STATE OF MICHIGAN

COURT OF APPEALS

JUDY F. WILLIAMS and BOBBY G. WILLIAMS, Plaintiffs-Appellees, v FARM BUREAU INSURANCE COMPANY, Defendant-Appellant.	UNPUBLISHED August 28, 2001 No. 221119 Wayne Circuit Court LC No. 97-734353-NZ

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment following a jury verdict awarding plaintiffs reimbursement of medical expenses and work loss. We affirm.

Plaintiffs, who are married, were both injured in a serious automobile accident that occurred on October 16, 1996. Plaintiffs subsequently treated at the Stroia Chiropractic Clinic under the care of Thomas Pinson, D. O. Plaintiffs were able to resume work with their tree service a few months after the accident, but were not able to work full time because of their injuries, and had to turn down approximately forty to fifty jobs. On March 14, 1997, after being examined by a doctor at defendant's request, plaintiffs received a letter from defendant stating that it would not reimburse them for their medical expenses because of the doctor's findings.

Plaintiffs sued defendant for reimbursement of medical expenses and work loss. At trial, defendant moved for a directed verdict on two bases: (1) that there was evidence that the chiropractic clinic that treated plaintiffs charged insured patients more than uninsured patients in violation of MCL 500.3157, and (2) that there was no evidence that plaintiffs suffered any wage loss from the accident. The trial court denied defendant's motion. The jury awarded plaintiffs $39,501.50 in medical expenses and $18,000 for Mr. Williams' work loss.[1] The trial court subsequently entered a judgment on the verdict awarding plaintiffs $87,392.94, including costs, interest, attorney fees, and mediation sanctions.

[1] The jury determined that Mrs. Williams had not suffered a loss of income as a result of the accident.

We review de novo a trial court's ruling on a motion for a directed verdict. *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000). "In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable interference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Id.* at 643-644. If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

Defendant first argues that the trial court erred in denying defendant's motion for a directed verdict on the basis that the medical charges incurred for services provided by the Stroia Clinic were unreasonable because the medical charges violated MCL 500.3157. Under personal protection insurance, an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, or use of a motor vehicle. MCL 500.3105(1). Personal protection insurance benefits are payable for "allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). An insurer may not be held liable for an expense that is not both reasonable and necessary. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 94; 535 NW2d 529 (1995).

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance. [MCL 500.3157.]

A no-fault insurer is not liable for the amount of any charge that exceeds the health care provider's customary charge for a like product, service, or accommodation in a case not involving insurance. *Hofmann, supra* at 103. "Customary charge" means the standard amount the physician, hospital, or clinic bills on behalf of every patient treated, as opposed to the amount of payment it accepts on behalf of the patient. *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 382-383; 554 NW2d 49 (1996). Whether there has been an overcharge impermissible under MCL 500.3157 is determined by looking to the provider's customary charge in cases not involving insurance. *Hofmann, supra* at 104. A provider cannot avoid committing an overcharge violation simply by claiming that the amount charged in a no-fault case is a "customary charge," when in fact the provider customarily charges a lesser amount in cases not involving insurance. *Id.* at 104-105.

In the present case, the evidence adduced at trial showed that the Stroia Clinic charged every patient the same amount for the same procedures, but that special consideration was given to patients who had special situations, such as being short of money. There were some situations where the Stroia Clinic would reduce the bill when the patient signed an affidavit of indigency stating an inability to pay. If a patient did not have automobile insurance, that would constitute a hardship that would justify a lower rate for treatment. When patients did not have insurance,

they would sign a form stating that they had limited funds to pay for the service and then would receive a lower rate.

The trial court did not err in denying defendant's motion for a directed verdict because, viewing the testimony and all legitimate inferences from the testimony in a light most favorable to plaintiffs, there is a factual question with regard to whether the Stroia Clinic customarily charged patients less in cases not involving insurance. The evidence adduced at trial shows that the Stroia Clinic may have charged patients without insurance less than it charged patients with insurance, but there is no evidence that the Stroia Clinic customarily charged uninsured patients less *because they were uninsured*. Instead, there is evidence that the Stroia Clinic charged uninsured patients less *only when they signed an affidavit of indigency stating that they could not afford the standard charge*. This evidence tends to show that the Stroia Clinic's basis for the lower charge was the patients' inability to pay the customary charge, rather than the patients' lack of reimbursable insurance. Cf. *Hofmann, supra* at 104-107 (MCL 500.3157 was violated where patients were billed less based on whether they had reimburseable insurance, not whether they could afford to pay for the services). Therefore, viewing the evidence in a light most favorable to plaintiffs, reasonable jurors could disagree in regarding to whether the Stroia Clinic customarily charged less in cases not involving insurance.

Defendant next argues that the trial court erred in denying defendant's motion for a directed verdict on the basis that plaintiffs presented no evidence of a loss of income from the accident. In addition to other personal protection insurance benefits that may be due from an insurer for accidental bodily injury, MCL 500.3107(1)(b), in part, requires payment for:

> Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. [MCL 500.3107(1)(b); *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 643; 513 NW2d 799 (1994).]

MCL 500.3107(1)(b) compensates an injured person for income he would have received but for the accident. *Marquis, supra* at 645. The statute compensates an injured person for lost income that he *would* have earned rather than what he *could* have earned. *Id.* at 648. "Work loss" under the statute covers only actual loss of earnings as contrasted to loss of earning capacity. *Id.* at 647. Work loss includes not only lost wages, but also lost profit that is attributable to personal effort and self-employment. *Kirksey v The Manitoba Public Ins Corp*, 191 Mich App 12, 17; 477 NW2d 442 (1991). In all cases, claimants bear the burden of proving the amount they would have earned had they not been injured in the accident. *Anton v State Farm Mutual Automobile Ins Co*, 238 Mich App 673, 684; 607 NW2d 123 (1999).

The evidence at trial indicated that Mr. Williams resumed doing tree service about a month or two after the accident, but he could no longer do heavy work because of his injuries. After the accident, he had to wear a back brace while he was working in order to alleviate the pain in his lower back. He testified that, after the accident, he turned down approximately forty or fifty tree service jobs because of his injuries from the accident. In 1996, when Mr. Williams was still working as a millwright, plaintiffs' expenses exceeded their revenues by $10,892 for their tree service business. In 1997, however, after Mr. Williams retired from his millwright job, plaintiffs had a profit of $9,337 from their tree service business. In 1998, plaintiffs had a net gain

of $33,078.01. At trial, plaintiffs' accountant, Alton Schroeder, projected that plaintiffs' income would have been approximately $4,375 a month if they had not been injured. Schroeder arrived at this figure by taking plaintiffs' earnings in June through August 1998 and averaging those earnings. Schroeder then projected this figure over the period between November 1, 1996, and August 31, 1998, and concluded that plaintiffs would have earned $144,474 if they had not been injured. Because plaintiffs actually earned $49,317, Schroeder concluded that plaintiffs had a loss of $95,157.

Defendant argues that plaintiffs did not present any evidence that Mr. Williams made any income from the tree service before the accident or that he lost profits that he would have made but for the accident. Although plaintiffs did not present any evidence that Mr. Williams made a profit from the tree service before the accident, he was working full time as a millwright before the accident and did not have the opportunity to work full time on his tree service until he retired from being a millwright after the accident. This Court has held that there may be a question of fact with regard to whether an injured person would have received income even when the injured person did not have an income before the accident. *Swartout v State Farm Mutual Automobile Ins Co*, 156 Mich App 350, 353-355; 401 NW2d 364 (1986).

Here, there is evidence that Mr. Williams was in the process of buying equipment so that he could work full time after he retired from his job as a millwright. Plaintiffs presented evidence that Mr. Williams had to refuse jobs because of his accident and that he lost $95,157 in profits as a result of his injury. Whether Mr. Williams actually would have earned these profits was a question of fact for the jury. *Id.* at 353-355. We find that reasonable minds could differ regarding whether Mr. Williams would have earned these profits from the tree service if he had not been injured. Therefore, the trial court did not err in denying defendant's motion for directed verdict with regard to the award of wage loss.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper