

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR KENT COUNTY**

**PREZANNIE JOHNSON,** )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
**COLONIAL INSURANCE** )  
**COMPANY, a foreign** )  
**corporation,** )  
 )  
 Defendant. )

C.A. No. 00C-09-021 HDR

Submitted: March 18, 2002

Decided: May 22, 2002

William W. Pepper, Sr., Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware, for Plaintiff.

Robert J. Leoni, Esq., of Morgan, Shelsby & Leoni, Newark, Delaware, for Defendant.

**Upon Defendant's Motion for Summary Judgment**  
***DENIED***

RIDGELY, President Judge

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**ORDER**

This 22nd day of May, 2002, it appears that:

(1) Defendant Colonial Insurance Company (“Colonial”) has moved for summary judgment on the issue of certain relief sought by Plaintiff Prezannie Johnson (“Plaintiff”). The action brought by Plaintiff stems from an automobile accident that occurred on May 1, 1998. As part of the action, Plaintiff seeks a declaratory judgment that Colonial is liable for the costs and expenses of a not yet performed surgical procedure on Plaintiff’s knee as well as lost wages that will result from said procedure. It is with regard to these future costs, expenses, and lost wages that Defendant moves for summary judgment.

(2) By statute, no-fault benefits in Delaware cover “reasonable and necessary expenses incurred within two years from the date of the accident.”<sup>1</sup> In the present case, the declaratory judgment requested involves expenses that have not yet been incurred and would necessarily fall outside this two-year window. An exception to this two-year window exists, however, “where a qualified medical practitioner shall, within two years from the date of the accident, verify in writing that surgical or dental procedures will be necessary and are then medically ascertainable but impractical or impossible to perform during that two year period.”<sup>2</sup> Insurers are required to notify insured persons that their coverage extends for a

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<sup>1</sup> 21 *Del. C.* § 2118(a)2a.

<sup>2</sup> 21 *Del. C.* § 2118(a)2a3.

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period of two years from the date of the accident and that this period is only extended “for compensation related to surgical or dental procedures that are related to the accident and that were impossible or impractical to perform within the 2-year period.”<sup>3</sup>

(3) The office notes describing Plaintiff’s visits with Dr. DuShuttle, his treating physician with regard to his knee, indicate the need for an ACL reconstruction as early as December of 1998. Following an eight and a half month gap in treatment, the records indicate the need for a total knee replacement. At no point, however, do Dr. DuShuttle’s records indicate that it was impossible or impractical for the Plaintiff to undergo either of these procedures within two years of the date of the accident. Dr. DuShuttle sent a letter to Plaintiff’s counsel dated June 6, 2000, more than two years and one month after the date of the accident. This letter indicates the need for a total knee replacement, and relates that need directly to the accident. However, the letter does not indicate that it was either impossible or impractical for the Plaintiff to have this surgery prior to May 1, 2000, the date on which the statutory two year period ended.

(4) Dr. DuShuttle first indicated in December of 1998 that Plaintiff required surgery. Following a review of Plaintiff’s December 1998 visits with Dr. DuShuttle, Colonial communicated to Plaintiff’s attorney that they would not relate that treatment of Plaintiff’s knee to the accident. Plaintiff has filed an affidavit

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<sup>3</sup> 21 *Del. C.* § 2118(a)(2)h.

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stating that Colonial specifically disputed responsibility for the costs and expenses of the necessary surgery, and that they refused to give Dr. DuShuttle's office authorization for the surgery.

(5) The Court must grant summary judgment if the evidence in the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.<sup>4</sup> Here, both sides agree that there are no genuine issues of material fact concerning this motion. All that remains is to determine whether Colonial is entitled to judgment as a matter of law with regard to the issue raised. I find that Colonial is not so entitled.

(6) At the time Colonial refused to relate the treatment to the accident and refused to authorize the surgery, there was either a breach of Colonial's duties under Plaintiff's policy or there was not. That is an issue to be decided by the trier of fact. Regardless of how that issue will be resolved, Plaintiff's possible recovery for the costs and expenses of surgery cannot be denied simply because Dr. DuShuttle did not later verify that the surgery was impossible or impractical to perform within two years of the accident. The statutory verification that the procedure was impossible or impractical to perform within two years does not apply to this case because coverage was claimed and denied within two years of the accident. In this case, Dr. DuShuttle first verified the need for surgery less than eight months after the accident. When, on February 8, 1999, Colonial refused to relate the treatment,

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<sup>4</sup> *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. Ct. 1994); *Morre v. Sizemore*, 405 A.2d 679 (Del. 1979).

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including possible surgery, to the accident, there was still more than one year remaining in the two year period. Plaintiff has sworn, essentially, that Colonial's refusal to pay for the surgery was the only reason that the surgery was not performed. When the facts are viewed in the light most favorable to Plaintiff, it was Colonial's denial of coverage which caused the surgery to not be performed within two years of the accident. On this record, Colonial is not entitled to summary judgment.

**NOW, THEREFORE, IT IS ORDERED** that Colonial's Motion for Summary Judgment is *DENIED*.

/s/ Henry duPont Ridgely

President Judge

cmh

oc: Prothonotary

xc: Order distribution