

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES D. LABS, JR.,

Plaintiff-Appellee,

v

AMERICAN ECONOMY INSURANCE
COMPANY,

Defendant-Appellant.

UNPUBLISHED

October 7, 1997

No. 197220

Kalamazoo Circuit Court

LC No. 95-739 NZ

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

In this no-fault action, defendant insurer appeals as of right the order of the circuit court granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). We vacate and remand for further proceedings consistent with this opinion.

The present dispute concerns whether certain expenses incurred by plaintiff insured constitute "allowable expenses" under the no-fault act, MCL 500.3107; MSA 24.13107, for which defendant insurer is obligated to reimburse plaintiff. The circuit court concluded that the expenses presently in issue were allowable and, accordingly, granted summary disposition in favor of plaintiff. Our review is de novo. *Pinckney Community Schools v Continental Casualty Co.*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

As explained in *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990), quoting *Manley v DAIIE*, 425 Mich 140, 169; 388 NW2d 216 (1986) (Boyle, J., concurring in part), an insured asserting that he has incurred an "allowable expense" under the no-fault act has the burden of demonstrating (1) that an expense has been incurred, (2) that the expense is reasonably necessary to the insured's care, recovery, or rehabilitation, and (3) that the charge is reasonable.

In the present case, the circuit court failed to distinguish between these distinct elements, seemingly concluding that if, for example, there was evidence that a particular activity or procedure was medically necessary, then it necessarily followed that the charge subsequently incurred for that activity was reasonable. This approach was improper. The insured bears the burden of submitting evidence that each of the three requirements set forth in the preceding

paragraph has been satisfied with respect to each expense for which reimbursement is sought. *Nasser, supra*. Therefore, we vacate the order appealed and remand with instructions that the court consider whether each expense submitted by plaintiff is supported by evidence that it has actually been incurred, that it is medically necessary, and that the charge itself is reasonable. Only if there exists no genuine factual issue with respect to a particular expense is summary disposition with respect to that expense appropriate. MCR 2.116(C)(10).

Further, in light of the fact that defendant has emphasized the particular expense of plaintiff's apartment, we would emphasize that this expense, too, is subject to the same requirements as all other expenses.

Defendant also raises a handful of ancillary issues which we now address briefly. Because defendant failed to raise below the question whether the affidavit of plaintiff's case manager was based on her personal knowledge, defendant has failed to preserve the issue for review. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Defendant may, however, raise this issue on remand before the circuit court. Similarly, defendant may again submit pursuant to MCR 2.116(H)(1) an affidavit to the circuit court if the alleged discovery difficulties of which defendant complains persist, and the court may, in its discretion, respond as it deems appropriate. MCR 2.116(H)(2). Finally, because we have vacated the order appealed, defendant's arguments concerning the circuit court's awards of penalty interest and attorney fees in favor of plaintiff are moot.

Vacated and remanded. Jurisdiction is not retained.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage