STATE OF MICHIGAN

COURT OF APPEALS

KEVIN WAYNE BENNETT,

Plaintiff-Appellee,

v

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
June 16, 1995

No. 154398
LC No. 89-911271-CK

Before: Jansen, P.J., and White and M.J. Talbot,* JJ.

PER CURIAM.

Defendant appeals as of right from a jury verdict in plaintiff's favor in this breach of contract action for no-fault personal injury protection (PIP) benefits. We vacate the jury's verdict of $204,700 for allowable expenses for reasonably necessary accommodations, and we vacate the award of attorney fees and mediation sanctions.

Plaintiff was injured in an automobile accident on December 22, 1988, and was rendered a C-6 quadriplegic. Plaintiff was hospitalized in various hospitals for his injuries until April 7, 1989. Thereafter, plaintiff continued to receive outpatient therapy and has received twenty-four-hour home care services from his wife, Sandra Bennett, and nursing attendants. Defendant paid the home-care nursing bills.

At the time of the accident, the Bennetts were renting, with an option to buy, a two-story house of approximately 1,000 square feet of space. Because of the layout of the house, medical personnel would not release plaintiff until appropriate living facilities had been secured. Sandra found an apartment deemed suitable. Defendant paid the difference in the rent ($230 per month). Because the apartment was less than ideal for plaintiff's needs, efforts were made to find a more desirable home. Defendant's representatives indicated that they would be willing to modify any home that the Bennett's chose to move into or build.

Plaintiff met with Henry Zabrowski, a residential builder, to discuss the possibility of building a new house. Zabrowski's proposal called for a house of 2,628 square feet at a cost of $190,700 to $204,000. Defendant's claims representative, however, met with Sandra regarding the possibility of buying a modified modular house of 1,500 to 1,800 square feet. Because a recommendation of a home visit report indicated that plaintiff could live in a modified modular house, defendant's claims representative declined to accept the Zabrowski proposal because plaintiff requested that defendant pay the entire amount of the new house.

Plaintiff filed suit in the Wayne Circuit Court against defendant, his no-fault insurer, claiming breach of contract by failing to timely pay certain medical and home care bills and that defendant was obligated to fully pay for the construction of a new barrier-free and handicap-accessible house. Plaintiff alleged that defendant had failed to advance the funds for the construction of the house. Judgment was entered on a special jury verdict form, awarding plaintiff $1,116 for overdue or unpaid benefits and

* Circuit judge, sitting on the Court of Appeals by assignment.

statutory interest, MCL 500.3142; MSA 24.13142, and $204,700 in benefits for construction of a new barrier-free home, which the jury found to be an allowable expense for reasonably necessary accommodations under MCL 500.3107; MSA 24.13107. The trial court orally awarded plaintiff attorney fees under MCL 500.3148; MSA 24.13148, and mediation sanctions under MCR 2.403(O). Defendant appeals, challenging its liability for constructing a new house, for expenses not yet "incurred," and for attorney fees and mediations sanctions. Defendant does not challenge the award of $1,116 for overdue benefits. We vacate the award of $204,700, and the award of attorney fees and mediation sanctions.

The first issue raised by defendant is whether "an insurer's obligation to pay personal protection insurance benefits for reasonable charges for reasonably necessary accommodations require[s] an insurer to pay for the entire cost of a new home for an insured, ownership of, and title to, which would belong to the insured." We must agree with plaintiff that this issue has not been properly preserved for appeal.

Defendant contested the reasonableness of plaintiff's request as being a factual issue for the jury to determine. Defendant never asserted the issue as one of law. The trial court cautioned against asking the jury to rule on a legal issue, however, it was defendant's position that plaintiff could not recover damages with respect to the house because no such expenses had been incurred. Defendant argued that the proper vehicle for presenting such a claim was a suit for declaratory judgment. Defendant was content to permit plaintiff to amend the complaint at that point. Plaintiff declined to amend, asserting that the benefits were in fact incurred because plaintiff's doctors had determined that he needed special facilities.

Because defendant never properly raised this issue as being one of law below, we find that it has not been preserved for appeal and we decline to review it. Booth Newspapers, Inc v Univ of Michigan Bd of Regents, 444 Mich 211, 234-235; 507 NW2d 422 (1993).

Defendant's next two issues are related. Defendant argues that plaintiff failed to seek a declaration of rights, preferring to maintain a breach of contract suit. Defendant argues that the result should not be changed into a declaratory judgment action after the fact because the jury expressly found that plaintiff had incurred no allowable expenses. In this regard, defendant also claims that the jury's answers on the verdict form were inconsistent because it found that plaintiff had incurred no allowable expenses, but awarded plaintiff $204,700 as allowable expenses for reasonably necessary accommodations.

We agree with defendant that a declaratory action would have been a more appropriate form of pleading in this case. We find dispositive that the jury returned a verdict tantamount to a declaration of rights, which entailed the determination of a mixed question of law and fact. The jury's verdict was legally inconsistent because it found that plaintiff had incurred no allowable expenses (a declaratory judgment), but awarded plaintiff money damages as allowable expenses for reasonably necessary accommodations. Because no allowable expenses were incurred, as a matter of law no money judgment may enter.

MCL 500.3107(1)(a); MSA 24.13107(1)(a) provides in pertinent part:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. . . .

The statute requires that three factors be met before an item is an allowable expense: (1) the charge must be reasonable, (2) the expense must be reasonably necessary, and (3) the expense must be incurred. Nasser v Auto Club Ins Ass'n, 435 Mich 33, 50; 457 NW2d 637 (1990); Davis v Citizens Ins Co, 195 Mich App 323, 326; 489 NW2d 214 (1992). "Where a plaintiff is unable to show that a particular, reasonable expense has been incurred for a reasonably necessary product and service, there can be no finding of a breach of the insurer's duty to pay that expense, and thus no finding of liability with regard to that expense." Nasser, supra, p 50.

In the present case, plaintiff presented no evidence that the services of building a new house were actually incurred. As this Court has stated, defendant is not obliged to pay any amount except upon submission of evidence that services were actually rendered and of the actual costs expended. Moghis v Citizens Ins Co, 187 Mich App 245, 247; 466 NW2d 290 (1991). The jury's verdict that no allowable expenses had been incurred should have been given its legal significance. Because no allowable expenses had been incurred, as found by the jury, defendant was not obligated to pay any amount. Thus, the money judgment in the amount of $204,700 should not have been entered.

We note that the present case is distinguishable from Manley v DAIIE, 425 Mich 140; 388 NW2d 216 (1986). In Manley, the trial court had entered a declaratory judgment determining amounts payable in the future before the expense was actually incurred. The Supreme Court stated that while the insurer is required to pay only necessary allowable expenses actually incurred, a trial court is not precluded from entering a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed. Such a declaration does not oblige the insurer to pay for the expense until it is actually incurred and the insurer receives a bill of service. Id., p 157.

In the present case, there was no declaratory judgment determining that the building of a new house was both necessary and allowable. Rather, the jury found that there had been no allowable expenses incurred. Therefore, we must vacate the money judgment in the amount of $204,700.

Defendant next argues that the trial court should not have awarded attorney fees to plaintiff. This Court technically lacks jurisdiction to review the award of attorney fees to plaintiff because there is no final judgment or order from which to appeal. MCR 7.203. That is because the trial court verbally ruled that plaintiff was entitled to no-fault attorney fees in the amount of $19,000, but there is no judgment or order finalizing this ruling. The judgment does not reference the trial court's ruling regarding attorney fees. However, because we have vacated the jury verdict of $204,700 and because the trial court's ruling is a matter of record and it appears that the order was not inadvertently entered, we will address the merits of the issue.

Given the nature of plaintiff's claims, defendant's offers with regard to the modular home, and the dispute regarding the statutory requirement that expenses be "incurred," defendant's refusal to pay for the house was not unreasonable so as to trigger statutory attorney fees. MCL 500.3148(1); MSA 24.13148(1); Gobler v Auto Owners Ins Co, 428 Mich 51, 66; 404 NW2d 199 (1987). We, therefore, vacate, the award of $19,000 in attorney fees for plaintiff.

Last, defendant argues that the trial court erred in awarding mediation sanctions. We again note that the trial court orally ruled on this issue only. The trial court ruled that plaintiff was entitled to mediation sanctions in the amount of $12,000. There is no written order or judgment incorporating this ruling. The judgment does not include reference to the court's ruling regarding mediation sanctions. Accordingly, we are without jurisdiction to determine this issue as there is no final judgment or order. MCR 7.203. However, because of our determination regarding the jury's money judgment and because the trial court's ruling is a matter of record and does not appear to be entered inadvertently, we will address the merits of the issue.

The mediation award was $125,000 for plaintiff. Both sides rejected. In light of our decision to vacate the jury's award of $204,700, plaintiff was awarded $1,116 by the jury that is not being contested on appeal. Thus, the award of $1,116 is more favorable to defendant than the mediation evaluation. Therefore, because plaintiff rejected the mediation evaluation and the jury's award, as modified, is not more favorable to plaintiff than the mediation evaluation, plaintiff is not entitled to mediation sanctions. MCR 2.304(O)(1). We, therefore, vacate the award of mediation sanctions in plaintiff's favor.

The jury's verdict of $204,700 as an allowable expense for reasonably necessary accommodations is vacated. The trial court's awards of $19,000 in attorney fees and $12,000 in mediation sanctions in plaintiff's favor are also vacated.

/s/ Kathleen Jansen
/s/ Michael J. Talbot

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WHITE, J. (concurring in part and dissenting in part)

I agree that the $19,000 award of attorney fees under the no-fault statute should be vacated, and that plaintiff should not be awarded mediation sanctions. However, I dissent from the majority's vacating the jury verdict of $204,700. I would affirm in part, reverse in part, and remand.

Following plaintiff's December 22, 1988, accident, he was hospitalized first at Oakwood Hospital, then University of Michigan Hospital, and finally at St. Joseph Mercy Hospital. Plaintiff was discharged from St. Joseph Mercy Hospital on April 7, 1989, but his treaters there would not discharge him to the home he and his family were renting. Mrs. Bennett and the two Bennett children moved to a barrier-free apartment on April 1, 1989. Defendant paid the moving expenses and paid the difference in rental between the apartment rental rate and the amount the Bennetts had paid for renting their prior home. The Bennetts still lived in this apartment in January, 1992, when this case was tried.

At trial, plaintiff advanced two claims: 1) that defendant had failed to timely pay certain medical and home care bills, and 2) that defendant was obligated to fully pay for the construction of a new barrier-free and handicap-accessible house for plaintiff and had failed to advance the funds for the home's construction.

After the jury was sworn, defense counsel moved for summary disposition, arguing that the jury had nothing to decide, since under the no-fault act first party benefits are not due and owing until incurred, and plaintiff had not incurred any expenses because no house had been built. See MCL 500.3107, supra. The following colloquy transpired:

> MR. KILLEEN [Defense Counsel]:
>
> * * *
>
> There is nothing at issue for the jury to decide. He has not incurred any expenses in building a house as far as I know, therefore, bills are not due and owing until they are incurred. If nothing is incurred there is nothing for this jury to hear.
>
> I don't want to have plaintiff's claim dismissed and have to refile and start all over again. I would prefer that the plaintiff be allowed to amend his complaint to make

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this a declaratory action and the jury be then asked to determine whether or not under no fault defendant insurance company has an obligation to build an injured a home.

THE COURT: You don't want the jury to get into the area of passing on a legal issue, do you?

MR. KILLEEN: No I don't and I don't think that they will. The statute discusses reasonable accommodations. In this case plaintiff has made a proposal that he wants a house built. He wants the auto club to pay the costs of the building of that house. I think that as a factual issue whether or not the defendant owes that, whether or not that claim is reasonable, and reasonable is what the statute requires. But, the statute also goes on to say nothing is owed until it is incurred.

THE COURT: What are you suggesting we do?

MR. KILLEEN: I suggest plaintiff amend his complaint and make this a declaratory action so there is something this jury can hear. Right now there is nothing the jury can decide.

MR. WEILER [Plaintiff's Counsel]: It sounds to me Mr. Killeen is making a motion for summary disposition. I believe that's what you're doing essentially. At the same time he's saying no, I don't really want it dismissed, I want him to amend it and change the character of the action to a dec action. His interpretation of the statute is different than mine.

Secondly, I think the Court should be aware one of the primary purposes of bringing this motion is so that, should the jury find that AAA is obligated to build a home, they get out of the statutory penalties provided by the failure to build a home before this lawsuit was brought and under the statute if they refuse to pay any expenses that have been incurred they are liable to [sic] some sanctions including attorney fees and statutory interest. By making it a dec action he is avoiding those sanctions.

It is unreasonable to assume that the legislature [sic] intended one to go out and build a home, barrior [sic] free home that could cost tens of thousands of dollars and then say okay, okay, AAA, will you pay for it? I think that's taking the word incurred a little too far.

This doctor, the plaintiff's doctor has said he needs different accommodations. They list what is needed in those accommodations. The physical therapist has listed what is needed in those accommodations. She is an occupational therapist, listed what is needed in those accommodations. Based upon those recommendations a house plan was developed. We came up with an overall plan that costs X amount of dollars. For all practical purpose that expense has been incurred.

To make my client put out X amount of dollars and then have that bill be incurred is ludicrous.

* * *

MR. KILLEEN: Unfortunately that's exactly what the statute says. That is exactly what the cases say. That it must be incurred and incurred you have to have incurred an obligation to pay. At this point they have not incurred an obligation to pay.

It may be unreasonable to expect someone to go out and spend the money to build a house and hope payment is made later on. Unfortunately, that's what the law says, it must be incurred.

There is nothing due and owing because nothing has been incurred by them.

I am opposed to summary disposition. I don't, however, want to deny these people their day in court and certainly the arguments, well, defendant is --

THE COURT: He says he doesn't want to make a dec action out of it.

MR. KILLEEN: That is up to him. I have a motion for summary disposition because nothing is incurred. If he doesn't amend his complaint I can't force him and encourage him. I just as soon, if the Court rules nothing has been incurred, this case has been dismissed, they can go and refile and two or three years from now we can come back.

* * *

MR. WEILER: I have presented Mr. Killeen with estimates what it would take to build this house. I provided him with that back in, I believe, January of 1990. He has had estimates.

THE COURT: Have you signed a contract with anybody to build it?

MR. WEILER: No, because we are –

THE COURT: Why don't you do that between now and tomorrow and we will get moving.

MR. KILLEEN: Unfortunately, still nothing is incurred.

MR. WEILER: That's my problem. He would have us go out and build a house on the chance we may end up with the same outcome or them saying it is unreasonable and we are not paying for it.

I should point out throughout the course of this litigation we have been making in roads, like, we are going to have some type of house built.

THE COURT:

* * *

What happens if we make it a dec action? What limitation does that put on you?

* * *

MR. KILLEEN: The gist of the whole conversation I take it from plaintiff's point of view is he is unwilling to proceed in a dec action because there's a concern that if he does so he waives any penalty interest for a bill that is beyond 30 days old.

MR. WEILER: That's one of my --

MR. KILLEEN: If it's not incurred it certainly can't be over 30 days old. He is really not leaving anything.

The court denied defendant's motion for summary disposition and trial continued.

Plaintiff established his injuries through the deposition testimony of a treating physician, Dr. Maynard, a faculty member at University of Michigan, specializing in physical medicine rehabilitation. Plaintiff is a C-6 quadriplegic. His condition is permanent.

Plaintiff also called Henry Zaborowski, the builder who drew up preliminary plans for a new home at the Bennetts' request. Zaborowski testified that his plan [the Zaborowski plan] was for a 2,628 square foot (excluding basement's square footage) barrier-free and handicap-accessible new home at a cost of $190,700, with an optional elevator to the basement and chairlift which would add $14,000 and $7,000, respectively, to the $190,700 figure.[1] The plan was for three bedrooms, two baths, a family room, a dining room, a kitchen and an attached oversized garage.[2] The plan also included a 600 square-foot deck, a fireplace, a jacuzzi in the master bathtub, five-foot wide hallways, and a basement, items not specifically recommended in an occupational therapist's report evaluating the Bennetts' apartment. Zaborowski testified that he added the deck so that plaintiff could enjoy the outdoors, the jacuzzi because plaintiff needs a larger tub because of his size and because many people in a wheelchair enjoy the benefits of a whirlpool, and the fireplace because the Bennetts asked for one. The five foot hallways and larger room sizes were to enable plaintiff to move freely about the home.

Paula Kartje, an occupational therapist at University of Michigan Medical Center who oversaw Bennett's occupational therapy and supervised his occupational therapist, testified that she conducted a home-study evaluation of the Bennetts' apartment on October 23, 1989, with the approval of Dr. Maynard. Kartje's report, issued December 1, 1989, was admitted into evidence at trial. It contained three sections: 1) Problems with the current living situation; 2) Plaintiff's current functional level; and

3) Recommendations for the optimal environment for plaintiff to function independently. Kartje's report stated:

> The family is currently living in a barrier-free apartment, however, there are many inaccessible and/or problematic areas identified which are significantly limiting his functional potential as well as the family's ability to function as a unit.

Kartje's report made a number of recommendations including recommending a fully accessible primary entrance, a second emergency exit, turning platforms on access ramps, and that the living area be spacious enough for use for family and leisure activities, have at least one five-foot turning circle and room to maneuver between furniture. Kartje made further recommendations as to the bathroom and kitchen, and for safety modifications and climate control. Kartje's report did not recommend that plaintiff have a new home constructed; rather it addressed problems with the apartment.

At trial, Kartje explained the different meanings ascribed to the terms "handicap-accessible" and "barrier-free." Handicap-accessible means meeting the minimum requirements for someone who is handicapped to enter. Barrier-free means not only the ability to enter, but also free access to the different areas in the building. Kartje testified that a barrier-free environment would be necessary to enable plaintiff to achieve maximum recovery potential. Kartje also testified that plaintiff has long legs requiring extra space in front of his wheelchair.

On cross examination, Kartje testified that the basement and fireplace included in the Zaborowski plan were not necessary for plaintiff's recovery. On redirect she answered "No" to the question whether there was anything else about the Zaborowski plan, other than the fireplace, that she would eliminate as not being necessary for plaintiff to obtain an optimal environment.

At the close of plaintiff's proofs,[3] defense counsel, relying on Moghis v Citizens Insurance Company, 187 Mich App 245; 466 NW2d 290 (1990), moved for directed verdict on the basis that plaintiff presented no testimony that any costs for the house had been incurred or expended. Plaintiff's counsel responded that Moghis dealt with a declaratory judgment for future expenses for aide care, and, relying on MCL 500.3142, that "the Statute does not say incurred it says accrued and I believe that the definition of those particular words is different" and "we had ample testimony the expense has accrued." The version of MCL 500.3142 in effect when plaintiff's complaint was filed stated in pertinent part:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) 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 . . .
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum. [Emphasis added.]

Defense counsel relied on the language of §3107, referring to "reasonable charges incurred."

The trial court discussed Moghis, Tennant v State Farm Insurance Co, 143 Mich App 419; 372 NW2d 582 (1985), Sharp v Preferred Risk Insurance Co, 142 Mich App 499, 511; 370 NW2d 619 (1985), and the relevant statutory provisions and denied the motion, stating:

> The fascinating part of reading the case law in this matter . . . I am left with the impression that this issue of constructing a barrior-free [sic] home or a home that if not barrior-free [sic], at least it will accommodate the party requesting the same, there [sic]

no instances where I am aware of where the Court has made a determination that the party requesting such relief must first of all find the means of expending funds that he has or getting someone else to provide him with the funds or, in the alternative, society providing such a protection and the insurance company ultimately making the payment.

It seems to this Court that as I read these decisions, and I am trying to really understand what would be fair, just and equitable, that the loss has incurred when, in this case, we find that both sides have produced evidence that indicates that the plaintiff does need such an accommodation, that if not completely barrior-free [sic], at least is barrior-free [sic] to the extent that it assures him that he will be protected and safe in that environment and he will have the type of housing that will accommodate him residing at home.

It is my opinion that once that decision has been made that that is in the best interest. Then, the issue resolves itself down to how much of the requested type of protective housing, barrior-free [sic] housing, would be fair, just and equitable in the interest of the parties.

Each of you to the present time has produced an expert that states what they believe would satisfy the requirement of accommodations that meets the needs of this plaintiff. At that point it would seem to be ludicrous to reach the conclusion that because he hasn't already paid for it, that it is not incurred as a practical matter. It has been incurred as a result of the physical problems that are directly attributable to an injury that he received for which he was insured.

If I were to rule otherwise I would in effect be saying that if you don't have the means of financing your early on recovery, then you are not entitled to any type of benefit under the no-fault law and, I certainly don't want to make that type of a decision in this matter.

The case law that has been cited to me primarily has to do with, first, what medical benefits, what aid care has been required. In each instance in those cases, as far as this particular plaintiff is concerned, they have been paid subsequent to it because the parties providing that service have agreed they would provide the service before they paid for it and that's been the ongoing process.

We now find that the plaintiff is in a position where he is negotiating to acquire housing or accommodations that meet his needs to function within that particular material home.

Now the amount without question is in dispute and is properly in dispute but the necessity of providing that, there can be no, up to the present time, based on the testimony I heard, I must deny your request for a summary disposition or a directed verdicted [sic] in this matter ...

The defense called Edwina Schuelke, the claims specialist who handled plaintiff's claim from November 1989 on. Schuelke testified that in June 1990 she received for the first time, from plaintiff's and defense counsel, the Zaborowski plan and price list proposal for construction of a new home. Schuelke testified that she, on behalf of defendant, had offered to pay for modifications to any home or apartment the Bennetts chose.

Schuelke testified that she learned through Dr. Maynard in May of 1989 and through conversations with the Bennetts that they were interested in purchasing a modular home. Schuelke met with Wonderland Modular Home Facility, which builds and designs modular homes, in early 1991 and had Kartje's report with her. They discussed whether a modular home could be modified to meet plaintiff's needs. In February 1991, Schuelke made a second trip there with Mrs. Bennett, at which time

they met with the builders, reviewed all the plans and the occupational therapist's recommendations, and the builder "reiterated all the things that could be done and how all the needs could be met." An occupational therapist employed by defendant went on one of these trips.

Schuelke testified that she deemed plaintiff's Zaborowski plan unreasonable and rejected it because

> you don't need to build a 2,600 square foot home to implement these modifications and also [because] the Bennett's [sic] had constantly indicated to us they were interested in placing a modular home on their land
>
> * * *
>
> and we could implement the modifications in the modular home.

Schuelke testified that although she could not testify as to what size home could be modified, in her experience defendant had placed additions of 420 to 500 square feet to modify homes for quadriplegics on, as one example, a 1,200 square foot home at a cost of about $40,000.

Debra Slattery, the occupational therapist employed by defendant, testified that the recommendations made in Kartje's evaluation of the Bennetts' apartment could be performed in virtually any living environment; on houses, apartments, and modular homes and those smaller than 2,600 square feet. Slattery testified that she and Schuelke spoke to a representative of the modular homes builder regarding Kartje's report and recommendations. They determined that the modifications could be made if the Augusta modular home model of about 1500 square feet were expanded to 1,800 square feet and Slattery believed the modular home so modified could meet plaintiff's needs. Slattery testified that in her experience as an occupational therapist handling cases like plaintiff's for insurers it

> never . . . went from that something was unsuitable to building of a home. There seems to always have been in all the cases I have done, we have looked at other homes that would be suitable and having those modifications done.

Called by defendant as an adverse witness, plaintiff testified that he and his family had not moved out of the apartment because he could not afford to move. Plaintiff also testified that he bought a parcel of land in Irish Hills soon after he got out of the hospital, and that he discussed it with the claims specialist handling his case at the time, a Mr. Hankamp. Plaintiff testified that Mr. Hankamp told him that "if we purchased a plot of land they would help us finance the house on whatever we decided to build."

Pursuant to the jury verdict form agreed on by counsel, the jury by special verdict found that plaintiff's claim for construction of a new home was an "allowable expense" defined in the form as "reasonable charges for reasonably necessary accommodations for the plaintiff's care, recovery and rehabilitation" (Question 1); that no allowable expenses had been incurred by plaintiff (Question 2); that plaintiff was entitled to recover 12% interest, i.e., $216, on overdue or unpaid benefits (Question 3); that the amount of benefits plaintiff was entitled to was $204,700 for reasonably necessary accommodations, $900 for overdue or unpaid benefits, and $216 in interest on late payments, totaling $205,816 (Question 4).

I

Defendant argues that its obligation to pay PIP benefits for reasonable charges for reasonably necessary accommodations does not extend to paying "for the entire cost of a new home for an insured, ownership of, and title to, which would belong to the insured." I agree with the majority that defendant is precluded from arguing in this Court that it has no such obligation as a matter of law because it took

the position at trial that the question was one of fact for the jury. While defendant contested the reasonableness of plaintiff's request, it never asserted that the issue is one of law and, rather, expressly stated that the question was one of fact for the jury. (See pages 2-3 supra). Defendant repeatedly took the position that plaintiff was not entitled to recover benefits because he has not incurred an expense, but that the question whether the benefit sought was an allowable expense (assuming a properly pled declaratory action) was a factual question for the jury. The majority arrives at this conclusion as well, but then goes on to vacate the jury verdict, holding that no money judgment may enter because no allowable expenses were incurred. I do not agree.

After the jury was selected, defense counsel sought summary disposition asserting that plaintiff could not recover damages with respect to the house under his claim for allowable expenses because no such expense had been incurred. Counsel conceded that the issue whether defendant was liable under the no fault act for benefits to cover the cost of constructing the house designed by Zaborowski was ripe for adjudication and was a question for the jury to determine, but argued that the proper vehicle for presenting such a claim was a suit for declaratory judgment. Defense counsel was content to permit plaintiff to amend the complaint at that point. Apparently, the dispute revolved around the question whether benefits were owing before they were actually incurred for purposes of the interest and attorney fee provisions of the no fault act. Plaintiff's counsel declined to amend, asserting that the benefits were in fact incurred because plaintiff's doctors had determined that plaintiff needed special facilities.

The court declined to dismiss plaintiff's case, concluding that the law does not require that the expense be incurred before the benefit is owing. While I agree that a declaratory action would have been the most appropriate form of pleading, I conclude that the dispute here elevates form over substance, and that given the positions taken by the attorneys, the trial court did not err in permitting the case to go to the jury based on its conclusion that an injured person whose need for special accommodations is undisputed need not actually incur the expense of obtaining those accommodations before the injured person can seek benefits under §3107. That is, an injured person may pursue a claim for benefits for an allowable expense if the person can show that such an expense is reasonable and necessary given the person's condition, although the expense has not yet been incurred by the person in the sense that no money has been advanced and the necessary services have not yet been rendered. The action is declaratory in nature, but an actual amount can be determined. The money will then be due when the necessary accommodation is actually provided. Manley v DAIIE, 425 Mich 140; 388 NW2d 216 (1986); Kondratek v Auto Club Ins Assoc, 163 Mich App 634; 414 NW2d 903 (1987).

In effect, the majority concludes that since the jury found that the expense was not "incurred," and the action included no declaratory count, the judgment must be vacated. However, in the instant case the question whether the expense was "incurred" was a legal question inappropriate for jury submission and irrelevant to the real dispute between the parties. Further, the questions of reasonableness and necessity were fully tried and were submitted to and decided by the jury.[4] It is not argued by defendant that the issues of reasonableness and necessity would have been presented differently had plaintiff acceded to defense counsel's request that he be required to amend to plead a declaratory action. It is unclear whether if plaintiff had orally amend his complaint when invited to do so and if everthing else thereafter transpired as it did, the majority would vacate the award or would merely require that the expense be incurred before the money is paid.

The majority also concludes that jury verdict is "legally inconsistent," apparently irreconcilably so. However, it seems clear that the jury concluded that the $204,700 expense was reasonable and allowable, as set forth in the verdict form, but that it had not yet been incurred because the house had not yet been built and plaintiff had not yet spent the money. It is not necessary that the case be retried based on this verdict. The Supreme Court in Manley held that the trial court was not precluded from entering a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed. Manley, supra at 157.

Under Manley, I would permit the portion of the jury's verdict in the instant case that is declaratory in nature, i.e., that plaintiff is entitled to $204,700 in allowable expenses for the construction of the Zaborowski plan home to stand, while applying Manley's holding that the insurer's obligation to pay for any expense does not arise until the expense is actually incurred. Id. at 157. Thus, I would remand for modification of the judgment to so provide.[5] I would also direct that the trial court reduce the amount by $4,500, representing the cost of the fireplace, for which there was no evidence of need.

Defendant further argued that under Kitchen v State Farm Insurance Co, 202 Mich App 55; 507 NW2d 781 (1993), a case decided subsequent to the trial court's decision, defendant is not obligated to construct a new home for plaintiff, the title to which would vest with plaintiff.

In Kitchen, the issue presented was who would hold title to a house built to accommodate the injured six year old. After the injured child's physicians determined that special housing accommodations were required for her long term needs, the parties stipulated that the defendant would provide $17,332 toward the purchase of lots and that the defendant would pay $239,782.41 and the plaintiffs $68,561.41 for construction of the home. The respective ownership interests were left for future determination. Plaintiffs appealed after the trial court entered an order providing, among other things, that an independent neutral corporate trustee would hold the real estate in trust for the injured child for her lifetime, and further providing that the family had to pay maintenance and utilities costs for the new home while they lived in the home. Id. at 58-59. This Court affirmed, stating:

> It is undisputed that the new house will provide reasonable and proper accommodations to [the injured] Elisha, as required by MCL 500.3107(a). . . and in addition will house the Kitchen family. As defendant notes, however, no one has ever suggested that it is necessary for Elisha's care that she hold legal title to the home in which she lives. We agree with defendant that as long as it satisfies its statutory obligation to pay for all reasonable charges incurred . . . defendant should be allowed to choose the least expensive adequate means of providing those items. This is completely consistent with the goal of the no-fault insurance system, which is to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses at the lowest cost to both the individual and the no-fault insurance system. . . . Declining to award Elisha unencumbered legal title to a home in which defendant has a quarter-million-dollar investment . . . operates as a cost-containment measure that benefits the no-fault insurance system. [Id. at 59.]

While I conclude that defendant failed to preserve the issue whether, as a matter of law, plaintiff's demand that it pay for the construction of a new home is unreasonable by its affirmative statements in the trial court that the question was one of fact for the jury, I nevertheless conclude that in light of this Court's decision in Kitchen, justice would require remanding with directions that the trial court address the issue of the proper form of legal title to the home.[6]

I agree with the majority that the $19,000 attorney's fees awarded under §3148 should be vacated, but would have permitted the trial court to award an appropriate fee for plaintiff's efforts in obtaining payment of the $900 determined to be owing. Further, in view of this Court's decision in Kondratek, supra, and the spirit behind MCR 2.403(O)(5), I conclude that neither side should be awarded mediation sanctions in the instant case.

Lastly, I observe that although the majority does not so state, presumably plaintiff is free to commence a declaratory action, or another action like the instant one when the expense is actually incurred.

I would affirm in part, reverse in part and remand.

/s/ Helene N. White

[1] The jury found that allowable expenses for reasonably necessary accommodations totaled $204,700, apparently incorporating the elevator into the cost of the home's construction, but not the chairlift.

[2] Zaborowski testified that the garage, which the defense characterized as a three-car garage, was four hundred square feet larger than the average (480 square feet) to accommodate a handicap van. He testified that he guessed you could fit three cars in there if you put one on an angle.

[3] For the convenience of the court and jury, the motion was actually argued after defendant began its proofs.

[4] Defense counsel effectively conceded this in his argument to the trial court regarding attorney's fees:

> MR. KILLEEN: Your Honor, if you will recall, this was a case where the plaintiff was asking for future no-fault benefits. They pled this under a standard breach of contract action.
>
> I brought a motion for summary disposition. You will recall we argued before the trial and also at my motion for directed verdict that this really should have been pled as a declaratory action.
>
> The jury returned a verdict finding that the plaintiffs [sic] claim for allowable expenses concerning his reasonable accommodations were reasonable. However, the second question on the verdict form was what benefits if any were incurred, they answered none.
>
> So, the jury returned a declaratory verdict.
>
> In addition, they found there was one medical bill, I think, in the amount of $900 that was due and owing and $200 in interest.
>
> So, the actual judgment should be in the amount of $1,000 and a declaratory judgment that the plans submitted by the plaintiff were reasonable but not a dollar amount. They found nothing was incurred. There is nothing owed until it is incurred. The jury found there was no incurred benefits. [Emphasis added.]

[5] Under Manley, I would direct that the judgment be modified to provide that the amount is payable as the accommodations are actually built. At oral argument, it was suggested that the home has in fact been built. If this is the case, plaintiffs should be required to provide evidence that the actual cost was as predicted by Zaborowski.

[6] I would instruct that the court address the question of title and the parties' relative interests in the house, taking into account amounts expended by the Bennetts on the land and any amounts expended in excess of the amount awarded by the jury. The parties or the court could explore the question whether the value of the parties' interests in the house as determined by the court could be reduced to a present value figure so that the parties could resolve their dispute finally at this time.