STATE OF MICHIGAN

COURT OF APPEALS

PENNY JO JOHNSON, Plaintiff-Appellant,	UNPUBLISHED November 9, 2010
v	No. 292401 Osceola Circuit Court
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant-Appellee.	LC No. 07-011215-NF

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

In this action seeking personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right the order of dismissal. Specifically, plaintiff contends that the trial court erred in granting summary disposition to defendant under MCR 2.116(C)(10) on her claims for payment of attendant care and replacement services. Because we conclude that factual issues remain for a jury determination, we reverse and remand.

I. BASIC FACTS

Plaintiff was injured when she was hit by a motor vehicle owned and operated by John Recca. Neither plaintiff nor Harrietta Johnson (Harrietta), plaintiff's former mother-in-law with whom she resided, was insured under a personal injury protection insurance policy. Recca had a no-fault insurance policy with defendant.

On May 24, 2007, plaintiff sued defendant for first-party personal protection insurance benefits. The trial court granted defendant summary disposition under MCR 2.116(C)(10) on plaintiff's claims for benefits relating to the attendant care and replacement services provided by Harrietta. First, the trial court held that pursuant to the one-year-back rule, MCL 500.3145, plaintiff was prohibited from recovering expenses incurred for services rendered before May 24, 2006, and that pursuant to the three-year limitation in MCL 500.3107(1)(c), plaintiff could not recover for expenses of replacement services provided more than three years after the date of the accident. Second, the trial court held that plaintiff failed to establish that any of the attendant care or replacement services provided by Harrietta were reasonably necessary or that plaintiff incurred any expenses for the services.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." We must view the documentary evidence in the light most favorable to the nonmoving party, *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009), as well as draw all reasonable inferences in favor of the nonmovant, *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

III. ANALYSIS

Plaintiff first claims that the trial court erred in holding that she failed to create a factual issue regarding whether the services provided by Harrietta were reasonably necessary. We agree.

Personal protection insurance benefits available under the no-fault act include expenses for attendant care and replacement services. MCL 500.3107(1) provides, in pertinent part:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (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. . . .
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> * * *
>
> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

An item is an "allowable expense" if (1) the amount of the expense was reasonable, (2) the expense was for a product, service, or accommodation reasonably necessary to the insured's care, recovery, or rehabilitation, and (3) the expense was incurred by the insured. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990); *Hamilton v AAA Michigan*, 248 Mich App 535, 543; 639 NW2d 837 (2001). In addition, there must be a causal connection between the expenses and the accidental bodily injury. *Hoover v Michigan Mut Ins Co*, 281 Mich App 617, 628; 761 NW2d 801 (2008). The expenses must be atypical and arise solely out of or because of the accidental bodily injury. *Id.* The burden is on the insured to establish entitlement to insurance benefits. *Nasser*, 435 Mich at 49.

The trial court described "[t]he facts and circumstances" offered by plaintiff to support her claims "as amorphous and speculative." "Speculation and conjecture are insufficient to create an issue of material fact." *Martin v Ledingham*, 282 Mich App 158, 161; 774 NW2d 328 (2009). However, viewing the evidence in the light most favorable to plaintiff, we conclude that the evidence demonstrates that factual issues remain for a jury.

First, although plaintiff cannot provide documentation of each and every service that Harrietta provided for her after the accident, or how long Harrietta spends performing the services, the testimony of the two women establishes that Harrietta provided services on a daily basis. According to the two women, since the accident, Harrietta has done all the cooking, cleaning, and grocery shopping. She helps plaintiff dress, bathe, go to the bathroom, and get in and out of bed. She reminds plaintiff to take her medication. Plaintiff testified that Harrietta spends approximately three hours per day performing replacement services, and Harrietta testified that she spends approximately two and a half to three hours per day attending to plaintiff's care. In addition, plaintiff's physician, Dr. Whelan, wrote that plaintiff requires assistance from Harrietta "for meal preparation, shopping, and everyday ADL's including dressing" and that Harrietta spends approximately three hours per day assisting plaintiff.

Second, there is evidence to establish that the services provided by Harrietta were causally connected to the injuries plaintiff suffered in the accident and are reasonably necessary. It is true that plaintiff suffered from numerous health problems before the accident. In addition, Dr. Whelan indicated that plaintiff required assistance from Harrietta before the accident. However, Dr. Whelan also indicated that he could safely conclude that plaintiff's back injuries were the result of being hit by an automobile and that, since the accident, plaintiff's pain and debility have increased and plaintiff is less able to tolerate "prolonged standing, ambulation due to pain." Plaintiff testified that she has constant pain in her back and legs. She described the pain in her back as a sharp pain, registering an eight to a ten on a scale of ten, and the pain in her legs as a dull pain, registering a five on a scale of ten. She stated, "It's painful. I can't do anything, meaning it's hard to walk. I can't clean the house like I used to and basically, what I do is either watch TV or read a book." Harrietta also testified that plaintiff has pain in her back and neck and across her shoulders every day. According to Dr. Whelan, since the accident, plaintiff has required additional assistance from Harrietta. Furthermore, plaintiff testified that before the accident she was able to do everything around the house that she wanted; she did not require any assistance. She cleaned, cooked, and shopped for groceries, but since the accident, Harrietta has performed all the household tasks. Plaintiff also testified that since the accident, Harrietta on a daily basis helps her dress and bathe and reminds her to take her medication. Harrietta explained that she assists plaintiff in doing her hair because plaintiff cannot raise her arms, helps plaintiff in and out of the bathtub because plaintiff cannot step over the tub, and helps plaintiff dress because plaintiff cannot bend over to put her clothes on.

