STATE OF MICHIGAN

COURT OF APPEALS

HELENA SOJECKA,

Plaintiff-Appellant/Cross-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant,

and

JOHN DOE,

Defendant.

UNPUBLISHED
December 16, 2010

No. 292513
Wayne Circuit Court
LC No. 08-101177-NF

Before: SHAPIRO, P.J., and SAAD and KELLY, JJ.

PER CURIAM.

In this action for first-party no-fault benefits, plaintiff appeals as of right from the trial court's order awarding her no-fault attorney fees of $1,500 pursuant to MCL 500.3148(1), but denying her request for additional no-fault attorney fees and also denying her request for attorney fees as a discovery sanction under MCR 2.313(C). Defendant cross appeals, challenging the trial court's award of attorney fees to plaintiff and denial of its request for attorney fees under MCL 500.3148(2). We affirm in part, but vacate and remand with regard to the amount of attorney fees owed to plaintiff pursuant to MCL 500.3148(1).

I. PROCEDURAL HISTORY

Plaintiff brought this action to recover first-party no-fault personal injury protection ("PIP") benefits and penalty interest in excess of $62,000. Following a jury trial, plaintiff was awarded PIP benefits of $1,140 and penalty interest of $166. Plaintiff thereafter moved for attorney fees under MCL 500.3148(1), seeking fees in excess of $41,000 based on defendant's unreasonable refusal to pay PIP benefits. Plaintiff also sought an additional award of $10,000 as a discovery sanction under MCR 2.313(C). Defendant filed its own motion for attorney fees and costs, seeking in excess of $45,000 under MCL 500.3148(2) on the ground that plaintiff's claim

was "in some respect fraudulent or so excessive as to have no reasonable foundation." The trial court partially granted plaintiff's motion and awarded plaintiff attorney fees of $1,500 under MCL 500.3148(1), but denied plaintiff's request for additional attorney fees as a discovery sanction. The court also denied defendant's motion for attorney fees and costs.

II. NO-FAULT ATTORNEY FEES

Both parties challenge the trial court's award of no-fault attorney fees to plaintiff. Defendant argues that the trial court erred in determining that plaintiff was entitled to any attorney fees under MCL 500.3148(1), and plaintiff argues that the trial court erred in determining that she was only entitled to attorney fees in the amount of $1,500. We affirm the attorney fees award but vacate and remand with regard to the reasonableness of the amount of attorney fees awarded to plaintiff.

This Court generally "review[s] a trial court's award of attorney fees and costs for an abuse of discretion." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "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). MCL 500.3148(1) permits a claimant's attorney fees to be charged against the insurer "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." "What constitutes reasonableness 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." *Univ Rehab Alliance*, 279 Mich App 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.*

"MCL 500.3148(1) establishes two prerequisites for the award of attorney fees." *Moore*, 482 Mich at 517. "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.'" *Id*. quoting MCL 500.3142(2). "Second, in postjudgment proceedings, the trial court must find that the insurer 'unreasonably refused to pay the claim or unreasonably delayed in making proper payment.'" *Id*. quoting MCL 500.3148(1). Thus, contrary to what plaintiff argues, the jury's finding that payments were overdue, alone, is insufficient to support an award of attorney fees under MCL 500.3148(1).

"An insurer's delay in making payments under the no-fault act is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, *or factual uncertainty*." *Univ Rehab Alliance*, 279 Mich App at 694 (emphasis added). "Nothing in the plain language of MCL 500.3148(1), … requires an insurer to reconcile competing medical opinions." *Moore*, 482 Mich at 521. Rather, "[w]hether attorney fees are warranted under the no-fault act depends not on whether coverage is ultimately determined to exist, but on whether the insurer's initial refusal to pay was unreasonable." *Univ Rehab Alliance*, 279 Mich App at 694; see also *Moore*, 482 Mich at 522.

"When an insurer refuses to make or delays in making payment, a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). Therefore, "[i]f an insurer refuses to pay or delays paying no-fault benefits, the insurer must meet the burden of showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Univ Rehab Alliance*, 279 Mich App at 694. An insurer's initial refusal to pay can be deemed reasonable even though the payments are later determined to be overdue. *Moore*, 482 Mich at 525-526. Thus, plaintiff is incorrect in arguing that the jury's finding that payments were overdue necessarily requires an award of attorney fees.

In this case, the evidence shows that there were differences of medical opinion between Dr. Stefan Glowacki, who believed that plaintiff was doing everything possible and would never work again, and Dr. Mary Kneiser, who believed that plaintiff had some degenerative problems unrelated to the June 2007 automobile accident and that with better physical therapy, she could resume her prior activities. However, Dr. Kneiser conceded that plaintiff would need some form of replacement services while she received more proactive physical therapy.

The jury found that benefits were overdue, but awarded plaintiff only $300 in medical expenses for Dr. Karol Zakalik's bill, $840 in replacement services, and $166 in penalty interest. Thus, a rebuttable presumption arose that defendant unreasonably refused to pay the benefits awarded by the jury. Defendant made no effort to question the reasonableness of Dr. Zakalik's bill, and Dr. Kneiser agreed that plaintiff needed additional replacement services. Therefore, defendant failed to rebut the presumption of unreasonableness with respect to these expenses. The trial court did not err in determining that plaintiff was entitled to an award of attorney fees under MCL 500.3148(1).

Plaintiff argues that the trial court abused its discretion in awarding plaintiff only $1,500 in attorney fees on the basis of the size of the jury award alone. We agree. The amount of attorney fees awarded under MCL 500.3148(1) must be reasonable. *Tinnin v Farmers Ins Exchange*, ___ Mich App ___; ___ NW2d ___ (2010) (Docket No. 286141, issued February 2, 2010), slip op, p 8. To determine whether an award of attorney fees is reasonable, the trial court should consider: "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." *Tinnin*, __ Mich App __ (slip op at 8) (internal quotations omitted) citing *Wood v Detroit Auto Inter-Ins Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982). "The party seeking attorney fees has the burden of proving that the fees are reasonable." *Tinnin*, __ Mich App __ (slip op at 8). If a trial is required to collect unreasonably, overdue PIP benefits, attorney fees necessitated by the trial are recoverable under MCL 500.3148(1). *Moore*, 482 Mich at 524-525.

In this case, the trial court abused its discretion in awarding plaintiff only $1,500 in attorney fees without determining whether that amount was reasonable. The trial court merely awarded an amount of attorney fees that was approximately equal to the total amount of PIP benefits the jury awarded plaintiff. The trial court, however, made no findings of fact with regard to any of the *Wood* factors including the professional standing and experience of plaintiff's attorneys, the skill, time and labor involved in the representation, the amount in question and the

results achieved, the difficulty of the case, the expenses incurred and the nature and length of the professional relationship. The trial court also did not address the reasonableness of plaintiff's request for $41,000 in attorney fees. Finally, the trial court did not find that plaintiff's attorney fees were not attributable to obtaining the unreasonably withheld, overdue PIP benefits. As a result, the trial court's award of $1,500 was outside the principled range of outcomes.

Moreover, the trial court erred in apportioning the amount of attorney fees on the basis of the size of the jury award alone. There is "no authority that requires a court to apportion attorney fees 'where a defendant has unreasonably refused to pay certain benefits even where its refusal to pay other benefits was found not to be unreasonable.'" *Tinnin*, __ Mich App __ (slip op at 14) quoting *Cole v Detroit Auto Inter-Ins Exchange*, 137 Mich App 603, 614; 357 NW2d 898 (1984). While a trial court has the discretion to consider the size of the result achieved when awarding attorney fees, it must still determine whether the award was reasonable. *Tinnin*, __ Mich App __ (slip op at 16).

In *Tinnin*, this Court held that it was not an abuse of discretion for the trial court to award the plaintiff all of the attorney fees requested, over $57,000, and refuse to apportion the amount of fees based on the size of the jury verdict in relation to the total claim. *Tinnin*, __ Mich App __ (slip op at 13). The *Tinnin* jury only awarded the plaintiff $1,235 for his physical medicine and rehabilitation bills and determined that those payments were overdue, entitling the plaintiff to $218 in no-fault interest while refusing to award plaintiff any benefits for attendant care, even though the plaintiff requested more than $90,000 to pay for attendant care services. *Tinnin*, __ Mich App __ (slip op at 4). We affirmed the trial court's refusal to apportion the fee and to instead focus on the *Wood* factors to determine what was reasonable. *Tinnin*, __ Mich App __ (slip op at 17).

In this case, unlike in *Tinnin*, the trial court only considered the size of the jury award and not whether the amount of attorney fees was reasonable. As a result, the trial court abused its discretion. We vacate the trial court's attorney fees award and remand to the trial court to determine a reasonable award of attorney fees.

III. DISCOVERY SANCTIONS

Plaintiff also argues that the trial court erred in denying her request for an additional award of attorney fees as a discovery sanction under MCR 2.313(C). We disagree.

A trial court's decision whether to impose discovery sanctions is reviewed for an abuse of discretion. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 404; 729 NW2d 277 (2006). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.*

MCR 2.313(C) provides:

> If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in

making that proof, including attorney fees. The court shall enter the order unless it finds that

(1) the request was held objectionable pursuant to MCR 2.312,

(2) the admission sought was of no substantial importance,

(3) *the party failing to admit had reasonable ground to believe that he or she might prevail on the matter*, or

(4) there was other good reason for the failure to admit. [MCR 2.313(C) (emphasis added).]

The purpose of requesting an admission is "to limit areas of controversy and save time, energy, and expense which otherwise would be spent in proffering proof of matters properly subject to admission." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 457; 540 NW2d 696 (1995). However, "[t]he mere fact that the matter was proved at trial does not, of itself, establish that the denial in response to the request for an admission was unreasonable." *Id*. (internal quotations omitted).

In the present case, plaintiff asked defendant to admit that it "unreasonably withheld payment from the Plaintiff for her replacement services" and that it "unreasonably withheld payment from the Plaintiff for his [sic] medical expense claim." Defendant denied both requests. At trial, the jury found that plaintiff was entitled to $300 in medical expenses and $840 in replacement services, and that both benefits were overdue.

Under MCL 500.3142(2), a payment is "overdue if not paid within 30 after an insurer receives reasonable proof of the fact and of the amount of loss sustained." In contrast, whether an "insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment" is the standard used to determined whether an insured is entitled to recover attorney fees under MCL 500.3148(1).

As previously indicated, the trial court awarded plaintiff $1,500 in attorney fees, thereby indicating that it found that defendant unreasonably refused to pay both Dr. Zakalik's bill and $840 in replacement services. However, the requests for admissions encompassed all of plaintiff's claims for replacement services and medical expenses, most of which she did not prevail on at trial. At trial, defendant questioned the medical necessity for Dr. Glowacki's visits, for Dominik Oleksy's physical therapy, and for the replacement services provided by plaintiff's grandson. Given Dr. Kneiser's opinion, defendant had a reasonable ground to believe it might prevail on those issues. Further, while plaintiff was awarded Dr. Zakalik's $300 bill, defendant prevailed concerning Dr. Glowacki's bill and Oleksy's physical therapy bill (totaling $28,818). In addition, while plaintiff was awarded $840 in replacement services, defendant prevailed on the other $11,060 that she originally sought. In this context, defendant's discovery denials were not unreasonable and the trial court did not err in denying plaintiff's request for attorney fees under MCR 2.313(C)

IV. INSURER ATTORNEY FEES

In its cross appeal, defendant argues that the trial court erred in denying it request for an award of attorney fees under MCL 500.3148(2). We disagree.

MCL 500.3148(2) provides:

> 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*. To the extent that personal or property protection insurance benefits are then due or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant for any amount of a fee awarded against him and not offset in this way or otherwise paid. [MCL 500.3148(2)(emphasis added).]

"A trial court's findings regarding the fraudulent, excessive, or unreasonable nature of a claim should not be reversed on appeal unless they are clearly erroneous." *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 627; 550 NW2d 580 (1996).

The excessiveness of a plaintiff's request for PIP benefits is not enough alone to support an award of attorney fees to an insurer under MCL 500.3148(2). Rather, the clear language of the statute requires that a claim be found to be "in some respect fraudulent or so excessive *as to have no reasonable foundation*." Thus, where a plaintiff's claim is not found to be unreasonable, a trial court does not commit clear error in denying an insurer's claim for attorney fees. *Beach*, 216 Mich App at 627. Further, as with MCL 500.3148(1), an insurer is only entitled to the fees directly attributable to defending against the particular claim found to meet the requirements of § 3148(2). *Id*. at 627-628.

In this case, the jury awarded plaintiff $300 for Dr. Zakalik's bill, no lost wages, $840 in replacement services, and $166 in penalty interest. However, the jury was not asked to determine whether any of plaintiff's claims were "in some respect fraudulent or so excessive as to have no reasonable foundation." At trial, defendant did not attempt to prove that plaintiff's medical bills were unreasonably excessive or fraudulent. Rather, defendant's theory was that the treatment was not medically necessary. While defendant attempted to show that plaintiff's wage-loss claim was unreasonably excessive or fraudulent, plaintiff testified that the figures she reported were gross income, and that about half of her gross income went to pay for her own cleaning supplies and uniforms. Concerning the claim for replacement services, defendant noted that plaintiff's grandson was not observed coming or going from plaintiff's apartment on the two occasions that plaintiff was under surveillance. However, even Dr. Kneiser agreed that plaintiff needed some form of replacement services.

Given the evidence presented at trial, we conclude that while plaintiff's claims were certainly disputed, the trial court did not err in rejecting defendant's argument that plaintiff's claims were "in some respect fraudulent or so excessive as to have no reasonable foundation."

Affirmed in part, vacated in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Kirsten Frank Kelly