STATE OF MICHIGAN

COURT OF APPEALS

BONNIE YACKISH,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 1, 2011

No. 289671
Ingham Circuit Court
LC No. 06-000941-NF

Before: METER, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

In this action to recover first-party no-fault benefits and to obtain a declaratory judgment, defendant appeals as of right from the trial court's order granting summary disposition to plaintiff, who was injured in an automobile accident. The trial court evaluated the allowable expenses under the no-fault act, MCL 500.3101, *et seq*. It ordered defendant to pay plaintiff's full current apartment rental costs, as well as the full cost of a new condominium, including ongoing expenses of ownership such as property taxes, home insurance, and association fees. The court also ordered that defendant pay the full cost of plaintiff's vehicle, along with insurance costs. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff suffered a spinal cord injury, which resulted in a complete loss of function from the chest down and only limited use of her arms. Because plaintiff's home could not be modified to accommodate her injury, defendant temporarily paid the full amount of plaintiff's rental costs for an apartment. However, defendant later reduced this amount to an amount equal to the difference between plaintiff's pre-injury and post-injury housing costs. Defendant also paid for modifications to be made to a van that plaintiff purchased to accommodate her injury.

Plaintiff subsequently brought an action for nonpayment of no-fault benefits. She argued that she was entitled to reimbursement for the full cost of her apartment rental as well as the full cost of her van, along with the full cost to insure it. She also requested a declaratory judgment that defendant was responsible for the full cost of a condominium of a similar size as her previous home, but with accommodations for her current physical needs, along with additional expenses related to the ownership of the condominium. Multiple motions for partial summary disposition were filed by both parties. The trial court ultimately concluded that defendant was obligated to pay the full cost to purchase and insure plaintiff's modified van, as well as the full cost of plaintiff's rental payments for her temporary apartment. The trial court further concluded

that defendant was obligated to pay the full purchase price of a new condominium that could be modified to plaintiff's needs, as well as the costs associated with ownership.

Defendant first argues that the trial court erred in ordering it to pay the full amount of plaintiff's current rental costs as well as the full purchase price of a condominium, together with the full costs associated with the ownership of the condominium, including property taxes, association dues, and insurance. We agree.

We review de novo the decision of a trial court pertaining to a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Whether a cost constitutes an allowable expense under the [no-fault act] is a question of statutory construction, subject to review de novo." *Hoover v Michigan Mut Ins Co*, 281 Mich App 617, 622; 761 NW2d 801 (2008).

A motion for summary disposition brought under MCR 2.116(C)(9) tests the sufficiency of the defendant's pleadings, and the trial court must accept all well-pleaded allegations as true. *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). Summary disposition is proper under this subrule when no factual development could deny the plaintiff's right to recovery. *Id*. at 425-426. Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Under the no-fault act, an injured person is entitled to payment of personal insurance protection (PIP) payments only for "[a]llowable 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). For an expense to qualify as an "allowable expense" under the no-fault act, (1) the charge must be reasonable, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the expense must be for the injured person's care, recovery, or rehabilitation. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 532 n 8; 697 NW2d 895 (2005).

In the instant matter, there is no dispute that plaintiff is entitled to some benefit related to her housing costs. Rather, the parties disagree with regard to the appropriate amount of that benefit. Plaintiff asserts that she is entitled to the full costs of her housing expenses, because those costs are affected by her injury. On the contrary, defendant maintains that its obligation is limited to the increase in plaintiff's housing costs that are causally connected to her injury.

The trial court concluded that defendant was obligated to pay for plaintiff's full housing expenses as a matter of law, based on the holding in *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 370 NW2d 619 (1985). In that case, this Court determined that rental expenses for an apartment that the plaintiff was residing in until modifications could be made to his parents' home were allowable expenses under MCL 500.3107, and the Court went on to state: "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*, 142 Mich App at 511.

The trial court's reliance on *Sharp* was misplaced, because the court did not take into account *Griffith*, 472 Mich at 525, which revisited the interpretation of the term "allowable expense" under the no-fault act to determine whether an injured plaintiff's at-home food costs could be considered allowable expenses under the act. The *Griffith* Court concluded that the plaintiff's at-home food costs were not allowable expenses if they were not related to his "'care, recovery, or rehabilitation.'" *Id*. at 536.[1] The *Griffith* court also indicated, albeit in dicta, that this reasoning could be used when considering a plaintiff's housing expenses as well. *Id*. at 538. Despite this language, plaintiff maintains that *Sharp* remains the standard for evaluating housing expenses as an allowable expense and that the trial court did not err in applying that case to the instant matter.

A recent published opinion from this Court, *Ward v Titan Ins Co*, 287 Mich App 552; 791 NW2d 488 (2010), makes clear that *Griffith* governs such issues. In *Ward*, discussing the defendant's cross-appeal from the trial court's determination that defendant pay the full cost of the plaintiff's rent, this Court stated that, pursuant to *Griffith*, "housing costs are only compensable to the extent that those costs became greater as a result of the accident." *Id*. at 557. For that reason, the *Ward* panel reversed the trial court's award of the plaintiff's full rental expenses because the record did not adequately demonstrate that this standard had been met. *Id*.

In addition, the trial court's holding is not correct in light of this Court's holding in *Hoover*, 281 Mich App 617. In *Hoover*, this Court was asked to review the trial court's award of various housing and living expenses as allowable expenses, as well as an award of attorney fees and penalty interest. *Id*. at 620. The trial court had awarded the plaintiffs 28% of expenses related to their home, such as tax bills, utility bills, and homeowner's insurance, after determining that 28% of the home could be attributed to their son, who had been catastrophically injured after being struck by a drunk driver. *Id*. At 620-622. In reviewing this determination, the *Hoover* Court was guided by the decision in *Griffith* and concluded that under the principles of *Griffith*, in allocating an award for an expense such as a utility bill, the trial court is not permitted to simply award the portion of the bill attributable to the injured person's usage, because some of those costs would have been incurred regardless of whether an injury had occurred. *Id*. at 630-631. A court must instead determine the portion of the bill incurred "because of the injuries." *Id*. at 631. For example, the power used to operate a ventilator for a ventilator-dependent person would be covered. *Id*. The *Hoover* Court acknowledged that making such determinations would

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[1] The Court went on to hold, however, that the cost of food in an institutional setting would be for accidental bodily injury and reasonably necessary for care, recovery, or rehabilitation given the "limited dining options available" in that setting and the requirement that the patient consume hospital food. *Id*. at 537. The Court found this to be analogous to a special diet necessary for recovery. *Id*. As noted by this Court in *Hoover*, however, see *Hoover*, 281 Mich App at 627 n 5, the *Griffith* Court did not distinguish between the cost of regular food and the cost of "special diet" food or that provided in the hospital. The *Griffith* Court apparently would have allowed recovery of all the food costs under those circumstances. See *id*.

be difficult, but were required by *Griffith*. *Id*. Accordingly, *Hoover* provides additional support for the conclusion that the trial court's decision that plaintiff was entitled to reimbursement for her full housing costs as a matter of law constituted error; indeed, there was no further development of the facts to establish the portion of plaintiff's housing costs attributable to her injuries.[2]

Hoover and *Ward* are binding in the instant case. MCR 7.215(J)(1). Consequently, the trial court's reliance on *Sharp* in determining that plaintiff's full housing costs were allowable expenses as a matter of law constituted error. We thus reverse the trial court's finding that plaintiff is entitled to full reimbursement of her housing costs, and we remand this case for further proceedings to determine the portion of the costs attributable to plaintiff's injury.

Defendant also challenges the trial court's determination that it is obligated to reimburse plaintiff for the full cost of her modified van, along with the full cost to insure this vehicle.

In *Davis v Citizens Ins Co*, 195 Mich App 323, 327-328; 489 NW2d 214 (1992), this Court held that the cost of a modified van was an allowable expense under the facts of that case. Defendant makes a reasoned argument that the holding in *Griffith* is as applicable to awards for transportation costs as it is to awards for housing expenses. However, a recent published decision of this Court specifically addressed the effect of the *Griffith* decision on the *Davis* holding and concluded that *Davis* was not overruled by *Griffith*, even though the decision in *Griffith* clarified the judicial construction of MCL 500.3105(1) and MCL 500.3107(1)(a). *Begin v Michigan Bell Telephone Co*, 284 Mich App 581, 594; 773 NW2d 271 (2009).[3] Accordingly,

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[2] While following *Griffith*, *Hoover* also recognized an exception for certain expenses that are "atypical, unusual, or out of the ordinary" and found that *Griffith* does not preclude these from being covered "in their entirety." *Hoover*, 281 Mich App at 627-628. For example, the Court discussed a dumpster allegedly necessitated by the numerous bags of garbage generated by the injured person's care. *Id*. at 634-635. The Court found that, while some of the trash would have been generated by the injured person or his caregivers regardless of the injury, the entire cost of the dumpster was covered because, like the special diet food in *Griffith*, it was necessitated by the accidental bodily injury. *Id*.

[3] The *Begin* Court held that "because *Davis* was issued on or after November 1, 1990, the *Davis* decision is binding precedential authority until it is 'reversed or modified by the Supreme Court, or by a special panel' of this Court. MCR 7.215(J)(1)." *Begin*, 284 Mich App at 594. We note that *Ward* did not discuss *Begin*.

The *Begin* Court further stated that, in certain instances:

> the product, service, or accommodation used by the injured person before the accident is so blended with another product, service, or accommodation that the whole cost is an allowable expense if it satisfies the statutory criteria of being sufficiently related to injuries sustained in a motor vehicle accident and if it is a

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because defendant's representative acknowledged that plaintiff requires a van to accommodate her injuries, the trial court did not err in ordering defendant to reimburse plaintiff for the full cost of the van. The insurance expenses directly flow from the van itself, and we therefore conclude that, under *Begin*, those expenses are allowable.

In light of our decision today, we reverse the trial court's award of penalty interest. This issue should be revisited by the trial court following factual determinations regarding the timing and propriety of plaintiff's claims and defendant's actions in response.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald

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> reasonable charge and reasonably necessary for the injured person's care, recovery, or rehabilitation under MCL 500.3107(1)(a). The latter inquiry, of course, is factual and dependent on the circumstances of each case. [*Id*. at 596-597.]

The *Begin* Court made the above statement in the course of discussing food in an institutional setting and modified shoes necessitated by an automobile accident. *Id*. at 596. It stated:

> We also note that the *Griffith* Court, when discussing the cost of food provided to an injured person in an institutional setting, did not suggest that only the marginal increase in the cost of such food served in an institutional setting would be an allowable expense. Nor did the Court suggest that only the marginal cost of modifying regular shoes would be a recoverable "allowable expense" under MCL 500.3107(1)(a). [*Begin*, 284 Mich App at 596.]

The *Begin* Court implied that a modified van was analogous to the institutional food and the modified shoes. *Id*. at 596-597.