STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN REHABILITATION CLINIC, INC., P.C., and DR. JAMES NIKOLOVSKI,

Plaintiffs-Appellants,

v

AUTO CLUB GROUP INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 4, 2007

No. 263835
Oakland Circuit Court
LC No. 03-047671-NF

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

In this action to recover fees for chiropractic services, plaintiffs appeal by leave granted the trial court's June 24, 2005, order partially denying their motion for declaratory judgment. We vacate the trial court's order and remand for further proceedings consistent with this opinion.

Dr. Nikolovski is a chiropractor and is the sole owner of the Michigan Rehabilitation Clinic located in Oak Park, Michigan. Plaintiffs supplied chiropractic services to several Detroit residents who had been involved in motor vehicle accidents and whose patronage had been secured through a telemarketing campaign. Several of the individuals who treated with plaintiffs had "coordinated" no-fault automobile insurance policies through defendant. When an individual's health insurance policy did not cover chiropractic care, plaintiffs sent the bills for treatment directly to defendant. Defendant denied the claims for plaintiffs' services, arguing that the insured was required to seek care through his or her primary health insurer before seeking services outside of his or her network.

Plaintiffs subsequently filed suit, arguing that defendant wrongfully denied their claims for reimbursement. After significant discovery had been conducted, plaintiffs filed a motion for declaratory judgment pursuant to MCR 2.605(A)(1). Plaintiffs argued that they were entitled to reimbursement for the chiropractic services rendered pursuant to *Sprague v Farmers Ins Exch*, 251 Mich App 260; 650 NW2d 374 (2002). Specifically, plaintiffs contended that the named insureds were not required to first seek services through their primary health insurance because chiropractic care was not covered under those policies. Defendant retorted that, pursuant to *Tousignant v Allstate Ins Co*, 444 Mich 301; 506 NW2d 844 (1993), the insureds agreed to avail themselves of health care, limited by the restrictions of their health insurance policies, when they accepted coordinated benefits in exchange for lower premiums on their no-fault policy.

Accordingly, defendant contended that the insureds were required to first treat and seek comparable services through their primary care physicians (PCPs).

The trial court agreed with defendant and denied plaintiffs' motion for declaratory judgment in relation to the 46 named insureds who had coordinated no-fault policies and had sought uncovered chiropractic care without first seeking treatment from their PCPs. This interlocutory appeal followed.

We review a trial court's determination in a declaratory action for an abuse of discretion. *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993). We review underlying questions of law, such as the interpretation of a statute or a contractual provision, de novo. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006). As in any bench trial, we review the trial court's findings of fact for clear error. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Pursuant to MCL 500.3105, a no-fault automobile insurer is required "to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle . . . ." Generally, a no-fault insurer providing personal protection insurance (PIP) benefits must reimburse an insured for medical expenses to the extent the costs are "[a]llowable 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(1)(a). The "coordination" of no-fault PIP benefits with other health insurance benefits is permitted pursuant to MCL 500.3109a:

> An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.

The no-fault automobile insurance policy issued by defendant and at issue in this case included the following coordinated benefits provision under the "Limits of Liability" section:

> If the Declaration Certificate shows "COORDINATED MEDICAL BENEFITS," it is agreed that primary medical insurance or health care benefit plans providing coverage for motor vehicle accident injuries are available to **you** or a **resident relative** and are **your** primary source of protection. If primary protection is available, **we** will pay benefits for all reasonable charges incurred for reasonably necessary products, services and accommodations for the care, recovery or rehabilitation of **you** or a **resident relative**, except to the extent that: (1) benefits are paid or payable under **your** primary protection; or (2) a provider within **your** primary source of protection is qualified and competent to render comparable services or accommodations. If primary protection is not available, amounts payable will be reduced by $300.

The Michigan Supreme Court discussed the application of no-fault PIP benefits coordinated with an insured's health insurance in *Tousignant*, *supra*. In *Tousignant*, the Court found that, when an insured purchases a coordinated no-fault automobile insurance policy, the no-fault insurer is not liable for medical expenses that the health insurer is contractually required to pay for or provide. *Id*. at 303. "[T]he legislative policy that led to the enactment of § 3109a requires an insured who chooses to coordinate no-fault and health coverages to obtain payment and services from the health insurer to the extent of the health coverage available from the health insurer." *Id.* at 307.

The Supreme Court provided the following description of "coordinated" benefits, which we find to be instructive:

> Coordination of no-fault and health coverages is optional. "It allows individuals to tailor their insurance coverage to their own special needs." [*LeBlanc v State Farm Mut Automobile Ins Co*, 410 Mich 173, 197; 301 NW2d 775 (1981), superseded by statute as noted in *John Hancock Prop & Cas Ins Cos v Blue Cross & Blue Shield of Michigan*, 180 Mich App 242; 446 NW2d 883 (1989), rev'd 437 Mich 368 (1991).] A no-fault insured who desires duplicative medical coverage from no-fault and health insurers can, by not coordinating and thus paying higher premiums, contract for coverage both by a no-fault insurer and a health insurer.
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> Insureds who coordinate, and thus pay a reduced premium, however, are deemed to have made the health insurer the "primary" insurer respecting injuries in an automobile accident. In *Federal Kemper Ins Co, Inc v Health Ins Administration, Inc*, 424 Mich 537; 383 NW2d 590 (1986), this Court held that when a no-fault insured coordinates no-fault and health coverages, health insurance is the "primary" coverage, and, thus, the health insurer is primarily liable for payment of the insured's medical expense. The Court so held in the construction of § 3109a, stating that such construction was necessary to make effective the legislative purpose in enacting § 3109a of eliminating, in exchange for a reduction of the premium charged for no-fault insurance, health care coverage under a no-fault policy that is duplicative of health care coverage with a health insurer.
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> . . . If a no-fault insured, who has chosen to coordinate no-fault and health coverages, could recover from the no-fault insurer medical expense obtainable from the health insurer, the legislative purpose—eliminating, in exchange for reduction in premium, health care coverage under a no-fault policy that is duplicative of health care coverage with a health insurer—would be defeated. [*Tousignant*, *supra* at 307-308.]

However, nothing in MCL 500.3107(1)(a), which requires a no-fault insurer to provide coverage for necessary medical expenses, requires a coordinated health insurer under MCL 500.3109a to provide the insured with a choice of physician or facility. *Tousignant*, *supra* at 309-310. If the no-fault insured wants to "retain a wide choice of physicians and facilities" in the event he or she is injured in an automobile accident, that insured may forgo the premium rate reduction and not coordinate his or her PIP benefits. *Id.* at 310. By coordinating, the insured

explicitly "agree[s] to relinquish choice of physician and facility" and to be limited by the choices provided under his or her health insurance policy. *Id.*

In *Sprague*, *supra* at 262, the plaintiff and her minor son sought treatment from their family's PCP following an automobile accident. The plaintiff was diagnosed with "upper back strain" and was placed on pain medication. *Id.* When the plaintiff's injury did not heal, her physician placed her on work disability and prescribed a course of physical therapy. *Id.* at 262-263. After two weeks of physical therapy, the plaintiff reported that her condition had improved and her physician released her to work. The physician instructed the plaintiff to return if her pain recurred. *Id.* at 263. Instead of returning to her PCP, the plaintiff and her minor son began treating with a chiropractor one month later. *Id.*

As in this case, the plaintiff in *Sprague* had an employer-provided health insurance plan that did not cover chiropractic treatment. *Sprague*, *supra* at 263. The plaintiff had also purchased a coordinated no-fault automobile insurance policy. The no-fault insurer in that case also denied coverage for the plaintiff's chiropractic claim because the "plaintiff had not made reasonable efforts to obtain medical services" from her primary health insurer. *Id.* This Court distinguished the facts in *Sprague* from *Tousignant* because, unlike the policy in *Tousignant*, the health insurer in *Sprague* was not "required, under its contract, to pay for or provide" the sought-out service. *Sprague*, *supra* at 269. The services utilized by the insured plaintiff in *Tousignant* were "obtainable" and "available" through the health insurance provider. *Id.* at 270. Based on the language used in *Tousignant*, this Court found:

> [A] party who holds a contract containing a coordinated benefits clause is required first to utilize the health care provider for services offered by that health care provider, but is able to seek reimbursement for "allowable expenses" that were not contractually required to be provided by the health care provider. MCL 500.3105, MCL 500.3107, MCL 500.3109a. In other words, because the services received by plaintiff in [*Sprague*] were not required by contract to be provided by [the primary health insurer], they were not subject to the coordination of benefits clause. As such, the general liability provision of the act, MCL 500.3105, applies to defendant's obligation to plaintiff under the act. [*Sprague*, *supra* at 270-271.]

This Court did note its sympathy toward the defendant no-fault insurer's plight in *Sprague*. The plaintiff failed to give her PCP, and thus the primary health insurer, the opportunity to continue and complete the course of treatment before seeking services out of the health care network. *Sprague*, *supra* at 271. However, this Court found that such a consideration had no effect on the determination of whether the coordination clause limited the defendant no-fault insurer's liability under MCL 500.3109a. Rather, the plaintiff's conduct affected the factual determination of whether the chiropractic treatment was a "reasonably necessary service" covered as an "allowable expense" under MCL 500.3107(1)(a). *Sprague*, *supra* at 271.

The only factual difference between this case and *Sprague* is that the current named insureds did not seek any medical care through their health insurance carrier prior to receiving the challenged chiropractic treatment. However, this difference does not affect the interpretation of defendant's coordination clause. In *Sprague*, this Court specifically held that an insured with coordinated benefits is "required first to utilize the health care provider for services offered by that health care provider." *Sprague*, *supra* at 270. It is undisputed that the health insurance

policies of the 46 named insureds at issue in this appeal did not cover chiropractic services. Regardless of whether the insureds first treated with their PCPs or immediately sought uncovered medical treatment, the dispositive question is whether the challenged service was reasonably necessary and, therefore, covered as an "allowable expense."

Defendant contends that, even though chiropractic services were not covered by the named insureds' health insurance policies, those individuals were required to first seek "comparable services or accommodations" from their primary health insurer. Defendant's no-fault insurance policy provides no test for determining whether an alternate service or accommodation is "comparable." Furthermore, neither party has presented any case law to assist in the interpretation of this clause. However, we find that such a determination would only affect whether the out-of-network medical treatment was reasonably necessary. If the insured could have procured "comparable services or accommodations" covered by his or her health insurance plan, the uncovered services may not have been "reasonably necessary." Accordingly, the trial court improperly denied plaintiffs' motion for declaratory judgment. Defendant was required under its coordinated no-fault policy to reimburse plaintiffs for the insureds' chiropractic care in the first instance. Of course, a question of fact exists regarding whether these services were reasonably necessary and, therefore, allowable expenses under MCL 500.3107.

In particular, plaintiffs will have the burden of proving that chiropractic services were "reasonably necessary" in the sense that "comparable services" that are (or are not depending on the particulars of the 46 health insurance policies at issue here) covered by the insured's health insurance policies (e.g., osteopathic, neurological, orthopedic or physical therapy services) would not have been appropriate to address their physical ailments. *Sprague*, *supra* at 271.[1]

Plaintiffs further contend that defendant may not require its insureds to make use of services provided by their primary health insurers because this Court has determined that no-fault automobile insurance is a "fee-for-service system" and cannot incorporate the rules of a health care management system. See *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 262 Mich App 228; 685 NW2d 428 (2004) (*Michigan Chiropractic Council I*), vacated 475 Mich 363; 716 NW2d 561 (2006) (*Michigan Chiropractic Council II*). However, plaintiffs have misinterpreted the case law in this regard. In *Michigan Chiropractic Council I*, *supra* at 232-233, Farmers Insurance Exchange and Mid-Century Insurance Company (Farmers) submitted a proposal to the commissioner of insurance to create a new type of coordinated benefit no-fault automobile insurance policy. Among other things, the insurer would give an additional reduction in PIP benefit premiums to those insureds who agreed to secure medical treatment "exclusively" from providers within Farmers' "preferred provider organization" (PPO). *Id.* at 233, 239-240. The insurance commissioner granted approval of this suggested policy option pursuant to MCL 500.2236, over the plaintiffs' challenge. *Michigan*

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[1] In that limited sense, perhaps, the trial court was correct in stating that the insured's were obligated to "look to" their health insurance coverage network before seeking coverage outside of it for chiropractic services. Nonetheless, we vacate the order denying declaratory judgment as its effect might be to disallow the insureds from proving their claims for reimbursement for chiropractic services from defendant consistent with this opinion.

Chiropractic Council I, supra at 233. The plaintiffs challenged Farmers' coordination clause because it amounted to an "offer or imposition of a managed care network [that] was unlawful under the no-fault act because there is no authority under the act for implementing a managed care scheme." *Id.* at 234-235.

This Court found that the insurance commissioner improperly approved of the suggested insurance policy. This Court noted that, in the context of the no-fault act, "managed care" had only been sanctioned to the extent that a no-fault insurer could offer to coordinate its insureds' benefits with their health insurance benefits. *Michigan Chiropractic Council I, supra* at 241. As provided by the language of MCL 500.3107(1)(a), the Legislature intended the no-fault act to encompass a wide range of choice in relation to a no-fault insured's medical treatment options. *Michigan Chiropractic Council I, supra* at 243. However, managed care under a PPO offers "only limited choice." Therefore, this Court found that "[t]he substitution of a PPO plan for no-fault general medical benefits is . . . not in keeping with the no-fault act." *Id.* Coordination of benefits under MCL 500.3109a may not be done at the expense of the benefits provided in MCL 500.3107. *Michigan Chiropractic Council I, supra* at 244-245. This Court found that a no-fault insurer could not lawfully limit the medical treatment of an insured by also providing the managed care network available to the insured. *Id.*

This case is inapposite of *Michigan Chiropractic Council I.* Defendant's no-fault insurance policy is not an attempt to create a managed care plan. Rather, defendant's coordinated benefits clause merely requires an insured to seek treatment through his or her primary health care insurer, whether the specific desired service is covered by the health insurance policy or whether "comparable services" are available. In any event, the Michigan Supreme Court vacated *Michigan Chiropractic Council I* in *Michigan Chiropractic Council II.* However, the Supreme Court did not consider the merits of the parties' arguments in doing so. Rather, the Supreme Court found that the plaintiff organizations lacked third-party standing to challenge Farmers' coordination clause on behalf of Farmers' insureds. *Michigan Chiropractic Council II, supra* at 378. The Court further found that the plaintiff organizations could not challenge the coordination clause on behalf of their constituent members. The Court noted that the challenge was not yet ripe for review because no member had filed a claim with Farmers and been denied reimbursement. *Id.* at 381.

Vacated and remanded for further proceedings consistent with this opinion.[2] We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra

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[2] We note that there would appear to potentially be a substantial issue of standing and who are the real parties in interest. Because the parties have not raised this issue, we do not address it. But we do recognize that the trial court may need to address it on remand in order to reach the ultimate disposition of this matter.