STATE OF MICHIGAN

COURT OF APPEALS

NOE GONZALES, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED November 16, 2004
v	No. 247669 Oakland Circuit Court
FARMERS INSURANCE EXCHANGE, Defendant-Appellee/Cross-Appellant.	LC No. 2000-026150-NF

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right and defendant cross-appeals from the trial court's post-judgment order granting plaintiff $3,086.14 in no-fault attorney fees under MCL 500.3148(1), following a jury verdict awarding plaintiff a portion of his claimed medical expenses, attendant care costs, and mileage for injuries incurred in an automobile accident. At issue on appeal is only the award of attorney fees. We affirm.

I

Plaintiff filed this action in September 2000 after defendant denied certain claims for no-fault insurance benefits following plaintiff's November 1999 automobile accident in Texas. Plaintiff sought $827,147.62 in unpaid benefits, consisting of $91,791.28 in medical bills, $5,234.34 in mileage, $657,000 for attendant care due to traumatic brain injury, and $73,122 in interest on attendant care. Defendant disputed that plaintiff was due any additional benefits, because plaintiff had not suffered a traumatic brain injury necessitating attendant care and plaintiff's other alleged injuries were unrelated to the automobile accident. Following an eight-day trial, the jury awarded plaintiff $480,038.54, finding allowable unpaid expenses of $381,156.99 and interest owed on the overdue benefits of $98,881.55.

Plaintiff thereafter filed a motion for attorney fees, arguing that defendant's denial of the benefits related to traumatic brain injury was unreasonable, MCL 500.3148(1). The trial court denied plaintiff's request for fees, finding that defendant did not unreasonably refuse to pay or delay payment, i.e., there was a bona fide question of fact regarding the existence of a traumatic brain injury and plaintiff's need for attendant care.

Plaintiff filed a motion for rehearing, arguing that the trial court erred in failing to consider defendant's nonpayment of no-fault benefits that arose out of plaintiff's injuries other than the traumatic brain injury. On reconsideration, the court reaffirmed its decision regarding the traumatic brain injury, but noted that it would consider plaintiff's claim with respect to other injuries, "[i]n the interest of justice," even though plaintiff had not raised this claim in his original motion. The court found that defendant unreasonably delayed payment of three medical bills, totaling $9,267.68. Based on plaintiff's one-third contingency fee arrangement with his attorney, the court awarded $3,086.14 in no-fault attorney fees.

II

Plaintiff argues that the trial court abused its discretion in failing to award plaintiff all of the attorney fees he incurred in this case. We disagree.

This Court reviews a decision to award or deny attorney fees under MCL 500.3148(1) for clear error. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 628; 550 NW2d 580 (1996). "[I]f the trial court's finding of unreasonable refusal or delay pursuant to MCL 500.3148(1) … is clearly erroneous, it will be reversed on appeal." *Id*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002).

Subsection 3138(1) of Michigan's no-fault insurance act provides:

> 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.

The purpose behind the no-fault act's attorney-fee penalty provision is to ensure that the insurer promptly makes payment to the insured. *Beach, supra* at 629. However, "[a] refusal or delay in payment by an insurer will not be found unreasonable within the meaning of § 3148(1) where the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty." *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994). Where there is a delay or refusal, a rebuttable presumption of unreasonableness arises, and the insurer has the burden of justifying the refusal or delay. *Beach, supra* at 629.

Initially, the trial court ruled that given the factual uncertainty concerning plaintiff's claim of traumatic brain injury, "defendant did not unreasonably refuse or unreasonably delay the benefits which are mostly charges for attendant care." The court stated that this was not a case in which the brain injury was clearly evident—the evidence did not show much outwardly wrong with plaintiff, and there was contradictory medical evidence. Further, many cases involving traumatic brain injury or closed head injury hinge on expert testimony, and in this case the experts disagreed whether there was such injury.

We find no clear error in the court's decision. The court's decision is supported by the evidence, and we are not left with a definite and firm conviction that a mistake was made. *Solution Source, supra.* We reject plaintiff's argument that he was entitled to reasonable fees "based on all of the work which plaintiff's counsel performed in this matter" merely because the trial court found that defendant unreasonably delayed or failed to pay certain medical bills, i.e., the three bills totaling $9,267.68, which were unrelated to the brain injury claim.

III

Plaintiff argues that the trial court abused its discretion in awarding attorney fees based on plaintiff's contingency fee agreement with his counsel because the court ignored the factors a trial court must consider in assessing the reasonableness of an attorney award. See *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). We disagree.

Plaintiff specifically urged the trial court to employ the one-third contingency fee agreement in its determination of attorney fees and cited case law in support of his contention that a one-third contingency fee agreement was fair and equitable in a "No Fault case such as this." Therefore, this issue is waived. Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998). "[A] party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court." *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

IV

Both parties argue that the trial court's decision to award plaintiff attorney fees of $3,086.14 must be reversed. Plaintiff argues that the court clearly erred in refusing to find that defendant unreasonably delayed payment with respect to all medical bills that were unrelated to plaintiff's contested closed-head injury. On cross-appeal, defendant argues that the court erred in awarding plaintiff any attorney fees absent a jury finding that the particular expenses were reasonably necessary or overdue. We find no basis for reversing the trial court's decision.

The trial court awarded attorney fees related to three expenses: (1) a Baylor Hospital emergency treatment bill of $7,779.65, (2) mileage expenses of $1,106.78, and (3) a bill from Frio Hospital in the amount of $381.25. The court concluded that any bills for the shoulder injury or the TMJ were not unreasonably unpaid or delayed given the evidence. Again, having reviewed the record, which included conflicting medical evidence, we find no clear error in the court's determination. The evidence supports a conclusion that "a bona fide factual uncertainty" existed regarding payment of these clams. *Beach, supra* at 629.

Further, although plaintiff argues that he was entitled to fees associated with approximately $18,000 in other expenses unrelated to the closed-head injury, plaintiff has failed to adequately argue the merits of this position. As the trial court noted in its decision on rehearing, plaintiff has provided only limited details regarding "what bills are for what medical expenses." Plaintiff has failed to state which expenses in particular were overdue, the amounts of the bills, and the specific injuries involved. A party may not leave it to this Court to search for

the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).[1]

Similarly, we find unconvincing defendant's argument on cross appeal that even the limited award of fees must be reversed because the necessary foundation for such an award cannot be established. Defendant essentially argues that the nonspecificity of the jury verdict form and the verdict precludes a finding that defendant's payment of any particular expenses were overdue and unreasonably delayed or unpaid. We disagree.

With respect to at least one of the bills, the emergency treatment bill of $7,779.65, the record indicates that payment was made a few weeks before trial; thus, this bill would not have been included in the amount awarded by the jury. Defendant has failed to show how this bill nevertheless could not be considered "overdue," and therefore subject to a finding that defendant unreasonably delayed payment. This is a finding properly made by the trial court following the jury verdict. *McCarthy*, *supra* at 103; *Cole v DAIIE*, 137 Mich App 603, 613-615; 357 NW2d 898 (1984). As noted above with respect to plaintiff, defendant has failed to otherwise argue the merits of its position by providing specific facts concerning the three bills at issue. *Traylor, supra.*

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] It appears that the court provided plaintiff an opportunity to resolve any dispute concerning remaining expenses following its decision on rehearing, through a meeting between the parties and additional review by the court, "on motion," yet neither party has indicated whether plaintiff availed himself of this opportunity.