STATE OF MICHIGAN

COURT OF APPEALS

SARA REBECCA REESE, Plaintiff-Appellee,	UNPUBLISHED March 18, 2014
v	No. 314210 Grand Traverse Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 2012-029266-NF

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) and awarding plaintiff attorney fees and taxable costs. We affirm in part, reverse in part, and remand for further proceedings.

On December 23, 2010, plaintiff was in a motor-vehicle accident. She was initially diagnosed with an acute closed-head injury and left wrist and hand contusions. Defendant paid the initial medical bills. Thereafter, plaintiff had a follow-up appointment at the Grand Traverse Women's Clinic. The doctor who performed the examination reported that plaintiff did not have any cognitive problems and that her main concern was the pain in her wrist. The doctor noted that plaintiff was seeing a counselor and was on medication for anxiety. About five months after the accident, plaintiff reported to her doctor that she had been experiencing concentration problems since the accident. As a result, plaintiff was referred to Dr. Glen Johnson for a neuropsychological evaluation. Dr. Johnson opined that she had a pain disorder related to the motor-vehicle accident that increased plaintiff's preexisting depression, anxiety, and OCD (obsessive-compulsive disorder) features. He recommended that her treatment include a program for both her physical pain and psychological issues. Thereafter, plaintiff began counseling with Dr. Samuel Sarns, which lasted from August 15, 2011, until May 2012. Defendant apparently started receiving the counseling bills on August 15, 2011, but had not paid them by the time plaintiff filed her lawsuit in June 2012. Moreover, defendant did not pay the physical therapy bills submitted for physical therapy on plaintiff's wrist.

The trial court granted summary disposition under MCR 2.116(C)(10). We review de novo a trial court's decision regarding a motion for summary disposition. *Cedroni Assoc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 45; 821 NW2d 1 (2012).

When reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

An injured claimant's entitlement to personal protection insurance (PIP) or first-party benefits arises from MCL 500.3105(1), which states: "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." Generally, PIP benefits are payable for "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). A first-party no-fault claimant "may recover if he can demonstrate that the accident aggravated a pre-existing condition." *Mollitor v Associated Truck Lines*, 140 Mich App 431, 438; 364 NW2d 344 (1985).

Defendant argues that because plaintiff had a pre-existing mental condition, her injuries and their treatment may not have been related to the motor-vehicle accident. Defendant argues that it was premature for the trial court to grant summary disposition because discovery was not complete and plaintiff's medical records from before the accident could reveal that she had the same problems before the accident. "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Summary disposition is appropriate if "further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Peterson Novelties v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003).

The emergency-room report clearly indicated that plaintiff had acute wrist and hand contusions following the accident. A follow-up report from the Grand Traverse Woman's Center indicated that plaintiff had left forearm or wrist pain. Further, there was no indication in all plaintiff's medical reports submitted to the trial court that plaintiff had sustained a wrist or forearm injury before the motor-vehicle accident. Any implication that if discovery is allowed to continue it could reveal that plaintiff had a preexisting wrist condition is purely speculative. A "nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute . . . ." *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). Defendant has failed to show a genuine issue of material fact regarding whether plaintiff's treatment for a physical injury to her wrist or forearm was related to the motor-vehicle accident.

The parties argue over the bills submitted by Drs. Johnson and Sarns. Regarding the neuropsychological evaluation by Dr. Johnson, we conclude that there is no genuine issue of material fact that the evaluation was reasonably necessary. On December 23, 2010 (the day of the motor-vehicle accident), plaintiff was diagnosed with an acute closed-head injury and a CT

(computerized tomography) scan of her head revealed "soft tissue swelling over the frontal region." During a follow-up exam on December 30, 2010, plaintiff was again diagnosed with a closed-head injury and later reported that she had had trouble concentrating since the accident. Plaintiff was referred to Dr. Johnson for a neurological evaluation. The link between the accident and the exam is clear. Defendant's argument that with additional discovery, including a possible independent medical exam, it might be determined that plaintiff's preexisting conditions were not aggravated because of a pain disorder are speculative. Moreover, Dr. Johnson determined that although plaintiff did not have postconcussional disorder, her complaints appeared to be "related to ongoing depression, anxiety, as well as pain related to the motor vehicle accident." Dr. Johnson opined that plaintiff "sustained a pain disorder related to the motor vehicle accident . . . that has increased pre-existing depression, anxiety, and OCD features."

