STATE OF MICHIGAN

COURT OF APPEALS

RENITA SPENCER f/k/a RENITA TILLMAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2008
v	No. 271702 Wayne Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Defendant-Appellant.	LC No. 03-338538-NF

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals the trial court's order that awarded plaintiff attorney fees of $30,250 under the no-fault act. For the reasons set forth below, we affirm.

Defendant maintains that, under MCL 500.3148(1), it did not unreasonably refuse to pay insurance benefits to plaintiff for the rotator cuff tears in her right and left shoulders. The standard of review for a trial court's award of attorney fees is currently under review by our Supreme Court. See *Ross v Auto Club Group*, 478 Mich 902; 732 NW2d 529 (2007). Our Courts have employed the clearly erroneous standard, the abuse of discretion standard, or a combination of standards when reviewing this issue.[1] *Id*. Though we could delay this matter until our Supreme Court issues an opinion in *Ross*, we hold that, under any of the above standards of review, the trial court correctly awarded attorney fees to plaintiff.[2]

[1] A finding is clearly erroneous if a reviewing court is left with a firm and definite conviction that a mistake has been made. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). Our Courts have also applied the clear error standard for a trial court's findings of fact, a de novo standard for legal rulings, and an abuse of discretion standard for other, discretionary rulings. *Ross*, *supra* at 902.

[2] In *Ross*, our Supreme Court is also reviewing whether, when a jury awards penalty interest to a plaintiff under MCL 500.3142(3) because benefit payments by the insurer are overdue, a (continued…)

As noted, the trial court awarded the attorney fees under MCL 500.3148(1), which 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.

Defendant maintains that its refusal to pay is not unreasonable under the statute because there was a legitimate factual uncertainty about plaintiff's entitlement to benefits. However, under Michigan law, a defendant's failure to pay is unreasonable when, given contradictory medical opinions, the defendant fails to attempt to reconcile the opinions or make an inquiry beyond the opinion of its own independent medical examination (IME) doctor.[3] *Moore v Secura Ins*, 276 Mich App 195, 199-202; 741 NW2d 38 (2007); *Liddell v DAIIE*, 102 Mich App 636, 651; 302 NW2d 260 (1981).

Here, defendant did not attempt to resolve the doctors' contradictory opinions as required under *Moore*. Defendant's adjuster, Douglas Nelson, testified that he "took everything into consideration" when he decided to terminate plaintiff's benefits. However, Nelson sent plaintiff's denial of claim letters immediately after he received the reports of defendant's IME physician, Dr. Joseph Salama, in July 2004 and November 2004. Dr. Salama testified that, when he reviewed plaintiff's medical records, he saw that plaintiff made no complaints about any shoulder pain. Accordingly, Dr. Salama concluded that plaintiff's rotator cuff tears could not be related to her car accident on January 14, 2003. To the contrary, plaintiff's medical records, including those submitted to defendant and Dr. Salama, show that plaintiff complained about shoulder pain and shoulder lifting as early as February 2003, when she was receiving physical therapy for her accident injuries. Her medical records also show that plaintiff reported her shoulder problems to other doctors in both 2003 and 2004, before defendant denied her claims.

Defendant asserts that, if plaintiff complained about shoulder pain, the pain was not symptomatic of a rotator cuff tear and, therefore, it is not clear that the tear diagnosed in February 2004 was caused by the accident. Defendant states that plaintiff would not have been able to lift her arm at all immediately after the accident if she had a torn rotator cuff in the

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rebuttable presumption arises that the insurer's failure to pay or delay in payment is also "unreasonable" under MCL 500.3148(1). *Ross, supra* at 903. We need not address whether it is plaintiff or defendant's burden to establish that the refusal to pay benefits was unreasonable or justified because, even if our Supreme Court rules that no presumption should arise from the award of penalty interest, plaintiff met her burden of proof with regard to defendant's unreasonable refusal to pay her claims.

[3] Defendant interprets *Thompson v DAIIE*, 133 Mich App 375; 350 NW2d 261 (1984), to hold that a legitimate question of factual uncertainty arises whenever an IME opinion contraindicates continuing treatment. However, the test enunciated in *Thompson* is "whether the adjuster's reliance on the opinion of that doctor is *reasonable under the circumstances*." *Id.* at 385 (emphasis added).

accident. However, Dr. Jack Lennox, who specializes in shoulder injuries, testified that rotator cuff tears caused by trauma may become progressively worse over time. Dr. Lennox opined that pain caused by a rotator cuff tear is caused by mechanical movement of the arm, and if the arm is not placed in a particular position where the tendon is pinched, then the patient will not experience pain. He also opined that overhead work generally causes pain with a rotator cuff tear. One of defendant's IME doctors, Dr. Joseph Femminineo, agreed that a patient with a torn rotator cuff would have pain when trying to lift their arm above their shoulder. He also acknowledged that plaintiff complained about pain when lifting and he restricted her from overhead lifting after his examination. Therefore, even according to defendant's physician, plaintiff's pain may have been symptomatic of a torn rotator cuff.

The purpose of the attorney fees provision in the no-fault act "is to ensure prompt payment to the insured." *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). Thus, we reject defendant's argument that it would be unduly burdensome for the insurer to make further inquiry when the opinions of IME and treating doctors conflict. It is simply improper for an insurer to deny coverage out of hand when, contrary to other medical evidence, an IME physician's opinion favors the insurer, particularly when, as here, the insurer knew or should have known that the opinion was based on an inaccurate or incomplete review of plaintiff's medical records, which were also in the insurer's possession. Here, defendant's adjuster made no effort to reconcile the conflicting medical reports in plaintiff's records. Indeed, at trial, defendant's adjuster demonstrated a very limited understanding of plaintiff's medical records, including how and where rotator cuff injuries occur or how they are diagnosed. Had the adjuster made some further inquiry with plaintiff's doctors and defendant's own IME doctors, he could have developed a more reasonable basis to grant or deny plaintiff's claim. However, his failure to do so resulted in defendant's unreasonable denial of plaintiff's claim for benefits and, therefore, the trial court correctly awarded plaintiff attorney fees under MCL 500.3148(1).

Affirmed.

/s/ Henry William Saad
/s/ Jane M. Beckering