STATE OF MICHIGAN

COURT OF APPEALS

GJOK PEPAJ,

Plaintiff-Appellant,

V

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 18, 2021

No. 352498
Macomb Circuit Court
LC No. 2018-000380-NF

Before: SWARTZLE, P.J., and MARKEY and TUKEL, JJ.

PER CURIAM.

In this first-party no-fault action, plaintiff Gjok Pepaj appeals by right the trial court's order granting summary disposition in favor of defendant Allstate Insurance Company. We affirm.

I. FACTUAL BACKGROUND

Pepaj was in a motor vehicle accident on September 8, 2014, which he claims caused certain injuries that, as of his deposition in June 2018, continued to require medical and psychological treatment, along with attendant care services. Specifically, Pepaj asserts that he still experiences neck and back pain and memory lapses as a result of the accident. Pepaj settled a previous no-fault action against Allstate regarding the accident, releasing Allstate from liability for all expenses incurred before December 8, 2016, and any expenses for replacement services incurred after December 8, 2016. At issue in this action are medical expenses and attendant care costs allegedly sustained by Pepaj after December 8, 2016. The trial court granted summary disposition to Allstate pursuant to MCR 2.116(C)(7) and (10). The trial court ruled that some of the attendant care services for which Pepaj sought coverage were actually replacement services and therefore barred by the release, MCR 2.116(C)(7). The trial court further ruled that Pepaj failed to present evidence that he incurred "reasonably necessary" medical or attendant care expenses after December 8, 2016, thereby failing to create a genuine issue of material fact, MCR 2.116(C)(10). Plaintiff now appeals by right.

II. STANDARD OF REVIEW AND SUMMARY DISPOSITION PRINCIPLES

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). We also review de novo issues of statutory interpretation. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, 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." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Id.* "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." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State*, 301 Mich App at 377. "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

In *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), this Court discussed (C)(7) motions, explaining:

> Under MCR 2.116(C)(7) . . ., this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties.[1] The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.]

[1] A party is not required to submit supporting documentary evidence when filing a motion for summary disposition under MCR 2.116(C)(7), see MCR 2.116(G)(3), but if documentary evidence is provided, it "must be considered by the court," MCR 2.116(G)(5).

III. DISCUSSION

In *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012), our Supreme Court explained:

> Under the no-fault automobile insurance act, MCL 500.3101 *et seq*., insurance companies are required to provide first-party insurance benefits, referred to as personal protection insurance (PIP) benefits, for certain expenses and losses. MCL 500.3107; MCL 500.3108. PIP benefits are payable for four general categories of expenses and losses: survivor's loss, allowable expenses, work loss, and replacement services.

In this case, the only relevant categories are "allowable expenses" and "replacement services." "We have recognized that the plain language of [MCL 500.3107(1)(a)[2]] imposes four requirements that a PIP claimant must prove before recovering benefits for allowable expenses: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) *the expense must be reasonably necessary*, (3) the expense must be incurred, and (4) the charge must be reasonable." *Douglas v Allstate Ins Co*, 492 Mich 241, 259; 821 NW2d 472 (2012) (emphasis added). "The plain and unambiguous language of § 3107 makes both reasonableness and necessity explicit and necessary elements of a claimant's recovery, and thus renders their absence a defense to the insurer's liability." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990). Along with allowable expenses recoverable under MCL 500.3107(1)(a), the costs of replacement services are also generally recoverable as indicated and defined in MCL 500.3107(1)(c). Section 3107(1)(c) specifically authorizes recovery of "[e]xpenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed . . . for the benefit of himself or herself or of his or her dependent." Further, "a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005).

A. MEDICAL EXPENSES

Pepaj argues that the trial court erred by granting summary disposition in favor of Allstate under MCR 2.116(C)(10) because there was a genuine issue of material fact regarding whether he incurred allowable expenses after December 8, 2016, for reasonably necessary medical services related to the motor vehicle accident. Specifically, Pepaj contends that he provided medical records showing that he sustained injuries arising from the accident, that he testified that he continued to experience symptoms related to those injuries beyond December 8, 2016, and that he provided medical billing statements covering services rendered after December 8, 2016. Pepaj maintains that this evidence, taken together, created a genuine issue of material fact.

[2] MCL 500.3107(1)(a) provides that PIP benefits include, in part, "[a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."

Pepaj was deposed on May 30 and June 13, 2018. He testified that he was in a motor vehicle accident on September 8, 2014. According to Pepaj, the accident caused neck pain and memory deficits. Medical records indicated that Pepaj was treated soon after the accident for neck and back pain. Although Pepaj could not identify specific dates on which he received medical treatment, he did provide estimates of when he was last treated by various physicians, ranging from six months to two years before his deposition. Pepaj also submitted various billing statements reflecting that he was billed for medical and psychological services provided to him after December 8, 2016. Notably, while defendant presented medical records concerning services rendered before December 8, 2016, he did not submit any medical records regarding services provided after that date. The billing statements for medical services rendered after December 8, 2016, did reveal several charges referencing "cervicalgia" and treatment by Dr. Neil Jaddou, who Pepaj testified was his primary care physician. Cervicalgia, which simply means neck pain, was one of the diagnoses Pepaj's doctors made shortly after the accident.

Especially pertinent to the instant case is the decision by the Michigan Supreme Court in *Krohn v Home-Owners Ins Co*, 490 Mich 145, 159-160; 802 NW2d 281 (2011), wherein the Court construed MCL 500.3107(1)(a) and stated:

> In order to give meaning to this statutory provision, we start by examining the perspective from which reasonable necessity is determined. Stated more precisely, when the Legislature provided that allowable expenses consist of "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation," did it intend for reasonable necessity to be determined under a subjective or objective standard?
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> The term "reasonable" commonly refers to that which is agreeable to or in accord with reason; logical, or not exceeding the limit prescribed by reason; not excessive. The term "reasonable" has also been defined to mean fair, proper, or moderate under the circumstances and fit and appropriate to the end in view. These definitions evidence an absence of the personal sentiment, prejudice, and bias associated with a subjective point of view, which is based on an individual's perceptions, feelings, or intentions, rather than the externally verifiable phenomena associated with an objective viewpoint. Accordingly, we conclude that reasonableness is not based merely on the subjective perception that a service is necessary for an injured person's care, recovery, or rehabilitation. Rather, the term "reasonably" must be determined under an objective perspective. [Quotation marks, citations, and alteration brackets omitted.]

The trial court relied heavily on *Krohn* in ruling on Allstate's motion for summary disposition. The court observed and ruled:

> In his deposition, Pepaj was questioned extensively about what providers he had seen since December 2016. . . . He identified five physicians, . . . however, he couldn't identify when he saw those providers, nor could he provide any information about the specific services and procedures they provided, their findings and diagnoses, or whether he had been billed for their services. Without this

> information, Pepaj cannot demonstrate by a preponderance of the evidence that he is entitled to medical benefits. Specifically, he has not demonstrated that the claimed medical expenses were reasonably necessary for his care, recovery, or rehabilitation for injuries caused by the accident. *Nass[e]r*. As explained by the Supreme Court, reasonableness is not based merely on the subjective perception that a service is necessary for an injured person's care, recovery, or rehabilitation. Rather, the term "reasonably" must be determined under an objective perspective. *Krohn*. Although Pepaj may personally believe his post-2016 medical expenses were necessary for his injuries from the 2014 accident, by failing to provide any evidence from a medical provider that links his post-2016 medical expenses to the 2014 accident, he has failed to establish his post-2016 medical expenses were objectively reasonable and necessary.
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> [A]t this stage in the case, all Pepaj has demonstrated is that he went to some doctors after 2016; he's not sure exactly when, and he hasn't provide[d] any details about what services they provided, what findings they made, what their diagnoses were, or how any of their services are related to the 2014 accident. Given his lack of evidence relating to his post-2016 medical expenses, Pepaj has failed to meet his burden to set forth specific facts via admissible evidence that establish a genuine issue of disputed fact exists. Viewing the evidence in a light most favorable to Pepaj, there is no specific, contemporaneous evidence relating to his post-2016 medical expenses from which a reasonable juror could reasonably conclude Pepaj has shown by a preponderance of the evidence that his medical expenses were reasonably necessary, reasonable in amount, and actually incurred. Accordingly, Allstate's request for summary disposition on his claim for medical expenses is . . . granted. [Quotation marks, citations, and footnotes omitted.]

The trial court's analysis and conclusion are consistent with *Krohn*, and we adopt them for purposes of this opinion. But we must address a couple of additional matters. With respect to the billing statements for medical and psychological services rendered after December 8, 2016, including those referencing cervicalgia, i.e., neck pain, the statements do not in any form or manner provide evidence that the associated services and expenses were reasonably necessary, just that Pepaj obtained the services and incurred the costs. For all we know, the reference to cervicalgia for billing purposes may simply have indicated that Pepaj saw the physician on the basis of subjective complaints of neck pain. And even assuming that it constituted a formal diagnosis, there is no elaboration that would permit the inference that the medical services or expenses resulted or arose from the motor vehicle accident. Pepaj was able to produce a mountain of medical records for services provided before December 8, 2016, which pertained to whether the medical expenses were reasonably necessary. He, however, provided no such evidence concerning treatment received after December 8, 2016, which we find puzzling. Moreover, we make clear that we are not weighing the evidence or assessing Pepaj's credibility, and we are reviewing the evidence in a light most favorable to Pepaj. The fatal flaw in Pepaj's case is the failure to submit evidence of "externally verifiable phenomena associated with an objective viewpoint," *Krohn*, 490 Mich at 159, i.e., some substantive evidence of an objective perspective by a doctor or psychologist indicating or suggesting that the medical and psychological services and expenses were reasonably necessary. Pepaj's vague deposition testimony provided, at best, a mere subjective perception or

belief by Pepaj that services were reasonably necessary. See *id.* at 159-160. Accordingly, the trial court did not err in summarily dismissing Pepaj's claim for medical expenses.

B. ATTENDANT CARE

Pepaj also argues that the trial court erred by granting summary disposition in favor of Allstate under MCR 2.116(C)(10) because there was a genuine issue of material fact regarding whether he incurred reasonable expenses after December 8, 2016, for reasonably necessary attendant care related to the motor vehicle accident. Pepaj contends that he requires reminders to take his medication, needs help administering medicated lotion, needs massages, has to be supervised, needs support to keep his mind active, and has to be taken to appointments. According to Pepaj, each of these qualify as an attendant care service for which he is entitled to coverage.

As an initial matter, the trial court was correct to hold that some of the services for which Pepaj had sought coverage were replacement services and not attendant care services. Cleaning Pepaj's house, doing his laundry, and preparing his meals were replacement services, MCL 500.3107(1)(c); *Johnson*, 492 Mich at 180,[3] and thus claims of coverage for those services were barred by the release and dismissible under MCR 2.116(C)(7).

The other services are attendant care services, the cost of which generally qualify as allowable expenses; however, it must still be shown that they were reasonably necessary. See *Douglas*, 492 Mich at 259. In this case, the trial court found that Pepaj failed to submit evidence showing that the services were reasonably necessary to care for his injuries. His own subjective belief that the services were reasonably necessary did not suffice. The trial court noted that the most recent medical records were from early 2016, that the billing statements from 2017 and 2018 were inadequate because no medical records connected to the billed services were submitted, and that Pepaj had not demonstrated that his condition remained unchanged since his last recorded medical visit in 2016. With respect to Pepaj's testimony that his physician told him that he needed six hours of attendant care services per week, the trial court stated that Pepaj failed to explain what types of attendant care services were needed and that, regardless, the testimony constituted inadmissible hearsay. Further, as to Pepaj's claim that he needed supervisory attendant services, the trial court found that the claim was belied by the testimony from Pepaj's son and surveillance video obtained through an Allstate investigation revealing that Pepaj went on unsupervised walks two to three days per week lasting from 30 to 90 minutes.[4] This evidence, according to the court, "undermine[d] any assertion by Pepaj that supervisory attendant care was objectively reasonable and necessary." The trial court determined that attendant care services were "not recoverable because no reasonable finder of fact could conclude that Pepaj ha[d] shown by a preponderance of

[3] The *Johnson* Court explained that "[s]ervices that were required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself because of the injury, are 'replacement services,' not 'allowable expenses.' "

[4] The surveillance video was used by Allstate to make a claim of fraud against Pepaj, forming an alternative basis in support of summary disposition, which the trial court found unnecessary to reach.

the evidence that the expenses were reasonably necessary to his care and recovery from injuries caused [by] the accident."

To the extent that the trial court weighed the evidence, resolved conflicts in the evidence, or assessed the credibility of witnesses, the court erred. But we agree with the court's general rejection of the claim for attendant care expenses because Pepaj failed to submit externally verifiable objective evidence that attendant care services were reasonably necessary. His reliance on his own subjective perception or belief that he needed attendant care services did not suffice to create a genuine issue of material fact. And, for the reasons discussed earlier in connection with medical and psychological services, the billing statements simply do not provide any basis to find that attendant care services and expenses were reasonably necessary. Accordingly, the trial court did not err in summarily dismissing Pepaj's claim for attendant care expenses.

We affirm. Having fully prevailed on appeal, Allstate may tax costs under MCR 7.219.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Jonathan Tukel