

STATE OF MICHIGAN
COURT OF APPEALS

TOULA GUILFOYLE, D.O.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

November 12, 2002

No. 235566

Huron Circuit Court

LC No. 00-001196-CK

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition in this no-fault action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was involved in a single-car rollover accident on July 30, 1998. At the emergency room, she complained of headache, left thumb pain, and back pain. She had a number of preexisting conditions at the time of the accident, including previous back problems. She had been disabled from her employment as a physician since 1994 due to repeated gastrointestinal problems.

A dispute arose regarding the payment of certain expenses, and plaintiff brought this action seeking reimbursement for the cost of necessary medical care. The major dispute concerned defendant's refusal to pay a portion of the cost of a \$300,000 swimming pool plaintiff constructed on a lot next to her home. Plaintiff's physician testified that a pool was necessary to provide the type of aquatic therapy required by plaintiff. The trial court granted defendant's motion for summary disposition, finding as a matter of law that the pool was not reasonably necessary in light of the alternative treatment that was available.

Defendant submitted interrogatories to plaintiff, seeking signed authorizations to obtain medical and disability benefit information concerning her preexisting conditions. An order compelling discovery was issued in December 2000, but plaintiff failed to comply. The trial court granted defendant's motion in limine to prevent plaintiff from presenting causation evidence due to the discovery violation, and the case was dismissed.

The right to recover personal protection insurance benefits is dependent on whether the injury arises out of the ownership, operation, maintenance or use of a motor vehicle as a motor

vehicle. MCL 500.3105(1). Plaintiff bears the burden of proving that her injuries were caused by the automobile accident. *Dengler v State Farm Mutual Ins Co*, 135 Mich App 645; 354 NW2d 294 (1984). Where plaintiff had preexisting back injuries, causation was at issue in this case.

A trial court is authorized by MCR 2.313(B)(2)(c) to dismiss a proceeding where a party fails to obey a discovery order. *Thorne v Bell*, 206 Mich App 625; 522 NW2d 711 (1994). Severe sanctions are generally appropriate only where a party flagrantly and wantonly refuses to provide discovery. *Bass v Combs*, 238 Mich App 16; 604 NW2d 727 (1999). Factors to be considered in determining an appropriate sanction include:

(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

The trial court did not abuse its discretion in imposing the sanction of dismissal. The violation was wilful, as the releases were simple matters and plaintiff was given several opportunities to provide them. Defendant was prejudiced where trial was set to begin the day after the motion hearing, and it did not have the relevant information. Plaintiff made no attempt to cure the defect, and she has not identified any lesser sanction that would better serve the interests of justice.

The trial court did not err in granting partial summary disposition of plaintiff's claim for reimbursement for the expense of building a pool. Personal protection insurance benefits are payable for:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.... [MCL 500.3107(a)].

An insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular product or service, or if the product or service itself is not reasonably necessary. *Nassar v Auto Club Ins Assn*, 435 Mich 33, 49; 457 NW2d 637 (1990). The plaintiff bears the burden of proof on these issues. *Id.* While the question whether expenses are reasonably necessary is generally one of fact for the jury, the trial court may resolve the issue as a matter of law where the conclusion is certain. *Spect Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 575; 633 NW2d 461 (2001). Where the evidence showed that plaintiff could receive similar benefits from alternative treatment, the trial court properly found that the pool expense was not reasonably necessary.

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter