STATE OF MICHIGAN

COURT OF APPEALS

CHARLOTTE CHALKO,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTO INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 9, 2009

No. 278215
Muskegon Circuit Court
LC No. 06-044301-NF

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting a judgment of no cause of action in favor of defendant after a jury trial in this first party, no-fault insurance action. We affirm.

This case arises out of a motor vehicle accident that occurred on June 29, 2001. Plaintiff suffered an open fracture of her right ankle. Plaintiff filed suit to recover 24-hour a day attendant care benefits. The jury returned a verdict for defendant, finding that plaintiff sustained an accidental bodily injury that arose out of the motor vehicle accident, but that defendant had already paid the allowable expenses for which it was obligated, with the exception that defendant should continue to pay for two hours of attendant care per day going forward. We affirm.

Plaintiff argues that the trial court erred in not granting her summary disposition on her claim for attendant care benefits because the undisputed facts show aggravation of a preexisting condition. We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Defendant moved for partial summary disposition, pursuant to MCR 2.116(C)(10), arguing that defendant should not be responsible for paying for plaintiff's bariatric surgery because that surgery was not associated with her injury from the accident, but rather with her preexisting obesity. MCR 2.116(C)(10) provides that where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(G)(4); *Coblentz*, *supra* at 568. Plaintiff responded that the trial court should grant her summary disposition pursuant to MCR 2.116(I)(2). MCR 2.116(I)(2) permits a trial court to enter a judgment for the party opposing a motion for summary disposition if it appears that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Mithrandir v Dep't of Corrections*, 164 Mich App 143, 145; 416 NW2d 352 (1987).

The evidence submitted in support of the parties' requests for summary disposition established that Dr. Joel C. Seidman opined that "I can't see any relationship at all between the injury she suffered and the motor vehicle accident and the respiratory failure that occurred." Dr. Seidman also indicated that there was a greater likelihood that plaintiff would be able to ambulate presently if she was not overweight. In contrast, Dr. Robert B. Pierce indicated that 24-hour attendant care was necessary due to the injuries plaintiff sustained in the automobile accident. This conflicting medical opinion evidence demonstrates that there was a genuine issue of material fact as to whether defendant's need for 24-hour attendant care arose out of the automobile accident. Consequently, summary disposition would not have been proper, pursuant to MCR 2.116(I)(2), because plaintiff would not have been entitled to judgment as a matter of law. *Mithrandir, supra*.

Plaintiff also argues that the trial court erred when it failed to direct a verdict in her favor on the issue of attendant care benefits, even though plaintiff failed to request a directed verdict. We review de novo the trial court's decision on a motion for a directed verdict. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). However, we review unpreserved claims for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). A no-fault insurer, under the Michigan no-fault act, MCL 500.3101 *et seq.*, is only liable to pay personal protection benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle."

At trial, Dr. Seidman opined that "I can't see any relationship at all between the injury she suffered and the motor vehicle accident and the respiratory failure that occurred." Dr. Stephen Bloom also opined that, based on his examination of plaintiff and review of her medical records, plaintiff needed 24-hour a day care for her general health, which included her obesity, pulmonary status and chronic lymphodema, but only two hours per day for accident related injuries, i.e. her ankle. Dr. Bloom further testified that plaintiff's obesity was not related to the accident, that her respiratory problems and lung disease were not related to the accident, and that her lymphodema was not related to the accident. In contrast, Dr. Pierce indicated that 24-hour attendant care was necessary due to the injuries plaintiff sustained in the automobile accident. In light of this conflicting medical opinion evidence, a directed verdict would not have been proper because there was a question of fact upon which reasonable jurors could differ regarding whether plaintiff's need for 24-hour attendant care arose out of the automobile accident. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). Accordingly, the trial court did not err when it failed to sua sponte grant a directed verdict for plaintiff on her claim for attendant care benefits.

Finally, plaintiff argues that the trial court erred by failing to instruct the jury with M Civ JI 50.11. We review claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 590; 657 NW2d 804 (2002). The determination whether an instruction is accurate and applicable based on the characteristics of a case is in the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

M Civ JI 50.11 instructs, in pertinent part:

> If an injury suffered by plaintiff is a combined product of both a preexisting [*disease/injury/state of heath*] and the effects of defendant's negligent conduct, it is your duty to determine and award damages caused by defendant's conduct alone. You must separate the damages caused by defendant's conduct from the condition which was preexisting if it is possible to do so.
>
> However, if after careful consideration, you are unable to separate the damages caused by defendant's conduct from those which were preexisting, then the entire amount of plaintiff's damages must be assessed against the defendant.

The above-cited instruction is a negligence instruction that simply does not apply in first party, no-fault insurance litigation. This instruction directs the jury to determine whether the "injury suffered by plaintiff is a combined product of both a preexisting [state of health] and the effects of defendant's negligent conduct." Stated differently, the jury is instructed to consider whether State Farm was the cause of the automobile accident that resulted in plaintiff's broken ankle. This instruction is inapplicable to the present case and including it in the jury charge would serve no purpose but to confuse the jury.

Implicit in plaintiff's argument on appeal is the notion that plaintiff's request for M Civ JI 50.11 was in fact a request for a modified version of this instruction—one that would address defendant's obligations under the no-fault act in light of plaintiff's pre-existing condition. However, the record is without any evidence to support this notion. The trial court's pre trial order required the parties to provide the court with its requested jury instructions three days prior to trial. Plaintiff's first submission of instructions failed to make any reference whatsoever to an instruction that would address plaintiff's pre-existing condition. After trial commenced, plaintiff amended her proposed jury instructions and asked the trial court to give M Civ JI 50.11. Plaintiff's amended proposed jury instructions did not in any way preserve the notion that this standard instruction should be modified. Further, no modified instruction was presented to the trial court. We conclude the trial court properly declined to include M Civ JI 50.11 in its charge to the jury.

Affirmed.

/s/ David H. Sawyer
/s/ Brian K. Zahra