STATE OF MICHIGAN

COURT OF APPEALS

JOANN GOODMAN GLINIECKI,

Plaintiff-Appellant/Cross-Appellee,

v

STATE FARM MUTUAL,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 24, 2003

No. 238144
Midland Circuit Court
LC No. 99-001553-CK

Before: Bandstra, P.J., and Whitbeck, C.J., and Gage, J.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant partial summary disposition, the order denying admissibility of de bene esse depositions, and the order determining the date when penalty interest and attorney fees began. Defendant cross-appeals the denial of attorney fees. We affirm in part and reverse in part.

This case arises out of plaintiff's claims for first-party no-fault insurance benefits allegedly owed as a result of a November 12, 1986 automobile accident. Plaintiff claims she experienced ongoing pain as a result of the accident, and, in 1998, after receiving no relief from doctors in Michigan, Minnesota or Georgia, she decided to seek treatment in Hawaii from Terry Vernoy, M.D., whom she located after seeing a television program that stated Hawaii had "the best medical treatments available." Plaintiff underwent shoulder surgery in January 1999, and filed the instant complaint in October 1999, seeking benefits.

Plaintiff's first issue on appeal is that the trial court erred in denying plaintiff's travel expenses to and from Hawaii because the trip was a reasonable and necessary expenditure. We disagree. A ruling on a summary disposition motion is reviewed de novo. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 490; 579 NW2d 411 (1998). Under MCR 2.116(C)(10), a party may move to dismiss a claim based on the assertion that there is no genuine issue concerning any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). When reviewing the motion, the court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Universal*, *supra* at 720.

Under MCL 500.3107(1)(a), transportation costs to obtain medical treatment are an allowable expense. See *Swantek v Automobile Club of Michigan Ins Group*, 118 Mich App 807, 810; 325 NW2d 588 (1982). But the expenses must be both reasonable and necessary, and the plaintiff bears the burden of establishing the claims. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990). Therefore, in this case, plaintiff was required to establish that the expenses were reasonably necessary to her recovery from injuries caused by the automobile accident. *Nelson v Detroit Auto Inter-Ins Exchange*, 137 Mich App 226, 231; 359 NW2d 536 (1984).

Plaintiff relies on *Sherwood v Chicago & West Michigan R Co*, 82 Mich 374; 46 NW 773 (1890), to support her claim that travel costs to and from Hawaii were a reasonable and necessary expense. That case is distinguishable, however, because the plaintiff's travel costs were incurred based on a referral from her physician. *Id.* at 384. Here, plaintiff did not receive a referral to Hawaii; she located the doctor in Hawaii after seeing a television program.

The only assertion that plaintiff made to support her claim that travel to Hawaii was a reasonable and necessary expense was that the doctors she had seen up to that point were not giving her the desired relief. Beyond that, plaintiff failed to provide affidavits or other evidence supporting the suggestion that there was any unique obstacle to using a physician with a closer geographic location. Absent documents supporting plaintiff's claim that a trip to Hawaii was reasonable and necessary, the court's decision that plaintiff lacked factual support for her claim and that defendant was entitled to partial judgment as a matter of law was correct.

Plaintiff's second issue on appeal is that the trial court erred in determining the date from which to calculate when penalty interest and attorney fees began. We disagree. A trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C). A trial court's finding of fact is clearly erroneous only if on review of the entire record, the Court is left with the definite and firm conviction that a mistake has been made. *Peters v Gunnell, Inc*, 253 Mich App 211, 222; 655 NW2d 582 (2002).

At the core of this issue is the proper determination of the date at which defendant received reasonable proof of plaintiff's claim. If there is a bona fide factual uncertainty regarding a claim, an insurer's delay in paying benefits may be reasonable, regardless whether the insurer is ultimately held responsible for the claim. *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103, 105; 527 NW2d 524 (1994). The scope of inquiry is whether the initial refusal to pay the expense was unreasonable, *id.* at 105, and whether plaintiff established that the expenses were reasonably necessary to her recovery from injuries caused by the automobile accident. *Nelson, supra* at 231.

Here, the court found that on November 1, 2000, defendant was supplied with a report providing reasonable proof that plaintiff's shoulder surgery was related to the 1986 automobile accident. The only documentation that plaintiff supplied before November 1, 2000, was a listing of medical costs provided in response to defendant's interrogatories. Thus, the date used by the court was not clearly erroneous – until defendant received the report from its own independent physician, it had not received any documentation from plaintiff that the surgery was reasonably related to the accident.

Plaintiff's third issue on appeal is that the trial court erred in refusing to order the parties

to appear at certain de bene esse depositions and in ruling that the failure of either party to appear would render the deposition inadmissible. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). Further, a trial court has discretion in ruling on the admissibility of a deposition or portions of a deposition, and the court's exercise of discretion will be upheld absent an abuse of discretion. *Hilyer v Hole*, 114 Mich App 38, 41; 318 NW2d 598 (1982). An abuse of discretion should only be found where the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias. *Barrett*, *supra* at 325. The burden of establishing admissibility rests on the party seeking admission of the deposition. *Valley Nat'l Bank of Arizona v Kline*, 108 Mich App 133, 141; 310 NW2d 301 (1981).

MCR 2.302(B)(4)(d) states:

> A party may depose a witness that he or she expects to call as an expert at trial. The deposition may be taken at any time before trial on reasonable notice to the opposite party, and may be offered as evidence at trial as provided in MCR 2.308(A). The court need not adjourn the trial because of the unavailability of expert witnesses or their depositions.

Ordinarily, depositions are considered hearsay and are inadmissible; however, MCR 2.308(A) provides, "[d]epositions or parts thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence." MRE 804(b) provides that deposition testimony is not excluded as hearsay in some instances:

> (5) Deposition Testimony. Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
>
> For purposes of this subsection only, "unavailability of a witness" also includes situations which:
>
> (A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
>
> (B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Here, on July 12, 2001, defendant notified plaintiff that it had scheduled the deposition of Sidney Goldman, M.D., for October 3, 2001 at 8:45 a.m. in Beverly Hills, Michigan. On September 27, 2001, plaintiff notified defendant that she had scheduled two depositions: one for Jeffrey J.K. Lee, M.D., on October 3, 2001 at 5:00 p.m. Hawaii-Aleutian standard time, 11:00

p.m. eastern standard time, in Honolulu, Hawaii, and one for John D. Dorchak, M.D., on October 4, 2001 at 6:00 p.m. in Columbus, Georgia. After receiving plaintiff's notice, defendant objected to participating in the out-of-state depositions via telephone, and asserted that the dates, times and locations of plaintiff's depositions were unreasonable. Plaintiff claimed that the depositions were necessary and appropriate de bene esse depositions and that the dates and times of the depositions were the only times the depositions could be scheduled.

The trial court refused to order defense counsel to attend a deposition at 11:00 at night, and ruled that if counsel exercised his right not to attend, the deposition would be inadmissible. Under the circumstances, the trial court did not abuse its discretion. Plaintiff's counsel noticed the deposition at a late date and the scheduling of the deposition required defense counsel to either travel to Hawaii in between a deposition in Michigan and one in Georgia, or attend the deposition via telephone at 11:00 p.m. The trial court found this unreasonable and refused to order defense counsel to attend the deposition. We find no abuse of discretion with the court's ruling. Likewise, we find that the trial court did not err in finding that if counsel did not attend the deposition, the deposition would be inadmissible. MRE 804(b).

On cross-appeal, defendant claims the trial court erred in denying attorney fees. We disagree in part and agree in part. A trial court's award of attorney fees is reviewed for an abuse of discretion. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 625-626; 550 NW2d 580 (1996). A trial court's findings regarding the fraudulent, excessive, or unreasonable nature of a claim should be affirmed on appeal unless clearly erroneous. *Beach*, *supra* at 627.

We first address defendant's claim for attorney fees based on the assertion that plaintiff's allegations were unsupported, unreasonable, and excessive in violation of MCL 500.3148(2). The court determined that plaintiff's claims could not be characterized as being without reasonable foundation because there was a medical justification that could have been furnished and plaintiff was going to furnish a rationale for her claims. Because it cannot be said that the court was mistaken in finding that plaintiff's claims were not without reasonable foundation, the court's decision to deny attorney fees under MCL 500.3148(2) was not clearly erroneous.

Next, we address defendant's claim for attorney fees based on the assertion that plaintiff's claims for lost wages and replacement services exceeded the three-year period of limitations in MCL 500.3107(b), and that plaintiff's claims for injuries dating back to 1991 violated the one-year back rule under MCL 500.3145(1). The imposition of a sanction under MCR 2.114 is mandatory on the finding that a pleading was signed in violation of the court rule or a frivolous action or defense had been pleaded. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

In *Richardson v Detroit Auto Inter-Ins Exchange*, 180 Mich App 704, 709; 447 NW2d 791 (1989), this Court found that the trial court erred in failing to grant the defendant's motion for sanctions where the plaintiff's claims were barred by the one-year limitation period under MCL 500.3145(1). In keeping with *Richardson*, where pleadings clearly violate a statutory period of limitations, the offending party is subject to sanctions because there is no basis for arguing that existing law warrants the claim. Thus, the trial court's failure to grant attorney fees under MCR 2.114(E) with respect to plaintiff's claims filed in violation of the periods of limitation in MCL 500.3107(b) and MCL 500.3145(1) was clearly erroneous.

We reverse the trial court's denial of defendant's attorney fees under MCR 2.114(E), but affirm the remainder of the trial court's rulings. We remand to the trial court for entry of an award of defendant's attorney fees under MCR 2.114(E). We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Hilda R. Gage