Regarding the therapy sessions with Dr. Sarns, however, the trial court erred in finding that there was no genuine issue of material fact. At the sessions, plaintiff received counseling on a wide array of problems. Viewed in the light most favorable to defendant, it is debatable whether everything reportedly troubling plaintiff was related to the motor-vehicle accident, and a remand for further proceedings is appropriate.

Defendant also argues that the court erred in awarding plaintiff attorney fees. "The trial court's decision to grant or deny attorney fees under the no-fault act presents a mixed question of law and fact." *Univ Rehabilitation Alliance v Farm Bureau Gen Ins Co*, 279 Mich App 691, 693; 760 NW2d 574 (2008). "What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). We review questions of law de novo and the trial court's findings of fact for clear error. *Univ Rehabilitation Alliance*, 279 Mich App at 693. "A finding is clearly erroneous where this Court is left with the definite and firm conviction that a mistake has been made." *Id*.

MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

In *University Rehabilitation Alliance*, 279 Mich App at 694, this Court set out the basic law regarding the award of attorney fees under the no-fault act:

> An insurer's delay in making payments under the no-fault act is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. Whether attorney fees are warranted under the no-fault depends not on whether coverage is ultimately determined to exist, but on whether the insurer's initial refusal to pay was unreasonable. If an insurer refuses to pay or delays paying no-fault benefits, the insurer must meet the burden of showing that the refusal or delay is the product of a legitimate question

> of statutory construction, constitutional law, or factual uncertainty. [Citations omitted.]

Defendant apparently received the physical-therapy bill after being sued by plaintiff. When asked by the Court why the bill was not paid, defendant asserted that it was not paid "because there are questions about her pre-existing situation." However, as explained above, defendant did not present any evidence suggesting that plaintiff had a preexisting wrist injury. On appeal, defendant does not even specifically address the evidence it was relying on to show that there was factual uncertainty with regard to the physical-therapy bill. Accordingly, the trial court did not err in awarding attorney fees in relation to this medical bill. Further, as explained above, the neuropsychological evaluation related to plaintiff's complaints about cognitive impairment experienced after the accident. Accordingly, defendant has not presented sufficient evidence to meet its burden of justifying the delay in the payment of benefits pertaining to the neuropsychological evaluation.

It is true that on appeal we have found a factual question regarding whether the therapy sessions with Dr. Sarns were related fully, in part, or not at all to the motor-vehicle accident. Nonetheless, defendant did not present sufficient evidence below to meet its burden of justifying the delay in the payment of any benefits due. The bills started being submitted in August 2011 and the lawsuit was not filed until June 2012. Plaintiff released her medical records from the date of the accident forward in May 2011. There is no indication on the record that defendant requested plaintiff's medical records from before the accident during the gap between receiving the bills and the start of the lawsuit. There is also no indication of a pre-complaint request for an independent medical examination. A preliminary report does indicate that defendant believed the injuries were unrelated to the accident and that it sent a letter on May 25, 2012, to plaintiff's doctors asking for documentation supporting how the current treatment was related to the motor-vehicle accident. However, it is unclear what happened in regard to the letter, and it is clear that the letter was not sent until almost nine months after the bills for treatment were first submitted. Defendant offers no explanation for this nine-month delay. Defendant cannot take so little investigative action and then later assert a factual dispute as its defense to a request for attorney fees; accordingly, should it be concluded after remand that therapy bills are covered, associated and apportioned attorney fees would be appropriate.

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

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter