STATE OF MICHIGAN

COURT OF APPEALS

DAVID BAKER, a Legally Incapacitated Person, by BETH BAKER, his Guardian,

Plaintiff/Counter-Defendant/Appellee,

v

AUTOMOBILE CLUB OF MICHIGAN, d/b/a AAA MICHIGAN,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant,

and

AUTO OWNER'S INSURANCE COMPANY and HOMEOWNER'S INSURANCE COMPANY,

Third-Party Defendants.

UNPUBLISHED
March 6, 2012

No. 295812
Saginaw Circuit Court
LC No. 06-059173-NO

DAVID BAKER, a Legally Incapacitated Person, by BETH BAKER, his Guardian,

Plaintiff/Counter-Defendant/Appellee,

v

AUTOMOBILE CLUB OF MICHIGAN, d/b/a AAA MICHIGAN,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant,

and

AUTO OWNER'S INSURANCE COMPANY and HOMEOWNER'S INSURANCE COMPANY,

No. 296340
Saginaw Circuit Court
LC No. 06-059173-NO

Third-Party Defendants.

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

In these consolidated appeals, defendant Automobile Club of Michigan, d/b/a AAA Michigan ("AAA Michigan"), appeals as of right from two separate orders in this litigation brought by plaintiff Beth Baker, as guardian for David Baker ("Baker"), a legally incapacitated person, to recover no-fault personal injury protection ("PIP") benefits on behalf of Baker. In Docket No. 295812, AAA Michigan challenges the trial court's opinion and order denying its motion for summary disposition with respect to plaintiff's claim for PIP benefits related to Baker's residential psychiatric care. In Docket No. 296340, AAA Michigan challenges the trial court's postjudgment order awarding plaintiff no-fault attorney fees of $45,000 and costs of $10,356.68 after finding that AAA Michigan unreasonably delayed in making proper payment to plaintiff. We affirm in Docket No. 295812, but reverse the award of attorney fees in Docket No. 296340 and remand for further proceedings to determine plaintiff's permissible taxable costs.

I. BASIC FACTS

Plaintiff is the mother and guardian of David Baker, who suffered serious head injuries when he was struck by an automobile while picking up mail for his employer, ABO Tent Events, in June 2004. Plaintiff maintains that Baker's head injuries resulted in a serious psychological condition that caused Baker to engage in self-destructive behavior, including cutting and burning himself, and an attempt at suicide. Because of his condition, Baker was admitted to the Lighthouse Neurological Rehabilitation Center for residential treatment and care.

Plaintiff filed this action against AAA Michigan to recover no-fault PIP benefits for the cost of Baker's residential care. Plaintiff also sought workers' compensation benefits for the same expense from ABO Tent's workers' compensation insurance carrier, third-party defendants Auto Owners Insurance Company and Homeowner's Insurance Company (collectively "Auto Owners"). The insurance parties contested Baker's entitlement to no-fault and workers' compensation benefits for the residential-care expenses, arguing that Baker's psychological condition was a pre-existing condition that was not caused by the automobile accident.

In the separate workers' compensation proceeding, in which AAA Michigan was permitted to intervene, a magistrate found that Baker had pre-existing psychological issues that "combined to be the overwhelming significant cause" of Baker's present condition and self-destructive behaviors. Accordingly, plaintiff's workers' compensation claim for the residential treatment expenses was denied. The magistrate's decision was affirmed by the Workers' Compensation Appellate Commission.

While the workers' compensation proceeding was pending, plaintiff brought this action against AAA Michigan to recover PIP benefits for the cost of Baker's residential care, and to

also recover no-fault work-loss benefits. In June 2006, the trial court issued a preliminary injunction requiring AAA Michigan to pay for Baker's residential treatment at Lighthouse pending resolution of plaintiff's claims against Auto Owners and AAA Michigan. AAA Michigan brought a counterclaim against plaintiff for reimbursement of benefits paid pursuant to the preliminary injunction, and a third-party complaint against Auto Owners. After Auto Owners prevailed in the workers' compensation proceeding, the trial court granted Auto Owners's motion for summary disposition of AAA Michigan's third-party complaint in this case. AAA Michigan then moved for summary disposition of plaintiff's claim against it with respect to the residential-care expenses, arguing that plaintiff was collaterally estopped from claiming that Baker's psychological injuries arose from the automobile accident because that factual issue was fully litigated and decided against plaintiff in the workers' compensation proceeding. The trial court disagreed and denied the motion.

The case proceeded to a trial on the issue of whether Baker's psychological condition arose out of the automobile accident and also on plaintiff's claim for unpaid work-loss benefits. A jury resolved both of those issues in favor of plaintiff, but the trial court later granted AAA Michigan's motion for judgment notwithstanding the verdict ("JNOV") with respect to the work-loss claim.

Afterward, plaintiff moved for no-fault attorney fees and an award of costs under MCL 500.3148(1). The trial court granted the motion and awarded plaintiff attorney fees of $45,000 and all of her actual requested costs of $10,356.68. These appeals followed.

II. DOCKET NO. 295812

AAA Michigan argues that the trial court erred in denying its motion for summary disposition of plaintiff's claim for PIP benefits related to Baker's residential care. Specifically, AAA Michigan contends that the trial court erroneously found that collateral estoppel did not apply to bar plaintiff's claim. We disagree.

Application of the doctrine of collateral estoppel presents a question of law that is reviewed de novo on appeal. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). A trial court's decision on a motion for summary disposition is also reviewed de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Summary disposition based on collateral estoppel is governed by MCR 2.116(C)(7). *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). When reviewing a motion under MCR 2.116(C)(7), a court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties if substantively admissible. *Odom*, 482 Mich at 466. The contents of the complaint must be accepted as true unless contradicted by the submitted evidence. *Id.*

"Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). Generally, collateral estoppel "requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same

parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes*, 481 Mich at 585. However, lack of mutuality will not preclude application of estoppel when it is asserted defensively against a party who had a full and fair opportunity to litigate the pertinent issue. *Monat v State Farm Ins Co*, 469 Mich 679, 691-692, 695; 677 NW2d 843 (2004).

The instant case involves the defensive use of collateral estoppel, and the only element at issue here is the first one. AAA Michigan contends that the issue of whether Baker's psychological condition arose from the accident was actually litigated and determined in the earlier workers' compensation proceeding. Plaintiff, on the other hand, argues, and the trial court agreed, that the two proceedings did not involve the same factual issue because the standard of proof for causation under the no-fault act is not the same as the standard of proof under the workers' compensation act.[1] In other words, plaintiff relies on the fact that the latter act used in the prior proceeding imposes a heightened standard of proof compared to the standard to be used in the subsequent no-fault proceeding.

Section 301 of the workers' compensation act provides, in pertinent part:

> (1) An employee, who receives a personal injury *arising out of* and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. . . .
>
> (2) Mental disabilities . . . shall be compensable *if contributed to or aggravated or accelerated by the employment in a* ***significant*** *manner*. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof. [MCL 418.301 (emphasis added).]

Conversely, § 3105 of the no-fault act provides, in pertinent part:

> (1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury *arising out of the ownership, operation, maintenance or use of a motor vehicle* as a motor vehicle, subject to the provisions of this chapter.

[1] We also note that the fact that the prior litigation was at the administrative level does not preclude the application of collateral estoppel. For collateral estoppel to apply as the result of an administrative decision, the administrative determination must have been adjudicatory in nature, must have provided a right to appeal, and the Legislature must have intended to make the decision final absent an appeal. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995). These requirements are met in workers' compensation claims. See, e.g., *Blazic v Wayne Co*, 460 Mich 868; 598 NW2d 346 (1999); *Fuchs v Gen Motors Corp*, 118 Mich App 547, 553; 325 NW2d 489 (1982).

> (2) Personal protection insurance benefits are due under this chapter without regard to fault. [MCL 500.3105 (emphasis added).]

There can be no dispute that the standards of proof are different. To be entitled to workers' compensation benefits, the injuries must "aris[e] out of" employment, and mental disabilities are compensable only if the employment contributed to them in a "significant manner." On the other hand, under the no-fault act, persons seeking PIP benefits for either physical or mental injuries must only prove that the injury arose out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. Hence, there is no "significant manner" requirement for claiming no-fault benefits.

While there is a difference between the proofs necessary to trigger benefits under the workers' compensation act and the proofs necessary to trigger benefits under the no-fault act, this difference, by itself, is not dispositive. The issue that AAA Michigan was attempting to preclude from being litigated in the no-fault trial was whether Baker's injuries *arose from the car accident*. Thus, in this instance, in order for collateral estoppel to operate as a bar to subsequent litigation, the workers' compensation proceeding must *necessarily have determined that Baker's injuries did not arise from the car accident*. See *People v Gates*, 434 Mich 146, 158; 452 NW2d 627 (1990) (in criminal prosecution for criminal sexual conduct, prior probate proceeding could act as a bar only if the jury in that probate proceeding necessarily determined that the defendant was not guilty of the present, charged crime). In order to determine whether a fact was necessarily determined in an earlier proceeding, courts need to ascertain the *underlying, actual basis* for that earlier verdict. See *id.* Normally, this is problematic when dealing with a general verdict, *id.*, but in this instance, there is a written opinion containing findings from that prior proceeding, which eliminates any question regarding the actual basis behind that prior determination.

Here, the magistrate in the workers' compensation proceeding never found that Baker's condition did not arise from the car accident. Instead, the magistrate's findings included:

> I find that these [pre-existing psychological problems] combined to be the *overwhelming significant cause* and produce[d] the eventual mental state and conditions including Plaintiff's self-destructive behavior such as attempted suicide and cutting . . . .
>
> I find that Plaintiff did suffer a serious closed head injury, but that while it may have been the last straw or event which pushed Plaintiff's emotional/mental illness over the top, in comparison to the above noted [pre-existing issues], it was . . . not a *significant* contributing factor/cause of his ongoing mental state and mental illness. [Emphasis added.]

These findings do not foreclose a conclusion that plaintiff met the no-fault standard of causation. Even though the accident may not have *significantly* contributed to his current condition, that does not preclude a finding that his condition did not merely *arise* from the accident. Thus, because this particular finding did not foreclose on finding that Baker's condition also "arose from the car accident," collateral estoppel was not applicable. Accordingly, the trial court did not err in denying AAA Michigan's motion for summary disposition based on collateral estoppel.

III. DOCKET NO. 296340

In Docket No. 296340, AAA Michigan first challenges the trial court's award of attorney fees pursuant to MCL 500.3148(1). "The trial court's decision to grant or deny attorney fees under the no-fault act presents a mixed question of law and fact." *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 576; 760 NW2d 574 (2008). The trial court's findings of fact are reviewed for clear error, but its legal decisions are reviewed de novo. *Id.* at 577.

AAA Michigan first argues that plaintiff was not entitled to attorney fees under § 3148(1) because there was never any finding by a jury that benefits for Baker's residential treatment were overdue. We agree.

MCL 500.3148(1) provides:

> 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.

"The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured." *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008).

MCL 500.3142(2) provides, in pertinent part:

> Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer.

Thus, there are two prerequisites that must be established in order for attorney fees to be awarded.

> First, the benefits must be overdue, meaning "not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained." Second, in postjudgment proceedings, the trial court must find that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008) (citations omitted).]

Regarding the first prerequisite, a plaintiff bears the burden of proving that reasonable proofs of loss were provided and that the defendant insurer failed to pay the claims within 30 days. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 730; 761 NW2d 454 (2008). Furthermore, these are proper questions for the jury to resolve. *Id.*; see also *Moore*, 482 Mich at

517 (explicitly stating that the second prerequisite of reasonableness is to be determined in "postjudgment proceedings," while not making such a distinction with respect to the first prerequisite of being overdue). Accordingly, in *Moore*, our Supreme Court observed that in *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 630; 550 NW2d 580 (1996), "a jury's decision that benefits were not overdue for purposes of MCL 500.3142 precluded the trial court from awarding attorney fees pursuant to MCL 500.3148(1) because a plaintiff is entitled to attorney fees only for overdue benefits."

In this case, the question of whether PIP benefits were overdue was submitted to the jury, but only in relation to the work-loss benefits. The jury determined that the work-loss benefits were overdue, but the trial court later granted AAA Michigan's motion for JNOV with respect to the work-loss benefits. Therefore, the jury's finding that the work-loss benefits were overdue cannot support the trial court's award of attorney fees under § 3148(1). Because plaintiff did not pursue any claim at trial that PIP benefits for Baker's residential treatment were overdue, which resulted in the jury not deciding on the issue, we conclude that plaintiff was not entitled to recover no-fault attorney fees under § 3148(1) with respect to the residential-care expense. Accordingly, the trial court erred in awarding plaintiff no-fault attorney fees under § 3148(1).[2]

AAA Michigan also argues that the trial court erred in awarding plaintiff her actual requested costs of $10,356.68. Although a trial court's award of costs is generally reviewed for an abuse of discretion, *LaVene v Winnebago Indus*, 266 Mich App 470, 473; 702 NW2d 652 (2005), costs may be awarded only where authorized by a statute, court rule, or a recognized exception, *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Accordingly, the determination of whether a statute authorizes an award of costs involves an issue of statutory interpretation, which is reviewed de novo on appeal. *LaVene*, 266 Mich App at 473.

Plaintiff's motion cited MCL 500.3148(1) as the only authority supporting her request for costs. As this Court observed in *Bloemsma v Auto Club Ins Ass'n*, 190 Mich App 686, 692; 476 NW2d 487 (1991), MCL 500.3148(1) does not authorize an award of actual costs because it "clearly provides only for an award of attorney fees." Thus, plaintiff was not entitled to an award of costs under § 3148(1). Although plaintiff's motion only sought costs under § 3148(1), the trial court's order stated that costs were awarded under MCR 2.625, MCL 600.2164, and MCL 600.2405.

MCR 2.625 provides, in pertinent part:

> (A) Right to Costs.
>
> (1) *In General.* Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

[2] In light of this decision, it is unnecessary to address AAA Michigan's alternative argument that the trial court erred in finding that any delay in making proper payment was unreasonable.

> (2) *Frivolous Claims and Defenses.* In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.

Although plaintiff argues on appeal that AAA Michigan's defense was frivolous, thereby entitling her to actual costs under MCR 2.625(A)(2) and MCL 600.2591, plaintiff did not seek costs under those rules below, nor did she argue that AAA Michigan's defense was frivolous. More importantly, the trial court never made any finding that AAA Michigan's defense was frivolous. Thus, there is no basis for concluding that the trial court relied on MCR 2.625(A)(2) when it awarded costs.

MCL 600.2164 provides that expert witness fees may be taxed as costs, and MCL 600.2405 provides a list of generally taxable items (several of which are not applicable here). In this case, however, plaintiff's list of requested costs included several items that are not included within these categories. Further, the trial court awarded plaintiff *all* of her requested costs without distinguishing between them or specifying which costs were taxable under MCR 2.625(A)(1). Accordingly, we vacate the trial court's award of costs and remand for further proceedings to determine which costs are allowable taxable costs under MCR 2.625.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Christopher M. Murray