STATE OF MICHIGAN

COURT OF APPEALS

KAYLA BLACKBURN, by her conservator, LONETTE BLACKBURN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2005
v	Nos. 253991; 255366 Ingham Circuit Court
AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellant.	LC No. 01-094550-NF

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

This is a consolidated appeal in which defendant appeals from two partial directed verdicts, an award of penalty interest under the no-fault act, MCL 500.3103 *et seq*, and two awards of attorney fees, one under the no-fault act and one under MCR 2.403(O). We reverse and remand.

Defendant first argues that the trial court clearly erred in awarding plaintiff $60,000 in partial payment of a house more suitable for Kayla, but for which defendant had already paid a significant amount, when there was no showing that the additional payment was necessary for her accommodation. We agree.

A trial court's decision on a motion for a directed verdict is reviewed de novo to determine whether the evidence and all legitimate inferences from the evidence, when viewed in the light most favorable to the nonmovant, fail to establish a claim as a matter of law. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). "When the evidence could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury." *Lamson v Martin*, 216 Mich App 452, 455; 549 NW2d 878 (1996), citing *Lester N Turner, PC v Eyde*, 182 Mich App 396, 398; 451 NW2d 644 (1990). Under MCL 500.3107(1)(a), defendant is required to pay for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary . . . accommodations." This Court explained that the no-fault act does not indicate the extent to which an insurer must supply an insured with housing; instead, the focus is on reasonableness. *Payne v Farm Bureau Ins*, 263 Mich App 521, 527; 688 NW2d 327 (2004). Significantly, reasonableness is heavily dependent on facts. *Id*. at 528. Moreover, the burden of proving those facts is on the plaintiff. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990).

There was no dispute that the original house was unsuitable. Kayla's parents elected to construct a new, substantially larger house. Defendant paid for a significant portion of the new house, and the parents also paid for a significant portion of it from the sale of their original house. Plaintiff's request for additional money from defendant was solely limited to the fact that, after the move was complete, the family's mortgage increased by approximately $71,000, of which $11,000 was admittedly for luxuries. It was also admitted that between one-quarter and one-half of the increased size of the house was not for Kayla's accommodation.

"As long as housing larger and better equipped is required for the injured person than would be required if he were not injured, the full cost is an 'allowable expense'" under the no-fault act. *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 511; 370 NW2d 619 (1985). However, in *Sharp*, the plaintiff was the sole occupant, and the entire cost of the accommodations was necessarily for the plaintiff's benefit. Here, the accommodations were for Kayla's entire family, which presumably gained some benefit from the additional space. The difference in mortgage amounts did not, by itself, prove that the accommodations *for Kayla* were reasonable. Therefore, the issue should not have been disposed of by directed verdict but, rather, was a question for the jury. *Payne*, *supra* at 529.

Defendant next argues that the trial court erred in granting a directed verdict on whether Kayla required twenty-four-hour attendant care from February 1, 2002. We agree.

Defendant relied on four expired prescriptions for twelve hours a day of attendant care. The first prescription predated Kayla's release from the hospital, and the last expired on January 1, 2002. One doctor refused to estimate the number of attendant care hours required because, once a patient left the hospital, the number of hours could no longer be predicted without knowing how long the care provider took to perform certain tasks. The other doctor testified that his original prescription had been for attendant care hours in addition to those Kayla was already receiving and opined that she required twenty-four-hour care. Kayla's parents testified that she required twenty-four-hour care. Defendant's claims specialist testified that she had seen nothing to contradict the prescriptions for twelve hours of care a day, but the rehabilitation nurse assigned to the case testified that it was solely the doctors' role to specify attendant-care needs. Another nurse who investigated the home concluded that Kayla required twenty-four-hour care. The conflicting testimony could have led reasonable jurors to disagree, and the court improperly substituted its judgment for that of the jury. *Lamson*, *supra* at 455.

Defendant next argues that the trial court inappropriately awarded no-fault penalty interest. We agree.

"Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits." *Williams v AAA Michigan*, 250 Mich App 249, 265; 646 NW2d 476 (2002), citing *Davis v Citizens Ins Co of America*, 195 Mich App 323, 328; 489 NW2d 214 (1992). The trial court's award of penalty interest on the $60,000 for the house, and its award of penalty interest on the attendant care, must be reversed because they have not yet been determined to be owing. Similarly, the penalty interest on the claim for diaper expenses must be reversed. Although defendant apparently did not contest awareness of the claim, diaper expenses were not mentioned until plaintiff's trial brief under the heading "Miscellaneous medical expenses." The pleadings otherwise referred to "other allowable expenses not yet identified."

Kayla's parents testified that they informally asked if diapers were allowable expenses and were denied. However, defendant's representative stated that diapers were compensable, and she would have paid for them if she had been asked. Thus, although both parties agreed at trial that plaintiff was entitled to the cost of diapers, and the court granted plaintiff judgment on the issue, the testimony indicated that whether defendant was made aware of the claim was an issue for the jury. *Lamson, supra* at 455; *Regents of the Univ of Michigan v State Farm Mut Ins Co,* 250 Mich App 719, 735; 650 NW2d 129 (2002). Because this was an issue for the jury, an award of penalty interest was premature. *Williams, supra* at 265.

Finally, because we reverse the directed verdicts, we reverse the court's award of no-fault attorney fees and vacate the award of case evaluation attorney fees. We direct the trial court to reconsider the matter following resolution of the merits of this case on remand.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff