STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM CHAPPEL,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 3, 2006

No. 260561
Washtenaw Circuit Court
LC No. 02-001334-NF

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a declaratory judgment determining that it was liable to pay $250,000 for future modifications to plaintiff's home. We affirm, but remand for the limited purpose of modifying the judgment to provide that the award for home modifications is not payable unless and until plaintiff actually incurs the expense of the modifications.

In 1974, plaintiff William Chappel was injured in an automobile accident. He sustained a spinal injury, which rendered him a quadriplegic. At the time of the accident, he was insured under a no-fault automobile insurance policy issued by defendant Auto-Owners Insurance Company. In 2002, plaintiff initiated this action for declaratory relief against defendant. He sought a declaration of rights to determine the amount of home modification expenses that defendant was obligated to pay under the insurance policy and the no-fault act, MCL 500.3101 *et seq*. Defendant moved for summary disposition of plaintiff's claims under MCR 2.116(C)(10), arguing that plaintiff failed to establish a genuine issue of material fact regarding whether the requested home modifications were an allowable expense under the no-fault act. The trial court denied the motion and a jury trial was held. The jury determined that the home modifications proposed by architect Henry O'Fiara, in a sketch entitled "option D," were reasonably necessary for plaintiff's care, recovery or rehabilitation. The jury determined that a reasonable cost for the home modifications was $250,000. The trial court entered a declaratory judgment in favor of plaintiff for home modifications in the amount of $250,000. Defendant moved for a judgment notwithstanding the verdict ("JNOV") or remittitur on the ground that the evidence did not support the jury's award. The trial court denied the motion.

Defendant first contends that the trial court erred in denying its motion for summary disposition and motion for a directed verdict because plaintiff failed to establish that the home modifications were an allowable expense under the no-fault act. We disagree.

We review de novo the denial of a motion for summary disposition in a declaratory judgment action. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 268 Mich App 542, 546; 710 NW2d 547 (2005). In reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the evidence in a light most favorable to the nonmoving party. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 41-42; 672 NW2d 884 (2003). If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Franchino v Franchino*, 263 Mich App 172, 181; 687 NW2d 620 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

We also review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference and resolving conflicts in the evidence in that party's favor, to decide whether a question of fact existed. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702; 644 NW2d 779 (2002). "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005).

The no-fault act provides that under personal protection insurance, an insurer is liable to pay benefits ("PIP benefits") for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. MCL 500.3105(1). However, the no-fault act does not specifically address to what extent an insurer must supply an insured with accommodations in the form of housing. *Williams v AAA Michigan*, 250 Mich App 249, 258; 646 NW2d 476 (2002). Rather, the act provides that PIP benefits are payable for allowable expenses, which consist 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). In this case, plaintiff had the burden of establishing that the modifications are allowable expenses. *Owens v Auto Club Ins Ass'n*, 444 Mich 314, 324; 506 NW2d 850 (1993).

Plaintiff failed to establish that any of the home modifications were reasonably necessary for his recovery or rehabilitation. He did not produce any evidence that the modifications would restore him to the condition he was in before he sustained his injuries or that the modifications would allow him to resume his pre-injury life. See *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 534-535; 697 NW2d 895 (2005). However, in response to defendant's motion for summary disposition, plaintiff presented sufficient evidence from which reasonable jurors could have concluded that the requested modifications were reasonably necessary for his "care."

> [T]he Legislature intended to limit the scope of the term "care" to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident. "Care" is broader than "recovery" and "rehabilitation" because it may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state. [*Griffith, supra* at 535.]

After the accident, plaintiff was confined to a wheelchair. He was unable to access two levels in his quad-level home. During power outages, the overhead lift system used to move plaintiff was inoperable. When traveling from his lower level bedroom, bathroom, and office to the main level kitchen or living area, he was forced to use an interior elevator or traverse an outdoor ramp. However, the outdoor ramp was impassable in the winter months and the elevator was unreliable and extremely unsafe. Although plaintiff could access the kitchen area, he could not reach the kitchen sink, stove, or countertop. The ramp that provided ingress into the home from the garage was difficult to maneuver because it was too steep. According to David Esau, an architect with experience in designing barrier-free homes, plaintiff's home was not suitable for his needs. Viewing this evidence in a light most favorable to plaintiff, we conclude that reasonable minds could differ on the issue of whether the modifications were reasonably necessary for plaintiff's care. Indeed, the evidence supports the conclusion that the modifications were necessitated by the injuries sustained by plaintiff in the motor vehicle accident. Therefore, defendant was not entitled to judgment as a matter of law and the trial court properly denied its motion for summary disposition. *Griffith, supra* at 535; *Franchino, supra* at 181.

The "resolution of the issue of reasonable accommodations is factually driven." *Payne v Farm Bureau Ins*, 263 Mich App 521, 528; 688 NW2d 327 (2004). Therefore, the reasonableness of accommodations is generally a question for the fact-finder. *Id.* at 529. Moreover, "as long as housing larger and better equipped is required for the injured person than would be required if he were not injured, the full cost is an 'allowable expense.' " *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 511; 370 NW2d 619 (1985). At trial, plaintiff testified that, during the winter months, he could not use the outdoor ramp and, therefore, could not leave his bedroom unless he used the elevator system, which was dangerous and needed to be replaced. Defendant's catastrophic claims adjuster, who was assigned to plaintiff's case, agreed that the elevator in plaintiff's house needed to be replaced. She acknowledged that certain modifications were "necessary" for plaintiff's home. She also admitted that she had no documentary evidence indicating that the modifications were not necessary for plaintiff's care.

Defendant argues that it is not obligated to pay for a new, larger garage because the garage was designed merely to accommodate plaintiff's wife's car. However, plaintiff testified that he needed more room in the garage because there was insufficient space to install a safety railing on the ramp in the garage and "there isn't room to get around." Further, O'Fiara testified that the existing ramp in the garage was difficult for plaintiff to maneuver because it was too steep. Moreover, O'Fiara proposed the construction of a new garage not only because the existing garage was unsuitable for plaintiff's needs, but also because it was necessary to modify the existing garage to provide for a new office, a wheelchair storage area, and a new ramp that was "to code."

Defendant also argues that the expense of constructing the new bedroom, bathroom, and office was not an allowable expense because, as a matter of law, none of the rooms were necessary for plaintiff's care. However, plaintiff's wife, his primary caregiver, testified that she generally had trouble moving plaintiff between the different levels in the quad-level home. His treating physician testified that the home was not suitable for plaintiff's care because of the multiple dangerous ramps and the lack of control over plaintiff's physical environment. Moreover, she testified that the home was unsuitable because the space where plaintiff received

his toileting and intimate care services was not sufficiently private from his bedroom or office, where he met with customers. In light of these concerns, O'Fiara proposed option D, which included a bedroom for plaintiff on the main level of the home so that he could conduct most of his activities on one level. Finally, defendant argues that the modifications were not necessary for plaintiff's care because he lived in the existing home for 30 years without the requested modifications. However, the evidence in this case clearly establishes that defendant's physical condition worsened in the years preceding the trial and, as a result, his needs changed. Viewing the evidence in the light most favorable to plaintiff, reasonable minds could disagree regarding whether the modifications proposed in option D were reasonably necessary for plaintiff's care. Therefore, the trial court properly denied defendant's motion for a directed verdict. Further, the evidence in this case supports the conclusion that a larger and better-equipped house was required for plaintiff than would be required if he were not injured. Therefore, the full cost of the home modifications was an allowable expense under MCL 500.3107(1)(a). *Sharp, supra* at 511.

Defendant next contends that the trial court erred in denying its motion for summary disposition because plaintiff did not incur any of the expenses of the home modifications and, therefore, defendant was not liable to pay for the modifications. We disagree.

PIP benefits accrue when the insured incurs the allowable expense, not when the injury occurs. MCL 500.3110(4). Therefore,

> [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." [*Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003), quoting *Manley v Detroit Automobile Inter-Ins Exch*, 425 Mich 140, 157; 388 NW2d 216 (1986).]

To "incur" means "[t]o become liable or subject to, [especially] because of one's own actions." *Id.* "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." *Id.* at 484 n 4. When the trial court entered the declaratory judgment in this case, plaintiff had not yet taken any action to become liable for the costs of the proposed home modifications. He neither paid for the modifications nor signed a contract for the purchase or construction of the modifications. Therefore, the expenses were not yet "incurred" and defendant was not obligated to pay the benefits. Plaintiff recognizes that, under *Proudfoot, supra,* he is not entitled to a money judgment for the future home modifications. Nevertheless, we remand this matter to the trial court for the limited purpose of modifying the judgment to provide that the award for the home modifications is not payable unless and until plaintiff actually incurs the expense of the modifications.

Finally, defendant contends on appeal that the trial court erred in denying its motion for a JNOV or remittitur because the evidence did not support the jury's award of $250,000 for home modifications. We disagree.

We review de novo a trial court's decision on a motion for a JNOV. *Sniecinski, supra* at 131. In reviewing the trial court's decision, we review the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party. *Kenkel v Stanley*

Works, 256 Mich App 548, 555; 665 NW2d 490 (2003). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Diamond, supra* at 682. We review a trial court's denial of a motion for remittitur for an abuse of discretion. *Id.* at 692.

> When reviewing a trial court's decision regarding remittitur, this Court must view the evidence in the light most favorable to the nonmoving party. "An abuse of discretion exists where an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there was no justification for the ruling made." [*Id.* at 693 (citations omitted).]

Based on the evidence presented in this case, we cannot conclude that plaintiff failed to sustain his claim for home modifications as a matter of law. Therefore, the verdict must stand. *Diamond, supra* at 682. Moreover, plaintiff presented evidence of the cost of the home modifications rather than inviting the jury to speculate concerning the cost. Therefore, the trial court did not err in denying defendant's motion for a JNOV. Cf. *Attard v Citizens Ins Co of America*, 237 Mich App 311; 602 NW2d 633 (1999).

Furthermore, the trial court properly denied defendant's motion for remittitur. Remittitur is justified when a jury verdict exceeds the highest amount the evidence will support. MCR 2.611(E)(1). In determining whether to grant a motion for remittitur, a trial court must consider whether the evidence supported the jury award. *Diamond, supra* at 693. We must accord the trial court due deference on this issue because, having witnessed all the testimony and evidence, the trial court is in the best position to make an informed decision regarding the excessiveness of the verdict. *Id.* at 692-693.

O'Fiara testified that the modifications proposed in option D would have cost $200,000 in 2000. A licensed builder testified that the cost of building materials increased approximately 15 percent between 2000 and 2004. Based on this evidence, defendant argues that a reasonable cost for the modifications is $230,000. However, defendant's claim adjuster testified that defendant hired an individual to perform an assessment of plaintiff's home and, according to his report, the cost of modifying plaintiff's home would exceed $250,000. Defendant is not entitled to relief where the damage award is within the range of the evidence presented. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 516; 667 NW2d 379 (2003). Thus, viewing the evidence in the light most favorable to plaintiff, and giving the trial court due deference on this issue, we cannot conclude that the trial court abused its discretion in denying defendant's motion for remittitur.[1]

Affirmed but remanded for the limited purpose of modifying the declaratory judgment to provide that the award for home modifications is not payable unless and until plaintiff actually

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[1] At oral argument, we were advised that plaintiff had undertaken modifications that did not comport with the jury awarded option. However, the propriety of the modifications presents an issue for the trial, not appellate, court to resolve.

incurs the expense of the modifications. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio