STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of PAUL HOWARD GARBO.

PAULETTE GARBO, Conservator of the Estate of PAUL HOWARD GARBO,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE CO,

Defendant-Appellant.

UNPUBLISHED
January 29, 1999

No. 202159
Washtenaw Probate Court
LC No. 95-106747 CZ

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff following a bench trial in this no-fault automobile insurance case. We vacate the trial court's award of attorney fees under the no-fault act but, in all other respects, affirm its judgment.

In September 1992, Paul Howard Garbo was involved in an automobile accident which resulted in a closed head injury. Plaintiff was insured by defendant at the time of the accident. When Paul was discharged from the hospital, his physician ordered twenty-four-hour attendant care because of his cognitive memory problems. The record shows that the physician's ordered twenty-four-hour attendant care spanned the period from January 1993 to April 1994. When Paul was brought home by plaintiff, Allen Home Health Care, a professional home health care service, provided some attendant care. However, by June 1993, plaintiff began to view the service as unreliable and engaged the services of Julie Stiver, who was to provide attendant care services during the daytime when plaintiff was at work. Around the same time, plaintiff discussed with Debora Glover, defendant's adjuster, receiving compensation for her aide care to Paul during those times when Stiver was not available. Plaintiff and Glover orally agreed upon the sum of $300 per week. Plaintiff testified that Glover had specifically told her that this sum would not cover non-waking hours. Through a letter in May 1994, plaintiff requested

from defendant retroactive payments for the uncompensated non-waking hours during the period from January 1993 to April 1994. Defendant's refusal to meet plaintiff's demand resulted in this suit.

Defendant first claims that the trial court clearly erred in finding that no mutual assent existed between plaintiff and Glover that the $300 per week compensation would cover non-waking hours. This term of the contract, being contested, presented a factual matter for the trial court to determine. This Court reviews the trial court's findings of fact in a bench trial under the clearly erroneous standard. MCR 2.613(C); *Morris v Clawson Tank* Co, 221 Mich App 280, 284; 561 NW2d 469 (1997). A finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. *Boyd v Civil Service Comm*, 220 Mich App 226, 235; 559 NW2d 342 (1996).

A "meeting of the minds" (mutual assent) is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 317; 575 NW2d 324 (1998). Because plaintiff claimed that Glover had expressly stated to her that the $300 per week constituted compensation for waking hours only and because this testimony was not unequivocally contradicted by the adjusters' testimonies, the trial court did not commit clear error in finding that no mutual assent existed that $300 per week would constitute compensation for non-waking hours as well.

Second, under MCL 500.3107(1)(a); MSA 24.13107(1)(a) of the no-fault act, "personal protection insurance benefits are payable for . . . [a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services accommodations for an injured person's care, recovery, or rehabilitation." In *Booth v Auto-Owners Ins Co*, 224 Mich App 724, 727; 569 NW2d 903 (1997), this Court stated that in order for a no-fault insurer to be responsible for personal injury protection benefits, three requirements must be satisfied: (1) the expense must have been incurred; (2) the expense must have been for a product, service, or accommodation reasonably necessary for the injured person's care, recovery, or rehabilitation, and; (3) the amount of the expense must have been reasonable.

Here, it was uncontroverted that Paul's physician had ordered twenty-four-hour attendant care from the time of Paul's discharge from the hospital, in January 1993, until April 11, 1994. Also, it could be reasonably inferred from plaintiff's testimony that Paul's mental state had very often required her supervision during non-waking hours to ensure Paul's welfare and safety due to his irregular sleep pattern and impulsive tendencies at nighttime during the period in question. Therefore, the evidence supported a finding that plaintiff had provided the attendant care service during Paul's non-waking hours contemplated by the physician's twenty-four-hour attendant care prescription. As the trier of fact, it was within the province of the trial court to determine whether plaintiff, in fact, was entitled to the compensation for the services rendered under the no-fault act. See *id.*, p 729 ("whether the plaintiff . . . [is] entitled to collect the value of the services [under the no-fault act] and the determination of the value are matters properly left for the jury to decide"). Based on the evidence adduced at trial, we hold that the trial court did not clearly err in finding that plaintiff had rendered attendant care services during Paul's non-waking hours from January 21, 1993 to April 11, 1994, entitling her to the value of the services rendered. See *Reed v Citizens Ins Co of America*, 198 Mich App 443, 451-452; 499

NW2d 22 (1993) (under § 3107 of the no-fault act, family members may be compensated for the services they provide at home to an injured person in need of care).

Defendant next contends that the trial court clearly erred in finding that plaintiff was entitled to be compensated at the commercial rate for her services rendered. Issues relating to the reasonableness or necessity of the charges under MCL 500.3107(1)(a); MSA 24.13107(1)(a), if disputed, should appropriately be resolved by the trier of fact. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995). Findings of fact in a bench trial are reviewed under the clearly erroneous standard. *Morris*, *supra*, p 284.

The reasonableness of the expenses incurred may be compared with rates charged by institutions. *Reed*, *supra*, p 453; *Sharp v Preferred Risk Mutual Ins Co*, 142 Mich App 499, 514; 370 NW2d 619 (1985). In *Sharp*, this Court held that the plaintiff was entitled to be compensated for replacement services at a higher rate than that which she had paid for the nurses and aides whom she had hired. *Id.*, p 513. This Court also concluded that the plaintiff had actually incurred expenses associated with the procurement of nurses and aides which justified being reimbursed for more than the actual rates paid the nurses and aides whom the plaintiff had hired. *Id.*, pp 513-514. Further,

> The method of charging more per hour than actually paid is a convenient shorthand method for compensating the plaintiff for these activities. This is the same method used by the nursing companies and the plaintiff is billing less than those nursing companies were. [*Id.*, p 514.]

Despite defendant's suggestion that Allen Home Health Care's hourly aide rate most likely covered some overhead costs, the fact is that the record does not include a reference to any overhead costs or the aides' take-home gross pay. Considering also that the trial court's ordered hourly compensation of $10.95 was actually less than what Allen Home Health Care charged *in toto* because it charged $0.55 more for weekend hours, we hold that the trial court did not clearly err in finding that plaintiff was entitled to compensation at the hourly rate of $10.95. *Booth*, *supra*, p 730 (whether the plaintiff was entitled to collect the value of the services and the determination of the value are matters properly left for the trier of fact to decide).

Defendant next argues that the trial court erred in awarding attorney fees under § 3148 of the no-fault act to plaintiff on the basis that its refusal to pay the insurance benefits had been unreasonable. A trial court's finding of unreasonable refusal or delay in the paying of personal protection insurance benefits owed will not be reversed on appeal unless it is clearly erroneous. *United Southern Assurance Co v Aetna Life & Casualty Ins Co*, 189 Mich App 485, 492-493; 474 NW2d 131 (1991).

A party may recover attorney fees under § 3148(1) of the no-fault act. See *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). Where there is a delay or refusal, "a rebuttable presumption of unreasonableness arises such that the insurer has the burden to justify the refusal or delay." *Id.*, p 335. "[W]hen considering whether attorney fees are warranted under the no-fault act, the inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's

initial refusal to pay was reasonable." *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 617 (1996). However, a refusal or delay in payments by an insurer will not be found to be unreasonable within the meaning of § 3148 where the delay is the product of a legitimate question of statutory construction, constitutional law, or even a bona fide factual uncertainty." *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987).

In response to plaintiff's request to be compensated for the non-waking hours, Mark Clements, the adjuster who took over the file from Glover, expressed, through a letter, refusal as follows:

> I received your letter of May 15, 1994. I must inform you that we are denying your request for an additional $16,680.00 for Attendant Care Services. You had previously reached an agreement with Debora Glover for reimbursement at a rate of $300.00 per week. This rate was unaffected by the number of hours Julie Stiver or any other Attendant Care worker provided service.

Clements testified that this written response to plaintiff's letter constituted a recording of what Glover had conveyed to him with respect to the details surrounding the $300 per week compensation. As noted above, Glover, through a letter dated May 10, 1993, and addressed to plaintiff, had stated the following:

> You and I agreed upon $300 per week to be paid to you to assist Paul during those hours the aide was not with Paul. Since Paul is in need of supervision still Auto-Owners felt this was an amicable settlement for the situation.

Thus, Clements' apparent understanding, spelled out in his May 31, 1994 letter addressed to plaintiff that the $300 per week constituted compensation for *all* hours, i.e., waking and non-waking, wherein plaintiff, rather than Stiver or a professional aide, had rendered attendant care to Paul, is not unreasonable given the language set forth in Glover's May 10, 1993 letter. While the evidence adduced at trial showed that plaintiff unequivocally claimed that non-waking hours had not been covered by the oral agreement and Glover expressed uncertainty regarding whether those hours had been included, we conclude that defendant's *initial* refusal to compensate plaintiff for having rendered attendant care for the non-waking hours was not unreasonable. We, therefore, hold that the trial court clearly erred in awarding attorney fees under the no-fault act to plaintiff.

Lastly, defendant argues that, although pursuant to *Yaldo v North Pointe Ins Co*, 217 Mich App 617; 552 NW2d 657 (1996), the trial court did not err in calculating the prejudgment interest at twelve percent under MCL 600.6013(5); MSA 27A.6013(5), this panel should conclude that *Yaldo* was wrongly decided and create a conflict under MCR 7.215(H). Our Supreme Court recently affirmed the decision in *Yaldo*, however, and held that an insurance policy constitutes a written instrument governed by MCL 600.6013(5); MSA 27A.6013(5), allowing prejudgment interest at twelve percent. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 343; 578 NW2d 274 (1998). Defendant's argument is therefore moot.

Affirmed in part and vacated in part.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie