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COURT DISCUSSES PROOF NECESSARY TO ESTABLISH ATTENDANT CARE CLAIM

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In *New Start, Inc, et al v State Farm*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2008 (Docket Nos. 277474; 279157), the court upheld the trial court's granting of a defense motion for summary disposition on plaintiff Daniel O'Connell's claim for PIP benefits. Specifically, plaintiff O'Connell claimed that the trial court erroneously granted summary disposition with respect to his claim for PIP benefits for attendant care services provided by his sister-in-law, Margaret Young O'Connell. Plaintiff O'Connell argued that it was not necessary that formal documentation of this claim for attendant care be submitted to defendant State Farm in order to satisfy the requirement of "reasonable proof" in MCL 500.3142(2).

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MCL 500.3142 provides:

- (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...

The court noted that what constitutes "reasonable proof" under the statute depends on the type of benefit sought. Although "exact proof" of the amount of loss is not required, the insured has only 30 days to challenge or investigate the claim once reasonable proof is provided. Of course, the filing of a lawsuit can trigger the 30-day period if the lawsuit provides notice of the amount of loss sustained and proof of the fact of loss is also provided.

The court also noted that although one generally becomes liable for payment of services when the service is rendered, an insured does not incur attendant care expenses unless the attendant care provider expects compensation for those services. *Burriss v Allstate*, 480 Mich 1081 (2008). Clearly, an insurer has no obligation to pay for an expense until that expense has actually been incurred. The court further noted that payment for attendant care benefits is payable by the insurer to or for the benefit of the injured person. The court found that plaintiff O'Connell failed to show a genuine issue of material fact with respect to whether any PIP benefits were overdue. Defendant State Farm had made payment directly to Margaret and her husband for attendant care services for a period ending in July 2003; however, plaintiff O'Connell had not presented any admissible evidence showing reasonable proof of his liability to pay for Margaret's attendant care services in any amount since September 2003, more than one year before the complaint was filed. The plaintiff argued that information in defendant's activity log regarding conversations between the claims representative and case manager demonstrated reasonable proof of the loss; however, the court found that there was nothing about this information that should have triggered an investigation by State Farm into whether it should make or deny payment to O'Connell or to Margaret on his behalf for Margaret's alleged attendant care services.

The court further held that there was nothing in the original or amended complaint that could be construed as providing the requisite reasonable proof of loss. For example, Margaret was not named as a plaintiff or claimant in the complaint. Margaret's deposition testimony one year after the amended complaint was filed did not help O'Connell's position because even though she testified that she provided attendant care services, she also testified that she expected to be paid by plaintiff New Start. She did not testify that O'Connell was obligated to pay her for attendant care services in any amount or that she made any claim for payment of attendant care services. Accordingly, the court upheld the trial court's ruling that plaintiff O'Connell did not raise a genuine issue of material fact as to whether defendant State Farm was provided with reasonable proof of both the fact and amount of the loss, as required by the no-fault act. The court did not express any opinion as to whether O'Connell could have proven that Margaret's services were compensable under the no-fault act.

Lastly, the court upheld the trial court's award of attorney fees and costs to the defendant based on a finding that plaintiffs' claims were frivolous under MCL 600.2591 but remanded the case for modification of the attorney fee award due to a previous stipulated dismissal of certain plaintiffs.