STATE OF MICHIGAN

COURT OF APPEALS

RANDY C. BURRIS,

Plaintiff-Appellant,

v

ALLSTATE INS. CO.,

Defendant-Appellee.

UNPUBLISHED
September 21, 2006

No. 261505
Wayne Circuit Court
LC No. 02-208320-NF

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right an order for final judgment and sanctions entered in defendant's favor following the trial court's partial grant of defendant's motion for judgment notwithstanding the verdict, vacating the jury's award of attendant care services. We reverse.

Plaintiff argues that the trial court erroneously granted defendant's motion for JNOV. After de novo review, we agree. See *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court views the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

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 v AAA Mich*, 250 Mich App 249, 257; 646 NW2d 476 (2002). Under the no-fault act, personal protection insurance benefits are payable for "allowable 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). An "allowable expense" under the statute is one that is: (1) reasonable; (2) reasonably necessary; and (3) incurred. See MCL 500.3701(1)(a); see, also, *Davis v Citizens Ins Co of America*, 195 Mich App 323, 326; 489 NW2d 214 (1992).

It is undisputed that the expense for attendant care services was reasonable and reasonably necessary. The issue, however, is whether the expense of attendant care services was incurred. Under MCL 500.3107(1) and 500.3110(4), no-fault benefits are payable when they are incurred, not when the injury occurs. Defendant relies on the holding of *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476; 673 NW2d 739 (2003), to support its position that in order to "incur"

an expense "there must be some legal obligation to pay." Indeed, in *Proudfoot* our Supreme Court adopted the dictionary definition of "incur" as including "'to become liable or subject to, [especially] because of one's own actions.'" *Proudfoot, supra* at 484, quoting *Webster's II New College Dictionary* (2001). But, that does not translate into "some legal obligation to pay."

In fact, this Court has addressed this issue, at least implicitly, on several occasions but particularly instructive is *Booth v Auto-Owners Ins Co*, 224 Mich App 724; 569 NW2d 903 (1997). In *Booth*, the plaintiff was severely injured in an automobile accident and required attendant care from her parents on a continual basis. After the defendant insurer refused to pay the parents for the 24-hour a day attendant care that they provided, the plaintiff filed suit. *Id.* at 726. The trial court granted the defendant summary disposition, ruling that the plaintiff failed to submit evidence establishing that she incurred expenses because her parents did not charge her for their services. *Id.* at 726-727. This Court reversed the trial court's ruling, holding that the plaintiff was not required to actually be billed by her family in order to establish that she "incurred" the expense of their attendant care services. *Id.* at 730. Further, relying on *Botsford Gen Hosp v Citizens Ins Co*, 195 Mich App 127, 143; 489 NW2d 137 (1992), this Court held that "whether the plaintiff was entitled to collect the value of the services and the determination of the value are matters properly left for the jury to decide." *Booth, supra*.

Here, plaintiff produced evidence that his family and a friend began providing 24-hour attendant care in December 2001, after plaintiff was divorced and moved back into his parents' house. Plaintiff father, Richard Burris, plaintiff's brother, Ryan Burris, and plaintiff's friend, Christopher Marcott, all testified that plaintiff required, and they provided, significant attendant care services. Dr. Maryann Guyon testified that plaintiff required 24-hour attendant care services as a result of the injuries plaintiff suffered in the 1978 automobile accident and wrote a prescription for the same. Defendant's claims adjuster, Kimberly Dotson, testified she had previously paid attendant care at $8.50 per hour. Thus, unlike the factual scenario presented in *Moghis v Citizens Ins Co of America*, 187 Mich App 245, 247; 466 NW2d 290 (1990), plaintiff produced evidence that attendant care services were actually provided to him since December 2001. Plaintiff was not required to actually be billed by his family and friend in order to establish that he "incurred" the expense of their attendant care services; thus, it was for the jury to decide whether he was entitled to collect the value of the services and to make the determination of the value. See *Booth, supra*. Accordingly, the trial court's order granting defendant's motion for JNOV on the ground that there was insufficient evidence presented to create an issue for the jury as to whether plaintiff "incurred" the expense is reversed. See *Merkur Steel Supply, Inc,* v *Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004).

Defendant also argues that regardless of whether plaintiff provided sufficient proof to support his claim for attendant care services, the claim fails on the alternative basis that the services provided by plaintiff's family and friend constituted household replacement services, where, unlike attendant care services, recovery is limited to the first three years after the date of the accident under MCL 500.3107(1)(c). Because this argument was not raised by defendant below, nor decided by the trial court, it is unpreserved and we need not consider it. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Nevertheless, if we did consider this argument we would conclude that it is without merit because the evidence does not support defendant's assertion that the services were "replacement" rather than "attendant care" services. See MCL 500.3107(1)(a).

To conclude, the trial court's order for final judgment and sanctions in favor of defendant is vacated and the jury verdict is reinstated. See *Gore v Flagstar Bank, FSB*, 474 Mich 1075, 1079; 711 NW2d 330 (2006).

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

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter