STATE OF MICHIGAN

COURT OF APPEALS

JANET MERRIWEATHER-SHANE, as Guardian of MICHAEL SHANE, Plaintiff-Appellee,	UNPUBLISHED February 11, 2016
v MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION, Defendant-Appellant.	No. 325886 Washtenaw Circuit Court LC No. 13-001008-NF

Before: O'CONNELL, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Defendant, Michigan Property & Casualty Guaranty Association (the Association) appeals as of right the trial court's entry of judgment and order awarding no-fault fees and costs in favor of plaintiff, Janet Merriweather-Shane, acting as guardian of Michael Shane, on a complaint for no-fault attendant care benefits. We affirm the trial court's judgment, but reverse in part the trial court's award of penalty interest and attorney fees and remand.

I. FACTUAL BACKGROUND

Shane was injured in a car accident in 1990 and suffered a head injury. Shane suffers from emotional and behavioral problems caused by his head injury, including paranoia, delusions, memory problems, and abruptly escalating frantic states. According to Merriweather-Shane, these outbursts include yelling, screaming, and breaking objects, and they could occur at any time, including the middle of the night. The police have been called on Shane for having episodes in public. Shane and Merriweather-Shane testified that Merriweather-Shane assists him with these outbursts by giving him medication and talking him out of them by speaking to him calmly.

The Association paid Merriweather-Shane for attendant care at a rate of $20 a day consistently through December 2009. According to Robert Bondy's entry in Shane's insurance file, these payments were for "monitor[ing] his meds and other activities" and "attend[ing] to his needs." In January 2010, Bondy placed Merriweather-Shane on an automatic payment cycle. He informed her by letter that she was no longer required to submit daily duty logs.

However, Bondy noted in the insurance file that the file lacked an updated prescription for attendant care. Merriweather-Shane gave Bondy the information regarding Shane's current physician at the University of Michigan, but the University would not release Shane's medical records to Bondy because he did not provide the proper authorization form.

On December 8, 2010, Kevin Murphy took over Shane's no-fault file. According to Murphy, Shane's file lacked any verification that he required attendant care, such as a prescription or medical notes. Murphy testified that he did not review the entire claim file and did not review the University's medical records because he was concerned with Shane's current need, not his past need. He decided to verify that Shane still required attendant care.

On March 16, 2011, the University faxed medical documentation to Murphy. The documentation provided that Shane continued to require psychiatric care. However, the documentation did not make any statements about attendant care. Murphy wrote Merriweather-Shane to inform her that he intended to assign a nurse case manager to Shane's file. Murphy assigned nurse case manager Rebecca Long.

Murphy's May 9, 2011 notes indicated that Shane continued to exhibit paranoia and that Merriweather-Shane continued to provide attendant care services, but Shane refused to take medication. Murphy indicated that Long would work with Shane to obtain a psychological evaluation. Murphy noted that on May 18, 2011, he spoke with Merriweather-Shane on the phone and informed her that without an attendant care prescription, the Association would discontinue attendant care payments. Murphy noted in June 2011 that Merriweather-Shane stated that Shane was not taking his medication, but she continued to provide him with supervision, transportation, and making medical appointments.

In a report dated July 28, 2011, Dr. Alan Mellow stated in a report that, "[w]ith respect to [Shane's] attendant needs, the primary care physician is better able to comment on this. The Psychiatry Department will not write that letter and instead refer[s] that evaluation back to the primary care doctor." Murphy and Long consulted over email. In an August 10, 2011 letter, Murphy informed Merriweather-Shane that, because a doctor would not opine regarding Shane's need for attendant care, the Association was canceling attendant care payments.

In August 2013, Shane called the Association to inquire about locating a new physician. The Association re-assigned Long to the case, and Long assisted Shane with locating Dr. David Beltzman. Dr. Beltzman testified that he met with Shane on September 24, 2013, at Long's request, and performed a psychiatric evaluation.

According to Dr. Beltzman, Shane had substantial problems with disinhibition, anger outbursts, and aggressiveness. Dr. Beltzman found Shane articulate, but intense and intimidating, in part because Shane would "spontaneously escalate into outbursts where he could not contain himself. He would yell, he would scream, he would . . . feel that he has been maltreated." The outbursts were somewhat frightening and threatening, in part because of Shane's large physical size. Shane required attendant care and "should've been constantly supervised." Dr. Beltzman testified that if left alone, Shane could inadvertently hurt himself or others.

