

STATE OF MICHIGAN
COURT OF APPEALS

BRISTOL WEST INSURANCE COMPANY,

Plaintiff/Counter-Defendant/
Counter-Plaintiff-Appellant,

v

JASON SMITH, by his Legal Guardian RHONDA SMITH,

Defendant-Appellee,

and

SPECTRUM HEALTH CONTINUING CARE,

Defendant/Counter-Plaintiff,

and

TRINITY HEALTH-MICHIGAN, d/b/a SAINT MARY'S HEALTH SERVICES, and MARY FREE BED HOSPITAL AND REHABILITATION CENTER,

Intervening Plaintiffs/Counter-
Defendants-Appellees.

UNPUBLISHED

February 6, 2007

No. 264693

Allegan Circuit Court

LC No. 03-033950-CK

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff Bristol West Insurance Company, a no-fault insurer, appeals as of right, challenging the trial court's orders granting summary disposition to intervening plaintiffs Trinity Health-Michigan and Mary Free Bed Hospital and Rehabilitation Center, awarding no-fault attorney fees and penalty interest to intervening plaintiffs and to defendant Jason Smith, granting Smith's motion to compel discovery, and denying plaintiffs' motion for entry of a default against Smith for failure to comply with discovery or cooperate with plaintiff's investigation. We affirm.

I. Background

This case stems from an automobile accident that occurred in October 2002, in which Jason Smith was catastrophically injured. Smith was subsequently treated at defendant Spectrum Health Continuing Care and intervening plaintiffs Trinity Health-Michigan (Trinity) and Mary Free Bed Hospital and Rehabilitation Center (Mary Free Bed). At the time of Smith's accident, his father, Richard Smith, was insured under a no-fault insurance policy issued by plaintiff, and Jason Smith was eligible for no-fault personal injury protection (PIP) benefits under this policy. Richard Smith was also an employee of the Parker Hannifin Corporation and a participant in its group health plan (the Parker Plan).

Plaintiff filed this action against Smith, Spectrum Health, NGS American, Inc. (the Parker Plan's plan supervisor), and Mongoose Administrators, Inc. (the Parker Plan's third-party administrator).¹ Plaintiff alleged that its no-fault policy was coordinated with the Parker Plan and that the Parker Plan was primarily liable for Smith's medical expenses. Plaintiff also alleged that Smith was obligated to complete certain COBRA² documents for the continuation of health insurance coverage under the Parker Plan. Plaintiff further alleged that Smith was required to submit reasonable proof of loss and proof that his medical expenses were reasonable charges incurred for reasonably necessary products for his care, recovery, or rehabilitation, that he failed to do so, and that he was therefore not entitled to PIP benefits.

Intervening plaintiffs intervened in the action and alleged that they provided necessary medical care to Smith for treatment of his auto accident injuries, that plaintiff was liable for these expenses under the no-fault act, MCL 500.3101 *et seq.*, and that plaintiff unreasonably refused to pay the amounts owed.

II. Intervening Plaintiffs' Motions for Summary Disposition

The trial court granted the intervening plaintiffs' motion for summary disposition under MCR 2.116(C)(10). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. The court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Id.* at 277.

Plaintiff argues that summary disposition in favor of the intervening plaintiffs was improper because they did not appropriately support their motion with documentary evidence showing that their charges were reasonably necessary for Smith's care.³ MCL 500.3107(1)(a)

¹ NGS and Mongoose were dismissed from this action and are not parties to this appeal.

² Consolidated Omnibus Budget Reconciliation Act, 29 USC § 1161 *et seq.*

³ On appeal, plaintiff does not contest that it was required to pay the charges or that the charges were reasonable.

provides that allowable expenses for PIP benefits include “all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.”

When a party moves for summary disposition under MCR 2.116(C)(10), the party must specifically identify the issues as to which it believes there is no genuine factual dispute, and the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Id.*; *Coblentz, supra*.

In moving for summary disposition and requesting a judgment with respect to the medical treatment rendered, it was intervening plaintiffs’ position that plaintiff did not dispute that the charges were reasonably necessary, but was only arguing that it was not the party liable to pay the charges. Plaintiff did not disagree with this position and did not object to the relief sought on the basis that the charges billed were in dispute. Consequently, the questions before the trial court were whether plaintiff, rather than the Parker Plan, had primary liability for Smith’s medical expenses, and, if so, the date that plaintiff became obligated to pay the expenses for purposes of determining the intervening plaintiffs’ entitlement to interest and attorney fees. The trial court determined that plaintiff had primary liability in accordance with its earlier determination that plaintiff had primary liability for allowable expenses to Spectrum Health, and the court thus entered judgments for the total amounts claimed by intervening plaintiffs, i.e., for Trinity’s “reasonable and necessary medical charges for the care and treatment of Jason Smith totaling \$40,014.29” and Mary Free Bed’s “reasonable and necessary medical charges for the care and treatment of Jason Smith totaling \$9,217.18.”

On appeal, plaintiff now challenges the trial court’s grant of summary disposition on the grounds that intervening plaintiffs had the burden of establishing that the expenses incurred were “reasonably necessary” for Smith’s care and that they failed to carry this burden. Plaintiff argues that the affidavits attached to the intervening plaintiffs’ complaint and motion were insufficient to support their position that there was no genuine issue of material fact regarding whether the charges were reasonably necessary.

We find no basis for relief on the grounds argued by plaintiff. As noted above, and as pointed out by intervening plaintiffs on appeal, plaintiff did not dispute, in response to the motion for summary disposition, that the expenses claimed by intervening plaintiffs were “reasonably necessary.”

Plaintiff’s counsel stated at the hearing on the motion for summary disposition that it “would concede that to the extent of the Court’s opinion for Spectrum⁴ that the Court’s opinion that Trinity is entitled to payment[;] it does not dispute that. What it disputes are the allegations

⁴ The trial court had previously granted Spectrum Health’s nearly identical motion for summary disposition.

that the delay was unreasonable and that Trinity is entitled to penalty interest.” Although these statements alone are not an explicit concession that the expenses at issue were medically necessary, when the statements are considered in the context of the other statements and arguments at the hearing, it is clear there was no factual dispute regarding whether the expenses were reasonably necessary.

Moreover, the issue of the propriety of plaintiff’s argument was raised, and addressed by the trial court, at the subsequent hearing on intervening plaintiffs’ motion for penalty interest and attorney fees. The trial court rejected plaintiff’s belated attempt to dispute the expenses at issue as not reasonably necessary.

Further, the trial court subsequently denied plaintiff’s motion for reconsideration, in which plaintiff specifically argued that the intervening plaintiffs failed to show that the expenses at issue were reasonably necessary. Plaintiff does not challenge the denial of its motion for reconsideration on appeal.

Notably, in response to intervening plaintiffs’ motion for interest and attorney fees, and with its motion for reconsideration, plaintiff submitted the affidavit of Milissa Kujawa, a vice president of ManageAbility, which handled payment claims submitted to plaintiff to determine “payment recommendations for medically appropriate and necessary treatment rendered to individuals by health care providers.” In her affidavit, Kujawa explained that when the bills were received, they were reviewed first to determine whether the treatment was medically appropriate for the injuries sustained and, if it was, whether the charges were reasonable. Kujawa stated that plaintiff requested that ManageAbility review the operative report for Smith, and ManageAbility “determined that the procedure was appropriate for the care of Mr. Smith.” Kujawa also stated that ManageAbility reviewed Mary Free Bed’s bills and recommended a reimbursement amount to plaintiff. Thus, it determined that Mary Free Bed’s bills were reasonably necessary.

Plaintiff maintained throughout this litigation that it was not an expert in determining what was reasonably necessary and, therefore, it relied on its outside auditor⁵ to make this determination. Plaintiff’s auditor determined that the charges were reasonably necessary. Under the circumstances, we find no error in the grant of summary disposition in favor of intervening plaintiffs.

Accordingly, plaintiff was not entitled to summary disposition under MCR 2.116(I)(2), and there is no basis for finding that intervening plaintiffs’ claims were fraudulent or so excessive as to have no reasonable foundation to entitle plaintiff to attorney fees under MCL 500.3148(2).

⁵ ManageAbility

III. Intervening Plaintiffs' Motion for Penalty Interest and Attorney Fees

Plaintiff argues that intervening plaintiffs were not entitled to penalty interest under MCL 500.3142 or attorney fees under MCL 500.3148(1), because no payment was due to intervening plaintiffs and therefore no payments were overdue. Likewise, they were not entitled to statutory interest under MCL 600.6013. We disagree, having determined that intervening plaintiffs were properly entitled to summary disposition on their claims against plaintiff for payment of the expenses incurred in treating Smith. Because plaintiff asserts no other basis for its claim of error in the award of penalty interest, statutory interest, and attorney fees, it is unnecessary to consider this issue further. See *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (appellate relief not warranted if the appellant fails to address the basis of the trial court's decision); *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (this Court is not required to discover the basis of an appellant's claim and then search for authority to sustain or reject the position.).

Plaintiff also argues that the trial court erred in determining that the amount of attorney fees requested by intervening plaintiffs was reasonable. Again, we disagree.

This Court reviews a trial court's decision regarding the reasonableness of attorney fees for an abuse of discretion. *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 61; 604 NW2d 745 (1999). The abuse of discretion standard is deferential and acknowledges that there is no single correct outcome; rather, there are multiple reasonable and principled outcomes. When a trial court chooses one of these principled outcomes, it does not abuse its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In determining whether attorney fees are reasonable, the trial court should consider

(1) the skill, time, and labor involved, (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the attorney, (3) the fee customarily charged in that locality for similar services, (4) the amount in question and the results obtained, (5) the time limitations imposed by the client or by the circumstances, (6) the nature and length of the professional relationship with the client, (7) the professional standing and experience of the attorney, and (8) whether the fee is fixed or contingent. [*Bolt, supra* at 60.]

Plaintiff takes issue with the manner in which the trial court conducted the evidentiary hearing. The court limited plaintiff to questions concerning the relevant factors used to determine reasonableness. We conclude that the trial court did not improperly curtail plaintiff's cross-examination of intervening plaintiffs' counsel when it excluded as irrelevant questions that did not pertain to the reasonableness factors. See MRE 401 and MRE 402. We reject plaintiff's assertion that *Miller v Meijer, Inc*, 219 Mich App 476; 556 NW2d 890 (1996), did not allow the trial court to restrict plaintiff's examination in the manner that it did. The *Miller* Court did not discuss the scope of questioning at an evidentiary hearing regarding the reasonableness of attorney fees. It simply held that where the opposing party challenges the reasonableness of the fee requested, the trial court must conduct an evidentiary hearing to inquire into the services actually rendered before approving the bill of costs. *Id.* at 479.

Plaintiff also asserts that the documentary evidence submitted by the intervening plaintiffs was insufficient to enable the trial court to determine the reasonableness of their requested fees because they did not list each task separately. Instead, intervening plaintiffs' counsel "block-billed." After reviewing the schedule of charges, we conclude that the tasks were specifically detailed to enable the trial court to assess the reasonableness of the fees. To the extent that plaintiff questioned the reasonableness of time spent on certain tasks, it had the opportunity to address these questions in the evidentiary hearing.

Plaintiff also challenges the reasonableness of the hourly rates of intervening plaintiffs' attorneys and suggests that lower rates would have been more appropriate based on its assessment of their competence. We find no abuse of discretion in the trial court's finding that intervening plaintiffs' attorneys' hourly rates were reasonable. Accordingly, we affirm the award of attorney fees.

IV. Smith's Motion to Compel

Jason Smith filed a motion to compel interrogatory answers from plaintiff. On the eve of the motion hearing, months after the interrogatories were served, plaintiff faxed Smith its answers. The trial court granted Smith's motion because it determined that plaintiff provided no substantive answers to the questions and that its objections to the questions were without merit. The trial court found that plaintiff was being obstructive and awarded Smith his actual attorney fees for having to bring and argue the motion. This Court reviews a trial court's decision on a motion to compel discovery for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005).

MCR 2.313(A) permits a party to move for an order to compel another party to answer interrogatories. Under the rule, incomplete or evasive answers are treated as a failure to answer. MCR 2.313(A)(4). Plaintiff argues that the trial court erred in granting Smith's motion to compel because its answers were proper. We disagree.

As the trial court noted, Smith's questions were pointed and relevant to the litigation. He sought to discover what bills had been submitted to plaintiff, if they had been paid and, if not, why. Plaintiff's answers lacked any substance and its objections were unreasonable. Contrary to plaintiff's assertions in its answers, the interrogatories were not vague, burdensome, or an attempt to harass. The fact that plaintiff forwarded the intervening plaintiffs' bills to its outside auditor did not excuse it from answering the questions. Plaintiff had access to the information needed to provide substantive answers. We therefore conclude that the trial court did not abuse its discretion in granting Smith's motion to compel. Accordingly, we find no merit to plaintiff's assertion that it was entitled to attorney fees for having to defend Smith's motion.

Plaintiff also argues that the trial court erred in awarding Smith attorney fees. MCR 2.313(A)(5(a)) mandates an award of expenses where the trial court grants a motion to compel, unless it "finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." Given the nature of plaintiff's answers, the trial court did not abuse its discretion in awarding Smith actual attorney fees.

V. Plaintiff's Motion for Default

Plaintiff filed a motion for default, alleging that Smith failed to participate in discovery and cooperate with its investigation. Plaintiff took issue with Smith's interrogatory answers, claiming that they were obstructive, unresponsive, and exhibited gamesmanship. Plaintiff also contended that Smith failed to take all necessary steps to ensure coverage under the Parker Plan, refused to submit to an independent medical examination, and refused to sign authorizations for the release of certain records, which it asserted were further examples of Smith's stonewalling. This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a default judgment as a sanction for discovery abuses. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 89; 618 NW2d 66 (2000).

The trial court denied plaintiff's motion, reasoning that dismissal was an extreme sanction and that plaintiff had not filed a motion to compel before bringing its motion for a default. As this Court observed in *Kalamazoo Oil*, *supra* at 86-87.

The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery. The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. [Quoting *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999) (citations omitted).]

“[A] default entered as a sanction is a means to penalize a party for failure to comply with the trial court's directives and, as noted above, should be entered only in the most egregious circumstances.” *Kalamazoo Oil*, *supra* at 87.

The trial court did not abuse its discretion in denying plaintiff's motion for a default. The trial court found no intentional obstruction of legitimate discovery by Smith to support dismissal. The court questioned the relevance of some information sought, and noted that it appeared that at least some of the information had already been provided to plaintiff, as Smith claimed in his answers. The trial court stated that if plaintiff brought an appropriate motion to compel, it would determine if plaintiff was entitled to the information it sought and if Smith then failed to comply with a court order, it would entertain sanctions at that point. Under the circumstances, the trial court properly refused to impose the severe sanction of dismissal.

Plaintiff further argues that even if the trial court's denial of its motion for default was proper, it erred in finding that the motion was frivolous and awarding sanctions to Smith for defending the motion. Plaintiff asserts that the motion was not frivolous because it had a sufficient basis in Smith's failure to cooperate. We review the trial court's determination that the motion was frivolous for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

To be subject to sanctions for bringing a frivolous claim under MCL 2.114(f), a claim is “frivolous” if: (1) the party's primary purpose in initiating the action or asserting the defense was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe that the facts underlying that party’s legal position were true; or (3) the party's legal position was devoid of arguable legal merit. *Id.* at 662. The determination whether a claim was frivolous must be based on the facts of the case. *Id.*

Plaintiff brought its motion under MCR 2.313(B) (failure to comply with an order), and MCR 2.313(D) (failure to answer interrogatories). However, Smith did not fail to comply with any court order, and he answered plaintiff’s interrogatories. His answers were not so lacking in substance as to be considered no answers at all. As noted above, the court found no basis for plaintiff’s claim of intentional obstruction of discovery and found the motion for default inappropriate. Thus, the trial court did not commit clear error in concluding that plaintiff’s motion for a default was frivolous, and therefore awarding Smith attorney fees.

VI. Smith’s Motion for Attorney Fees

Plaintiff argues that the trial court erred in granting Smith’s motion for attorney fees under MCL 500.3148(1). This Court reviews for an abuse of discretion the trial court’s decision to grant or deny attorney fees. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 627; 550 NW2d 580 (1996). Plaintiff first argues that Smith explicitly waived his right to attorney fees in a written agreement executed before the commencement of this litigation. The construction of clear contract language is a question of law that this Court reviews de novo. *Mahnick v Bell Co*, 256 Mich App 154, 157, 159; 662 NW2d 830 (2003). Questions of statutory interpretation are also reviewed de novo on appeal. *Id.* at 157.

The parties do not dispute that the contract language is clear, and we agree. Clear contracts must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). The agreement specifically provides that the “parties agree to waive any attorney fees that they may be entitled to with respect to the declaratory judgment action under MCLA 500.3148.” Plaintiff argues that this action is the declaratory action contemplated in the agreement, while Smith argues that it is not. According to the agreement, the purpose of plaintiff filing the declaratory action was to allow the trial court to decide if Smith was obligated to sign the COBRA documents. The agreement stated, “The only issue that will be addressed will be that related to the COBRA documents”

Plaintiff’s instant declaratory judgment complaint sought resolution of this issue, but also sought a declaration that Smith was not entitled to PIP benefits with respect to benefits for which he had not provided the requisite documentation. It is clear that the COBRA documents were not the only issue addressed in the instant complaint. We therefore conclude that plaintiff’s complaint is not the declaratory action contemplated in the parties’ agreement. The waiver of attorney fees clause only applied, on its terms, to the action contemplated in the agreement. Thus, we conclude that the agreement did not prevent Smith from seeking attorney fees under MCL 500.3148.

Plaintiff next argues that Smith was not entitled to attorney fees under the plain language of the statute. MCL 500.3148(1) states:

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.

Plaintiff argues that Smith was not entitled to attorney fees because he does not meet the definition of a “claimant.” We disagree. In construing MCL 500.3148(1), this Court has observed that a claimant is defined as “a person who makes a claim.” *Lakeland Neurocare Ctrs v State Farm Mut Automobile Ins Co*, 250 Mich App 35, 41; 645 NW2d 59 (2002) (citation omitted). Relevant dictionary definitions of the word “claim” include “a demand for something as due; an assertion of a right or an alleged right,” and “a request or demand for payment in accordance with an insurance policy” *Id.* (citation omitted). Smith was making a demand for something as due, i.e, PIP benefits, was asserting a right, and made a demand for payment in accordance with an insurance policy.

Plaintiff further argues that Smith cannot recover under the statute because he did not file “an action.” However, plaintiff’s emphasis is misplaced. The statute only states that “an” action needs to be filed; it does not restrict recovery to only claimants who file an action.

Plaintiff also argues that the award of attorney fees was precluded on the basis of the lack of notice of any claim for fees, MCR 2.111(B)(1), and Smith’s failure to join his claim for no-fault attorney fees pursuant to MCR 2.203(A). We likewise find these arguments without merit.

MCL 500.3148(1) permits the award of attorney fees where counsel represents and advises a claimant “in an action for personal . . . injury protection benefits.” In this case, plaintiff clearly placed Smith’s entitlement to PIP benefits at issue by filing the complaint seeking a declaration that Smith was not entitled to PIP benefits that were not properly documented. Plaintiff alleged:

24. Defendant, Jason Smith, has neglected, failed, and otherwise refused to provide the necessary documentation to support that the charges are reasonable charges that were incurred for reasonably necessary products, services, and accommodations for his care, recovery, and/or rehabilitation.

25. Failure to provide said information causes Defendant, Jason Smith, not to be entitled to personal injury protection benefits under Michigan’s No-Fault Act.

26. Defendant, Jason Smith, is required by MCLA 500.3142 to provide reasonable proof of the fact and of the amount of the loss sustained to Plaintiff, Bristol West Insurance Company, in support of his claim for personal injury protection benefits.

27. Defendant, Jason Smith, has failed, refused, and otherwise neglected to provide to Plaintiff, Bristol West Insurance Company, reasonable proof of the fact and of the amount of the loss sustained to support his claim for personal injury protection benefits.

28. Failure to provide said information causes Defendant, Jason Smith, not to be entitled to personal injury protection benefits under Michigan's No-Fault Act.

Smith's entitlement to PIP benefits was directly at issue in this action, and thus the trial court did not err in determining that Smith's counsel was "entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue." MCL 500.3148(1) "This result is consistent with the purpose and goal of the no-fault system in that it promotes the reasonable and prompt payment of no-fault benefits to rightful payees, minimizes the likelihood of a no-fault payee's unjustified economic loss, and mitigates the potential for litigation predicated on such claims." *Lakeland Neurocare Ctrs*, supra at 44. The fact that plaintiff instituted these proceedings as a declaratory judgment action does not, through plaintiff's hypertechnical argument, preclude the application of MCL 500.3148(1).

Plaintiff also argues that the award of fees was unreasonable. As discussed above with regard to the award of fees to intervening plaintiffs, we find no abuse of discretion in the award of fees to Smith. *Bolt*, supra at 61. Contrary to plaintiff's argument, Smith filed a detailed invoice with his supplemental brief that listed each task and the accompanying time spent, which provided a sufficient basis for the court's determination of reasonableness. The detailed invoice properly supported the request for fees, and we find no merit in plaintiff's challenge on the ground that counsel misled the court with respect to his attendance at depositions. To the extent that plaintiff argues that the hourly rate was unreasonable, and a lower rate was more appropriate, plaintiff's cursory argument fails to establish that the rate was in any way unreasonable.

Finally, we reject plaintiff's argument that it was entitled to attorney fees for having to defend Smith's motion. Plaintiff asserts that Smith's motion was frivolous because the parties' agreement and the statute's plain language clearly precluded Smith from recovering such fees. Because we concluded that the agreement was inapplicable to this case, it cannot be a basis for finding that Smith's motion was frivolous. Likewise, Smith's motion for attorney fees was justified under MCL 500.3148(1), and therefore was not frivolous. Thus, plaintiff was not entitled to attorney fees.

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Helene N. White