STATE OF MICHIGAN

COURT OF APPEALS

SHANNON D. BEAUCHAMP, as Personal Representative of the Estate of ROGER L. BEAUCHAMP, Plaintiff-Appellant,	UNPUBLISHED September 3, 2013
v	No. 305345 Oakland Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	LC No. 2008-091795-NF

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment in this no-fault insurance action. We affirm in part, reverse in part, and remand this case to the trial court.

This action arises out of a collision between an automobile and plaintiff's decedent's motorcycle on August 31, 2004.[1] Plaintiff first argues that the trial court abused its discretion when it denied her motion for additur or a new trial because the jury, as evidenced by its findings on the verdict form, allegedly ignored uncontroverted evidence.

"This Court reviews a trial court's decision on a motion for additur or a new trial for [an] abuse of discretion." *Taylor v Kent Radiology, PC*, 286 Mich App 490, 524; 780 NW2d 900 (2009). "The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes." *Heaton v Benton Const Co*, 286 Mich App 528, 542; 780 NW2d 618 (2009).

MCR 2.611(E)(1) provides:

[1] Roger L. Beauchamp, the driver of the motorcycle, died on October 20, 2011, while this appeal was pending. Plaintiff was appointed as the personal representative of his estate.

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

MCR 2.611(A)(1) provides:

> A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:
>
> * * *
>
> (d) A verdict clearly or grossly inadequate or excessive.
>
> (e) A verdict or decision against the great weight of the evidence or contrary to law.

See also *Taylor*, 286 Mich App at 525. MCR 2.611(A)(1) "provides the only bases upon which a jury verdict may be set aside." *Kelly v Builders Square, Inc*, 465 Mich 29, 38; 632 NW2d 912 (2001). "When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses." *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006). "The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, even if it is arguably inconsistent, if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." *Id*. at 407 (internal quotation marks, brackets, and citations omitted). "Every attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." *Id*. (internal quotation marks, brackets, and citations omitted).

Initially, we note that defendant accuses plaintiff of "harboring error as an appellate parachute," see *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002), because plaintiff drafted the special verdict form. The "appellate parachute" rule prevents a party from having a "second bite at the apple" in the event of an unfavorable outcome, when that party from the start acquiesced to the error from which he or she seeks relief. See *id*.

Defendant claims that, to the extent the jurors were confused by the form, plaintiff created that confusion and must accept the result of the jury's deliberations. However, cases that discuss the "appellate parachute" rule have involved errors that were so glaringly apparent at the time they were made that the failure to preserve them would have raised a reasonable person's suspicion that the omission was intentional. See, e.g., *Marshall Lasser, PC*, 252 Mich App at 109 (the plaintiff preserved the right to a jury trial, participated in a bench trial, and then complained on appeal about the lack of a jury trial), *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 476-477; 442 NW2d 705 (1989) (the plaintiff consented to entry of a judgment providing for no damages from the defendant, then argued on appeal that the judgment should have included $100,000 in damages against the defendant), and *Nat'l Pharm Servs, Inc v*

Harrison Community Hosp, 67 Mich App 286, 292-293; 241 NW2d 76 (1976) (the trial court read two similar, erroneous jury instructions, the defendant objected to only one, and then argued on appeal that the second instruction was erroneous). In this case, the special verdict form was arguably ambiguous, not erroneous. The four corners of the document did not compel any particular answer, correct or incorrect, and we decline to apply the "appellate parachute" rule.

Defendant is correct, however, that the special verdict form was flawed in some respects. The jury was asked, in question 1, to find the "reasonable value of the hourly compensation to which [plaintiff was] entitled to be compensated for the various *services* she provide[d] to and on behalf of [Roger]," and it answered "$17.00 per hour" (emphasis added). Then, in the tripartite question 2, it was asked, first, whether "allowable *expenses* [were] incurred by or on behalf of [Roger]," and was provided with the explanation that "[a]llowable *expenses* consist of all reasonable charges for reasonably necessary products, *services*, and accommodations for [Roger's] care, recovery, or rehabilitation" (emphases added). Question 2B asked for the "expenses" owed to each of eight providers, and question 2C asked for "the additional amount of allowable *expenses* owed" (emphasis added).

The special verdict form's wording was unclear with respect to the purpose of question 2C. For example, was the answer supposed to represent the total value of the services plaintiff provided Roger, the hourly rate of which the jury determined in question 1, or was it meant to be a grand total of expenses owed to the eight listed providers,[2] expenses owed to providers not already listed, and the value of the services plaintiff provided Roger? At any rate, plaintiff and defendant, by way of their appellate arguments, seem to agree that jury intended to write its award for attendant-care services by plaintiff in the space next to question 2C, but plaintiff and defendant differ on where to go from there. Defendant argues that the jury's response to question 2C, $33,095.31, deliberately reduced the damages from those sought by plaintiff because the jury "could have easily concluded that the [p]laintiff was not entitled to be paid for the time she spent sleeping," or "that the $17.00 an hour rate only became operative, say[,] within the last several months before trial." Plaintiff argues that the calculation was a mistake or that the jury ignored uncontroverted evidence. In its opinion and order, the trial court said that it was "of the opinion that if [p]laintiff wanted the [j]ury to multiply the [hourly] rate by some quantity of hours for the claim of underpayment, [p]laintiff should have included that question" on the special verdict form.

A jury verdict may not be set aside if there is any logical way of interpreting it. *Allard*, 271 Mich App at 406-407. Additional language in question 2C explicitly admonished the jury to exclude from its answer expenses already paid. The jurors may have determined that the total value of plaintiff's services was $315,982.72, subtracted the $282,887.41 defendant had paid,

[2] The jury found that defendant owed expenses for only one of the eight providers—St. John Providence Hospital—in the amount of $1,040.

and wrote the result, $33,095.31, in the blank next to question 2C.[3] Had they done so, they would have compensated plaintiff for about 18,587 hours, a reduction of about 38.2 percent from the 30,059.35 hours plaintiff claimed, at $17 an hour, the rate to which they found plaintiff entitled in question 1. This is far from the apocalyptic reduction of which plaintiff complains, having assumed that she would receive $17 an hour for each of the 30,059.35 hours claimed.[4] The jury may have assumed that plaintiff slept or otherwise did not provide services to defendant for an average of 9.12 hours (38 percent) of each 24-hour period claimed for services.

The "adequacy of the amount of damages awarded is ordinarily within the province of the jury," *Taylor v Mobley*, 279 Mich App 309, 311; 760 NW2d 234 (2008), witness credibility is also within the province of the jury, *Allard*, 271 Mich App at 406-407, and the jury was not obligated to credit plaintiff for all the hours she claimed.[5] Accordingly, the trial court's denial of plaintiff's motion for additur or a new trial was not "outside the range of reasonable and principled outcomes," *Heaton*, 286 Mich App at 542, and therefore it was not an abuse of discretion.

Plaintiff next argues that the trial court abused its discretion when, after ruling that defendant owed attorney fees under MCL 500.3148(1), it awarded plaintiff attorney fees only for her counsel's time relating to motions for summary disposition and for a directed verdict. Plaintiff contends that MCL 500.3148(1) entitles her to reasonable attorney fees for her attorneys' time spent on the entire case.

"[W]e review for an abuse of discretion a trial court's decision whether to award attorney fees under the no-fault act." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 442; 814 NW2d 670 (2012). Whether an insurer's denial of benefits is reasonable under the particular facts of the case is a question of fact that this Court reviews for clear error. *Id.* A finding is clearly erroneous "when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

"The purpose behind the no-fault act's attorney-fee penalty provision is to ensure that the insurer promptly makes payment to the insured." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 67; 737 NW2d 332 (2007). 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

[3] In the absence of an explicit place to enter the ultimate amount defendant owed for plaintiff's services, it was logical for the jury to write this number in response to question 2C, the most open-ended question on the special verdict form.

[4] The relatively small amount of penalty interest to which the jury found plaintiff entitled also suggests that it disagreed with plaintiff's calculations.

[5] We note that the jury heard evidence from a claims representative that plaintiff was, at times, able to perform other, personal activities while supervising Roger.

> the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

To show entitlement to attorney fees under the no-fault act, an insured plaintiff must show that benefits were "not paid within 30 days after the insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). Also, "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), quoting MCL 500.3148(1). "[R]efusal or delay in payment by an insurer will not be found unreasonable within the meaning of § 3148(1) where the refusal or delay is the product of a legitimate question of statutory construction [or] constitutional law, or a bona fide factual uncertainty." *Roberts*, 275 Mich App at 67 (internal quotation marks and citation omitted). "Where there is a delay or refusal, a rebuttable presumption of unreasonableness arises, and the insurer has the burden of justifying the refusal or delay." *Id*.

The trial court found that its prior rulings regarding plaintiff's motions for partial summary disposition and a directed verdict "establish[ed] that [d]efendant unreasonably delayed or refused to make payment of benefits that were due, thereby entitling [p]laintiff to an award of attorney fees" under the no-fault act. The court granted plaintiff's motion for attorney fees with respect to fees incurred related to the motions for partial summary disposition and a directed verdict and denied the motion with respect to fees incurred related to other claims, including attendant-care services.[6]

The record establishes that defendant paid plaintiff's claims for the attendant-care services she provided Roger at the rates Tracey Iler, the claims representative employed by defendant who administered benefits in plaintiff's claim, deemed appropriate, and that the main focus of the trial was the proper hourly rate. William King, an economist and financial analyst, testified that a reasonable "blended hourly rate" for the various services plaintiff provided Roger was between $20.70 and $26.09, depending on whether and to what extent overtime was included. Renee LaPorte, a registered nurse, testified that plaintiff functioned, "at the minimum," as a life-skills trainer, the reasonable market value for which was "between [$]30 to $45 an hour, depending on the level of care the client needs." In contrast, Iler testified that plaintiff was not entitled to the type of rates Iler would have approved for outside agencies, because plaintiff does "other things . . . while she's working," and can "go to sleep[,] have friends over[,] talk on the phone[, and] handle other business" while supervising Roger. In its response to question 3 on the special verdict form, the jury found that at least some of the "expenses or losses to which . . . plaintiff was entitled [were] overdue," but it is not clear whether it found that payment for the St. John Providence bill, payment for plaintiff's attendant-care services, or payment for both was overdue.

[6] Although the trial court's reasoning is not set forth in a logical sequence, it can be inferred from the language employed that the trial court denied attorney fees related to attendant-care services because there had been a reasonable dispute regarding the amount owed.

Plaintiff successfully sought the admission of binders containing her attendant-care claims from 2007 to 2011. For a time, Iler authorized payments for daytime attendant care at $11 an hour and for nighttime attendant care at $5.50 an hour. Later, she began to authorize payments at three different hourly rates for three eight-hour blocks of each day, with an average hourly rate of $9.41. Iler said that, on the log plaintiff kept of attendant-care hours, the number of hours plaintiff claimed was the same as the number of hours for which she was paid. The evidence indicates a bona fide factual dispute concerning the appropriate hourly rate for plaintiff's attendant-care services. There is no evidence that defendant delayed or refused payment. As this Court held in *Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 379-380; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005):

> Defendants in this case have not refused to pay health-care benefits due plaintiffs. To the contrary, defendants paid what they believed to be the reasonable charges incurred for reasonably necessary products, services, and accommodations for their insureds' care. Under the . . . case law, defendants are allowed to pay the reasonable amount and contest the claim under the act without penalty where a reasonable dispute exists regarding the amount of benefits owing. The fact that the amount paid is less than the amount the health-care provider charged does not violate the act where the amount paid is based on a proper determination of what is reasonable . . . . [Citations omitted.]

The trial court's denial of plaintiff's request for attorney fees related to her attendant-care services is consistent with the purpose of the attorney-fee provision of the no-fault act, which is "to ensure that the insurer promptly makes payment to the insured." *Roberts*, 275 Mich App at 67. Because plaintiff was compensated promptly, and a good-faith dispute clearly existed regarding the appropriate hourly rate for plaintiff's attendant-care services, we hold that plaintiff is not entitled to attorney fees under MCL 500.3148(1) for that claim.[7]

In contrast, the St. John Providence bill, for $1,040, which defendant received on November 19, 2008, had not been paid in any amount at the time of trial. Defendant did not dispute the amount of the bill, and thus we remand this case for the trial court to determine

[7] Plaintiff cites *Cole ex rel Robinson v Detroit Auto Inter-Ins Exch*, 137 Mich App 603, 614-615; 357 NW2d 898 (1984), for the proposition that attorney fees for the entire claim should be assessed even if the insurer unreasonably delayed only a portion of the payment. In *Cole*, *id*. at 614, the Court stated, "We find the trial court's refusal to allocate [attorney fees] proper under the facts of this case." Under the facts of *this* case, with a trial having occurred with respect to attendant-care services, with the clear dispute regarding the hourly rate for those services, and with the finding (not challenged by way of a cross-appeal) that payment for certain other expenses *had* been unreasonably delayed, we find the allocation proper, and there is no evidence that it was "too difficult" to allocate the fees. Cf. *Butt v Detroit Auto Inter-Ins Exchange*, 129 Mich App 211, 221; 341 NW2d 474 (1983). Finally, we note that neither *Cole* nor *Butt* is strictly binding on us under MCR 7.215(J)(1).

whether the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. See *Moore*, 482 Mich at 517.

Defendant next argues that the trial court erred when it entered a declaratory judgment entitling plaintiff to $17 an hour for only 17 hours each day for the services she provided Roger.

This Court reviews declaratory rulings de novo. *White v State Farm Fire & Cas Co*, 293 Mich App 419, 423; 809 NW2d 637 (2011). A Michigan court may, in a case of "actual controversy" within its jurisdiction, "declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). An "actual controversy" exists, for the purpose of MCR 2.605(A)(1), "when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012).

In response to question 1 on the special verdict form, the jury found that the "reasonable value of the hourly compensation to which [plaintiff] is entitled to be compensated for the various services she provides to and on behalf of" Roger, who has since died, was "$17.00 per hour." The trial court found that "[i]t appears that the [j]ury found that [p]laintiff is entitled to payment for attendant care services at $17.00 per hour," but that the amount of the verdict "show[ed] that the [j]ury did not find that [p]laintiff was entitled to $17.00 an hour for 24 hours a day." It concluded that $17 an hour for 17 hours each day and "7 hours of nighttime care at half the rate ($8.50 per hour)," minus time charged by an outside attendant-care agency, was "consistent with the [v]erdict." The trial court's July 12, 2011, judgment ordered defendant to pay plaintiff "$17.00 per hour for 17 hours a day of daytime care services . . . once those services are incurred and reasonable proof of the fact and the amount of the claim is presented to [d]efendant," but then stated that it made "no declaration as to the rate [d]efendant is to pay [p]laintiff for the remaining 7 hours of nighttime care services provided to Roger."

The trial court's decision to effectively alter the jury verdict on its own initiative was erroneous. A declaratory judgment is a "binding adjudication of the rights and status of litigants that is conclusive in a subsequent action between the parties as to the matters declared . . . ." *FACE Trading, Inc v Dep't of Consumer and Industry Services*, 270 Mich App 653, 663; 717 NW2d 377 (2006) (internal quotation marks, brackets, and citations omitted). Nothing in the jury verdict unambiguously indicated that plaintiff's right to $17 an hour for "various services she provide[d] to and on behalf of" Roger applied only for 17 hours a day. However, plaintiff is also incorrect in suggesting that she was automatically entitled to $17 an hour for 24 hours each day. No interpretation of the jury's verdict permits such a daily payment, and the law is clear that, while the determination of future benefits is a permissible use of a declaratory judgment, *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 149-150; 388 NW2d 216 (1986), insurers may not "be charged for payment until they [have] the bills to substantiate the charges," *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 295; 732 NW2d 160 (2006). The word "services" in question 1 of the special verdict form unambiguously indicated that plaintiff was required to assist Roger in some way before she was entitled to compensation.

Because the right to payment of $17 an hour was the only future right against defendant to which plaintiff was entitled by the plain meaning of the jury verdict, the sole limitation on that

right having been the requirement that plaintiff first provide a service, the declaratory judgment was erroneous. Because Roger has died, making a declaratory judgment unnecessary, the trial court shall enter a judgment in favor of plaintiff for any yet-unpaid services.[8]

We affirm the trial court's denial of plaintiff's motion for additur or a new trial, reverse the declaratory judgment, and remand for entry of a judgment in favor of plaintiff for any yet-unpaid services she provided "to or on behalf of" Roger, at an hourly rate of $17, and for a determination regarding whether defendant unreasonably refused or delayed payment of the St. John Providence bill. If the trial court determines that defendant unreasonably refused or delayed payment of the St. John Providence bill, it shall determine whether plaintiff is entitled to additional attorney fees. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

[8] The simple fact is that there is only so much that can be inferred from the jury verdict; all a court can infer is that the jury intended for plaintiff to be compensated at $17 an hour for her services. We express no opinion regarding the scope of the word "services."