STATE OF MICHIGAN

COURT OF APPEALS

RODNEY HOOVER and MAXINE HOOVER, Conservators of the Estate of MICHAEL HOOVER, a Developmentally Disabled Person,	FOR PUBLICATION December 11, 2008
Plaintiffs-Appellees,	
v	No. 278237 Genesee Circuit Court
MICHIGAN MUTUAL INSURANCE COMPANY, now known as AMERISURE MUTUAL INSURANCE COMPANY,	LC No. 86-085769-NZ
Defendant-Appellant.	Advance Sheets Version

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

SCHUETTE, P.J. (*concurring in part and dissenting in part*).

I concur in the conclusion reached by my distinguished colleagues, Judges Murphy and Fitzgerald, that the 28 percent allocation ordered by the trial court was not legally sound and was arbitrary. I also concur that there is no basis for awarding defendant attorney fees because plaintiffs' claims were not fraudulent.

I respectfully dissent, however, from the majority's expansive application of *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521; 697 NW2d 895 (2005), to this case. I do not believe that plaintiffs are entitled to payment of benefits for any costs other than those for the backup generator, television monitoring system, and medical alert pendant service. I also respectfully dissent from the majority's determination that defendant unreasonably refused to pay or delayed payment of benefits for any costs other than those for the generator, television monitoring system, and medical alert pendant service. Therefore, I would reverse and remand for recalculation of the awards to which plaintiffs are entitled.

Under the *Griffith* Court's interpretation of MCL 500.3105(1) and 500.3107(1)(a), an insured's housing costs are compensable if they are affected by accidental injuries arising out of the operation of a motor vehicle and are reasonably necessary for the insured's "care, recovery, or rehabilitation." *Id*. at 530.

At the outset, I agree with the majority that the trial court erroneously allocated 28 percent of the cost of plaintiffs' home as directly related to Michael's custody and care. In

arriving at 28 percent, the trial court relied on the parties' agreement on accommodations and found that defendant had contributed $200,000 toward construction costs of the handicap-accessible home—or roughly 28 percent of the total cost of the $700,000 home. However, this figure merely represents a settlement agreement between the parties regarding defendant's contribution to construction costs for "any and all accommodations reasonably necessary for Michael Hoover's care, recovery and rehabilitation." The fact that nearly 28 percent of the construction costs related to accommodations for Michael does not mean that 28 percent of the home is apportioned to Michael or that care related to Michael's injury constitutes 28 percent of the cost of certain items for which the court awarded benefits. Similarly, despite plaintiffs' assertion that 28 percent is the proper apportionment because Michael uses 2,000 square feet of the 7,200-square-foot home, the amount of space Michael uses cannot alone account for the apportionment of the home related to care for his injuries that resulted from the accident. Indeed, Michael would require space to live in a house regardless of the injuries he sustained in the accident. In other words, the expense of living in a house is not, by itself, causally related to the injuries at issue. Consequently, the trial court improperly attributed 28 percent of the home to Michael's needs.

Given this, the court's awards apportioned at 28 percent were arbitrary. First, the award of 28 percent of plaintiffs' real estate taxes in no way accounts for the home's appraisal value. The fact that defendant contributed 28 percent of the cost of the home does not explain the extent to which facilities constructed for care of Michael's injuries caused by the accident affected the tax appraisal. Second, no evidence was presented concerning the percentage of plaintiffs' utility bills, maintenance costs (including those for a water softener, well, septic system, the roof, structural maintenance, and general maintenance and repair), and telephone bills that are attributable to Michael's care necessitated by his injuries. Indeed, irrespective of his injuries, plaintiffs would be required to pay taxes, utilities, maintenance costs, and telephone bills.

Further, allocation of 28 percent of the security system expenses and homeowners insurance to defendant was wholly improper. Regarding the security system, Rodney Hoover testified that this system is used for crime prevention and helps Michael's nurses feel safer. The system is not reasonably necessary for Michael's care, recovery, or rehabilitation.[1] Similarly, homeowner's insurance is completely unrelated to Michael's care, recovery, or rehabilitation. Again, plaintiffs would bear the cost of that insurance irrespective of his injuries.

Moreover, the trial court improperly awarded plaintiffs 100 percent of the costs of the dumpster, elevator maintenance, Maxine Hoover's cleaning, and snow removal. First, although Michael generates two to three bags of garbage a day, the court's finding that the dumpster is "solely for Michael's waste" was clearly erroneous given Rodney's testimony that this expense covers waste removal for the entire household, as well as testimony that use of the dumpster is also necessitated by the fact that the house is 2,500 feet from the road. Use of the dumpster is

[1] Rodney testified that the ADT security system was used predominantly to "keep an eye on Michael." However, in context, it appears that Rodney was referring to the television monitoring system, also provided by ADT. Defendant does not dispute the court's award for that expense.

not reasonably necessary for Michael's care, recovery, or rehabilitation. Second, regarding the elevator maintenance costs, although Rodney testified that the elevator permits Michael access to the basement in the event of a weather emergency, the need for access to a basement because of weather conditions is not causally related to Michael's injuries. Third, while Maxine explained that she performs "serious" daily cleaning of Michael's room (including vacuuming, mopping and sweeping floors, and cleaning the tub, walls, and windows), evidence was not presented that this cleaning is causally related to Michael's injuries. Further, Maxine admitted that a portion of her cleaning results from the mess left by Michael's nurses. Moreover, removing snow from a driveway is completely unrelated to the injuries at issue. Indeed, plaintiffs would need to remove snow from the driveway irrespective of Michael's injuries. Consequently, the only benefits I find the trial court properly awarded were those for the backup generator, television monitoring system, and medical alert pendant services.

Further, I agree with defendant that the court erred in awarding plaintiffs attorney fees and penalties and in failing to address defendant's request for attorney fees.

> The no-fault act provides for attorney fees when an insurance carrier unreasonably withholds benefits. The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact. [*Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).]

A trial court's award of interest under the no-fault statute is reviewed de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 319; 602 NW2d 633 (1999).

Under MCL 500.3148(1), an attorney representing a claimant may recover fees when an insurer's personal protection insurance benefits payment is overdue, and the 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 proper payment." "When determining whether attorney fees are warranted for an insurer's delay to make payments under the no-fault act, a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Attard*, *supra* at 317.

With the exception of payments that defendant concedes plaintiffs legitimately claimed (i.e., payments for the generator, television monitoring system, and medical alert pendant service), defendant did not unreasonably delay payments. Indeed, as noted earlier, factual uncertainty existed regarding the 28 percent apportionment of the house as directly related to care for Michael's injuries. Additionally, plaintiffs were not entitled to benefits for the costs of the security system, homeowner's insurance, the dumpster, elevator maintenance, Maxine's cleaning, and snow removal. Thus, I believe that the trial court should recalculate attorney fees with respect to the items that defendant conceded were appropriate.

Defendant also contends that the trial court erred in awarding plaintiffs interest under MCL 500.3142(2). I agree in part. "[T]he no-fault interest statute requires an insurer to pay simple interest of twelve percent for personal protection insurance benefits that are not paid within thirty days 'after an insurer receives reasonable proof of the fact and of the amount of loss

sustained.'" *Attard, supra* at 319, quoting MCL 500.3142(2). "[N]o-fault interest is intended to penalize an insurer that is dilatory in paying a claim." *Attard, supra* at 319. As noted earlier, defendant was only dilatory in providing benefit payments for the generator, television monitoring system, and medical alert pendant service after notice was provided within the statutory time frame. Whether defendant owed additional payments was, at best, uncertain. Thus, interest was only appropriate for late payment regarding these items.

I would reverse and remand for the trial court to award costs and recalculate attorney fees and penalties.

/s/ Bill Schuette