

STATE OF MICHIGAN
COURT OF APPEALS

EVELYN PROUDFOOT,

Plaintiff-Appellee,

v

STATE FARM MUTUAL INSURANCE CO.,

Defendant-Appellant.

FOR PUBLICATION
January 10, 2003
9:10 a.m.

No. 232282
Washtenaw Circuit Court
LC No. 97-004357-NF

Updated Copy
March 14, 2003

Before: Cooper, P.J., and Jansen and R.J. Danhof*, JJ.

R.J. DANHOF, J. (*dissenting*).

I respectfully dissent. Expenses for home modification were not overdue because plaintiff has not incurred those expenses and there was a bona fide factual dispute over the necessity of the modifications. I would reverse and remand in part.

The goal of the no-fault act is "to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain *economic losses*." *Shavers v Attorney Gen*, 402 Mich 554, 579; 267 NW2d 72 (1978) (emphasis added). Both statutory interest and attorney fees may be awarded only on expenses that are overdue. MCL 500.3142 (interest); MCL 500.3148(1) (fees). Expenses are not overdue until an insurer receives reasonable proof "of *the amount of loss sustained*." MCL 500.3142(2) (emphasis added). Although plaintiff need not first pay the expenses out of pocket, or have been billed for the expenses, she must become liable for them; defendant is not obligated to pay for modifications plaintiff may never make. See *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 636-638; 552 NW2d 671 (1996); *Moghis v Citizens Ins Co of America*, 187 Mich App 245, 247; 466 NW2d 290 (1991) ("Defendant is not obligated to pay any amount except upon submission of evidence that services were actually rendered and of the actual cost expended."). This is how an expense is incurred: plaintiff must have a *loss* before defendant is required to pay it. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990); MCL 500.3110(4).

In this case, even the trial court recognized that plaintiff never became liable for her house modification expenses; it acknowledged that defendant would be responsible for the modification costs only "as the expenses are incurred under the no-fault law." Plaintiff discusses at length the reasonableness of the modifications and how the jury found they were necessary, but can point to no actual loss, an element required by the statutes. Rather, plaintiff asks this Court to hold that an expense is incurred when defendant is presented with a quoted estimate for

potential expenses. This is clearly contrary to the statutory language and would open the door to considerable abuse both in terms of unreasonable estimates and estimates for work that is ultimately never performed.

The trial court found that defendant unreasonably delayed in making payment. However, 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.

Because the payments were not overdue, the court erred in considering at all whether fees should be awarded. Furthermore, the scope of inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable. *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994). If 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 under MCL 500.3148(1). *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 629; 550 NW2d 580 (1996).

In this case, there was both a clear question of factual uncertainty and a clear question of statutory construction. The issue of the reasonableness of plaintiff's proposed modifications was a factual matter resolved by the jury. The question of the meaning of "incurred" used in the statutes was not resolved until after the jury trial. Plaintiff argues that rescinding the penalties of fees and interest in this case will permit insurers in the future to stall on payments and force plaintiffs to go to trial; however, this would only be the case where there are legitimate reasons for delay, as identified in *Beach*. *Id.* When an insurance company, presented with reasonable bills, unreasonably refuses or delays payment, then the penalties apply.

Plaintiff also argues that requiring injured persons to become liable for expenses before they can recover from insurance companies discriminates against those who cannot afford to pay out of pocket or go into debt. However, this Court is not to question the wisdom of the Legislature but may only carry out its intent as indicated by the plain language of the statute. *People v Morris*, 450 Mich 316, 326; 537 NW2d 842 (1995). Moreover, plaintiff need not become liable for the entire project before seeking payment; she can submit claims to defendant *as they are incurred*.

The majority notes that the parties stipulated \$69,300 as a reasonable amount for attorney fees, and defendant does not dispute that the expense for the architect's bill was actually incurred. However, this does not mean that defendant should be penalized for the entire sum on the basis of the one, de minimis expense. MCL 500.3148(1) only entitles plaintiff to attorney fees incurred in conjunction with representation concerning benefits that are overdue. *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 48; 586 NW2d 395 (1998). Plaintiff is not entitled to expenses for counsel when those expenses were not incurred for the purpose of obtaining overdue benefits.

I would find the expenses for modification were not overdue, and defendant should not be required to pay attorney fees or interest associated with that part of the litigation. I would remand the case for the parties to litigate what constitutes reasonable attorney fees for the \$815.10 architect's bill.

/s/ Robert J. Danhof