STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM JAMES HARDRICK, Plaintiff-Appellee,	FOR PUBLICATION December 1, 2011 9:00 a.m.
v	Nos. 294875; 298661; 299070 Oakland Circuit Court
AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellant, and	LC No. 2008-091361-NF Advance Sheets Version
AAA MICHIGAN and ALLSTATE INSURANCE COMPANY, Defendants.	

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

GLEICHER, P.J.

In this no-fault insurance action, a jury found defendant Auto Club Insurance Association (ACIA) liable to plaintiff William Hardrick for family-provided attendant-care services at a rate of $28 an hour. The jury reached this judgment after a trial at which ACIA was barred from presenting any evidence.[1] We vacate that judgment and remand for a new trial as the lower court abused its discretion by imposing an unjust and disproportionate sanction against ACIA.

The parties vigorously contest the parameters of the evidence relevant on retrial to prove the reasonable rate for family-provided attendant-care services. ACIA contends that agency rates are irrelevant to establish the cost of family-provided care. We conclude that evidence of agency rates constitutes a material and probative measure of the general value of attendant-care services, including care provided by family members.

[1] These three appeals all arise out of the same lower-court action for no-fault benefits and have been consolidated to advance the efficient administration of the appellate process.

I. BACKGROUND FACTS AND PROCEEDINGS

In May 2007, a car struck Hardrick, then aged 19, as he walked home from work. Hardrick suffered a traumatic brain injury resulting in cognitive deficits and emotional instability. Extensive hospital-based rehabilitation yielded only minimal therapeutic gains. In 2008, Hardrick's psychiatrist recommended around-the-clock attendant care "for supervision and safety." Hardrick's parents provide the prescribed attendant care.

ACIA admitted responsibility for paying Hardrick's personal protection insurance (PIP) benefits, "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). ACIA classified Hardrick's parents as "home health aides," and paid them a rate of $10.25 to $10.50 an hour for the attendant care they provided. Hardrick filed this lawsuit seeking a determination that his parents qualified as "behavioral technicians," entitling them to charge a higher hourly rate. Throughout the litigation, the parties disputed only the "reasonable charge" for Hardrick's parents' services. ACIA never contested the number of hours Hardrick's parents worked providing attendant care or its responsibility to pay PIP benefits.[2]

Before trial, the circuit court determined that ACIA had violated its discovery orders by providing belated and incomplete responses to discovery requests. Hardrick pursued a default judgment, but the court opted to impose a "lesser sanction." The court precluded ACIA from presenting any witnesses or evidence. As a result, ACIA was limited to cross-examining Hardrick's witnesses and challenging his proffered evidence.

At the trial, Hardrick presented the testimony of Robert Ancell, Ph.D., a vocational rehabilitation counselor and case manager. Ancell opined that Hardrick's psychiatrist ordered attendant-care services at a level consistent with the care provided by behavioral technicians. Ancell explained that within the attendant-care rubric, a "companion, like a baby sitter," fulfills the lowest level of responsibility. At the next level, nurse's aides, also known as home health aides, attend to "basic care needs" such as "[b]athing, feeding, dressing" and spending time with the brain-injured patient. Licensed practical nurses occupy the next rung of the responsibility ladder. "Somewhere comparable" to the licensed practical nurses, behavioral therapists "understand[] how to deal with behavior issues" by "cuing" and "structuring" behavior. According to Ancell, Hardrick's psychiatrist ordered supervision "by someone with [the] experience of a behavioral technician or life skills trainer, or someone who is very familiar to the

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[2] ACIA's counsel conceded in a pretrial motion that "The only issue for [t]rial is the amount of compensation for Plaintiff's family members who provide Plaintiff the needed 24 hour a day attendant care." At the hearing on Hardrick's motion for a default judgment, ACIA's counsel further conceded: "The only issue in this case is whether or not the attendant care rate being paid to the parents of this injured individual is a fair rate. That's the only issue. There's no medical issues, there's no coverage issues, there's no issues of anything else." Given these concessions at the trial level, ACIA is precluded from complaining on appeal that Hardrick's parents did not actually serve the logged number of attendant-care hours.

patient who knows how to distract him, structure him, and set limits on him in a way that won't escalate his behaviors."

Ancell testified that Hardrick's parents have fulfilled the supervisory duties described by their son's psychiatrist, and opined that the value of their care ranged between $25 and $45 an hour. Ancell derived this range from "the market place . . . as it relates to providing that kind of service to individuals and individuals who are clients of ours that receive those types of services[.]" During cross-examination, Ancell clarified that although the "value" of the care fell within the $25 to $45 range, a behavioral technician's hourly wage would be less. Ancell explained that his value calculation factored in benefits and other "government mandated inclusions" applicable to agencies and conceded that employment benefits constitute 30 percent of an agency employee's hourly rate. Ancell agreed that independent contractors receive no benefits, but noted that they pay social security taxes at a rate two times greater than agency employees.

The trial court limited the jury's reasonable-charge calculation to a range of $25 to $45 an hour, and the jury ultimately concluded that $28 an hour represented a reasonable charge for Hardrick's parents' attendant-care services. The trial court then ordered ACIA to pay Hardrick's attorney fees, pursuant to MCL 500.3148(1) of the no-fault act, at a rate of $500 an hour, finding that ACIA "unreasonably delayed in making proper payment."

II. DISCOVERY VIOLATION

ACIA concedes "that it did not timely respond to Plaintiff's . . . interrogatories and requests for discovery" and that the trial court was justified in imposing a sanction. ACIA challenges only the court's choice of a sanction.

As a result of ACIA's failure to provide timely and complete discovery, Hardrick filed a motion for a default judgment. The trial court noted that a default judgment is a "drastic sanction" that "should be only used when there has been a flagrant and wanton refusal to facilitate discovery." The court further noted that it was required to consider "whether a lesser sanction would better serve the interest of justice." The court found that Hardrick had been severely prejudiced by ACIA's reticence because discovery had since closed, case evaluation was completed, and the time to file a motion for summary disposition had passed. Yet, the court found that ACIA was not "obfuscating and attempting to impair discovery in a malicious sense." The trial court then ruled, "I find in light of that that an appropriate *lesser sanction* is to not allow the defendant to produce any witnesses at all. And that is the Court's finding, that that lesser sanction is appropriate." (Emphasis added.)

Following the court's imposition of the sanction, the court twice adjourned the trial to accommodate the needs of Hardrick's counsel. As the date for the rescheduled trial approached, ACIA filed a motion for reconsideration, expressing its desire to introduce "expert witnesses regarding rate and level of care." By then, ACIA had supplied Hardrick with complete discovery and Hardrick had had a sufficient opportunity to review the information, thereby eliminating any possible prejudice. In the interim, however, the case had been reassigned to a visiting judge who declined to overrule the original judge's penalty imposed for ACIA's past conduct.

We review a trial court's imposition of discovery sanctions for an abuse of discretion. *Dorman v Clinton Twp*, 269 Mich App 638, 655; 714 NW2d 350 (2006). An abuse of discretion occurs when the decision is outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The trial court sanctioned ACIA pursuant to MCR 2.313. "The interpretation and application of a court rule involves a question of law that this Court reviews de novo." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). This Court reviews any factual findings underlying a trial court's decision for clear error. MCR 2.613(C). "A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made." *Johnson*, 281 Mich App at 387.

MCR 2.313(B)(2) provides for the imposition of discovery sanctions as follows:

> If a party or an officer, director, or managing agent of a party, or a person designated . . . to testify on behalf of a party, fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
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> (a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> (b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;
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> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party;
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> In lieu of or in addition to the foregoing orders, the court shall require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

It is readily apparent that the trial court abused its discretion by selecting the sanction imposed. The court specifically concluded that ACIA's conduct did not merit the drastic sanction of a default judgment. Even though the court labeled its order as "a lesser sanction," the court actually imposed a sanction more severe and limiting than a default judgment would have been. Had the court granted Hardrick's request for a default judgment, ACIA would have been permitted to present evidence to prove the extent of Hardrick's damages. *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982), mod on other grounds by *Smith v Khouri*, 481 Mich 519 (2008) (while "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue," it is not an admission of

damages); *Dollar Rent-A-Car Sys v Nodel Constr*, 172 Mich App 738, 743; 432 NW2d 423 (1988) (a default "operates as an admission by the defaulting party of issues of liability, but leaves the issues of damages" to be resolved at a hearing at which the defaulting party has "full participatory rights"). The court's actual sanction went further and precluded ACIA from presenting any evidence, even on the damages issue.

A court may impose the severe sanction of a default judgment "only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled in part on other grounds *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628 (2008); *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994).

> Before imposing the sanction of a default judgment, a trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to defendant, and whether wilfulness has been shown. [*Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994).]

Ultimately, the court's chosen discovery sanction must "be proportionate and just . . . ." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87; 618 NW2d 66 (2000).

The trial court correctly determined that ACIA had violated the court's discovery order by providing belated and incomplete discovery. ACIA's failure to adequately respond to discovery requests extended over several months, even after an order to compel was entered. The court also correctly concluded that ACIA's discovery violation was not flagrant and wanton, but more likely negligent. Given the lack of flagrant and wanton conduct on ACIA's part, the court properly determined that a default judgment would be too severe a sanction.

Yet, as noted, the trial court found that Hardrick had suffered severe prejudice. At that point, the date originally set for trial was drawing nigh and the court was concerned that ACIA's delay amounted to a "trial by ambush." The court expressed further concern over the effect of ACIA's delay on the court's docket: "The alternative would be for this Court to basically re-start and re-gear up the scheduling order which would include significantly expanding the time that the Court would have to dedicate to this case, re-opening discovery, case evaluation, motions for summary disposition. That is completely inappropriate."

The trial court clearly erred by concluding that ACIA's discovery violations severely prejudiced Hardrick. Hardrick controlled the necessary information regarding his treatment, progress, and the attendant-care services provided by his parents. Hardrick bore the burden of proof on the reasonable value of the attendant-care services and could investigate the issue without assistance from ACIA. Hardrick was also fully aware of ACIA's defense theory given that ACIA had compensated his parents at "health aide" rates. He easily could have accessed the United States Department of Labor's statistics on which ACIA based its payment schedule. Moreover, at the time of the discovery-violation hearing, the parties had agreed to proceed with witness depositions despite the expiration of the discovery period. Thus, the court and Hardrick

were aware that Hardrick would discover additional information regarding ACIA's defense before trial. The court could have allayed its concern that ACIA was attempting to conduct a trial by ambush by precluding ACIA's presentation of any undisclosed witnesses or evidence. And the proper remedy for the inconvenience caused to the court's docket would be to hold ACIA in contempt of court. MCR 2.313(B)(2)(d); *Johnson*, 281 Mich App at 387. Moreover, the trial was adjourned for nearly six months following the imposition of the sanction and by no fault of ACIA. This additional time more than amply allowed continued discovery, which did, in fact, occur. The extended trial-preparation period certainly reduced the prejudice caused by ACIA's earlier discovery violation and supported ACIA's subsequent request to modify the existing sanction.

In the end, the trial court's error cost ACIA the opportunity to present any evidence regarding the reasonable rate of service, an element of damages. Because the sanction was disproportionate and affected the entirety of the trial, we vacate the jury's judgment in Hardrick's favor and remand for a new trial.[3] On remand, the court may find a lesser degree of prejudice caused to Hardrick and may impose some sanction on ACIA for its violation of discovery orders. However, the court should carefully consider what sanctions are "just" under the circumstances. See MCR 2.313(B)(2).

III. FAMILY-PROVIDED ATTENDANT CARE

By remanding this case for a new trial, we have reopened the parties' debate regarding the valuation of family-provided attendant-care services. MCL 500.3107(1)(a) provides for the payment of "[a]llowable expenses," "consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." ACIA contends that the rates charged by health-care agencies for attendant-care services are irrelevant to establish the reasonable rate for unlicensed, family-provided services. ACIA argues that the rate for family-provided attendant care must be based on what a similarly skilled care provider doing the same work could earn if employed performing that work for an unrelated employer. According to ACIA, the pertinent rate for determining the value of the family-provided attendant care is a similar worker's wage, not the hourly fees that a health-care agency might charge to provide such services because that charge would include operating expenses as well as wages. To that end, ACIA filed a motion in limine to preclude Hardrick's evidence in this regard or, in the alternative, requested special jury instructions to limit the use of the evidence. We hold that the market rate for agency-provided attendant-care services bears relevance to establishing a rate for family-provided services.

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[3] The trial court granted a partial directed verdict in Hardrick's favor, requiring the jury to determine a value for attendant-care services between $25 and $45 an hour. The court's decision was based on the lack of evidence contradicting Hardrick's expert witness's valuation of such services. Because ACIA will be able to present evidence regarding damages on remand, including the reasonableness of the rate, we need not consider the propriety of the court's order granting a partial directed verdict.

A. RELEVANCY

ACIA relies extensively on *Bonkowski v Allstate Ins Co*, 281 Mich App 154; 761 NW2d 784 (2008), for the proposition that evidence of agency rates for attendant-care services "is irrelevant" to establish the rate for family-provided care. However, *Bonkowski* expressly acknowledged that its analysis of this issue was pure dicta:

> This case touches on an interesting question of law and statutory interpretation: whether, when determining reasonable compensation payable under MCL 500.3107(1)(a) to lay providers of attendant care services, a jury may rely on the rates charged by health care agencies that employ licensed health care professionals who provide attendant care services. We use the words "touches on" intentionally, as this issue is not squarely before us in this appeal.
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> This Court has previously embraced the notion that "comparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable and for placing a value on comparable services performed [by family members]." *Manley v Detroit Automobile Inter-Ins Exch*, 127 Mich App 444, 455; 339 NW2d 205 (1983). We question the conclusion reached in *Manley*.
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> Notwithstanding our questioning of *Manley*, defendant did not argue in the trial court or on appeal in this Court that *Manley* was wrongly decided. Rather, the lower court record reflects that defendant only argued before the trial court that, under MCL 500.3107, Andrew's expenses had not been "incurred." The question whether attendant care services were "incurred" is distinct from the question whether the amount paid for attendant care services was reasonable. [*Bonkowski*, 281 Mich App at 164-165 (citation omitted).]

We are, therefore, in no way bound to follow *Bonkowski*. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008).

In any event, we disagree with *Bonkowski*'s suggestion that agency rates are irrelevant to establish family-care rates, to wit:

> In determining reasonable compensation for an unlicensed person who provides health care services, a fact-finder may consider the compensation paid to licensed health care professionals who provide similar services. . . . For this reason, consideration of the compensation paid by health care agencies to their licensed health care employees for rendering services similar to the services provided by unlicensed family members is appropriate when determining reasonable compensation for those family members. However, the actual charges assessed by health care agencies in the business of providing such services is not relevant and provides no assistance in determining reasonable compensation for the actual provider of such services. The focus should be on the compensation provided to the person providing the services, not the charge assessed by an

> agency that hires health care professionals to provide such services. [*Bonkowski*, 281 Mich App at 164-165.]

We agree that the rates charged by an agency to provide attendant-care services are not dispositive of the reasonable rate chargeable by a relative caregiver. However, this does not detract from the relevance of such evidence.

Relevant evidence is evidence "having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401 (emphasis added). Relevance divides into two components: materiality and probative value. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Material evidence relates to a fact of consequence to the action. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). "'[A] material fact "need not be an element of a crime or cause of action or defense but it must, at least, be 'in issue' in the sense that it is within the range of litigated matters in controversy."'" *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996), quoting *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995), quoting *United States v Dunn*, 805 F2d 1275, 1281 (CA 6, 1986). Materiality "looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." 1 McCormick, Evidence (6th ed), § 185, p 729. Here, the material fact at issue concerns a reasonable charge for Hardrick's attendant-care services. No-fault insurers routinely pay agency rates for attendant-care services. As Ancell explained, the rates charged vary according to the level of care provided. Thus, the rate charged by an agency for the care provided by a "behavioral technician" relates to a consequential fact, the reasonableness of Hardrick's claimed charge for his parents' "behavioral technician" services, and thus falls within the range of litigated matters in controversy. [4]

To be relevant, evidence must tend "'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Crawford*, 458 Mich at 389-390. Our Supreme Court emphasized in *Crawford*, 458 Mich at 390, "The threshold is minimal: 'any' tendency is sufficient probative force." Evidence is relevant if it "in some degree advances the inquiry," McCormick, § 185, p 736, and is not objectionable simply because it fails to supply conclusive proof. "No single item of evidence can be rejected upon the sole ground that it falls short of making a case; if it

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[4] In *People v VanderVliet*, 444 Mich 52, 60 n 8; 508 NW2d 114 (1993), our Supreme Court quoted approvingly from a treatise authored by Professor Edward Imwinkelried, as follows:

> "This is the normal test for materiality: Does the item of evidence even slightly increase or decrease the probability of the existence of any material fact in issue? Standing alone, the item of evidence need not have sufficient probative value to support a finding that the fact exists. So long as the item of evidence affects the balance of probabilities to any degree, the item is logically relevant." [Citation omitted.]

contributes to that end it must be received, and its sufficiency in connection with the other evidence must be determined on a review of the whole when the case is closed." *Collins v Beecher*, 45 Mich 436, 438; 8 NW 97 (1881). Our Supreme Court highlighted this concept in *Brooks*, 453 Mich at 519, by quoting extensively from McCormick's treatise on evidence:

> "Under our system, molded by the tradition of jury trial and predominantly oral proof, a party offers his evidence not *en masse*, but item by item. An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not ever make that proposition appear more probable than not. Whether the entire body of one party's evidence is sufficient to go to the jury is one question. Whether a particular item of evidence is relevant to his case is quite another. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable. Thus, the common objection that the inference for which the fact is offered 'does not necessarily follow' is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. A brick is not a wall." [1 McCormick, Evidence (4th ed), § 185, p 776.]

Here, the question presented is not whether an agency rate is reasonable per se under the circumstances, but whether evidence of an agency rate may assist a jury in determining a reasonable charge for family-provided attendant-care services. The fact that an agency charges a certain rate for precisely the same services that Hardrick's parents provide does not *prove* that the rate should apply to the parents' services. However, an agency rate for attendant-care services, routinely paid by a no-fault carrier, is a piece of evidence that throws some light, however faint, on the reasonableness of a charge for attendant-care services. See *Beaubien v Cicotte*, 12 Mich 459, 484 (1864). In other words, an agency rate supplies one measure of the value of attendant care and is worthy of a jury's consideration. A jury may ultimately decide that an agency rate carries less weight than the rate charged by an independent contractor, or no weight at all. But the fact that different charges for the same service exist in the marketplace hardly renders one charge irrelevant as a matter of law. Ultimately, the challenged evidence is relevant and the trial court properly rejected ACIA's attempt to exclude it.[5]

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[5] The relevancy of agency rates in determining a reasonable rate for home care has long been implied in Michigan jurisprudence. See *Reed v Citizens Ins Co of America*, 198 Mich App 443, 453; 499 NW2d 22 (1993) ("The reasonableness of the expenses incurred may be judged by comparison with rates charged by institutions."), overruled by *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 540; 697 NW2d 895 (2005) (overruling the proposition that "room and board" and food provided during home care are allowable expenses); *Manley*, 127 Mich App at 455 ("[C]omparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable . . . ."), rev'd 425 Mich 140 (1986) (omitting any analysis or comment on the statement relevant here); *Dunaj v Harry Becker Co*, 52 Mich

B. REASONABLE CHARGES IN THE MARKETPLACE

The dissent argues that "market rates" should dictate a "'reasonable charge' for no-fault services . . . ." *Post* at 6. According to the dissent, "a reasonable charge for attendant-care services provided by a family member is determined by what the family member could receive in the open market for providing similar services." *Post* at 6-7. The dissent reasons that the "relevant market" includes "what an individual care provider would be paid" or "what a health-care agency might pay an 'independent contractor' to provide similar services." *Post* at 6-7. After confining a "reasonable charge" to the wage that might be earned by a family member "in the open market," the dissent contends that agency rates lack relevance to market rates. *Post* at 6-7 (emphasis added).

Neither the no-fault act nor this state's vast body of no-fault caselaw mentions the term "relevant market." It commonly appears, however, in antitrust cases. A claimant seeking to prove the existence of a monopoly must establish the relevant market. *Attorney General, ex rel State Banking Comm'r v Michigan Nat'l Bank*, 377 Mich 481, 489; 141 NW2d 73 (1966). The Michigan Antitrust Reform Act, MCL 445.771 *et seq.*, defines the "relevant market" as "the geographical area of actual or potential competition in a line of trade or commerce, all or any part of which is within this state." MCL 445.771(b). The United States Court of Appeals for the Sixth Circuit has described the test for ascertaining a relevant market as involving "the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service." *White & White, Inc v American Hosp Supply Corp*, 723 F2d 495, 500 (CA 6, 1983).[6]

A relevant market includes a cluster of services or products rather than a lone offering. "Relevant markets are generally not limited to a single manufacturer's products, but are composed of products that have reasonable interchangeability--*i.e.*, gasoline rather than ExxonMobil-branded gasoline." *Partner & Partner, Inc v ExxonMobil Oil Corp*, 326 Fed Appx 892, 899 (CA 6, 2009).

> [D]efining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market. [*SmithKline Corp v Eli Lilly & Co*, 575 F2d 1056, 1063 (CA 3, 1978).]

Under federal law, determining the parameters of the relevant market presents questions of fact. *White & White*, 723 F2d at 499-500.

App 354, 358-359; 217 NW2d 397 (1974) (holding in a workers' compensation case "that medical services provided by a claimant's wife are compensable to the same extent as they would be if the services had been rendered by someone other than the wife").

[6] Michigan's antitrust laws are patterned after federal statutes. *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 397; 516 NW2d 498 (1994).

The Legislature selected "reasonableness" as the operative criterion for determining the amount of a charge for services. MCL 500.3107(1)(a). To the extent that the market for a particular service bears on its reasonableness, the parameters of the relevant market present jury questions. Consumers of attendant-care services may select among a variety of providers, including themselves. Viewed through the antitrust-law lens, the relevant market for attendant-care services includes agency-provided services, family-provided services, and independently contracted care. We find implausible the notion that a "relevant market" may exclude real-life competitors for precisely the same services. A true "market approach" considers the actual marketplace rather than an artificial construct restricted to but one choice.

Further, the dissent's wage-based approach to defining a "reasonable charge" cannot be reconciled with the language of the no-fault act. According to the dissent, "a reasonable charge for any attendant-care services plaintiff's parents provide is the equivalent of what compensation they could command on the open market for providing similar services to unrelated persons. This, in turn, would depend on their qualifications, training, experience, and what persons providing similar services could earn." *Post* at 7. Thus, the dissent limits a "reasonable charge" for attendant-care services supplied by family members to "what the family member could receive in the open market for providing similar services." *Post* at 6-7. This definition conflates an employee's wage with a provider's reasonable charge.

The governing statutory language provides that a no-fault insurer must pay "[a]llowable 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) (emphasis added). To charge is "'[t]o demand a fee; to bill.'" *Holland v Trinity Health Care Corp*, 287 Mich App 524, 528; 791 NW2d 724 (2010), quoting Black's Law Dictionary (8th ed). As a noun, the word "charge" means "[t]he price set or asked for something." *The American Heritage Dictionary* (2d college ed, 1982). MCL 421.44(2) defines "wages" as "remuneration paid by employers for employment[.]" A worker's wage contributes to the charge for a service, but the two are simply not equivalent. Real life examples readily distinguish the two concepts. If one orders a pizza for delivery, a delivery charge may attach. The delivery charge and the pizza deliverer's wage are highly unlikely to correspond. Alternatively, one may hire a car service to provide transportation to an airport. The charge for the service will certainly exceed the wage paid to the driver.

Another legal analogy illustrates the fundamental distinction between wages and reasonable charges. Attorney fee statutes such as 42 USC 1988 authorize courts to award a "reasonable attorney's fee" to prevailing litigants. Reasonable fees, equivalent to reasonable charges, are generally "calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Blum v Stenson*, 465 US 886, 895; 104 S Ct 1541; 79 L Ed 2d 891 (1984).

> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill,

> experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to -- for convenience -- as the prevailing market rate. [*Id.* at 895 n 11.]

In *Smith v Khouri,* 481 Mich 519; 751 NW2d 472 (2008), our Supreme Court considered the method for determining a "reasonable attorney fee" under the case evaluation rule, MCR 2.403(O)(6). The Supreme Court specifically rejected the notion that a reasonable attorney fee equated with an attorney's actual wage, explaining that the court rule

> only permits an award of a reasonable fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the actual fee charged or the highest rate the attorney might otherwise command. As *Coulter v Tennessee,* 805 F2d 146, 148 (CA 6, 1986), explains, reasonable fees "are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region." [*Smith,* 481 Mich at 528 (opinion by TAYLOR, C.J.) (emphasis omitted).]

Instead, several factors determine a reasonable attorney fee, including "'the fee customarily charged in the locality for similar legal services'" and the number of attorney hours expended in the litigation. *Id.* at 530 (citation omitted). The "relevant market" for this inquiry encompasses the locality in which the case was litigated. *Id.* The Supreme Court took pains to emphasize that "[t]he fees customarily charged in the locality for similar legal services" should be the measure, rather than the fee charged by an area's top lawyers. *Id*. at 531.

In the no-fault realm, this Court has repeatedly rebuffed efforts by both providers and insurers to circumscribe a fact-finder's reasonable-charge determination. In *Hofmann v Auto Club Ins Ass'n,* 211 Mich App 55, 113; 535 NW2d 529 (1995), this Court rejected the argument that the "customary fee" obtained by a provider for patients insured by Blue Cross and Blue Shield of Michigan (BCBSM) defined the "reasonable charge" for the service, reasoning:

> ACIA's reasoning is premised on the principle that BCBSM's "payments" to plaintiffs for x-rays, as opposed to plaintiffs' "charges" to BCBSM for those x-rays, are the proper criteria to be used in determining the plaintiffs' "customary charge" for x-rays. This position is untenable, however, in light of the clear statutory language of [MCL 500.3157], which states that a "charge" in a no-fault case "shall not exceed the amount [a] person or institution customarily *charges* for like products, services and accommodations in cases not involving insurance" (emphasis added). Thus, ACIA's reliance on the amount that was "paid" by BCBSM, as opposed to the amount that plaintiffs "charged," is unwarranted.

In *Mercy Mt Clemens Corp v Auto Club Ins Ass'n,* 219 Mich App 46, 54-55; 555 NW2d 871 (1996), this Court extended *Hofmann* by holding that the amount paid by Medicare, Medicaid, workers' compensation insurers, and BCBSM "is not admissible to prove the customary charge that defendant must pay under [MCL 500.3157]." These precedents instruct that the no-fault act does not confine a provider's reasonable charge to the amount the provider customarily *receives* from third-party payors.

C. OTHER RELEVANT EVIDENCE

Given that many factors influence the determination of a "reasonable charge" for attendant-care services, a jury may consider a provider's wage as one piece of evidence relevant to this calculation. We view the reasonableness inquiry as encompassing any evidence bearing on fair compensation for the particular services rendered. The principles supporting the relevancy of agency rates equally support the relevancy of other evidence. For example, Ancell testified that an agency would pay its employees less than the $25 to $45 hourly rate charged to the patient. Evidence of the employee's hourly wage throws some light, however faint on the reasonableness of a charge for attendant-care services. *Beaubien*, 12 Mich at 484. ACIA correctly notes that the jury should hear such evidence to more fully and accurately calculate a reasonable rate for the services rendered.

Similarly, evidence of the "overhead" incurred (or not incurred) by Hardrick's parents would be relevant to calculating a reasonable charge. In this regard, we find instructive *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499; 370 NW2d 619 (1985). In *Sharp*, this Court acknowledged that a family's provision of attendant care can include more than time for care services rendered. Sharp's mother personally hired and coordinated the home-nursing staff, and managed the business side of Sharp's care. This Court determined that the cost of such "overhead" was properly considered in calculating a reasonable rate for the caregiver's services. *Id.* at 513-515.

A parent who personally provides attendant-care services also certainly bears an "opportunity cost." "The term 'opportunity cost,' which is borrowed from the field of economics, refers to the amount that is sacrificed when choosing one activity over the next best alternative." *Mira v Nuclear Measurements Corp*, 107 F3d 466, 472 (CA 7, 1997) (citation and some quotation marks omitted). "[T]he opportunity one gives up by engaging in some activity is the cost of that activity . . . ." *Chronister Oil Co v Unocal Refining & Mktg*, 34 F3d 462, 465 (CA 7, 1994). Limiting a family member's "reasonable charge" to a wage ignores these other costs. In the end, the Legislature commanded that no-fault insurers pay a "reasonable charge" for attendant-care services, thereby consigning to a jury the necessary economic-value choices.

This analysis is consistent with *Sokolek v Gen Motors Corp*, 450 Mich 133; 538 NW2d 369 (1995). *Sokolek* is a workers' compensation case in which the parties disputed the reasonable rate for a relative who provided "other attendance" recognized under MCL 418.315(1) of the workers' compensation act. The *Sokolek* Court determined that the issue should be left to the trier of fact, noting that "[m]any considerations may be necessary to make such a determination." *Sokolek*, 450 Mich at 145 (opinion by BRICKLEY, C.J., and LEVIN, J.). As noted in *Sokolek*:

> The defendant argues that there is no reason why the plaintiff's wife should receive the extra money that an agency charges to address administrative costs. Although we agree that this argument is logically compelling, we hold that what level of compensation is reasonable is a factual determination for the magistrate to decide.

* * *

> [T]he magistrate is in a better position than an appellate court to make this determination. The record before us on appeal is limited, and it is difficult for us to know whether it would be appropriate to award at least part of the extra expense required to hire a home companion from a nursing agency. Many considerations may be necessary to make such a determination.
>
> For example, the cost of minimal benefits and social security contributions may be included in the higher hourly rate paid to a nursing agency, and it may be necessary to provide similar benefits to an independent companion, over and above a standard salary. Nursing agencies may also pay to provide training to their employees above and beyond the abilities of an independent companion, training that may be necessary to care for the plaintiff. *In short, this is a multifaceted factual issue, involving the various types of in-home care available, the duties performed by them, their customary billing and payment practices, and the type of services being performed by the plaintiff's wife.* [*Id.* at 145-146 (emphasis added).]

None of the evidence proffered by ACIA or Hardrick, or even mentioned by this Court, is *dispositive* of the reasonable-charge issue. Rather, the evidence provides a collage of factors affecting the reasonable rate that may be charged by Hardrick's parents for the services they provide.

D. RELEVANCY PRINCIPLES APPLIED

The no-fault act entitles providers of attendant care to impose a "reasonable charge" for their services. The reasonable-charge provision applies to family members, agencies, and independent contractors. In a recent case construing MCL 500.3107(1)(a), our Supreme Court set forth several definitions of the term "reasonable," including "that which is 'agreeable to or in accord with reason; logical,' or 'not exceeding the limit prescribed by reason; not excessive,'" and "'fair, proper, or moderate under the circumstances' and '[f]it and appropriate to the end in view.'" *Krohn v Home-Owners Ins Co*, 490 Mich 145, 159; 802 NW2d 281 (2011) (citations omitted). These definitions of the term "reasonable" demonstrate "an absence of the personal sentiment, prejudice, and bias associated with a subjective point of view . . . ." *Id.* A subjective view is "'based on an individual's perceptions, feelings, or intentions' rather than the 'externally verifiable phenomena' associated with an objective viewpoint." *Id.* (citations omitted). In *Krohn*, the Supreme Court held that an objective standard guides an assessment of the term "'reasonably necessary.'" *Id.* at 163. We discern no basis for applying a different standard to the term "reasonable charge."

"[T]he question whether expenses are reasonable and reasonably necessary is generally one of fact for the jury . . . ." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 55; 457 NW2d 637 (1990). In making this determination, a jury is entitled to consider evidence relevant to the reasonableness of the charge. MRE 401 defines relevant evidence in expansive terms. As Justice COOLEY explained in *Stewart v People*, 23 Mich 63, 75 (1871): "The proper test for the admissibility of evidence ought to be . . . whether it has a tendency to affect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness." The amount charged for attendant-care services substantially similar to the services provided by

Hardrick's parents affords a logical basis for calculating a "reasonable charge." The charges made by others for the same services provided by Hardrick's parents may incorporate fees and costs not present within the Hardrick household, but as with any evidence, these shortcomings affect the weight of the evidence rather than its admissibility.[7]

E. JURY INSTRUCTIONS

As noted, ACIA requested special jury instructions designed to limit or direct the jury's consideration of the factors relevant to establishing a "reasonable charge" for services. We review de novo the trial court's rejection of ACIA's requested special jury instructions. *Heaton v Benton Constr Co*, 286 Mich App 528, 537; 780 NW2d 618 (2009). Instructional error warrants reversal when it affects the outcome of the trial. MCR 2.613(A); *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

ACIA presented two alternative jury instructions to guide the jury's consideration. Proposed Alternative A instructed the jury that "[a]mounts charged by health care agencies cannot be considered in determining reasonable compensation." The trial court properly rejected that instruction because it would have precluded the jury's consideration of relevant evidence.

ACIA's proposed Alternative B, on the other hand, recognizes the multifaceted nature of the required calculation:

> Plaintiff can recover benefits for care provided by member[s] of Plaintiff's family at its reasonable market value. In determining the reasonable market value of such care, you are to consider:
>
> (l) the type and amount of care Plaintiff reasonably needed;
>
> (2) the various types of in-home care available from outside care providers;
>
> (3) the duties performed by outside care providers;
>
> (4) the customary billing and payment practices of outside care providers; and

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[7] We respectfully disagree with the dissent's contention that evidence establishing only the "outer boundaries" of an issue "is not helpful to prove the fact at issue." *Post* at 8. Usually, no single piece of evidence proves a case. Individual pieces of evidence, like bricks, join together to form a wall of proof. An agency rate may represent the "outer boundary" of a reasonable charge for attendant-care services, but along with other evidence including rates charged by independent contractors, a litigant may elect to incorporate evidence of agency rates in a wall of proof supporting the reasonableness of the rate claimed.

(5) the type and amount of services being performed by the member[s] of Plaintiff's family.

There is evidence that rates charged by home care agencies are higher than the amounts paid to the employees who actually render care. The difference between the rates charged by agencies and the amounts paid to its employees include agency overhead, such as social security contributions, malpractice insurance, health insurance, disability insurance, office clerical staff, rent, legal fees, accounting costs and office supplies, in addition to profit for the agency. In determining the amount owed for care rendered by member[s] of Plaintiff's family, you are to consider whether any additional amounts charged by home care agencies are also necessary for the family member to provide care to Plaintiff.

Alternative B accurately reflects that many factors are relevant to the reasonable-rate issue. Alternative B is consistent with *Sokolek*'s analysis of a reasonable rate for home-provided care in the workers' compensation realm. See *Sokolek*, 450 Mich at 145-146 (opinion by BRICKLEY, C.J., and LEVIN, J.). It is consistent with *Sharp*'s recognition that even family-provided care may include "overhead" costs. *Sharp*, 142 Mich App at 513-515. And the proposed instruction allows the jury to consider a broad spectrum of relevant evidence. We therefore conclude that the trial court should have presented this proposed instruction to adequately and accurately inform the jury.

Whether the charge sought by Hardrick's parents qualifies as "'fair, proper, or moderate under the circumstances'" and "'[f]it and appropriate to the end in view,'" *Krohn*, 490 Mich at 159 (citations omitted), will be more fully and clearly assessed based on evidence corresponding to this jury instruction. The jury must weigh agency charges against the charges made by other providers of the same or similar services to determine a reasonable fee. Because ACIA will be able to present such evidence on retrial, the jury will be able to calculate a reasonable charge for Hardrick's parents' services under the circumstances.[8]

Accordingly, we vacate the judgment against ACIA and remand for a new trial consistent with this opinion. Neither party may tax costs pursuant to MCR 7.219 as neither party prevailed in full. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer

[8] ACIA also challenges the court's award of no-fault penalty interest for unreasonably delaying payment after proof of loss was presented. Because this issue may be eliminated on retrial, we decline to comment on the propriety of the award.