The evidence establishes that plaintiff suffered back injuries in the accident and that, thereafter, Harrietta provided attendant care and replacement services to plaintiff. The testimony of plaintiff and Harrietta, along with the statements of Dr. Whelan, when viewed in the light most favorable to plaintiff, *Marilyn Froling Revocable Living Trust*, 283 Mich App at 278, demonstrates that there are factual questions for a jury determination regarding how often the services were provided, if the services were causally connected to the injuries plaintiff suffered in the accident, and whether the services were reasonably necessary. The trial court erred in holding that plaintiff failed to present evidence that the services were reasonably necessary.

Plaintiff also claims that the trial court erred in holding that she failed to create a factual issue regarding whether she incurred any expenses for the attendant care and replacement services provided by Harrietta. We agree.

"To 'incur' means 'to become liable or subject to, especially because of one's own actions." *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003) (alteration omitted). "An insured could be liable for costs *by various means*, including paying for costs out of pocket or signing a contract for products or services." *Id.* at 484 n 4 (emphasis added).

Both parties rely on *Burris v Allstate Ins Co*, 480 Mich 1081; 745 NW2d 101 (2008). In *Burris*, the Supreme Court reversed this Court's opinion and reinstated the trial court's order granting judgment notwithstanding the verdict on the plaintiff's claim for attendant care expenses. It did so because

> the plaintiff did not present sufficient evidence at trial that he incurred attendant-care expenses. The evidence failed to establish that the attendant-care providers expected compensation for their services. Therefore, the evidence failed to establish that the plaintiff "incurred" attendant-care expenses. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484 (2003). [*Burris*, 480 Mich at 1081.]

The relevant facts in *Burris* were that three men, the plaintiff's father, brother, and friend, provided the plaintiff with attendant care services. None of the three men recorded the dates and times that they cared for the plaintiff. They did not submit any claims to the plaintiff or the defendant, the plaintiff's insurance company, for payment of their services, and the plaintiff never promised them payment. In addition, each testified that he did not expect to be paid for his services. See *Id.* at 1082 (CORRIGAN, J., concurring), 1086 (WEAVER, J., dissenting).

There are many similarities between the present case and *Burris*. Plaintiff never paid Harrietta for her services. Neither plaintiff nor Harrietta ever recorded the dates and times that Harrietta provided services to plaintiff. In addition, Harrietta never submitted a claim to either plaintiff or defendant for payment of her services. Furthermore, Harrietta knew that plaintiff could not afford to pay her. These facts could be used to argue that Harrietta did not expect to be compensated for her services. However, we must look at the facts in the light most favorable to plaintiff. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 278.

In determining if plaintiff presented sufficient evidence to create a factual dispute regarding whether Harrietta expected compensation for her services, we find instructive the following statement from Justice CORRIGAN's concurring opinion in *Burris*:

> In *Proudfoot, supra* at 484, this Court adopted the following dictionary definition of "incur": "[t]o become liable or subject to, [especially] because of one's own actions." "Liable" means "obligated according to law or equity: responsible." *Webster's Ninth New Collegiate Dictionary* (1987). Thus, the definition of "incur" adopted in *Proudfoot* requires a legal or equitable obligation to pay. . . .
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> Under *Proudfoot*, the term "incur" does not mean that an insured must necessarily enter contracts with the care provider to be entitled to reimbursement for attendant-care expenses ("liable" means "obligated according to law *or equity*"). Nor does it mean that an insured must necessarily present a formal bill establishing that the attendant-care services were provided. It merely means that

> the insured must have an obligation to pay the attendant-care-service providers for their services. I agree with Justice Kelly that in determining allowable attendant-care expenses, there 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. [*Burris*, 480 Mich at 1084-1085 (emphasis in original).]

In this case, plaintiff and Harrietta testified that there was an agreement between them that plaintiff would pay Harrietta for her services. Regarding replacement services, plaintiff testified that she and Harrietta reached an agreement that she would pay Harrietta $20 per hour for the services. Harrietta also testified that plaintiff agreed to pay her for providing replacement services, although she testified that the agreed upon amount was $20 per day. Regarding attendant care services, plaintiff and Harrietta testified that they reached an agreement that plaintiff would pay Harrietta for the services. Plaintiff testified that she agreed to pay Harrietta $3 an hour, while Harrietta testified that no amount was agreed upon. Admittedly, the testimony of plaintiff and Harrietta differs regarding the amount that plaintiff agreed to pay Harrietta. As defendant argued below, their testimony may not be sufficient to establish a legally enforceable contract. See *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006) ("[A] contract requires mutual assent or a meeting of the minds on all the essential terms."). However, as Justice CORRIGAN noted, because the term "incur" means to become "obligated by law or equity," an insured does not necessarily need to enter into a contract to be liable for services. *Burris*, 480 Mich at 1084-1085. In addition, the fact that plaintiff never paid Harrietta for her services is not dispositive of whether plaintiff incurred any expenses. Out-of-pocket payment is only one way that an insured can be liable for expenses. *Proudfoot*, 469 Mich at 484 n 4.

The testimony of plaintiff and Harrietta that there was an agreement that plaintiff would pay Harrietta for her services distinguishes the present case from *Burris*. The testimony of the two women, when viewed in the light most favorable to plaintiff, *Marilyn Froling Revocable Living Trust*, 283 Mich App at 278, demonstrates that there is a factual question regarding whether Harrietta, the attendant care and replacement services provider, expected compensation for her services. *Burris*, 480 Mich at 1081. Accordingly, the trial court erred in holding that plaintiff failed to present sufficient evidence that she incurred any expenses to withstand summary disposition.

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher