STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM JAMES HARDRICK,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant,

and

AAA MICHIGAN and ALLSTATE INSURANCE COMPANY,

Defendants.

FOR PUBLICATION
December 1, 2011

Nos. 294875; 298661; 299070
Oakland Circuit Court
LC No. 2008-091361-NF

Advance Sheets Version

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

MARKEY, J. (*concurring in part and dissenting in part*).

I agree with the majority that the trial court abused its discretion by imposing an unjust and disproportionate discovery sanction and that, therefore, the judgment for attendant care and attorney fees must be vacated and this case remanded for a new trial. I respectfully disagree, however, that agency rates are relevant to determining a reasonable charge for attendant care provided by family members under the no-fault insurance act. MCL 500.3107(1)(a). I find persuasive the discussion on this issue in *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 164-165; 761 NW2d 784 (2008). I would hold inadmissible evidence of rates agencies charge to provide caregivers; the hourly rate necessary to operate a business to provide individual-care givers is not material to the question of a reasonable charge to compensate individual family members who provide attendant care to injured loved ones. The jury should be instructed consistent with this ruling.

In Docket No. 294875, defendant Auto Club Insurance Association (defendant or ACIA), appeals by right the judgment entered in plaintiff's favor for attendant care as an allowable expense under the no-fault act, MCL 500.3107(1)(a). In Docket Nos. 298661 and 299070, defendant appeals the trial court's order for attorney fees under MCL 500.3148(1).

Plaintiff suffered a traumatic brain injury after being struck by an automobile while walking home from his job. Plaintiff asserted that although his parents were not licensed or

formally trained caregivers, other than receiving direction from plaintiff's treating doctors, they should be compensated $25 to $45 an hour—what agencies would charge to provide high-skilled caregivers capable of handling plaintiff's emotional problems. At trial, because of a discovery sanction, defendant was not permitted to present any witnesses or any affirmative evidence. Plaintiff's parents, the caregivers, did not testify, and defendant's cross-examination was limited to the scope of the direct testimony elicited by plaintiff. At the close of plaintiff's evidence, plaintiff moved for a directed verdict on the issues that (1) the claimed attendant-care expenses had been incurred, and (2) absent contrary evidence, the value of the attendant care was no lower than $25 and no higher than $45 an hour. The trial court granted plaintiff's motion and so instructed the jury, which returned a verdict for plaintiff that a reasonable charge for attendant care was $28 an hour. Together with penalty interest under MCL 500.3142(3), the resulting judgment was entered for $333,354.01, even though ACIA had already paid plaintiff's parents $10.25 or $10.50 an hour for all hours of care claimed.

In Docket Nos. 298661 and 299070, defendant appeals the trial court's order for attorney fees under MCL 500.3148(1), asserting bona fide factual issues existed regarding the reasonable level of attendant care plaintiff required and the reasonable rate that plaintiff's parents could charge for it. Alternatively, defendant argues that the trial court assessed an unreasonably high attorney fee.

I. FAMILY-PROVIDED ATTENDANT CARE

Before trial, defendant filed with the court requests for jury instructions based on *Sokolek v Gen Motors Corp*, 450 Mich 133, 144-145; 538 NW2d 369 (1995), and *Bonkowski*, 281 Mich App 154. The essence of the requested instructions was that the market rate for family-provided attendant care must be based on what a similarly skilled care provider doing the same work could earn if employed by an unrelated employer. In other words, the pertinent market rate for determining the value of the family-provided care is a similar worker's wage, not the hourly fees that a health-care agency would charge to provide a health-care worker that includes the agency's operating expenses in addition to what the agency would pay the caregiver.

Defendant also filed a motion in limine seeking to preclude plaintiff from introducing evidence of amounts health-care agencies charge for providing home attendant care. On the basis of *Sokolek* and *Bonkowski*, defendant argued that rates health-care agencies charge are irrelevant in determining compensation for unlicensed family members who provide attendant care. Defendant argued that the only relevant evidence is evidence regarding what such agencies would pay to their health-care employees to provide services similar to what the family member provided. Plaintiff argued that the discussion in *Bonkowski* on this issue is nonbinding dicta, and that *Manley v Detroit Auto Inter-Ins Exch*, 127 Mich App 444; 339 NW2d 205 (1983), rev'd and remanded 425 Mich 140 (1986), provides the controlling rule of law. In *Manley*, the Court opined 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*, 127 Mich App at 455. The trial court denied the motion and also denied defendant's request for supplemental jury instructions.

Thus, defendant presents the fundamental question: what relevance do agency rates have in determining reasonable compensation for nonlicensed family-provided attendant care?

A. STANDARD OF REVIEW

A trial court's decision to admit or exclude evidence is reviewed on appeal for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). But questions of law underlying a trial court's evidentiary decision, such as the application of a constitutional provision, statute, court rule, or rule of evidence, are reviewed de novo. *Id*. at 159; *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

Allegations of instructional error are reviewed de novo. *Heaton v Benton Constr Co*, 286 Mich App 528, 537; 780 NW2d 618 (2009). Instructional error will not warrant reversal unless it affected the outcome of the trial. MCR 2.613(A); *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008). Ultimately, this issue depends on the interpretation and application of the no-fault act, a question of law reviewed de novo. *Bonkowski*, 281 Mich App at 164.

B. ANALYSIS

The questions presented are what evidence is relevant and what courts should instruct jurors in deciding what constitutes a "reasonable charge" for reasonably necessary attendant-care services, under MCL 500.3107(1)(a), provided by a family member to another member of the family injured in an automobile accident. Stated otherwise, how should fact-finders determine reasonable compensation for family members of the injured person who provide attendant care that is an allowable expense under the no-fault act? I find that the pertinent discussion of this issue in *Bonkowski* is persuasive dicta. "It is permissible for an appellate court to find dictum persuasive and decide to follow it." *Schoenherr v Stuart Frankel Dev Co*, 260 Mich App 172, 181; 679 NW2d 147 (2003) (WHITBECK, C.J., concurring). I also find that defendant's argument has logical merit, and is consistent with the limiting language of the no-fault act and the act's cost-containment public-policy goals. *Sokolek*, 450 Mich at 145 (opinion by BRICKLEY, C.J., and LEVIN, J.); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 376-378; 670 NW2d 569 (2003). I would hold that the trial court erred by not granting defendant's motion in limine and also erred by refusing to instruct the jury as requested.[1] I would therefore reverse and remand for a new trial for these reasons as well.

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[1] Defendant's proposed "Alternative A" jury instruction provides:

> Family members are entitled to reasonable compensation for care provided to an injured person. In determining reasonable compensation for a family member who provides health care services, you may consider the compensation paid to licensed health care professionals who provide similar services. Amounts charged by health care agencies cannot be considered in determining reasonable compensation.

First, contrary to plaintiff's argument, *Manley*, 127 Mich App 444, is not controlling or binding legal precedent. *Manley* was decided before November 1, 1990, and was reversed by our Supreme Court, 425 Mich 140. Consequently, it lacks precedential authority. MCR 7.215(J); *Bradacs v Jiacobone*, 244 Mich App 263, 268-269; 625 NW2d 108 (2001), citing *Mitchell v Gen Motors Acceptance Corp*, 176 Mich App 23, 34; 439 NW2d 261 (1989). Moreover, the Supreme Court did not adopt, or even discuss, the pertinent statement in the Court of Appeals opinion 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*, 127 Mich App at 455. As a result, there can be no remaining controlling or binding legal precedent from the Court of Appeals decision in *Manley* on the issue of family-provided attendant care. *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262; 657 NW2d 153 (2002).

Additionally, the issue presented in *Manley* concerned whether the parents of the injured plaintiff could claim as an allowable expense charges for room and board and nurse's aides for their son. See *Manley*, 127 Mich App at 451-455. While the Supreme Court affirmed this Court's ruling that insurers are obligated under the no-fault act to pay parents if they provide their children with services that are allowable expenses under the act, *Manley*, 425 Mich at 153, 159-160, the Court did not discuss methods for determining the value of such services. And, although the parents obtained an award for past services, this part of the award was not considered by either appellate court. *Id.* at 149. Thus, the Court in *Manley* did not decide the method of determining a reasonable charge for family-provided attendant care.

Despite its lack of precedential value, subsequent panels of this Court have cited the *Manley* dicta. In *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 513; 370 NW2d 619 (1985), the Court found it reasonable for a mother to charge the no-fault insurer slightly more than what she paid for nurses and nurse's aides to care for her injured son. The Court reasoned that this compensated the mother for administrative services of "seeking, interviewing, selecting, training, and supervising the nurses" and "billing the insurance company, and paying the nurses." *Id*. The Court found this "consistent with *Manley*" and reasonable in that case because the

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> In determining the amount owed for care rendered by [a] member[s] of Plaintiff's family, you are to consider:
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> (1) the type and amount of care Plaintiff reasonably needed;
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> (2) the type and amount of services actually performed by [a] member[s] of Plaintiff's family;
>
> (3) whether the family member was a licensed health care provider;
>
> (4) the types of in-home care available from outside care providers; and
>
> (5) the amounts outside care providers would have been paid to provide the type and amount of services Plaintiff received from [a] member[s] of [his/her] family.

"plaintiff charges less than similar institutions . . . ." *Id*. at 514. Because *Sharp* was decided before November 1, 1990, it also lacks binding precedential authority. MCR 7.215(J).

In *Reed v Citizens Ins Co of America*, 198 Mich App 443; 499 NW2d 22 (1993), overruled by *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 540 (2005), this Court again followed the *Manley* dicta. *Reed* noted that the *Sharp* Court had opined that "[t]he reasonableness of the [allowable] expenses incurred may be judged by comparison with rates charged by institutions." *Reed*, 198 Mich App at 453. Because our Supreme Court subsequently overruled *Reed*, it too has no binding precedential authority. *Mitchell*, 176 Mich App at 34.

Nevertheless, even though it lacks precedential authority, I find that the *Manley* Court correctly opined that "'allowable expenses' . . . are implicitly purchased by [the injured person] at their reasonable market value." *Manley*, 127 Mich App at 455. That is, the reasonable or market value of the attendant-care services plaintiff "purchased" from his parents is what they could receive by marketing similar services to unrelated purchasers when insurance is not involved. This would be consistent with the plain language of MCL 500.3107(1)(a), limiting allowable expenses to "reasonable charges." What payment plaintiff's parents could command on the open market would depend on their qualifications, training, experience, demand for the service, and other factors. What an agency might charge to provide a caregiver of such services is not relevant because it does not accurately reflect what the individual caregiver would earn.

The *Bonkowski* Court discussed these market principles in a case very similar to the present case in that it involved family-provided attendant care, and many of the same experts testified. The plaintiff in *Bonkowski* was severely injured, suffering not only traumatic brain injury but also spinal injuries that rendered him a quadriplegic. *Bonkowski*, 281 Mich App at 157-158. The plaintiff was discharged from the hospital to the care of his father, Andrew, who received some training from the hospital for that purpose but otherwise only had the educational equivalent of a high school degree. *Id*. at 158-159. Allstate, the no-fault insurer, agreed to pay Andrew approximately $166,000 a year to provide attendant care for the plaintiff, but the plaintiff demanded that Andrew be paid $34 an hour instead of the $19 an hour proposed by Allstate. *Id*. at 159. At trial, defense counsel contended that the testimony of plaintiff's experts based on "agency rates" would include a plethora of business expenses that Andrew would not incur. *Id*. at 161-162. Also, the defendant's claims adjuster testified that Allstate "was unwilling to pay the agency rate for Andrew to care for plaintiff because an agency is licensed and incurs more expenses." *Id*. at 162. The jury returned a verdict in the plaintiff's favor. *Id*. at 163.

On appeal, the issue of using agency rates as a basis for determining the reasonableness of charges for family-provided attendant care was not squarely presented because Allstate had not argued in the trial court that *Manley* was wrongly decided. Nevertheless, the *Bonkowski* Court questioned the *Manley* dicta and opined:

> Under MCL 500.3107, family members are entitled to reasonable compensation for the services they provide at home to an injured person in need of care. 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.]

In dicta, the *Bonkowski* Court opined that the market rate or reasonable charge that a family member providing attendant care may charge can be determined from evidence of what persons providing similar care would be paid, not by what an agency would be paid to provide a care worker to perform similar services. But, the Court affirmed the jury verdict because Allstate did not properly preserve or properly present the issue in this Court and because substantial evidence documented Andrew's care of the plaintiff, the reasonableness of which was a question of fact for the jury. *Bonkowski*, 281 Mich App at 167-169.

The *Bonkowski* Court also addressed the issue of agency rates when it held that the trial court had erred by awarding attorney fees under MCL 500.3148(1) because Allstate had a bona fide factual basis to challenge the plaintiff's claim. On this point, the Court opined:

> Neither the medical community nor the legal community has established a hard and fast rule for determining the reasonable rate of compensation due unlicensed individuals who provide necessary health care services to family members. While consideration of rates paid to licensed and trained health care providers is appropriate, the law does not require that unlicensed individuals who have not earned a degree in a pertinent health care profession be paid the same compensation paid to licensed health care professionals. It can hardly be disputed that the greater the time a health care professional invests in his or her education and training, the greater the compensation would be for that professional. Andrew received specialized training to allow him to provide professional quality care to his son in an array of disciplines. However, Andrew's training was provided over the course of four months. Andrew did not invest years to obtain an education and specialized training to become a medical professional. Quality care made possible by the dedication and love of family members is often preferable to institutional care. Yet, this Court has recognized that family-provided accommodations are generally less costly than institutional care. Under these circumstances we cannot conclude that defendant acted unreasonably when it offered to compensate Andrew at the lower end of the range of what a licensed and formally educated health care professional might expect to command in the open market. [*Bonkowski*, 281 Mich App at 172-173 (citation omitted).]

I would combine the reasoning of *Manley* that market rates control what is a "reasonable charge" for no-fault services with the reasoning of *Bonkowski* regarding the relevant market: what an individual care provider would be paid. I would hold that 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. So, under § 3107 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. Perhaps the closest market equivalent is what a health-care agency might pay an "independent contractor" to provide similar services.

The companion case of *Mullins v Frank H Wilson Co*, decided with *Sokolek*, 450 Mich 133, supports my conclusion that agency rates do not accurately reflect, and therefore are not relevant to, the market rate of family-provided attendant care. At issue in *Mullins* was whether, in a workers' compensation case, Mullens's wife was entitled to be compensated for attendant care at an agency rate for a "'homemaker companion'" or at only half that rate as the cost to hire an independent nurse's aide. *Id*. at 144 (opinion by BRICKLEY, C.J., and LEVIN, J.). As in the no-fault act, MCL 418.315(1) provides for "reasonable" services, which "refers not only to the services to be performed, but to the compensation to be paid to the provider of such services." *Sokolek*, 450 Mich at 144-145 (opinion by BRICKLEY, C.J., and LEVIN, J.). The Court found the defendant's argument "that there is no reason why the plaintiff's wife should receive the extra money that an agency charges to address administrative costs" was "logically compelling . . . ." *Id*. at 145. The Court held, however, that the reasonable level of compensation was a multifaceted factual determination for the fact-finder to resolve. *Id*. at 145-146.

Another question presented here is whether a reasonable charge for family-provided attendant care would include shift premiums, overtime, and benefits that a health-care worker might earn if employed by an agency. The *Bonkowski* Court suggested that a reasonable charge by a family member for attendant care would not include shift premiums and overtime. *Bonkowski*, 281 Mich App at 173. The Court in *Mullins* suggested it may be necessary to include benefits similar to those earned by health-care workers. *Sokolek*, 450 Mich at 145-146 (opinion by BRICKLEY, C.J., and LEVIN, J.). Under the market analysis discussed above, shift premiums, overtime, and benefits would likely not factor into determining a reasonable charge for family-provided attendant care. Shift premiums and overtime are generally paid in circumstances when the law requires it or when necessitated by supply and demand to hire and retain people to work unpopular shifts. Family members providing services to other family members are not covered by labor laws; presumably, they are motivated by nonfinancial reasons. Similarly, health-care agencies pay their workers benefits to attract and retain employees. It seems unlikely that a family member marketing his or her health-care services outside the family could command both a salary and benefits as an independent contractor. On the other hand, if there were evidence to support it, the issue would be for the fact-finder to determine. *Id*. at 145; *Bonkowski*, 281 Mich App at 169.

My market analysis is also consistent with the cost-containment public policy goals of the no-fault act. "'The basic goal of the no-fault insurance system is to provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses at the lowest cost to the individual and the system.'" *Advocacy Org*, 257 Mich App at 377, quoting *Gooden v Transamerica Ins Corp of America*, 166 Mich App 793, 800; 420 NW2d 877 (1988). With respect to holding health-care costs down, "the plain and ordinary language of § 3107 requiring no-fault insurance carriers to pay no more than reasonable medical [or other allowable] expenses, clearly evinces the Legislature's intent to place a check on health care

providers who have no incentive to keep the doctor [or allowable expense] bill at a minimum." *McGill v Auto Ass'n of Mich*, 207 Mich App 402, 408; 526 NW2d 12 (1994) (quotation marks and citation omitted).

Finally, while I generally agree with the majority's discussion of relevance under MRE 401, I respectfully disagree with the majority's application of the "any tendency" standard in this circumstance where agency rates can only be said to be relevant *because* they encompass evidence at the heart of the issue: what individual caregivers are paid to provide the services at issue. The "[a] brick is not a wall" analogy the majority discusses, see *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996), quoting 1 McCormick, Evidence (4th ed), § 185, p 776, illustrates the problem admitting evidence of agency rates in this case. Admitting evidence of agency rates in this case is akin to admitting evidence of the dimensions of a brick wall to prove the dimensions of the individual bricks that comprise the wall or admitting evidence of the cost to build the brick wall to estimate the cost of the individual bricks. In either scenario, the evidence only establishes outer boundaries; it is not helpful to prove the fact at issue.

This point is illustrated in *People v Coy*, 243 Mich App 283; 620 NW2d 888 (2000). In a murder trial, the prosecution introduced evidence that the DNA of the defendant was consistent with blood found on a knife blade and on a doorknob but did not provide evidence of the likelihood of the potential match. The Court opined that without statistical-based interpretive testimony the DNA evidence lacked "'relevance or meaning to the trier of fact'" and was "'"meaningless" to the jury and, thus, inadmissible.'" *Id*. at 298-299, quoting *Nelson v State*, 628 A2d 69, 76 (Del, 1993). Even though the DNA evidence clearly satisfied the "any tendency" standard of relevancy, the Court held that without the interpretive evidence, the DNA evidence "was insufficient to assist the jury in determining whether defendant contributed DNA to the mixed sample." *Coy*, 243 Mich App at 301. As an alternative, the Court also concluded that the DNA should have been excluded under MRE 403 because "'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Coy*, 243 Mich App at 302.

In the present case, evidence of agency rates is only relevant to determine a reasonable rate to compensate family members providing attendant care if there is also evidence separating the component of an agency's hourly fee that represents that which is necessary to compensate an individual caregiver providing similar services. *Bonkowski*, 281 Mich App at 164-165. Assuming such evidence is available, the only purpose for admitting evidence of the agency rate would be to confuse or mislead the jury into believing it reasonable to compensate family members for care provided by them as if they were for-profit health-care providers having satisfied all the requisites to be engaged in such a business. In light of the purposes of the no-fault act, I would hold such a level of compensation for family-provided care would not be a "reasonable charge" within the meaning of MCL 500.3107(1)(a).[2] I conclude that agency rates

[2] All activities in life have "opportunity costs" and I read nothing in the no-fault act or MCL 500.3107(1)(a) in particular that permits anyone—whether or not a family member—to recover as part of a "reasonable charge" for an "allowable expense" the cost of opportunities foregone.

are not relevant to prove a "reasonable charge" for family-provided attendant care, but to the extent the evidence satisfies the "any tendency" standard of MRE 401, it should be excluded because the evidence's "probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury . . . ." MRE 403.

II. MOTIONS FOR A DIRECTED VERDICT

Defendant argues that because plaintiff's parents did not testify at trial, there was no evidence that they actually provided the high level of care that plaintiff sought as an allowable expense. As a result, defendant argues, plaintiff failed to prove the care his parents provided was entitled to compensation at a rate higher than that of a health aide, which defendant had already paid. Consequently, defendant argues, the trial court erred by not granting it a directed verdict. Alternatively, defendant argues that the trial court erred by granting plaintiff a directed verdict on the issue that the higher level of attendant care had been "incurred." Defendant notes that while some level of care was incurred, the lack of evidence plaintiff presented entitled defendant, on plaintiff's motion for a directed verdict, to the reasonable inference that the care provided was at the lower level of a basic health aide. I conclude that the trial did not err by denying defendant's motion but did err by granting plaintiff's motion. The determination of a reasonable charge for the attendant care at issue should have been left for a properly instructed jury to decide.

A. PRESERVATION

Defendant opposed granting plaintiff's motions for a directed verdict that attendant care had been "incurred" and limiting the jury's consideration of a "reasonable" rate to charge for the care to between $25 and $45 an hour. Defendant also moved for a directed verdict on the issue that plaintiff had not presented proof that plaintiff's parents actually proved a higher level of care than that which defendant had already paid. Thus, these issues are properly preserved because they were raised, addressed, and decided by the trial court.

B. STANDARD OF REVIEW

A trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). The evidence presented up to the point of the motion and all legitimate inferences from the evidence must be viewed in the light most favorable to the nonmoving party to determine whether a fact question existed. *Heaton*, 286 Mich App at 532. It is for the jury to weigh the evidence and decide the credibility of the witnesses. *King v Reed*, 278 Mich App 504, 523 n 5; 751 NW2d 525 (2008). A trial court properly grants a directed verdict only when no factual question exists upon which reasonable minds could differ. *Heaton*, 286 Mich App at 532.

C. ANALYSIS

On review of the record, I conclude that the trial court properly denied defendant's motion for a directed verdict on the basis of the lack of proof that the claimed attendant-care hours had been "incurred." The jury could reasonably infer the attendant-care hours were incurred from calendar time records submitted to defendant, the medical prescriptions for

attendant care, Dr. Gerald Shiener's testimony that plaintiff's parents provided the prescribed attendant care, and defendant's payment of the attendant-care hours claimed. Indeed, there was no evidence from which the jury could conclude that the claimed attendant-care hours were not "incurred." Therefore, the trial court properly granted plaintiff's motion for a directed verdict on this issue.

On the other hand, under the no-fault act, "allowable expenses" must be "reasonable charges," MCL 500.3107(1)(a), and a person providing an injured person services "may charge a reasonable amount for . . . services," MCL 500.3157. "When read in harmony, §§ 3107 and 3157 clearly indicate that an insurance carrier need pay no more than a reasonable charge and that a health care provider can charge no more than that." *McGill*, 207 Mich App at 406. Further, although the trial court properly directed a verdict in plaintiff's favor by finding that the attendant care was "incurred," it did not decide the distinct question of what a reasonable charge for those services should be. *Bonkowski*, 281 Mich App at 165. The determination of a reasonable charge for an allowable product, service, or accommodation is generally for the jury to determine as a question of fact. *Id*. at 169, citing *Advocacy Org*, 257 Mich App at 379, and *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 55; 457 NW2d 637 (1990).

Here, evidence presented to the jury would permit it to infer that a reasonable charge for the services plaintiff's parents provided was less than the limited range the trial court's instructions permitted. Specifically, the jury could reasonably infer from the testimony of Dr. Robert Ancell that live-in health-care workers and independent contractors might receive compensation at a lesser hourly rate. Further, Dr. Ancell described attendant care for "safety purposes" as follows: "[A]t the lowest level of responsibility is somebody who's a companion, like a baby sitter. Okay. Somebody who is just there, may get something for somebody, basically for safety purposes. No medical training, basically a companion. They typically make $10 an hour." The jury also heard Dr. Shiener describe plaintiff as like an 11 year old in an adult body. Dr. Shiener also testified that plaintiff needed supervision for his own safety from "someone who knows how to manage behavior and knows how to interact with him in a skillful way, can be there to make sure that he's safe, that he doesn't do anything dangerous. . . . To discourage him from doing something that he's made his mind up to do when it's a bad idea." Although Dr. Shiener testified that he described a "behavioral technician or a life skills trainer . . . more than just a babysitter or a home health aide," the jury might have inferred that the skill level he described was what most parents or guardians do naturally. Finally, from evidence that defendant paid the claimed attendant-care hours at the rate of $10.25 or $10.50 an hour, the jury could have reasonably inferred that this rate represented a reasonable rate of compensation for the services rendered. "Once plaintiffs charge the insured, the insurer then makes its own determination regarding what is reasonable and pays that amount to plaintiffs." *Advocacy Org*, 257 Mich App at 379 n 4. So, evidence existed, viewed in the light most favorable to defendant, that would permit the jury to infer that a reasonable charge for attendant-care services in this case was less than the range to which the trial court restricted the jury's determination.

Additionally, the trial court erred by limiting the jury's determination of a reasonable rate of compensation because it is the jury's responsibility to weigh the evidence and judge the credibility of witnesses. *King*, 278 Mich App at 522. The jury could have chosen to reject the evidence that supported plaintiff's theory of compensation. *Id*. at 523. "'[T]he jury is free to

credit or discredit any testimony.'" *Id*. at 523 n 5, quoting *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001). For example, in *Manley*, in determining a reasonable room and board charge, the "plaintiffs relied upon evidence that the Oakland County Medical Care Facility charged $78 per day" and the defendant relied upon evidence that the plaintiff "could be accommodated in a nursing home at $48 per day." *Manley*, 127 Mich App at 454. The jury rejected this evidence when it determined that $30 a day was a reasonable charge for providing room and board. *Manley*, 425 Mich at 154 n 13.

For these reasons, I conclude that the trial court erred by limiting the jury's determination regarding a reasonable charge for the attendant-care services that plaintiff's parents provided and that this error also warrants reversal and remand for a new trial.

III. CONCLUSION

I agree with the majority that the trial court abused its discretion by imposing a sanction for a discovery violation that was not just or proportionate to the violation. The disproportionate discovery sanction that precluded defendant from presenting any witnesses or evidence at trial and the inability of defendant to confront plaintiff's parents regarding the attendant care they provided combined to deny defendant a fundamentally fair trial. Consequently, I agree that the judgment entered in this matter must be vacated and the order for sanctions must be set aside.

I also conclude that the trial court erred by not granting defendant's motion in limine regarding evidence of agency rates, by refusing to give supplemental jury instructions as requested, and by limiting the jury's fact-finding ability when determining a reasonable charge for the attendant care at issue. These errors also warrant reversal and remand for a new trial.

Because of the resolution of the issues raised in Docket No. 294875, the issues in Docket Nos. 298661 and 299070 are moot.

/s/ Jane E. Markey