STATE OF MICHIGAN

COURT OF APPEALS

WOODROW ALLEN BYERS,

Plaintiff-Appellee/Cross-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
October 29, 2009

No. 285755
Kent Circuit Court
LC No. 06-0056644-CK

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's orders granting plaintiff's motion for partial summary disposition and motion in limine as well as the jury's award of future benefits to plaintiff under the Michigan no-fault act, MCL 500.3101 *et seq*. Plaintiff cross appeals the court's order awarding attorney fees under MCR 2.403 and MCL 500.3148(1). To the extent attorney fees were awarded under MCR 2.403, we reverse, but in all other respects we affirm the lower court.

I. Background

This case arises out of no-fault benefit claims for injuries plaintiff sustained when the vehicle defendant's insured was driving struck plaintiff's motorcycle on June 10, 2005. At the time of the accident, plaintiff worked as an apprehension officer, more commonly known as a bounty hunter, for AA Bail Bonds. (An apprehension officer re-arrests individuals who fail to appear in court in violation of their bond agreement.) Doreen Byers, plaintiff's wife, owns and runs AA Bail Bonds and also works as the primary bond writer; plaintiff has no ownership interest in the company. AA Bail Bonds was formed in 2004.

Following the accident, plaintiff began receiving benefit payments from defendant for wage loss and replacement services. Although plaintiff was entitled to a maximum replacement services benefit of $140 per week, plaintiff and defendant agreed to reduce this payment to $80 per week so that plaintiff and Doreen would not have to fill out the replacement benefit forms. A dispute later arose concerning the duration of this alleged oral agreement, with plaintiff and Doreen claiming the payment would extend through the statutory three-year period following the accident and defendant's claim representative, Patricia Griffin, asserting that the agreement was

only valid for 60 to 90 days. Plaintiff sporadically submitted replacement benefit forms until June 23, 2006. Defendant only paid a portion of the claims submitted. Regarding plaintiff's wage loss benefits, defendant obtained wage records from AA Bail Bonds and determined plaintiff's daily wage loss benefit to be $95.19 per day. Notably, since the accident, plaintiff's injuries have precluded him from working as an apprehension officer. However, plaintiff occasionally wrote bonds before the accident and has written a "handful" since the accident. Additionally, plaintiff has routinely accompanied his wife since the accident during the course of her job. Because of this, a dispute arose regarding whether plaintiff was entitled to work loss benefit payments, with defendant asserting that plaintiff was able to return to work as a bondsman, but with Doreen explaining that plaintiff was only employed as an apprehension officer and that his apprehension work was subcontracted to another officer.

On June 8, 2006, plaintiff filed suit alleging that defendant had failed to pay expenses for wage loss, replacement services, and any other allowable expense under the Michigan no-fault act, MCL 500.3101 *et seq*. Plaintiff also requested attorney fees under MCL 500.3148. Nearly five months later, on November 28, 2006, plaintiff underwent knee surgery. Plaintiff submitted a $9,459.87 bill for the surgery, for which defendant made partial payments of $1,176.27 and $3,025.77 on March 12, 2007, and November 15, 2007, respectively, before paying the balance of the bill sometime in late November 2007.

On November 30, 2007, the last business day before trial, plaintiff moved for summary disposition, seeking penalty interest of 12 percent for defendant's "overdue" payments for his knee surgery under MCL 500.3142(2) and (3)[1] as well as attorney fees under MCL 500.3148(1). According to plaintiff, defendant waited until "the eve of trial" to pay the balance of these and nearly all other medical expenses on account of the pending litigation.[2] Additionally, plaintiff filed a motion in limine on January 2, 2008,[3] to preclude defendant from presenting evidence: (1) that plaintiff owns or runs AA Bail Bonds; (2) of Doreen Byers or AA Bail Bonds's tax records; (3) of any business records or argument that AA Bail Bonds business has improved since plaintiff's accident; (4) that plaintiff can perform other work for AA Bail Bonds; or (5) that subcontract labor has anything to do with the payment of plaintiff's lost wages because such evidence would be irrelevant to the issue of wage loss.

The court heard oral argument on both motions on January 11, 2008. Regarding the motion in limine, the court granted plaintiff's request in its entirety on relevancy grounds with

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[1] MCL 500.3142(2) provides in part that "benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(3) provides for a simple interest penalty of 12 percent per annum for "overdue" payments.

[2] According to defendant, the balance of the bill was not paid until November 15, 2007, due to investigations to determine whether the knee injury was related to the accident. In any event, defendant noted that plaintiff's medical bills, up to this point, were not part of the litigation as plaintiff had previously admitted in his answers to interrogatories and deposition.

[3] The court adjourned trial to February 18, 2008.

the exception of category (4) pertaining to whether plaintiff could perform other work for AA Bail Bonds. The court also granted the motion for summary disposition because defendant was "disingenuous" in paying overdue benefits just before trial. As the court explained in its opinion and order:

> This [c]ourt finds that it is disingenuous on behalf of the Defendant insurance company State Farm Mutual to be involved in litigation regarding No-Fault benefits and then pay "overdue" benefits just prior to trial. It appears to the Court that this is clearly a move by the Defendant insurance company to avoid paying attorney fees and to position themselves better at the trial of this matter.
>
> If this matter was tried and the unpaid medical bills were not raised as elements of damage by the Plaintiff in the trial of this case, the [c]ourt is certain that later when those same bills after trial would be submitted to the insurance company, the insurance company would deny and argue that they should have been raised at the trial.

Pursuant to the court's order, plaintiff submitted a proposed order for $61,000 in attorney fees for "overdue" medical expenses. Defendant objected to the proposed order and another hearing was held. During the hearing, the court clarified that defendant was not ordered "to pay every single thing that was submitted to them" and reiterated that plaintiff was entitled to attorney fees on the amounts defendant had already paid. At the conclusion of the hearing, the court directed the parties to "sit down in a conference room out there and talk" and to return if they were unable to reach an agreement. The record provides no information regarding any subsequent agreements or pre-trial orders on this matter.

The case proceeded to trial, and the jury returned a verdict in favor of plaintiff. The verdict form permitted a damages award for the full three years following the accident although only two and half years had elapsed, but did not delineate past and future damages. In sum, the jury awarded $62,246.96, which included damages for work loss ($52,162.55), replacement services ($4,300), and interest owed on "overdue" benefits ($5,784.91).

Plaintiff subsequently submitted a proposed judgment including, *inter alia*, an award of nearly $150,000 in attorney fees under MCL 500.3148(1) and case evaluation sanctions.[4] Defendant challenged the proposed judgment arguing that: (1) neither the pleadings nor the jury's verdict specified which benefits that were "overdue" or when reasonable proof was supplied to defendant; (2) there was an issue of fact concerning whether any denial of benefits was unreasonable; and (3) it was impossible to award future "overdue" benefits where the verdict did not delineate past or future benefits. Defendant also contended that an award of case evaluation sanctions would unfairly punish defendant for going to trial because the court's ruling on plaintiff's motion for summary disposition, motion in limine, and the jury's award of future benefits changed the complexion of the case. The court rejected defendant's arguments, but noted that it would not allow "double dipping" for awards under both MCL 500.3148(1) and case

[4] Defendant rejected the case evaluation award of $40,000 to plaintiff on May 17, 2007.

evaluation sanctions, which would be addressed at an evidentiary hearing. The court subsequently entered judgment on the verdict noting that the issue of prejudgment and postjudgment interest was preserved.

At the evidentiary hearing on attorney fees, the court found that defendant's denial of benefits was unreasonable. Notable to the court was that Griffin misunderstood plaintiff's occupation as an apprehension officer and defendant did not obtain an independent medical examination. Regarding the reasonableness of the requested fees, the court reduced the requested award to $70,300, taking into account the complexity of the trial and the experience of the attorneys. The instant appeals ensued.

III. Analysis

A. Partial Summary Disposition

Defendant first challenges the trial court's granting of partial summary disposition to plaintiff, resulting in the awarding of payments for "overdue" medical benefits and attorney fees. This argument is without merit.

This Court reviews de novo an appeal from an order granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). Additionally, an award of attorney fees under the no-fault act presents a mixed question of law and fact. *Univ Rehabilitation Alliance v Farm Bureau Gen Ins Co*, 279 Mich App 691, 693; 760 NW2d 574 (2008). What constitutes reasonableness is a question of law reviewed de novo, however, the unreasonable denial of benefits under the particular facts of a case is a question of fact reviewed for clear error. *Id*. "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008) (quotation marks and citation omitted).

Under the Michigan no-fault act, if an insurer fails to pay personal protection insurance (PIP) benefits[5] within 30 days after receiving reasonable proof of the fact and of the amount of

[5] The Michigan no-fault act permits PIP benefits for accidental injury arising from, *inter alia*, the operation of motor vehicle. MCL 500.3105(4). The applicability of the no-fault act is not in dispute.

the loss sustained, the benefits are "overdue" and the insurer must pay a penalty of 12 percent simple interest per annum. MCL 500.3142(2) and (3). The no-fault act also allows reasonable attorney fees for overdue benefits "'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.'" *Attard v Citizens Ins Co*, 237 Mich App 311, 317; 602 NW2d 633 (1999), quoting MCL 500.3148(1). "When an insurer refuses to make or delays in making payment, a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay." *Id*. The relevant inquiry "is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable." *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). An insured's refusal to pay is not unreasonable if it is based on factual uncertainty. *Univ Rehabilitation Alliance*, *supra* at 694.

Here, according to defendant's "Explanation and Review" of benefits, medical bills relating primarily to plaintiff's knee surgery were submitted to defendant on November 28, 2006. As these bills were not paid until November 2007, they were "overdue." While defendant points out that certain portions of these bills were in dispute given that they did not surface until more than a year after the motorcycle accident and it was unclear whether the knee injury was in fact related to the accident, defendant has failed to present any evidence supporting that assertion, thus failing to sustain their burden in opposing a motion for summary disposition. *Rice*, *supra* at 31; *Maiden*, *supra* at 121. Thus, defendant failed to show that factual uncertainty justified the delay in payments. *Attard*, *supra* at 317.

Defendant also contends that summary disposition was improper because for two reasons it was not on notice that medical expenses were part of the litigation: (1) plaintiff's complaint sought *only* work loss and replacement services benefits and (2) plaintiff indicated in both his interrogatory answers and deposition that medical benefits were not part of the lawsuit.

Regarding the sufficiency of the complaint, "the primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993), citing 1 Martin, Dean & Webster, Michigan Court Rules Practice, p 186. As such, a complaint must contain "[a] statement of facts . . . with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend . . . ." MCR 2.111(B)(1). Thus, because a complaint need only cite "the nature of the claims," a new theory of liability need only fit "within the scope of the general factual allegations previously pleaded in support of another claim" to meet the pleading requirements of MCR 2.111(B)(1). *Smith v Stolberg*, 231 Mich App 256, 259-260; 586 NW2d 103 (1998) (internal quotation marks omitted) (allegations in the complaint that the defendant intentionally pushed the plaintiff were sufficient to maintain an action for assault and battery even though the complaint only claimed negligence).

In this case, the complaint alleges that plaintiff suffered injuries in a motorcycle accident and sought damages for benefits under the no-fault act. Although the complaint specifically requests payment for wage loss and substituted service, the complaint expressly indicates that plaintiff's expenses are not limited to wage loss and substituted service, but also include "[a]ny other allowable expenses under the Michigan No-Fault Act." The complaint also seeks penalty interest and attorney fees for "overdue" benefits. Notably, MCL 500.3107 provides as allowable PIP benefits "all reasonable charges incurred for reasonably necessary products, services and

accommodations for an injured person's care, recovery, or rehabilitation." In light of this, we conclude that the complaint sufficiently gave defendant notice of the nature of the claims such that seeking penalty interest and attorney fees for "overdue" medical benefits was appropriate.

With respect to plaintiff's interrogatory answers and deposition, plaintiff notes that his assertions that medical bills were not a part of this lawsuit were true at the time they were answered. And indeed, while plaintiff's knee surgery occurred November 18, 2006, defendant's "Explanation[s] of Review" of the claims were dated from March 12, 2007, to November 15, 2007. This is significant as plaintiff had already answered his interrogatories on September 26, 2006, and was not deposed until February 7, 2007. Thus, plaintiff's answers during discovery – made long before medical bill payments were overdue – provide no refuge of ignorance for defendant.

Defendant counters that under MCR 2.302(E), plaintiff had a duty to seasonably amend his answers to his interrogatories and deposition regarding medical bills. However, that rule requires a party to amend a prior response if the party obtains information on the basis of which the party knows that "the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." MCR 2.302(E)(1)(b)(ii). The circumstances of this case do not point to plaintiff's knowing concealment. Certainly, plaintiff's complaint broadly indicated that he sought "any" benefits under MCL 500.3107 as well as attorney fees and penalty interest, and importantly, defendant was well aware that plaintiff sought medical benefits pertaining to his knee surgery. For defendant to argue now that it was unaware medical benefits were part of the suit even though it had declined to pay these benefits until shortly before trial was scheduled is, as the trial court observed, disingenuous. Summary disposition was appropriate.[6]

B. Motion in Limine

Defendant next argues that the trial court erred in excluding evidence of plaintiff's financial records on relevancy grounds. We conclude that the trial court either did not abuse its discretion in its evidentiary rulings or, if it did so, that it was harmless error. This Court reviews the trial court's decision to grant a motion in limine for an abuse of discretion. *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[6] Plaintiff argues that summary disposition was appropriate because plaintiff and defendant had an oral agreement regarding replacements services and also because the verdict was more favorable than case evaluation. These arguments are irrelevant, however, as the trial court did not award case evaluation sanctions in granting summary disposition, which pertained to "overdue" medical bill payments and not replacement services. Further, as the jury did not consider the issue of "overdue" medical bill payments, the issue is not moot as plaintiff contends. Regardless, summary disposition was appropriate.

Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *Roulston v Tendercare, Inc*, 239 Mich App 270, 282; 608 NW2d 525 (2000). "As defined in MRE 401, 'relevant evidence' is 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Dep't of Transportation v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 165 n 62; 700 NW2d 380 (2005). A fact of consequence is a fact that is material. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 731; 761 NW2d 454 (2008). "'Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.'" *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995), quoting 1 McCormick, Evidence (4th ed), § 185, p 773.

In granting the motion in limine, the trial court excluded: (1) evidence that plaintiff owns or runs AA Bail Bonds; (2) Doreen Byers's or AA Bail Bonds's tax records; (3) business records or argument that AA Bail Bonds business has improved since plaintiff's accident; and (4) evidence or argument that subcontract labor has anything to do with the payment of plaintiff's lost wages. According to defendant, this evidence was material to its theory of the case concerning whether plaintiff could have or actually did return to work.

Regarding the issue of ownership, defendant does not dispute that "on paper," Doreen is the sole shareholder for AA Bail Bonds. Regardless, even if plaintiff owned or ran AA Bail Bonds, such evidence would not, *ipso facto*, make it more probable that plaintiff returned or could return to work. The exclusion of this evidence was not an abuse of discretion.

With respect to the financial records, defendant asserts that because corporate tax returns and business records show that both corporate income and Doreen's income increased in 2005 (the year of the accident), such evidence would render it more probable that plaintiff had been working since the accident. However, increases in income could occur for a variety of reasons, and as such, the records do not make it *more* probable that plaintiff was working. Regardless, evidence was presented at trial that plaintiff was physically unable to perform apprehension work due to the injuries he sustained in the accident. This evidence was undisputed. Thus, even if the financial records and tax returns were admissible, any error in their exclusion was harmless. MCR 2.613(A).

Defendant notes that because plaintiff testified at his deposition that AA Bail Bonds's income had gone down since his accident, the financial records indicating the contrary were relevant as they undercut his credibility. "The credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant." *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). In this instance, though, the portion of plaintiff's deposition in context shows that plaintiff admitted his misunderstanding of the question regarding gross corporate income. The decision to exclude this evidence did not fall outside the range of reasonable and principled outcomes.

Concerning subcontract labor, defendant points out that financial records indicate that payments to Larry Byrd, the apprehension subcontractor, decreased from $5,440 to $5,037 between 2004 and 2005. A plausible explanation for this, defendant argues, is that plaintiff continued to perform apprehension work after the accident. Admittedly, on these facts alone, defendant's inference–though weak–is sustainable and the financial records would make such an

inference more probable. However, as previously noted, plaintiff was unable to perform apprehension work after the accident. Thus, even if this exclusion constituted error, such was harmless.

Finally, defendant contends that evidence of Byrd's compensation was relevant to the determination of whether plaintiff sufficiently mitigated damages. "[MCL 500.3107(b)] requires defendant to pay plaintiff for work [he] '*would* have performed' in the three years after the accident." *Bak v Citizens Ins Co*, 199 Mich App 730, 739; 503 NW2d 94 (1993) (emphasis in original). As such, a plaintiff has a duty to mitigate work loss damages by seeking alternative work. *Id*. Here, Dr. Michael Jabara, plaintiff's doctor, Doreen Byers and plaintiff admitted that plaintiff was able to perform sedentary labor, which included working as a bondsman. However, notwithstanding that plaintiff was employed as an apprehension agent rather than bondsman and therefore bond writing was not part of his employment, evidence relevant to the mitigation of damages would not be Byrd's compensation, but the compensation plaintiff would have received as a bondsman. Consequently, the court did not abuse its discretion in excluding plaintiff's financial records or evidence pertaining to subcontract labor.

C. Future Benefits

This brings us to defendant's argument that the court erred in permitting the jury to consider and to award damages for future benefits. We disagree.[7] Our review of the applicability of a court rule, such as MCR 2.605 governing declaratory judgments, is de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003); *Kernan v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002). Similarly,

> [w]e review claims of instructional error de novo. Jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructional error warrants reversal if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice. [*Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002) (quotation marks and citations omitted).]

Initially, defendant maintains that because plaintiff failed to request declaratory relief, the court was precluded from making any determination regarding future benefits. This argument misapprehends this case and the applicable law. In a declaratory judgment action, a party seeks to have the court determine the rights and duties of the parties. MCR 2.605. The underlying purpose of the declaratory judgment rule is to "provide a broad, flexible remedy to increase access to the court. In the usual case, an actual controversy exists where a declaratory judgment is necessary to guide a litigant's future conduct in order to preserve his legal rights." *United States Aviex Co v Travelers Ins Co*, 125 Mich App 579, 585; 336 NW2d 838 (1983).

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[7] We reject plaintiff's argument that this issue is waived. On the contrary, defendant argued at length regarding the propriety of awarding damages in absence of a request for declaratory relief.

Plaintiff, in this case, filed an action for breach of contract and interest and fees under the no-fault act. He did not seek a court's guidance to preserve legal rights, and it was not the court that made a determination regarding future benefits. It was the jury. As such, it was unnecessary for plaintiff to request a declaratory judgment. Moreover, because issues of fact existed regarding whether PIP benefits–including future benefits–were even reasonable and necessary, presentation of this issue to the jury was appropriate. *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 296-297; 550 NW2d 580 (1996). Indeed, even in declaratory actions, juries may determine future PIP benefits. *Id*.

Defendant's reliance on *Manley v Detroit Automobile Inter-Ins Exchange*, 425 Mich 140, 150-151; 388 NW2d 216 (1986), and *Rose*, *supra*, for the proposition that future benefits may only be awarded by a declaratory judgment is unfounded. At issue in *Manley* was whether a trial court could enter a declaratory judgment requiring future benefit payments even though such costs had yet to be incurred. *Manley*, *supra* at 157. In answering in the affirmative, the Supreme Court explained that requiring future PIP benefit payments does not require an insurer to pay costs until such costs are actually incurred. *Id*. In *Rose*, this Court reversed the trial court's declaratory judgment awarding future PIP benefits because the jury only determined that the plaintiff was entitled to future care without determining if the care was reasonable and necessary. *Rose*, *supra* at 296-297. As no declaratory judgment was entered in the instant case, neither *Manley* nor *Rose* supports the position defendant asserts.

Defendant also contends that the court erred in permitting the jury to award damages for the full three year period following the accident without requiring the jury to delineate between past and future benefits. *Manley's* holding that future expenses may be awarded before they are incurred, however, stands contrary to this position. *Manley*, *supra* at 157. However, given *Manley's* explanation that an insurer is not liable for future expenses until they are incurred, the verdict form was improper because it failed to distinguish between past and future expenses rendering it impossible to determine when defendant's payment was due at the time the verdict was reached. *Id*. Regardless, the three years following the accident for which defendant was liable for payments have now elapsed, and all benefits awarded have come due. Consequently, this issue is moot. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 371 n 15; 716 NW2d 561 (2006). Allowing the verdict to stand at this point is not inconsistent with substantial justice. *Cox*, *supra* at 8.

D. Attorney Fees

Plaintiff raises the last issue in this case, cross-appealing the trial court's attorney fee award on the grounds that the court erred in calculating his attorneys' hours billed and fee rates. The court awarded attorney fees under both MCR 2.403(O) as a case-evaluation sanction and under MCL 500.3148(1) of the no-fault act. We review a trial court's decision regarding the amount of attorney fees awarded as case-evaluation sanctions, as well as a court's award of attorney fees under the no-fault act for an unreasonable delay in payment, for an abuse of discretion. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000); *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 634-635; 552 NW2d 671 (1996). Underlying findings of fact, however, are reviewed for clear error. *In re Temple*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

"[A] party who rejects a case-evaluation award is generally subject to sanctions if he fails to improve his position at trial."[8] *Campbell v Sullins*, 257 Mich App 179, 198; 667 NW2d 887 (2003). Under MCR 2.403(O)(6)(b), case-evaluation sanctions include "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." Similarly, the no-fault act also permits "a reasonable [attorney] fee" in actions where PIP benefits are "overdue."[9] MCL 500.3148(1).

As a preliminary matter, we acknowledge that our Supreme Court held in *Smith v Khouri*, 481 Mich 519, 522, 537; 751 NW2d 472 (2008) (opinion by Taylor, C.J.), that a trial court must, in determining attorney fees under MCR 2.403(O), determine a "baseline" fee[10] and briefly indicate its view of each of the factors enunciated in *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982) and Rule 1.5(a) of the Michigan Rules of Professional Conduct. Here, although the trial court indicated its fee and hourly calculations on the record, it did not expressly indicate that the rates were those customarily charged in the locality for similar legal services, nor did it briefly indicate its view of each of the *Wood* and MRPC factors. However, notwithstanding this error, because the court's award was also made in accordance with the requirements of the no-fault act, we may review the propriety of the award under that standard. *Univ Rehabilitation Alliance, Inc*, *supra* at 700 n 3.

The evaluation of the reasonableness of an attorney fee award under the no-fault act, MCL 500.3148(1), involves consideration of the non-exclusive list of factors enunciated in *Wood* and patterned after the Michigan Rules of Professional Conduct. *Michigan Tax Mgt Services Co v Warren*, 437 Mich 506, 509-510; 473 NW2d 263 (1991); *Univ Rehabilitation Alliance, Inc*, *supra* at 699-700. Under *Wood*, a court should consider:

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Wood*, *supra* at 588, quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973) (citations omitted).]

Further, in making its evaluation under MCL 500.3148(1), a court need not detail its findings regarding each specific factor; rather, a court ultimately determines a reasonable attorney fee by considering the totality of the circumstances. *Warren*, *supra* at 510; *Univ Rehabilitation Alliance, Inc*, *supra* at 700.

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[8] As the verdict in this case was more than ten percent favorable to plaintiff than the case evaluation award, which defendant rejected, defendant was subject to sanctions. MCR 2.403(O)(3).

[9] There is no dispute on appeal that the benefit payments at issue were "overdue."

[10] The "baseline" fee is calculated by multiplying the reasonable hourly rate, "i.e., the reasonable hourly or daily rate customarily charged in the locality for similar legal services[,]" by the reasonable number of hours expended. *Smith*, *supra* at 522.

In the instant case, plaintiff requested $149,572 in attorney fees. This request included the billable hours and rates of the attorneys as follows: Mr. Nolan billed 248 hours at $350 per hour; Mr. Villas billed 124 hours at $350 per hour; and Mr. Graham billed 113.5 hours at $165 per hour. The trial court, however, awarded Nolan 248 hours at $250 per hour; Villas 13.9 hours at $150 per hour; and Graham 61.4 hours at $100 per hour, for a total award of $70,300. It cannot be said that this award fell outside the range of reasonable and principled outcomes.

Indeed, the trial court not only expressly stated on the record that it considered each of the *Wood* factors, but the court's comments clearly indicate that these factors guided its calculus in determining a reasonable amount of fees. Specifically, the court observed that the case was not complex in light of the number of witnesses and the small amount of discovery and could have been tried in one or two days by one attorney. The court also acknowledged the experience of plaintiff's lead attorney, but noted that in light of that experience, he should have paid for the other attorneys out of his own fee. Regarding the expenses incurred, the court elaborated that particular bills submitted caused "concern" and were "questionable," including the billing before the retainer agreement was signed, billing plaintiff for multiple attorneys for conferences, and charging $10,625 for three and a half hours of trial and $455 for 1.3 hours to draft letters. It was after this explanation that the court reduced the hourly rates and rendered its detailed review of the specific hours for which no fees would be awarded. In light of the trial court's thoughtful and careful explanations, we find no abuse of discretion.

We reverse the attorney fee award only insofar as it was based on MCR 2.403, but affirm the lower court in all other respects.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello