

STATE OF MICHIGAN
COURT OF APPEALS

RANDY OLSEN,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

February 20, 2020

No. 346650

Macomb Circuit Court

LC No. 2016-003562-NF

Before: MURRAY, C.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

In this first-party no-fault action, defendant appeals by leave granted¹ the trial court’s order denying defendant’s motion for summary disposition. We reverse and remand for entry of an order granting defendant’s motion for summary disposition.

I. BACKGROUND

The facts of this case are relatively undisputed. On February 14, 2012, plaintiff, a pedestrian, was struck and injured by a motorist insured by defendant. Following the accident, plaintiff signed a contract with Adult Residential Care Services (ARCS) for a “leased private unit residence,” and “at least one regularly scheduled health-related service or two supportive services.” Under the contract, ARCS would be responsible for “housing, utilities, amenities and food” The 2012 contract stated that ARCS contracted with Continuum Home Care Services, LLC (Continuum) “for personnel providing delivery of home care services,” and required plaintiff to also execute a service agreement with Continuum. The requirement that ARCS contract with Continuum was eliminated in the most recent 2014 contract between plaintiff and ARCS. The ARCS residence was not a licensed adult foster care facility.

¹ *Olsen v Allstate Ins Co*, unpublished order of the Court of Appeals, entered December 20, 2018 (Docket No. 346650).

Under the 2014 contract, ARCS billed \$200 per day for the services provided under the contract. The rate covered protection and safety for plaintiff and other expenses involved with the maintenance and upkeep of the residence. The rate also included charges for David Hooven's services, ARCS's owner, as plaintiff's nurse case manager. As the case manager, Hooven attended plaintiff's appointments, managed his medication, and monitored the Continuum staff. With respect to medication management, ARCS made calls to plaintiff's physicians to renew his prescriptions, went to the pharmacy to refill prescriptions, and weekly filled plaintiff's "pillboxes" with medications.

At the request of defendant, a functional home living assessment was performed in 2017 to "evaluate [plaintiff's] home environment and provide recommendations regarding the necessity of attendant care." The assessment noted that the attendant care services provided by Continuum included 24-hour supervision, reminders to take medications, preparation of meals, and cleaning of floors, bath, counters, and vacuuming. With respect to medication management, the assessment provided the following:

[Plaintiff] requires assistance with medication management. A medication organizer is utilized and set-up once weekly by a nurse. Medications and medication organizer were noted as locked away in a safe, accessed by caregiver(s).

The assessment recommended that plaintiff receive "24 hours daily assistance primarily for safety supervision due to limitations with memory and impulsivity. . . . [Plaintiff] would also continue to require assistance with medication management and transportation to medical appointments and sheltered workshop."

Defendant refused to pay for ARCS's services, so plaintiff filed a complaint in the Macomb Circuit Court alleging breach of contract, and seeking declaratory judgment related to defendant's refusal to pay personal protection insurance (PIP) benefits, MCL 500.3101 *et seq.* Defendant eventually filed a motion for summary disposition under MCR 2.116(C)(10), arguing that the treatment provided by ARCS was unlawfully rendered because that treatment constituted foster care, and ARCS was not a licensed adult foster care facility. Thus, according to defendant, Michigan law did not require it to pay for treatment provided by ARCS.

Plaintiff's position was that while ARCS provided plaintiff with supervision and protection, it did not provide plaintiff with personal care, and all three components—supervision, protection, and personal care—are required for treatment to be considered foster care. Plaintiff also argued that to the extent some personal care assistance is provided to him, it was provided by Continuum, which is an independent contractor, and not affiliated with ARCS.

After a hearing, the trial court issued an opinion and order denying defendant's motion for summary disposition. While the court concluded that no issue of material fact existed regarding whether plaintiff received personal care services, the court concluded that there was a question of material fact regarding who provided the personal care—ARCS or Continuum. Thus, the court denied defendant's motion. Defendant's motion for reconsideration was subsequently denied.

II. DISCUSSION

Defendant argues that the trial court erred when it denied its motion for summary disposition because regardless of who provided the personal care to plaintiff—ARCS or Continuum—the provision of that care rendered ARCS an adult foster care facility for which it had no license.

“Appellate review of the grant or denial of a summary-disposition motion is de novo,” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003), as are questions of statutory interpretation, *Tree City Props, LLC v Perkey*, 327 Mich App 244, 247; 933 NW2d 704 (2019).

“We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West*, 469 Mich at 183. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.*

Under MCL 500.3107, “a claimant can recover as an allowable expense the charge for a product, service, or accommodation that has the object or purpose of effectuating the injured person’s care, recovery, or rehabilitation.” *Admire v Auto-Owners Ins Co*, 494 Mich 10, 26; 831 NW2d 849 (2013). “An expense is an ‘allowable expense’ if (1) the expense is for an injured person’s care, recovery, or rehabilitation, (2) the expense is reasonably necessary, (3) the expense is incurred, and (4) the charge is reasonable.” *ZCD Transp, Inc v State Farm Mut Auto Ins Co*, 299 Mich App 336, 341; 830 NW2d 428 (2012).

Section 3107 is read in conjunction with MCL 500.3157. *Cherry v State Farm Mut Auto Ins Co*, 195 Mich App 316, 319; 489 NW2d 788 (1992). Under MCL 500.3157(1), “a physician, hospital, clinic, or other person that lawfully renders treatment to an injured person for an accidental bodily injury covered by personal protection insurance, . . . may charge a reasonable amount for the treatment or training.” Thus, payment by an insurer is required as a no-fault benefit only when the “treatment [was] lawfully rendered, including being in compliance with licensing requirements . . .” *Cherry*, 195 Mich App at 320. “If the treatment was not lawfully rendered, it is not a no-fault benefit and payment for it is not reimburseable.” *Id.* The plaintiff seeking payment bears the burden to prove the services are compensable. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 57; 744 NW2d 174 (2007).

Resolution of this case requires examination of various statutory texts. “The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision.” *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). “If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.” *Id.*

The term “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 . . .” MCL 400.704(8). In turn, an “adult foster care facility” is “a home

or facility that provides foster care to adults.” MCL 400.703(4). The term includes “facilities and foster care family homes for adults who are aged, mentally ill, developmentally disabled, or physically disabled who require supervision on an ongoing basis but who do not require continuous nursing care.” *Id.* Adult foster care facilities are required to be licensed by the State. MCL 400.713(1).

Plaintiff and Hooven admit that ARCS provided plaintiff with supervision and protection, two of the three elements of foster care under MCL 400.704(8). Plaintiff denies, however, that ARCS also provided plaintiff with “personal care.” That term is defined by statute as:

[P]ersonal assistance provided by a licensee or an agent or employee of a licensee to a resident who requires assistance with dressing, personal hygiene, grooming, maintenance of a medication schedule as directed and supervised by the resident’s physician, or the development of those personal and social skills required to live in the least restrictive environment. [MCL 400.706(1).]

Defendant argues that on the basis of *Healing Place, Ltd v Farm Bureau Mut Ins Co of Mich*, unpublished per curiam opinion of the Court of Appeals, issued August 5, 2010 (Docket No. 286050) (WILDER, J., concurring in part and dissenting in part), rev’d 488 Mich 1026 (2011),² the focus of the inquiry regarding whether services are lawfully rendered should be on the treatment that the patient requires, and not how the provider characterizes the treatment or who provides the treatment. In *Healing Place*, the partial dissent concluded that the trial court did not err when it granted summary disposition to the defendant because the defendant was not responsible to pay for the plaintiff’s treatment because the provider was an unlicensed adult foster care facility. *Healing Place*, unpub op at 2. There, the plaintiff “received 24-hour staff interaction, and that staff maintained a medication schedule for her.” *Id.* In addition, the plaintiff had “external controls placed on her including her hours, the routine determination of who is permitted and is not permitted in her apartment, and how her apartment is maintained, including regular inspections.” *Id.* Thus, the record supported the conclusion that the plaintiff “ ‘require[d] supervision on an ongoing basis but [did] not require continuous nursing care . . . ’ ” *Id.*, quoting MCL 400.703(4) (alterations in original).

Pursuant to *Healing Place*, 488 Mich at 1026, the relevant inquiry is on the treatment provided to the patient. The record before the trial court was undisputed about what type of personal care services plaintiff required. The record shows that plaintiff required 24-hour

² *Healing Place* was appealed to the Supreme Court and, in lieu of granting leave, the Supreme Court reversed this Court “for the reasons stated in the Court of Appeals partial dissenting opinion” *Healing Place Ltd v Farm Bureau Mut Ins Co of Mich*, 488 Mich 1026, 1026 (2011). Thus, Judge WILDER’s partial dissent in *Healing Place* is binding on this Court. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001) (“An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent.”).

assistance because of impulse control and memory issues, and also required continuous medication management and transportation assistance.

Maintenance of a medication schedule is one of the activities listed under MCL 400.706(1) as constituting personal care. The un rebutted testimony of Hooven clearly demonstrated that plaintiff required this assistance, and it was provided by Hooven while plaintiff was at ARCS. Hooven testified (similar to the unlicensed provider in *Healing Place*) that he “manage[d] [plaintiff’s] medications and I do all those nursing back-up things to the attendant care” Indeed, in his deposition, Hooven testified that he did not do “any of the personal care issues” for plaintiff, except “monitoring the medications and [setting] those up.” Finally, the billing summary submitted by ARCS to defendant included services to “fill medical pillboxes at least weekly,” among other medical services. Thus, ARCS provided plaintiff with “supervision, personal care, and protection,” MCL 400.704(8), and was not licensed as an adult foster care facility. The treatment it rendered was, for purposes of reimbursement under the no-fault act, unlawful.

Plaintiff’s argument—that so long as the facility housing the patient does not provide all components of foster care, a license is not required—would turn the licensure requirement into a nullity. “[A] reviewing court should not interpret a statute in such a manner as to render it nugatory.” *Apsey v Memorial Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007). Under plaintiff’s interpretation, facilities would be disincentivized from obtaining a license, which would run contrary to the Legislature’s intent when creating the licensure requirement. See *Greentrees Civic Ass’n v Pignatiello*, 123 Mich App 767, 772; 333 NW2d 350 (1983), aff’d 423 Mich 466 (1985) (quotation marks omitted) (“The purpose of the Adult Foster Care Facility Licensing Act, as stated in its title, is to provide for the licensing and regulation of adult foster care facilities; to provide for the establishment of standards of care for adult foster care facilities; to prescribe powers and duties of the department of social services and other departments; to prescribe penalties; and to repeal certain acts and parts of acts.”).

The recent decision in *Life Skills Village, PLLC v Nationwide Mut Fire Ins Co*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 345237), reinforces our conclusion. In comparing the definition of “personal care” under MCL 400.706(1), and “supervision” as defined in MCL 400.707(7), the *Life Skills Village* Court stated that it could “discern from the definition of supervision that personal care requires something more, or at least different, than guidance and reminders to the residents.” *Life Skills Village, PLLC*, ___ Mich App at ___; slip op at 6. In other words, the *Life Skills Village* Court concluded that “personal care” requires something more or different than simple guidance and reminders to residents, i.e., something different than “supervision.” *Id.* And, because in that case it was undisputed that the *only* services provided by Life Skills Village was the “prompting” of residents, and the party receiving services did not require any assistance with tasks, the Court concluded that no personal services were provided by the entity. *Id.* at ___; slip op at pp 2, 6. Here, it is undisputed that ARCS provided physical assistance to plaintiff through the weekly filling of his medication pillboxes. Additionally, the trial court’s decision being reviewed in *Life Skills Village* was premised upon that portion of MCL 400.706(1) that states “that the development of both social and personal skills required to live in the least restrictive environment.” *Id.* at ___; slip op at p 4. Because that clause within MCL 400.706(1) is not at issue here, the ultimate conclusion in *Life Skills Village* is distinguishable.

III. CONCLUSION

The order of the trial court denying defendant's motion for summary disposition is reversed, and this case is remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

Defendant may tax costs having prevailed in full. MCR 7.219(A)(2).

/s/ Christopher M. Murray

/s/ Brock A. Swartzle

/s/ Thomas C. Cameron