

STATE OF MICHIGAN
IN THE SUPREME COURT

RANDY C. BURRIS,

Plaintiff/Appellee,

-vs-

ALLSTATE INSURANCE COMPANY,

Defendant/Appellant.

Supreme Court No.: 132949

Court of Appeals No.: 261505

Wayne County Circuit Court
Case No. 02-208320-NF

Lower Court Judge Hon. William J. Giovan

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Suppl

**PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE
TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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ORAL ARGUMENT REQUESTED

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SUPPLEMENTAL ARGUMENT

Plaintiff/Appellee relies on his Response to Defendant/Appellant's Application for Leave to Appeal as if set forth herein. And, pursuant to the Order of this Supreme Court dated October 19, 2007, Plaintiff/Appellee submits this Supplemental Brief.

It is well recognized in Michigan that family-provided attendant care not only benefits the injured person but also acts as a cost containment measure to the no fault system. As the Court of Appeals pointed out in Reed v Citizens Insurance Company of America, 198 Mich App 443; 499 NW2d 22 (1992):

“Denying compensation for family-provided accommodations while allowing compensation in an institutional setting would discourage home care that is, generally, we believe, less costly than institutional care. Irrespective of cost considerations, it can be stated without hesitation that home care is more personal than that given in a clinical setting.” (Reed, at 452).

And, while it is true that Reed has been overturned by this Court on the issue of whether room and board in a home setting is a covered no fault benefit for an injured person, the underlying concept that home care is less expensive than institutional care remains true, and is an important consideration in the case at bar.

If the Defendant's position is upheld by this Court, family and friends will be required to enter into negotiated contracts with an injured person in order to be compensated for prescribed attendant care services. Because of the obvious family dynamics involved, family members might become extremely reluctant to do so. This would force the injured person to hire a commercial care agency to provide attendant care services, which is much more costly not only to the individual auto insurer involved in each scenario, but to the entire no

fault system. Such a requirement will impose an additional financial burden on an already expensive system and would act to defeat the overall goal of the no fault system; to provide accident victims with assured, adequate and prompt reparations AT THE LOWEST COST to both individuals and the no fault system. Williams v AAA, 250 Mich App 249, 257; 646 NW2d 476 (2002).

Commercial agencies will also be much less reluctant to pursue litigation to assure payment is made for the services provided. Commercial care agencies have overhead expenses not typically associated with family provided care, and these additional costs would be passed on to the insurance companies and into the no fault system. In the long run, this is an impractical solution. Not only will it impose an additional financial to the system, but will be harmful to the injured person, as family provided care is generally considered more beneficial to the injured person than a commercial agency, for the obvious reason that family will be more attentive to the needs of the injured person.

Thus, should Defendant prevail in its position, the overall result may be severely detrimental to the system itself.

Defendant relies on the definition of "incur" set forth by this Supreme Court in Proudfoot v State Farm Mutual Insurance Company, 469 Mich 476; 673 NW2d 739 (2003). The definition this Court used focuses on the actions of the person receiving the services, rather than the care giver.

According to Proudfoot, to "incur" means:

"To become liable or subject to ESPECIALLY BECAUSE OF ONE'S ACTIONS". Proudfoot, supra at 484, (emphasis added).

Thus, one must focus on the actions of the person receiving the services to determine whether he has incurred the service. Focusing on the actions of Randy Burris, it is clear that he has incurred attendant care services. As a result of the injuries he suffered in his car accident, he required, and accepted, the help of his father, brother and friend because his injuries prevented him from providing the services to himself. By receiving the services pursuant to a prescription from his doctor, Randy has implicitly purchased them, regardless of whether those providing the services specifically demanded payment. It is the actions of Randy Burris in accepting attendant care services that results in the service being incurred. Just as a patient who visits a doctor incurs the expense of that visit regardless of whether he promises to pay for the service, once Randy receives attendant care services, he has implicitly purchased those services. There is no requirement that a formal promise to pay be made. The Court of Appeals recognized this in the case at bar and their decision was correct on this issue.

The facts presented in the case at bar is much different from a scenario wherein the actions of Richard Burris, Ryan Burris and Chris Marcott could be considered a gift, or simply an act of generosity. In the case at bar, the above individuals provided care to Randy pursuant to a prescription, because Randy needed the care, not just because they were being generous. And, at trial, each noted that they were providing the service for that reason. Since they provided the service and Randy accepted the service, it was implicitly purchased. See Booth v Auto-Owners, 224 Mich App 724; 569 NW2d 903 (1997), and the other cases cited in Plaintiff's Response to Defendant/Appellant's Application. Thus, from the perspective of the person receiving the services, using the definition of "incur", Randy has become liable to the

caregivers because he accepted the service which they provided to him pursuant to a prescription for injuries he sustained in a motor vehicle accident.

This Court is asked to keep in mind that all of the issues addressed by Defendant-Appellant in its Application were addressed at the Trial Court and, after extensive discussions regarding jury instructions, the jury was instructed on this very issue. The jury was asked to decide whether Randy had, in fact, incurred attendant care expenses. As part of the charge to the jury, the Court told them exactly what they must consider in determining whether Randy Burris had incurred attendant care expenses. The Court used the exact definition set forth in Proudfoot, and stated, during its charge, as follows:

“ Now, I said that the plaintiff must have incurred the allowable expenses. What do I mean by allowable - incurred? By incurred I mean that the plaintiff had to become liable for or subject to those expenses, especially because of his own actions.

In the case of attendant care services, if family members provide attendant care services for an injured person, the services are implicitly purchased at their reasonable value.

So, if you decide under the rules I’ve already given you that no fault benefits are owed to the plaintiff, you are instructed to award benefits that have not already been paid by the defendant as follows. Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for the plaintiff’s care, recovery or rehabilitation arising out of the accident in question.” (Trial, Jan. 15, p. 33)

The Court had previously instructed the jury on the definition of attendant care expenses (a definition agreed to by the parties after extensive discussions), as follows:

“ Attendant care is reimbursement for medically prescribed supervision of an injured person that is necessary to preserve the health or safety of the injured person. This is distinguished from

another kind of expenses that is not involved in this case and that is replacement services.” (Trial Jan. 15, p. 32)

So, the jury was provided the definition of incur, as set forth by the Supreme Court in Proudfoot and was given the definition of attendant care. This was all done after defense counsel argued to the jury in his closing argument (January 14, Transcript pp. 138-140) that, because the providers did not request payment, the expense had not been incurred.

Once the jury was provided with the law, it became their decision as to whether the facts, as applied to the law which was provided to them, justified an award of attendant care services. Despite Defendant’s eloquent closing argument that no such expense had been incurred because the caregivers stated that they did not expect compensation, the jury correctly applied the law as the Court gave it to them and found that attendant care services had, in fact, been incurred. And, the Court specifically required the jury to determine the amount of attendant care expenses owed to each caregiver, so they were given the additional requirement of considering the testimony of each caregiver to determine whether that caregiver was entitled to compensation for the services provided.

In this appeal, there is no need for this Court to interpret the statute involved, MCL 500.3107(a). This Court has already interpreted the statute, and in particular the definition of the word “incur”. No additional interpretation is required. All that is required is a determination as to whether:

“in the light most favorable to non-moving party, reasonable jurors could have honestly reached a different conclusion. If so, the verdict must stand”. Zantel Marketing Agency v Whitesell Corp., 265 Mich App 559, 568; 696 NW2d 735 (2005).

The Court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party, and a Motion for JNOV should only be granted if the evidence viewed in this light fails to establish a claim AS A MATTER OF LAW. Forge v Smith, 458 Mich 198, 204; 580 NW2d 876 (1998) (emphasis added); Wilkinson v Lee, 463 Mich 388, 391; 617 NW2d 305 (2000).

The issue presented by the Defendant/Appellant in its Application does not require statutory interpretation. The statute at issue, MCL 500.3107(a) has already been adequately interpreted and the word incur has already been defined in Proudfoot. The only question is whether the evidence in the case at bar, together with all reasonable inferences, created a jury question on the issue of whether attendant care services had been incurred. Once the jury found that they had, the verdict must be allowed to stand.

CONCLUSION

The jury was properly instructed on the law and the verdict should not have been overturned by the Trial Judge. The Court of Appeals correctly reinstated the verdict and based on the *de novo* standard of review, this Court should allow the original verdict to stand. The other issues raised by Defendant/Appellant have been adequately addressed in Plaintiff/Appellee's Response to Defendant/Appellant's Application for Leave to Appeal.

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