

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL DEMERY,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,
a/k/a AAA OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
August 30, 2011

No. 297189
Oakland Circuit Court
LC No. 2009-098579-NF

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Defendant appeals the trial court's order that granted summary disposition to plaintiff. For the reasons set forth below, we reverse and remand for further proceedings.

I. FACTS

Plaintiff sustained various injuries in an automobile accident in 2003, including severe damage to his left forearm and a closed head injury. Plaintiff was insured by defendant at the time of the accident. The Oakland Circuit Court entered a judgment for plaintiff's recovery of attendant care benefits in 2005. Defendant complied with the judgment until February 29, 2008, when it reduced the hourly rate it paid for family-provided attendant care services. Plaintiff filed this action against defendant and later filed a motion for summary disposition. Based on the prior judgment, plaintiff argued that defendant is collaterally estopped from relitigating the issue of the hourly rate because defendant cannot show a change in circumstances that would justify reducing the payment for attendant care benefits from \$30 per hour to \$11 per hour.

II. ANALYSIS

We agree with defendant that it submitted evidence to establish a genuine issue of material fact about whether plaintiff requires 24-hour skilled nursing care.¹ Defendant presented

¹ We review de novo a trial court's ruling on a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). In evaluating a motion for summary disposition

evidence that, at the time of the prior judgment that ordered defendant to pay \$30 per hour in attendant care benefits, plaintiff had undergone several surgeries for his amputated arm. Following each surgery, plaintiff's wife Ira, who is a registered nurse, changed his post-surgical dressing, sterilized his wounds, and looked for signs of infection. Ira also provided plaintiff with assistance with bathing and dressing, took him to medical appointments, reminded him to take his medication, and assisted him when he experienced memory problems and depression.

While, in the prior case, a trial court judge ruled that defendant must pay \$30 per hour for Ira's attendant care services, by its own terms, that judgment only applied through June 2, 2007. Defendant asserts that, while plaintiff may continue to require 24-hour care, he no longer needs the same skilled nursing care he required when the prior judgment was entered. At her deposition on October 2, 2009, Ira testified that she sets up plaintiff's doctor appointments and that she or one of her daughters takes plaintiff to appointments. Ira stated that plaintiff had not seen a doctor for his arm in the previous two years and that he sees his physical medicine and rehabilitation doctor, Dr. Atty, once every three months. Evidence also shows that plaintiff was enrolled in a closed head injury program, though the record evidence differs with regard to how often plaintiff actually attended that program. Ira further testified that plaintiff was not receiving other counseling, despite his problems with depression, anxiety, and impulsiveness. Ira conceded that she has no training or certification in psychological counseling or therapy.

As of the date of her deposition, Ira continued to provide some bathing, dressing, and meal preparation assistance to plaintiff, but the record reflects that the primary basis for plaintiff's need of 24-hour care is for his own safety and supervision due to his continuing psychological problems and some remaining physical limitations.

There is clearly an issue of fact with regard to the level of care plaintiff requires. Plaintiff presented a report drafted by Renee LaPorte, RN, who stated that, as of September 23, 2009, plaintiff needed Ira to continue to act as his Life Skills Trainer and that Ira's 24-hour service is valued at \$30 per hour. However, the basis for her assertion as to the value or cost of that service is not apparent from the record. While Ira is a registered nurse, no evidence established that she is a "Life Skills Trainer" or what licensing, training or compensation a "Life Skills Trainer" generally receives.

Further, defendant presented evidence that the care Ira currently provides plaintiff does not necessarily require the skills of a registered nurse or a licensed practical nurse. Defendant presented evidence that, according to Ira's own testimony about the care she and her daughter actually provide to plaintiff, the level of skill required for plaintiff's 24-hour care may be closer to that of a home health aide than a registered nurse. Specifically, according to documents submitted by defendant, a home health aide would provide plaintiff with hygienic care, exercise

brought under this subsection, a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz*, 475 Mich at 567-568. If 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(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568.

and ambulation, housekeeping assistance, help with taking medication, supervision, self-reliance and structure, which encompass many of the tasks Ira testified she performs for plaintiff. Further, defendant submitted a report from Dr. Leslie Schutz who opined that the level of care plaintiff requires is for “supervision . . . from a safety standpoint.”

Plaintiff submitted a report from Dr. Gerald Shiener in which he also stated that plaintiff needs 24-hour attendant care “for safety and supervision.” In Dr. Shiener’s opinion, that care should be provided by a Life Skills Trainer or a Behavioral Technician because of the risk that plaintiff may attempt to “ ‘break away’ from attendant care.” Thus, plaintiff presented evidence that he may require a higher level of care than mere “supervision,” but the record raises serious questions about whether plaintiff continues to require the 24-hour care of a skilled nurse.

As noted, defendant does not dispute that, at this time, plaintiff requires 24-hour care. The record appears clear that plaintiff has various cognitive and behavioral problems that cause him to act impulsively or diminish his ability to function without supervision. Further, plaintiff continues to experience some pain and leg weakness. However, as discussed, defendant presented evidence that the level of 24-hour care plaintiff requires is primarily for safety and supervision as well as self-care tasks and that this is a level of care lower than that of an RN or LPN. Because defendant established a genuine issue of material fact on this critical issue, it was error for the trial court to grant summary disposition to plaintiff.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad