STATE OF MICHIGAN

COURT OF APPEALS

SARA KAPLAN,

Plaintiff-Appellee,

v

STATE AUTOMOBILE MUTUAL INSURANCE BUREAU and STATE AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
November 28, 2000

No. 211336
Leelanau Circuit Court
LC No. 96-003993-AV

Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.

PER CURIAM.

Defendant[1] appeals by leave granted from the circuit court's decision to affirm in part and reverse in part the district court's judgment for plaintiff in this no-fault insurance dispute. We affirm the denial of defendant's motion for summary disposition and the district court's judgment for plaintiff. We reverse the circuit court's decision to award plaintiff attorney fees.

In June 1988, plaintiff injured her neck in an automobile accident in Leelanau County where she maintains a summer residence. Plaintiff applied for personal injury (PIP) benefits under her Florida insurance policy underwritten by defendant, which was a Michigan certified insurer pursuant to MCL 500.3163; MSA 24.13163. Defendant paid for plaintiff's medical care until 1993, then refused to pay further benefits for plaintiff's chiropractic treatments or massage therapy.

Plaintiff sued in district court seeking compensation for her medical expenses, attorney fees and costs, and declaratory relief defining defendant's future obligations under the insurance contract. Defendant moved for summary disposition, which the district court denied. After a bench trial, the district court found that defendant was obligated to pay for plaintiff's chiropractic treatment and massage therapy. Plaintiff moved for an award of attorney fees and, after a hearing, the court determined that defendant's refusal to pay benefits was unreasonable and

[1] For purposes of this appeal, both named defendants are referred to as "defendant."

awarded plaintiff attorney fees limited to $1,000. Upon reconsideration, the court reversed its prior ruling and denied attorney fees.

Defendant appealed the trial court's findings to the circuit court, which affirmed the district court's denial of defendant's motion for summary disposition and the court's finding that defendant must pay for plaintiff's chiropractic care and massage therapy. Plaintiff cross-appealed the district court's decision to deny attorney fees. The circuit court found that defendant's refusal to pay for plaintiff's medical expenses was unreasonable and reversed the district court's decision.

I.

Defendant first argues that the district court erred when it denied defendant's motion for summary disposition. We review de novo a trial court's decision on a motion for summary disposition based on failure to state a claim.[2] *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim to determine whether the plaintiff has stated a prima facie case. *Wortelboer v Benzie Co*, 212 Mich App 208, 217; 537 NW2d 603 (1995). The motion is based only on the pleadings and all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion should be granted only when the claim is so clearly unenforceable that no factual development could justify recovery. *Simko, supra.*

Defendant advances several theories in support of its argument that it is not responsible for plaintiff's personal injury benefits. Defendant first denies any liability to pay plaintiff's personal injury benefits pursuant to MCL 500.3163; MSA 24.13163, which allows out-of-state insurers to certify that if their policyholders who are not Michigan residents sustain personal injury as a result of accidents in Michigan, the insurer will pay benefits according to the no-fault act. MCL 500.3163(1), (2); MSA 24.13163(1), (2). As a result of this certification, the out-of-state insurer obtains the rights and immunities of the no-fault act and the insurer's claimants also receive the rights and benefits of the act. MCL 500.3163(3); MSA 24.13163(3).

To state a claim that defendant was obligated by MCL 500.3163; MSA 24.13163 to provide plaintiff with PIP benefits according to the Michigan no-fault act, plaintiff had to allege that (1) defendant was certified in Michigan, (2) there existed an automobile liability policy between plaintiff and defendant, and (3) there is a sufficient causal relationship between plaintiff's injuries and her operation of the motor vehicle as a motor vehicle. *Goldstein v Progressive Casualty Ins Co*, 218 Mich App 105, 109; 553 NW2d 353 (1996). In this case,

[2] Defendant claims that the motion was brought pursuant to 2.116(C)(10). Review of the motion reveals that defendant did not attach affidavits or other documentary evidence to the brief supporting its motion as is required by a (C)(10) motion. *Smith v Globe Life Ins*, 460 Mich 446, 455; 597 NW2d 28 (1999). Because defendant's prayer for relief asked for dismissal due to "[p]laintiff's failure to state a claim upon which relief can be granted," the motion will be analyzed as one brought under MCR 2.116(C)(8).

plaintiff alleged in her complaint that defendant was certified, which defendant admitted in its answer. Plaintiff also alleged that, at the time of the accident, defendant issued an insurance policy covering her vehicle and that she was injured in that vehicle while driving the vehicle in Michigan. On its face, plaintiff stated a valid claim that defendant was obligated to provide plaintiff with Michigan no-fault PIP benefits.

However, defendant argues that MCL 500.3163(3); MSA 24.13163(3) does not apply because plaintiff is not an out-of-state resident, but a resident of Michigan. This issue was not preserved for review because it was not raised in defendant's motion for summary disposition. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, this allegation is contrary to the facts of plaintiff's complaint, which clearly state that at the time of the accident, plaintiff was a resident of Florida. In a motion for summary disposition for failure to state a claim, the trial court must accept the allegations in the complaint as true. *Maiden*, *supra* at 119. Defendant's argument that plaintiff was not an out-of-state resident is without merit.

Defendant also argues that whether it was certified under MCL 500.3163; MSA 24.13163 is not relevant to the analysis because plaintiff had a Michigan insurance policy in effect at the time of the accident. Defendant cites no support for the proposition that the existence of a Michigan insurer somehow negates its obligations under MCL 500.3163; MSA 24.13163. Defendant's mere statement of an argument without citation to authority is insufficient to raise the issue for appellate review. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Moreover, defendant's argument that it is not required to pay further benefits because it is not the highest priority insurance carrier under MCL 500.3144; MSA 24.13144 is without merit. In addition to the vehicle involved in the accident, which was registered and insured in Florida, plaintiff also owned a vehicle that was titled in Michigan and insured by an insurance policy written in Michigan. Defendant contends that the no-fault act creates a higher priority for insurers of vehicles that are registered in Michigan and, therefore, the insurer of plaintiff's Michigan vehicle had priority over defendant's policy.

MCL 500.3114; MSA 24.13114 establishes the priority of liability for insurance carriers where two or more no-fault policies cover the parties personal injuries:

> (4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied. [MCL 500.3114(4); MSA 24.13114(4).]

This subsection of the statute references subsections (1) to (3), however, none of these subsections apply to the instant case. Defendant attempts to argue that the language of the first

sentence of subsection (1) places priority on Michigan insurance carriers. Subsection (1) provides:

> (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1)[3] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . . When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and shall not be entitled to recoupment from the other insurer.

While defendant's argument is not entirely clear, it appears to be asserting that, because MCL 500.3101(1); MSA 24.13101(1) requires insurance coverage on Michigan registered vehicles, and MCL 500.3114; MSA 24.13114, which establishes insurance priority, cross-references MCL 500.3101(a); MSA 24.13101(1), plaintiff must first look to insurance coverage through her Michigan insurer.

Defendant's arguments reads a requirement into the statute that simply does not exist. The first sentence of MCL 500.3114(1); MSA 24.13114(1) does not establish priority of insurance coverage. Rather, that sentence simply provides that a personal injury policy covers not only the named insured, but the named insured's spouse and any relatives who live with the named insured. The cross-reference to MCL 500.3101(1); MSA 24.13101(1) only serves to limit the application of the first sentence of MCL 500.3114(1); MSA 24.13114(1) to policies written on vehicles that must be registered in Michigan. Contrary to defendant's argument, insurance priority is established by MCL 500.3114(4); MSA 24.13114(4), which provides that the highest priority is on the insurer of the owner or registrant of the vehicle occupied. MCL 500.3114(4)(a); MSA 24.13114(4)(a).

In her complaint, plaintiff stated that she owned the vehicle she was operating at the time of the accident and that it was insured by defendant. Accepting these facts as true, defendant's insurance policy was either in the highest priority, or at most, was in equal priority to plaintiff's Michigan policy. The trial court's decision to deny summary disposition on this basis was not in error.

Defendant next argues that plaintiff should not be entitled to Michigan no-fault benefits because she did not contract for those benefits and did not pay a premium for them, and that her

[3] MCL 500.3101(1); MSA 24.13101(1) provides:

> (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance.

attempt to obtain unlimited personal injury benefits from a Florida insurance policy that allowed for a $10,000 maximum personal injury benefit subverts both Michigan and Florida statutory law. Defendant cites no cases on point to these arguments, however, defendant relies heavily on the language of *Gersten v Blackwell*, 111 Mich App 418; 314 NW2d 645 (1981), to advance what appear to be policy arguments against liability.

However, defendant's policy arguments are neither compelling nor compatible with the unambiguous requirements of the no-fault act. Defendant was under no obligation to file the certificate under MCL 500.3163; MSA 24.13163 and did so, presumably because it was to its benefit to become certified. In addition to the obligations imposed by certification, out-of-state insurers receive significant benefits from certification, including policies that are more attractive to potential customers and limitations on tort liability. *Safeco Ins Co v Economy Fire & Casualty Co*, 182 Mich App 552, 556-557; 452 NW2d 874 (1990); *Kriko v Allstate Ins Co of Canada*, 137 Mich App 528, 532; 357 NW2d 882 (1984). An out-of-state insurer should not have "the unilateral option to either rely on or render void its properly filed and maintained no-fault certification depending on whether in a particular situation the provisions of the no-fault act work to its benefit or subject it to liability." *Safeco*, *supra* at 557.

Next, defendant argues that, even if the trial court correctly concluded that it is in equal priority with plaintiff's Michigan insurance policy, then it is only liable to pay for half of plaintiff's personal injury benefits. Defendant cites no support for its argument that, where insurance companies are in equal priority, the company that is paying the benefits need only pay for fifty percent of the benefits. In fact, under Michigan no-fault law, where insurers are in equal priority, the remedy for the insurer paying benefits is to seek partial recoupment from the other insurers. MCL 500.3115(2); MSA 24.13115(2); *DAIIE v Home Ins Co*, 428 Mich 43, 48; 405 NW2d 85 (1987). The trial court did not err when it held that plaintiff may seek benefits from defendant even if another insurer was in equal priority with defendant.

II.

Defendant next argues that the trial court erred in finding that plaintiff's chiropractic treatments and massage therapy were compensable medical expenses under the Michigan no-fault act. We disagree. Findings of fact of a trial court sitting without a jury are reviewed under the clearly erroneous standard. *Gumma v D & T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). A finding is clearly erroneous if no evidence supports it, or if there is evidence supporting it, but this Court is left with a definite and firm conviction that a mistake has been made. *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

Under Michigan's no-fault system, personal protection benefits are payable for all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery or rehabilitation. MCL 500.3107(1)(a); MSA 24.13107(1)(a). Plaintiff has the burden of proving three factors to show that medical expenses are allowable: (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); *Manley v DAIIE*, 425 Mich 140, 169; 388 NW2d 216 (1986); *Cherry v State Farm Mutual Automobile Ins*, 195 Mich App 316, 318-319; 489 NW2d 788 (1992). Whether expenses are

reasonably necessary is a question of fact. *Nelson v DAIIE*, 137 Mich App 226, 231; 359 NW2d 536 (1984).

In this case, only the second factor was in dispute. Plaintiff admitted that the chiropractic treatments and massage therapy would not cure her condition, but that it provided her with drug-free pain relief. Plaintiff testified that the chiropractic treatments relieved her pain for ten to fourteen days, and that massage therapy improved the efficacy of the chiropractic manipulation. Plaintiff's chiropractor testified that plaintiff's condition was probably chronic and that his treatment relieved her pain. The massage therapist testified that massage therapy provided pain relief by relaxing plaintiff's muscles and improving flexibility. Plaintiff's orthopedic surgeon offered his opinion that plaintiff received pain relief from the chiropractic treatment and that the treatment was reasonable. He admitted that chiropractic treatment could exacerbate an arthritic spine, but did not believe that was happening in plaintiff's case.

Defendant countered that plaintiff's chiropractic and massage treatments were not only ineffective at controlling plaintiff's pain, but may actually be exacerbating her condition. Defendant's expert, J. Allan Robertson, M.D., D.C., claimed that chiropractic care is contraindicated for plaintiff's condition and that her symptoms were caused by the chiropractic manipulation. He also believed that the massage therapy was not reasonable or necessary for plaintiff's pain management. On the other hand, Robertson admitted that he did not examine plaintiff and that symptom relief is a legitimate goal for plaintiff's incurable condition. Defendant also presented the report of a medical examination by its expert Dr. Sam Ho, who believed that the chiropractic treatment was not advisable for plaintiff's condition. Defendant admitted that it received an earlier report from its expert, Ryan Kolle, D.C., who concluded that chiropractic care was beneficial to plaintiff.

Based on this evidence, we are not left with the firm conviction that an error was made. Plaintiff presented adequate evidence to support her proposition that the treatments were alleviating her pain. Although defendant refuted this evidence with the testimony of its own experts, questions of credibility are properly resolved by the trier of fact. *Triple E Produce Corp v Mastronardi*, 209 Mich App 165, 174; 530 NW2d 772 (1995). The court was in the position to best judge the veracity and credibility of the witnesses and this Court gives due regard to a trial court's findings when they are based on an assessment of witness credibility. MCR 2.613(C); *State-William Partnership v Gale*, 169 Mich App 170, 174; 425 NW2d 756 (1988).

Defendant also argues that, as a matter of law, plaintiff's treatments are not allowable medical expenses unless they are advancing plaintiff toward recovery. Defendant bases this argument on language from this Court's decision in *Nelson, supra*:

> Under the Michigan no-fault act, an insurer is liable for personal protection insurance benefits including "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation". MCL 500.3107(a); MSA 24.13107(a). In order for plaintiff *in this case* to sustain her burden of proving defendant's liability for medical expenses incurred with Dr. Badgley, plaintiff is required to establish that the expenses were reasonably necessary to her recovery from

> injuries caused by the automobile accident. [*Nelson, supra* at 231 (emphasis added).]

In its interpretation of this decision, defendant overlooks three critical words: "in this case." By holding that the plaintiff in *Nelson* had to show that her expenses were reasonably necessary to her recovery, this Court was merely describing the burden a particular plaintiff had to meet under the circumstances of her case. In fact, defendant's interpretation of *Nelson* contradicts the clear language of the statute, which states that the expenses must be for "reasonably necessary products, services and accommodations for an injured person's *care, recovery, or rehabilitation*." MCL 500.3107(1)(a); MSA 24.13107(1)(a) (emphasis added). Defendant's argument is without merit.

III.

Finally, defendant argues that the circuit court erred by reversing the district court's finding that defendant's refusal to pay benefits was reasonable and that plaintiff was not entitled to attorney fees. We agree. A trial court's finding regarding the reasonableness of an insurer's delay in paying no-fault benefits should be reversed only if it is clearly erroneous. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994).

A no-fault claimant is entitled to reasonable fees where the insurer unreasonably refused to pay benefits. MCL 500.3148(1); MSA 24.13148(1). When the benefits are not paid within the statutory period, a rebuttable presumption of unreasonable refusal arises and the insurer has the burden to justify the refusal. *Bloemsma v Auto Club Ins Ass'n*, 174 Mich App 692, 697-698; 436 NW2d 442 (1989). A refusal will not be found unreasonable where it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. *McKelvie, supra* at 335.

We agree that defendant unreasonably refused to pay benefits on the basis that the Florida law capping benefits at $10,000 applied or that the Michigan insurer had priority. The language of the no-fault act clearly states that where an insurer files a certificate pursuant to MCL 500.3163; MSA 24.13163, and an out-of-state claimant of that insurer is injured in a vehicular accident in Michigan, the insurer "shall be subject to the personal and property protection insurance system set forth in this act." MCL 500.3163(1); MSA 24.13163(1). Further, defendant had no reasonable basis to argue that plaintiff's Michigan insurance carrier had priority over defendant's policy. Even if a priority dispute existed, it would not be a valid basis for defendant's refusal to pay plaintiff's benefits. *Bloemsma, supra* at 697. Similarly, defendant's argument that benefits that do not promote recovery from injuries are not compensable is directly contradicted by the unambiguous language of MCL 500.3107(1)(a); MSA 24.13107(1)(a). Thus, defendant has failed to show that its refusal to pay further benefits was based on a legitimate question of statutory construction.

However, defendant demonstrated that its refusal to pay further benefits was based, at least in part, on a bona fide factual uncertainty regarding the reasonable necessity of defendant's medical treatment. Defendant had evidence, prior to its decision to terminate payment for plaintiff's benefits, that her chiropractic treatment and massage therapy were not reasonably necessary medical expenses for her care, recovery, or rehabilitation. Specifically, Dr. Ho's report

indicated that chiropractic care was not recommended and might aggravate the problem. Therefore, the circuit court clearly erred in reversing the district court's decision finding that defendant's refusal to pay was reasonable.

Affirmed in part and reversed in part.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski