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STATE OF MICHIGAN

COURT OF APPEALS

DENISE MOGHIS,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

OCT 1 8 1990

No. 108313

Before: Wahls, P.J., and Gillis and Jansen, JJ.

PER CURIAM.

Plaintiff suffered closed head injuries in an automobile accident. Although defendant paid many costs, defendant disputed others, resulting in the instant action to compel payment of some past expenses and for declaratory judgment of other future expenses. After a jury trial in December, 1987, judgment was rendered on the verdict, and defendant's post-trial motions for judgment N.O.V. or for new trial were denied. Defendant appeals as of right, alleging that there was insufficient evidence of past expenses and work loss, that the jury improperly awarded future expenses and payment for services gratuitously supplied by friends, and that the trial court erred in instructing the jury and in supplying the jury with a calculator. We hold that plaintiff was improperly awarded compensation for services which were not incurred and thus reduce the judgment against defendant by $280,000. We also modify the trial court's award for allowable future expenses to allow the trial court to retain jurisdiction over future expenses, to ensure payment only after the expenses have actually been incurred. Further, we reduce the jury's award of $25,000 for work loss to $21,216 to comport with the proofs presented at trial. We affirm the jury verdict in regard to the remaining allegations of error.

First, defendant alleges that the jury award of $280,000 for past aid care was not incurred by plaintiff and, therefore, is not recoverable under the automobile no-fault act, MCL 500.3101 et seq.; MSA 24.13101 et seq. We agree. MCL 500.3107; MSA 24.13107 provides that personal protection insurance benefits are payable for allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. The three requirements under this provision are that (1) the expense must have been incurred, (2) must have been for a product, service or accommodation reasonably necessary for the injured person's care, recovery or rehabilitation, and (3) the amount of the expense must have been reasonable. Manley v DAIIE, 127 Mich App 444; 339 NW2d 205 (1983), rev'd on other grounds 425 Mich 140; 388 NW2d 216 (1986). Defendant is not obliged to pay any amount except upon submission of evidence that services were actually rendered and of the actual cost expended. Manley, 425 Mich at 159. We find that there is insufficient evidence to support a jury conclusion that plaintiff incurred past aid care. Although there was testimony indicating that to some extent plaintiff needed some sort of aid care, there is no evidence that this aid care was actually provided to plaintiff. Plaintiff received some help from friends with whom she lived. However, the extent of any aid to defendant was not established sufficient for a finding that plaintiff incurred semi-dependent past aid care.

Second, defendant alleges that there was insufficient evidence to support the jury verdict that the services plaintiff claims were reasonably necessary for the plaintiff's recovery or rehabilitation. Viewing the evidence in a light most favorable to the plaintiff, we find that a reasonable person could find that the services claimed were medically necessary. There was sufficient evidence to support the jury verdict that care, such

as is provided by Rainbow Tree Center which charged approximately $4,000 per month, was reasonably necessary. The question was properly left to the trier of fact. Boggerty v Wilson, 160 Mich App 514, 522; 408 NW2d 809 (1987), lv den 430 Mich 851 (1988).

Third, defendant alleges that the jury's determination of future aid care expenses was improper and that the trial court erred in entering a judgment ordering the insured to pay $4,000 per month directly to the insured. Our Supreme Court in Manley, supra, upheld a judgment entered on a jury verdict for future expenses. The Manley court held that the jury's verdict concerning the reasonable costs of services is a valid basis for a judgment on the verdict for future expenses. The Manley court noted that both parties are entitled to a redetermination from time to time of the amounts properly allowable for services, upon a showing of substantial change in the facts and circumstances. The Manley court further noted:

> Until there is a determination by the Court of Appeals in another case or by this Court of the question whether the cost of providing food, shelter, utilities, clothing, and other maintenance at home is an "allowable expense" where the injured person, if not at home, could properly be placed in an institution because he cannot care for himself, or there is some other substantial change in the facts and circumstances, the jury's verdict establishing the need and the reasonable cost of providing room and board precludes relitigation of the factual or legal issues disputed and decided in this lawsuit, except, again, that insofar as nurse's aides are concerned [defendant] is not obliged to pay any amount except upon submission of evidence that services were actually rendered and of the actual cost expended.

Thus, we modify the judgment to provide for payment upon documentation of aid care expenses, to a maximum of $4,000 per month, or until modified by the trial court.

Fourth, defendant claims that the jury's verdict on plaintiff's work loss claim was against the great weight of the evidence and that the trial court erred in denying defendant's motion. We affirm the jury's finding of a work loss but reduce the amount from $25,000 to $21,216. MCL 500.3107; MSA 24.13107 provides that personal protection insurance benefits are payable

for work loss consisting of loss of income from work an injured person would have performed during the first three years after the date of the accident, had they not been injured. Section 3107 reduces the amount of the claim by fifteen percent due to taxes and limits the amount of recovery to $1,000 per thirty-day period. Although plaintiff was rather vague on her income at Amatron, a company owned by plaintiff and her ex-husband, she eventually affirmed that she had answered an interrogatory to the effect that she had earned $4 per hour and worked thirty to forty hours per week. On the basis of this testimony, we find that the trial court did not err in denying defendant's motion for summary disposition under either MCR 2.116(C)(10) or (C)(8). We find that a genuine issue of material fact existed to create a jury question. Dumas v Automobile Club Ins Assn, 168 Mich App 619, 626; 425 NW2d 480 (1988). Likewise, the trial court did not err in denying defendant's motion for a directed verdict. The evidence establishes a prima facie case of wage loss. Michigan Mutual Ins Co v CNA Insurance Companies, 181 Mich App 376, 389; 448 NW2d 124 (1989).

Defendant also claims that the trial court erred in failing to grant its motion for a judgment N.O.V. or for a new trial on plaintiff's wage loss claim. Specifically, defendant objects to the trial court's determination that the jury could award work loss benefits based on loss of potential profit. Work loss includes not only lost wages, but lost profit which is attributable to personal effort and self-employment. Coates v Michigan Mutual Ins Co., 105 Mich App 290, 295; 306 NW2d 484 (1981). However, the work loss must be income lost due to the personal injury. Id. Plaintiff's position as a joint worker with her husband created the potential for lost income even where plaintiff did not receive an hourly pay. We find that the trial court did not err in finding that the plaintiff potentially lost income resulting from the share in profits

attributable to personal effort in self-employment. As to defendant's claim that the amount of the judgment was against the great weight of the evidence, we defer to the trial court and its unique qualification to judge the credibility of the witnesses in denying defendant's motion for judgment N.O.V. or new trial. Troyanowski v Village of Kent City, 175 Mich App 217, 223; 437 NW2d 266 (1988). However, we are convinced that the amount reached should be reduced by fifteen percent as required by statute. The proofs presented at trial indicate that plaintiff was paid, at most, $4 per hour for forty hours per week, creating a total of $24,960 for three years. This figure comports with the jury verdict. However, this amount must be reduced by fifteen percent as required under MCL 500.3107; MSA 24.13107. Thus, we reduce the amount of judgment to $21,216.

Finally, defendant alleges that the trial court erred in instructing the jury and providing the jury with a calculator. As to the jury instructions, defendant alleges that the trial court erred in presenting plaintiff's theory of the case as if it were the opinion of the court. We disagree. Defendant's failure to make a timely and specific objection to jury instructions precludes appellate review unless manifest injustice would result. Janda v City of Detroit, 175 Mich App 120, 437 NW2d 326 (1989). We conclude that manifest injustice would not result. The instructions, when viewed in their entirety, clearly stated the claims of the parties and the applicable rules of law. Further, instructional error does not require reversal unless the results of a jury verdict are inconsistent with substantial justice. Callesen v Grand Trunk Western Railroad, 175 Mich App 252, 263; 437 NW2d 372 (1989). Reversal is not required.

Likewise, the trial court did not reversibly err in giving the jury a calculator. We find that any error is

harmless beyond a reasonable doubt. Any possible inferences from the trial court allowing the jury to use a calculator are minimal and do not require reversal.

In sum, we find that the trial court erred in failing to direct a verdict for defendant on compensation for services which were not provided to plaintiff. Thus, the judgment shall be reduced by $280,000. We find that the trial court properly entered a judgment on the allowable future expenses determined by the jury, except to the extent that the trial court's judgment requires payment without regard to whether the expenses are actually incurred. We modify the judgment as to future expenses to allow the trial court to retain jurisdiction over future expenses and to require documentation of the actual expenses. We find that the trial court did not err in allowing the issue of work loss to be addressed by the jury. However, the jury award should be reduced to $21,216 from $25,000. The alleged errors in instructing the jury and in allowing the jury to use a calculator do not merit reversal.

Reversed in part and affirmed in part and remanded for an entry of judgment consistent with our opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ John H. Gillis
/s/ Kathleen Jansen