

SPECT IMAGING, INC., Plaintiff-Appellee, v ALLSTATE INSURANCE CO, Defendant-Appellant. SPECT IMAGING, INC., Plaintiff-Appellant, v ALLSTATE INSURANCE CO, Defendant-Appellee. SPECT IMAGING, INC., Plaintiff-Appellee, v AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellant. SPECT IMAGING, INC., Plaintiff-Appellant, v AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellee.

No. 219347, No. 219397, No. 219401, No. 219405

COURT OF APPEALS OF MICHIGAN

246 Mich. App. 568; 633 N.W.2d 461; 2001 Mich. App. LEXIS 136

April 12, 2001, Submitted
June 29, 2001, Decided

PRIOR HISTORY: [***1] Wayne Circuit Court. LC No. 97-702271-CK, LC No. 97-702271-CK, LC No. 96-647918-CK, LC No. 96-647918-CK.

DISPOSITION: Reversed and remanded in all cases.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants appealed from the order of the Wayne Circuit Court, Michigan, finding in favor of plaintiff its action alleging violations of the no-fault act, [Mich. Comp. Laws § 500.3101 et seq.](#)

OVERVIEW: Plaintiff was in the business of providing brain single photon emission computed tomography (SPECT) imaging services to the general public. Plaintiff initiated a tort action against defendant insurers, alleging defendants failed to pay for brain SPECT scans performed on defendants' insureds in violation of the no-fault act, [Mich. Comp. Laws § 500.3101 et seq.](#) The trial court granted plaintiff's motion for summary disposition under [Mich. Ct. R. 2.116\(C\)\(10\)](#). Upon review, the appellate court reversed. The appellate court determined that the circuit court, as a court of general jurisdiction, had original subject-matter jurisdiction of plaintiff's direct provider no-fault claim under [Mich. Comp. Laws § 600.605](#). However, the circuit court erred in determining as a matter of law that brain SPECT scans constituted "reasonably necessary" expenses under the no-fault act. Factual disputes existed regarding whether the scans were reasonable and necessary in relation to defendants' insureds.

OUTCOME: The judgment was reversed, and the matter was remanded.

CORE TERMS: brain, scan, imaging, insured, necessary expense, reasonably necessary, no-fault, matter of law, citations omitted, primary jurisdiction, patient, insurer's, expert testimony, admissible, traumatic, technology, evidentiary hearing, evidence relating, medical literature, quotations, provider, genuine, novel, mild, evidence to support, factual disputes, allowable expenses, expense incurred, medical expense, medical knowledge

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Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 The appellate court reviews a trial court's grant of summary disposition de novo.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims

HN2 A motion brought under [Mich. Ct. R. 2.116\(C\)\(10\)](#) tests whether there is factual support for a claim.

Civil Procedure > Summary Judgment > Opposition > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

HN3 In evaluating a motion for summary disposition brought under [Mich. Ct. R. 2.116\(C\)\(10\)](#), a trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law.

Insurance Law > Motor Vehicle Insurance > Coverage > No-Fault Coverage > Personal Injury Protection > General Overview

HN4 See [Mich. Comp. Laws § 500.3107\(1\)\(a\)](#).

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

HN5 To be reimbursed for an allowable expense under [Mich. Comp. Laws § 500.3107\(1\)\(a\)](#), a plaintiff bears the burden of proving that: (1) the charge for the service was reasonable, (2) the expense was reasonably necessary, and (3) the expense was incurred.

Evidence > Testimony > Experts > General Overview

HN6 ⚡ An insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular product or service, or if the product or service itself is not reasonably necessary. The plain and unambiguous language of [Mich. Comp. Laws § 500.3107](#) makes both reasonableness and necessity explicit and necessary elements of a claimant's recovery, and thus renders their absence a defense to the insurer's liability.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

HN7 ⚡ The question whether litigation expenses are reasonable and reasonably necessary is generally one of fact for the jury.

Estate, Gift & Trust Law > Trusts > General Overview

Evidence > Testimony > Experts > Admissibility

Evidence > Testimony > Experts > Kelly-Frye Process

HN8 ⚡ The party proffering medical evidence bears the burden of demonstrating its acceptance in the medical community. Under Mich. R. Evid. 702, the trial court is required to determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted. To determine whether the requisite standard of reliability has been met, the court must determine whether the proposed testimony is derived from recognized medical knowledge. To be derived from recognized medical knowledge, the proposed testimony must contain inferences or assertions, the source of which rests in an application of medical methods. The inferences or assertions must be supported by appropriate objective and independent validation based on what is known. As long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel.

Evidence > Testimony > Experts > General Overview

HN9 ⚡ Upon the offer of medical evidence, the trial court shall undertake the threshold determination of whether under Davis-Frye, it has been demonstrated that the evidence has gained general acceptance in the medical community.

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > Jurisdiction > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN10 ⚡ The applicability of the primary jurisdiction doctrine is a question of

law the appellate court reviews de novo. No fixed formula exists for determining whether the doctrine of primary jurisdiction applies; each case must be decided on its own facts. However, when determining whether the doctrine of primary jurisdiction is applicable, the court adheres to the following three-pronged test: First, a court should consider to what extent the agency's specialized expertise makes it a preferable forum for resolving the issue. Second, the court should consider the need for uniformity and consistency in resolution of the issue. Third, it should consider whether judicial resolution of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities.

COUNSEL: Danielle P. McCluskey and Sheila R. Thorp, for SPECT Imaging, Inc. Milford, Flint.

Garan, Lucow, Miller & Seward, P.C. (by David M. Shafer and David J. Lankford), for Allstate Insurance Company. Detroit.

Lanctot, McCutcheon, Schoolmaster, Taylor & Hom (by David R. Tuffley) (Gross, Nemeth & Silverman, P.L.C. by Mary T. Nemeth, Of Counsel), for the Auto Club Insurance Association. Mt. Clemens, Detroit.

JUDGES: Before: O'Connell, P.J., and Fitzgerald and Wilder, JJ.

OPINION BY: Peter D. O'Connell

OPINION

[*570] [**463] O'CONNELL, P.J.

In these cases consolidated on appeal, defendants [Allstate Insurance Company](#) ▼

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(Docket No. 219347) and [Auto Club Insurance Association](#) ▼

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[*571] (ACIA) (Docket No. 219401) appeal as of right from judgments in favor of plaintiff SPECT Imaging, Inc. In Docket Nos. 219397 and 219405, plaintiff also appeals as of right from the same judgments. We reverse and remand in all cases.

Plaintiff is a business providing single photon emission computed tomography (SPECT) brain imaging services to the general public. SPECT imaging is a process in which a flow-tracer or receptor-binding [**464] substance is injected intravenously into an individual. This flow-tracer accumulates in a certain part of the brain according to the distribution [***2] of nutrients in the brain. By the use of a gamma camera, a three-dimensional image of the brain is obtained and transmitted onto a computer screen.

Plaintiff initiated the present actions against defendants in 1996 and 1997, alleging as relevant to this appeal that defendants failed to pay for brain SPECT scans performed on a number of defendants' insureds and that such failure to pay is a violation of the no-fault act, [MCL 500.3101 et seq.](#) In the complaints, plaintiff did not refer specifically to the individuals allegedly insured by defendants. Rather, the identities of these individuals, whether they were injured in motor vehicle accidents, and the extent of their alleged injuries is information that is unclear from the record.

During discovery, defendants moved for an evidentiary hearing, seeking to determine whether evidence of SPECT imaging, which defendants claimed was a "novel scientific procedure" was admissible pursuant to [MRE 702](#) and [MCL 600.2955](#). For reasons unclear from the record, the trial court declined to hold an [*572] evidentiary hearing, instead ordering the parties to bring cross-motions for summary disposition.

Pursuant to the trial [***3] court's order, plaintiff moved for summary disposition under [MCR 2.116\(C\)\(10\)](#), arguing that factual disputes did not exist with regard to whether plaintiff's charges for SPECT imaging were allowable expenses under the no-fault act. In response, defendants argued that plaintiff failed to set forth evidence to support its assertion that SPECT imaging was necessary for each of defendants' insureds. Defendants also contended that genuine issues of material fact existed with regard to whether SPECT imaging was an established, reliable medical procedure to the extent that it was a "reasonably necessary" expense under [MCL 500.3107\(1\)\(a\)](#). In support of their respective motions, the parties presented the trial court with the deposition testimony of numerous experts as well as extensive medical literature discussing the merits and disadvantages of using SPECT scan imaging to diagnose mild traumatic brain injury.

After a hearing on the parties' motions, the trial court issued a seventeen-page written opinion granting plaintiff's motion for summary disposition and denying defendants'. The trial court reviewed § 3107 of the no-fault act, observing that "implicitly [***4] § 3107 would seem to require a showing that any medical technology used for any medical expense incurred is at least somewhat reliable." It appears from a review of the trial court's ruling that the trial court favored an approach grounded in public policy. Moreover, the trial court appeared reluctant to render a decision that would inhibit physicians in their use of new, [*573] novel technology to treat patients. A review of the trial court's comments are of guidance:

Given the limited number of tools in his armamentarium, the practitioner could conclude that the SPECT scan is a useful enough instrument for brain injury cases. The practitioner must be forward-looking enough to the point of anticipating new technology and how it may help his patients. We note that aside from their cost, no downside to using such scans has been shown; in particular, there is no evidence that SPECT scans harm patients. We find it extremely difficult to conclude that the SPECT scans do not represent "reasonably necessary" expenses. Diagnosing head injuries is not easy; medical science [**465] does not yet have sufficient tools of sufficient power to pinpoint each and every injury. Indeed the instant dispute [***5] proves this: the reason doctors and other medical personnel have resorted to the sometimes exotic technology of imaging is because it is so hard to assess brain activity and provide meaningful measurements of it. . . . In sum, given the imperfect state of the field, it does not strike us as unreasonable for a doctor to use even imperfect tools like SPECT scans.

On appeal in Docket Nos. 219347 and 219401, defendants challenge the trial court's grant of summary disposition under [MCR 2.116\(C\)\(10\)](#) in favor of plaintiff. ^{HN1} We review de novo a trial court's grant of summary disposition. [Asset Acceptance Corp v Robinson](#), 244 Mich. App. 728, 730; 625 N.W.2d 804 (2001). ^{HN2} A motion brought under [MCR 2.116\(C\)\(10\)](#) tests whether there is factual support for a claim. [Burden v Elias Bros Big Boy Restaurants](#), 240 Mich. App. 723, 725-726; 613 N.W.2d 378 (2000).

^{HN3} In evaluating a motion for summary disposition brought under [MCR 2.116\(C\)\(10\)](#), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence [***6] fails to [*574] establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. [Maiden v Rozwood](#), 461 Mich. 109, 120; 597 N.W.2d 817 (1999) (citations omitted).

The crux of defendants' argument on appeal is that the trial court erred in determining as a matter of law that brain SPECT scans constitute "reasonably necessary" expenses under the no-fault act where factual disputes existed with regard to whether the scans were reasonable and necessary in relation to defendants' insureds. We agree.

These appeals implicate § 3107 of our no-fault act. ^{HN4} [MCL 500.3107\(1\)\(a\)](#) provides in relevant part:

Personal protection insurance benefits are payable for the following:

Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Emphasis supplied.

^{HN5} To be reimbursed for an "allowable expense" under [MCL 500.3107\(1\)\(a\)](#), a plaintiff bears the burden of proving that (1) the charge for [***7] the service was reasonable, (2) the expense was reasonably necessary, and (3) the expense was incurred. [Shanafelt v Allstate Ins Co, 217 Mich. App. 625, 637; 552 N.W.2d 671 \(1996\)](#); [Owens v Auto Club Ins Ass'n, 444 Mich. 314, 323-324; 506 N.W.2d 850 \(1993\)](#); [Davis v Citizens Ins Co of America, 195 Mich. App. 323, 326-327; 489 N.W.2d 214 \(1993\)](#).

At issue is whether the brain SPECT scans performed by plaintiff on defendants' insureds were reasonably necessary expenses to the extent that defendants are liable for reimbursing plaintiff. In [Nasser v Auto Club](#) [*575] Ins Ass'n, 435 Mich. 33, 52, n.7; 457 N.W.2d 637 (1990), our Supreme Court observed that § 3107 is a provision of liability.

^{HN6} An insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular product or service, or if the product or service itself is not reasonably necessary. The plain and unambiguous language of § 3107 makes both reasonableness and necessity explicit and necessary elements of a claimant's recovery, and thus renders their absence a defense to the [***8] [***466] insurer's liability. [Nasser, supra at 49](#) (emphasis in original).

As the Nasser Court recognized, "^{HN7} the question whether expenses are reasonable and reasonably necessary is generally one of fact for the jury." [Id. at 55](#) (citations omitted); see also [Hofmann v Auto Club Ins Ass'n, 211 Mich. App. 55, 94; 535 N.W.2d 529 \(1995\)](#). In the instant case, plaintiff argues that the trial court properly determined that brain SPECT scans are a reasonably necessary expense as a matter of law. Plaintiff correctly recognizes that in some instances, the trial court may properly determine the issue as a matter of law, if it can be "'said with certainty' that an expense was both reasonable and necessary." [Nasser, 435 Mich. at 55](#) (internal quotations and citations omitted).

In the lower court, defendants vehemently argued that brain SPECT scans were not reasonably necessary services in the treatment of defendants' insureds. In spite of defendants' strong objections, the trial court decided as a matter of law that brain SPECT imaging was a reasonable and necessary expense and was therefore subject to reimbursement by defendants under § 3107. The trial court's [***9] decision was grounded in its reasoning that SPECT scans in general assist physicians [***576]

in the diagnosis and treatment of traumatic brain injuries. However, absent from the trial court's decision was any reasoning with regard to whether brain SPECT scans were reasonably necessary for each particular insured. In our view, the court erred in not considering whether each particular expense at issue was reasonably necessary for each insured. Our conclusion is consistent with our Supreme Court's reasoning in [Nasser, supra](#).

In [Nasser, supra](#), our Supreme Court, speaking through Justice Boyle, emphasized that an insurer cannot be held liable for reimbursement of expenses under § 3107 unless each particular expense is proved by the plaintiff to be reasonable and necessary.

It is each particular expense that must be both reasonable and necessary. The concept of liability cannot be detached from the specific payments involved, or expenses incurred Where a plaintiff is unable to show that a particular expense has been incurred for a reasonably necessary product and service, there can be no finding of a breach of the insurer's duty to pay that [***10] expense, and thus no finding of liability with regard to that expense. [435 Mich. at 50](#) (emphasis supplied).

The record here does not contain evidence to support plaintiff's assertion that each particular expense stemming from plaintiff's performance of brain SPECT imaging on defendants' insureds was reasonable and necessary. Plaintiff has failed to put forth any evidence addressing the condition of each individual insured, the injuries suffered, or the need for a brain SPECT scan relating to each individual. On this record, we cannot say "with certainty" that brain SPECT scans were reasonably necessary expenses in the treatment of each insured. [Nasser, 435 Mich. at 55](#).

[*577] In our view, the conflict among plaintiff's and defendants' expert witnesses, together with the dissension in the medical literature regarding whether SPECT scans are useful in diagnosing mild traumatic brain injury, created genuine factual issues sufficient to withstand summary disposition under [MCR 2.116\(C\)\(10\)](#). Under these circumstances, where (1) defendants vehemently contested the reasonableness and necessity of plaintiff's services with [**467] respect to their insureds, and (2) plaintiff [***11] did not prove that each expense was reasonably necessary for each insured, summary disposition was inappropriate, and the trial court incorrectly determined questions reserved to the trier of fact. [Nasser, supra at 57](#); [Reed v Citizens Ins Co of America, 198 Mich. App. 443, 453; 499 N.W.2d 22 \(1993\)](#).

Further, in our view, determining that brain SPECT scans are reasonably necessary expenses as a matter of law without regard to the individual circumstances of each patient thwarts the policy underlying § 3107. In [McGill v Auto Ass'n of Michigan, 207 Mich. App. 402, 408; 526 N.W.2d 12 \(1994\)](#), a panel of this Court recognized that insurance companies are not required to accept health-care providers' unilateral decisions about what constitutes reasonable medical expenses, because to do so would undermine the Legislature's purpose in enacting § 3107.

It is clear that the Legislature did not intend for no-fault insurers to pay all claims submitted without reviewing the claims for lack of coverage, excessiveness, or fraud. [McGill, supra at 408](#) (internal quotations and citation omitted).

[*578] Consequently, if we [***12] were to affirm the trial court's determination that brain SPECT imaging is a reasonable and necessary expense under § 3107 as a matter of law under all circumstances, such action would in turn allow medical providers to recover expenses without being put to their proofs regarding whether a particular expense was reasonable and necessary. The Nasser Court expressly sought to avoid this result. [Nasser, 435 Mich. at 50](#).

On remand, the trial court shall conduct an evidentiary hearing to determine whether expert testimony and evidence relating to SPECT imaging are admissible under [MRE 702](#) and Davis-Frye. ¹ *HNS* The party proffering the evidence bears the burden of demonstrating its acceptance in the medical community. [Anton v StateFarm Mut Auto Ins Co, 238 Mich. App. 673, 679; 607 N.W.2d 123 \(1999\)](#). Pursuant to [MRE 702](#), the trial court is required to determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted. To determine whether the requisite standard of reliability has been met, the court must determine whether the proposed testimony is derived [***13] from recognized medical knowledge. To be derived from recognized medical knowledge, the proposed testimony must contain inferences or assertions, the source of which rests in an application of medical methods. Additionally, the inferences or assertions must be supported by appropriate objective and independent validation based on what is known, e.g., scientific and medical literature. This is not to say, however, that the subject of the medical testimony must be known to a certainty. As long as the basic methodology and principles employed by an expert to reach a conclusion [*579] are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel. [Nelson v American Sterilizer Co \(On Remand\), 223 Mich. App. 485, 491-492; 566 N.W.2d 671 \(1997\)](#) (internal quotations and citations omitted).

[**468] See also [Tobin v Providence Hospital, 244 Mich. App. 626, 646-647; 624 N.W.2d 548 \(2001\)](#).

----- Footnotes -----

¹ [People v Davis, 343 Mich. 348; 72 N.W.2d 269 \(1955\)](#); [Frye v United States, 54 App. D.C. 46; 293 F. 1013 \(1923\)](#).

----- End Footnotes -----

[***14] Similarly, ^{HNS} the trial court shall undertake the threshold determination whether under Davis-Frye, "it has been demonstrated that the evidence relating to SPECT imaging in the treatment of mild traumatic brain injury has gained general

acceptance in the medical community." [Stitt v Holland Abundant Life Fellowship \(On Remand\)](#), 243 Mich. App. 461, 468; 624 N.W.2d 427 (2000) (citation omitted); see also [Anton](#), 238 Mich. App. at 678-679.

If the court determines that the expert testimony and evidence relating to SPECT imaging satisfy the standards of [MRE 702](#) and Davis-Frye, and are therefore admissible at trial, the ensuing determination, whether brain SPECT imaging was a reasonably necessary expense in the treatment of defendants' insureds pursuant to [MCL 500.3107\(1\)\(a\)](#), is a question reserved for the trier of fact. [Nasser](#), 435 Mich. at 55.

In Docket No. 219401, defendant ACIA also argues that the trial court erred in concluding that the doctrine of primary jurisdiction precluded it from considering ACIA's allegations that the proprietor of SPECT Imaging, Inc., engaged in misconduct in [***15] violation of the Public Health Code, [MCL 333.1101 et seq.](#), by (1) referring patients to a facility in which he had an interest and (2) employing an individual who was not licensed to perform SPECT scans. We agree.

HN10 [***580] The applicability of the primary jurisdiction doctrine is a question of law we review de novo. [Michigan Basic Property Ins Ass'n v Detroit Edison Co](#), 240 Mich. App. 524, 528; 618 N.W.2d 32 (2000). "No fixed formula exists for determining whether the doctrine of primary jurisdiction applies; each case must be decided on its own facts." [Cherry Growers, Inc. v Michigan Processing Apple Growers, Inc.](#), 240 Mich. App. 153, 161-162; 610 N.W.2d 613 (2000). However, when determining whether the doctrine of primary jurisdiction is applicable, we adhere to the following three-pronged test:

First, a court should consider to what extent the agency's specialized expertise makes it a preferable forum for resolving the issue. Second, the court should consider the need for uniformity and consistency in resolution of the issue. Third, it should consider whether judicial resolution of the issue will [***16] have an adverse effect on the agency's performance of its regulatory responsibilities. [Id.](#) at 162 (citations omitted).

In our view, the trial court erred in concluding that the doctrine of primary jurisdiction precluded it from considering the issue. This is not a case where the doctrine of primary jurisdiction required the trial court to defer to the relevant licensing authority. As an initial matter, the circuit court, as a court of general jurisdiction, has original subject-matter jurisdiction of plaintiff's direct provider no-fault claim. [MCL 600.605](#); see also [Farmers Ins Exchange v South Lyon Community Schools](#), 237 Mich. App. 235, 241; 602 N.W.2d 588 (1999).

Further, the nature of the factual and legal questions presented are not "of a type to require agency expertise to evaluate." [Rinaldo's Constr. Corp. v. Michigan Bell Tel. Co.](#), 454 Mich. 65, 72; 559 N.W.2d 647 (1997), citing [Attorney General v Diamond Mortgage Co](#), 414 Mich. 603, 615; 327 N.W.2d 805 (1982). Moreover,

ACIA's allegations present a case of "basic issues of fact and law that the courts address on a regular basis." [Cherry Growers, 240 Mich. App. at 163](#); [**469] see also [Diamond Mortgage, 414 Mich. at 614](#). [***17] In our opinion, requiring the lower court to decide whether the alleged actions by these individuals violated the Public Health Code to the extent that plaintiff is unable to recover expenses under the no-fault act would not result in a "pervasive regulatory scheme" being "thrown out of balance." [Id. at 614](#).

Given our conclusion regarding the trial court's grant of summary disposition, we need not address defendants' and plaintiff's alternate arguments on appeal. We reverse and remand in all cases for proceedings consistent with this opinion. We do not retain jurisdiction.

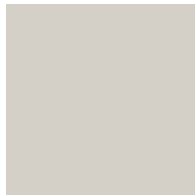
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