STATE OF MICHIGAN

COURT OF APPEALS

JAMES DOUGLAS, Plaintiff-Appellee,	UNPUBLISHED June 23, 2011
v	No. 295484 Washtenaw Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	LC No. 05-000596-NF

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In this action for recovery of personal injury protection (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.*, defendant appeals as of right from a judgment awarding plaintiff attendant care benefits, following a bench trial, as well as no-fault attorney fees, penalty interest, and prejudgment interest, for a total judgment amount of $1,163,395.40. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

In July 1996, plaintiff sustained a traumatic brain injury when he was struck by a car while riding a bicycle. Although the injury impaired plaintiff's memory and affected his personality and mental well-being, plaintiff was able to return to work for a period of time after the accident. In May 2005, plaintiff filed this action for recovery of PIP benefits against defendant, who had been assigned to administer plaintiff's claim by the Michigan Assigned Claims Facility.[1] Defendant paid certain PIP benefits after the action was filed, but disputed plaintiff's entitlement to attendant care benefits.

Defendant filed three motions for partial summary disposition with respect to plaintiff's entitlement to attendant care benefits. Defendant's first motion was resolved pursuant to a

[1] An assigned-claims insurer is an insurer of last priority under the no-fault act. *Farmers Ins Exch v Farm Bureau Gen Ins Co*, 272 Mich App 106, 112; 724 NW2d 485 (2006); see also MCL 500.3172(1).

consent order that precluded any claim for expenses incurred before May 31, 2004, based on the one-year back rule in MCL 500.3145(1). Defendant's second motion, which was directed at its liability for attendant care benefits, was denied by the trial court without prejudice after the court modified its scheduling order to extend the time for trial, case evaluation, completion of discovery, and the filing of witness lists. Defendant's third motion, which was directed at its liability for attendant care benefits for the period from May 31, 2004, to November 7, 2006, was denied because the trial court determined that there were factual questions for trial.[2]

The case proceeded to a bench trial that was conducted over four days between September 11, 2008, and May 21, 2009. In a written opinion dated August 6, 2009, the trial court determined that plaintiff was entitled to attendant care benefits for services provided by his wife, Katherine Douglas, from May 31, 2004, up to the date of trial. Plaintiff was awarded weekday aide care of seven hours each day and weekend aide care of 16 hours each day up to November 1, 2007, and 40 hours each week from November 1, 2007, up to November 18, 2009, the date of the judgment. In addition, the trial court awarded plaintiff attorney fees and penalty interest based on its determination that defendant did not pay plaintiff's medical bills until October 2006 and that the benefits were overdue.

II. MOTIONS FOR PARTIAL SUMMARY DISPOSITION

On appeal, defendant challenges the trial court's denial of its second and third motions for partial summary disposition with respect to its liability for attendant care benefits.

We review a trial court's summary disposition ruling de novo. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). Although defendant argues that the trial court erred in denying its second motion for partial summary disposition because the submitted evidence did not support plaintiff's claim, the record discloses that the trial court did not address the merits of defendant's motion, but rather denied it as premature, without prejudice, because the court modified its scheduling order to extend the time for discovery, and the court concluded that further discovery was required to properly decide the issue. The court specifically ruled that defendant would be permitted to refile its motion after the close of discovery. On appeal, defendant does not address the basis for the trial court's decision. Where an appellant does not fully recognize the basis of a trial court's decision or address an issue that necessarily must be reached, this Court may deny appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987); see also *City of Riverview v Sibley Limestone*, 270 Mich App 627, 638; 716 NW2d 615 (2006). Given defendant's failure to address the basis for the trial court's denial of defendant's second motion for partial summary disposition without prejudice, appellate relief with respect to that issue is not warranted.

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[2] This Court denied defendant's application for leave to appeal that decision "for failure to persuade the Court of the need for immediate appellate review." *Douglas v Allstate Ins Co*, unpublished order of the Court Appeals entered February 15, 2008 (Docket No. 280718).

With respect to defendant's third motion for partial summary disposition, our review is limited to the evidence presented to the trial court at the time that motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Although the trial court failed to identify the particular subrule on which it relied when reviewing the motion, because the trial court's decision was based on documentary evidence outside the pleadings, review is appropriate under MCR 2.116(C)(10). *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim based on the substantively admissible evidence presented by the parties. MCR 2.116(G)(6); *Adair v Mich*, 470 Mich 105, 120; 680 NW2d 386 (2004); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The moving party has the initial burden of supporting its position with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b) and (4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to show a genuine issue of disputed fact for trial. *Id.*; *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009). Summary disposition is appropriate if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Ctr*, 277 Mich App at 56. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison*, 481 Mich at 425.

Under the no-fault act, PIP benefits are payable for "[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). A plaintiff must prove that "(1) the charge for the service was reasonable, (2) the expense was reasonably necessary and (3) the expense was incurred." *Williams v AAA Mich*, 250 Mich App 249, 258; 646 NW2d 476 (2002). Although the question whether an expense is allowable is generally a question of law, whether expenses are reasonable and reasonably necessary are generally questions of fact. *Wilcox v State Farm Mut Auto Ins Co*, 488 Mich 1011; 791 NW2d 723 (2010).

Expenses for "recovery" and "rehabilitation" under MCL 500.3701(1)(a) are those expended to "bring an insured to a condition of health or ability sufficient to resume his preinjury life." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 535; 697 NW2d 895 (2005). "Care" is broader in scope because "it may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state." *Id.* "Care" includes replacement services, that is, services performed by another that the injured person would have performed but for the injury. *Johnson v Recca*, ___ Mich App ___; ___ NW2d ___ (Docket No. 294363, issued April 5, 2011), slip op at 5. Under MCL 500.3107(1)(c), however, recovery for replacement expenses is limited to three years after the date of the accident. *Id.*

"Care" may also include attendant care, even if the caregiver does not have medical training. *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 180; 318 NW2d 679 (1982). However, the services must be reasonably necessary, *Williams*, 250 Mich App at 258, and actually rendered, *Moghis v Citizens Ins Co*, 187 Mich App 245, 247; 466 NW2d 290 (1990) (1991). See also *Attard v Citizens Ins Co*, 237 Mich App 311, 317-318; 602 NW2d 633 (1999).

In addition, to "incur" the expense, the provider must expect compensation for the service. *Burris v Allstate Ins Co,* 480 Mich 1081; 745 NW2d 101 (2008). "[T]o incur an expense for attendant-care services, the insured's family members and friends, just like any other provider, must perform the service with a reasonable expectation of payment." *Id.* at 1085 (CORRIGAN, J., concurring)

In this case, we disagree with defendant that the trial court erred in relying on the November 28, 2006, affidavit of plaintiff's treating psychologist, Thomas Rosenbaum, to find a factual issue for trial with respect to defendant's liability for attendant care benefits between May 31, 2004, and November 7, 2006. The affidavit contains the expert's conclusions that plaintiff "is in need of aide care during all waking hours" and that Katherine had provided aide care since the time of the motor vehicle accident. It also includes a statement that the affiant met with both plaintiff and his wife and reviewed the plaintiff's records. Conclusory averments in an affidavit are insufficient to establish a genuine issue of material fact. *SSC Assoc Ltd Partnership v Gen Retirement Sys,* 192 Mich App 360, 364; 480 NW2d 275 (1991). The fact that an affiant is a proposed expert does not justify the use of conclusory averments. While the proponent of the evidence is not required to incorporate the expert's qualifications and methods into the affidavit, the proponent must show that the proposed expert, if sworn as a witness, could testify competently to the facts stated in the affidavit. *Dextrom v Wexford Co,* 287 Mich App 406, 428; 789 NW2d 211 (2010); see also MCR 2.119(B)(1). An expert opinion that merely parrots a legal test, without providing a scientific or factual basis for its conclusion, does not create a genuine issue of material fact. *Travis v Dreis & Krump Mfg Co,* 453 Mich 149, 175; 551 NW2d 132 (1996) (opinion of BOYLE, J.). However this affidavit includes both the conclusion and its basis. Experts routinely rely on medical records and the admissible hearsay from patients seeking care to form an opinion. The affidavit need not provide the detail of deposition to create a question of fact. A fair reading of the affidavit supports a finding that the affiant relied on the statements of the parties to determine what activity plaintiff's wife engaged in during the subject period and subsequently evaluated those activities and found them to meet the definition of attendant care. While there is clearly no prescription for attendant care that pre-dates Dr Rosenbaum's care, that fact alone does not preclude a rationale trier of fact from finding that attendant care was reasonable and necessary from May 31, 2005 until November 2006.

Defendant also challenged whether any attendant care expenses had been incurred prior to November 2006. Even where a service is reasonably necessary the services must be actually rendered. *Moghis v Citizens Ins Co,* 187 Mich App 245, 247; 466 NW2d 290 (1990), See also *Attard v Citizens Ins Co,* 237 Mich App 311, 317-318; 602 NW2d 633 (1999). In its brief, defendant admits that the "testimony clearly showed that there was only a small window of time each weekday in which any care could have been performed." Defendant argues that only one hour of attendant care was offered, limiting its definition of attendant care to Mrs. Douglass's prompting the plaintiff to recall things and organize his life. However, Mrs. Douglass also testified that she had to provide safety monitoring because plaintiff would leave the stove lit and that she spent her entire weekend re-directing the plaintiff. In any case, the crux of the motion was whether any services were rendered, not the amount. Given that the deposition itself provides testimony regarding services such as prompting and safety that could be classified as attendant care service, it is unnecessary to address whether the affidavits of attendant care should be disregarded because they contradict sworn testimony. Thus, the trial court did not err in

finding that there were material questions of fact sufficient to defeat the third motion for summary disposition.

