STATE OF MICHIGAN

COURT OF APPEALS

FARMERS INSURANCE EXCHANGE, Plaintiff-Appellant,	UNPUBLISHED March 10, 2011
v	Nos. 295311; 296150 Wayne Circuit Court
FELICYA YVONNE THOMAS, Defendant-Appellee.	LC No. 09-006324-NF

Before: MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ.

PER CURIAM.

In Docket No. 296150, plaintiff Farmers Insurance Exchange (Farmers) appeals by leave granted[1] the trial court's order denying its motion for summary disposition and granting defendant Felicya Yvonne Thomas' motion for summary disposition. On appeal, Farmers argues that the trial court erred when it determined that MCL 500.3177(1) did not authorize Farmers to obtain reimbursement from Thomas for personal injury benefits paid to a person injured while occupying Thomas' uninsured automobile. In Docket No. 295311, Farmers appeals as of right the trial court's order granting Thomas' motion for sanctions. On appeal, Farmers argues that it was not in the interest of justice to award offer of judgment sanctions to Thomas, and that the trial court's award of attorney fees was not supported by the evidence. For the reasons stated below, we conclude that the trial court properly dismissed Farmers' suit for reimbursement. In addition, the trial court properly ordered Farmers to pay Thomas' attorney fees as a sanction for rejecting Thomas' offer of judgment. However, because we conclude that the trial court erred when it ordered Farmers to pay fees without making the necessary findings, we vacate the award and remand for a hearing to determine the amount of fees that should be awarded.

[1] See *Farmers Ins Exch v Thomas*, unpublished order of the Court of Appeals, entered June 3, 2010 (Docket No. 296150).

I. BASIC FACTS AND PROCEDURAL HISTORY

In April 2008, Thomas drove her sister to a party. Thomas did not have insurance on her car at that time. During the party her sister left to get some air and sit in the car, which was parked on the street. Later, Thomas checked on her sister and found her sleeping in the car; she left her sleeping. Sometime thereafter, an unknown driver struck Thomas' parked car and drove off leaving Thomas' sister seriously injured. Thomas' sister filed a claim with the Michigan Assigned Claims Facility because there was no no-fault insurance policy available to cover her personal injury. Her claims were assigned to Farmers and it paid more than $160,000 in benefits.

In March 2009, Farmers sued Thomas for reimbursement of its payments to her sister under MCL 500.3177(1), which permits reimbursement from the owner or registrant of an uninsured car that was involved in the accident giving rise to the insurer's obligation to pay. In her answer, Thomas stated that her car was not required to have insurance because it was not being used as a motor vehicle at the time of the accident. She also attached an offer of judgment for $100. Farmers did not respond to the offer of judgment.

In August 2009, Farmers moved for summary disposition. Farmers argued that it was entitled to summary disposition because under MCL 500.3106, a parked car is subject to reimbursement under MCL 500.3177(1) when the injured party is occupying it. Thomas filed a response and countermotion for summary disposition. She reiterated her argument that her car did not have to be insured at the time of the accident because MCL 500.3101 only requires vehicles that are "being driven or moved upon a highway" to be insured. She also argued that a parked vehicle is not being "used as a motor vehicle" as defined by the no-fault act. Finally, because Farmers rejected her offer of judgment by non-response, Thomas asked the trial court to order Farmers to pay her reasonable attorney fees under MCR 2.405.

After a hearing on the motions, the trial court determined that Thomas' vehicle was not required to be insured at the time of the accident because it was parked and, further, that the vehicle was not being used as a motor vehicle at the time of the accident. For these reasons it determined that Farmers' complaint should be dismissed. It also asked Thomas to move for sanctions in a separate motion.

Thomas moved for offer of judgment sanctions in October 2009. She attached schedules and exhibits in support of an award of attorney fees for 35 hours, billed at $500 per hour. Farmers argued in response that sanctions were not in the interest of justice because Thomas' $100 offer of judgment was not calculated to encourage settlement and also argued that the rate and number of hours billed was unreasonable. The trial court eventually awarded Thomas attorney fees for 38 hours at $350 per hour.

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

Farmers first argues on appeal that the trial court erred when it determined that Farmers could not seek reimbursement from Thomas under MCL 500.3177 and granted summary disposition in favor of Thomas for that reason. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

B. ANALYSIS

Under the no-fault act, an insurer who becomes "obligated to pay personal protection insurance benefits" to a person injured in an accident arising "out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle" may sue to recover "benefits paid" from "the owner or registrant of the uninsured motor vehicle or from his or her estate." MCL 500.3177(1). In this case, it is undisputed that Farmers became obligated to pay no-fault benefits to Thomas' sister as a result of an automobile accident that involved, on some level, at least one uninsured vehicle—Thomas' car. However, it is well-settled that an insurer's ability to seek reimbursement under MCL 500.3177 is limited to seeking reimbursement from the owners or registrants of uninsured vehicles that were involved in the accident as motor vehicles. That is, if the uninsured vehicle is not involved in the accident as a motor vehicle, the owner will not be liable for reimbursement under MCL 500.3177(1). See *Elbode v Allstate Ins Co*, 147 Mich App 390; 383 NW2d 209 (1985).

In *Elbode*, the plaintiff apparently drove his wife to a restaurant in his uninsured car. See *id.* at 393 n 1 (noting that the plaintiff's car was parked outside the restaurant). While at the restaurant, another driver crashed through the wall of the restaurant and killed the plaintiff's wife. *Id.* at 392. The plaintiff sued the driver's insurer for survivor benefits and the insurer counter-sued for reimbursement under a prior version of MCL 500.3177. *Id.* The Court in *Elbode* held that the reimbursement provision applied only to uninsured vehicles involved in the accident. Because the plaintiff's vehicle was not involved in the accident, he could not be liable for reimbursement to the insurer under MCL 500.3177.[2] See *id.* at 393-396. This Court also found it noteworthy that MCL 500.3177 had recently been amended and now, consistent with its interpretation of the prior version, expressly stated that an insurer could only seek reimbursement from the owners of uninsured vehicles that were involved in the accident as motor vehicles. *Id.* at 394 n 3 (recognizing the amended language and concluding that the "injury which occurred

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[2] The Court also summarily rejected the plaintiff's argument that his car did not have to be insured under the no-fault act because, at the time of the accident, it was not being driven or moved upon a highway and was not therefore uninsured within the meaning of MCL 500.3177(1). See *id.* at 393 n 1 (characterizing this argument as "illogical.").

did not arise out of the ownership, maintenance or use of an uninsured motor vehicle as a motor vehicle."). Thus, the question here is whether Thomas' car was involved in the accident that gave rise to Farmers' obligation to pay benefits *as a motor vehicle*.

MCL 500.3177 requires that, when an insurer seeks reimbursement from the owner of an uninsured motor vehicle, the injuries for which the insurer paid must arise "out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle." A substantially similar phrase is used in multiple places throughout the no-fault act. See, e.g., MCL 500.3105(1) ("Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter."), MCL 500.3106 (stating that accidental bodily injury does not "arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle" unless certain exceptions apply), and MCL 500.3163(1). When a phrase is used in different places in a statute, it should be given the same meaning throughout, unless the Legislature specifies otherwise. *Robinson v Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010).

In *McKenzie v ACIA*, 458 Mich 214, 220; 580 NW2d 424 (1998), our Supreme Court explained the meaning of this phrase: "[W]e are convinced that the clear meaning of this part of the no-fault act is that the Legislature intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." Farmers argues, however, that because Thomas' sister's injuries arose out of her occupancy in a *parked* vehicle, MCL 500.3106, by itself, determines whether reimbursement is permitted in this case, without consideration of the discussion in *McKenzie*. MCL 500.3106 provides:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
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> * * *
>
> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

It is undisputed that Thomas' sister's injuries were sustained while she occupied a parked vehicle.

The structure of MCL 500.3106—"does not arise out of . . . unless"—only provides a threshold requirement for concluding that accidental bodily injury arose out of the use of a parked vehicle as a motor vehicle. See *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635-636; 563 NW2d 683 (1997) (noting that MCL 500.3106 is merely a threshold requirement). Indeed, MCL 500.3106 does not define when a parked vehicle is being used as a motor vehicle but, rather, defines *when an injury may arise* out of the use of a parked vehicle as a motor vehicle. The vehicle must also, separately, be used as a motor vehicle. *Id.*; see also *Yost v League Gen Ins Co*, 213 Mich App 183, 184-185; 539 NW2d 568 (1995).

Thus, it is necessary to determine whether the vehicle's use, in this case, was "closely related to [its] transportational function and only when engaged in that function." *McKenzie*, 458 Mich at 220. Here, the vehicle was parked and its only occupant was sleeping. On the other hand, the vehicle had been driven to the party earlier in the evening and it was expected to be driven home later. Waiting to be transported in a vehicle is at least somewhat related to the vehicle's transportational function. Nevertheless, at the time of the accident Thomas' car was not engaged in any actual transportational function. This case is closely analogous to *Yost*.

In *Yost*, the plaintiff was injured while sleeping in a parked car that caught fire. *Yost*, 213 Mich App at 184. This Court concluded that even though the car satisfied one of the parked vehicle exceptions under MCL 500.3106, the plaintiff there nevertheless failed to establish that the car was being used as a motor vehicle when the accident occurred: "When the car caught fire, it was being used as nothing more than a bed." *Id*. at 185. Thomas' vehicle was merely the scene of the hit and run accident that caused her sister's injuries; there is no connection between the transportational function of defendant's vehicle and the injuries.

The trial court did not err when it concluded that, under MCL 500.3177(1), Farmers could not seek reimbursement from Thomas as the owner of an uninsured motor vehicle involved in the accident.

III. OFFER OF JUDGMENT SANCTIONS

A. STANDARDS OF REVIEW

Farmers next argues that the trial court erroneously awarded Thomas attorney fees as offer of judgment sanctions. This Court reviews a trial court's decision on the applicability of the "interest of justice" exception to sanctions under MCR 2.405(D)(3) for an abuse of discretion. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 374; 689 NW2d 145 (2004). However, this Court reviews de novo the proper interpretation of court rules. *Id*.

B. ANALYSIS

Thomas made an offer of judgment with her answer for $100. But Farmers, who sought $170,000 in damages, did not respond to the offer. The trial court concluded that it was appropriate to award attorney fees under MCR 2.405(D)(3) which provides that, if an offer to stipulate to the entry of a judgment is rejected, the court "shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule."

Farmers argues that an award of attorney fees was not in the interest of justice because Thomas' offer was insincere and this case contained novel legal issues of public importance. The purpose of an award of costs and fees under MCR 2.405(D) is "to encourage settlement and to deter protracted litigation." *Luidens v Sixty-Third Dist Ct*, 219 Mich App 24, 31; 555 NW2d 709 (1996). Nevertheless, this Court has repeatedly held that the interest of justice exception should only apply in "unusual circumstances" and that the award of attorney fees should "be the rule." *Derderian*, 263 Mich App at 390-391. "[F]ew situations will justify denying an award of costs under MCR 2.405 in the interest of justice." *Luidens*, 219 Mich App at 32 (quotation marks and citation omitted). The mere fact that a losing party's position was "not frivolous"

does not justify application of the exception. *Id*. at 34. Further, whether it was reasonable to reject the offer of judgment is not relevant to whether the exception should apply. *Id*. at 33. Rather, in the spirit of encouraging settlement, a denial of attorney fees may be appropriate where the offer of judgment is judged to be merely for gamesmanship purposes rather than a sincere offer. *Id.* at 35.

Whether Thomas' $100 offer constitutes "gamesmanship" depends in part on the merits of Farmer's case. Farmers argues that this case "involves substantial issues of public interest that have not been previously addressed by" this Court. It appears that Farmers is confusing a relatively novel *factual* situation—an uninsured occupant of an uninsured parked car is a victim of a hit and run and the driver is never identified—with one containing novel legal issues. But the legal analysis in this case was straightforward. The statutory phrase "motor vehicle as a motor vehicle" has been clearly explicated in this Court's jurisprudence. Thus, we find no novel legal issues—and, by extension, no legitimate issues of public importance—presented in this case.

In this light, we see no evidence that the $100 offer of judgment was not merely gamesmanship. Granted, in light of Farmers' request for relief of $170,000, $100 is small. However, in light of the $0 recovery—after a straightforward legal analysis at the summary disposition phase of the case—$100 is not unreasonable. Moreover, Farmers presented no other facts in support of the contention that the $100 offer was insincere. For instance, there were no mediation sanctions with which to compare the offer. See *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 339-340; 525 NW2d 470 (1994). Further, Farmers did not make a counteroffer to which Thomas could respond. Accordingly, we cannot conclude that the trial court's decision to award fees fell outside the range of principled outcomes. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008).

IV. ATTORNEY FEES

A. STANDARD OF REVIEW

Farmers finally argues that the trial court erred when it failed to conduct an evidentiary hearing regarding the determination of a reasonable attorney fee. This Court generally reviews a trial court's decision regarding an award of attorney fees for an abuse of discretion. *In re Temple*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

B. ANALYSIS

Our Supreme Court recently considered the framework for a trial court's determination of a reasonable attorney fee. See *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). The Court made several conclusions. First, "the trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services . . . ." *Id*. at 530. The court should base this fee on credible evidence. *Id*. at 530-531. Second, the court should multiply this fee by "the reasonable number of hours expended in the case . . . ." *Id*. at 531. The reasonable number of hours should be based on detailed billing records. *Id*. at 532. Only then should the trial court consider other factors to determine "whether an up or down adjustment is appropriate" in order to arrive at the final "reasonable attorney fee." *Id*. at 531. Finally, the Court held that

the party opposing a fee request is entitled to an evidentiary hearing if "a factual dispute exists over the reasonableness of the hours billed or hourly rate." *Id.* at 532.

While Farmers focuses on whether the trial court properly declined to hold an evidentiary hearing with respect to reasonable attorney fees, we conclude that, without respect to that question, the trial court erred when it failed to employ the framework required by *Smith* for determining reasonable attorney fees. In its decision awarding the specific amount of the fees, the trial court made no mention of the "fee customarily charged in the locality for similar services." *Smith*, 481 Mich at 530. As such, it is apparent that the trial court failed to make a determination regarding the customary fee as a necessary starting point in the determination of a reasonable fee. *Id.* at 530-531. Further, the trial court only purported to consider, but did not discuss, additional factors in relation to its hourly rate determination and not with respect to the overall reasonableness of the fee award after making the rate and time determinations, as required by *Smith*. *Id.* at 530-531. *Smith* explicitly requires, for purposes of consistency, the trial court to first make factual determinations regarding the fee customarily charged for similar services *and* regarding the hours worked by the attorney(s) and only then to apply additional factors. *Id*. Moreover, the factors should be briefly discussed to aid appellate review. *Id.*

Thomas argues that *Smith* is not applicable to this case because the attorney fees in this case were awarded as offer of judgment sanctions, MCR 2.405, whereas in *Smith* the fees were awarded as case evaluation sanctions, MCR 2.403. There is no indication in *Smith* that it is only applicable to an award of attorney fees under MCR 2.403; the requirements detailed above for determining reasonable attorney fees are not based in any way on the text of MCR 2.403. *Smith*, 481 Mich at 529-534. Accordingly, Thomas' argument is unavailing. On remand, the trial court must undertake a determination of reasonable attorney fees according to *Smith*.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Thomas may tax costs. MCR 7.219(A).

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly