STATE OF MICHIGAN

COURT OF APPEALS

CLYDE EVERETT, Plaintiff-Appellee,	UNPUBLISHED June 15, 2010
v	No. 287640 Lapeer Circuit Court
AUTO OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 06-037406-NF

ON RECONSIDERATION

Before: GLEICHER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

Defendant Auto Owners Insurance Company appeals as of right a circuit court order that awarded plaintiff Clyde Everett attorney fees and costs under the no-fault act, MCL 500.3148(1). We reverse and remand.

Plaintiff endured serious injuries in a December 1, 2005 rollover accident. The accident left plaintiff a paraplegic. On May 17, 2006, plaintiff filed a breach of contract action against defendant, his no-fault insurer, seeking reimbursement of allegedly overdue no-fault insurance expenses attributable to medical care, rehabilitative services, and necessary modifications to plaintiff's home. Between the commencement of plaintiff's lawsuit and February 2008, the parties negotiated concerning the extent of necessary modifications to plaintiff's residence. In mid-February 2008, the parties agreed to settle the amount of plaintiff's home modification claim. On February 13, 2008, plaintiff contracted with Recovery Construction Services for the performance of $64,426.69 in home modifications. In August 2008, the circuit court awarded plaintiff $11,728.54 in attorney fees and costs pursuant to MCL 500.3148(1), on the basis that defendant had unreasonably delayed payment for plaintiff's home modifications.

Defendant insists on appeal that the circuit court erred in awarding plaintiff attorney fees and costs. According to defendant, plaintiff's request for home modification expenses did not qualify as overdue because plaintiff did not incur any home modification-related expenses until he signed his February 13, 2008 contract with Recovery Construction Services. This Court reviews for an abuse of discretion a circuit court's ultimate "decision to award attorney fees." *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). However, we review for clear error a circuit court's finding "whether the defendant's denial of benefits is reasonable under the particular facts of the case." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

And to the extent that our review of the circuit court's award of attorney fees involves interpretation of no-fault statutes, we consider de novo these questions of statutory construction. *Id*. at 6-7.

Defendant invokes as purportedly dispositive of its position that plaintiff did not incur home modification expenses until February 2008 the Michigan Supreme Court's decision in *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476; 673 NW2d 739 (2003). In *Proudfoot*, the Supreme Court addressed the propriety of a trial court's post-jury trial awards to the plaintiff of home modification expenses, "judgment interest, MCL 600.6013, no-fault penalty interest, MCL 500.3142, and no-fault attorney fees, MCL 500.3148(1)." *Id*. at 479. In pertinent part, the Supreme Court, *id*. at 483-484, initially held as follows concerning the nature of an incurred expense under the no-fault act:

> We . . . affirm the Court of Appeals holding concerning the declaratory judgment that the modifications to [the] plaintiff's home were reasonably necessary, that the amount of the allowable expense was $220,500 (plus the VAT), and that [the] plaintiff had supplied reasonable proof of those expenses on December 2, 1997. Likewise, the judgment awarding [the] plaintiff the architectural services that [the] plaintiff has already paid is affirmed.
>
> However, we reverse that portion of the Court of Appeals judgment that ordered [the] defendant to pay the total amount of future home modification expenses . . . *because the expenses in question have not yet been incurred*. [Emphasis added.]
>
> MCL 500.3107 provides in part:
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> "(1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> "(a) 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 in original.]
>
> MCL 500.3110(4) provides that "(p)ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss *is incurred*." [Emphasis in original.]
>
> To "incur" means "(t)o become liable or subject to, (especially) because of one's own actions." . . . . *Because the expenses in question were not yet "incurred," the Court of Appeals erred in ordering [the] defendant to pay the total amount to the trial court*. [Emphasis added, footnote omitted.]

The Supreme Court further explained as follows, *id*. at 485, that the trial court had incorrectly awarded the plaintiff no-fault attorney fees:

> With regard to attorney fees, MCL 500.3148(1) provides that
>
> > "(a)n 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." [Emphasis in original.]
> >
> > Thus, attorney fees are payable only on *overdue* benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying. Here, plaintiff was entitled only to those reasonable attorney fees that were attributable to the $815.10 architect's fee. *Claims for the modification expenses are not yet "overdue" because they are not yet "incurred."* [Emphasis added.]

In this case, the parties agree that plaintiff only became contractually obligated to pay for the modifications to his residence on February 13, 2008, when he entered a contract with Recovery Construction Services. As our Supreme Court plainly explained in construing the relevant terminology of the no-fault act, reasonable charges become payable by an insurer when they are "incurred" by an insured, MCL 500.3107(1), MCL 500.3110(4), and "incur" means "(t)o become liable or subject to, (especially) because of one's own actions." *Proudfoot*, 469 Mich at 483-484. Given that plaintiff undisputedly became liable to pay for the requested expenses comprising his home modification on February 13, 2008, the Supreme Court's analysis in *Proudfoot*, *id*., leads to our inescapable conclusion that plaintiff did not *incur* any reasonable expenses compensable under the no-fault act *until February 13, 2008*. And in light of the facts that (1) the parties do not dispute that they agreed to a settlement of plaintiff's request for home modification expenses in February 2008, and (2) no evidence suggests that defendant delayed payment after February 2008, plaintiff's "[c]laims for the modification expenses are not yet "overdue" under MCL 500.3148(1). *Proudfoot*, 469 Mich at 485.[1]

[1] We recognize plaintiff's appellate contentions that defendant "engaged in a pattern of conduct designed to delay or prevent the execution of any contract for home modifications to move forward, despite the absence of any genuine dispute as to what modifications were reasonably necessary," such as "refus[ing] to provide the $30,000.00 deposit required to put the [plaintiff-Recovery Construction Services] contract into effect . . . ." However, even accepting the veracity of these propositions, we remain unconvinced that they have any bearing with respect to the governing no-fault expense incurrence analysis in *Proudfoot*, 469 Mich at 483-485. Plaintiff points to no relevant no-fault case law or other authority suggesting that defendant's alleged delay alters the moment when plaintiff incurs a no-fault expense; plaintiff cites only *Stanton v Dachille*, 186 Mich App 247, 258; 463 NW2d 479 (1990), a real estate contract case that discussed the enforceability of a condition precedent, which has no import on the present case.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kurtis T. Wilder