STATE OF MICHIGAN

COURT OF APPEALS

VICKY L. MASE,

Plaintiff-Appellee/
Cross-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant/
Cross-Appellee.

September 23, 1992

No. 132002

UNPUBLISHED

Before: Hood, P.J., and Connor and Richard C. Kaufman,* JJ.

PER CURIAM.

A jury found defendant liable for certain benefits plaintiff claimed under Michigan's no-fault act, MCL 500.3101, et seq.; MSA 24.13101 et seq. Defendant appeals as of right and plaintiff cross appeals from the judgment entered on that verdict. We affirm in part, reverse in part and remand.

I

Plaintiff was paralyzed in an automobile accident on February 10, 1988. There was no dispute that she was entitled to no-fault benefits. What was disputed was the reasonableness and necessity of certain benefits she claimed. The parties agreed that plaintiff's house needed to be replaced with a structure that could accommodate her special needs, but they disagreed on what a reasonable replacement would be. The parties also disputed how many hours per day plaintiff required a paid attendant to care for her.

II

Defendant claims that a verdict could not be entered against it regarding plaintiff's housing because no expense had yet been incurred, as required by MCL 500.3107(a); MSA 24.13107(a). We disagree.

Plaintiff's amended complaint sought declaratory relief regarding housing. The jury found that home construction or modification of $138,500[1] was reasonably necessary for plaintiff's care, recovery and rehabilitation. An action for declaratory relief is proper before an expense is actually incurred. When a dispute arises a trial court is not precluded from entering a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed. Manley v Detroit Automobile Inter-Ins Exchange, 425 Mich 140, 157; 388 NW2d 216 (1986).

However, the judgment the trial court entered on the verdict did not declare plaintiff's rights, but merely awarded her money. This was error. Defendant cannot be ordered to pay until plaintiff actually incurs the expense of obtaining new housing. Manley, supra. Therefore, we remand to the trial court for modification of the judgment to reflect the declaratory nature of the housing portion of the judgment. The order will reflect that payment by defendant is only required upon documentation of actual expenses. Moghis v Citizens Ins Co, 187 Mich App 245, 249; 466 NW2d 290 (1991), lv den 437 Mich 1028 (1991).

III

Defendant next argues that the trial court erred in finding that defendant had unreasonably refused to pay no-fault benefits. Defendant claims that since the housing expense still has not been incurred, it could

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

not have refused to pay.

Defendant raises this issue only with regard to "penalty interest," MCL 500.3142(3); MSA 24.13142(3). Since the judgment awarded no penalty interest, this question is moot.

The trial court made the finding defendant objects to while awarding plaintiff attorney fees, MCL 500.3148(1); MSA 24.13148(1). The award of attorney fees was not raised in defendant's statement of questions presented and thus is not properly before this Court. Preston v Dep't of Treasury, 190 Mich App 491, 498; 476 NW2d 455 (1991), lv den 439 Mich 980 (1992).

Moreover, we do not agree that attorney fees cannot be awarded on claims like plaintiff's where the expense has not yet been incurred. By refusing to pay for plaintiff's reasonable housing needs, defendant prevented plaintiff from incurring the expense and thereby delayed paying proper benefits. The statute specifically provides for awards of attorney fees when the insurer has unreasonably delayed making proper payments. MCL 500.3148(1); MSA 24.13148(1).

IV

Finally, defendant contends the trial court erred in granting plaintiff judgment notwithstanding the verdict on the issue of attendant care. We disagree.

The jury found that beginning on the day of its verdict, plaintiff required attendant care twenty-four hours per day. Plaintiff moved for judgment notwithstanding the verdict because there was no evidence that her condition had changed. The trial court granted the motion, finding that plaintiff required twenty-four hour care since coming home from the hospital. The trial court opined that the jury may have been confused or reached a compromise.

When deciding a motion for judgment notwithstanding the verdict, the trial court must review the testimony in the light most favorable to the nonmoving party. Michigan Microtech, Inc v Federated Publications, Inc, 187 Mich App 178, 186; 466 NW2d 717 (1991), lv den 438 Mich 872 (1991). Granting the motion is proper if the evidence was not sufficient to go to the jury. Id. This Court will not disturb the trial court's decision unless there has been a clear abuse of discretion. Id., pp 186-187.

The trial court's action was proper because there was no factual dispute regarding plaintiff's needs and plaintiff was entitled to judgment as a matter of law. All the witnesses agreed that plaintiff needed an attendant with her twenty-four hours a day, at least until her housing situation changed. The only dispute below was whether defendant could require plaintiff's husband to act as the attendant at night without compensation. A purely legal question.

The no-fault act pays for reasonably necessary services incurred for an injured person's care, even when those services are provided by a family member. See Manley, supra, p 158 n 18; Sharp v Preferred Risk Mutual Ins Co, 142 Mich App 499, 514; 370 NW2d 619 (1985), lv den 425 Mich 881 (1986); OAG, 1983-1984, No 6155, p 120 (June 21, 1983). Cf. Brown v Eller Outdoor Advertising Co, 111 Mich App 538; 314 NW2d 685 (1981). If plaintiff's husband acts as defendant's attendant he is entitled to compensation for his service. Defendant cannot simply impress him into its service without recompense.

Moreover, the jury verdict contained no finding regarding how many hours of attendant care plaintiff needed between the time she came home from the hospital and the day of the jury verdict. Therefore, it was appropriate for the trial court to supplement the jury's verdict with its own findings. MCR 2.514(C).

V

On cross-appeal, plaintiff contends the trial court erred in awarding prejudgment interest under MCL 600.6013(6); MSA 27A.6013(6), rather than MCL 600.6013(5); MSA 27A.6013(5), as amended by 1987 PA 50. We agree.

Defendant's action was for a claimed breach of the written no-fault insurance contract she had with defendant. While the terms of the contract may have been dictated by the no-fault act, defendant's liability was created by the contract. Thus, the trial court's judgment was rendered on a written instrument. On remand, the trial court should recalculate the interest awarded using the fixed rate provided in MCL 600.6013(5); MSA 27A.6013(5).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Michael J. Connor
/s/ Richard C. Kaufman

[1] The jury originally awarded $168,500, but based on a stipulation of the parties, this was reduced by $30,000, representing plaintiff's equity in the home.