STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN KRYWY,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 24, 2008

No. 274663
Wayne Circuit Court
LC No. 04-423259-NF

STEPHEN KRYWY,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

No. 277313
Wayne Circuit Court
LC No. 04-423259-NF

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

In these consolidated cases, defendant and plaintiff each filed separate claims[1] of appeal from a judgment that awarded plaintiff over $450,000 in unpaid personal protection insurance

---

[1] The record reflects that defendant filed its claim of appeal on the same day that plaintiff moved for reconsideration. If defendant filed first, then plaintiff's motion for reconsideration was not properly before the trial court, but if plaintiff filed first, then defendant's claim of appeal was premature. Plaintiff then filed his claim of appeal after the trial court entered its denial of his motion for reconsideration, which defendant later argued was filed one day too late to preserve plaintiff's claim of appeal as of right. Under the circumstances, and for the sake of judicial economy, we exercise our discretion to treat each claim of appeal as an application for leave to
(continued…)

(PIP) benefits, including interest, costs, and attorney fees. The judgment was in accordance with a jury verdict in plaintiff's favor.

This case arose out of an automobile accident in which plaintiff was injured. The jury decided that defendant was liable for several unpaid expenses, which were generally related to plaintiff's claim that he suffered a brain injury. These appeals, however, only involve issues that were never submitted to the jury, but were instead decided by the trial court as a matter of law. We address plaintiff's issues first.

Plaintiff argues that the trial court erred by granting defendant's motion in limine and preventing plaintiff from calling an expert on case management. We disagree. The disputed witness was Charles Rogers, who owned Community Resource Consultants, Inc. (CRCI), the case management business that contracted with plaintiff to provide him with administrative and organizational services. Plaintiff did not attempt to add Roberts to his witness list until two days before the start of trial. A trial court's decision to allow a party to amend a witness list is reviewed for abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992).

If a witness does not appear on a witness list that is duly filed and served before the deadline set by the trial court, then the trial court may bar the added witness from testifying at trial unless the witness's proponent demonstrates "good cause" for the late addition. MCR 2.401(I)(2). Here, the trial court issued a scheduling order that extended the deadline for discovery and set the deadline for exchanging witness lists at April 7, 2005. Defendant complied with the deadline, because it had already filed its witness list when the trial court entered the discovery extension. The record reflects that plaintiff did not file a witness list until July 6, 2005, which prompted defendant to move that the list be stricken. Plaintiff then filed another list on August 11, 2005. The trial court heard defendant's motion in October and resolved the issues in plaintiff's favor. The trial court's order allowed plaintiff to call all the witnesses on his lists, but it also allowed defendant to add any experts it needed to rebut the new witnesses. Plaintiff then added another witness in December, even though the time for filing the witness list had expired eight months before.

In response to defendant's motion in limine, plaintiff argued that defendant had "sandbagged" plaintiff's counsel into believing that the only issue regarding the case management claim was whether the services were necessary in light of plaintiff's disputed lack of brain injury. Plaintiff argued that, if he had known that defendant was going to challenge the reasonableness of the charges, he would have included Roberts' name on the earlier-filed witness lists. However, adopting plaintiff's argument would require us to take a skewed legal view of the case and overlook several contradictory facts.

"Where 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

(…continued)

appeal. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998). We grant leave on all the issues raised in each party's appellate briefs. *Id.*

expense." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990); see also *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321-322; 602 NW2d 633 (1999). "The burden of proof regarding whether a particular expense is reasonable and necessary lies with the plaintiff." *Davis v Citizens Ins Co of America*, 195 Mich App 323, 327; 489 NW2d 214 (1992). Because plaintiff was required to prove the reasonableness of CRCI's charges as an element of defendant's breach of its duty under MCL 500.3107(1)(a), defendant's position leading up to trial does not alter plaintiff's inescapable responsibility to present prima facie evidence that the charges were reasonable. The facts also fail to support plaintiff's "sandbag" argument, because plaintiff admits that it was informed of defendant's "new" position in the case in February, but plaintiff did not move to add Roberts as a witness until the eve of trial in June. Moreover, the testimony of Roberts's assistant, Pam Flaherty, demonstrates that defendant challenged both the reasonableness of CRCI's charges, as well as their necessity, from the time defendant's claims representative, Douglas Nelson, initially discussed defendant's denial of CRCI's claims with Flaherty over the phone. Under the circumstances, the trial court correctly rejected plaintiff's argument that defendant's actions provided "good cause" for adding Roberts to the witness list.

Plaintiff also argues that the trial court abused its discretion by not considering the factors in *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). We disagree. Plaintiff fails to demonstrate which, if any, of the *Dean* factors[2] support his position, especially given his earlier failure to file a witness list and his unexcused delay in trying to add Roberts. In contrast, the trial court correctly explained that the case was getting old and the day for trial was at hand, so Roberts could not testify. Our review of the record reveals that the trial court adequately weighed the decision with regard to the relevant factors[3] from *Dean*, so we do not find any abuse of discretion in its final decision.

Next, plaintiff argues that the trial court erred by granting defendant a directed verdict on his claim for case management benefits. We disagree. We review de novo a trial court's

---

[2] The factors include:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Dean*, *supra*.]

[3] The eighth factor did not favor plaintiff, because he had two other witnesses who could have potentially testified about the reasonableness of the CRCI charges, making Roberts's testimony somewhat cumulative. Therefore, unlike *Dean*, *supra*, the trial court's decision to bar Roberts's expert testimony did not extinguish the cause of action, and barring Roberts furthered the just interests of efficiency and the enforcement of judicial scheduling orders.

decision to grant a directed verdict. *Kallabat v State Farm Mut Auto Ins Co*, 256 Mich App 146, 150; 662 NW2d 97 (2003). "A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001).

To support his claim for the CRCI charges, plaintiff presented the testimony of Flaherty and the fact that defendant initially paid some of the CRCI invoices. However, Flaherty's testimony only established that she charged $105 per hour for predominantly clerical and secretarial work. Flaherty testified that she had no knowledge about how Roberts established that rate, no experience with billing aside from inputting her hours, and no idea what other case managers in the region might charge. See *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 513-514; 370 NW2d 619 (1985). She also testified that the same rate applied to her assistant, even though she did not testify that either of them had any specialized credentials or particularized expertise. To the contrary, the evidence suggested that the pair spent an extraordinarily long time performing rote tasks. For example, on separate occasions, they each took one hour to fill in, print, and mail a short form letter. More importantly, Flaherty did not present any information about how her rate was established or explain how her expertise and time translated into the final bill. Instead, she provided generic information about how she accompanied plaintiff at his doctor's appointments, periodically reviewed his file, and sent various letters and reports. The trial court correctly determined that, without more, no rational jury could find that $105 per hour was a reasonable rate for the work Flaherty described. *Cacevic*, *supra*. Rather than defend the rate, Flaherty deferred every reference to its computation to the absent Roberts. Under the circumstances, Flaherty's testimony did not even raise a permissible inference that CRCI's facially excessive charges were reasonable. See *Kallabat*, *supra*, at 150-152.

Regarding plaintiff's argument that defendant evidenced the reasonableness of the charges by initially paying them, Flaherty acknowledged that she never informed defendant that CRCI was billing it for clerical work by uncertified personnel and support staff. Therefore, defendant's initial, uninformed willingness to pay CRCI's first invoices did not raise a material issue of fact about whether the charges were reasonable. In fact, Flaherty's evidence demonstrated that Nelson did inform her that he thought the charges were unreasonable soon after CRCI became involved in the case. In the end, the trial court correctly ruled that plaintiff failed to demonstrate that the charges in CRCI's invoices were prima facie reasonable for the services explained by Flaherty. *Id.* Accordingly, the trial court did not err by granting defendant's motion for a directed verdict on the case management fees.[4]

---

[4] We also have serious reservations about whether the CRCI charges, or, for that matter, many of the attendant care charges actually awarded to plaintiff, were "incurred" by plaintiff in accordance with MCL 500.3107(1)(a) and our Supreme Court's recent opinion in *Burris v Allstate Ins Co*, ___ Mich ___; ___ NW2d ___ (Docket No. 132949, issued March 7, 2008), but these issues are not before us on appeal. We note, however, that if plaintiff actually incurred the CRCI charges at issue, then we do not condone the reckless decision of plaintiff's trial counsel to remain employed by both CRCI (a creditor) and plaintiff (its debtor) on a matter directly related

(continued…)

In its appeal, defendant argues that the trial court erred by granting plaintiff's motion for attorney fees. It further argues that the trial court should have granted defendant its attorney fees because plaintiff failed to substantiate the CRCI charges at trial. We disagree with both arguments. As an initial matter, the trial court did not abuse its discretion by denying defendant's motion for attorney fees, because plaintiff did not fail to demonstrate that the CRCI charges had "no reasonable foundation." MCL 500.3148(2). As in *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 627-628; 550 NW2d 580 (1996), the trial court granted defendant a directed verdict because of a fundamental failure of proof by the plaintiff, a failure that probably could have been remedied by calling Roberts to the stand. In other words, although the fees were facially excessive and the trial record was devoid of evidence that would justify them, defendant never affirmatively established that they were either "fraudulent or manufactured." *Nelson v DAIIE*, 137 Mich App 226, 237; 359 NW2d 536 (1984). Just as plaintiff failed to meet its burden of proving reasonableness, defendant failed to meet its burden of proving that the fees were "so excessive as to have no reasonable foundation." MCL 500.3148(2). Although the charges were facially excessive for the limited work Flaherty suggested in her testimony, the trial court did not clearly err by determining that the charges had a reasonable foundation in actual work performed by CRCI staff. See *Beach*, *supra*. Therefore, it did not abuse its discretion by denying defendant's motion for attorney fees. See *id*.

Nor did the trial court err by awarding plaintiff statutory attorney fees under MCL 500.3148(1). The trial court correctly revisited some of the original decisions made by Nelson and determined that defendant unreasonably delayed and denied benefits on Nelson's assumptions, misinformation, and imperfect data. See *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 355; 737 NW2d 807 (2007). The trial court also discredited the medical defense presented against plaintiff's formidable, and successful, closed-head injury claims. Under the circumstances, defendant fails to rebut the presumption that its delay in providing benefits was unreasonable, *id*. at 353, and the trial court did not clearly error in deciding that plaintiff was entitled to his reasonable attorney fees under MCL 500.3148(1).

Affirmed.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

(…continued)

to the outstanding debt.