# STATE OF MICHIGAN

# COURT OF APPEALS

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MEGAN M. NICKELL, a Minor, by her Next Friend, CINDY LEWIS,

Plaintiff-Appellee/Cross-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

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UNPUBLISHED
September 28, 2006

No. 259944
Washtenaw Circuit Court
LC No. 02-001159-NF

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

PER CURIAM.

This is an action to recover no-fault benefits. The case arose from a 2001 automobile accident that rendered plaintiff a paraplegic. Following a jury trial, the trial court entered a judgment for plaintiff, awarding $179,539 in no-fault benefits and $1,908 in no-fault interest. The court subsequently awarded plaintiff attorney fees of $73,369 under MCL 500.3148, a provision of the no-fault act, and as a sanction under the offer of judgment rule, MCR 2.405. Defendant appeals as of right. Plaintiff cross appeals, challenging the trial court's denial of several additional expenses as no-fault benefits. We affirm.

Defendant first argues that the trial court erroneously allowed plaintiff to introduce evidence concerning the claims handling history in this case when the issue at trial was limited to determining the reasonableness of proposed modifications to Megan's home. Defendant raised this issue in a motion for a new trial, which the trial court denied.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001). In making this determination, "we consider the facts on which the trial court acted to determine whether an unprejudiced person would say that there was no justification or excuse for the ruling made." *Id.* (citation and quotation marks omitted). In reviewing the trial court's denial of defendant's motion for a new trial, we are guided by our Supreme Court's statement in *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34; 609 NW2d 567 (2000):

> The Court of Appeals [is] permitted to reverse the denial of [a] motion for a new trial *only* if that denial was so palpably and grossly violative of fact and logic that it evidence[d] not the exercise of will but perversity of will, not the

> exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. [Citations and quotation marks omitted; emphasis in *Bean*.]

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In this case, the jury was required to determine the reasonable cost for modifications to plaintiff's home that were reasonably necessary to accommodate plaintiff's care, recovery, and rehabilitation. MCL 500.3107(1)(a). The parties disagreed on what expenses were both reasonable and reasonably necessary for plaintiff's care, recovery, and rehabilitation. We agree with the trial court that the evidence of defendant's claims handling history was probative of the reasonableness of its proposed expenses. Under the factual circumstances of this case, evidence that defendant acted unreasonably with respect to plaintiff's past claims was probative of whether the plan it was now offering was a reasonable one.

In addition, the trial court correctly concluded that the disputed evidence did not violate the parties' October 2003 agreement. The agreement provided that the jury would determine the reasonable scope and value of barrier-free home accommodations but did not expressly prohibit the parties from presenting evidence of the claims handling history, and no such limitation could reasonably be implied. While the agreement limited the issues that would be tried, it did not limit the evidence that the parties could present with regard to the issue in question.

Thus, the trial court did not abuse its discretion in allowing the evidence. Because the evidence was admissible, plaintiff's counsel did not engage in misconduct by referring to this evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999). Thus, the trial court also properly denied defendant's motion for a new trial with respect to this issue.

Next, defendant argues that the trial court erred by disallowing its special requested jury instructions. We disagree. A trial court's decision regarding jury instructions is reviewed for an abuse of discretion. *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999). This Court reviews the instructions in their entirety and "will not reverse a court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice." *Id.*

Defendant's first requested supplemental jury instruction would have instructed the jury to disregard evidence of defendant's claims handling. Consistent with our determination that this evidence was relevant to the issue the jury was required to decide, we conclude that the trial court did not abuse its discretion by declining to give this instruction.

Defendant also requested that the trial court give the following supplemental instruction:

> The goal of the No-Fault Insurance is to provide victims of motor vehicle accidents assured, adequate and prompt reparation of certain economic losses at the lowest cost to both the individual and the no-fault insurance system.

This proposed instruction was based on *Kitchen v State Farm Ins Co*, 202 Mich App 55, 58; 507 NW2d 781 (1993), in which this Court stated:

> We agree with defendant that as long as it satisfies its statutory obligation to pay for all reasonable charges incurred for those products, services, and accommodations reasonably necessary to meet [the insured's] needs, defendant should be allowed to choose the least expensive adequate means of providing those items. This is completely consistent with the goal of the no-fault insurance system, which is to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses at the lowest cost to both the individual and the no-fault insurance system.

Even if defendant's proposed jury instruction accurately states the goal of the no-fault system as stated in *Kitchen*, the trial court adequately instructed the jury on the requirements of the no-fault act, including plaintiff's burden of proving that she incurred an allowable expense as defined in the act in order to recover the expense as a no-fault benefit. Defendant does not claim that the trial court's instructions failed to correctly state the law. Because we are not persuaded that the instructions given failed to adequately cover this area of the law, we decline to find that the trial court abused its discretion by refusing to give defendant's requested instruction.

Next, defendant argues that the jury's finding regarding the reasonableness of the home modifications should have been reflected as a declaratory judgment, rather than a money judgment, because plaintiff had not yet "incurred" this expense. Defendant further argues that, because the expense had not yet been incurred, an award of attorney fees under the no-fault act was improper. We disagree.

The statutory basis for an award of attorney fees is MCL 500.3148(1), which 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. [Emphasis added.]

Unless expenses are "incurred," they are not yet overdue, and attorney fees attributable to the expense are not payable under this provision. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003).

In *Proudfoot*, a home modification issue was presented to the jury, which rendered a verdict in favor of the plaintiff for $220,500. *Id.* at 479. The trial court entered a money judgment on the award and awarded no-fault attorney fees under MCL 500.3148(1). *Proudfoot, supra* at 479-480. The Supreme Court held that the insurer was not required to pay the total amount of future home modifications because the expenses were not yet incurred. *Id.* at 484. The Court explained:

> To "incur" means "[t]o 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 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).]

The Court thus concluded that because the expenses were not yet incurred, they were not overdue, and an award of attorney fees attributable to the expenses were not recoverable under § 3148(1). *Id*. at 485.

This case is factually distinguishable from *Proudfoot*. In this case, plaintiff had already signed a construction contract for the home modifications. In *Proudfoot*, *supra* at 484 n 4, the Supreme Court observed:

> An insured could be liable for costs by various means, including paying for costs out of pocket or signing a contract for products or services. Should the insured present a contract for products or services rather than a paid bill, the insurance company may, in order to protect itself, make its check payable to the insured and the contractor.

Thus, the home modification expense was incurred in this case because plaintiff had signed a contract for the work. A principal of the contractor testified that he considered the contract binding. Accordingly, the trial court properly entered a monetary judgment for plaintiff, and we decline to disturb the trial court's award of no-fault attorney fees.

On cross appeal, plaintiff argues that there was no dispute at trial that her modification plan was reasonable and that, therefore, the trial court erred in denying her motion for a directed verdict on this issue. Because plaintiff ultimately prevailed at trial on this issue and because we have upheld the jury's verdict on appeal, this issue is moot and we decline to address it further. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Plaintiff also argues that the trial court erred in denying her motion for summary disposition in which she sought recovery for the cost of insurance on her modified van, the cost of food purchased while she resided in a motel, and the cost of other home-related expenses (e.g., insurance, utilities, taxes). We disagree.

Under MCL 500.3107(1)(a), defendant was required to pay all "allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."

In *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 536; 697 NW2d 895 (2005), the Court held that the plaintiff was not entitled to recover home food costs as a no-fault benefit. The Court noted that MCL 500.3105(1) requires that allowable expenses be causally connected to a person's injury. *Griffith*, *supra* at 530-531. The Court found that the plaintiff could not meet this requirement, explaining:

> Plaintiff does not claim that her husband's diet is different from that of an uninjured person, that his food expenses are part of his treatment plan, or that these costs are related in any way to his injuries. She claims instead that

> Griffith's insurer is liable for ordinary, everyday food expenses. As such plaintiff has not established that these expenses are "for accidental bodily injury . . . . ." [*Id*. at 531-532.]

Plaintiff maintains that this case is factually distinguishable from *Griffith* because she was a sixteen-year-old student living with her parents before the accident and did not own a van or a house at the time. She asserts that, but for the accident, she would not have the expenses associated with the use of the van and ownership of a house. The pertinent inquiries under *Griffith*, however, are whether the claimed expenses are different from that of an uninjured person, whether the expenses are part of the plaintiff's treatment plan, or whether the various costs are related in some way to the plaintiff's injuries. See *id.* at 531. Plaintiff failed to show that the expenses in question were for accidental bodily injury.

Furthermore, these expenses cannot be considered "allowable expenses" under MCL 500.3107(1)(a). In *Griffith*, the Court explained that an expense is an "allowable expense" only if the expense is related to the insured's care, recovery, or rehabilitation. *Id.* at 532. Griffith's food costs were not related to his care, recovery, or rehabilitation. *Id*. at 535-536. The Court explained:

> While such expenses are no doubt necessary for his *survival*, they are not necessary for his recovery or rehabilitation from the injuries suffered in the accident, nor are they necessary for his care because of the injuries he sustained in the accident. Unlike prescription medications or nursing care, the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his "care, recovery, or rehabilitation." In fact, if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his "care, recovery, or rehabilitation" and are not "allowable expenses" under MCL 500.3107(1)(a). [*Id.* at 536 (emphasis in *Griffith).*]

Plaintiff failed to present evidence that the van insurance expense and the various household expenses were necessary for her care, recovery, or rehabilitation.[1]

Plaintiff also sought reimbursement of her food expenses incurred while she resided in a motel. Although plaintiff correctly observes that the Court in *Griffith* held that food costs in an institutional setting are "benefits for accidental bodily injury" and are "reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation"

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[1] We also note that the parties agreed to a "Transportation Purchase Agreement" whereby defendant agreed to purchase a modified van and the policyholder agreed to be solely responsible for "[a]ll taxes, title and registration fees, *insurance*, extended warranties, repairs, maintenance and fuel" (emphasis added). Plaintiff fails to explain why this agreement should not be enforced as written. See *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

*Griffith*, *supra* at 537-538, plaintiff was not in an institutional setting when her food expenses were incurred. Plaintiff made no claim that her diet was different from that of an uninjured person, that her food expenses were part of her treatment plan, or that these costs were related in any way to her injuries. We conclude that, under *Griffith*, these expenses are not recoverable.

The trial court properly denied plaintiff's motion for summary disposition.

Affirmed.

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