III. BENCH TRIAL

Defendant also challenges the trial court's decision, following the bench trial, to award plaintiff PIP benefits for Katherine's attendant care from May 31, 2004, to November 18, 2009. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A finding is clearly erroneous when, although there is evidence it support it, this Court on the entire record is left with a definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Deference is given to the trial court's special opportunity to judge the credibility of witnesses who appear before it. MCR 2.613(C). Where it appears that the trial court was aware of the issues and correctly applied the law, and an award of damages is within the range of evidence, this Court has not found clear error in the award. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176-177; 530 NW2d 772 (1995).

While we do not fully agree with defendant's arguments, we conclude that the case must be remanded for further findings regarding plaintiff's claim for attendant care expenses. Contrary to defendant's argument on appeal, the trial court's award was not intended to compensate Katherine for her mere presence in the home. The trial court specifically found that plaintiff required supervision and that Katherine was the appropriate person to provide it.

We also reject defendant's argument that MCL 500.3107(1)(a) requires that nursing care be provided by an aide in order to qualify as an allowable expense. Pursuant to *Griffith*, 472 Mich at 535, the material question is not whether Katherine's services may be labeled as nursing care, but whether Katherine's services were reasonably necessary because of the motor vehicle accident, subject to the limitation in MCL 500.3107(1)(c) that precludes an award for replacement expenses incurred more than three years after the date of an accident. *Johnson*, ___ Mich App ___ (slip op at 5).

We also note that MCL 418.315(1), a provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, which provides for attendant or nursing care, has been construed as allowing for on-call time if it is necessary. *Morris v Detroit Bd of Ed*, 243 Mich App 189, 197-199; 622 NW2d 66 (2000). Such time may be compensable under the WDCA even if the caregiver was pursuing his or her own interest or performing household tasks, so long as the caregiver performs these tasks within the limits of the on-call job. See *Brown v Eller Outdoor Advertising Co*, 111 Mich App 538, 543; 314 NW2d 685 (1981). Contrary to defendant's argument on appeal, this Court's decisions in *Moghis*, 187 Mich App at 247, and *Attard*, 237 Mich App at 317-318, do not preclude awards for supervisory or on-call time where a claim is made for PIP benefits under the no-fault act. In *Moghis*, 187 Mich App at 247, this Court determined that there was insufficient evidence that aide care was actually provided. In *Attard*, 237 Mich App at 317-318, this Court merely found that a question of fact existed with respect to whether 24 hours of supervisory care was actually provided by the plaintiff's wife in a case where the plaintiff's physician recommended 24-hour supervision each day.

Because we find no support for defendant's position on appeal, and the decisions in *Morris*, 243 Mich App at 197-199, and *Brown*, 111 Mich App at 543, are consistent with how the Supreme Court construed MCL 500.3107(1)(a) in *Griffith*, 472 Mich at 535, the trial court did err as a matter of law by allowing the award for attendant care to be based on supervisory care. Giving due deference to the trial court's determination that Rosenbaum's opinion was credible, we find no clear error in its finding that attendant care, including supervisory care, was reasonably necessary for plaintiff, or the court's determinations of the amount of hours it deemed reasonable, or that Katherine was an appropriate person to provide the care.

Nonetheless, an insurer has no obligation to pay any amount for aide care except upon submission of evidence that services were actually rendered and the cost expended. *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 159; 388 NW2d 216 (1986); *Moghis*, 187 Mich App at 249. In addition, the caregiver must reasonably expected payment at the time of the claimed performance. *Burris*, 480 Mich 1085 (CORRIGAN, J., concurring). Here, the trial court's decision does not indicate that it was aware of, or rendered findings, with respect to the requirement that the caregiver reasonably expect payment at the time of the claimed performance.[3] At most, the trial court cited *Booth v Auto-Owners Ins Co*, 224 Mich App 724; 569 NW2d 903 (1997), for the proposition that it was not necessary that an insured actually be billed by a family member. However, *Booth* was decided before our Supreme Court addressed the meaning of "incur" in *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003). Under this definition, "incur" means "[t]o become liable or subject to, [e]specially because of one's own actions." *Id.* at 484, quoting *Webster's II New College Dictionary* (2001). As explained in Justice Corrigan's concurring opinion in *Burris*, 480 Mich at 1084-1085:

> Under *Proudfoot*, the term "incur" does not mean that an insured must necessarily enter contracts with the care provider to be entitled to reimbursement for attendant-care expenses ("liable" means "obligated according to law *or equity*"). Nor does it mean that an insured must necessarily present a formal bill establishing that the attendant-care services were provided. It merely means that the insured must have an obligation to pay the attendant-care-service providers for their services. . . . But to incur an expense for attendant-care services, the insured's family members and friends, just like any other provider, must perform the services with a reasonable expectation of payment.

And while damages need not be proven with mathematical precision where, by the very nature of the circumstances, precision is not attainable, *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98-99; 443 NW2d 451 (1989), the trial evidence in this case did not reflect that Katherine maintained records of her claimed attendant care. At most, there was evidence that Katherine completed "affidavit of attendant care services" forms on June 25, 2007, for certain past months

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[3] While defendant does not address this element of allowable costs, we have chosen to address it in the interests of justice. *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994).

in an effort to reconstruct her time. Even then, Katherine's descriptions of her services were vague (e.g., "breakfast lunch dinner"), and in some instances the descriptions of services on the forms were left blank.

There was also evidence at trial that Katherine completed several "contact sheet" forms in November 2007, while employed part time as a rehabilitation aide by Rosenbaum's head injury rehabilitation program known as TheraSupport. Rosenbaum acknowledged that defendant paid for her services, but nothing in the trial court's decision indicates that it accounted for the payments. Further, while Katherine testified at trial regarding the nature of her care for plaintiff, her testimony concluded on February 19, 2009, approximately nine months before the award period ended on November 18, 2009.

In a case involving an award for future expense, findings regarding the reasonable costs of services are a valid basis for a declaratory judgment with respect to future expenses. *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 295; 732 NW2d 160 (2006); *Moghis*, 187 Mich App at 248. But both parties are entitled to a redetermination from time to time of the allowable amount upon a showing of a substantial change in facts and circumstances. *Moghis*, 187 Mich App at 248. In addition, the insurer has no obligation to pay any amount for aide care except upon submission of evidence that services were actually rendered and the costs expended. *Manley*, 425 Mich at 159; *Moghis*, 187 Mich App at 249.

While this case does not involve a declaratory judgment, the principles applicable to such judgments are instructive in reviewing the trial court's monetary award. Because defendant had no obligation to make payment until it was provided with documentation of Katherine's attendant care, the trial court clearly erred in awarding attendant care benefits to plaintiff without requiring sufficient documentation to support the daily or weekly hours underlying the award. Therefore, we remand this case to the trial court for further proceedings regarding the amount of incurred expenses for attendant care from November 7, 2006, to November 18, 2009. On remand, the trial court shall also determine whether Katherine reasonably expected compensation at the time of performance. The trial court may take additional testimony, if necessary, and amend its findings or render new findings, and amend the judgment accordingly. Cf. MCR 2.611(A)(2)(b) to (d).

With respect to defendant's challenge to the hourly rate of $40 used by the trial court to determine the award, we find no clear error. The compensation paid to a licensed healthcare professional who provides similar services may be used to determine reasonable compensation for an unlicensed person. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 164; 761 NW2d 784 (2008). The rate charged by institutions may also provide a valid method for determining whether the charge for care provided by a family member for comparable services is reasonable. *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 514; 370 NW2d 619 (1985). Here, the $40 rate is supported by Rosenbaum's testimony regarding the rate charged by his TheraSupport program for attendant care and also the testimony of defendant's adjuster regarding rates charged by commercial agencies for home attendant care. Thus, the trial court's use of the $40 rate is within the range of evidence. Therefore, we find no basis for disturbing this finding. *Triple E Produce Corp*, 209 Mich App at 176-177.

IV. ATTORNEY FEES

Lastly, defendant argues that the trial court erred in awarding plaintiff no-fault attorney fees based on its determination that defendant failed to timely pay medical expenses. We agree. The prerequisites for an award of attorney fees under MCL 500.3148 are summarized in *Moore v Secura Ins*, 482 Mich 507, 511; 759 NW2d 833 (2008), as follows:

> First, the benefits must be overdue, meaning "not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). Second, in postjudgment proceedings, the trial court must find that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1).

Although there was evidence that medical bills were not paid until October 2006, more than 30 days after this action was filed in May 2005, plaintiff failed to establish that the medical bills were not paid within 30 days of defendant's receipt of reasonable proof of the fact and amount of the loss sustained. Therefore, we reverse the trial court's award of attorney fees and statutory interest based on that award.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens