FILED: August 11, 2004

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARK WILLIAM LEA,

Respondent,

v.

FARMERS INSURANCE COMPANY OF OREGON,

Appellant.

01CV0040; A119351

Appeal from Circuit Court, Curry County.

Richard K. Mickelson, Judge (Judgment).

Hugh C. Downer, Jr., Judge (Supplemental Judgment).

Argued and submitted March 16, 2004.

Thomas M. Christ argued the cause and filed the briefs for appellant.

K. R. Olin argued the cause for respondent. With him on the brief was Olin & Margolis, P. C.

Before Edmonds, Presiding Judge, and Wollheim and Schuman, Judges.

SCHUMAN, J.

Judgment for plaintiff for damages reduced to $910.50; otherwise affirmed.

SCHUMAN, J.

Plaintiff sustained injuries in an automobile accident caused by an underinsured motorist. In this action, he sought to recover damages from his own insurer, defendant Farmers Insurance Company of Oregon, according to the underinsured motorist terms of his policy. At the close of plaintiff's case, defendant moved to strike the claim for damages for medical expenses because plaintiff failed to produce any evidence that the expenses were for necessary treatment or that the amount charged was reasonable. The trial court denied the motion and defendant then presented its case. The jury found in favor of plaintiff. Defendant appeals, assigning error to the court's denial of the motion to strike. It also appeals from the supplemental judgment awarding plaintiff attorney fees. We modify the judgment.

Initially, the parties disagree over our standard of review. Defendant argues that whether plaintiff can recover his medical expenses without offering any evidence that they were reasonable and necessary is a legal question that we review for errors of law. Plaintiff, citing

Tadsen v. Praegitzer Industries, Inc., 324 Or 465, 468, 928 P2d 980 (1996), maintains that, because the trial court denied a motion to strike, for we must view the evidence and reasonable inferences from it in the light most favorable to plaintiff, the nonmoving party, and affirm the denial if there is any evidence to support it. In fact, both parties are correct. To the extent that resolving this case requires us to decide whether a court has no option but to grant the motion if plaintiff presents no evidence that his expenses were reasonable and necessary, the question is one of law. To the extent that resolving the case requires us to decide whether plaintiff has, in fact, met that evidentiary burden, we employ the "any evidence" standard proposed by plaintiff. *Id.*; Or Const, Art VII (Amended), § 3.

We begin with the legal question. In *Tuohy v. Columbia Steel Co.*, 61 Or 527, 532, 122 P 36 (1912), the Supreme Court held unequivocally that "a plaintiff in a case involving personal injuries can recover, as a part of his damages, his reasonable expenses for medicines and medical treatment, but there must be some evidence that the charges are reasonable." Subsequent cases reaffirm that unequivocal holding. In *Pinder v. Wickstrom*, 80 Or 118, 156 P 583 (1916), the defendant, a motorist, argued that the plaintiff could not recover damages for medical expenses caused by the defendant because the plaintiff did not plead that the amount of the expenses was reasonable. *Id.* at 120. The court found in favor of the plaintiff, noting that, although reasonableness of medical expenses need not be pleaded, nonetheless "[i]t is elementary that there must be evidence tending to prove that such items of special damages are reasonable." *Id.* In *Coblentz v. Jaloff*, 115 Or 656, 239 P 825 (1925), the plaintiff in a personal injury case testified as to the amount he paid to cover medical services but not as to its reasonableness. The court held,

> "It is true that there is ample evidence as to the extent and nature of the services rendered, and many cases hold under such circumstances the jury is permitted to draw a reasonable inference as to the reasonable value of the same; but this court in *Tuohy* * * * held that 'a plaintiff in a case involving personal injuries can recover, as a part of his damages, his reasonable expenses for medicines and medical treatment, but there must be some evidence that the charges are reasonable.' The rule thus announced was approved in the later case of *Pinder* * * *, and is supported by many other authorities * * *. In the light of these decisions it was error to have submitted this item to the jury as an element of damages."

Id. at 665-66. And in *Mathews v. City of La Grande*, 136 Or 426, 299 P 999 (1931), a personal injury case stemming from an allegedly defective sidewalk, the defendant argued that the court erred in allowing the plaintiff to testify regarding the reasonableness of the amounts he had paid in medical expenses. In rejecting that assignment of error, the court cited the language in *Tuohy* quoted above. *Id.* at 430.

Plaintiff does not cite any case that explicitly or implicitly overrules *Tuohy*. Rather, he suggests that more recent cases indicate a modern tendency to disregard overly strict rules in general and that a minority of other states have a different rule. We find neither of these arguments to be relevant or persuasive. Further, plaintiff argues that we should adopt the rule that evidence of the amount of the expenses is itself evidence of their reasonableness because modern jurors, unlike those in the *Tuohy* era, can be presumed to know what is or is not reasonable because of their own experience. That argument is also unpersuasive; indeed, given the proliferation in treatment modalities and the fact that a significant number of medical expenses today are paid by insurance companies and not individuals, we would conclude that a contemporary juror may be less capable of knowing what charges are