STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION,

Plaintiff/Counter-
Defendant-Appellant,

v No. 108884

GLYNN ULBRICH, a minor, by
JUANITA McCLELLAND, his next
friend, DAVID McCLELLAND, and
JUANITA McCLELLAND,

Defendant/Counter-
Plaintiffs-Appellees,

and

GENERAL HEALTH CORPORATION,
a Michigan corporation, and
ERNEST P. CHIODO, M.D.,

Defendants-Appellees.

Before: Sullivan, P.J., and Maher and P. J. Clulo,* JJ.

PER CURIAM

Plaintiff Auto Club Insurance Association (AAA) appeals by leave granted from the May 16, 1988 order of the Macomb Circuit Court which granted a preliminary injunction requiring AAA to pay for medical and rehabilitative services provided to Glynn Ulbrich by defendant General Health Corporation. The injunction was to remain in effect until resolution of AAA's claim for declaratory judgment as to its liability for personal injury protection benefits and, if necessary, a determination of what the reasonable and necessary level of benefits should be. AAA also challenges the trial court's decision regarding the bond requirement imposed upon defendant Dr. Ernest Chiodo pending final resolution of the dispute. We affirm the preliminary injunction and the imposition of bond as modified in this opinion.

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*Circuit judge, sitting on the Court of Appeals by assignment.

On August 6, 1987, defendant Glynn Ulbrich, then fourteen years old, was a passenger in an automobile driven by another fourteen-year-old which was involved in a serious one-car accident. He sustained severe head injuries which left him comatose for almost two months. Presently, he continues to suffer mental and motor function impairments, and is in need of psychological, physical, cognitive, occupational, and recreational therapy.

Originally, therapeutic services were provided by Total Therapy Management, Inc. (TTM) at a cost of about $8,000 per month. The costs were voluntarily paid by AAA, the no-fault insurer of the automobile involved in the accident.

On January 22, 1988, defendant Juanita McClelland removed Glynn from the care of TTM and placed him in the care of Dr. Ernest P. Chiodo and his wholly owned corporation, General Health Corporation. Mrs. McClelland became unhappy with TTM after she visited the facility unannounced on several occasions and found Glynn playing pool or engaging in some other unsupervised or superfluous activity. The costs charged by Dr. Chiodo and General Health Corporation were allegedly substantially higher than before, approximating $25,000 per month.

On September 15, 1988, AAA filed a complaint in the Macomb Circuit Court, seeking a declaratory judgment that it was not liable for all or part of the personal injury protection benefits currently paid to Dr. Chiodo and General Health Corporation for care provided to Glynn. Specifically, AAA claimed that the fees charged for Glynn's care were unreasonable and excessive. Additionally, it claimed that many of the services provided by General Health Corporation were available free of charge from the state and federal governments and the local school system but that the McClellands have refused to apply for such services. On May 18, 1988, AAA filed a first

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amended complaint which, in addition to the above-allegations, asserted that Glynn and the driver of the automobile may have stolen the vehicle and, therefore, according to the terms of the policy, coverage was excluded.

In an answer filed collectively on behalf of all the defendants, they denied that no efforts were made to obtain services through the local school system. They also asserted that not all governmental benefits entitled plaintiff to a setoff, as it suggested. Finally, defendants claimed that the fees charged by Dr. Chiodo and General Health Corporation were reasonable and were for necessary medical expenses.

On May 4, 1988, Mrs. McClelland, as next friend of Glynn, filed a counterclaim against AAA and requested a preliminary injunction requiring AAA to continue paying for Glynn's care in full. The counterclaim alleged that AAA refused to pay for Glynn's care and "as a result of non-payment of benefits Glynn Ulbrich is in imminent danger of suffering irreparable harm including death." That latter allegation was based on a statement in Mrs. McClelland's affidavit that Glynn had attempted suicide on April 17, 1988, purportedly because of the financial pressures placed on the family by AAA.

A hearing on the preliminary injunction request was held on May 16, 1988. Counsel for defendants argued that the injunction was necessary because AAA had refused to pay any benefits during the previous four months and that the McClellands cannot afford the services needed by Glynn on their own. Counsel further stated that "this child has had suicidal attempts, got psychiatric problems that are very severe and ... there is no adequate remedy at law and [sic] for the simple reason that he may not be alive very much longer if he continues to be deprived of the proper and full and necessary care that can be given by the General Health Corporation." AAA objected to the grant of an injunction on two grounds: First, there was an adequate remedy

at law available to defendants under the no-fault statutes; and second, an injunction would give the defendants all the relief they asked for without the benefit of a trial.

The trial court, after considering the parties arguments, ruled:

> "Well, in this case I see it is a child's life versus the Auto Club.... [I]t may be a question of fact [i.e., whether Glynn's life is in danger] but at this juncture if it's the child's life I am going for the child's life. You [AAA] may win in the long run and it may cost you some money but if what counsel is telling me is the truth I am going to grant the preliminary injunction at this posture of the case. Then we will bring it up right away so that we can find out if the law is on your side."

Counsel for AAA then argued that, in light of the trial court's ruling, defendants should be required to post bond to protect AAA in the even that it prevails on the merits of the case. Because AAA had not previously requested a bond and because -- by AAA's own admission -- this "is an extremely complex issue," the court ordered that counsel for AAA prepare a new motion with regard to bond so it would have something to review.

An order granting the preliminary injunction was entered on the day of the hearing, i.e., May 16, 1988. That order also stated that "security herein is not required until further order of the court."[1]

On May 23, 1988, AAA, without first filing a new motion for security as ordered by the trial court, filed with this Court an emergency application for leave to appeal, a motion for immediate consideration thereof, and a motion for stay of proceedings pending appeal. By an order dated June 6, 1988, this Court granted each of AAA's motions. Additionally, it was held that the stay pending appeal "shall be discontinued if appellees [defendants] give security for the payment of costs and damages that may be incurred or suffered by appellant [AAA] if appellant is found to have been wrongfully enjoined or restrained, MCR 3.310(D)(1)."

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On June 9, 1988, defendants filed an emergency motion with the trial court for setting of bond and a determination of security for damages. A hearing on the motion was held on June 10, 1988, at which time the trial court ordered Dr. Chiodo to purchase a surety bond in the amount of $50,000 as security for AAA's costs pending a decision in this case.

The principal issue on appeal, broadly stated, is whether the trial court erred in granting the preliminary injunction to defendants. We find no error.

The standards for granting or denying a preliminary injunction were explained by this Court in Bratton v Detroit Automobile Inter-Insurance Exchange, 120 Mich App 73, 79; 327 NW2d 396 (1982):

> "The grant or denial of a preliminary injunction is within the sound discretion of the trial court. Grand Rapids v Central Land Co, 294 Mich 103, 112; 292 NW 579 (1940); Michigan Consolidated Gas Co v Public Service Comm, 99 Mich App 470, 478; 297 NW2d 874 (1980). The object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either. Gates v Detroit & M R Co, 151 Mich 548, 551; 115 NW 420 (1908). The status quo which will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy. Steggles v National Discount Corp, 326 Mich 44, 51; 39 NW2d 237 (1949); Van Buren School Dist v Wayne Circuit Judge, 61 Mich App 6, 20; 232 NW2d 278 (1975). The injunction should not be issued if the party seeking it fails to show that it will suffer irreparable injury if the injunction is not issued. Niedzialek v Barbers Union, 331 Mich 296, 300; 49 NW2d 273 (1951); Van Buren School Dist, supra, p 16. Furthermore, a preliminary injunction will not be issued if it will grant one of the parties all the relief requested prior to a hearing on the merits. Epworth Assembly v Ludington & N R Co, 223 Mich 589, 596; 194 NW 562 (1923). Finally, a preliminary injunction should not be issued where the party seeking it has an adequate remedy at law. Van Buren School Dist, supra, p 16."

It is clear that a party is not granted "all the relief requested" if such relief is not irreversible and lasts only until a decision on the merits of the case can be reached. See Attorney General v Thomas Solvent Co, 146 Mich App 55, 62-63; 380 NW2d 53 (1985), lv den 425 Mich 880 (1986); Psychological Services of Bloomfield, Inc v Blue Cross and Blue Shield of Michigan, 144 Mich App 182, 185; 375 NW2d 382 (1985).

The grant or denial of a preliminary injunction, being a matter in equity, is reviewed by this Court de novo with due deference given to the findings of the circuit court. That is, the circuit court's findings will be sustained unless this Court is convinced that, had it heard the evidence in the first instance, it would have reached a contrary result. Groveland Twp v Jennings, 106 Mich App 504, 509-510; 308 NW2d 259 (1981), aff'd 419 Mich 719; 358 NW2d 888 (1984).

In the instant case, AAA does not challenge the issuance of the injunction per se; rather, it attacks only the amount of benefits required to be paid thereunder. Specifically, it claims that the fees charged by Dr. Chiodo and General Health Corporation are unreasonable in comparison with fees charged by comparable health care providers. AAA further argues that the injunction goes too far in ordering it to continue paying the fees charged, even given the $50,000 surety bond imposed upon Dr. Chiodo, because the injunction grants defendants all the relief requested without the benefit of trial.

Upon exercising our power of de novo review, we find ourselves in the awkward position of agreeing with the trial court's decision in principle and with the defendants' argument in application. Hence, we are faced with the Solomonic task of reconciling the two positions, i.e., maintaining therapeutic services to Glynn without charging AAA excessive fees which it may not be able to recoup later if defendants prove to be judgment proof. We offer the following solution and modify the terms of the preliminary injunction accordingly.

The decision of the trial court granting the preliminary injunction is affirmed insofar as it (1) ordered AAA to pay reasonable benefits so that Glynn can receive the necessary therapeutic services, and (2) ordered Dr. Chiodo to post a $50,000 surety bond as security for AAA's costs pending a trial and final judgment in the case. We modify the injunction,

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though, to allow General Health Corporation to collect all fees -- past, present, and future -- in accordance with the schemes described infra, which are documented by General Health Corporation and verified by the individual therapists. The amount of the benefits to be paid by AAA shall vary depending on whether Dr. Chiodo has posted the bond as ordered.[2] If Dr. Chiodo has posted the bond, or upon the moment of his doing so, AAA shall pay to General Health Corporation an amount equal to the actual rate charged by the individual therapist or $75 per hour, whichever is larger, for the time actually spent in therapy. In situations where Glynn failed to attend a scheduled therapy session without giving advance notice required by the therapist, AAA shall pay the amount actually charged by the individual therapist for Glynn's no-show, plus ten percent thereof, to General Health Corporation. If Dr. Chiodo has not posted the bond, AAA shall pay only the amount actually charged by the individual therapist. This includes situations where the therapy session was actually held and where Glynn failed to attend without giving advance notice. However, regardless of whether or not Dr. Chiodo has posted bond, AAA's liability for charges due to Glynn's unexcused no-shows shall be limited to that incurred between January 22, 1988 (the date on which Glynn was placed in the care of General Health Corporation) and the date of the release of this opinion. After the release of this opinion, any charges due to Glynn's unexcused no-shows shall be charged, if at all, against the family and not AAA. Finally, again whether or not Dr. Chiodo has posted bond, AAA shall pay an aide, who is supplied by General Health Corporation and whose duty it is to watch over Glynn and to prevent him from harming himself, at a rate of $12 per hour. If Mrs. McClelland, or some other family member or friend not affiliated with General Health Corporation, performs this task, AAA shall pay that person $2.35 per hour.

As is obvious from our modifications of the trial court's preliminary injunction, we have attempted to fashion a remedy which does not unduly burden AAA and does not remove all of General Health Corporation's incentive for providing the necessary therapeutic services. We acknowledge that not every dispute that might arise over the fees charged can be anticipated, thus there may be situations where our modified order does not give direction. In such case, we believe the trial court is quite capable of making a decision which satisfies the spirit of our opinion. It must be noted, too, that this opinion is not meant to preclude General Health Corporation from claiming fees in accordance with its own billing schedule at trial. We have not intended to intimate anything regarding the reasonableness of the fees charged by General Health Corporation.

As modified, we hold that the preliminary injunction was properly issued. The documentary evidence attached to the parties' pleadings, including the affidavit of Mrs. McClelland and the numerous medical reports, amply support the contention that Glynn could suffer serious physical harm, including death, due to his impulsive and self-destructive behavior. These behavioral problems clearly threaten irreparable harm to Glynn unless therapeutic services are provided in an effort to abate them. Further, we believe "maintaining the status quo," in the context of this case, means providing services to preserve the health and well-being of Glynn. This, in turn, requires AAA to continue paying for the services. The preliminary injunction does not now grant defendants all the relief requested but rather limits the fees to a predetermined level of profit; recovery of the balance, if at all, will be had only after fully adjudicating the reasonableness of the charges. And, since defendants seek benefits beyond the time of trial, it cannot be said that they are receiving all the relief requested.

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The decisions of the trial court granting the preliminary injunction and imposing the surety bond upon Dr. Chiodo are affirmed as modified in accordance with this opinion.

/s/ Joseph B. Sullivan
/s/ Richard M. Maher
/s/ Paul J. Clulo

[1] There are actually three different orders in the record. In addition to the one quoted in the body of this opinion, one simply states that "security herein is not required" and the other states that "security herein is not required, or [sic] until further order of this court." Upon reviewing the trial court's oral ruling at the hearing, we believe the court intended to excuse security only until it had an opportunity to examine the parties' briefs on the matter. The order quoted in the body of this opinion reflects that intention most accurately.

[2] Apparently, as of the date of oral arguments in the case before this Court, Dr. Chiodo has not posted the bond because the parties cannot agree on the language of the proposed order. We are confident the trial court is moving to enter such order as soon as possible. When this is done, if Dr. Chiodo is recalcitrant then enforcement of the order shall be through the trial court's contempt powers.