STATE OF MICHIGAN

COURT OF APPEALS

ROBERT MASON,

Plaintiff/Appellee/Cross-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant/Third-Party Plaintiff/Counter-Defendant/Appellant/Cross-Appellee,

and

CHRYSLER, LLC, f/k/a DAIMLERCHRYSLER COMPANY, LLC, f/k/a DAIMLERCHRYSLER CORPORATION, and DAIMLERCHRYSLER INSURANCE COMPANY,

Third-Party Defendants/Counter-Plaintiffs/Appellees.

UNPUBLISHED
October 3, 2013

No. 297891
Oakland Circuit Court
LC No. 2008-089794-NI

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

Allstate Insurance Company ("Allstate") appeals as of right the trial court's order denying its motion for summary disposition and granting summary disposition in favor of Chrysler, LLC and DaimlerChrysler Insurance Company ("DCIC") in this first party no-fault insurance benefits case. We find that DCIC' s insurance policy, as worded and applied, violates the Michigan No-Fault Act, MCL 500.3101, *et seq*., and, when reformed to comply with the Act, places DCIC as an insurer of equal priority with Allstate with respect to providing PIP benefits to plaintiff in this matter. We therefore reverse and remand for an allocation of the payment of plaintiff's PIP benefits and related expenses between Allstate and DCIC, or, if all payment has been made, partial recoupment of those benefits and related expenses by Allstate from DCIC pursuant to MCL 500.3115(2). We further remand for an evidentiary hearing to address Allstate's challenges to the attorney fees requested by plaintiff. We affirm in all other respects.

I. FACTS

On March 15, 2007, plaintiff, Robert Mason, was driving an automobile that was owned by his employer, third-party defendant Chrysler, LLC (or one of its affiliates or subsidiaries) when he was rear-ended by another vehicle. Plaintiff was leasing the vehicle from Chrysler through a program whereby eligible Chrysler employees and retirees may lease a Chrysler vehicle directly from Chrysler (usually at a greatly reduced rate) and the payment for the same is deducted from the employee's paycheck or retiree's pension check. The vehicle remains titled and registered to Chrysler, who also maintains a policy of insurance on the vehicle issued through DCIC.

The automobile sustained damage and plaintiff suffered injuries to his back, groin, thigh, and knee. Plaintiff underwent arthroscopic knee surgery and is still undergoing treatment for back pain. At the time of the accident, plaintiff also had a no-fault insurance policy through defendant, Allstate Insurance Company, on another vehicle he owned. Allstate initially refused to extend personal protection insurance (PIP) benefits to plaintiff after the accident, eventually did pay plaintiff PIP benefits associated with the accident for a period of time, and then abruptly stopped paying the benefits. Plaintiff thereafter initiated an action against Allstate for its failure/refusal to provide all of the no-fault benefits due after the accident, asserting breach of the parties' insurance contract.

Allstate responded to the complaint that, among other things, it was not the first insurer in order of priority under the Michigan No-Fault Act. It also filed a third-party complaint for declaratory relief against Chrysler and DCIC, seeking a declaratory judgment that the policy issued by DCIC applies to the accident and plaintiff's injuries arising from the accident is first in order of priority. Chrysler and DCIC filed a third-party counter-claim for declaratory judgment against Allstate seeking a ruling that Allstate was the highest priority insurer and thus responsible for plaintiff's PIP benefits associated with the accident. Shortly thereafter, Chrysler and DCIC moved for summary disposition pursuant to MCR 2.116(C)(10) on Allstate's third-party claim against them and on their third-party counter-claim against Allstate. Allstate counter-moved for summary disposition in its own favor on its third-party claims against Chrysler and DCIC, as well as on plaintiff's claim of breach of contract against Allstate.

On April 9, 2009, the trial court issued an opinion and order denying Allstate's motion for summary disposition and granting Chrysler and DCIC's motion for summary disposition. Trial thereafter proceeded on plaintiff's claim of breach of contract against Allstate. The jury ultimately returned a verdict in plaintiff's favor in the amount of $18,082.44 for unpaid benefits, all of which were found to be overdue. Plaintiff thereafter filed a motion for costs and attorney fees pursuant to MCR 2.403(O), which the trial court granted. On February 18, 2010, a judgment was entered in plaintiff's favor and against Allstate in the amount of $180,185.45, including no-fault statutory interest, judgment interest, and attorney fees. After the trial court denied Allstate's motions for a new trial and JNOV, Allstate filed the instant claim of appeal.

II. COMPLIANCE OF DCIC'S INSURANCE POLICY WITH MICHIGAN NO FAULT-ACT

On appeal, Allstate first contends that the trial court erred in granting summary disposition in Chrysler and DCIC's favor because DCIC's policies issued on vehicles leased

through Chrysler's employee/retiree lease program violate the Michigan No-Fault Act, MCL 500.3101 *et seq*. We agree.

Decisions on motions for summary dispositions are reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). The construction and interpretation of the language of an insurance contract presents an issue of law that is reviewed de novo. *Hellebuyck v Farm Bureau General Ins Co of Michigan*, 262 Mich App 250, 254; 685 NW2d 684 (2004).

We first note that plaintiff's contention that Allstate cannot challenge DCIC's policy due to the grant of partial summary disposition in plaintiff's favor on one of Allstate's affirmative defenses is without merit. The specific affirmative defense on which plaintiff sought summary disposition provided:

> Defendant is not the proper insurer to pay personal protection insurance benefits to Plaintiff arising out of the subject motor vehicle accident, as the Defendant is not highest in the order of priorities provided for in section 3114 of the Michigan No Fault Statute, MCL 500.3114(3).

On appeal, Allstate's argument with respect to DCIC is not that its policy is simply first in priority on its face (as its affirmative defense implied), but that the policy, as worded, violates the Michigan No-Fault Act, should be reformed to comply with the Act and, once reformed, is first in order of priority. Thus, Allstate's failure to appeal the trial court's ruling on its affirmative defense does not preclude it from alleging error in the trial court's failure to find that DCIC's policy was violative of the Michigan No-Fault Act. Our attention turns, then, to whether DCIC's policy violates Michigan's No Fault law and ought to be reformed.

