STATE OF MICHIGAN

COURT OF APPEALS

PETER BALALAS, Plaintiff-Appellee,	UNPUBLISHED August 2, 2012
v	No. 302540 Wayne Circuit Court
STATE FARM INSURANCE COMPANY, Defendant-Appellant.	LC No. 08-109599-NF

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right a judgment for plaintiff and an order granting plaintiff attorney fees and costs under the no-fault personal injury protection insurance statute, MCL 500.3148. Defendant also claims that the trial court abused its discretion by denying defendant's request for attorney fees and costs. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

Defendant first argues that the trial court abused its discretion in granting plaintiff's motion for attorney fees because defendant's claims adjuster reasonably relied on medical reports in making her decision. We disagree.

A trial court's decision to grant or deny a motion for attorney fees presents a mixed question of fact and law. *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 693; 760 NW2d 574 (2008). This Court reviews the trial court's findings of fact for clear error, and questions of law de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "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." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). However, this Court reviews a trial court's ultimate decision whether to award attorney fees for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

Michigan generally follows the "American Rule," under which a prevailing party may not recover attorney fees from the losing party as a cost of litigation, unless a statute or court rule expressly authorizes the award. *Smith v Smith*, 278 Mich App 198, 208; 748 NW2d 258 (2008). In no-fault personal injury protection insurance cases, MCL 500.3148(1) permits a claimant to

obtain attorney fees from an insurer "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." "MCL 500.3148(1) establishes two prerequisites for the award of attorney fees." *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008). "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)). If a claimant establishes the first prerequisite, a rebuttable presumption arises regarding the second. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). The insurer then bears the burden of justifying the refusal or delay. *Id*.

An insurer may justify its refusal to pay a claimant benefits by showing that the claim presented a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Univ Rehab Alliance*, 279 Mich App at 694. The trier of fact's ultimate decision that the insurer owed benefits to the claimant does not alone establish the unreasonableness of the insurer's initial decision. *Id*.; *Moore*, 482 Mich at 522. Rather, the court must examine the circumstances as they existed at the time the insurer made the decision, and decide whether that decision was reasonable at that time. *Univ Rehab Alliance*, 279 Mich App at 694. "[T]he claimant shoulders the initial burden to supply reasonable proof of her entire claim, or reasonable proof for some portion thereof. When the claimant provides such evidence, the insurer then must evaluate that evidence as well as evidence supplied by the insurer's doctor before making a reasonable decision regarding whether to provide the benefits sought." *Moore*, 482 Mich at 523.

In *Moore*, the plaintiff suffered a knee injury in a car accident and eventually required knee replacement surgery. *Moore*, 482 Mich at 512. The defendant paid the plaintiff's claim for wage loss and other no-fault benefits until its doctor reported that the plaintiff had fully recovered from the accident and that her continued knee problems were caused by a pre-accident condition. *Id*. at 513-514. The doctor stated that the plaintiff could return to work, but could not climb, walk on uneven ground, kneel, squat, or perform overhead lifting. *Id*. at 513.

The defendant then discontinued paying the plaintiff no-fault benefits because it believed that, due to the doctor's report, reasonable proof existed establishing that the plaintiff's claim was no longer justified. *Moore*, 482 Mich at 514. The plaintiff filed suit, seeking $96,000 in work loss benefits, $21,000 for household or replacement services, and more than $11,000 in penalty interest. *Id*. The jury awarded the plaintiff $42,775 in work loss benefits, no damages for household or replacement services, and only $98.71 in penalty interest for overdue payments. *Id*. The plaintiff then filed a postjudgment motion for attorney fees and costs under MCL 500.3148(1). *Id*. The trial court awarded the plaintiff the full amount that she requested, totaling $79,415. *Id*.

The Supreme Court held that the jury's finding that the defendant only owed $98.71 in penalty interest showed that only one week of work loss benefits were overdue at the time of trial. *Moore*, 482 Mich at 524. The Court explained that "before plaintiff's suit went to trial, [the] defendant already had paid plaintiff $822.52 for one week of work loss benefits and all other payments that [the] defendant owed . . . . Because [the] plaintiff did not attribute any of the

$79,415 that the trial court awarded her in attorney fees and costs to collecting $822.52 in overdue work loss benefits, [the] plaintiff is not entitled to attorney fees." *Id.*

The Court in *Moore* went on to hold that an insurer need not reconcile the differing opinions of doctors in determining whether to pay wage loss benefits. *Moore*, 482 Mich at 522. The plain language of MCL 500.3101 *et seq* does not require the insurer to go beyond the medical opinions of their physicians, but merely requires that the insurer's initial refusal to pay be reasonable. *Id*. at 522. This remains a fact-specific inquiry that the courts should determine on a case-by-case basis. *Id*. at 522 n 18. The Court held that, because the defendant had based its decision on a legitimate, reasonable factual uncertainty, no reasonable jury could find that the plaintiff's claim was overdue. *Id*. at 522-523. In fact, the insurer made sure that it paid the portion of benefits that it mistakenly withheld long before trial. *Id*. The Court, therefore, held that the plaintiff could not recover attorney fees.

In this case, plaintiff presented defendant with reasonable proof establishing his claim for work loss benefits. Plaintiff provided defendant with a report by a chiropractor who stated that, because of his car accident, plaintiff could never return to work in the same capacity as he had previously worked. Plaintiff also relied on testimony showing that he was receiving regular treatment for his knee. Defendant began paying plaintiff benefits, but later decided to discontinue paying benefits. Thus, if defendant unreasonably decided to discontinue the medical benefits, those benefits became overdue and plaintiff may recover attorney fees for litigating this claim.

This case differs from *Moore*, where the Court found the defendant's denial reasonable, because defendant has failed to point to any medical evidence suggesting that plaintiff no longer required medical treatment. As defendant's claims adjuster essentially admitted, she did not base her benefits denial on medical evidence she had at the time of the decision. When pressed by the trial court, defendant could not provide any medical evidence, known to defendant's claims adjuster at the time that she denied the claim, establishing that plaintiff could perform his duties and return to work. To the contrary, defendant's investigator stated that he monitored plaintiff and did not see him perform any tasks inconsistent with his claimed injuries. Although defendant later received expert testimony supporting its position that plaintiff could return to work, and later attempted to examine plaintiff further, this Court will not consider this evidence because it must review defendant's claims adjuster's decision at the time it was made.

In addition, as in *Moore*, the trial court properly relied on the jury's determination of interest owed in deciding which benefits were overdue. Here, the jury awarded plaintiff $1,170 in wage loss benefits. Again, in *Moore*, the jury awarded $42,755 in wage loss benefits, but only $98.71 in interest, showing that the jury found only $822 overdue. In this case, the jury awarded $213 in penalty interest, which shows that the jury found the medical benefits overdue. Because the trial court based its holding on the jury's factual finding that the benefits were overdue, we hold that the finding did not amount to clear error. The court's finding that the benefits were overdue then gave rise to the presumption that they were unreasonably withheld, which defendant had the burden to rebut.

Defendant failed to rebut the presumption that it unreasonably denied plaintiff's medical benefits claim. The trial court specifically asked defendant to point to any part of the trial

transcript that showed its claims adjuster relied on medical testimony in denying plaintiff's claim. Defendant failed to do so. In fact, defendant's claims adjuster testified that she did not even know of plaintiff's job duties at the time that she denied his claim, and that she only learned of those duties later. This blind denial cannot be deemed reasonable based on what the claims adjuster knew at the time she made her decision. The claims adjuster apparently believed that either: (1) because plaintiff's employer had ceased doing business, plaintiff should no longer receive benefits, or (2) plaintiff's claim should be denied because he lied about his wage loss benefits. However, plaintiff's employer testified that all of his former employees gained immediate employment with other companies. Additionally, plaintiff's claims adjuster admitted that she did not inform plaintiff that defendant would provide him rehabilitation services if he required them. Finally, the wage loss claim is irrelevant to determining whether plaintiff required additional medical treatment due to the car accident.

We also reject defendant's argument that, because he dismissed his household services, attendant care, and other benefits claims, plaintiff may not recover attorney fees for preparation of those claims. Defendant moved for summary disposition with regard to these claims, and the trial court held that questions of fact remained for the jury. Therefore, the trial court explicitly found that there was factual evidence to support these claims. The dismissal of these claims at and before trial, therefore, merely amounted to trial strategy. Additionally, this Court held in *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 522; 791 NW2d 747 (2010), that because "MCL 500.3148(1) does not unambiguously require the apportionment [of fees] . . . [a] trial court d[oes] not abuse its discretion by refusing to apportion [a] plaintiff's award of attorney fees." *Id*. The question, rather, is whether the fees are reasonable when considering the surrounding circumstances. *Id*. In this case, the court properly applied the reasonableness factors enumerated in *Wood v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982), namely:

> (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. [*Wood*, 413 Mich at 588 (citation omitted).]

The trial court explicitly discussed several of these factors before finding plaintiff's attorneys' rates reasonable and the total amount awarded reasonable.

Because defendant failed to present any record evidence supporting the claims adjuster's decision, and because the jury awarded penalty interest indicating medical benefits were overdue, the trial court's finding that the benefits decision was unreasonable was not clearly erroneous. Because the trial court reasonably based its decision to grant plaintiff attorney fees on this finding, that decision does not amount to an abuse of discretion. *Khouri*, 481 Mich at 526.

Defendant next argues that the trial court erred in granting plaintiff attorney fees and costs because plaintiff's requests were fraudulent or unreasonable and unsupported. We disagree.

"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). "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." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 296.

This Court reviews for an abuse of discretion a trial court's decision to grant or deny court costs and attorney fees to a prevailing party. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996); *Khouri*, 481 Mich at 526. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Khouri*, 481 Mich at 526.

At the trial court level, defendant stipulated to plaintiff's attorneys' hourly rates. The trial court accepted this stipulation and explained that the hourly rates were reasonable under the circumstances. Defendant may only argue, therefore, that the number of hours granted by the trial court was unreasonable.

On appeal, defendant has failed to specify which of plaintiff's hours the trial court should have stricken, or present any argument why those hours were excessive. Defendant has, therefore, abandoned this claim by failing to adequately support it with relevant authority. *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007). Further, defendant's claim fails on its merits. Plaintiff's attorneys presented an affidavit of the hours they worked on the case. Defendant's attorney then objected to those hours he believed were unreasonable. He further argued that the fees should be apportioned according to the different claims. The trial court essentially struck all entries that defendant asked the court to remove. The trial court also justified the total amount and hours granted by referring to the factors enumerated in *Wood*, 413 Mich at 588. Additionally, the trial court again rejected defendant's apportionment argument under *Tinnin*, 287 Mich App at 522. Because the trial court relied on the proper law, made reasonable factual findings based on the attorneys' abilities, relationships to their client, and the other surrounding circumstances, we hold that the trial court's grant of attorney fees did not amount to an abuse of discretion.

Under MCL 600.2549, "[r]easonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used." Under the plain language of this statute, an award of costs for deposition transcripts used at trial cannot be upheld unless those transcripts were filed with the clerk's office. *Elia v Hazen*, 242 Mich App 374, 381; 619 NW2d 1 (2000). At the motion hearing, defendant's attorney asserted that the transcripts were not filed with the clerk's office. Plaintiff's attorney merely responded by stating that he was "99.99 percent sure" that they were. The trial court did not address the filing requirement and granted plaintiff's costs for all of the transcripts, totaling $2,172.60.

We hold that the trial court erred in allowing costs for the deposition transcripts before finding that they had been filed with the clerk's office. In *Elia*, 242 Mich App at 381-382, the

trial court taxed costs for deposition transcripts that had been used at trial but not filed with the clerk's office. *Id*. This Court reversed the trial court's decision, holding that, because the transcripts were not filed, the trial court lacked statutory authority to grant those costs. *Id*. In this case, the trial court failed to make the requisite factual finding that plaintiff filed the transcripts with the clerk's office. Thus, the trial court may have lacked the statutory authority to grant this request. We therefore remand the case to the trial court to determine if the transcripts were properly filed with the clerk's office.

Defendant finally argues that the trial court abused its discretion in denying its motion for attorney fees because plaintiff's claims for wage loss, household services, and attendant care were so excessive that they had no reasonable foundation. We disagree.

Under MCL 500.3148(2), "[a]n insurer may be allowed . . . a reasonable sum against a claimant as an attorney's fee for the insurer's defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation." As discussed *supra*, the trial court denied defendant's motion for summary disposition, explicitly finding that plaintiff had presented questions of fact regarding his wage loss and attendant care claims. Plaintiff presented deposition testimony from his fiancé, in which she stated that she cared for plaintiff after his injury. In addition, plaintiff and his employer testified regarding his wage loss claim. Because plaintiff presented competent testimony regarding these claims, and the trial court reasonably decided that they were supported by evidence and not excessive or unreasonable, we reject this claim.

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

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello