STATE OF MICHIGAN

COURT OF APPEALS

ALTHEA BELL,

Plaintiff-Appellee,

and

TRAUMATIC BRAIN & CATASTROPHIC INJURY, INC., and MEDICO TRANSPORTATION, INC.,

Intervening Plaintiffs,[1]

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 9, 2010

No. 281138
Wayne Circuit Court
LC No. 04-432579-NF

UNIVERSITY NEUROSURGICAL ASSOCIATES,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

No. 281139
Wayne Circuit Court
LC No. 05-526161-NF

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

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[1] Intervening plaintiffs, Medico Transportation, Inc., and Traumatic Brain & Catastrophic Injury, Inc., were dismissed from this action on October 13, 2005, and May 8, 2006, respectively. These entities were plaintiff's medical treaters. They are not involved in this appeal. All further references to "plaintiffs" refer to plaintiff and University. Plaintiff, in the singular, refers to Bell.

PER CURIAM.

In Docket Nos. 281138 and 281139, defendant, Allstate Insurance Company, appeals as of right the trial court's order denying its motion for attorney fees in this first-party no-fault action. In Docket No. 281138, Allstate appeals the order as it relates to plaintiff, Althea Bell (defendant's insured); in Docket No. 281139, Allstate appeals the order as it relates to plaintiff, University Neurological Associates (plaintiff's treating clinic).[2] We affirm in part and vacate and remand in part.

Plaintiff has a 20-year history of problems with her low back. In 1987, she was involved in an automobile accident, causing injury to her low back. As a result, plaintiff did not return to work, and has not returned to any kind of work thereafter. In the early 1990s, plaintiff began to receive Social Security disability payments.

Plaintiff testified at trial that she had fairly consistent low back pain after the 1987 accident, through the early 2000s. She regularly treated with various physicians, receiving physical therapy and cortisone injections.

In 2001, plaintiff was involved in an automobile accident, in which she allegedly did not suffer injury. At trial, plaintiff claimed that early 2003, she began to experience a good deal of relief from her low back symptoms.

On October 13, 2003, plaintiff was involved in a third automobile accident, the first of the two accidents at issue in the present dispute. Another vehicle collided with the rear end of plaintiff's vehicle. Plaintiff claimed that this accident injured her upper and lower back areas, that these particular injuries from the 2003 accident caused her to have problems turning her neck, and that this accident caused her to suffer other range of motion limitations as well as panic attacks, all of which prevented her from driving.

On January 7, 2004, plaintiff was involved in a fourth automobile accident. An ambulance took her to the hospital. Plaintiff testified that she felt pain all over her body, especially in her neck, back, legs, arms, and hands. The hospital discharged her later the same day, but she continued to receive treatment for neck and low back pain. Plaintiff claimed that the 2004 accident caused her injuries that prevented her from doing "any kind of activities." At the time of trial in 2007, plaintiff claimed that she was still unable to do basic household chores. In February 2007, plaintiff underwent spinal fusion surgery. She testified that she continues to receive physical therapy and other treatment to treat back and spine symptoms.

Plaintiff sought first-party no-fault coverage from Allstate, her auto insurance provider. Plaintiff's claim was with regard to both the 2003 and 2004 accidents and sought medical expenses, attendant care and replacement services. Although Allstate initially paid a portion of the claim, it eventually denied coverage, on the basis that there was insufficient evidence that plaintiff's injury and symptoms were caused by the 2003 and 2004 accidents.

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[2] These two cases were consolidated below for trial and on appeal.

Plaintiff asserted that the injuries for which she was treated were caused by both the 2003 and 2004 accidents, and not by preexisting conditions and commenced this action, seeking approximately $150,000 in medical expenses, approximately $60,000 in attendant care, and approximately $24,000 in replacement services. In November 2005, University Neurosurgical Associates filed its action against Allstate, alleging that it submitted reasonable proof of its services to plaintiff, and that Allstate wrongly denied payment. The trial court consolidated the two cases, and the matter went to trial.

There was conflicting evidence at trial regarding whether the treatments plaintiff received, after the 2003 and 2004 accidents, were for injuries resulting from those accidents, or were related to preexisting injuries. At the conclusion of the trial, the jury returned a verdict of no cause of action in favor of Allstate.

Allstate then filed a motion for attorney fees under MCL 500.3148, arguing that the claim was so excessive as to have no reasonable foundation, and that it was in some respects fraudulent. The trial court denied the motion; rejecting Allstate's argument that plaintiff's claim was so excessive as to have no reasonable foundation. The trial court did not decide the question whether plaintiff's claim was in some respect fraudulent. This appeal ensued.

The decision whether to award attorney fees pursuant to MCL 500.3148 of the no-fault act is reviewed for clear error. *Ivezaj v Auto Club*, 275 Mich App 349, 352-353; 737 NW2d 807 (2007). MCL 500.3148(2) provides, in relevant part:

> An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation.

As noted above, the trial court did not decide whether plaintiff's claim was in some respect fraudulent. For the reasons stated below, we conclude that (1) the trial court did not clearly err in finding that plaintiff's claim had a reasonable foundation, and (2) the trial court must, in the first instance, decide the fact-oriented question of whether the claim was, in some respects, fraudulent.

It was undisputed at trial that plaintiff has been suffering serious and chronic back pain since her 1987 car accident. By the time of her 2003 car accident, she was already suffering from disc herniation and degenerative disc disease. However, the fact that plaintiff was suffering from back injuries at the time of her 2003 and 2004 accidents did not preclude a finding that the 2003 accident and/or the 2004 accident caused new back injuries, or aggravated the existing ones. Indeed, Dr. Sophia Grias and Dr. Miguel Lis-Planells, employees of University who treated plaintiff for years, testified that the 2003 accident and/or the 2004 accident aggravated her back condition. Specifically, Dr. Lis-Planells opined that plaintiff's 2003 accident "significantly aggravated" her disc degeneration and disc herniation. Dr. Grias concurred that a comparison of plaintiff's pre-2003 accident medical records with her post-2004 accident medical records demonstrated an aggravated back condition that she (Dr. Grias) believed was caused by the 2003 accident and/or the 2004 accident.

The opinions of Dr. Grias and Dr. Lis-Planells were grounded in fact. Both doctors testified to reviewing some of plaintiff's pre-2003 medical records. Although it is not clear how many prior medical records they reviewed, or what records they failed to review, there is insufficient evidence that the records they did review were so inadequate as to render the doctors opinions, that the later accidents aggravated pre-existing conditions, lacking in reasonable foundation for plaintiff's claims. In addition to the doctors' testimony at trial, plaintiff testified that the 2003 accident and/or the 2004 accident aggravated her back condition, and limited her activities. Considering the totality of the evidence, the trial court did not commit clear error in finding that plaintiff's claims were not so excessive as to lack reasonable foundation.

Next, whether plaintiff's claims were "in some respect fraudulent," MCL 500.3148, is a fact-oriented question, because the elements of fraud include intent to deceive, among other fact-oriented elements. See *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715, 719 (2008).[3] The trial court is, relatively speaking, better equipped than we are to answer, in the first instance, fact-oriented questions, especially ones involving intent (because, here, intent touches on credibility).[4] Because the trial court did not address the question whether plaintiff's claims were in some respect fraudulent, we vacate the trial court's denial of Allstate's motion for attorney fees, and remand for a resolution of this issue.[5]

Affirmed in part, vacated and remanded in part. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray

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[3] "To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) *the defendant made it with the intention that the plaintiff should act upon it*; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury." *Roberts, supra* at 403 (emphasis added).

[4] We note that, under our Supreme Court's precedent, a trial court's decision about whether an insurer acted reasonably, for purposes of a motion for attorney fees under MCL 500.3148, involves a mixed question of law and fact: what constitutes reasonableness is a question of law, but whether the insurer's denial of benefits is reasonable under the particular facts of the case is a question of fact. *Moore v Secura Ins Co*, 482 Mich 507, 516; 759 NW2d 833 (2008).

[5] We note, without deciding this issue, that plaintiff conceded that her application to defendant for no-fault benefits did contain some material false information, in that it denied that she had previously received medical treatment for back, neck, and hand pain. According to plaintiff, her doctor's assistant completed that portion of the application. But plaintiff signed the application (although she claimed that she did not recall seeing the false information, and denied personally writing any false information), and the claim need only be "*in some respects* fraudulent . . . ." MCL 500.3148(2) (emphasis added).