# STATE OF MICHIGAN

# COURT OF APPEALS

TRINA RICHARD,

Plaintiff-Appellee/Cross-Appellant,

and

TBCI P.C.,

Intervening Plaintiff,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
June 21, 2012

No. 298650
Wayne Circuit Court
LC No. 06-613557-NF

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted a $51,809.17[1] judgment in favor of plaintiff, Trina Richard, that was entered after a jury trial. The lawsuit was initiated for the recovery of first-party no-fault personal injury protection ("PIP") benefits. Plaintiff cross-appeals from the same judgment. We affirm.

## I. BASIC FACTS

On October 1, 1991, plaintiff, then a 16-year old high school student, was hit by a vehicle while she was walking across a street in Detroit. The impact of the collision tossed plaintiff into the air, which resulted in her head hitting the ground when she landed. She had a "huge," "thick," "gigantic" knot on her head. Plaintiff was transported to Henry Ford Hospital, where she was treated and released later that same day. The hospital records show that plaintiff

[1] The $51,809.17 was broken down as follows: $40,704.20 for allowable expenses; $4,884.50 for statutory interest, MCL 500.3142; and $6,220.47 for post-filing judgment interest, MCL 600.6013(8).

suffered a large hematoma on her right forehead and abrasions on the right side of her chin and face. Additionally, she was diagnosed with a closed-head injury. Plaintiff returned to school some weeks after the accident.

After the October 1, 1991, accident, plaintiff's parents filed a claim with defendant for $420 for replacement services, which was paid. The medical bills presumably were paid by plaintiff's health insurance carrier.

At trial, plaintiff complained of having neck and back pain virtually every day since the accident. However, from 1993 until 2005, plaintiff received no treatment for any head, neck, or back injuries related to the accident. In fact, she never even mentioned any such injuries during her many doctor visits throughout this time.

In 2005, plaintiff met with Lawrence Gamby, a certified rehabilitation counselor and case manager, who had started Gamby, Kageff[2] & Associates ("GK&A"). GK&A provided services to plaintiff totaling $16,000, which defendant has not paid.[3] Gamby testified that these services were reasonably necessary for plaintiff's care and treatment stemming from the October 1, 1991, accident.

GK&A initially referred plaintiff to Dr. Thomas Park, a psychiatrist, at TBCI P.C.[4] Dr. Park then referred plaintiff to Dr. Woo Kim, a physical medicine physician, for care of her neck and back pain; to Dr. Renee Applebaum, a neuropsychologist, for neuropsychological evaluation; and back to GK&A for case-management services. GK&A also utilized Health Care Unlimited, another company owned by Gamby, which provided transportation for plaintiff. Gamby claimed that Health Care Unlimited was owed $13,000 for these transportation services, which also were reasonably necessary charges that defendant denied.

Dr. Applebaum first evaluated plaintiff in March 2006. Dr. Applebaum found that there was no indication of malingering[5] and concluded that plaintiff was moderately impaired. Dr. Applebaum also concluded that plaintiff had a cognitive disorder and organic personality syndrome, which were all attributable to the October 1, 1991, car accident. Dr. Applebaum testified that she incurred $5,150 in charges for her services.

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[2] The trial transcript spelled this name as "Caga," but the parties' briefs on appeal spell it "Kageff." We assume the parties' briefs are correct and will use the "Kageff" spelling.

[3] Gamby later formed "Gamby & Associates," but that entity did not provide any services to plaintiff.

[4] TBCI P.C. had intervened in the lawsuit and successfully petitioned the court to bifurcate the trial, with its issues being tried separately. However, TBCI P.C. was ultimately dismissed by stipulated order on February 1, 2010.

[5] "Malingering" is defined as the "intentional production of false or grossly exaggerated physical or psychological symptoms." Medscape Reference, Malingering, <http://emedicine.medscape.com/article/293206-overview> (accessed September 2, 2011).

In 2005, defendant received a bill for the treatment plaintiff received. Ruth Billiau was the claims adjuster at Allstate that was assigned to the claim. Billiau was skeptical that the current treatment was related to the 1991 accident since there had been no treatment or issues during the previous 12 years. Accordingly, defendant requested authorizations from plaintiff for her medical records. But plaintiff never returned the authorizations. Contemporaneous to this, Billiau sent plaintiff to be evaluated by Dr. Clifford Fergison, a neuropsychologist. But because Billiau never received any authorizations, she did not have access to, and could not provide Dr. Fergison with, any of plaintiff's medical records that spanned from 1993 through 2005.

Dr. Fergison evaluated plaintiff on November 30, 2005, and gave a report of his findings. Dr. Fergison concluded that "there was significant evidence of symptom exaggeration based on symptom validity testing," which made it impossible for him "to arrive at any clear diagnosis or treatment recommendations." On cross-examination, Dr. Fergison clarified that, even though plaintiff's testing results were consistent with symptom exaggeration, malingering, and pre-existing impairment, he could not conclude that plaintiff actually was exaggerating, malingering, or had a pre-existing impairment.

After reading Dr. Fergison's report, Billiau denied plaintiff's claims for benefits. Billiau explained that, while she also had Dr. Applebaum's conflicting report, she based her decision solely on Dr. Fergison's report.

Plaintiff filed suit on May 10, 2006. Before trial, plaintiff, in a motion in limine, sought to have any evidence of plaintiff's prior abortion excluded from trial. Plaintiff argued that such evidence was irrelevant to any of the contested issues at trial and, even if the abortion was somewhat relevant, any relevance would have been substantially outweighed by undue prejudice, making it inadmissible pursuant to MRE 403. The trial court granted the motion but noted that defendant would be allowed to make a subsequent offer of proof at trial if it wished. There is nothing on the record to suggest that defendant ever made such an offer of proof.

After a six-day trial, a jury returned a verdict in favor of plaintiff in the amount of $40,704.20 for allowable expenses and $4,884.50 for statutory interest.

On May 27, 2009, defendant filed a motion with the trial court to settle the record, or in the alternative, to have a new trial. Defendant noted that the entire transcript from August 13, 2008, was missing. The missing testimony supposedly included part of the direct testimony (and possibly a portion of the cross-examination) of plaintiff's father, Cornell Richard; all of the testimony of plaintiff's husband, Anthony Montgomery; and Dr. Park's direct-examination (and possibly a portion of the cross-examination).

On January 15, 2010, defendant provided a proposed record of the testimony of Cornell but stated that Dr. Park's settled record of testimony was to be supplied by plaintiff.[6] A few days later, plaintiff submitted her proposed record for the testimony of Cornell and Dr. Park.

[6] Anthony Montgomery's testimony was not a concern because, since it was introduced via deposition, the testimony was still available.

Plaintiff's version of Cornell's testimony was not substantively different than defendant's version except for a few instances. Even though defendant disagreed with the additions that plaintiff proposed related to Cornell's testimony, the trial court ordered that both sides' proposed facts would encompass the settled record.

## II. EVIDENCE OF ABORTION

Defendant argues that the trial court abused its discretion when it excluded evidence that plaintiff had an abortion. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Generally, relevant evidence is admissible. MRE 402. Evidence is relevant if it has a tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. MRE 401; *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002). Defendant argued at the trial court that the fact that plaintiff got an abortion was "relevant because it is part of what made her into the person she is today. . . . These sort of incidents very much flavor and create the person we have here today and going to be testifying at trial. . . . In this case it is relevant and the testimony will support that." In other words, defendant maintained that plaintiff's abortion was a cause of at least some of her impairments. However, this was sheer speculation on defendant's part. There was nothing in the record that suggested that the abortion did cause any such impairment. Thus, the trial court correctly excluded the evidence on a relevance basis.

On appeal, defendant argues that the expert testimony of Dr. Elliot Wagenheim was sufficient to show that the abortion was relevant. However, there are two significant flaws with this assertion. First and foremost, Dr. Wagenheim's testimony came towards the end of trial and, thus, was not available to the trial court at the time it granted plaintiff's motion in limine. Therefore, it can have no bearing on whether the trial court erred at the time it granted the motion. Second, Dr. Wagenheim never testified about an abortion specifically. Instead, defendant relies on Dr. Wagenheim's testimony that a person who had "been abused physically, emotional[ly], [or] sexually tend[s] to develop certain personality traits and certain patterns." Defendant did not introduce expert testimony, however, to establish that having an abortion, while likely emotionally and physically traumatic, is the equivalent of being physically, emotionally, or sexually abused. Thus, the jury would have had to speculate to reach such a conclusion.

Even assuming, arguendo, that plaintiff's abortion was relevant, the evidence was still inadmissible pursuant to MRE 403. Under MRE 403, even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *Detroit v Detroit Plaza Ltd P'ship*, 273 Mich App 260, 272; 730 NW2d 523 (2006). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Waknin*, 467 Mich at 334 n 3. Here, the probative value was minimal since any link between plaintiff having an abortion and her mental state years after the fact is tenuous at best. Conversely, the danger of jurors giving undue weight to this fact is clear.

This Court noted in 1979 that "[t]he existing strong and opposing attitudes concerning the issue of abortion clearly make any reference thereto potentially very prejudicial." *People v Morris*, 92 Mich App 747, 751; 285 NW2d 446 (1979). This rationale is no less valid in 2011. Thus, given the limited probative value of the evidence, it would have been reasonable for the trial court to have concluded that the probative value was substantially outweighed by the potential of unfair prejudice. Moreover, reviewing courts should generally defer to a trial court's contemporaneous judgment of probative value and potential unfair prejudice under MRE 403. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). Accordingly, the trial court did not abuse its discretion when it excluded evidence of plaintiff's abortion.

## III. DIRECTED VERDICT

Defendant next argues that the trial court erred when it denied its motions for directed verdict with respect to the separate issues of attendant-care benefits and benefits supplied by GK&A. We disagree.

A lower court's decision on a motion for directed verdict is reviewed de novo. *King v Reed*, 278 Mich App 504, 520; 751 NW2d 525 (2008). The evidence presented up to the time of the motion is viewed in a light most favorable to the nonmoving party to determine whether a question of fact existed. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). If reasonable jurors could honestly have reached different conclusions, then the motion is properly denied. *Id.*

### A. ATTENDANT-CARE BENEFITS

Under Michigan's No-Fault Act, MCL 500.3101 et seq., PIP benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). A plaintiff must prove that "(1) the charge for the service was reasonable, (2) the expense was reasonably necessary and (3) the expense was incurred." *Williams v AAA Mich*, 250 Mich App 249, 258; 646 NW2d 476 (2002).

"Care" includes attendant care, even if the provider does not have medical training. *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 180; 318 NW2d 679 (1982). But attendant care, like all other compensable services, must be reasonably necessary and actually rendered. *Williams*, 250 Mich App at 258; *Moghis v Citizens Ins Co*, 187 Mich App 245, 247; 466 NW2d 290 (1990).

Defendant maintains that there was insufficient evidence to show that plaintiff actually received any attendant-care services. However, defendant's brief on appeal fails to reference the testimony of plaintiff's husband, Anthony Montgomery, which was introduced via deposition. Montgomery recounted providing care to plaintiff related to her condition, which included cooking, caring for their child, leaving daily reminders, and helping her with her medication. Therefore, viewing this evidence in a light most favorable to plaintiff, the nonmoving party, a jury could have concluded that Montgomery actually provided attendant-care services to plaintiff.

Defendant also contends that, even if attendant-care services were provided, plaintiff never "incurred" any expense. Defendant relies on *Manley v DAIIE*, 425 Mich 140; 388 NW2d 216 (1986), in arguing that an insurer is not obligated to pay unless there is a bill presented. However, this reliance is misplaced. In *Manley*, the Court stated that "*insofar as nurse's aides are concerned* [the insurer] is not obligated to pay any amount except upon submission of evidence that servicers were actually rendered and of the actual cost expended." *Id.* at 159 (emphasis added). Defendant provides the above quote minus the emphasized portion. Thus, it is clear that this statement is in the context of nonfamily members providing care. There is nothing to suggest in *Manley* that this requirement extends to immediate family members. In fact, the Supreme Court recently has explained that "incurring" an expense simply means that "the attendant care providers expected compensation for their services." *Burris v Allstate Ins Co*, 480 Mich 1081, 1081; 745 NW2d 101 (2008). Justice Corrigan, in a concurring opinion, explained that

> the term "incur" does not mean that an insured must necessarily enter contracts with the care provider to be entitled to reimbursement for attendant-care expenses. . . . Nor does it mean that an insured must necessarily present a formal bill establishing that the attendant-care services were provided. It merely means that the insured must have an obligation to pay the attendant-care-service providers for their services. [*Id.* at 1084-1085, (Corrigan, J., concurring).]

Therefore, defendant's position that attendant-care services must be billed in order to be recoverable is not supported by case law. As the *Burris* Court explained, all that is necessary is that the providers expected to be compensated. *Id.* at 1081. Here, plaintiff testified that she communicated with the caregivers that she intended to compensate them. Furthermore, Montgomery testified that, although no specific dollar amounts were discussed, he talked to plaintiff about getting paid at the prevailing rate. Hence, when viewing plaintiff's testimony and Montgomery's testimony in a light most favorable to plaintiff, a jury could have inferred that at least some caregivers expected to be compensated for their services.

We note that defendant's criticism of the verdict form is not pertinent to whether the trial court properly denied the motion for directed verdict. Instead, whether the verdict form was deficient is an entirely separate legal issue. Moreover, it appears from the record that defendant wrote and submitted the proposed verdict form and never objected to it at trial. As a result, defendant has either waived the issue by offering the form itself or has forfeited the issue by not objecting to it. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002). Moreover, given that the trial court did not err in denying the motion for directed verdict, defendant's argument regarding the verdict form is moot.

## B. EXPENSES FOR GK&A

Defendant also claims that, because GK&A was no longer in business and did not have a current assumed-name certificate under MCL 445.1, GK&A could not collect from plaintiff for any services it rendered, which in turn means that defendant cannot be obligated to pay plaintiff for those services. We disagree.

MCL 445.1 requires a person who conducts business under an assumed name to file a certificate in the county in which the person conducts the business. Failure to comply with this requirement bars the person from filing suit. MCL 445.5.[7] However, MCL 445.1 also provides that this filing requirement only is applicable when the assumed name is "other than the real name of the person owning, conducting, or transacting that business."

Here, the assumed name in question is "Gamby, Kageff & Associates," and the name of the person conducting the business was "Gamby." Thus, by the plain language of the statute, it is clear that Gamby was not required to file any certificate under MCL 445.1 because the assumed name encompassed his and his partner's real names. This is wholly distinguishable from the case that defendant relies on, *Krager v Hedler Storage*, 7 Mich App 644; 152 NW2d 708 (1967). In *Krager*, the plaintiff, Herman Krager, operated the "Casnovia Milling Company" but never filed an assumed-name certificate in Newaygo County. *Id.* at 646. This failure to file was fatal to the plaintiff's case, because it was evident that "Casnovia," under which business was transacted, was not Krager's real name. More analogous to the present case is *June v Vibra Screw Feeders, Inc*, 6 Mich App 484; 149 NW2d 480 (1967). In *June*, the plaintiff "used his own surname, June, as part of the name of the company he operated and in so doing, was not subject to the filing requirements of the assumed name filing statute." *Id.* at 492-493. Just as the plaintiff in *June* was not required to file an assumed-name certificate because he used his own name in the company's name, Gamby was not required to file an assumed-name certificate because he used his name in his company's name.

Therefore, Gamby was not required to file an assumed name certificate, and his failure to do so, does not invoke any of the limitations of MCL 445.5. As a result, the trial court did not err by denying defendant's motion for directed verdict on this issue.

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[7] MCL 445.5, in pertinent part: "Any person or persons owning, carrying on or conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this act, shall be guilty of a misdemeanor . . . . [H]owever, the fact that a penalty is provided herein for noncompliance with the provisions of this act shall not be construed to avoid contracts; but any person or persons failing to file the certificate required by [MCL 445.1 and MCL 445.1a] shall be prohibited from bringing any suit, action or proceeding in any of the courts of this state, in relation to any contract or other matter made or done by such person or persons under an assumed or fictitious name, until after full compliance with the provisions of this act; but no person or persons doing business under a fictitious name or as the assignee or assignees thereof shall maintain or prosecute any action, nor shall any order, judgment, or decree be made in any action heretofore or hereafter commenced in any court of this state upon or on account of any contract or contracts made or transactions had under such fictitious name after August 14, 1919, if the conduct of such business under such fictitious name has ceased, or if it is still conducted under such fictitious name, then until after full compliance with the provisions of this act."

## IV. ATTORNEY FEES – MCL 500.3148(2)

Defendant argues that the trial court abused its discretion when it denied its request for attorney fees. We disagree.

A trial court's decision regarding the granting of attorney fees is reviewed for an abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard*, 476 Mich at 557. A trial court's findings regarding the fraudulent, excessive, or unreasonable nature of a claim are reviewed for clear error. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 627; 550 NW2d 580 (1996). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-697; 690 NW2d 505 (2004).

Generally, attorney fees are not recoverable unless a statute, court rule, or common-law exception exists. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Here, defendant requested attorney fees pursuant to MCL 500.3148(2), which provides, in relevant part, the following:

> 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.

Defendant argues, as it did at the trial court, that the fact that plaintiff was only awarded $40,704.20 when plaintiff sought much more before trial is conclusive that plaintiff's claim was, in part, fraudulent or excessive. Specifically, defendant noted that plaintiff initially requested $6 million during case evaluation and lowered that request to $463,000 during discovery. The trial court denied defendant's request and stated that "[j]ust because the plaintiff didn't get everything [she] wanted, doesn't make it automatic fraudulent or excessive." We are not left with a definite and firm conviction that the trial court's conclusion was incorrect.

The mere fact that an ultimate jury award is much less than what a plaintiff claims can be relevant to whether the initial claim was fraudulent or excessive, but it is not dispositive. Defendant relies on *Robinson v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket Nos. 244824 & 245363). Of course, unpublished opinions are only persuasive authority and are not binding on this panel. MCR 7.215(C)(1). In fact, we disagree with the analysis employed in *Robinson*. The *Robinson* Court agreed with the defendant that a $4,000 verdict on an $82,000 claim "is evidence" that the jury found that plaintiff's claim was in some respect fraudulent or so excessive as to have no reasonable foundation. *Robinson*, unpub op at 1. The Court then, without any further analysis, remanded for an award of a reasonable amount of attorney fees. *Id.*

We find that simply remanding without any further analysis was not appropriate because that action did not give the proper deference to the trial court's findings of fact. Specifically, the *Robinson* panel never considered whether this "evidence" was of such a nature that it left them

with a definite and firm conviction that the trial court erred in its conclusion. We do not disagree that a disparity in the amount ultimately awarded and the amount initially sought is *evidence* that the initial claim may have been excessive. But that is entirely different from holding that a disparity *conclusively establishes* that a claim was excessive or fraudulent, necessitating an award of attorney fees. As a result, we do not find *Robinson* persuasive.

Defendant also claims that the trial court applied the incorrect legal standard when it made the following statement at the hearing:

> I think merely the fact plaintiff prevailed does not trigger this statutory requirement, at least in this case, and I think that each case has to be looked at individually. Although I was not expecting [defendant] to request attorney fees, I think the same standard applies to [defendant]. Just because the plaintiff didn't get everything they wanted, doesn't make it automatic fraudulent or excessive.
>
> So your request is denied.

Defendant's position is without merit. While the trial court did use the words "I think the same standard applies to [defendant]," it is clear that the court did not actually apply the same legal standard. In fact, the court clearly identified the correct standard as being whether plaintiffs claim was "fraudulent or excessive."[8] The trial court was merely making an analogy between plaintiff's claim for attorney fees and defendant's claim for attorney fees. Plaintiff claimed she was owed the fees on the sole basis that the jury awarded penalty interest, pursuant to MCL 500.3142. The court was explaining that this fact was not dispositive for awarding plaintiff attorney fees just as the fact that plaintiff received a lot less than what she was requesting was not dispositive to defendant's claim of fees.

## V. MOTION FOR NEW TRIAL

Defendant argues that the trial court erred when it did not order a new trial because of the missing transcript for the second day of trial. We disagree.

Defendant has waived this issue. Defendant's motion at the trial court was a "Motion to Settle the Record, or, in the Alternative, for a New Trial." Hence, defendant asked for one of two particular remedies. The trial court granted one of those remedies when it entered an order to settle the record. Thus, defendant cannot now complain that the trial court did what it was specifically requested to do. See *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002) ("A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute.").

[8] The fact that the trial court abbreviated the standard as being "fraudulent or excessive" instead of "in some respect fraudulent or so excessive as to have no reasonable foundation" while conversing in open court is of no consequence. The trial court clearly was referring to the standard set in MCL 500.3148(2) and not MCL 500.3148(1).

We note that the only question before this Court is whether the trial court erred in not granting a new trial. To the extent that defendant also argues on appeal that the *method* the court used to settle the record was inadequate, that particular issue is not listed in defendant's statement of the questions presented as required by MCR 7.212(C)(5) and, therefore, is abandoned. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

## VI. ATTORNEY FEES – MCL 500.3148(1)

Plaintiff, on cross-appeal, argues that the trial court erred when it denied her request for attorney fees under MCL 500.3148(1). We disagree.

"The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). Questions of law are reviewed de novo, and questions of fact are reviewed for clear error. *Id.* "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* (internal quotations omitted). Moreover, a trial court's ultimate decision regarding the granting of attorney fees is reviewed for an abuse of discretion. *Peterson*, 283 Mich App at 235.

The award of attorney fees in this instance is governed by MCL 500.3148(1), which states,

> 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.

Thus, "attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008), citing *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003)

Hence, the fundamental question on appeal is whether defendant's refusal to pay was unreasonable. When answering this question, the inquiry is not dependent on whether the insurer was ultimately held responsible for the benefits, but whether its *initial* refusal to pay was reasonable. *Ross*, 481 Mich at 11. Furthermore, a refusal to pay is not unreasonable if it is based on a bona fide factual uncertainty. *Moore*, 482 Mich at 520.

Here, plaintiff contends that defendant was unreasonable when it failed to clarify Dr. Fergison's report. In doing so, plaintiff relies on *Tinnin v Farmers Ins Exch*, 287 Mich App 511; 791 NW2d 747 (2010). In *Tinnin*, the insurer failed to clarify the results of its physician report that did not specifically address whether it was reasonable for the insured to obtain the treatment in question. *Id.* at 516. In fact, that physician testified that he believed it *was reasonable* for the insured to continue to receive the treatment on an as-needed basis. *Id.* at 516-517. However,

that situation is distinguishable from the instant case. Dr. Fergison never testified that plaintiff's condition was caused by the 1991 car accident, nor did Dr. Fergison ever testify that plaintiff required the at-issue medical and attendant care. Plaintiff, instead, refers to Dr. Fergison's testimony, where he states that he could not form *any* opinion with regard to plaintiff's condition. While this is true, this inability to form a definitive opinion was based on Dr. Fergison's view that plaintiff was exhibiting characteristics consistent with one who was exaggerating her symptoms, malingering, or having a pre-existing condition. The exchange went as follows:

> *Q.* Do you – when you mention those things previously, you weren't suggesting that my client was malingering, were you?
>
> *A.* What I was reporting on was that she performed in the ranges that would be considered in the symptom exaggerated, malingering, or represent preexisting impairment.
>
> *Q.* Okay. And just so that the jury's clear, you're not offering an opinion that my client was exaggerating, correct?
>
> *A.* That is correct.
>
> *Q.* And you're not offering an opinion that she was malingering?
>
> *A.* That is correct.
>
> *Q.* And you're not offering an opinion that there was a preexisting condition, right?
>
> *A.* Correct.

The fact that Dr. Fergison could not state with certainty that he knew plaintiff was exaggerating does not change his underlying findings that plaintiff's testing was *consistent* with one who was exaggerating. As a result, Dr. Fergison said that because of this characteristic, it was impossible for him to give an evaluation of plaintiff's condition.

Contrary to plaintiff's assertion, Dr. Fergison's true opinion was not "the opposite" of what the claims adjuster thought the report read. Essentially, the claims adjuster interpreted the report as stating that plaintiff *was* exaggerating, malingering, or had a pre-existing condition, while Dr. Fergison merely stated that plaintiff's results were *consistent* with one who was exaggerating, malingering, or had a pre-existing condition. The difference between these two views is slight. Therefore, *Tinnin* is not persuasive for plaintiff's position.

It is important to note that defendant was skeptical of plaintiff's claim for benefits because this claim came after a 12-year period in which plaintiff had no claims whatsoever related to the accident. Thus, when the claims adjuster saw Dr. Fergison's report, it reinforced the belief that plaintiff's current claim was not related to the 1991 accident.

Plaintiff also contends that defendant acted unreasonably when it failed to provide medical records to Dr. Fergison. However, it was impossible for defendant to forward the records because the claim file was lost years earlier. While the loss of the claim file was the sole fault of defendant and not plaintiff, defendant cannot be said to have been unreasonable in not providing records it could not access.

Also noteworthy is that defendant sent a request for an authorization for medical records to plaintiff, but plaintiff never returned the signed form. Thus, defendant was prohibited from getting plaintiff's medical records and could not forward those records to Dr. Fergison.

But plaintiff also maintains that Billiau had access to a report written by Dr. Park and should have forwarded it to Dr. Fergison. Plaintiff again relies on unpublished cases to support her position. In *Clack v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 1998 (Docket No. 192420), this Court affirmed the lower court's award of attorney fees to the plaintiff. This Court did so because it found that the independent medical evaluation ("IME") reports the insurer possessed *confirmed* that plaintiff had jaw, back, and neck injuries, making its refusal to pay for those injuries unreasonable. Furthermore, the Court found that at the time the insurer denied benefits, it only had a single IME report that concluded that the plaintiff was not disabled. However, that report was prepared without seeing an MRI of the plaintiff's knee, and when the physician saw the MRI at trial, he admitted that "the MRI did show an internal derangement of the right knee." Thus, it is easy to see why the *Clack* panel found that the trial court did not clearly err. But that situation is distinguishable from the instant case because (1) none of the reports generated by defendant confirmed any diagnosis offered by plaintiff, and (2) Dr. Fergison never admitted that seeing Dr. Park's report would have changed anything. We also note that seeing someone's *conclusions* is vastly different than seeing actual *testing results*, such as an MRI. The inherent value of objective *results* is much greater than someone else's subjective *opinions*.

Also, plaintiff's reliance on *Spencer v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2008 (Docket No. 271702), is greatly misplaced. The principle that *Spencer* espoused, that an insurer is unreasonable when it fails to attempt to reconcile conflicting opinions or make an inquiry beyond its own IME opinion, has been explicitly overruled by our Supreme Court in *Moore*, 482 Mich at 521.

Last, plaintiff maintains that any reliance on Dr. Fergison's report was conclusively unreasonable because Dr. Fergison was a psychologist, not a physician. Plaintiff relies on MCL 500.3151 as support for her view. MCL 500.3151 provides, in pertinent part:

> When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians.

However, plaintiff is reading more into the statute than there is. The purpose of the statute is apparent from the plain and ordinary meaning of the words. The statute simply mandates that a person who seeks PIP benefits "shall submit to mental or physical examination by physicians." This statute does not speak to or limit which evaluations an insurer can rely on in making its determinations. Thus, under MCL 500.3151, plaintiff may have been rightfully

able to decline the examination with Dr. Fergison since he was not a physician. See *People v Beckley*, 434 Mich 691, 728; 456 NW2d 391 (1990) (recognizing that psychologists are different than physicians), citing *People v LaLone*, 432 Mich 103, 109; 437 NW2d 611 (1989); see also MCL 600.2157 (identifying physician-patient privilege) and MCL 333.18237 (identifying psychologist-patient privilege). However, plaintiff did not object and instead proceeded with the examination. There is nothing inherently unreasonable about relying on a psychological report when the insured is complaining of psychological problems. In fact, plaintiff relied on an evaluation and report done by Dr. Applebaum, also a psychologist, in support of her case.

In sum, the trial court did not clearly err when it determined that defendant's denial of plaintiff's claim was reasonable under the circumstances. Defendant was presented with a claim for benefits for an accident that occurred 14 years earlier, when there were no other claims during this intervening period. Then, after defendant requested that plaintiff submit to an examination, defendant was informed by Dr. Fergison that plaintiff's results were consistent with one who was exaggerating her symptoms. All of these facts combined with the fact that plaintiff never provided a signed medical record authorization created a bona fide factual uncertainty regarding the authenticity of the claim. Thus, we are not left with a definite and firm conviction that the trial court erred. Consequently, the trial court did not abuse its discretion when it denied plaintiff's request for attorney fees.

Affirmed. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio