STATE OF MICHIGAN

COURT OF APPEALS

EMILY LAMOINE DAVIS,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

August 3, 1992
9:55 a.m.

No. 130815

PUBLISHED

EMILY LAMOINE DAVIS,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

No. 133019

Before: Holbrook, Jr., P.J., and Griffin and Marilyn Kelly, JJ.

HOLBROOK, JR., P.J.

Plaintiff filed an action in Branch Circuit Court against defendant for no-fault benefits based on an automobile accident which rendered her a paraplegic. In Docket No. 130815, defendant appeals as of right a June 26, 1990 judgment awarding plaintiff $24,527, which is the purchase price of a van converted for wheelchair use, as well as documented mileage for the use of the van. In Docket No. 133019, plaintiff appeals as of right the September 6, 1990 order denying imposition of penalty interest on the benefits under MCL 500.3142; MSA 24.13142. This Court consolidated these appeals by order dated November 8, 1990.

On April 28, 1988, plaintiff was a passenger in an automobile which was struck by a truck. At that time, defendant was plaintiff's no-fault carrier. The accident rendered plaintiff a paraplegic. She is presently confined to a wheelchair. Plaintiff requested that defendant purchase a van converted for wheelchair use, but defendant refused, offering instead to pay for the renovation of a van and mileage. Plaintiff then purchased a van converted for wheelchair use for $24,527.

Following a bench trial, the circuit court judge held that the purchase price of the van converted for wheelchair use was a reasonable and necessary expense under the personal protection benefits statute of the no-fault act, MCL 500.3107(a); MSA 24.13107(a). The court reasoned that the van was necessary for plaintiff to lead as full and complete life as possible given her physical limitations. The court noted that the ambulance service provided by the county would provide only medical transportation. Further, the court found that the public transportation system was geographically limited to the county.

After the court entered the judgment order, plaintiff filed a bill of costs, which included $4,565.31 in no-fault penalty interest. The trial judge denied imposition of the penalty interest. He reasoned that the primary obligation under the no-fault act was the immediate payment of medical costs, and that any carrier refusing to reasonably and promptly pay those costs runs the risk of the statutory interest. Since the amount sought by plaintiff arose from defendant's refusal to purchase the van and not medical costs, the court refused to impose the statutory penalty interest.

Defendant argues on appeal that it is not liable for the purchase price of a van and a mileage fee when there is alternative transportation available for plaintiff. Defendant contends that the van is primarily used by plaintiff's family for personal use, rather than plaintiff's medical needs. On the other hand, plaintiff argues that a van is reasonably necessary for her care and recovery. She implores us to read the statute liberally to reach its intended result of providing relief for plaintiff's injury. According to her, providing transportation for her daily requirements is defendant's responsibility under the no-fault act.

The payment of personal protection benefits under the no-fault act includes payment of the following:

> Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. MCL 500.3107(a); MSA 24.13107(a).

Three factors must be met for an item to be considered an "allowable expense" under the statute: (1) the charge must be reasonable; (2) the expense must be reasonably necessary; and (3) the expense must be incurred. Nasser v Auto Club Ins Ass'n, 435 Mich 33, 50; 457 NW2d 637 (1990), citing Manley v DAIIE, 425 Mich 140, 169; 388 NW2d 216 (1986); Moghis v Citizens Ins Co of America, 187 Mich App 245, 247; 466 NW2d 290 (1991), lv den 437 Mich 1022 (1991). The burden of proof regarding whether a particular expense is reasonable and necessary lies with the plaintiff. Nasser, pp 49-50. Whether a van converted for use by a paraplegic is an allowable expense is an issue of first impression.

In Sharp v Preferred Risk Mutual Ins Co, 142 Mich App 499, 510-512; 370 NW2d 619 (1985), lv den 425 Mich 881 (1986), this Court held that rental expenses were allowable expenses under the no-fault act. The trial court in Sharp had held that the plaintiff was entitled to the difference between what apartment rent would cost him if he were uninjured and the more expensive apartments he actually rented. Id., p 510. This Court reversed, ruling that the trial court had construed the rule of law in Manley v DAIIE, 127 Mich App 444; 339 NW2d 205 (1983), rev'd 425 Mich 140; 388 NW2d 216 (1986) too narrowly. The Court in Sharp concluded that as long as larger and better equipped housing was required for the injured person than would be required for the uninjured person, the full cost was an allowable expense. Id., p 511.

Here, the cost of the van was reasonable, and obviously the expense was incurred. We also find that the van was reasonably necessary. Transportation is as necessary for an uninjured person as for an injured person. However, the converted van is a necessary product for the injured person given the limited availability of plaintiff's alternate means of transportation. The ambulance service provides service within Branch county, travelling outside the county two or three times per week. Although this service is available twenty-four hours per day, seven days a week, advance notice is preferred for clients such as plaintiff who reside more than five miles away from town. Moreover, since the ambulance service is the only one in the county, transportation could be delayed or unavailable due to medical emergencies. The local transit authority provides door-to-door service to clients who make advance reservations, but it is unavailable during evenings. The van allows plaintiff to travel outside of the county for medical purposes and vacations. In addition, the van was reasonably necessary according to plaintiff's treating physician. He testified that when he discharged plaintiff, one of the requirements was that plaintiff be equipped with a van for her transportation, allowing her the independence to go to work. Under these circumstances, we find that the converted van is an allowable expense.

We also conclude that the trial court erred in ordering defendant to pay for all of the van's documented mileage. Mileage for personal use is as necessary for an injured person as for an uninjured person. However, we do consider mileage incurred for medical treatment an allowable expense. Accordingly, we remand to the trial court to determine the travel expenses actually incurred for the purpose of obtaining medical treatment. See Neumann v State Farm Mutual Automobile Ins Co, 180 Mich App 479, 486; 447 NW2d 786 (1989); Swantek v Automobile Club of Michigan Ins Group, 118 Mich App 807, 809-810; 325 NW2d 588 (1982), lv den 417 Mich 995 (1983).

Finally, we agree with plaintiff that she is entitled to interest on the personal injury protection benefits under MCL 500.3142(3); MSA 24.13142(3). Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of good faith of the insurer in not promptly paying the benefits. Clute v General Accident Assurance Co of Canada, 179 Mich App 527, 539; 446 NW2d 839 (1989), lv den 435 Mich 857 (1990); Bach v State Farm Mutual Automobile Ins Co, 137 Mich App 128, 131-132; 357 NW2d 325 (1984), lv den 421 Mich 862 (1985).

Defendant, relying upon Kreighbaum v Automobile Club Ins Ass'n, 170 Mich App 583; 428 NW2d 718 (1988), lv den 433 Mich 906 (1989), argues that the trial court correctly refused to issue penalty interest defendant reasonably believed that the benefit was unreasonable. The plaintiff in Kreighbaum sought penalty interest, as well as attorney fees and judgment interest, under the no-fault act. The Court in Kreighbaum denied this relief sought by the plaintiff, citing Joiner v Michigan Mutual Ins Co, 137 Mich App 464, 479; 357 NW2d 875 (1984), lv den 422 Mich 920 (1985). However, when Joiner again came before this Court on this specific issue, this Court held that penalty interest is triggered when the personal protection benefits become overdue with no exception for the good faith of the insurer in denying liability. Joiner v Michigan Mutual Ins Co, 161 Mich App 285, 292; 409 NW2d 808 (1987). Consequently, an insurer's good faith in withholding payment of the benefits is relevant in awarding attorney fees under the act, but is irrelevant to liability under the penalty interest statute. Grossheim v Associated Truck Lines, Inc, 181 Mich App 712, 715-716; 450 NW2d 40 (1989); Bloemsma v Auto Club Ins Ass'n, 174 Mich App 692, 698; 436 NW2d 442 (1989), after remand 190 Mich App 686; 476 NW2d 487 (1991); Bach, p 132. On remand, the trial court shall determine the amount of penalty interest due plaintiff.

The trial court's decision regarding its order granting plaintiff the cost of the converted van is affirmed. We vacate that part of its decision ordering defendant to pay for all of the van's documented mileage, and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Marilyn Kelly

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Before: Holbrook, Jr., P.J., and Griffin and Marilyn Kelly, JJ.

GRIFFIN, J. (concurring).

I concur in the judgment. I write separately to emphasize the limited scope of our affirmance.

The other no-fault jurisdictions that have considered the issue of whether a specially equipped van is a reasonably necessary medical expense under their no-fault acts have done so with mixed results. In Stewart v Allstate Ins Co, 103 NJ 139; 510 A2d 1131 (1986), the New Jersey Supreme Court held that the cost of a specially modified van is a medical expense covered by the PIP provisions of the New Jersey Automobile Reparation Reform Act. However, the Superior Court of Pennsylvania in Langan v Harleysville Ins Co, 376 Pa Super 372; 546 A2d 75 (1988), refused to follow Stewart and construed its former no-fault act much more restrictively. The majority of the Pennsylvania appellate court held that a specially equipped van is an allowable medical expense under the Pennsylvania no-fault act only if it is proved that "such a vehicle is the most economical and only feasible method of transporting the injured person 'to secure medical and vocational rehabilitation services' and that the vehicle will be used solely for this purpose." Id. at 378. [Emphasis added.] Both the New Jersey and Pennsylvania cases involved rulings on motions for summary judgment.

In the present case, Branch Circuit Judge Michael H. Cherry refused to grant summary disposition to either party on the basis that the issue was one of fact for the trier of fact. At the conclusion of a nonjury trial, Judge Cherry found the van at issue to be a reasonable medical transportation expense necessary to accommodate plaintiff's accident related handicap. On appeal, defendant argues that Judge Cherry erred in finding the public transportation system in Branch County to be inadequate to serve the plaintiff's medical needs. I join the majority in affirming because I cannot conclude that the trial court's finding of fact was clearly erroneous. MCR 2.613(C). As noted by the trial judge, the Branch County Transportation Service (BATA) is limited geographically to the county of Branch. Plaintiff's doctors, however, practice in the neighboring county of Kalamazoo. Defendant's position that plaintiff should utilize an ambulance service to be transported out of the county was determined to be unreasonable by the lower court. This finding is not clearly erroneous and therefore must be affirmed.

An important but unpreserved issue is the measure of plaintiff's damages. At trial and on appeal, defendant simply argued that it was not responsible for a specially equipped van or in the alternative that it was liable only for the cost of converting a van to special paraplegic use. Defendant apparently overlooks the fact that prior to the accident plaintiff and her husband owned two vehicles. The van at issue replaced a vehicle that plaintiff operated prior to the accident. In my view, the lower court erred in requiring defendant to bear 100 percent of the initial purchase price of the van. Rather, when the necessary product is a replacement, the measure of damages should be the difference between the new product and the previously owned product. Additionally, defendant should be afforded a lien on the van and prior to its purchase be given an option to lease such a vehicle or to purchase it in monthly installments. Under appropriate circumstances, an insurer should have the alternative to contract with a transportation authority to provide for all of its insured's medical transportation needs on a twenty-four hour basis.

While Manley v DAIIE, 127 Mich App 444; 339 NW2d 205 (1983) rev'd 425 Mich 140; 388 NW2d 216 (1986), may have construed the no-fault act too restrictively, Sharp v Preferred Risk Mutual Ins Co, 142 Mich App 499; 370 NW2d 619 (1985), appears to construe it too broadly. Surely, if the plaintiff in Sharp had owned a condominium or a home prior to his injury, this Court would not require a defendant auto carrier to bear the full cost of purchasing a new residence without a deduction or set off of plaintiff's previous home ownership interest. The goal of the no-fault act is "to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." Shavers v Attorney General, 402 Mich 554, 579; 267 NW2d 72 (1978). Reparation for actual damages is provided, not windfalls. See, e.g., Thompson v DAIIE, 418 Mich 610, 619; 344 NW2d 764 (1984)(opinion by Levin, J.), and MacDonald v State Farm Mutual Ins Co, 419 Mich 146; 350 NW2d 233 (1984).

In my view, plaintiff's transportation damages caused by the accident are in part the difference between the cost of the specially equipped van and the value of plaintiff's previous vehicle. However, because this measure of damages was neither argued nor preserved by defendant, I concur with the majority.

I join in Judge Holbrook's opinion as to the other issues.

/s/ Richard Allen Griffin

THE WEEK'S OPINIONS

higan Court of Appeals

(Continued)

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.ile." Another result would be that more bands than should be present would . There was no evidence of that occur-ere. Also, another expert testified that a positive" test result cannot be obtained. 'e conclude that the trial court did not err in finding that the prosecution estab-that DNA identification testing is gener-ccepted in the scientific community as le. Given the overall acceptance of the que in other jurisdictions, we hold that courts may take judicial notice of the ility of DNA identification testing. ... theless, before the trial court admits the sults into evidence, the prosecutor must ish in each particular case that the gener-ccepted laboratory procedures were fol-l. We are satisfied that [the laboratory] ved the generally accepted procedures in ase."

efendant claims the statistical analysis of NA identification testing is inadmissible. ndant claims the danger is that "'trial by ematics' will evolve." We disagree. One testified that the statistical probability of tch is one to four hundred million. The lation for this testimony was adequate. out statistical analysis, "identification test-vould be a matter of speculation ...." Also, tical analysis "does not remove the issue lentity from the jury, which is free to gard or discredit the evidence."

efendant also claims the judge failed to ulate sufficient reasons for departing from entencing guidelines. The guidelines rec-nended a minimum range of six to 15 years he kidnapping conviction. The court gave ndant a life sentence. The minimum range the first-degree criminal sexual conduct victions were eight to 20 years. The mini-n range for the armed robbery conviction five to 15 years. Defendant was sentenced to 150 years for the remaining crimes. The t failed to state the reasons for its depar-Therefore, "we vacate defendant's entire ence and remand for resentencing."

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upon annulling a marriage or entering a judgment of divorce, the circuit court may enter orders that it considers just and proper regarding the care, custody, and support of the minor children of the parties." The wards are not plaintiff and defendant's children, therefore, the court did not have statutory authority to order support for the wards. However, there is support for plaintiff's position in *Nygard v. Nygard.* In *Nygard,* the plaintiff discovered that she was pregnant. Defendant, who was not the child's father, offered to marry her and support the child. The parties married and defendant had his name placed on the birth certificate as the child's father. When the parties divorced, the court held that defendant had essentially contracted to support the child.

This case is essentially different than the *Nygard* decision. Neither parent is a biological parent of the wards. In fact, the wards' parents are still alive and have not had their parental rights terminated. "Under these circumstances, the ... court had no jurisdiction to resolve the issue of the [wards'] support...." We "hold that defendant is not obligated to support the children. The biological parents of a child are obligated to support and maintain that child."

The court's order is vacated.

Tilley v. Tilley. (Lawyers Weekly No. MA-5313 - 3 pages) (Murphy, J.).

Summary by KMP.

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No-Fault

Medical Benefits - Unlicensed Practitioner

Where plaintiff was receiving acupuncture from a nurse outside a physician's care, the acupuncture was not an "allowable expense" payable under the no-fault act.

Plaintiff was injured in a car accident and

No-Fault

Personal Protection Benefits - Van Converted For Transportation

Where plaintiff was paralyzed in ~~a car~~ accident, she is entitled to the cost of a van converted for wheelchair use as a personal protection benefit under the no-fault law. She is also due mileage for trips to medical facilities and penalty interest against defendant-insurer for failure to pay for these benefits.

Plaintiff was paralyzed in an automobile accident and confined to a wheelchair. She had to visit medical personnel after the accident. Transportation services in her rural county were inadequate. Plaintiff asked defendant-insurer to pay the cost of a van converted to wheelchair use. Defendant refused, offering to renovate a van instead.

Plaintiff went ahead and bought a converted van for $24,527. She sued defendant for the cost plus mileage. She also sought penalty interest for defendant's refusal to pay those costs. The trial court awarded plaintiff the cost of the van and mileage but denied interest. The parties cross-appeal.

To qualify as an "allowable expense" under the no-fault act, an expense must be: 1) reasonable, 2) reasonably necessary and 3) actually incurred. All those requirements were satisfied. In addition, the van was a reasonable necessity. The lack of good transportation services in plaintiff's county made the van necessary.

Plaintiff may also receive mileage for travel to medical appointments, but not for personal use. Upon remand, the trial court must separate the two types of mileage. Finally, plaintiff is entitled to penalty interest for defendant's failure to pay the cost of the van and mileage, despite defendant's good faith in disputing the costs.

Davis v. Citizens Ins. Co. of Am. (Lawyers Weekly No. MA-5310 - 5 pages) (Holbrook, J.).

Summary by MJM.

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No-Fault

Work Loss Benefits After New Job

Where plaintiff 1) took a new job at lower pay after her automobile accident and 2) then quit the new job, she is entitled to some work-loss benefits during her employment and unemployment.

Plaintiff was injured in a car accident. During recuperation, her employer replaced her. She took a new job at lower pay. After several weeks, plaintiff quit the new job. The court awarded plaintiff work-loss benefits for the period she spent at the new job. The award was based on the pay differential between her old and new jobs. However, the court denied benefits for the time she was unemployed after the new job. Both parties appeal.

The court correctly granted plaintiff work-loss benefits, based on the difference in pay between her old and new jobs. However, the court should have continued those benefits even after plaintiff quit her new job. This would recognize "that plaintiff was forced to take the new job because of accident-related injuries. The benefits which plaintiff is eligible for are those which resulted from wage loss due to her injuries and which continued regardless of whether she kept the new job."

Marquis v. Hartford Accident and Indemnity. (Lawyers Weekly No. MA-5315 - 4 pages) (Marilyn Kelly, J.) (Griffin, J., dissenting, disagrees with the award of benefits to plaintiff after she quit her new job. By awarding those benefits, the majority is compensating plaintiff for loss of earning capacity, not loss of income. This is impermissible under the no-fault law.).

Summary by MJM.

(See accompanying story on page one.)

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