STATE OF MICHIGAN

COURT OF APPEALS

ZIGMOND CHIROPRACTIC, P.C.,

Plaintiff/Counter-Defendant-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee,

and

NEUROSCIENCE, P.C.,

Third-Party Defendant.

UNPUBLISHED
July 12, 2011

No. 295574
Wayne Circuit Court
LC No. 08-014965-NF

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment in favor of defendant and against plaintiff and third-party defendant Neuroscience, P.C. The judgment was entered after the trial court granted defendant's motion for partial summary disposition under MCR 2.116(C)(7) and (10). The motion concerned plaintiff's claims against defendant for payment of no-fault benefits; it also concerned defendant's counterclaim against plaintiff and third-party complaint against Neuroscience for reimbursement of defendant's previous payments. Defendant alleged that plaintiff was precluded from receiving payment, as a no-fault benefit, for any activity or service other than spinal manipulation. On appeal, plaintiff argues that the trial court erred in granting defendant's motion because there were genuine issues of material fact concerning the nature of the services plaintiff rendered to defendant's insureds. We affirm in part and vacate in part the trial court's order granting defendant's motion for partial summary disposition and the judgment in favor of defendant. We also vacate the trial court's order granting costs and attorney fees.

This case arose from Dr. Boris Zigmond's treatment of three of defendant's insureds, Clemantine Jackson, James Battles, and Bennie McGraw ("the insureds" or "defendant's insureds"), after they were involved in an automobile accident. Dr. Zigmond is a chiropractor

who practices in Oak Park, Michigan. In addition to spinal manipulation, Dr. Zigmond performed other types of treatments on the insureds, including hot pack therapy, mechanical traction therapy, therapeutic exercises, massage therapy, myofascial release, neuromuscular reeducation, and kinetic activities. Dr. Zigmond also referred the insureds to a neurologist, Dr. Rizwan Qadir, of Neuroscience, for neurological testing to rule out central or peripheral neuropathy. Dr. Qadir was apparently sharing office space with Dr. Zigmond and was paying $1,000 per month in rent, as well as an additional amount for the use of some of Dr. Zigmond's equipment and supplies.

In its complaint, plaintiff alleged that defendant had failed to reimburse plaintiff for the reasonable medical expenses of the insureds' treatments. Defendant filed a counterclaim and a third-party complaint, seeking to recover for payments it had made to plaintiff and Neuroscience on behalf of the insureds. Defendant subsequently moved for partial summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10), alleging that plaintiff and Neuroscience were collaterally and judicially estopped from relitigating defendant's liability for services other than spinal manipulation. Alternatively, defendant asked the court to rule that the services other than spinal manipulation were beyond the scope of chiropractic practice and within the scope of professions in which Dr. Zigmond was not licensed, and that the expenses for those services were not payable as no-fault benefits. Without addressing the estoppel arguments, the trial court granted defendant's motion for partial summary disposition[1] and subsequently entered judgment in defendant's favor. We agree with plaintiff that the trial court erred in granting defendant's motion.[2]

We review de novo a trial court's decision to grant a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). A motion for summary disposition brought under MCR 2.116(C)(10) should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 552. "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. at 551-552. Issues of statutory construction are also reviewed de novo as questions of law. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).[3]

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[1] Defendant's motion for summary disposition was "partial" because it left open the question of the amount of damages.

[2] We note that, in the "Applicable Law" section of its brief, plaintiff "suggest[s] that this Court[,] at a minimum, refer [defendant's] allegation that [plaintiff] operated unlicensed facilities to the appropriate regulatory authority for review and recommendation." However, plaintiff fails to even mention such a referral in the "Argument" or "Relief Requested" sections of its brief. In its "Relief Requested" section, plaintiff asks the Court to reverse the judgment and the order awarding costs and attorney fees and remand this case to the trial court for further proceedings.

[3] Although defendant's motion for partial summary disposition was also brought under MCR 2.116(C)(7), the trial court did not rule on defendant's estoppel arguments, and plaintiff's brief

"Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCL 500.3105(1). Personal protection insurance benefits are payable for "[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 public health code, MCL 333.1101 *et seq.*, governs licenses to engage in the "practice of chiropractic." See, e.g., MCL 333.16411. The treatments for which plaintiff claims payment were allegedly provided between November 2007 and July 2008. At all relevant times before January 5, 2010,[4] MCL 333.16401, which defines the scope of chiropractic practice, provided:

> (1) As used in this part:
>
> (a) "Chiropractor", "chiropractic physician", "doctor of chiropractic", or "d.c." means an individual licensed under this article to engage in the practice of chiropractic.
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> (b) "Practice of chiropractic" means that discipline within the healing arts which deals with the human nervous system and its relationship to the spinal column and its interrelationship with other body systems. Practice of chiropractic includes the following:
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> (*i*) Diagnosis, including spinal analysis, to determine the existence of spinal subluxations or misalignments that produce nerve interference, indicating the necessity for chiropractic care.
>
> (*ii*) A chiropractic adjustment of spinal subluxations or misalignments and related bones and tissues for the establishment of neural integrity utilizing the inherent recuperative powers of the body for restoration and maintenance of health.
>
> (*iii*) The use of analytical instruments, nutritional advice, rehabilitative exercise and adjustment apparatus regulated by rules promulgated by the board pursuant to section 16423,[5] and the use of x-ray machines in the examination of patients for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine. The practice of chiropractic does not include the performance of

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on appeal does not address the estoppel issues or the standard for reviewing a trial court's decision concerning a motion brought under MCR 2.116(C)(7).

[4] MCL 333.16401 was amended by 2009 PA 223, effective January 5, 2010.

[5] MCL 333.16423 provides for administrative rulemaking.

> incisive surgical procedures, the performance of an invasive procedure requiring instrumentation, or the dispensing or prescribing of drugs or medicine.
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> (2) In addition to the definitions in this part, article 1 contains general definitions and principles of construction applicable to all articles in this code and part 161 contains definitions applicable to this part. [Footnote added.]

In *Attorney General v Beno*, 422 Mich 293, 301; 373 NW2d 544 (1985), the trial court enjoined the defendant chiropractor from engaging in certain practices determined to be outside the scope of chiropractic practice, and this Court affirmed. The Michigan Supreme Court concluded that dispensing vitamins to patients was within the scope of chiropractic practice and that the record was insufficient with respect to the use of galvanic current, but agreed with this Court that x-rays in other than the spinal area, a general physical examination including the analysis of hair and urine samples, the execution of an employee health record, and the use of ultrasound and diathermy fell outside the scope of the chiropractic statute. *Id*. at 297. The Supreme Court concluded, however, "that the issuance of an injunction against these practices, merely because they are not included within chiropractic, is in error," and it remanded "for an opportunity to establish that [the practices at issue] constitute the unlicensed practice of medicine, or some other 'violation' of article 15 of the Public Health Code so as to justify an injunction." *Id*. at 297-298, citing MCL 333.16291(1) (injunctive relief for violation of the health code). In analyzing whether each practice was within the scope of chiropractic practice, the Court noted that because of the overlap among the definitions of various health-care professions, "[m]erely because these activities may constitute the practice of physical therapy, or for that matter the practice of medicine, nursing, etc., does not thereby inevitably mean that they are not within the scope of chiropractic." *Id*. at 332.

This Court considered *Beno* in deciding *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55; 535 NW2d 529 (1995). In *Hofmann*, this Court considered whether expenses for various products and services the plaintiffs rendered to the defendant's insureds during the course of chiropractic care were subject to payment as no-fault benefits. *Id*. at 59-60. Quoting *Beno*, 422 Mich at 303-304, the Court explained that merely because an activity is excluded from the statutory scope of chiropractic practice, it does not follow that the activity is unlawful and therefore not subject to payment as a no-fault benefit. *Hofmann*, 211 Mich App at 64-65. This Court then considered whether several different services and activities were within the statutory scope of chiropractic practice. *Id*. at 71-89. The Court held that orthopedic and neurological examinations of nonspinal areas and the use of hot and cold packs were outside the scope of chiropractic practice. *Id*. at 73-75, 79-81. It concluded that cervical and intersegmental traction "is within the scope of chiropractic when used for purposes of correcting a subluxation or misalignment of the vertebral column or related bones and tissues, but excluded when used for therapeutic, treatment purposes." *Id*. at 82. The Court remanded for the trial court to give the parties the opportunity to address, with regard to the activities excluded from the scope of chiropractic practice, whether each activity was unlawful "as, for example, constituting the practice of medicine without a license." *Id*. at 65. It instructed that, for activities deemed lawful, the trial court was required to further determine whether the expense for the activity was an allowable expense under MCL 500.3107. *Id*. at 65-67.

In granting defendant's motion for partial summary disposition in this case, the trial court ruled:

> [T]he Public Health Code limits what chiropractors can do, uh, you have to be a licensed physical therapist, or a licensed M.D., to perform any of these functions that [plaintiff] has billed [defendant] for, and they are not compensable, because [Dr.] Zigmond is not licensed to perform those functions, so, [defendant] is correct, in not paying for those services. The Court is going to gran[t] [defendant]'s motion for summary disposition.

We agree with plaintiff that the trial court erred in granting defendant's motion for partial summary disposition on this basis. This is not a correct statement of the law, and the court failed to address whether the specific practices at issue were within the scope of chiropractic practice, let alone whether it was unlawful for Dr. Zigmond to engage in them. Under *Hofmann*, 211 Mich App at 64-65, even a service or activity not within the scope of chiropractic practice may be subject to payment as a no-fault benefit, as long as it was not *unlawful*, as, for example, the unlicensed practice of medicine or physical therapy. Therefore, it is appropriate to separately consider each type of service for which plaintiff is seeking payment.

HOT PACKS

All three insureds were treated with hot packs. Assuming plaintiff's use of hot packs was outside the scope of chiropractic practice,[6] it requires little analysis to conclude that the application of a hot pack to a patient's back was not *unlawful*.

MECHANICAL TRACTION THERAPY

The chiropractic statute (current MCL 333.16401(1)(e)(*iv*) and former MCL 333.16401(1)(b)(*iii*)) includes within the scope of chiropractic practice "[t]he use of . . . adjustment apparatus regulated" by the administrative rules. Under those rules, "'[a]djustment apparatus' means a tool or device used to apply a mechanical force to correct a subluxation or misalignment of the vertebral column or related bones and tissues for the establishment of neural integrity." 2006 AACS, R 338.12001(a). *Hoffman*, 211 Mich App at 82, determined that traction is within the scope of chiropractic practice when used for the purpose of correcting a subluxation or misalignment, though not when used for "therapeutic, treatment purposes."

According to Dr. Zigmond's deposition testimony, the mechanical traction therapy is administered using a device that has rollers that move back and forth under the patient's spine.

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[6] *Hofmann*, 211 Mich App at 79-81, so held. We note that, as of January 5, 2010, MCL 333.16401(*iv*) now expressly includes "[t]he use of *physical measures*, analytical instruments, nutritional advice, rehabilitative exercise, and adjustment apparatus regulated by rules promulgated under section 16423." (Emphasis added.) 2009 PA 223. Administrative rules have not yet been promulgated under this new statutory language.

According to Dr. Zigmond, the purpose of this is, "in layman's terms," "to stretch the spine." All three insureds received this type of therapy. There is at least a question of fact regarding whether the traction, as used by Dr. Zigmond to treat the insureds, was within the scope of chiropractic practice—that is, whether the "stretching" was to correct a subluxation or misalignment. Given the existence of this fact question, the trial court could not properly conclude, as a matter of law, that Dr. Zigmond's use of traction was unlawful.

THERAPEUTIC EXERCISES, NEUROMUSCULAR REEDUCATION, AND KINETIC ACTIVITIES

The chiropractic statute (current MCL 333.16401(1)(e)(*iv*) and former MCL 333.16401(1)(b)(*iii*)), includes the use of "rehabilitative exercise" within the scope of chiropractic practice. "'Rehabilitative exercises' means the coordination of a patient's exercise program, the performance of tests and measurements, instruction and consultation, supervision of personnel, and the use of exercise and rehabilitative procedures, with or without assistive devices, for the purpose of correcting or preventing a subluxated or misaligned vertebrae of the vertebral column." Rule 338.120019(d).

The "therapeutic exercises" performed by the insureds at Dr. Zigmond's direction involved either a stationary bicycle or a "muscle strengthening machine" involving both arm and leg movement. According to Dr. Zigmond, chiropractors use stationary bicycles for the sacroiliac joint. Again according to Dr. Zigmond's deposition testimony, "neuromuscular reeducation" is work for posture, performed while the patient is seated on a large exercise ball. "Kinetic activities" are movements to increase the patient's range of motion or to control and train the muscles of the back, with the patient seated either on a table or on an exercise ball. These types of treatment were used for each of the insureds, except that Battles, at least during the two visits documented in the evaluation forms, was not treated using kinetic activities. These activities fell within the scope of chiropractic practice because "rehabilitative exercise" is defined broadly to include "the *use of exercise* . . . for the purpose of correcting *or preventing* a subluxated or misaligned vertebrae of the vertebral column." Rule 338.120019(d) (emphasis added).

MASSAGE THERAPY AND MYOFASCIAL RELEASE

All three insureds were treated with massage therapy, either hands-on or with a handheld machine, and myofascial release. Further factual development may establish that the massage and myofascial release fell within the scope of chiropractic under former MCL 333.16401(1)(b)(*ii*):

> A chiropractic adjustment of spinal subluxations or misalignments *and related . . . tissues* for the establishment of neural integrity utilizing the inherent recuperative powers of the body for restoration and maintenance of health. [Emphasis added.]

Even assuming these activities did not fall within the scope of chiropractic practice, the only way Dr. Zigmond's provision of these treatments could be *unlawful*, in our estimation, is if they amounted to the unlicensed practice of massage therapy. The Michigan license requirements for massage therapists, MCL 333.17953 and MCL 333.17957, were added by 2008

PA 471, which became effective January 9, 2009. The last of the services for which plaintiff seeks reimbursement were rendered in July 2008. Therefore, Dr. Zigmond's use of massage therapy and myofascial release to treat the insureds could not have been unlawful, at the time it was provided, as the unlicensed practice of massage therapy.

We therefore conclude that the trial court erred in granting defendant's motion for partial summary disposition as it pertains to plaintiff, and we remand for further proceedings. We emphasize that, on remand, plaintiff must establish that its charges amount to allowable expenses under MCL 500.3107.[7] *Hoffman*, 211 Mich App at 65-67. Whether a charge is reasonable is a determination for the trier of fact. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 169; 761 NW2d 784 (2008). Because Neuroscience has not appealed, and plaintiff does not raise any arguments specifically pertaining to Neuroscience, we vacate the trial court's order granting partial summary disposition and the judgment in favor of defendant only in part, as they pertain to plaintiff. We also vacate the trial court's order granting costs and attorney fees.

Vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

[7] Defendant argues that we should instruct the trial court to refrain from certain proceedings on remand until a Court of Appeals opinion in a related case has been released. We leave this to the discretion of the trial court.