STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. CHARTIER, Plaintiff-Appellee,	UNPUBLISHED January 12, 2006
v	No. 257301 Bay County Circuit Court
AUTOMOBILE CLUB INSURANCE ASSOCIATION, Defendant-Appellant.	LC No. 03-003069-NF

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment in favor of plaintiff in this no-fault automobile insurance coverage dispute. We affirm in part, reverse in part, and remand.

I

As a result of injuries incurred in a motor vehicle accident in 1979, plaintiff is a paraplegic. In spite of his disability, plaintiff is employed and his job requires some amount of regular travel by motor vehicle in addition to his travel to and from his work place. In the years since his accident, plaintiff has purchased a number of vehicles which defendant has paid to modify for his use. In 2003, plaintiff's physician gave an opinion that plaintiff required a properly equipped, handicapped accessible van to address upper extremity problems and pain and to avoid degenerative changes. Plaintiff requested that defendant purchase a suitable van for him, but defendant refused. This lawsuit followed. The trial court entered a declaratory judgment requiring defendant to provide plaintiff with a van modified for his use and to pay plaintiff's actual and reasonable attorney fees. Subsequently, the court entered a money judgment in plaintiff's favor in the amount of $46.575.50 to pay for the appropriate van, $10,830 in attorney fees, and $233 in fees.

Defendant first argues that the van was not an allowable expense and urges this Court to either distinguish the current facts from those of *Davis v Citizens Ins Co of America*, 195 Mich App 323; 489 NW2d 214 (1992), or declare its disagreement with the precedent pursuant to MCR 7.215(J)(2). Additionally, defendant argues that an award of attorney fees was inappropriate in this case.

II

The first issue on appeal is whether summary disposition was appropriate. This Court reviews a trial court's grant of summary disposition, as well as statutory interpretation, de novo on appeal. *Williams v AAA Mich*, 250 Mich App 249, 257; 646 NW2d 476 (2002); *Hamilton v AAA Mich*, 248 Mich App 535, 541; 639 NW2d 837 (2001). A motion brought under MCR 2.116(C)(10) tests whether there is factual support for a claim and affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties are considered in the light most favorable to the party opposing the motion. *Spect Imaging, Inc* v *Allstate Ins Co*, 246 Mich App 568, 573-574; 633 NW2d 461 (2001).

The overall goal of the Michigan no-fault insurance system "is to provide accident victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system." *Williams, supra* at 257. Under the no-fault act, personal protection insurance benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a); MSA 24.13107(a). In order for an item to be considered an "allowable expense" under the statute, three factors must be met: "(1) the charge must be reasonable; (2) the expense must be reasonably necessary; and (3) the expense must be incurred." *Davis, supra* at 326. The questions of whether charges are reasonable and the expense reasonably necessary are generally for the jury, but in some instances, the trial court may properly determine the issue as a matter of law if it can be said with certainty that the expense was reasonable and necessary. *Spect, supra* at 575.

As to reasonableness, although plaintiff argued that the lowest price quote offered by defendant reflected a lower quality purchase, neither plaintiff nor defendant argue on appeal that the expense of the van is unreasonable. Therefore, we do not need to address the reasonableness of the expense.

Whether the expense is reasonably necessary can be resolved by reference to *Davis.* The facts in the present case are almost identical to the facts present in *Davis*. Both plaintiffs were rendered paraplegics following an automobile accident, and both requested that the respective defendants pay for a van modified for use by a person in a wheelchair. *Id.* at 325. In finding that a modified van was reasonably necessary, the *Davis* Court stated:

> Transportation is as necessary for an uninjured person as for an injured person. However, the modified van is necessary in this case given the limited availability of alternative means of transportation. . . . The van allows plaintiff to travel outside the county for medical purposes and vacations. In addition, the van was reasonably necessary according to plaintiff's treating physician. . . . Under these circumstances, we find that the modified van is an allowable expense. [*ID* at 327-328.]

Therefore, this Court must focus on the unique circumstances of the current facts to determine whether a modified van is necessary. For almost a decade, plaintiff's treating physician has prescribed a modified van for plaintiff. Even the occupational therapist recommended by *defendant's* case manager stated that plaintiff requires an accessible van. Therefore, it is clear that, based on the needs of his particular disability, plaintiff's circumstances require a modified van. Additionally, plaintiff's treating physician believes plaintiff's disability is "partial, permanent and ongoing." Thus, it does not appear that plaintiff's need for a modified van is likely to diminish anytime in the near future. Accordingly, plaintiff has unquestionably demonstrated his need for a modified van due to his disability and we affirm the court's finding underlying its declaratory judgment that the expense was reasonably necessary.

Defendant argues that this Court should express its disagreement with the precedent established in *Davis*. However, this Court's finding that plaintiff's unique circumstances require a modified van, under the *Davis* requirement that a court look to the unique circumstances of the case, is consistent with the goals of the no-fault act. "The overall goal of the no-fault insurance system is to provide accident victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system." *Williams, supra* at 257. For over two decades, plaintiff has accepted the modifications defendant has placed on the vans plaintiff purchases. However, these modifications are inadequate for plaintiff's unique disability and have only served to further irritate plaintiff's condition. Any reparation short of a modified van is inadequate for this particular plaintiff, and therefore in conflict with the goal of the no-fault system. We are in agreement with the holding of the *Davis* case and the result it compels in this case with regard to reasonable necessity.

Finally, in order for an item to be considered an "allowable expense" under the statute, the expense must be incurred. *Davis, supra* at 326. The Michigan Supreme Court discussed the meaning of "incurred" in *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003). In *Proudfoot*, the plaintiff sustained serious injuries during an automobile accident that resulted in the plaintiff's need for a wheelchair. *Id.* at 478. The plaintiff paid an architect to prepare plans for significant home modifications. *Id*. The defendant denied both the plaintiff's request for reimbursement of the architect's bill as well as the plaintiff's request for the home modifications. *Id.* The Michigan Supreme Court affirmed this Court's holding that the modifications to the plaintiff's home were reasonably necessary and the amount was reasonable; however, the Court reversed the portion of this Court's opinion requiring defendant to pay the total amount of future home modifications because the expenses in question had not yet been incurred. *Id.* at 483. In doing so, the Court stated:

> To "incur" means "to become liable or subject to, [especially] because of one's own actions." A trial court may enter "a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed[, but s]uch a declaration does not oblige a no-fault insurer to pay for an expense until it is actually incurred. At the time of the judgment, plaintiff had not yet taken action to become liable for the costs of the proposed home modifications. Because the expenses in question were not yet "incurred," the Court of Appeals erred in ordering defendant to pay the total amount to the trial court. [*Proudfoot, supra* at 484 (citations omitted).]

In the instant case, plaintiff did not purchase the van and never became liable for payments. Therefore, based on the reasoning in *Proudfoot*, plaintiff did not "incur" the expense within the meaning of § 3107. Accordingly, the cost of the modified van is not an "allowable expense" and the court's grant of monetary relief based on the purchase price of the modified van is reversed.

III

The next issue on appeal is whether the trial court erred in awarding plaintiff attorney fees. This Court will not reverse a trial court's finding regarding an unreasonable refusal or delay in paying benefits in the absence of clear error which will only be found when we are left with the definite and firm conviction on the entire record that a mistake was made *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999).

MCL 500.3148 provides, in relevant part:

> 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.

Therefore, in order for defendant to be liable for payment of attorney fees, the benefits must be overdue. In this case, claims for the modified van are not overdue because they have not yet been incurred. See *Proudfoot*, *supra* at 485. Accordingly, it was clear error for the court to award plaintiff attorney fees and the award is reversed.

We affirm the trial court's declaratory judgment that defendant is required to provide plaintiff with a modified van, but reverse the trial court's grant of a monetary judgment and its award of attorney fees. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Alton T. Davis