An insurance policy is construed in accordance with well-settled principles of contract construction. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). That is, the court will read the contract as a whole and enforce the written terms according to their plain and ordinary meaning. *Farm Bureau Mut Ins Co v Buckallew*, 246 Mich App 607, 611; 633 NW2d 473 (2001). The language of insurance contracts must be construed to give effect to every word, clause, and phrase. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). When the policy language is clear, a court must enforce the specific language of the contract. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 160; 534 NW2d 502 (1995). An insurance contract is clear and unambiguous if it fairly admits of but one interpretation. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). An insurance contract is ambiguous if, after reading the entire contract, its language can reasonably be understood in different ways. *Id.* at 566-567.

Insurance contracts are also, however, subject to statutory regulations. *Depyper v Safeco Ins Co of America*, 232 Mich App 433, 437; 591 NW2d 344 (1998). The Michigan No-Fault Insurance Act is a "comprehensive legislative enactment designed to regulate the insurance of motor vehicles in this state and the payment of benefits resulting from accidents involving those motor vehicles." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 595; 648 NW2d 591 (2002). Insurance contracts "should be construed in light of statutory requirements, and mandatory statutory provisions should be read into insurance contracts." *Depyper*, 232 Mich App at 438.

Relevant to the instant matter, MCL 500.3101(1) requires that "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." "Owner" is defined for purposes of that chapter at MCL 500.3101(2)(h) as:

> (*i*) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (*ii*) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.
>
> (*iii*) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.

All parties acknowledge that plaintiff leased the vehicle from Chrysler, his employer, for a period of longer, than 30 days, though the vehicle remained titled to Chrysler. Plaintiff, then, is the "owner" of the vehicle for purposes of MCL 500.3101. As such, he was required to maintain security for the vehicle under the statute. According to the testimony, payment for the DCIC policy on the vehicle was bundled into plaintiff's monthly lease payment for the vehicle. Thus, while plaintiff paid for the security required by MCL 500.3101, it was issued to and procured by Chrysler.

Allstate contends, however, that the DCIC policy violates Michigan No-Fault law because it allows DCIC to shift its liability for PIP benefits for injuries arising out of accidents involving vehicles it ostensibly insures. According to Allstate, whenever the DCIC policy assumes any liability for such benefits, its liability is secondary to other no-fault insurance except in rare situations. In support of its argument, Allstate directs us to the Endorsement of the DCIC policy which provides:

> A. Coverage
>
> We will pay personal injury protection benefits to or for an "insured" who sustains "bodily injury" caused by an "accident" and resulting from the ownership, maintenance or use of an "auto" as an "auto. These benefits are subject to the provisions of Chapter 31 of the Michigan Insurance Code . . .

The policy further defines "an insured" as follows:

> B. Who Is An Insured
>
> 1. You or any "family member".
>
> 2. Anyone else who sustains "bodily injury":
>
> a. While "occupying" a covered "auto", or

b. As the result of an "accident" involving any other "auto" operated by you or a "family member" if that "auto" is a covered "auto" under the policy's Liability Coverage, or

c. While not "occupying" any "auto" as a result of an "accident" involving a covered "auto".

Allstate further directs us to a declarations page of the "Business Auto Coverage Form" that is part of the policy. In this form, it is stated, "Throughout this policy, the words "you" and "your" refer to the named insured shown in the declarations. The words "we", "us" and "our" refer to the Company providing this insurance." The named insured in the declarations is "DaimlerChrsyler Corporation, DaimlerChrysler Motors Company LLC and its United States subsidiaries, and its present and future subsidiaries, owned controlled and managed companies and corporations any associated or affiliate companies, now or hereafter constituted, or previously existing." According to Allstate, because the named insured is a corporation, and "you" in the policy refers to the named insured, the "you" (i.e., named insured) referred to in B. 1 of the policy as "an insured" is the corporation—which can never suffer bodily injury and thus cannot obtain first party benefits. Allstate further points out that Part C of the DCIC policy contains the following exclusion, "We will not pay personal injury protection benefits for "bodily injury" . . . [t]o anyone entitled to Michigan no-fault benefits as a Named Insured under another policy . . ." Allstate contends that the above render the policy absurd and in contravention of the legislature's intention.

This precise issue was recently addressed by a panel of this Court in *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242; 819 NW2d 68 (2012). In that case, John and Vera-Anne Corwin were driving a Jeep Compass that John leased from his former employer, Chrysler, when they were involved in an accident and sustained severe injuries. John leased the vehicle through a retiree lease program, and his monthly payment included insurance on the vehicle issued through DCIC. The lawsuit involved a priority dispute regarding PIP benefits payable to the Corwins between DCIC, who contended that it was not liable for PIP benefits if the Corwins were entitled to PIP benefits as the named insured on another policy, and two other insurers who had issued policies of insurance on other vehicles owned by the Corwins. At issue on appeal was the specific language in the DCIC policy issued on the vehicle involved in the accident regarding who "an insured" and a "named insured" were under the policy and thus to whom DCIC was liable for the payment of PIP benefits. The language in the *Corwin* DCIC policy mirrors the language at issue in the policy before this panel, providing in the declarations page that Chrysler and its subsidiaries are the "named insured" and defining "you" for purposes of the policy as "the Named Insured shown in the Declarations" and "us" as "the Company providing this Insurance." The *Corwin* policy also contains the same exclusion concerning the payment of PIP benefits if one is entitled to Michigan no-fault benefits as a named insured on another policy. *Id*. at 249.

This Court found that the DCIC policy should be reformed to name the Corwins as the named insureds on the policy because, "(1) Chrysler LLC and its United States subsidiaries, the named insureds in the policy, do not have an insurable interest and (2) the policy contravenes the legislative intent of the no-fault act." *Id*. at 257. This Court found that under the relevant definitions, Chrysler was neither the owner nor registrant of the vehicle at issue and had conceded the same. And, it did not maintain, operate or use the vehicle so as to give it any

liability for residual liability or property protection insurance benefits. Because Chrysler had no benefit from having the vehicle insured, nor would it suffer a loss from its damage or destruction, it had no insurable interest as would be required to support the existence of a valid auto insurance policy and to be the named insured. The *Corwin* Court found that because Chrysler lacked an insurable interest, the policy violates public policy. *Id*. at 260.

The *Corwin* Court further pointed out that the Legislature's intent is that a vehicle's owner be primarily responsible for providing coverage. The Court indicated that Mr. Corwin was the owner of the vehicle due to the long term lease, purchased no–fault insurance from DCIC because the payments for the same were deducted from his paychecks and rolled into his lease payments, and DCIC thus provided no-fault insurance to the Corwin household and was their personal insurer. Nevertheless, DCIC tried to avoid primary liability for PIP benefits under MCL 500.3114 by naming Chrysler as the named insured on its policy and because the Corwins are the named insured on another policy. This Court found that to allow this to stand would be to allow DCIC to avoid the Legislature's intent and that reformation was thus necessary. When the DCIC policy was reformed to place the Corwins as "named insureds" on the policy and thus to fall within the definition of "you", this Court found that DCIC was equal in order of priority with the Corwins other two insurers and thus remanded the matter back to the trial court to determine the amount of each insurer's liability and to order appropriate reimbursement under MCL 500.3115(2). *Id*. at 267.

We are presented with the exact same situation and, indeed, the exact same DCIC insurance policy and language. The reasoning in *Corwin* is sound, and, given that they are interpreting the exact same policy in a published decision, is binding. Reformation of the DCIC policy to include plaintiff as a "named insured" and thus "you" for purposes of the policy is necessary.

The above being true, we look to the priority statute, MCL 500.3114, to determine who was first in order of priority between Allstate and DCIC. MCL 500.3114(1) provides:

> Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. A personal injury insurance policy described in section 3103(2) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motorcycle accident. When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer.

On reformation of the DCIC policy, plaintiff is a "named insured" in the DCIC policy. Plaintiff is also undisputedly the "named insured" in a policy issued by Allstate. Where two or more insurers issue insurance policies identifying an individual as a "named insured," the insurers are of equal priority when it comes to providing PIP benefits. *DAIIE v Home Ins Co*, 428 Mich 43,

47-48; 405 NW2d 85 (1987); *Corwin*, 296 Mich App at 267. Allstate and DCIC are thus equal in priority for purposes of PIP benefits. Allstate has implicitly acknowledged as much, indicating in its supplemental authority that under *Corwin*, DCIC would be "an" insurer in first priority rather than "the" insurer in first priority.

When two insurers are in equal priority with regard to the payment of personal protection insurance (PIP) benefits, the insurer paying the benefits is entitled to "partial recoupment" of those benefits and related expenses from the other insurer. MCL 500.3115(2). Thus, Allstate is entitled to a recoupment of benefits and related expenses from DCIC. Remand to the trial court for an allocation of these benefits and related expenses is thus necessary.

III. PROTECTIVE ORDER

Allstate next contends that the trial court abused its discretion in denying Allstate's motion for a protective order to conduct discovery-only depositions of plaintiff's treating physicians/expert witnesses. We disagree.

"A trial court's decision regarding discovery is reviewed for abuse of discretion." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). The interpretation and application of court rules is a question of law reviewed de novo on appeal. *Kernen v Homestead Development Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

MCR 2.302(B)(4) provides, in relevant part:

> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial may be obtained as follows:
>
> ***
>
> (a)(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial.
>
> ***
>
> (d) A party may depose a witness that he or she expects to call as an expert at trial. The deposition may be taken at any time before trial on reasonable notice to the opposite party, and may be offered as evidence at trial as provided in MCR 2.308(A) . . . .

MCR 2.302(C) provides:

> Protective orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

***

(7) that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;

MCR 2.308, governing the use of depositions in court proceedings, further provides: "(A) **In General.** Depositions or parts thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence."

According to Allstate, the trial court improperly required it to show good cause for taking the discovery-only depositions of plaintiff's treating physicians and, even if this requirement was somehow justified, Allstate properly noticed the discovery-only depositions of these physicians for purposes of preparing for cross-examination. However, pursuant to MCR 2.302(C), Allstate was required to show good cause in order for its requested protective order to issue and, contrary to its assertion otherwise, its deposition notices did not specify that the depositions were being noticed for discovery purposes only.

The deposition notice of Dr. William S. Gonte states, in relevant part that "the Defendant will take the deposition upon oral examination of Dr. William S. Gonte . . . This deposition will be taken in accordance with Rules 2.306(A)(1) and 2.306(B)(1) of the Michigan Court Rules." The deposition notices of Dr. Grais and Dr. Diaz were worded the same.[1] Nowhere is it stated that the depositions were intended to be taken solely for discovery purposes.

In *Petto v The Raymond Corp*, 171 Mich App 688, 692; 431 NW2d 44 (1988), the defendant specifically noticed the deposition of plaintiff's expert for purposes of discovery only and objected during the deposition when plaintiff attempted to inquire into the expert's qualifications and background. Plaintiff's counsel conceded that the deposition had been noticed for discovery purposes only. At trial, however, plaintiff indicated that the expert would not be appearing and requested that the expert's deposition be read into evidence. The trial court denied the request. On appeal, the plaintiff claimed that the trial court abused its discretion in excluding the deposition from trial. A panel of this Court held that both parties were fully aware that the deposition had been noticed for discovery purposes only and defendant had been led to believe up until the very day of trial that the expert would be testifying at trial. We stated, ". . . had plaintiff wished to present [the expert's] deposition at trial he should have noticed it for use at trial . . . . We believe that a request for a protective order under MCR 2.302(C) would only have been required had plaintiff noticed [the expert's] deposition to be used at trial and defendant wanted the deposition to be used only for the purpose of discovery." *Id*. at 692.

[1] Plaintiff filed cross-notices of taking the same depositions on the same date. These notices read, in relevant part, "Please take notice that . . . we will take the trial de bene esse deposition upon oral examination of Dr. William S. Gonte, this deposition to be taken in accordance with Rules 2.306(A)(B) and 2.305 of the Michigan Court Rules . . ."

In this case, unlike *Petto*, the notices for taking the depositions at issue do not purport to limit the depositions for discovery purposes only. Moreover, in requesting a protective order, Allstate indicated that it sought to find out just the foundation for plaintiff's expert's medical opinions, and now that plaintiff had filed cross-notices to take the de bene esse depositions of the physicians, they were put in the position of trying to discredit the witnesses. It is notable however, that plaintiff's experts that were being deposed were his treating physicians and Allstate already had all of plaintiff's medical records. These were not independent medical experts and the amount in controversy was, as plaintiff points out, relatively small. Plaintiff was entitled, under MCR 2.302(B)(4)(d) to notice the depositions of its own experts and did so by way of cross notices to take place on the same date and time as Allstate's depositions of the same witnesses. A protective order under MCR 2.302(C) requires a showing of good cause and the court may issue such an order where justice is required to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Allstate has not demonstrated any of the above. The trial court thus did not abuse its discretion in denying Allstate's motion for a protective order to conduct discovery-only depositions of plaintiff's treating physicians/expert witnesses.

IV. ALLSTATE'S MOTIONS FOR PARTIAL DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)

Allstate next contends that the trial court erred in denying its motions for partial directed verdict and for JNOV concerning replacement service benefits and medical mileage. We disagree.

We review de novo both a trial court's denial of a motion for a directed verdict or its denial of a motion for judgment notwithstanding the verdict. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). When examining these motions, "we view the evidence, as well as any legitimate inferences, in the light most favorable to the nonmoving party and decide whether a factual question exists about which reasonable minds might have differed." *Id.*

Under the no-fault act, an insurance company is "required to provide first-party insurance benefits . . . for certain expenses and losses." *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Specifically, an insurer must pay PIP benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle[.]" MCL 500.3105(1). Those benefits include:

> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation....
>
> ***
>
> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years

> after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.
> MCL 500.3107(1).

The cost of transportation and mileage to and from medical appointments are allowable expenses. *ZCD Transp, Inc v State Farm Mut Auto Ins Co*, 299 Mich App 336, 343; 830 NW2d 428 (2012). The benefits indicated in MCL 500.3107(1)(c) are generally referred to as "replacement services."

Testimony at trial established that Allstate would pay $20 per day for replacement services and plaintiff requested a total of $15,520 in replacement services. At trial, plaintiff testified that since the accident he has been unable to do certain activities around the house that he previously had done, such as raking leaves, cleaning gutters, and performing household repairs. He testified that he had previously done all of the planting, the weeding, and the laying of mulch outside the house and that he had assisted with the vacuuming, the laundry, the mopping of floors, and basically everything else to keep the home clean and was unable to do so after the accident. Plaintiff testified that he kept a log of services performed and submitted the same to Allstate for a period of time, but after Allstate discontinued benefits, he no longer kept a log. Plaintiff testified, however, that the services performed continued, consistent with the previously kept log, generally on a daily basis.

Plaintiff's wife also testified that prior to the accident, plaintiff would do all of the landscaping around the home and would share in all of the daily housework, including laundry, mopping, vacuuming, and cooking. Plaintiff's wife further testified that plaintiff would carry all heavy things for her prior to the accident. Plaintiff's wife testified that after the accident, he could not carry anything heavy, including his own bags to his car and was unable to help with any household tasks, such as the laundry, and was even unable to drive himself for a period of time. Plaintiff's wife further testified that she has had to take over the tasks previously performed by plaintiff such as shoveling the driveway, weeding, and cleaning the pool.

In addition, an exhibit was submitted wherein plaintiff's primary physician, Dr. Lerner, filled out a claim for replacement services for plaintiff. In the claim form, Dr. Lerner indicated that plaintiff required replacement services for 2 hours per day to assist with mopping, laundry, vacuuming, yard work, lifting over 10 pounds, shoveling snow, taking out garbage and making beds from December 20, 2007, until June 1, 2008. Plaintiff further submitted forms that he had provided to Allstate detailing replacement services for 73 additional days from August 2007-December 20, 2007.

As indicated by the trial court in denying Allstate's motion for directed verdict, Allstate has not shown that it requires specific proof of every hour of every day for replacement services. And, Allstate has provided no law that requires the same. While it is true that "[w]here a plaintiff is unable to show that a particular, reasonable expense has been incurred for a reasonably necessary product and service, there can be no finding of a breach of the insurer's duty to pay that expense, and thus no finding of liability with regard to that expense," (*Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990)), Allstate has not alleged that plaintiff did not require replacement services or that the same were not reasonable or necessary. Allstate simply contends that the requested replacement services were not specific enough. To

the extent that Allstate now claims that said expenses were not reasonable or necessary, the question of whether expenses are reasonable and reasonably necessary is generally one of fact for the jury. *Id*. at 55.

Although plaintiff did not provide documentation of each and every service his wife performed for him or detail precisely every minute she spent performing each service, the testimony and documentary evidence was sufficient to allow the jury to adequately calculate the approximate amount of replacement services to which plaintiff was entitled. The fact that the jury awarded plaintiff only a little over half of what he requested indicates that it took into consideration all of the evidence and made calculations based upon the evidence before it. And, at trial Allstate had the opportunity to challenge reasonableness and necessity of the replacement services. Allstate was not entitled to a partial directed verdict or JNOV on plaintiff's claim for replacement services benefits.

With respect to medical mileage, plaintiff requested 1202 miles at $.58 per mile for a total of $697.16 in medical mileage. Plaintiff testified at trial that he had driven over 1200 miles to and from medical appointments as a result of his accident. Plaintiff testified at trial that he lives in Northville, Michigan. He testified that the first doctor he saw after his accident was located approximately one mile from his home. Plaintiff testified that he thereafter saw Dr. Meeron three times, Dr. Gonte three or four times, Dr. Diaz once, Dr. Grais several times (Dr. Grais testified that she saw him four times), Dr. Mendelson, Dr. Fischgrund and his partner five to six times, Dr. Bleiberg, and attended two courses of physical therapy (once for 18 sessions; once for 14 sessions). The evidence also established that plaintiff went to three IME's, and had two other MRI's. Documentary evidence was submitted as follows: bills from Dr. Bleiberg, Dr. Grais, Advanced Ortho in Southfield for physical therapy, and Dr. Fischgrund; plaintiff's medical records from all treating doctors, including reports prepared by the doctors, and; some of the treating doctor's curriculum vitae.

Again, Allstate does not dispute that plaintiff incurred medical mileage. It takes issue only with the specificity with which plaintiff presented evidence concerning the requested mileage. However, Allstate has provided no law suggesting that a request for medical mileage necessarily be broken down on a per trip basis. The jury was made aware that plaintiff resided in Northville. The medical records, bills, curriculum vitae, etc, logically contained the addresses of plaintiff's treating physicians as well as the dates plaintiff treated with each doctor. As such, the mileage was reasonably calculable by the jury. And, though plaintiff indicated he was not seeking mileage for a trip to Mishawka, Indiana (testified to be a three hour trip from his home) for a special MRI, the jury was free to award him mileage for that trip if it found the expense reasonable and necessary, and it may have done so. Allstate was thus not entitled to a partial directed verdict or JNOV on the issue of medical mileage.

V. ALLSTATE'S RIGHT TO A FAIR TRIAL

Allstate next asserts that its right to a fair trial was prejudiced in four instances, such that the trial court erred in denying its motion for a new trial. We review a trial court's decision to deny a motion for a new trial for abuse of discretion. *Abke*, 239 Mich App at 361.

First, Allstate claims that it was entitled to a new trial because its right to a fair trial was prejudiced by the trial court's denial of its motion in limine to preclude the introduction of evidence concerning plaintiff's knee injury a payment for the same. We review a trial court's decision regarding discovery for an abuse of discretion. *Phillips*, 468 Mich at 587.

It is undisputed that after plaintiff underwent an independent medical examination (IME) scheduled by Allstate in August 2007, Allstate discontinued the payment of any PIP benefits to plaintiff, including those for his knee. It is also undisputed that in October 2009, Allstate made a payment of $8,187.36 to plaintiff which represented three weeks of missed work from plaintiff's knee surgery of August 2008 and medical mileage, attendant care services, and replacement services related to treatment of the knee. The payment also included interest on the unpaid benefits. When Allstate moved in limine to preclude introduction of any evidence concerning plaintiff's knee injury and any payments previously made concerning the knee injury, the trial court denied the motion because it was untimely and because the payment of PIP benefits for the knee injury did not preclude the jury from considering whether and finding that the payments were overdue.

MCL 500.3142 provides:

> (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) Personal protection insurance 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. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum.

Allstate essentially conceded that payment for plaintiff's knee injury was overdue by paying interest on the benefits. And, plaintiff indicates in its brief on appeal that "none of the damages requested by plaintiff's counsel pertained to the knee, as Allstate had 'voluntarily' paid them on the eve of trial."

As pointed out in his response to Allstate's motion in limine, plaintiff is entitled to seek a reasonable attorney fee for pursuing overdue PIP benefits pursuant to MCL 500.3148. According to *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008), "MCL 500.3148(1) establishes two prerequisites for the award of attorney fees. First, the benefits must be overdue, meaning "'not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained.'" MCL 500.3142(2). Second, in post judgment proceedings, the trial court must find that the insurer "'unreasonably refused to pay the claim or unreasonably delayed in making proper payment.'" Our Supreme Court has indicated that

"MCL 500.3148(1) requires that the trial court engage in a fact-specific inquiry to determine whether the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. *Moore*, 482 Mich at 522.

Because Allstate paid the benefits plaintiff concedes he was seeking pursuant to the knee injury and additionally paid the interest that would be owed on the overdue payments, there was nothing for the jury to award with respect to that injury. And, any attorney fees and costs associated with the overdue payment would be awarded and calculated by the *trial court* in post-judgment proceedings. The evidence regarding the knee injury and payments for the same was thus irrelevant to the jury and should not have been admitted.

However, evidentiary errors are not a basis for disturbing a judgment unless declining to take such action would be inconsistent with substantial justice. *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001). An error affecting substantial rights is one that is outcome-determinative. *People v Parcha*, 227 Mich App 236, 247; 575 NW2d 316 (1997). Allstate contends that the jury was likely influenced in its award of overdue benefits to plaintiff concerning his back injury by evidence that its award of benefits concerning plaintiff's knee injury were overdue. Allstate has not established the same. The evidence concerning plaintiff's knee injury was substantial (he underwent knee surgery, etc.). However, plaintiff also began asserting back pain immediately after the accident and had several MRI's, was told that he had disc herniation and would likely require back surgery, but, seeking alternatives, underwent two rounds of physical therapy, began injections, and was disabled and limited in activities from his treating physicians associated with his back issues. Allstate refused to pay any benefits after August 2007 despite the above. The jury could have easily found all benefits associated with plaintiff's back injuries overdue absent evidence of last minute, overdue payments for plaintiff's knee injury. Allstate's right to a fair trial was not prejudiced by the trial court's denial of his motion in limine to exclude evidence of plaintiff's knee injury and payments for the same.

Allstate next asserts that its right to a fair trial was prejudiced by the trial courts reading of plaintiff's special jury instruction regarding Allstate's payment for plaintiff's knee injury. A properly preserved challenge to jury instructions is reviewed de novo on appeal. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). However, we review for an abuse of discretion the trial court's decision regarding special jury instructions and supplemental jury instructions. *Chastain v Gen Motors Corp*, 254 Mich App 576, 590; 657 NW2d 804 (2002); *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008).

The trial court instructed the jury that "If you decide no-fault benefits are owed to the Plaintiff, you are instructed to award benefits that have not already been paid by the Defendant as follows . . . ." The trial court then instructed:

> Members of the jury, the complaint in this case was filed on March 4th of 2008. On August 14th, 2008 the Plaintiff underwent arthroscopic surgery to his knee by Dr. David Mendelson. On October 7th, 2009 Allstate made a payment of $8,187.36 to the Plaintiff for certain expenses it claimed were related to the Plaintiff's knee surgery. According to Allstate the following payments were made: $3,288, wage loss, three weeks at $4,713 per month; $300, medical mileage; $440, outstanding to St. Mary's Mercy Hospital for surgery; $1,560,

> attendant care; $1,640, replacement services, heavy ADLs for remainder of 2007 and 40 weeks of 2008; $867, no-fault interest; $92.36, out-of-pocket patient payments made by Robert Mason to Dr. Mendelson's office. If you believe that Allstate was aware of all of these payments on or before September 7th, 2009, you may find that the payments were overdue.

As discussed above, evidence concerning plaintiff's knee injury and payment for the same should not have been admitted at trial. Likewise, the above jury instruction should not have been given. Again, the jury need not have determined whether the payment was overdue, given Allstate's inclusion of penalty interest in its payment (as acknowledged by the trial court).

Further, prior to closing arguments, plaintiff orally moved for partial directed verdict, seeking a ruling that the October 7, 2009, payment of $8,187.36 for plaintiff's knee injury was overdue. The trial court ruled that it was, in fact, overdue granting plaintiff's motion or partial directed verdict. The trial court having already ruled that the payment was overdue, there was no purpose in submitting the exact same question to the jury for resolution.

Nevertheless, reversal is not warranted when an instructional error does not affect the outcome of the trial. *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008). The trial court made clear to the jury that it was only to award damages that Allstate had not already paid. And, the jury verdict form very clearly instructed that if the jury found that damages were incurred by plaintiff arising out of the accident, the jury was to award only that amount not already paid by Allstate. The jury was then asked if any of the damages they awarded, i.e., those not already paid by defendant were overdue and, if so, the date they became overdue. These instructions and jury verdict form being what they were, it cannot be said that the instructional error affected the outcome of the trial. The fact that the erroneous instruction allowed the jury to determine whether the benefits paid on plaintiff's knee were overdue was harmless.

Next Allstate claims that its right to a fair trial was prejudiced by plaintiff's use of a chart in closing arguments which included information never introduced into evidence. During closing argument, plaintiff utilized a cumulative chart presented on a board detailing all of the mileage traveled by plaintiff to and from his medical appointments and the breakdown of his request for replacement services. Plaintiff told the jury during closing argument that the chart represented ". . . what we believe [] we are owed in this case." Plaintiff then detailed that he was asking for a specific amount for work loss, then $20 per day in replacement services for " . . . 858 days, that's the actual amount of days from the date of the cut-off all the way through the 8th, I didn't know exactly when we'd end up closing. $20 a day is a total of $17,160. I gave them credit for $1,640 which they voluntarily paid. The total amount of replacement services, $15,520, that's it. That's the $20 a day for all the days that he has been unable to provide these services."

Concerning medical mileage, plaintiff referenced the chart, indicating, "The medical mileage issue, that's the longest one . . . . These are based on medical records; and simply where we got it from, you go to Mapquest, you type in the doctor's address. It's 13 miles to Michigan Head and Spine and you double it. The total is 1,202 at 58 cents a mile . . . ."

The information provided in the chart concerning replacement services is merely cumulative. Plaintiff had argued during trial that his wife had performed replacement services for him on essentially a daily basis since Allstate cutoff benefits. The chart simply set forth how many days that was and multiplied that number of days by the $20 daily rate Allstate indicated that it paid for replacement services. The chart did not break down any specific tasks performed on a daily basis. There is no basis for Allstate's claim of prejudice stemming from the chart's use concerning replacement services.

As to medical mileage, the chart did, in fact, break down each trip plaintiff made to each doctor as well as provide the mileage from his home to each doctor. This specific breakdown was not presented during trial. Instead, evidence concerning medical mileage was presented through plaintiff's testimony that he lived in Northville and traveled approximately 1202 miles total for medical appointments, and plaintiff's medical documents and bills showing his treating physicians' addresses. As stated by Allstate, there was no evidence at trial or support in the record for plaintiff's reference at closing to Mapquest or reliance on the same. Thus, contrary to the trial court's conclusion, the information concerning mileage contained in the chart was not merely a demonstrative aid. Had the chart contained only information that the jury had seen during trial, the conclusion may have been correct. See, e.g., *Phillips v Diehm*, 213 Mich App 389, 402-403; 541 NW2d 566 (1995).

However, as with all evidentiary errors, Allstate must still demonstrate substantial prejudice to warrant a new trial. *Miller*, 244 Mich App at 531. Due to the other evidence that was presented concerning medical mileage (the jury could have simply accepted plaintiff's testimony that he drove 1202 miles), and the fact that Allstate never denied that medical mileage was incurred, prejudice has not been shown.

Finally, Allstate contends that its right to a fair trial was prejudiced by the trial court's refusal to instruct the jury as to Michigan Civil Jury Instruction 6.01a. Relevant portions of the standard Michigan Civil Jury Instructions must be given in each action in which they apply, accurately state the law, and are requested by a party. MCR 2.516(D)(2). "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." *Cox*, 467 Mich at 8, quoting *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Jury instructions are to be reviewed in their entirety, and reversal is not warranted when an instructional error does not affect the outcome of the trial. *Jimkoski*, 282 Mich App at 9.

M Civ JI 6.01(a) addresses the failure to provide evidence or a witness and provides (as would be adopted for this case):

> The plaintiff in this case has not offered the MRI film taken of plaintiff's spine in August 2009 in Indiana. As this evidence was under the control of the plaintiff and could have been produced by him, and no reasonable excuse for the plaintiff's failure to produce the evidence was given, you may infer that the evidence would have been adverse to the plaintiff.

The notes accompanying this instruction indicate that M Civ JI 6.01(a) should be given when the Court finds that:

> 1. the evidence was under the control of the plaintiff and could have been produced by him;
>
> 2. no reasonable excuse for plaintiffs' failure to produce the evidence has been shown; and
>
> 3. the evidence would have been material, not merely cumulative, and not equally available to the opposite party.

Allstate requested that this jury instruction be given when plaintiff failed to provide actual MRI films of plaintiff's back taken by Vertical Plus Imaging in Indiana in August 2009. Allstate contended that it requested the actual MRI films so that its experts could review them and that plaintiff's failure to produce the films prejudiced Allstate.

Allstate further contended that plaintiff had control over whether he signed the authorization for the release of the films. Plaintiff responded that he never had the MRI films in his possession and that Allstate could have simply subpoenaed the films. Plaintiff further responded that a report was filed from another radiologist concerning a reading of the films and Allstate's expert testified that he read the report and would not expect anything different, such that Allstate was not prejudiced and was not entitled to any adverse inference by the absence of the MRI.

After inquiring when the request for the MRI was made by Allstate and whether plaintiff had control of the MRI or ever had it in his possession, the trial judge in this instance concluded, "I think everyone would agree that Vertical Imaging lost the film" and declined to give the requested jury instruction, stating:

> A review of the testimony would indicate that the instruction will not be given. The review of the instructions under MCJ 6.01 indicates the evidence that the proponent—strike that, the Defendant must prove that the evidence was under the control of the Plaintiff and could have been produced by him. The evidence was under the control of an imaging company in Indiana, Plaintiff never had it and he couldn't produce it. The imaging company is the one that lost the evidence. Motion denied.[2]

Allstate's primary expert, Dr. Quint, had reviewed plaintiff's two prior MRI's and had found them to show only degenerative changes of plaintiff's spine, not attributable to the car accident. Dr. Quint reviewed a report prepared concerning the August 2009 MRI done in Indiana. Dr. Quint stated that he preferred to look at the MRI films himself because people have different opinions as to what the imaging findings represent. Dr. Quint testified that, however, based on the report, it sounds like the findings from the August 2009 report are the same from the prior two MRI studies.

[2] It is unclear why the trial court reached this conclusion, as no one ever argued that Vertical Imaging lost the film.

Plaintiff did not deny that he was sent a record release form concerning the MRI film and simply did not sign it. It could be reasonably argued that the MRI films, being his medical records, were within his control and by failing to sign the release form, without any explanation or excuse, plaintiff did not produce the MRI films. However, the jury instruction, to be given, must not only be under the control of plaintiff and capable of being produced by him but no reasonable excuse has been shown by plaintiff for his failure to produce the same, but "the evidence would have been material, not merely cumulative, and not equally available to the opposite party." As pointed out by plaintiff, Allstate could have attempted to subpoena the MRI. And, Allstate's own expert, testified that the report prepared by another radiologist indicated that the MRI was consistent with the prior two MRI's that Dr. Quint had already reviewed and had concluded established that plaintiff had only degenerative changes in his back not attributable to the car accident. Dr. Quint thus already concluded that the absent MRI was negative to plaintiff's case and informed the jury of his opinion. The MRI would thus have been cumulative to the report and Dr. Quint's already formed opinion. Allstate was thus not entitled to the requested jury instruction. And, any error in the failure to give the instruction would have been harmless, given Dr. Quint's previously expressed opinion.

VI. GREAT WEIGHT OF THE EVIDENCE

Allstate asserts that the jury verdict was against the great weight of the evidence such that it was entitled to JNOV and/or a new trial. We disagree.

A court may grant a new trial when the verdict is against the great weight of the evidence, MCR 2.611(A)(1)(e), but should do so only when the verdict is "manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *Id.* When a party challenges a jury's verdict as being against the great weight of the evidence, we must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer to the jury's assessment of the witnesses' credibility. *Allard v State Farm Ins Co*, 271 Mich App 394, 406–407; 722 NW2d 268 (2006). The jury's verdict must be upheld, even if it is inconsistent, if there is any interpretation of the evidence that could logically explain the jury's findings. *Id.* at 407.

Plaintiff presented evidence that he suffered a back injury in the accident at issue and immediately sought treatment for the same. He has undergone two courses of physical therapy, received pain medication, muscle relaxers, and many courses of injections for this injury. He has been disabled by doctors from performing activities for periods of time and has been unable to perform general household services that he had previously been able to perform, as detailed in section IV. of this opinion. This evidence was sufficient to support the jury verdict.

VII. AWARD OF ATTORNEY FEES

Allstate contends that the trial court erred in awarding plaintiff attorney fees under MCL 500.3148(1) where bona fide factual uncertainties existed with respect to plaintiff's injuries and the benefits claimed. Allstate further contends that the amount of attorney fees awarded to plaintiff under MCR 2.403(O) were unreasonable.

This Court generally "review[s] a trial court's award of attorney fees and costs for an abuse of discretion." *Moore*, 482 Mich at 516. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. However, "[t]he trial court's decision to grant or deny attorney fees under the no-fault act presents a mixed question of law and fact." *Univ Rehab Alliance, Inc v Farm Bureau Ins Co of Mich*, 279 Mich App 691, 693; 760 NW2d 574 (2008). What constitutes reasonableness for purposes of awarding attorney fees under MCL 500.3148(1) is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact. *Id*. at 693. "We review de novo questions of law, but review the trial court's findings of fact for clear error." *Id*. "A finding is clearly erroneous where this Court is left with the definite and firm conviction that a mistake has been made." *Id*.

A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). We review the amount awarded, however, for an abuse of discretion. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 356; 737 NW2d 807 (2007). We also review for abuse of discretion the amount awarded as reasonable attorney fees. *Peterson v Fertel*, 283 Mich App 232, 239-240; 770 NW2d 47 (2009).

MCL 500.3148 provides:

> (1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer 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.

Thus, under MCL 500.3148(1), to award attorney fees the benefits must first be overdue and then in post judgment proceedings, the trial court must find that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. *Moore*, 482 Mich at 517. If a claimant establishes the first prerequisite, a rebuttable presumption arises regarding the second. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). The insurer then bears the burden of justifying the refusal or delay. *Id*.

An insurer may justify its refusal to pay a claimant benefits by showing that the claim presented a legitimate question of factual uncertainty. *Univ Rehab Alliance*, 279 Mich App at 694. The court must examine the circumstances as they existed at the time the insurer made the decision, and decide whether that decision was reasonable at that time. *Brown v Home-Owners Ins Co*, 298 Mich App 678, 691; 828 NW2d 400 (2012).

Allstate contends that bona fide factual uncertainties existed concerning, among other things, whether plaintiff's back injury was related to the accident and whether it was a disc herniation. There is no dispute that the radiologist who read plaintiff's first MRI found a disc herniation. It is also undisputed that Allstate completely discontinued paying plaintiff benefits in August 2007, after an IME by Dr. Middledorf and, according to its special investigation analyst, Catia Monforton, medical records it had at the time. While that may be true, it is also true that Allstate became aware of plaintiff's knee surgery, by its own admission at least as of September,

2008 yet still refused to pay any benefits related to plaintiff's knee until October, 2009. It is also true that plaintiff continued to be treated for back pain and that his medical records revealed that he was disabled due to back issues that, by all accounts other than the IME, related his back issues to the car accident. It is further true that Allstate admitted that it referred this matter to its special investigation unit, in part, due to the fact that two of the doctors that were treating plaintiff were, unbeknownst to plaintiff, being investigated by Allstate. The trial court could have found that this played a significant, unreasonable factor in Allstate's delay/refusal to pay benefits, and, in fact, noted in its opinion concerning the payment of fees and costs that "this case was difficult because Defendant referred to Allstate's Special Investigation Unit, which raised many issues, and delayed payment." The trial court did not abuse its discretion in awarding plaintiff attorney fees pursuant to MCL 500.3148.

MCR 2.403(O) requires a party who has rejected case evaluation to pay the opposing party's actual costs if that opposing party accepted case evaluation and the case proceeds to a verdict, unless the verdict is more favorable to the rejecting party than the case evaluation. "Actual costs" 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." MCR 2.403(O)(6)(b). The burden of proving the reasonableness of the requested fees rests with the party requesting them. *Smith*, 481 Mich at 529.

In *Wood v Detroit Automobile Inter–Ins Exch*, 413 Mich 573588; 321 NW2d 653 (1982), the Michigan Supreme Court elucidated six factors to be considered in determining a reasonable attorney fee in the context of awarding case evaluation sanctions:

> (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.

More recently, the Supreme Court has modified these factors slightly, and has clarified:

> In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood [supra*] and MRPC 1.5(a). Michigan Rule of Professional Conduct 1.5(a) sets forth eight factors, which overlap the *Wood* factors. The factors set forth in MRPC 1.5(a) are:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Smith, 481 Mich at 537.

In accordance with *Smith*, then, when determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services by using reliable surveys or other credible evidence. In general, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488-489; 652 NW2d 503 (2002), overruled on other grounds, *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005). "If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Smith*, 481 Mich at 532. "The burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Smith*, 481 Mich at 531, quoting *Blum v Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891 (1984).

Plaintiff's counsel requested a rate of $350 per hour, which Allstate asserts is unreasonable. Plaintiff submitted a copy of the 2007 Economics of Law Practice Summary Report to the trial court for consideration, which showed that the median hourly billing rate for Oakland County is $200-$205. The trial court noted this hourly rate then noted in a written opinion, issued without the benefit of having conducted a hearing:

> Here, attorney Joshua Lerner is a fine lawyer, and is respected by others in the legal community. He displayed exceptional skill during the trial, and was extremely well-prepared. This case was difficult because Defendant referred to Allstate's Special Investigation Unit, which raised many issues, and delayed payment. Defendant also filed, unsuccessfully, a delayed application for leave to the Court of Appeals, and an application for leave to the Michigan Supreme Court regarding the taking of certain depositions, requiring Plaintiffs counsel to respond and defend. For all of these reasons, the Court finds that an upward departure to $350 an hour is justified.

The fact that this case lasted more than two years and involved a multitude of pre- and post-trial motions and issues, most precipitated by Allstate, is of some worth in determining the reasonableness of counsel's hourly rate. However, while the trial court considered some of the *Smith* factors in determining whether the requested hourly rate was reasonable, its focus was primarily upon defendant's actions. Given that the awarded rate is within the 90th percentile and Allstate properly challenged the rate charged as unreasonable, an evidentiary hearing should have been held to allow Allstate to challenge the hourly rate and present any countervailing evidence. *Smith*, 481 Mich at 532.

An evidentiary hearing should also have been held to address Allstate's arguments that the amount of time and labor plaintiff incurred and billed for the case exceeded the amount and time required and was thus unreasonable and that it was unreasonable for plaintiff's attorney fees to be based on a minimum of .25 hour (15 minute) increments. While the trial court opined that it had reviewed the billed charges and found them to be reasonable, there is no substantial analysis contained in its review and, as indicated in *Smith*, where a factual dispute exists concerning the reasonableness of the hourly rate charged or hours billed by the fee applicant, the opposing party is *entitled* to an evidentiary hearing to challenge the fee applicant's evidence. 481 Mich at 532.

We reverse and remand for an allocation of the payment of plaintiff's PIP benefits and related expenses between Allstate and DCIC, or, if all payment has been made, partial recoupment of those benefits and related expenses by Allstate from DCIC pursuant to MCL 500.3115(2). We further remand for an evidentiary hearing to address Allstate's challenges to the hourly rate charged, hours billed and billing increments used by plaintiff's counsel. We affirm in all other respects.

We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto