for-profit corporation, was not licensed to perform professional services under the Professional Services Corporation Act (PSCA).[6]

At a September 23, 2005 hearing on the motion, Broe Rehabilitation argued that Allstate's argument was disingenuous in light of the fact that it paid the majority of the charges billed; Broe Rehabilitation specifically noted that in February 2002, the month when Alder suffered the massive seizure, Allstate paid the full amount charged. Broe Rehabilitation also asserted that the June 1990 incident was irrelevant because Broe Rehabilitation was only claiming charges owed since 1996. Broe Rehabilitation also clarified that this was not a medical malpractice case; therefore, the fact that certain services may not have been properly performed was not the issue—the issue was whether the charges that were incurred were reasonable and necessary. Broe Rehabilitation pointed out that none of the exhibits submitted by Allstate supported a finding that Broe Rehabilitation had not actually provided the billed services. Last, Broe Rehabilitation argued that the licensure argument was a red herring because Allstate always knew that it was not professionally licensed and, regardless, there was no private cause of action available under the PSCA. Allstate responded, essentially contending that the fact that it paid a portion of the bills did not bar it from now asserting that Broe Rehabilitation was never entitled to payment for services that it either did not perform or was not licensed to perform. Allstate also argued that Broe Rehabilitation's "self-supporting" affidavits were inappropriate evidence on which to grant summary disposition. After noting that it was "at a state of a ball of confusion," the trial court took the matter under advisement.

In November 2005, Broe Rehabilitation moved for a stay pending the Michigan Supreme Court's review of this Court's decision in *Cameron v Auto Club Ins Ass'n*, holding that "since the effective date of the 1993 amendment, the general saving provision of the RJA[7] does not apply to actions commenced under the no-fault act."[8] The trial court granted the motion, adjourning trial from January 2006 to June 2006. In June 2006, the trial court extended the stay "pending the decision of the Michigan Supreme Court[.]"

In August 2006, Allstate moved to lift the stay and renewed its motion for partial summary disposition regarding the one-year back rule in light of the Supreme Court's decision in *Cameron v Auto Club Ins Ass'n*, which held that the RJA's disability tolling provision did not

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[6] MCL 450.221 *et seq*.

[7] MCL 600.5851(1).

[8] *Cameron v Auto Club Ins Ass'n* (*Cameron I*), 263 Mich App 95, 103; 687 NW2d 354 (2004), aff'd in part and vac'd in part 476 Mich 55 (2006).

toll the no-fault insurance act's one-year-back rule.[9] Allstate requested that, in light of *Cameron*, any recovery of damages be limited to one year from the filing of the claim. Broe Rehabilitation responded, requesting that the trial court rule on Broe Rehabilitation's outstanding (C)(10) motion.

At a September 2006 hearing, Broe Rehabilitation informed the trial court that this Court had recently ruled that the lawfulness of an entity's corporate structure was irrelevant to the lawfulness of the treatment rendered, i.e., if a licensed practitioner rendered the treatment, then the services were lawfully rendered.[10] Allstate essentially conceded the issue.[11] But Allstate then informed the trial court that, following an August 2006 jury trial in the Oakland Circuit Court, Allstate was awarded $3 million in its action against Broe Rehabilitation to recoup no-fault insurance benefits paid to Broe Rehabilitation. Allstate explained that the action alleged fraud, unjust enrichment by mistake of fact, and breach of contract, and that some of the bills that Allstate was seeking to recoup were those paid for Alder's care. The trial court took the matter under advisement pending confirmation that the prior judgment barred determination of payment for Alder's care in this case; absent such notice, the trial court stated that it would enter an order granting Broe Rehabilitation "whatever balance that is due and owing given the decision in Cameron."[12]

In October 2006, Allstate moved for summary disposition under MCR 2.116(C)(6) and (7), arguing that in light of entry of the judgment on the $3 million jury verdict, Broe Rehabilitation's claims were barred because that verdict "determined that the services allegedly provided to . . . Daniel Alder, [were] not in fact compensable under the Michigan No-Fault Act." In other words, Allstate argued that Broe Rehabilitation could no longer demand payment for those fraudulently procured bills. Allstate further noted that the jury found no cause of action on Broe Rehabilitation's counter-claim for payment of benefits "on behalf of three other Allstate insureds." Accordingly, Allstate argued that Broe Rehabilitation's claim in the present case was barred by the prior judgment.

Broe Rehabilitation responded, noting that the jury returned a verdict of only $3 million even though Allstate had requested $3.5 million and that the verdict form did not specify on which specific claims the jury found in Allstate's favor. Therefore, Broe Rehabilitation argued that it was mere speculation for Allstate to assert that the jury's verdict definitively included

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[9] *Cameron v Auto Club Ins Ass'n* (*Cameron II*), 476 Mich 55, 58; 718 NW2d 784 (2006).

[10] *Miller v Allstate Ins Co* (*Miller I*), 272 Mich App 284; 726 NW2d 54 (2006), vacated and remanded 477 Mich 1062, on remand 275 Mich App 649, lv gtd 480 Mich 938 (2007).

[11] When the trial court asked him whether he had read the case, Allstate's counsel responded, "I hadn't, but as far as my feeling now I believe that the only issues now in front of us are the billings reasonable, necessary and basically compensable under the No-Fault Act."

[12] In a supplemental brief, Broe Rehabilitation asserted that in light of *Cameron II*, the amount owed for Broe Rehabilitation's services to Alder between June 2, 2002 and August 2002 was $15,850.

claims submitted for Alder's care.[13] Broe Rehabilitation noted that the jury finding of no cause of action on its counterclaim against "three other Allstate insureds" was irrelevant to this matter. Broe Rehabilitation also asserted that Allstate was procedurally barred from now raising a (C)(6) motion when it failed to assert that defense in its responsive pleadings. Last, Broe Rehabilitation pointed out that even though this action was pending at the time that Allstate filed the Oakland County action against Broe Rehabilitation, Allstate failed to identify the existence of any other actions in its complaint, as required by MCR 2.113(C)(2). Therefore, Broe Rehabilitation argued that Allstate's violation of the procedural rules constituted a waiver of the issue.

At a December 2006 hearing, Allstate argued that, as a party to the Oakland County case, Broe Rehabilitation could have requested a specific jury finding regarding whether the Alder claims were included in the verdict, but having failed to do so, Broe Rehabilitation waived any argument that the Alder claims were not included in that verdict. Broe Rehabilitation responded, arguing that because a court speaks through its orders and the prior judgment did not mention the Alder claims, it must be assumed that those claims were not included in the verdict. Broe Rehabilitation then reminded the trial court that at the previous hearing it had indicated that, absent confirmation that the prior judgment barred further determination of payment for Alder's care in this case, it would enter an order in Broe Rehabilitation's favor. The trial court then stated as follows:

> Yes. I was inclined to do that.
>
> I think that's what I'll do, sir, because I really don't know. I don't know. I'm damned if I do and I'm damned if I don't. I'm right if I'm wrong and I'm wrong if I'm right just because.
>
> I don't blame either one of you. But the facts are here.
>
> I guess I should blame you, [Allstate's counsel], more than [Broe Rehabilitation's counsel] because [Broe Rehabilitation's counsel] wasn't in the other case. So he couldn't have asked for it. Whoever the other lawyer was didn't ask for it.
>
> But you were there. I suppose you could have gotten [a] special verdict to the jury, which cases are you making an award on even if they didn't put down the amount in light of the fact that this case was pending.
>
> So I guess I'm going to grant what small amount—because he wanted a lot more . . . .
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> * * *
>
> I'm making a decision based on the fact that I don't know that I am wrong. That's what I'm saying. I asked for guidance from you.

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[13] Allstate replied to this assertion by submitting an affidavit from a "litigation consultant," attesting that the $3 million jury verdict included the billings involving Alder.

I wasn't out there in Oakland County. So I don't know what happened. All I know is that Broe was involved out there. . . .

Nobody consolidated it. Whatever conversation was had about Mr. Alder out there we don't know what it is. We don't know what it wasn't. Mr. Alder's bill, if it was included, would have been among the 3.5 million. Maybe they excluded Mr. Alder. Maybe they didn't exclude Mr. Alder. I don't know.

Since I don't know then I guess I ought to find [in] favor of the—I've got to find one way or the other. So I'll find in favor of Broe and give him $15,000, which I guess he could set off against that three million that he owes you. And give him $15,000, if that is the proper amount.

* * *

. . . If [Broe Rehabilitation] committed all those kinds of dastardly acts with reference to all those other folks that they may have cared for, do we know that [they] did it in the case of Alder. That's why I thought you were going to—That is the determination I thought that was going to be made: This factual situation they found, they dealt with it and made a determination and considered it and it's res judicata because they've already made a determination.

But you aren't able to tell me that.

* * *

I believe that Mr. Broe provided whatever medical care that was indicated and that he was entitled to it. However, he is barred from recovery because of the Cameron case in terms of how far back he can go. I believe there is—I don't have any reason to challenge and you don't either that if he's able to recover anything the $15,800 is an appropriate amount.

Following the hearing, the trial court entered a written order lifting the stay, denying Allstate's motion for summary disposition, granting Broe Rehabilitation's motion for partial summary disposition under MCR 2.116(C)(10), and entering judgment in favor of Broe Rehabilitation in the amount of $15,580.[14]

Allstate now appeals.

[14] Despite the trial court's foregoing reference to amounts of $15,000 and $15,800, as previously indicated in footnote 12, Broe Rehabilitation's actual claimed damages were $15,580.

II. Broe Rehabilitation's Motion For Summary Disposition

A. Standard Of Review

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[15] The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and producing admissible evidence to establish those disputed facts.[16] Conjectures, speculations, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.[17] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[18] We review de novo the trial court's ruling on a motion for summary disposition.[19]

B. Genuine Issue Of Material Fact

Allstate argues that the trial court failed to articulate appropriate grounds on which to grant Broe Rehabilitation summary disposition when the trial court based its decision on "the fact that I don't know that I am wrong." Allstate contends that it met its burden of showing that a genuine issue of disputed fact existed regarding the reasonableness of the charges for Alder's care, thereby precluding summary disposition.

Allstate's obligation to pay Broe Rehabilitation for Alder's medical expenses arises pursuant to sections 3105, 3107, and 3157 of the no-fault insurance act. MCL 500.3105(1) provides that an insurer is liable to pay personal protection benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle[.]" MCL 500.3107(1)(a) further provides, in pertinent part, that personal protection insurance benefits are payable for "[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." And MCL 500.3157 provides as follows:

> 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, and a person or institution providing rehabilitative

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[15] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[16] *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

[17] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher*, *supra* at 420; *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

[18] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[19] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> occupational training following the injury, may charge a *reasonable* amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution *customarily* charges for like products, services and accommodations in cases not involving insurance. [Emphasis added.]

A no-fault insurer may not place limits on the amount it will pay to a service provider for particular services.[20] Only the statutory qualifications of reasonableness and customariness limit the amount that a no-fault insurer must pay for covered medical expenses.[21]

"Customary charges" means the standard amount a service provider bills on behalf of every patient treated.[22] But a "customary" charge is not necessarily a "reasonable" charge that must be reimbursed in full by the insurer.[23] "[T]he 'customary fee' is simply the cap on what health-care providers can charge, and is not, automatically, a 'reasonable' charge requiring full reimbursement under § 3107."[24] The service provider bears the burden of proving both the customariness and the reasonableness of its charges.[25]

> However, the Legislature has not defined what is "reasonable" in this context, and, consequently, insurers must determine in each instance whether a charge is reasonable in light of the service or product provided. It may be that a health-care provider's "customary" charge is also reasonable given the services provided, while at other times the "customary" charge may be too high, and thus unreasonable. Either way, the trier of fact will ultimately determine whether a charge is reasonable.[26]

"'Where a plaintiff is unable to show that a particular, reasonable expense has been incurred for a reasonably necessary product and service, there can be no finding of a breach of the insurer's duty to pay that expense, and thus no finding of liability with regard to that expense.'"[27]

As mentioned, Broe Rehabilitation attached to its motion for summary disposition affidavits and numerous other documents allegedly supporting that its charges were reasonable, necessary, and actually incurred, and that its services were reasonably necessary for Alder's care.

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[20] *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 139; 485 NW2d 695 (1992); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 113; 535 NW2d 529 (1995).

[21] *Auto Club Ins Ass'n*, *supra* at 139; *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 376-377; 670 NW2d 569 (2003), aff'd 472 Mich 91(2005); *Hofmann*, *supra* at 113-114.

[22] *Munson Medical Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 382; 554 NW2d 49 (1996).

[23] *Advocacy Org for Patients & Providers*, *supra* at 376.

[24] *Id*. at 377.

[25] *Id.* at 380; *Munson Medical Ctr*, *supra* at 385.

[26] *Advocacy Org for Patients & Providers*, *supra* at 379.

[27] *Id.* at 374, quoting *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990).

Allstate nevertheless argues that Broe Rehabilitation's "self-serving" affidavits were insufficient evidence on which to grant summary disposition. We disagree.

"A party or a witness may not create a factual dispute by submitting an affidavit that contradicts his own prior conduct."[28] For example, a witness is bound by his or her deposition testimony and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition.[29] Similarly, a defendant cannot support a motion for summary disposition by submitting an affidavit that merely states a flat and conclusory denial of the allegations in the complaint.[30] However, absent such contradictions or conclusory denials, all documentary evidence, including affidavits, are relevant when a party moves for summary disposition on the grounds that there is no genuine issue of material fact.[31]

Broe Rehabilitation supported its motion with an affidavit of Ann Manning, Vice President of Community Relations for Broe Rehabilitation, which stated as follows:

> 2. As Vice President of Community Relations, I am knowledgeable about the amount BRS routinely charges for services provided and the amount BRS routinely receives from various No-Fault providers.
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> * * *
>
> 7. The charges are reasonable charges for the products, services and accommodations provided to Daniel Alder.
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> 8. The charges are the standard, customary amounts BRS charges every patient for the same health care services.
>
> 9. The charges are comparable to and competitive with those charged by other service providers who provide similar services in the Southeastern Michigan area.

Manning further averred that "BRS provided products, services and accommodations to Daniel Alder on an inpatient basis from November 30, 1987 through August 25, 2002."

According to the affidavit of Broe Rehabilitation Administrator, Timothy Broe, Ph.D, "Daniel required significant supervisory and rehabilitative care as a result of his traumatic brain injury." And, according to the affidavit of Bryan Weinstein, M.D., Psychiatric Medical Director of Broe Rehabilitation, "[t]he services provided to Daniel by BRS included residential services (room and board, maximum assist with all activities of daily living), medical case management

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[28] *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997); *Aetna Casualty & Sur Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993).

[29] *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993).

[30] *Durant v Stahlin*, 374 Mich 82, 84-85; 130 NW2d 910 (1964).

[31] *Bergen v Baker*, 264 Mich App 376, 388; 691 NW2d 770 (2004); *Madison Nat'l Bank v Lipin*, 57 Mich App 706, 709; 226 NW2d 834 (1975).

(cognitive remediation, community re-entry outings, TBI education, AA/NA group meetings, group therapy) neuro-cognitive therapy, recreational therapy, psychological, rehabilitation and family counseling." Additionally, Broe Rehabilitation submitted various letters and reports documenting the services that Alder received. This was sufficient to meet Broe Rehabilitation's burden to specifically identify the undisputed factual issues and support its position with documentary evidence.[32]

Conversely, Allstate failed to provide documentary evidence that identified specific facts to show that there was a dispute of material fact over whether the charges were reasonable or incurred. Instead, Allstate simply questioned Broe Rehabilitation's 24-hour supervision by citing instances of possible neglect over a 12-year period. None of the exhibits submitted by Allstate supported a finding that Broe Rehabilitation did not actually provide the billed services. More specifically, Allstate failed to relate the claimed instances of "deplorable treatment" to any nonpayment of specific bills that Broe Rehabilitation charged. Allstate's failure to raise a genuine issue of fact regarding Alder's care left Broe Rehabilitation's asserted facts uncontroverted. Accordingly, we conclude that the trial court did not err in granting Broe Rehabilitation summary disposition.

C. Licensure

As in the proceedings below, Allstate argues that Broe Rehabilitation's services were not lawfully rendered, as MCL 500.3157 requires,[33] because Broe Rehabilitation was not properly licensed. But having conceded the issue, Allstate no longer argues that Broe Rehabilitation had to be incorporated under the PSCA. Moreover, this Court has held that the lawfulness of an entity's corporate structure is irrelevant to the lawfulness of the treatment rendered.[34]

Allstate now argues that Broe Rehabilitation, although licensed as an adult small group home,[35] was not properly licensed as a nursing home.[36] However, because Allstate did not argue this below, this argument is unpreserved and, therefore, we need not review it on appeal.[37]

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[32] See MCR 2.116(G)(3)(b); *Maiden*, *supra* at 120; *Munson Medical Ctr*, *supra* at 54.

[33] MCL 500.3157 provides in pertinent part 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, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered." (Emphasis added).

[34] *Miller v Allstate Ins Co* (*On Remand*) (*Miller II*), 275 Mich App 649; 739 NW2d 675, lv gtd 480 Mich 938 (2007).

[35] See MCL 400.703.

[36] See MCL 333.20109.

[37] *Booth Newspapers v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003).

III. Allstate's Motion For Summary Disposition

A. Standard Of Review

Allstate argues that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(6) and (7). We review de novo the trial court's ruling on a motion for summary disposition.[38]

Under MCR 2.116(C)(6), a party may move for dismissal of a claim on the ground that "[a]nother action has been initiated between the same parties involving the same claim." The purpose of the rule is to prevent plaintiffs from harassing opposing parties and wasting money and energy by bringing repeated suits involving the same issues as those already posed in pending litigation.[39] However, "MCR 2.116(C)(6) does not operate where another suit between the same parties involving the same claims is no longer pending at the time the motion is decided."[40]

Under MCR 2.116(C)(7), a party may move for dismissal of a claim on the ground that the claim is barred because of a "prior judgment . . . or other disposition of the claim before commencement of the action." Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[41] The trial court must accept as true the plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence and construe them in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[42]

B. Analysis

Pointing to the jury verdict in the Oakland County case, Allstate argues that the trial court should have granted summary disposition to Allstate because a prior judgment had been rendered in favor of Allstate on the issue of recoupment for payments made for Broe Rehabilitation's services provided to Alder.

However, Allstate waived presentation of motions for summary disposition under both MCR 2.116(C)(6) and (7) by not raising the arguments in its responsive pleading. Under MCR 2.116(D)(2), "[t]he grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading . . . ." Further, according to MCR 2.111(F)(2),

> A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the

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[38] *Spiek*, *supra* at 337.

[39] *Fast Air, Inc v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999).

[40] *Id.* at 546.

[41] *Maiden*, *supra* at 119.

[42] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

> defenses the party has against the claim. *A defense not asserted in the responsive pleading or by motion as provided by these rules is waived*, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted. [Emphasis added.]

Therefore, albeit for a different reason,[43] we conclude that the trial court properly denied Allstate's motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette

[43] See *Tipton v William Beaumont Hosp*, 266 Mich App 27, 37-38; 697 NW2d 552 (2005).