STATE OF MICHIGAN

COURT OF APPEALS

YOUSSEF SALMAN,

Plaintiff-Appellee,

v

MOHAMAD AKHDAR,

Defendant,

and

AMICA MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 17, 2009

No. 286923
Wayne Circuit Court
LC No. 06-607306-NI

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

In this insurance dispute, defendant, Amica Mutual Insurance Company ("Amica"), appeals as of right from a judgment for plaintiff following a jury trial.[1] The jury found Amica liable for $161,420 in personal protection insurance ("PIP") benefits, including attendant care and other medical expenses, under the no-fault act, MCL 500.3101 *et seq*. We affirm.

I. Witness Testimony

Amica first argues that the testimony of Dr. Bassam Maaz, Dr. Peter Samet, and Dr. Richard Klein did not satisfy the evidentiary requirements under MRE 702 because their testimony lacked the proper foundation due to inconsistencies and omissions in plaintiff's medical history and his reporting of symptoms. Amica also contends that portions of the testimony from these witnesses were not permitted under MCL 500.3135(2)(a)(*ii*). We disagree.

[1] Defendant, Mohamad Akhdar ("Akhdar"), was dismissed from this case prior to trial.

A trial court's decision on whether to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). The trial court abuses its discretion if its decision is outside the range of principled outcomes. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). "Moreover, even if a court abuses its discretion in admitting or excluding evidence, the error will not merit reversal unless a substantial right of a party is affected, MRE 103(a), and it affirmatively appears that the failure to grant relief is inconsistent with substantial justice, MCR 2.613(A)." *Morales*, *supra* at 729.

The trial court's exercise of its "gatekeeper" role under MRE 702, the purpose of which is to ensure the admission of only reliable scientific evidence, is only a threshold inquiry into the "principles and methodology" behind the expert's conclusion, not the truth thereof. *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 594-595; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-783; 685 NW2d 391 (2004).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

We will address the contested testimony of each witness in turn. First, it is undisputed that plaintiff underwent treatment for back pain in 2002 and was diagnosed with degenerative joint disease. Dr. Maaz was unaware of this particular diagnosis at the time he treated plaintiff. However, Dr. Maaz was aware of degenerative issues in plaintiff's spine at the time he treated plaintiff based on his review of the MRI reports. Amica also contests Dr. Maaz testifying that plaintiff was suffering from headaches and dizziness as a result of a closed head injury. The trial court permitted Dr. Maaz's testimony because he was a neurologist who examined plaintiff and was testifying with regard to his observation and diagnosis.

When expert testimony is based only on speculation, the trial court should exclude the testimony. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). However, if the basic methodology and principles employed to reach a conclusion create a sound foundation for the conclusion reached, the expert testimony is admissible. *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 492; 566 NW2d 671 (1997).

Although Dr. Maaz was unaware of the previous diagnosis of degenerative joint disease in plaintiff's back, he was aware of the degenerative issues that resulted in that diagnosis. Dr. Maaz distinguished the degenerative issues from plaintiff's herniated discs by relating the herniated discs to the trauma from the car accident and relating plaintiff's degenerative condition to his age. Therefore, Dr. Maaz was not speculating regarding causation of plaintiff's herniated discs.

Further, Dr. Maaz is a board certified neurologist, which is a specialty that has to do with the brain and spine. Dr. Maaz did a comprehensive neurological exam of plaintiff and gave his opinion regarding plaintiff's condition and what caused plaintiff's condition. Based on his own testing, Dr. Maaz found that plaintiff had brain abnormalities, which were the source of his dizziness, and related those abnormalities to trauma from the car accident. Although Dr. Maaz works in consultation with a psychologist and a psychiatrist when he suspects a brain injury, Dr. Maaz possessed independent findings to make his diagnosis. Further, Amica does not argue that Dr. Maaz's methodology was unreliable. Therefore, Dr. Maaz was not speculating when he diagnosed plaintiff's closed head injury.

Regarding Dr. Samet, Amica argues that his impression that plaintiff's symptoms of vertigo and memory issues were causally related to the trauma of the accident was without adequate foundation. Amica contends that Dr. Samet did not do any independent testing for a closed head injury. However, Dr. Samet specializes in orthopedics and neurology, with a focus on the spinal cord and neuro-trauma and was a clinical consultant for a facility that treated patients who have suffered traumatic brain injuries. Dr. Samet made his diagnosis based on his own examination of plaintiff and the prior tests done on plaintiff by other doctors, which included Dr. Maaz. However, there is no indication of what specifically Dr. Samet relied upon when drawing his conclusion that plaintiff has suffered a closed head injury. Nevertheless, because Dr. Samet testified that he consulted with Dr. Maaz, who had findings regarding a possible closed head injury for plaintiff, and Dr. Samet's specialty in the field of neuro-trauma, we conclude that the trial court did not abuse its discretion in finding there was adequate foundation for Dr. Samet to testify regarding his finding that plaintiff had a closed head injury.

Amica also argues that there was no foundation for Dr. Maaz and Dr. Samet to causally relate their diagnoses of a closed head injury to plaintiff's car accident and his need for attendant care. "Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Gilbert*, *supra* at 782. Expert testimony may be excluded when based on assumptions that do not comport with the established facts or are derived from unreliable data. *Tobin v Providence Hospital*, 244 Mich App 626, 650-651; 624 NW2d 548 (2001); *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999).

Although there were inconsistencies in some of plaintiff's medical records and plaintiff's reporting of his symptoms, these issues were topics for cross-examination and for attacking the credibility of the doctor's opinions. However, there was an adequate foundation for the testimony of Dr. Maaz and Dr. Samet. The evidence showed that from the time of the accident forward, plaintiff suffered from back and neck pain, as well as dizziness and headaches. In addition, although there were conflicting opinions from independent medical examiners, there were objective medical tests that supported plaintiff's reporting of symptoms. Further, Dr. Maaz, who concluded that plaintiff was in need of attendant care because of his conditions caused by the accident, saw plaintiff initially only days after the accident. Also, contrary to Amica's argument, Dr. Samet's failure to see plaintiff contemporaneously with the accident and his failure to record that plaintiff was in need of attendant care until June 2007, did not make Dr. Samet's testimony unreliable. Dr. Samet testified that, based on his examination and review of plaintiff's records, plaintiff had been in need of such care from the time of the accident forward. Therefore, because this testimony was based on prior records, including from Dr. Maaz, the trial

court did not abuse its discretion by permitting it. Further, issues with inconsistencies in the records and conflicting expert testimony are properly left for the jury resolve. See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Amica also argues that the testimony of Dr. Klein was without an adequate foundation. Dr. Klein is a dentist who testified about the cause of plaintiff's problems with his jaw. However, Dr. Klein testified that he relied on the symptoms that plaintiff reported following the accident in finding that plaintiff's problems with his jaw were caused by the accident. Dr. Klein specifically referenced the records from the emergency room and from Dr. Maaz. Therefore, the trial court did not abuse its discretion in concluding that Dr. Klein had a proper foundation for giving his opinion that trauma from the accident caused plaintiff to suffer an injury to his jaw.

II. Jury Instructions

Next, Amica argues that the trial court erred by not giving an additional instruction explaining that attendant care was distinguishable from household services and that attendant care needed to be for extraordinary things that plaintiff could not do for himself. We disagree.

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). However, claims of instruction error do not warrant reversal unless it is apparent to the reviewing court that failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case*, *supra* at 6.

Prior to closing arguments, the parties discussed whether additional instruction regarding attendant care was necessary. Counsel for Amica requested a further instruction in order to distinguish attendant care from household services. Amica's counsel also argued that attendant care should be characterized as extraordinary. However, the trial court disagreed and only gave the additional instruction that plaintiff requested for attendant care. The trial court instructed the jury regarding attendant care by stating:

> Allowable expenses include but are not limited to medical expenses, and allowable expenses also include attendant care.
>
> * * *
>
> Now, with regard to attendant care, which is another kind of allowable expense, included in an allowable expense is the care provided by family members, which is often referred to as attendant care, as distinguished from replacement services. The test is whether or not those attendant services are both reasonable and necessary.

MCR 2.516(D)(2) provides:

> Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and
>
> (c) they are requested by a party.

However, the model instructions do "not have the force and effect of a court rule," and MCR 2.516(D) "does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions." MCR 2.516(D)(1) and (4).

Implicit in the trial court's instruction was that the care needed to be beyond plaintiff's ability because the trial court stated that the care had to be "necessary." If plaintiff could handle the task himself then the care would no longer be necessary. Second, the trial court did provide an instruction regarding replacement services that was distinct from its instruction regarding attendant care. The trial court stated:

> The third type of benefit is known as replacement service expenses, and consists of expenses not exceeding 20 dollars per day, reasonably incurred in obtaining ordinary and necessary services in place of those the injured person would have performed during the first 3 years after the date for the accident, not for income but for the benefit of himself or his dependents.

Therefore, the trial court did instruct on replacement services, which is the category household services would have fallen into. We conclude that the trial court was within its discretion not to give additional instructions on attendant care. That plaintiff was not able to perform attendant care tasks himself was implicit in the instruction, and the trial court did give an instruction on replacement services, which made it unnecessary to further instruct on the difference between attendant care and household replacement services.

III. JNOV

Amica also argues that the trial court erred in denying its motion for JNOV or new trial. We disagree.

We review de novo a trial court's decision on a motion for JNOV. *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 517; 742 NW2d 140 (2007). The evidence and all legitimate inferences must be viewed in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Id*. at 517-518. Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Id*. at 518. We review for an abuse of discretion a trial court's denial of motions for a new trial. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Under the no-fault act, which allows recovery of "all reasonable charges incurred for reasonably necessary . . . services . . . for an injured person's care," MCL 500.3107(1)(a), recovery of damages is permitted for attendant care services provided, at no actual charge, by family members. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 164; 761 NW2d 784 (2008); *Booth v Auto-Owners Ins Co*, 224 Mich App 724, 727-730; 569 NW2d 903 (1997). "The trier of fact will ultimately determine whether a charge is reasonable." *Bonkowski*, *supra* at 169 (quotation omitted). Under the statute, the charge must be reasonable, the expense must be reasonably necessary, and the expense must be incurred. *Burris v Allstate Insurance*, 480 Mich 1081, 1084; 745 NW2d 101 (2008) (Corrigan, J., concurring).

> [Incur] merely means that the insured must have an obligation to pay the attendant-care-service providers for their services. [T]here is no basis to treat family members differently than hired attendant-care-service workers. But to incur an expense for attendant-care services, the insured's family members and friends, just like any other provider, must perform the services with a reasonable expectation of payment. [*Id.* at 1085.]

Amica argues that there was insufficient evidence to establish that attendant care services were incurred because there was no expectation of payment. Amica contends that the forms detailing the attendant care were insufficient because they were retroactively completed. Further, Amica argues that there is no evidence of what the charges were. Moreover, Amica contends that the testimony of plaintiff's wife, Miriam Salman ("Miriam"), merely related to instances of household replacement services, not attendant care.

Viewing the evidence and all legitimate inferences in the light most favorable to plaintiff, who is the nonmoving party, there was evidence of attendant care provided on a daily basis by Miriam at the time of the accident on December 31, 2005, through February 2008, based on forms that she filled out detailing this care. For each day, Miriam indicated the number of hours, ranging from 10 to 12 hours, she spent caring for plaintiff and the tasks she performed. The need for this care was backed up by the testimony of Dr. Maaz, who recommended six to eight hours of care, and Dr. Samet, who recommended that additional care beyond that time frame was needed. These tasks performed by Miriam included assisting plaintiff with bathing, grooming, meals, supervising him, car transfers, medication, locomotion, and stairs. On most of the forms, Miriam indicated that she had not been paid for these services. Otherwise she left this section blank. Miriam did not indicate how much she was requesting for her services on the forms. However, she did testify that she was requesting whatever the jury thought was reasonable.

Amica argues that because these forms were not filled out contemporaneously with the care provided, they do not constitute sufficient evidence that plaintiff incurred attendant care charges. However, there is no requirement that these forms be filled out contemporaneously. Rather, there is a permissible inference that Miriam had a reasonable expectation of payment because she filled out the forms going back to the day of the accident. Certainly there is a question of credibility regarding whether Miriam could accurately recall the care she provided for plaintiff on a daily basis, but the question of credibility is generally for the fact-finder to decide. See *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). Further, as plaintiff argues, there is no requirement that Miriam assign a dollar amount to the care she provided. Rather, she is required to have a reasonable expectation of payment. Assigning a specific dollar amount is further evidence of a reasonable expectation of payment,

but even without it, the forms and Miriam's testimony create a legitimate inference that she had a reasonable expectation of payment and attendant care expenses were therefore incurred.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens