STATE OF MICHIGAN

COURT OF APPEALS

COMMUNITY RESOURCE CONSULTANTS, INC., Plaintiff-Appellee,	UNPUBLISHED February 1, 2007
v PROGRESSIVE MICHIGAN INSURANCE COMPANY, Defendant-Appellant.	No. 269726 Ingham Circuit Court LC No. 04-000879-CK

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In this dispute over payments under the Michigan No-Fault Act, MCL 500.3101 *et seq*., defendant appeals by leave granted from the trial court's denial of its motion for summary disposition. We agree that a question of fact remains, and we therefore affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In 1997, Richard Fero was involved in an automobile accident that resulted in both a closed head injury and a spinal cord injury causing paralysis from the chest down. Defendant is Fero's insurer. Plaintiff has provided case management services for Fero since the accident.

Plaintiff filed suit against defendant seeking payment for services rendered to Fero. Defendant filed a motion for summary disposition arguing that their records indicated that $19,684.64 of the $60,023.22 plaintiff sought was for services provided more than a year before the suit was filed. Defendant asserted that plaintiff was barred from recovering this amount because of the "one-year back" rule of MCL 500.3145(1).

We review de novo a trial court's summary disposition decision. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998).

The first invoice submitted by plaintiff to defendant was dated July 27, 1999, and the last was January 12, 2005. According to the customer balance detail document provided by plaintiff and attached by defendant as exhibit B to its brief on appeal, it was routine for plaintiff to submit multiple invoices before receiving any payment from defendant. For example, the first batch of invoices included three dated July 27, 1999, one dated July 28, and one dated July 29. Payment for these invoices was dated January 4, 2000. According to that same document, partial payment

of some invoices, leaving an outstanding billed balance to accrue, was fairly common. Defendant asserts that unpaid amounts were line items on invoices that lacked proper substantiation when the invoices were submitted. Plaintiff filed suit on June 18, 2004, seeking payment of all outstanding balances from defendant. As of January 12, 2005, the cumulative unpaid balance accrued from the partially paid invoices, plus the total unpaid invoices submitted since the last payment, dated December 2, 2003, totaled $58,808.96.

Defendant argued that $19,684.64 of this $58,808.96 had accumulated from 18 invoices for services provided between December, 2001 and June, 2003, more than a year before the suit was filed. Although defendant correctly argues that the "one-year back" rule of MCL 500.3145(1) provides that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced,"[1] the trial court here found a question of fact made summary disposition inappropriate, and it is that finding which concerns this Court.

Defendant asserts that plaintiff's own records reflect that the services in question for amounts totaling $19,684.64 were provided before June 18, 2003. Defendant is correct. However plaintiff argued, in the trial court,[2] a course of dealing had been established by the routine of invoicing and payment that plaintiff and defendant followed beginning in 1999. Plaintiff would submit several invoices, and defendant would issue one check. Although defendant would identify which invoices each check was intended to cover, because some invoices were only partially paid, plaintiff would apply the incoming payment to whatever outstanding invoices were aged longest. Plaintiff argued that this is a standard practice where there is an "open account" billing arrangement between parties.

The trial judge concluded that a question of fact existed with respect to the billing arrangement between the parties, noting that an arrangement such as described by plaintiff was common in many commercial contexts.[3] Given that the document agreed on by the parties as

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[1] Plaintiff and defendant argue about the meaning of the term "incurred" in this statute. Although we do not find this inquiry dispositive here, in the interest of clarifying the issue, we note that in *Bombalski v Auto Club Ins Ass'n*, 247 Mich App 536; 637 NW2d 251 (2001), this Court addressed the meaning of "incurred." The *Bombalski* Court noted that in *Shanafelt v Allstate Ins Co,* 217 Mich App 625, 636-638; 552 NW2d 671 (1996), this Court relied upon *Random House Webster's College Dictionary* (1995) and defined "incur" as "'to become liable for.'" The *Bombalski* Court also noted that Black's Law Dictionary (7th ed), p 771, similarly defines "incur" as "[t]o suffer or bring on oneself (a liability or expense)." *Bombalski, supra* at 542. The *Bombalski* Court went on to favorably offer the following quotation from *Shanafelt*: "[o]bviously, plaintiff became liable for her medical expenses when she accepted medical treatment." *Bombalski, supra* at 542, quoting *Shanafelt, supra* at 638. Therefore, a loss is incurred at the time the treatment or services were provided, not, as plaintiff argues, at the time plaintiff submits a bill for the treatment or services.

[2] Curiously, plaintiff has filed nothing in this Court, neither a brief on appeal nor a brief in response to defendant's motion for leave to appeal.

[3] Specifically, the judge stated: "there's certainly a legitimate argument that can be made in the

(continued…)

accurately reflecting the cycle of invoicing and payments indicates that payments were often significantly delayed, typically applied to multiple invoices, and more often than not left unpaid balances to accrue, we would agree that there is some question as to the understanding between these parties about their billing arrangement. We find this fact question is highlighted by the point that although defendant kept up with payments, albeit delayed, for several years, before delaying so long that plaintiff ultimately decided to file suit to collect. Plaintiff's patience with defendant's delayed payment process should not be rewarded by a shortfall of $19,684.64 in expenses billed according to the process routinely followed by the parties.

We find that a fact question remains for a trier of fact to consider, and the trial court therefore did not err in denying defendant's motion for summary disposition.

Affirmed.

/s/ Stephen L. Borrello
/s/ Jessica R. Cooper

(…continued)

commercial context . . .. I don't know how they do it and maybe you have to get an expert tells [sic] us how you do it."