STATE OF MICHIGAN

COURT OF APPEALS

CASIMIR ANDREW ZABORSKI,

Plaintiff-Appellant/Cross-Appellee,

v

STATE FARM MUTUAL AUTO INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
January 14, 2021

No. 350834
Macomb Circuit Court
LC No. 2018-001058-NF

Before: LETICA, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

In this case concerning claims for personal injury protection (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right the trial court's order striking plaintiff's proposed expert and dismissing plaintiff's complaint without prejudice. On appeal, plaintiff challenges the trial court's decisions to strike his proposed expert and dismiss his claim for medical benefits, and also the court's earlier order granting defendant's motion for summary disposition on plaintiff's claims for attendant care benefits. Defendant cross-appeals, challenging the trial court's decision to dismiss the case without prejudice. For plaintiff's appeal, we find no errors. For defendant's cross-appeal, however, we conclude that the trial court erred by dismissing plaintiff's claim without prejudice.

I. BACKGROUND

This case arose when plaintiff, while riding a bicycle, was struck by a motor vehicle on October 18, 2012. Defendant provided PIP benefits to plaintiff through April 21, 2017, pursuant to a settlement of earlier litigation. Plaintiff in the instant action seeks medical and attendant care benefits for services provided after that date.

After discovery concluded, defendant sought summary disposition on plaintiff's claim for attendant care benefits. At the hearing on the motion, the trial court expressed concern that "we don't have anything from a physician relative to the current attendant care requirements," and, accordingly, granted defendant's motion "reluctantly" because discovery was over "and there's nothing in this file that suggests that 12 hours a day is necessary."

The litigation continued in connection with plaintiff's claims for reimbursement of medical expenses. Defendant, complaining of plaintiff's lack of cooperation with the discovery process, filed a motion in limine to dismiss the case, or, alternatively, to prevent plaintiff from calling any experts at trial. The trial court granted that motion in part, limiting plaintiff to a single expert—Dr. Bradley Sewick. The order further provided that "plaintiff may only produce records or proffer testimony from Dr. Sewick that were in fact produced during the course of discovery."

The day after the court entered this order, plaintiff noticed Dr. Sewick's deposition for the day before trial was scheduled to begin. At Dr. Sewick's deposition, he testified that plaintiff's attorney had sent him "additional records to review" in January 2019, and that his testimony would be based in part on those additional records.

The next day, at the time scheduled for trial, defense counsel protested that plaintiff's physician had produced 238 pages of documents in response to a discovery subpoena, but then, at the deposition, relied on a file that "contained 899 additional pages that weren't produced during the course of discovery." Plaintiff's attorney retorted that the additional documents were known and available to defendant, but the trial court responded that "[t]hat's not the issue," the interrogatories and order were "specific," that plaintiff "didn't provide the information that was requested." The court then struck Dr. Sewick's testimony in its entirety.

Defense counsel then moved the court "for a dismissal with prejudice because plaintiff cannot present any evidence that he sustained an accidental bodily injury arising out of the October 18, 2012 motor vehicle accident." Plaintiff's attorney protested that plaintiff could continue without Dr. Sewick and rely on other information disclosed in discovery, but defense counsel replied that without Dr. Sewick "they can't lay testimony or foundation that these bills are reasonable and customary and that they were reasonable and related to . . . the accident on October 18th of 2012." The trial court agreed and dismissed the case, but without prejudice.

This appeal, and cross-appeal, followed.

II. ATTENDANT CARE BENEFITS

Plaintiff first argues that the trial court erred by granting defendant's motion for summary disposition in connection with plaintiff's claim for attendant care benefits. We disagree.

This Court reviews do novo a trial court's decision on a motion for summary disposition. *Ford Credit Int'l Inc v Dep't of Treasury*, 270 Mich App 530, 534; 716 NW2d 593 (2006). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor,* 263 Mich App 618, 621; 689 NW2d 506 (2004).

After discovery, defendant moved for summary disposition on plaintiff's claim for attendant care benefits. At the ensuing hearing, the trial court stated that it could not find anything in the record "saying [plaintiff] needs" attendant care, to which plaintiff's counsel acknowledged

that plaintiff did not have a prescription for attendant care.[1] Plaintiff's counsel nonetheless argued that the court could infer from plaintiff's continued treatment that he "needs help with [his] emotional and mental well-being," to which the court replied, "You need something more than that. . . . I would assume this is a serious injury, that there would be a basis for some form of attendant care . . . but nothing here to support it." The trial court eventually granted defendant's motion, concluding that "nothing" in the case file suggested that the attendant care services provided to plaintiff were reasonably necessary.

On the record before us, we agree with the trial court's conclusion. Pursuant to MCL 500.3107(1)(a), no-fault benefits include "[a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." For an allowable expense to be compensable under this subsection, three requirements must be met: (1) the charge must be reasonable, (2) the expense must be reasonably necessary, and (3) the expense must be incurred. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990). The plain language of MCL 500.3107(1)(a) makes both reasonableness and necessity elements of a claimant's recovery, and thus renders their absence a defense to the insurer's liability. *Id*. at 49. The burden of proving the reasonable necessity of a service lies with the plaintiff. *Id*. "An expense is 'reasonably necessary' if (1) it is objectively reasonable and (2) it is necessary for the insured's care, recovery, or rehabilitation." *ZCD Transp, Inc v State Farm Mut Auto Ins Co*, 299 Mich App 336, 342; 830 NW2d 428 (2012); see also *Krohn v Home-Owners Ins Co*, 490 Mich 145, 163; 802 NW2d 281 (2011). The requirement that the service be "for an injured person's care" does not refer to the injured person's "care in general," but to care "necessitated by the injury sustained in the motor vehicle accident." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 534-535; 697 NW2d 895 (2005).

In response to interrogatory requests by defendant, plaintiff identified his mother as his attendant care provider, and stated that she had been providing attendant care services since April 2017 and that she provided him with "general supervision . . . and emotional support as necessary." At his deposition, when asked what attendant care services plaintiff's mother provided him, plaintiff explained that he often suffered from crying spells and that his mother offered him emotional support.[2] But plaintiff could not say precisely when or for how long his mother provided

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[1] After the trial court granted partial summary disposition to defendant, plaintiff attached to his motion for reconsideration a prescription for attendant care that was dated after the trial court made its decision. The trial court properly declined to consider this evidence because it was produced for the first time in a motion for reconsideration. See *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474 n 6; 776 NW2d 398 (2009). We likewise decline to consider this evidence because it was not before the trial court when it decided defendant's motion, and "we must limit our review to the evidence presented to the trial court at the time defendant's motion was decided." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

[2] Plaintiff was explained the difference between attendant care services and replacement services before being asked what attendant care services his mother provided, but when he answered the question plaintiff still listed certain replacement services that his mother provided him, such as cooking and cleaning. Plaintiff never claimed in the trial court or on appeal that those replacement services were compensable as attendant care services.

him emotional support because it varied and he had not been keeping track of the attendant care provided to him. He also admitted that he did not have a prescription for attendant care.

In response to defendant's motion for summary disposition, plaintiff attached an affidavit from his mother in which she averred that she provided plaintiff with emotional support and supervision. Plaintiff also attached to his response medical documents from after his 2012 accident evidencing that he suffered a closed-head injury. Some of the documents confirmed that the injury caused a variety of cognitive issues, including memory issues and "the possibility of a Mood Disorder." However, the most recent medical record that plaintiff provided was from November 2014, and it was with regard to complaints of neck and back pain. The most recent document that plaintiff provided with regard to cognitive issues he suffered from the accident was dated January 2013. Plaintiff did not present any evidence, save his deposition testimony and mother's affidavit, pertaining to the time period for which he seeks benefits—April 21, 2017 to present.

After reviewing the record, we conclude that there is insufficient evidence to create a question of fact whether the emotional support and supervision that plaintiff's mother provided to plaintiff were reasonably necessary for plaintiff's care. More specifically, there is nothing in the record from which a jury could reasonably infer that the emotional support and supervision provided to plaintiff were necessary for his care. At his deposition, plaintiff never testified that his mother supervised him and, consequently, never testified that he required her supervision. Plaintiff did, however, testify about his mother providing him emotional support, but that testimony was vague and only tended to establish that he received support. It did not tend to establish that he required emotional support, much less that the support was "necessitated by the injury sustained in the motor vehicle accident." *Griffith*, 472 Mich at 534-535. Similarly, plaintiff's mother in her affidavit averred that she provided emotional support for plaintiff, but her averment did not tend to establish that the support was necessitated by plaintiff's closed-head injury. And while plaintiff's mother did state that plaintiff required the supervision that she provided him, nothing in the record tends to establish that this supervision was necessitated by plaintiff's injury from the 2012 accident for the period spanning from April 21, 2017 to present.

Plaintiff contends that the reasonable necessity of the attendant care services provided to him can be inferred from his medical records. Yet plaintiff failed to produce any medical records for the time period relevant to his instant claim—the period beginning on April 21, 2017. The records that plaintiff did produce, which only go through 2014, offer no insight into whether the emotional support given to, and supervision of, plaintiff by his mother was reasonably necessary for plaintiff's care from April 21, 2017 through the present. It is undisputed that plaintiff suffered a closed-head injury in 2012 that caused a variety of cognitive issues, but that evidence, by itself, does not tend to establish that emotional support and supervision were reasonably necessary services for plaintiff's care from April 21, 2017 to present.

Therefore, based on the sparse record before us, we agree with the trial court that plaintiff failed to offer sufficient evidence to create a question of fact that the attendant care services he received from April 21, 2017 to present were reasonably necessary for his care.

III. PROPOSED EXPERT

Plaintiff next argues that the trial court erred by concluding that he failed to abide by its order to offer testimony from Dr. Sewick relating only to information disclosed in the discovery process, and in striking Dr. Sewick's testimony entirely in response to that failure. We disagree.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 153; 908 NW2d 319 (2017). This includes a court's decisions concerning discovery, *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000), and the court's decisions regarding the appropriate remedy for failure to comply with a discovery order, *Kurczewski v State Hwy Comm*, 112 Mich App 544, 549; 316 NW2d 484 (1982). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes." *Fette v Peters Constr Co*, 310 Mich App 535, 547; 871 NW2d 877 (2015).

Under MCR 2.302(B)(4)(a)(*i*), when one party intends to call an expert witness at trial, the other party may, through interrogatories, require the party to identify the expert, "to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." During discovery, defendant, through an interrogatory, requested that plaintiff name any expert witnesses that he intended to call at trial, and produce the documents "pertaining to" those witnesses and "[a] summary of each witness's anticipated testimony." In response, plaintiff stated, "See signed authorizations to release records." As this relates to Dr. Sewick, the doctor produced a 238-page file in response to defendant's subpoena.

While discovery was ongoing, defendant, through a second interrogatory, requested supplemental information from plaintiff about which expert(s) plaintiff intended to call at trial "together with substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Plaintiff never responded to this second interrogatory. Pursuant to MCR 2.302(E)(1)(b), a duty to supplement responses made during discovery can arise "at any time before trial through requests for supplementation," and a party who fails to provide requested supplementation can face sanctions, see MCR 2.302(E)(2). Consequently, after discovery closed and plaintiff had still not supplemented his responses despite defendant's request, defendant filed a motion in limine requesting sanctions against plaintiff. Specifically, defendant asked the court to disallow plaintiff from calling any expert witnesses at trial based on his failure to respond to defendant's second request for interrogatories. Rather than granting defendant's motion, the trial court allowed plaintiff to call Dr. Sewick, but limited plaintiff to "only produc[ing] records or proffer[ing] testimony from Dr. Sewick that were in fact produced during the course of discovery." See MCR 2.313(C)(1) (stating that, if a party fails to provide information as required by MCR 2.302(E), the court may impose sanctions as listed in MCR 2.313(B)(2)(b), which allows the court to sanction a party by limiting the evidence that the party can introduce).

Yet when Dr. Sewick testified, he did not limit his testimony to the 238-page file that was produced in connection with him during discovery, but also testified based on almost 900 additional pages provided to him by plaintiff's counsel after the close of discovery. Thereafter, defense counsel objected to the fact that Dr. Sewick had relied on documents not disclosed in connection with him during discovery, arguing that it violated the trial court's order. The court

agreed, reasoning that defense counsel had "asked for all the documents that [Dr. Sewick] was going to be utilizing in formulating his opinion" but plaintiff "didn't give them to [defendant]." Plaintiff protested that defendant had access to the information that Dr. Sewick relied on, to which the court explained, "That's not the issue. The issues [sic] was the interrogatories were specific. The order of this Court was specific. You didn't provide the information that was requested." The court went on to explain that plaintiff "did not provide information [Dr. Sewick] relied upon to formulate his opinion" despite having the opportunity to do so, and accordingly struck Dr. Sewick's testimony.

We conclude that the trial court's ruling was not an abuse of discretion. "A duty to supplement disclosures or responses may be imposed . . . at any time before trial through requests for supplementation," MCR 2.302(E)(1)(b), and a party can be sanctioned for failing to fulfill this duty, MCR 2.302(E)(2). Because plaintiff never supplemented his response to defendant's first interrogatory despite defendant's request that he do so, the trial court sanctioned plaintiff by limiting Dr. Sewick's testimony to the records produced and testimony proffered by him during discovery. Instead of abiding by those limitations, however, Dr. Sewick testified about almost 900 additional pages of documents provided to him by plaintiff's counsel after the close of discovery. This violation of the trial court's order justified sanctions.

On appeal, plaintiff seems to contend that no sanction was justified because all of the information upon which Dr. Sewick relied was disclosed to defendant through discovery. The issue, however, was not the availability of the evidence to defendant, but plaintiff's failure to provide the evidence to defendant. As previously explained, pursuant to MCR 2.302(B)(4)(a)(*i*), plaintiff, in response to defendant's interrogatory, was required "to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." The only information that plaintiff provided in response to defendant's interrogatory was, "See signed authorizations to release records." When defendant requested plaintiff to supplement this information, plaintiff never responded. It seems that plaintiff believes he had no duty to supplement his response to defendant's interrogatory because the information was otherwise available to defendant. While this is generally true, see MCR 2.302(E)(1)(a)(*i*), defendant requested the supplemental information, so plaintiff was indeed under a duty to disclose it, see MCR 2.302(E)(1)(b). Thus, as the trial court correctly pointed out, the issue was not that the information upon which Dr. Sewick relied on to form his opinion was otherwise available to defendant, but that plaintiff failed to provide the information to defendant despite defendant's requests.

Plaintiff more generally argues that the trial court's sanction striking Dr. Sewick's testimony was too harsh. In *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), this Court provided a non-exhaustive list of factors a court could consider in determining the appropriate sanctions, including whether the party had a history of refusing to comply with discovery request, the prejudice to the other party, and whether a lesser sanction would better serve justice.

Here, defendant was prejudiced by plaintiff's failure to limit Dr. Sewick's testimony to the 238-page file that he provided during discovery because it left defendant unaware of the specific facts upon which Dr. Sewick relied in reaching his opinion. This in turn impaired defendant's

ability to identify the issues about which Dr. Sewick would testify and prepare a meaningful cross-examination of those issues, which is part of the underlying purpose for the pretrial exchange of discovery regarding experts. See *Nelson Drainage Dist v Bay*, 188 Mich App 501, 505; 470 NW2d 449 (1991) (explaining that the "pretrial exchange of discovery regarding experts" is intended to "aid[] in narrowing the issues" and in the "preparation of cross examination") (quotation marks and citation omitted). Moreover, plaintiff had a history of refusing to comply with discovery requests, as reflected by defendant's multiple motions to compel plaintiff to answer interrogatories, defendant's request to compel plaintiff to provide signed authorizations for the release of medical records, and defendant's motion to compel more specific answers to interrogatories. Further, plaintiff provided Dr. Sewick the almost 900 additional pages to review in January 2019 and not only failed to inform defendant of this until Dr. Sewick's deposition, but did not confirm that Dr. Sewick would be testifying as part of the trial until one week before trial was to begin, which was almost six months after plaintiff gave Dr. Sewick the additional pages to review. Lastly, though plaintiff argues that the trial court should have considered a lesser sanction before striking Dr. Sewick's testimony, the trial court had already attempted to impose a lesser sanction on plaintiff by limiting Dr. Sewick's testimony to information disclosed in relation to him during discovery. In light of the foregoing, we cannot conclude that the trial court's decision to strike Dr. Sewick's testimony was outside the range of reasonable and principled outcomes, and thus the trial court's ruling was not an abuse of discretion.

IV. DISMISSAL WITHOUT PREJUDICE

In his final argument, plaintiff contends that dismissal of his claim for benefits was an overly harsh sanction in response to the trial court's objections to how he complied with discovery requirements. In response, defendant contends that the dismissal was not a sanction but rather was a grant of defendant's oral motion for summary disposition, and as such, counterclaims that the dismissal of plaintiff's action should have been with prejudice. We agree with defendant.

After the trial court struck Dr. Sewick's testimony, defense counsel moved to dismiss plaintiff's claim "because plaintiff cannot present evidence that [he] sustained an accidental bodily injury arising out of the October 18, 2012 motor vehicle accident." Defense counsel further explained, "Without Dr. Sewick [plaintiff] can't lay testimony or foundation that [plaintiff's bills] were reasonable and related to the—to the accident on October 18th of 2012." The trial court agreed with defense counsel and granted the motion, but did so without prejudice.

On appeal, plaintiff correctly points out that whether the trial court's ruling was a dismissal on the merits is unclear. On the one hand, defendant appeared to request, and the trial court appeared to grant, dismissal based on a lack of evidentiary support, which would be an adjudication on the merits. On the other hand, an adjudication on the merits requires dismissal with prejudice, see *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co*, 223 Mich App 559, 563; 567 NW2d 456 (1997), which the trial court expressly declined to do, lending credence to plaintiff's contention that the trial court did not dismiss the case on the merits, see *Garrett v Washington*, 314 Mich App 436, 450; 886 NW2d 762 (2016) ("A dismissal of a suit without prejudice is no decision of the controversy on its merits, and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought."), and instead dismissed the case as a discovery sanction.

Despite this, we believe it is ultimately clear that the trial court's dismissal of the case was an adjudication on the merits. This case is similar to *LaCourse v Gupta*, 181 Mich App 293; 448 NW2d 827 (1989). There, the defendant argued in the trial court that the plaintiff's failure to provide a witness list or comply with discovery barred her from presenting the expert testimony necessary to sustain her burden of proof. *Id*. at 295. The trial court agreed and dismissed the plaintiff's complaint. *Id*. On appeal, the plaintiff contended that her case should not have been dismissed as a sanction, to which this Court held that plaintiff's complaint was not in fact dismissed as a sanction. *Id*. at 296-297. This Court explained that "the sanction imposed was to prohibit [the] plaintiff from calling any expert witnesses," and summary disposition was then "granted because, in the absence of expert testimony, there was no genuine issue of material fact." *Id*.

Similar to *LaCourse*, we conclude that the discovery sanction imposed on plaintiff was the striking of Dr. Sewick's testimony, and the trial court subsequently granted summary disposition to defendant—apparently under MCR 2.116(C)(10)—because, absent Dr. Sewick's testimony, there was no genuine issue of material fact.

On appeal, plaintiff nonetheless argues that summary disposition was improper because he could have relied on defendant's experts and adjusters to establish the basis for his claims, thereby creating genuine issues of fact for trial. We agree with defendant, however, that plaintiff's "citation-free reference to unspecified records and anticipated testimony from adverse witnesses is not enough to show a *genuine* issue for trial." See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) ("If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.") (Quotation marks and citation omitted.)

Turning to defendant's cross-appeal, we agree with defendant that the trial court's dismissal of plaintiff's claim should have been with prejudice. As explained, we interpret the trial court's ruling as granting summary disposition to defendant. In so doing, the trial court reviewed the evidence and determined that plaintiff did not have sufficient evidentiary support for his claim. Such a ruling is a judgment on the merits. See *Roberts v City of Troy*, 170 Mich App 567, 577; 429 NW2d 206 (1988). "Where a trial court dismisses a case on the merits, the plaintiff should not be allowed to refile the same suit against the same defendant and dismissal should therefore be with prejudice." *ABB Paint Finishing*, 223 Mich App at 563. Accordingly, the trial court's order dismissing plaintiff's complaint should have been with prejudice. The trial court's order dismissing the case without prejudice is vacated, and the case is remanded to the trial court for entry of an order specifying that dismissal is with prejudice.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien