

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANTONINA JUZBA,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant-Appellant.

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UNPUBLISHED

March 26, 2009

No. 283820

Washtenaw Circuit Court

LC No. 06-001387-NF

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant State Farm Mutual Automobile Insurance Company appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of plaintiff Antonina Juzba, and entering judgment in favor of plaintiff in the amount of \$173,703.46<sup>1</sup> in this action for no-fault benefits under MCL 500.3107(1)(a) of the no-fault act, MCL 500.3101 *et seq.* We affirm.

I

On July 12, 2002, plaintiff sustained injuries in an automobile accident. She was discharged from the hospital to a residential brain injury rehabilitation institute. She spent three months at Rainbow Rehabilitation Center before being transferred to the Ann Arbor Rehabilitation Center (AARC). State Farm provided plaintiff's no-fault automobile insurance, and paid for her treatment at AARC until May 2004, when it discontinued payments to AARC. Juzba thereafter filed suit, seeking recovery of allowable expenses incurred after May 2004. On August 29, 2006, a jury returned a verdict in plaintiff's favor, and a judgment was entered on the verdict on October 27, 2006. The judgment stated in pertinent part:

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<sup>1</sup> The judgment consisted of \$144,000 in "No-Fault benefits," \$7,650 in "No-Fault attorney fees based on \$300 per hour," \$10,375 in "No-Fault penalty interest," and \$11,678.46 in "RJA Judgment interest."

THE JURY FOUND THAT the claimed products, services, and accommodations were reasonably necessary for the Plaintiff's care, recovery and rehabilitation of an injury arising out of the use or operation of a motor vehicle as a motor vehicle and are therefore recoverable allowable expenses as defined by the Michigan No-Fault Act; and

THE JURY ALSO FOUND THAT the outstanding payments are allowable expenses incurred between June, 2004, and June, 2006, inclusive, are overdue as defined by the Michigan No-Fault Act, and that penalty interest of 12% per annum is therefore owed on these charges.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

The claimed products, services, and accommodations were reasonably necessary for the Plaintiff's care, recovery and rehabilitation of an injury arising out of the use or operation of a motor vehicle as a motor vehicle as are therefore recoverable allowable expenses as defined by the Michigan No-Fault Act; and

The outstanding payments for allowable expenses incurred between June, 2004, through June, 2006, inclusive, are overdue as defined by the Michigan No-Fault Act, and that penalty interest of 15% per annum is therefore owed on these charges.

IT IS HEREBY ORDERED THAT:

JUDGMENT IS HEREBY ENTERED in favor of Plaintiff, Antonina Juzba, and against Defendant, State Farm Mutual Automobile Insurance Company, in the amount of \$250,800.00<sup>2</sup> for allowable expenses claimed for the period of June, 2004 through August 29, 2006, plus \$29,928.00 in No-Fault Penalty Interest on the allowable expenses claimed between June, 2004, and June, 2006, inclusive, pursuant to the Michigan No-Fault Act, said interest amount being calculated as of August 29, 2006, and shall continue to accrue until satisfied, plus any and all other recoverable Interest, Costs, Attorney Fees, and/or Sanctions that the Plaintiff may be entitled to recover.

On December 8, 2006, plaintiff filed the complaint in the present action, alleging that State Farm refused to pay for services provided by AARC as of September 1, 2006, just days after the jury rendered its verdict in the first litigation. Plaintiff sought reimbursement for services provided to her by AARC beginning in September 2006.

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<sup>2</sup> Before trial began, plaintiff filed a motion in limine addressing the reasonableness of the per diem rate charged by AARC for its services. Based on concessions by State Farm's agents, the trial court ruled that the rate charged by AARC for its services to plaintiff was reasonable.

On July 27, 2007, plaintiff filed a motion for summary disposition under MCR 2.116(C)(7), arguing that the factual issues on which plaintiff's claim for no-fault benefits were predicated had already been decided in the first litigation and, therefore, that collateral estoppel barred relitigation of the issue of whether the services provided by AARC are reasonable and necessary and, therefore, allowable expenses under the no-fault act. Plaintiff submitted with her motion an affidavit signed by Dr. Terry Braciszewski, a licensed psychologist and the clinical director of AARC. In that affidavit, Dr. Braciszewski stated that plaintiff has been a patient participating in AARC's semi-independent living program since November 2002. He also detailed his familiarity with the issues involved in plaintiff's first action against State Farm, where he was one of plaintiff's witnesses with respect to plaintiff's "brain injury, causation and treatment." Dr. Braciszewski averred that neither plaintiff's diagnosis nor her need for the services being provided by AARC had changed since August 2006 when the jury rendered its verdict.

On August 31, 2007, State Farm filed a response to plaintiff's motion. State Farm asserted that this particular no-fault matter was not previously litigated and that the judgment rendered in plaintiff's favor only covered expenses between June 2004 and June 2006. State Farm also asserted that the alleged treatment provided by AARC since the jury verdict are separate and distinct services and that the reasonableness and necessity of services incurred since that time are not issues that were decided by the jury in the previous suit. State Farm urged the trial court to deny plaintiff's motion for summary disposition "as there is a genuine issue of material fact relative to the alleged treatment provided to the Plaintiff by Ann Arbor Rehabilitation Center following the jury verdict of August 29, 2006."

On September 7, 2007, the trial court held a hearing on plaintiff's motion. The court noted that a jury had previously concluded that plaintiff suffered injuries as a result of the automobile accident, that she needed treatment, and that the treatment provided by AARC was reasonable and necessary. The court then stated to defense counsel:

. . . you're the same insurer. We had a whole trial, a jury heard all those arguments. They made this determination. She has a brain injury, she has a policy of insurance with you, she needs this treatment, it's reasonable and necessary, and it's overdue. And you paid it. And, now you've stopped paying again. What is different, other than you want another bite at the apple?

Defense counsel responded that the issue was whether the continuing treatment provided to plaintiff by AARC was reasonable and necessary given the fact that there had been no therapeutic change in plaintiff's condition in over two years. Defense counsel stated:

And, the problem that you have is, nobody in my experience, even with a traumatic brain injury, gets the same treatment for two and a half years or (indiscernible) infinitum without any progress at all. And, when you're confronted with an affidavit this early in this particular proceeding that says nothing's change, the question then – the question is, why has nothing changed?

The trial court granted plaintiff's motion, stating:

I – I think that – I think that what your insurer should do is what the jury found that you should do. And, that’s to pay on the contract for these expenses that she’s incurred as a result of the automobile accident; end of story.

## II

State Farm argues that the trial court erred by relying on the judgment in the prior litigation to establish a future claim for no-fault benefits. This Court reviews de novo a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(7). *Davis v Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006).

Summary disposition is proper under MCR 2.116(C)(7) when “[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.” A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff’s complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. Whether a party is collaterally estopped from challenging an issue addressed in a prior proceeding involves a question of law, which is reviewed de novo. *Horn v Dep’t of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996).

Here, plaintiff moved for summary disposition on the ground that the doctrine of collateral estoppel barred defendant from litigating the reasonableness and necessity of the services provided by AARC specifically. The doctrine of collateral estoppel is intended to relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication by preventing inconsistent decisions. *Monat v State Farm Ins Co*, 469 Mich 679, 692-693; 677 NW2d 843 (2004). Collateral estoppel precludes relitigation of an issue in a subsequent, different case between the same parties if the prior action resulted in a valid final judgment and the issue was actually and necessarily determined in the prior matter. *Id.* To be necessarily determined in the first action, the issue must have been essential to the resulting judgment. *Bd of Co Rd Comm’rs for the Co of Eaton v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). The ultimate issue in the second case must be the same as that in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). The doctrine requires that the same parties must have had a full opportunity to litigate the issue in the prior proceeding, and there must be mutuality of estoppel. *Monat, supra* at 692-693; *Nummer v Dep’t of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

This case is essentially a continuation of an established lawsuit. Both cases involve the same parties, same medical provider, and same expense once again being denied by State Farm. A review of plaintiff's claims in both the first action and the instant action reveals that they are based on the same factual allegations. In the first action, the parties actually litigated and the jury actually determined the issues of the nature and extent of plaintiff’s injuries. The jury determined that plaintiff had a brain injury and that she needed treatment. The jury in the first action also determined that the treatment provided by AARC was reasonable and necessary, and

decided the issue of damages for allowable expenses for claims up until the time of the verdict. Determination of these issues was essential to resolution of plaintiff's claim for no-fault benefits, and the issues decided by the jury are issues necessary for plaintiff to prevail on her claim here. The present lawsuit is seeking further benefit installments for the same benefits and the same medical expenses at issue in the first lawsuit. The expense not being paid is for treatment at AARC, the same facility providing the same care. There are no new causes of action or theories plead, and the case involves the same defendant cutting off the same benefits litigated previously.<sup>3</sup>

Although the jury made no determination regarding the reasonableness and necessity of future benefits, plaintiff attached to her motion for summary disposition the affidavit of Dr. Terry Braciszewski, who averred that neither plaintiff's diagnosis nor her need for the services being provided by AARC had changed since the jury rendered its verdict in August 2006. Despite the passage of nearly 9 months between the times plaintiff filed this action and when she filed her motion for summary disposition, State Farm apparently failed to engage in discovery to support its position that the treatment being provided by AARC is no longer reasonable and necessary. State Farm failed to submit any documentary evidence with its reply to plaintiff's motion for summary disposition to contradict Dr. Braciszewski's averments in his affidavit. Under these circumstances, where a jury previously determined the necessity and reasonableness of plaintiff's treatment, where plaintiff presented an affidavit to establish the continued necessity and reasonableness of the treatment, and where State Farm failed to present documentary evidence to contradict plaintiff's documentary evidence, the trial court properly granted summary disposition in favor of plaintiff under MCR 2.116(C)(7).<sup>4</sup>

### III

State Farm argues that the trial court erred by awarding plaintiff attorney fees pursuant to MCL 500.3148 because a legitimate question existed regarding State Farm's liability to pay benefits and, therefore, it did not unreasonably refuse to pay benefits. "The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (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). This Court reviews de novo questions of law, but we review findings of fact for clear error. *Id.* "A decision is clearly erroneous when 'the reviewing court is left with a definite and firm conviction that a mistake has been made.'" *Id.*, quoting *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). Moreover, we review a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526, 751 N.W.2d 472 (2008).

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<sup>3</sup> Mutuality of estoppel exists because the party invoking collateral estoppel, plaintiff, would have been bound by an adverse decision.

<sup>4</sup> State Farm might have avoided summary disposition by submitting documentary evidence to contradict the documentary evidence in support of plaintiff's claim regarding the necessity and reasonableness of plaintiff's continued treatment at AARC.

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.

Additionally, § 3142 of the no-fault act, MCL 500.3142(2), provides, in pertinent part:

Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer.

“The purpose of the [§ 3148] penalty provision is to ensure prompt payment to the insured.” *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). Accordingly, “[o]verdue benefits give rise to a rebuttable presumption of unreasonable refusal or undue delay.” *Moore, supra* at 199. However, “[i]f the insurer's refusal or delay in payment is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, the refusal or delay will not be found unreasonable.” *Id.* (citation omitted). “When an insurer refuses to make or delays in making payment, a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay.” *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). The relevant inquiry “is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable.” *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). The reasonableness of the delay or refusal is to be assessed as of the time the decision is made. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 354; 737 NW2d 807 (2007).

At the time State Farm made the decision not to pay for plaintiff's continued treatment at AARC, a jury had already determined that treatment at AARC was reasonably necessary for plaintiff's care, recovery and rehabilitation of an injury arising out of the use or operation of a motor vehicle. Even though State Farm asserted that it questioned the continued necessity and reasonableness of the treatment being provided by AARC, State Farm failed to establish the existence of a bona fide legal or factual dispute. Under the circumstances presented here, the trial court did not clearly err in finding that State Farm unreasonably refused to continue to pay benefits for a treatment that a jury had found to be reasonably necessary, and did not abuse its discretion by awarding plaintiff attorney fees and costs.

Affirmed.

/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey