

STATE OF MICHIGAN
IN THE SUPREME COURT

SHAUN BONKOWSKI,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Defendant-Appellee.

Supreme Court No. 137672

Court of Appeals No. 273945

Oakland County Circuit Court
No. 01-035172 NF

Liss, Seder & Andrews, P.C.
Nicholas S. Andrews (P42693)
Arthur Y. Liss (P16725)
Attorneys for Plaintiff-Appellant
39400 Woodard, Suite 200
Bloomfield Hills, MI 48304
(248) 647-9700

Daniel S. Saylor (P37942)
Simeon R. Orlowski (P27171)
Garan Lucow Miller, P.C.
Attorneys for Defendant-Appellee
1000 Woodbridge Street
Detroit, MI 48207-3192
(313) 446-5520

Larry A. Smith (P27989)
Co-counsel for Plaintiff-Appellant
24750 Lahser Road
Southfield, MI 48033
(248) 358-3920

137672
reply

**PLAINTIFF-APPELLANT'S REPLY TO DEFENDANT-APPELLEE ALLSTATE
INSURANCE COMPANY'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

FILED
FEB 6 2009
CORBIN B. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

PAGES

Index of Authorities

iii

Plaintiff's Entitlement to Attorney Fees
Under the No-Fault Act

1

Plaintiff's Entitlement to Both No-Fault
Attorney Fees and Attorney Fees as Case
Evaluation Sanctions

8

INDEX OF AUTHORITIES

PAGES

Combs v Commercial Carriers, Inc.
117 Mich App 67; 323 NW2d 596 (1982)

9

McAuley v General Motors Corp.
457 Mich 513; 578 NW2d 282 (1998)

8

McKelvie v Auto Club Ins.
203 Mich App 331; 512 NW2d 74 (1994)

9

Rafferty v Markovitz
461 Mich 265; 602 NW2d 367 (1999)

8, 9

STATUTES

MCL 500.3148

5

NOW COMES PLAINTIFF-APPELLANT, SHAUN BONKOWSKI, by and through counsel, Larry A. Smith, and in rebuttal of the matters stated in Defendant-Appellee Allstate Insurance Company ("Allstate")'s Answer to the Application for Leave to Appeal, represents unto this Honorable Court as follows:

A. PLAINTIFF'S ENTITLEMENT TO ATTORNEY FEES UNDER THE NO-FAULT ACT

Defendant Allstate's Answer to Plaintiff-Appellant's Application for Leave to Appeal is misleading with regard to the question of Plaintiff's entitlement to reasonable attorney fees under MCL 500.3148 in several significant respects:

While it is true that Allstate paid Mr. Bonkowski \$19.00 per hour for his services as Shaun Bonkowski's care provider, when one considers that no overtime or shift premiums were paid, the elder Bonkowski's actual base rate of compensation was just \$14.25 per hour. Andrew Bonkowski attends his son around the clock, checking the bag collecting Plaintiff's urine through the night every hour and a half and repositioning Shaun due to skin pressure concerns at maximum intervals of two hours throughout the night. Mr. Bonkowski initially set his alarm clock to wake himself up to perform these tasks during the night, but subsequently trained himself to wake up automatically to take care of them. In addition, if Shaun has an issue of some sort in the night, they have "call switch" systems set up to enable Plaintiff to wake his father up if necessary (Tr II, pp 45-46, 82-85, 126). If it is considered that AB would have been entitled to receive overtime or shift premiums, as the trial court record established a qualified caregiver working such hours would receive (with regard to the entitlement to overtime premiums, see testimony of Jan Mainella, Tr IV, pp 152-156; testimony of Dr. Robert

Ancell, Tr III, 69, 71, 78-79, 82-88, 94), Andrew Bonkowski's base rate of compensation was actually 25% less than the nominal \$19.00/hr. Allstate was providing. As indicated at page 26 of Plaintiff's application, with overtime factoring into the equation, there are 32 units of pay per day (one for each of the first 8 hours, and 1.5 for each of the following 16 hours for time and a half, or overtime). With the elder Mr. Bonkowski receiving \$19.00/hr. for 24 hours, his total daily pay was $\$19.00 \times 24 \text{ hours} = \$456.00/\text{day}$. Dividing \$456 by 32 yields a base pay rate of only \$14.25/hr. for serving as not one but *five highly skilled caregivers for this quadriplegic, brain-injured patient!* Viewed in this light, it is readily apparent that Allstate's conduct was far from reasonable insofar as the rate of Andrew Bonkowski's compensation is concerned.

Allstate's continued assertions that the verdict below was based on agency rates that were not incurred by Plaintiff are similarly based upon arguments that are superficially inviting, but fail to pass muster under even casual scrutiny. Defendant's suggestion at page three of its answer to Plaintiff's application for leave to appeal that the verdict is equivalent to a finding, with the amount of benefits already paid by Allstate, that Mr. Bonkowski's care should be reimbursed at a rate of more than \$50.00 per hour is misleading, unless it is considered in the same terms as Dr. Ancell's testimony that \$80.00/hr. was a fair approximation of what it would cost to procure equivalent care in the professional healthcare marketplace (Tr III, pp 86-88, 99). Both figures reflect a straight-time hourly rate with no consideration given for overtime pay. As Defendant acknowledged at page 19 of its brief in the Court of Appeals below, there are a total of 39,984 hours at issue here—1,666 days x 24 hours per day. $\$80.00/\text{hr.} \times 39,984 \text{ equals}$

\$3,198,720.00, or just under the Ancell figure of \$3,205,125.00 for providing a registered nurse with overtime in conjunction with Plaintiff's other required caregivers, Tr III, pp 94, 99. The jury in this cause awarded a total of \$1,381,114.00 in attendant care expenses not already paid by Allstate. Defendant paid \$763,000 in attendant care benefits over the same period. Phrased in equal terms, the total amount of the jury's award plus the sum Allstate had already paid was thus more than 33% less than the amount Plaintiff's expert testified would be required to replace Andrew Bonkowski at straight-time, "agency rates."

If it is conceded that the elder Bonkowski would have been entitled to a base hourly rate plus overtime for the 16 hours he put in caring for Plaintiff every day after the first 8 hours, his base rate would have been \$40.22 per hour *for serving in the capacity of not one but at least five different caregivers* (remembering that each day breaks down into 32 units of hourly pay, 8 for the first eight straight-time hours and 24 for the next 16, at time and a half, 32 hourly units of pay per day times 1,666 days at issue = 53,312 total hourly units of pay. Dividing the amount Allstate actually paid in attendant care of \$763,000 plus the additional amount of the jury's verdict, \$1,381,114, by the 53,312 total hourly units of pay yields \$40.22 per hour of *base pay*). **THE JURY THUS AWARDED ONLY 22 CENTS PER HOUR MORE FOR ANDREW BONKOWSKI TO PERFORM THE SERVICES OF MULTIPLE, SKILLED CAREGIVERS THAN AN AGENCY WOULD HAVE CHARGED FOR JUST A HIGH-TECH LPN ALONE (Tr III, p 106).** There is absolutely no question that the jury's verdict was not directly based on "agency rates." Rather than

continuing to beat this dead horse into the ground, Allstate should finally acquiesce in its burial.

The trial court most certainly did not fail to make a finding that that Allstate had acted unreasonably in failing to pay Plaintiff more than the \$14.25 base-pay rate it had paid voluntarily, as Allstate alleges in its answer to Plaintiff's application for leave to appeal. While the circuit judge was obviously not loquacious in enunciating his reasoning, Judge Simon did indeed make a "fact-specific" inquiry and finding in this regard, stating that the court was granting Plaintiff's motion for no-fault attorney fees "only after August 29, 2001," because "that was the date the Plaintiff first presented a demand of \$34.00 per hour, and the documentation [was] in support of that demand" (9/6/06 transcript, p 7). Both the \$34.00/hr. the trial court referred to and the \$14.25/hr. rate discussed above reflected base rates of pay and are therefore directly comparable. Considering the wealth of evidence produced at trial with regard to the immensity of the care-giving tasks that confronted Mr. Bonkowski on a daily basis, the amounts a professional agency would charge for such services *and* the amounts such caregivers would actually receive on a net, or take-home basis, the disparity between the range of acceptable compensation and what Allstate attempted to get away with paying reflects the truly outrageous nature of its conduct. Defendant's contention that "there is no basis in the record of this case for a factual finding of 'unreasonable' conduct on the part of the insurer relative to disputing Plaintiff's claim for greater attendant care benefits" (Defendant's answer to Plaintiff's application for leave to appeal, p 22) has plausible appeal only to one unfamiliar with the actual substance of

this action and the circuit court record. To characterize Defendant's actions in this regard as being merely "unreasonable" is far more charitable than is deserved. There is no question that the requirement of MCL 500.3148, "the attorney's fee shall be a charge against the insurer in addition to the benefits recovered, *if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making the proper payment,*" were met in the case at bar. Judge Simon did not decide the issue of attorney fees in a vacuum, but was instead well-versed in the proofs, as well as the materials submitted and filed by the parties in support of their respective positions. The court stated its reasoning clearly, albeit briefly, on the record, in accordance with the law.

At page 24 of its answer to the pending application for leave, Allstate contends that it was not unreasonable for Defendant to conclude that the value of Andrew Bonkowski's services would be less than that of a licensed professional caregiver. This allegation, however, represents nothing more than skilled misdirection at its finest and most subtle, as the actual issue involved in this action insofar as the award of attorney fees is concerned is *not* the ultimate value of the services Mr. Bonkowski was providing, or even the ultimate relative value of such services compared to those of a licensed caregiver. Instead, the issue of whether Allstate acted unreasonably and Plaintiff was consequently entitled to attorney fees is tied to the *great, vast disparity* between the amount Allstate attempted to get away with paying and what the evidence overwhelmingly indicated would be a fair and reasonable range of payment. It is the latter sum which the jury verdict represents. In the event the Court is concerned with

the relative quality of care as between that which Mr. Bonkowski offered and what licensed, professional caregivers could provide, the evidence was undisputed that the elder Bonkowski provided superior care to his son.

Shaun Bonkowski's extended rehabilitation program at Craig was originally to be six months in duration, with Mr. Bonkowski also scheduled to be there for that time period. It was expected that Plaintiff would be discharged from Craig no earlier than February, 2002. However, since Shaun was doing so well with Andrew Bonkowski providing all of his care there after his initial training, Craig was sufficiently confident in the latter's ability as a caregiver to discharge Shaun home sixty days earlier than planned in December, 2001. Mr. Bonkowski in fact possesses an extraordinarily high degree of competence, due to the fact that he does far more than methodically meet Plaintiff's care requirements (all factual assertions cited in the paragraphs immediately following have as their source the transcript references set forth in the second paragraph below).

With a quadriplegic patient who also suffers from a brain injury, Dr. Perlman explained that the caregiver must be extraordinarily well-trained, educated and vigilant, always being on the lookout for potential problems because any seemingly minor problem can quickly lead to a much greater one, with death always lurking in the background. Andrew Bonkowski is consequently always evaluating his son, since he has learned that Shaun's appearance reveals a great deal about his condition. Should Plaintiff not look quite right, his father immediately starts to investigate the reasons why. Mr. Bonkowski has come to know both the matters involved in his training at Craig and Shaun so well that his proficiency in caring for Plaintiff has risen well above the level

of care trained nurses can ordinarily be expected to provide. On one occasion when Shaun was hospitalized after his discharge from Craig in a non-rehabilitation unit, where the staff nurses lacked experience in caring for spinal cord patients, Andrew Bonkowski wrote a protocol of care for the nurses to follow, which included turning Shaun, recognition of the signs and symptoms of dysreflexia, the manner in which Plaintiff's bladder program should be performed, and his positioning requirements to prevent skin breakdown.

While Mr. Bonkowski almost never leaves Plaintiff, on those rare occasions when his son must be left in the care of a properly trained RN, it is Andrew Bonkowski who must instruct the RN with regard to Shaun's specific needs and requirements during the time it is expected he will be gone. Even a well-trained, qualified professional nurse simply will not be aware of Plaintiff's particular needs and will not usually be able to offer Shaun the same high level of care that Mr. Bonkowski provides daily (Tr I, 200, 209-210, 227-228; Tr II, 7-9, 58-60, 63, 99-100, 114-115, 152-157; Tr III, 4-5, 24-25).

Defendant's continued reliance upon the statements of Dr. Perlman to support the proposition that its conduct with respect to Mr. Bonkowski's compensation was not unreasonable merely demonstrates the weakness of its position, for two reasons. First, as stated, the issue presented with regard to the award of no-fault attorney fees is not whether Mr. Bonkowski should have unequivocally been paid on a par with professional caregivers. Instead, it is the great disparity between what those caregivers earned versus the paltry amount Allstate attempted to pay Andrew Bonkowski that overwhelmingly establishes that Defendant's conduct was unreasonable and supports

the award of no-fault attorney fees made by the trial court. Second, Dr. Perlman himself candidly acknowledged that his opinion concerning the appropriate level of compensation for Mr. Bonkowski was incompetent, as he was not qualified to give such an opinion (Tr I, pp 234-236, 240-241; Tr IV, pp 89-90, 174). Considering that it was decisively shown in the trial court record that Andrew Bonkowski's skills as Plaintiff's caregiver clearly *exceeded* those of corresponding licensed caregivers as far as Shaun's needs were concerned, Perlman's acknowledged unqualified opinion reflects nothing more than bias towards licensed caregivers or perhaps even ignorance of the true extent of the elder Bonkowski's ability in this context.

B. PLAINTIFF'S ENTITLEMENT TO BOTH NO-FAULT ATTORNEY FEES AND ATTORNEY FEES AS CASE EVALUATION SANCTIONS

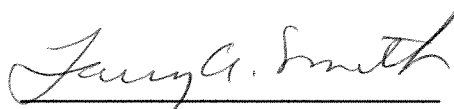
Allstate's contention that *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999) controls this case with regard to the issue of whether Plaintiff is entitled to attorney fees under both the no-fault act, under which they are assessed as a penalty for the insurer's culpable conduct, and MCR 2.403, under which such fees are compensatory, misses the mark by a wide margin. **RAFFERTY'S RULING WAS SPECIFICALLY CONDITIONED UPON THE FACT THAT NEITHER OF THE TWO SOURCES UNDER WHICH ATTORNEY FEES WERE CLAIMED IN THAT CASE TO BE RECOVERABLE IN ADDITIVE FASHION (THE CIVIL RIGHTS ACT, MCL 37.2802, AND THE MEDIATION SANCTIONS RULE, MCR 2.403(O)) WERE PENAL IN NATURE:**

"We further said [in *McAuley v General Motors Corp.*, 457 Mich 513; 578 NW2d 282 (1998)] that there is no support in either provision for the

conclusion that attorney fees may be imposed *as a penalty* or that a party may recover an amount in excess of a reasonable attorney fee. *Id.*, at 519, 578 NW2d 282. This rationale is similarly applicable to sec. 802 of the Civil Rights Act, which also authorizes an award of reasonable attorney fees as part of the costs of litigating a civil rights complaint” (at 602 NW2d 370; emphasis added).

The instant action, as discussed at length under Argument II of Plaintiff-Appellant’s Application for Leave to Appeal, pp 33-38, is quite different. While attorney fees recoverable under the mediation sanctions rule are compensatory, those awarded under MCL 500.3148 are indeed penal in character, *McKelvie v Auto Club Ins.*, 203 Mich App 331; 512 NW2d 74, 77 (1994); *Combs v Commercial Carriers, Inc.*, 117 Mich App 67, 72-73; 323 NW2d 596 (1982). Hence both may be recovered by Plaintiff Bonkowski here in the event that this Honorable Court concludes, as Plaintiff submits it clearly should, that the Court of Appeals erred in reversing the trial court’s award of no-fault attorney fees in Plaintiff’s favor. Contrary to Defendant Allstate’s ill-founded contentions, Plaintiff’s argument was not repudiated by *Rafferty*, but instead is completely consistent with that Court’s actual ruling.

Respectfully submitted,



LARRY A. SMITH (P27989)
Co-counsel for Plaintiff-Appellant
24750 Lahser Road
Southfield, MI 48033
(248) 358-3920