Dr. Beltzman authored a report on December 2, 2013, which he sent to Long. However, Dr. Beltzman testified that he did not provide a prescription for attendant care. He never prescribes attendant care for his clients, but instead leaves prescription-writing to the client's physical medicine doctor.

In October 2013, Merriweather-Shane filed a complaint for attendant care benefits. She provided a summary services log that indicated that, from October 15, 2012 to October 15, 2013, she had provided attendant care that included monitoring medication use, monitoring head-injury-related complaints and concerns such as mood, memory, headaches, and somatic complaints, provided transportation, and provided Shane with safety and supervision. Merriweather-Shane claimed that she did this for 6 hours a day and requested $18 an hour for her services. According to Merriweather-Shane, she has a Master's degree in special education and makes $36 an hour supervising adolescents at the psychiatric hospital at which she works.

On November 4, 2013, Murphy responded by letter that he was denying payment because he did not have a medical verification of the necessity of the services. However, on January 8, 2014, Long informed Murphy that Shane saw Dr. Owen Z. Perlman, who wrote a prescription for 6 hours of daily attendant care. Long attached a copy of the scrip to her email. Murphy testified that he received the scrip, but did not resume paying attendant care benefits because he did not have an itemized statement from Merriweather-Shane to verify that she was performing attendant care. However, he acknowledged that he did not ask Merriweather-Shane for a daily services log until June 4, 2014.

Following proofs, the trial court found that Shane required constant, consistent attendant care as detailed in his medical records, and that the Association was aware of his ongoing need for attendant care services. It found that the Association should have paid Merriweather-Shane $20 a day from October 15, 2012, until January 8, 2014. It also found that, following Dr. Perlman's prescription on January 8, 2014, it should have paid Merriweather-Shane $15 an hour for 6 hours. It found that the Association's refusal to pay was an unreasonable denial of attendant care benefits, and it awarded interest and attorney fees. The trial court's December 3, 2014 judgment provided for "12% no-fault interest" from October 15, 2012, to July 31, 2014; "12% no-fault interest" from July 31, 2014 to December 1, 2014; "[n]o-fault attorney fees pursuant to MCL 500.3184," costs, and judgment interest as of the entry of the judgment.

The Association now appeals.

II. SUFFICIENCY OF THE EVIDENCE

The Association contends that the evidence was not sufficient to support the trial court's verdict awarding Merriweather-Shane attendant care costs after October 15, 2012. We disagree.

This Court reviews for clear error the trial court's findings of fact following a bench trial. MCR 2.613(C); *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012). A finding is clearly erroneous if, after reviewing the record, we are definitely and firmly convinced that the trial court made a mistake. *Id*. at 256-257. We give regard to the special opportunity of the trial court to judge the credibility of the witnesses that appeared before it. *In re Clark Estate*,

237 Mich App 387, 395-396; 603 NW2d 290 (1999). We review de novo issues of statutory interpretation and the trial court's conclusions of law. *Douglas*, 492 Mich at 255-256.

Under the no-fault act, an insurer is liable to pay benefits for bodily injuries arising out of the use of a motor vehicle. MCL 500.3105(1). These expenses are limited to "allowable expenses." MCL 500.3107(1)(a). To be an allowable expense,

> (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable. [*Douglas*, 492 Mich at 259.]

"[T]he services must be related to the insured's injuries to be considered allowable expenses." *Id*. at 260. The services must be "reasonably necessary." *Id*. at 264.

First, the Association contends that the trial court clearly erred when it found that it improperly denied Merriweather-Shane's request for attendant care service payments before January 8, 2014, because it was unable to determine whether Shane required attendant care services since he was no longer taking his medications. We disagree.

In *Douglas*, the defendant insurance company contended that attendant care services were not reasonably necessary "because there was no medical prescription for attendant care services" before the date in question in that case. *Id*. at 265. The Court concluded that the trial court could find that services were reasonably necessary in the absence of a prescription. *Id*. at 265. Specifically, the Court noted that a doctor testified that the plaintiff's doctor had recommended supervision. *Id*. at 265-266.

We are not definitely and firmly convinced that the trial court made a mistake when it rejected the Association's argument that the attendant care services were solely related to Shane's medication usage. This argument was directly at odds with Merriweather-Shane's service logs through December 2010 and the Association's own records. In his description of Shane's claim, Bondy stated that Merriweather-Shane "monitors [Shane's] meds *and other activities*" and "is paid $20.00/day *to attend to his needs*." Merriweather-Shane's logs through December 2009 included medication-related activities, but also included monitoring his head-injury related complaints. We reject the Association's argument that Merriweather-Shane's attendant care services were based solely on Shane taking prescription medication that he failed to take until late 2013.

Instead, the Association insisted that it required a prescription for attendant care to determine whether those services were necessary. On one hand, it is undisputed that Shane's medical records did not contain a prescription for attendant care. On the other hand, the presence or absence of a prescription is not determinative. See *Douglas*, 492 Mich at 265-266. The question is whether there is a preponderance of the evidence that the services were reasonably necessary. *Id*. at 265.

In this case, Shane's voluminous medical records reflected that Shane's condition had remained essentially unchanged since 1990. A March 16, 2011 report signed by Dr. Mellow indicated that Shane did require psychiatric care and continued to experience instability. On May 9, 2011, Murphy noted that "[w]ife continues to provide A/C to clt but clt refuses to take

TBI meds." On June 8, 2011, Merriweather-Shane detailed for Murphy over the phone the services that she continued to provide to Shane, which included supervising him, making his medical appointments, transportation to appointments, attending appointments, and dealing with his "daily frustrations." Finally, even though Dr. Mellow indicated that he would not provide a prescription, Dr. Mellow also indicated that Shane was not functional in social settings and stated that Shane's physician would be able to opine regarding Shane's need for attendant care. Dr. Beltzman testified that Shane should have been constantly supervised as of September 24, 2013, and there is no indication that his condition was any better before that date. We conclude that the trial court's finding that Shane required attendant care was not clearly erroneous.

Second, the Association contends that the trial court clearly erred when it found that Merriweather-Shane actually rendered attendant care services after January 8, 2014, because she did not provide contemporaneous daily logs of her activities. We disagree.

An insured must establish proof that attendant care expenses were actually incurred by a preponderance of the evidence. *Douglas*, 492 Mich at 269. "This evidentiary requirement is most easily satisfied when an insured or caregiver submits itemized statements, bills, contracts, or logs listing the nature of the services provided with sufficient detail for the insurer to determine whether they are compensable." *Id*. However, "no statutory provision *requires* that this method be used to establish entitlement to allowable expenses—a caregiver's testimony can allow a fact-finder to conclude that expenses have been incurred . . . ." *Id*. at 270. A lack of contemporaneous documentation may affect the witness's credibility. *Id*. at 271.

In this case, both Shane and Merriweather-Shane testified about the extent of the services Merriweather-Shane provided. These services not only included administering Shane's medication, which she testified he resists, but scheduling appointments, taking Shane to appointments, monitoring his head injury and mood complaints, and redirecting him, up to and including redirecting him in the middle of the night. Dr. Beltzman testified that, as of September 2013, "Mr. Shane should've been constantly supervised." According to Dr. Beltzman, Shane likely required more than 6 hours a day of attendant care. Finally, Merriweather-Shane submitted a summary of her attendant care activities.

We also reject the Association's argument that it properly denied Merriweather-Shane's claims for attendant care because she did not submit daily logs. "[O]nce a claimant seeks payment from the insurer for providing ongoing services, the insurer can request regular statements logging the nature and amount of those services to ensure that the claimed services are compensable." *Douglas*, 492 Mich at 270.

In this case, not only did the Association not request logs until June 4, 2014, it specifically informed Merriweather-Shane that it did not require her to submit logs. And when Merriweather-Shane submitted her services summary, the Association did not claim that it was insufficiently detailed, but instead refused payment on the basis that there was no medical need for the services. While her lack of contemporaneous documentation implicated her credibility, see *id*. at 271, this Court does not decide credibility issues on appeal.

We conclude that the trial court did not clearly err when it found that Merriweather-Shane actually provided Shane with attendant care services.

III. UNREASONABLE REFUSAL TO PAY BENEFITS

The Association contends that the trial court erred by awarding 12% no-fault interest and attorney fees because (1) the trial court may not require it to pay attorney fees under the no-fault act, and (2) its decision to deny attendant care benefits was reasonable.

A. STANDARDS OF REVIEW

This Court reviews de novo issues of statutory interpretation. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 12; 795 NW2d 101 (2009). When interpreting a statute, our goal is to give effect to the intent of the Legislature. *Id*. at 13. If statutory language is unambiguous, this Court must enforce the statute as written. *Id*. This Court should read statutory language as a whole and in context, and should read subsections of cohesive statutory provisions together. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). This Court must avoid interpretations that render statutory language meaningless. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012).

This Court reviews the trial court's finding of unreasonable refusal for clear error. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 171; 761 NW2d 784 (2008). The trial court's decision regarding whether to award attorney fees is an exercise of discretion. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 634; 552 NW2d 671 (1996); *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id*.

B. AUTHORITY TO ORDER FEES AND INTEREST

"Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). The rate of interest on an overdue payment is 12% per annum. MCL 500.3142(3). Additionally, in a no-fault action, a prevailing plaintiff is entitled to attorney fees if the insurer unreasonably refused to pay a claim. MCL 500.3148; *Shanafelt*, 217 Mich App at 635. "[A] plaintiff is entitled to attorney fees only for overdue benefits." *Moore*, 482 Mich at 519.

The Association contends that the trial court could not order it to pay attorney fees because it cannot be held liable for fees under the no-fault act. We disagree.

The Association is treated like an insurer under the no-fault act:

> The association is subject to the requirements of this chapter and [MCL 500.8101 *et seq*] but is not subject to the other chapters of this act. The association shall be subject to other laws of this state to the extent that it would be subject to those laws if it were an insurer organized and operating under [MCL 500.5000 *et seq*], to the extent that those other laws are consistent with this chapter. [MCL 500.7911(3).]

The Association is responsible to pay covered claims. MCL 500.7931. A covered claim is an obligation of an insolvent insurer that arises out of an insurance policy contract and remains unpaid by an insolvent insurer. MCL 500.7925(1)(a)-(f). "Covered claims shall not include . . .

attorneys' fees and expenses . . . incurred by the insolvent insurer before the receiver was appointed." MCL 500.7925(7); see *Metry, Metry, Sanom & Ashare v Mich Prop & Cas Guaranty Assoc*, 403 Mich 117, 120-121; 267 NW2d 695 (1978).

The Association contends that attorney fees incurred in an action against the Association are not covered claims. This proposed interpretation is contrary to MCL 500.7925(7) because it renders the phrase "incurred by the insolvent insurer before the receiver was appointed" meaningless. If attorney fees in general are not covered claims, the Legislature would have no reason to specify that attorney fees incurred *before* the receiver was appointed were not covered claims. The exclusion of fees incurred before the Association was appointed separates out those fees incurred after the Association was appointed. In this case, all of Merriweather-Shane's fees were incurred after the Association was appointed. On the basis of the exclusion in MCL 500.7925(8), we conclude that covered claims include attorney fees related to an insurance contract that the Association incurred after it was appointed.

The Association additionally argues that MCL 500.7948 precludes the trial court from holding it liable for actions taken in performance of its duties. This is a governmental immunity provision. See *LM v State*, 307 Mich App 685, 691-692; 862 NW2d 246 (2014) (interpreting essentially identical language in the Local Financial Stability and Choice Act, MCL 141.1541 *et seq*). Such provisions render a department "immune from tort liability if the tort claims arise from the department's exercise or discharge of a governmental function." *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002). Merriweather-Shane did not pursue a tort claim against the Association—her action was based on the existence of a contract. We conclude that MCL 500.7948 does not apply.

Next, the Association contends that the trial court clearly erred when it found that the Association's refusal to pay attendant care benefits was unreasonable. The Association contends that it is reasonable for it to periodically verify that an insured continues to require attendant care, particularly when conditions may change and the insured lacks a current prescription. We agree in part that the trial court clearly erred when it found that the Association's actions were unreasonable.

"[A] delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Shanafelt*, 217 Mich App at 635. The reasonableness of the delay does not depend on whether coverage is ultimately determined to exist. *Id*.; *Moore*, 482 Mich at 522. An insurer's decision to terminate benefits is not unreasonable if there are conflicting medical opinions about a plaintiff's claim. *Id*. at 522.

In this case, the Association attempted to obtain a prescription for attendant care since early 2010, and Dr. Mellow ultimately refused to provide an attendant care prescription. Nurse case manager Long also opined that Shane's treating physician would state that Shane did not require attendant care. It is unclear whether Shane even had a regular treating physician at that time, since the record indicates that his care primarily came through the psychiatric emergency room. Additionally, we note that Dr. Beltzman opined that Shane required attendant care in September 2013, but he testified that he did not contact the Association. Dr. Beltzman did not send his report to Long until December 2013, and his report did not include a scrip. We conclude that that there was a legitimate factual uncertainty regarding Shane's need for attendant

care when the Association refused to pay his benefits as of August 10, 2011, and that persisted through December 2013.

However, we conclude that the trial court did not clearly err when it found that the Association's failure to pay benefits after Dr. Perlman issued a prescription for attendant care on January 8, 2014 was unreasonable. At that point, there was no longer any factual uncertainty regarding whether Shane continued to require attendant care—a medical doctor stated that Shane required attendant care for 6 hours a day. Additionally, while Murphy testified at trial that he denied attendant care payments because of Merriweather-Shane's failure to submit daily log forms, the trial court could have decided that his testimony was not credible because his November 4, 2013 denial letter stated that the Association would not provide payment because Shane did not have a medical verification of the necessity of attendant care. Additionally, the Association informed Merriweather-Shane that she no longer had to submit log forms in January 2011, and the Association did not ask Merriweather-Shane to provide logs until June 4, 2014.

We conclude that the trial court's unreasonableness determination was not clearly erroneous as of January 8, 2014. Merriweather-Shane was entitled to prejudgment interest at a rate of 12% per annum and attorney fees from that date, but we reverse the trial court's determination of unreasonableness prior to January 8, 2014, and remand for it to determine what portion of interest and attorney fees is attributable to the Association's denial after that date.

C. REASONABLENESS OF FEES ORDERED

The Association contends that the amount of fees the trial court ordered was excessive. We disagree.

Reasonable attorney fees are fees "similar to that customarily charged in the locality for similar legal services[.]" *Smith v Khouri*, 481 Mich 519, 528; 751 NW2d 472 (2008) (opinion by TAYLOR, CJ.). To determine the fee customarily charged in the locality, "trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan." *Id*. at 530. These surveys can provide the most reliable, credible data from which to determine the fee customarily charged for similar services. *Id*. at 531-532.

After multiplying the reasonable hourly rate by the reasonable hours billed, the trial court "should consider other factors to determine whether they support an increase or decrease in the base number." *Id*. at 533. Factors may include:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Id*. at 529, quoting *Wood v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982).]

Additional factors may also include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent. [*Id*. at 530, quoting MRPC 1.5(a).]

The trial court utilized the Economics of the Law Practice Surveys while determining an appropriate hourly rate. While the Association takes exception with the trial court's award of an hourly rate of $250 an hour because it contends that the case did not require a high amount of skill and was not exceptionally difficult, the trial court considered these factors when making its award. After stating that it had considered the Association's objections, the trial court reduced the $350 an hour requested rate of Merriweather-Shane's attorney, finding that the rate requested was "somewhat excessive." And while the Association contends that the fee award was excessive because it nearly exceeded the value of the benefits plaintiff's attorney obtained for her clients, as illustrated above, "the amount involved and the results obtained" are only one factor for the trial court to consider.

We conclude that the trial court's decision regarding the rate of attorney fees did not fall outside the range of principled outcomes.

IV. POSTJUDGMENT INTEREST

The Association contends that the trial court improperly ordered postjudgment interest at a rate of 12% per annum. The record fails to support this assertion.

MCL 600.6013(8) provides that interest in a civil action

> is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section.

Once the trial court enters judgment in a no-fault action, interest on the judgment accrues at the postjudgment interest rate under MCL 600.6013(8). *Bonkowski*, 281 Mich App at 176.

In this case, the trial court's order provided:

> Judgment interest from the date the Complaint was filed on October 15, 2013 on the entire amount of the money judgment including taxable costs and attorney fees *from the date the Judgment was entered until it is paid in full*. [Emphasis added.]

The language of the trial court's judgment is not contrary to the judgment interest statute. It does not provide for 12% postjudgment interest.

While the Association references paragraph 2 of the judgment to support its argument, this paragraph does not concern postjudgment interest. Paragraph 2 concerns July 31, 2014 to December 1, 2014. The judgment in this case was not entered until December 3, 2014. Accordingly, the period in paragraph 2 did not concern a period after the judgment and is not contrary to MCL 600.6013(8) or *Bonkowski*. We conclude that the record fails to support the Association's claim regarding postjudgment interest.

We affirm the judgment. However, because the trial court's determination that the Association's actions were unreasonable before January 8, 2014 was clearly erroneous, we reverse in part the trial court's award of penalty interest and attorney fees and remand for a new determination of those amounts. No costs, neither party having prevailed in full. MCR 7.219. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Donald S. Owens
/s/ Jane M. Beckering