S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ICIE GARDNER MCGHEE,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 13, 2014

No. 311976
Wayne Circuit Court
LC No. 10-001089-NF

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying her no-fault attorney fees and awarding her only $578 in taxable costs. Because the trial court did not abuse its discretion in failing to award no-fault attorney fees and because the trial court did articulate which costs it was awarding and denying to plaintiff, we affirm.

Plaintiff first argues on appeal that the trial court erred in denying her no-fault attorney fees because defendant's denial of benefits was unreasonable, as there was not a bona fide factual uncertainty.

"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. *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 442; 814 NW2d 670 (2012).

The grant of attorney fees in this case is governed by MCL 500.3148(1), which provides the following:

> 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. An insurer does not have a duty to look beyond the medical opinion of its own physicians and the independent medical examinations performed by those physicians. *Id*. at 522. Moreover, "[n]othing in the plain language of MCL 500.3148(1) . . . requires an insurer to reconcile competing medical opinions." *Id*. at 521. However, an insurer "acts at its own risk in terminating benefits in the face of conflicting medical reports." *Id*. at 522.

When benefits are denied or delayed, there is a rebuttable presumption that the insurer acted unreasonably. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). Accordingly, "[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, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 694; 760 NW2d 574 (2008).

Defendant contends that bona fide factual uncertainties existed concerning whether plaintiff was entitled to wage loss benefits and replacement services. In denying no-fault attorney fees, the trial court concluded that the initial denial was not unreasonable because it relied on the independent medical examination conducted by Dr. Ronald Taylor.

The trial court did not clearly err in determining that defendant's denial was reasonable. The record reveals that Dr. Taylor was board certified in spinal cord injury and medicine. Dr. Taylor examined plaintiff, who complained of neck and back pain. His examination revealed no objective findings and no objective basis for plaintiff's complaints. He also reviewed MRIs of the cervical spine and lumbar spine which showed only degenerative changes. According to Dr. Taylor, plaintiff had reached maximum medical improvement and could return to work. He also opined that plaintiff did not require further testing or treatment, and she did not need replacement services.

While there were differences of medical opinion between Dr. Taylor and plaintiff's treating doctors, there was no obligation for defendant to reconcile these competing medical opinions. *Moore*, 482 Mich at 521. In addition, the jury's verdict confirmed that a factual uncertainty existed concerning plaintiff's entitlement to wage loss benefits and replacement services. In this case, the jury found that plaintiff was entitled to wage loss benefits but not

replacement services. Accordingly, the trial court did not abuse its discretion in denying no-fault attorney fees pursuant to MCL 500.3148.

Plaintiff next argues on appeal that the trial court erred because it failed to articulate which taxable costs were granted and which were denied. Plaintiff urges this Court to remand this issue to the trial court to articulate which taxable costs requested were granted and denied. We review a trial court's ruling on a motion for costs under MCR 2.625 for an abuse of discretion. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 367; 737 NW2d 807 (2007).

MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." "If a trial court declines to award taxable costs to a prevailing party, it 'must justify the failure to award costs.'" *Gentris v State Farm Mut Auto Ins Co*, 297 Mich App 354, 365; 824 NW2d 609 (2012), quoting *Blue Cross & Blue Shield of Mich v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997).

Notably, plaintiff does not challenge on appeal the correctness of the trial court's ruling itself; instead, plaintiff seeks a remand because the trial court allegedly "did not articulate which costs in particular were being granted or denied."[1] Plaintiff is mistaken because a review of the record reveals that the trial court articulated which costs were granted and which were denied. In its order awarding $578 in costs to plaintiff, the trial court stated that it did so "for the reasons stated on the record" at the motion hearing. At that hearing, the trial court stated:

> As far as the [costs] go, you're not entitled to most of the [costs] that you listed there. *You're entitled to the ones counsel listed in his response.* [Emphasis added.]

Thus, in making its determination, the trial court relied on and adopted the arguments set forth in defendant's responsive pleadings. In its responses, defendant contended that plaintiff failed to provide authority for the vast majority of the costs requested. Defendant meticulously went through the costs requested by plaintiff and provided justifiable reasons to the trial court for which to deny plaintiff's requested costs. It argued that the various statutes and court rules cited by plaintiff provided details regarding the amount of said costs but did not provide any authority for the taxation of said costs. For example, plaintiff requested costs for procuring medical records and the case evaluation fee. In its response, defendant correctly contended that there is

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[1] It is clear that this is plaintiff's sole argument on appeal because she even states in her concluding paragraph in her brief on appeal that

> the record here does not indicate the court's basis for rejecting Appellant's request for taxable costs. Therefore, the proper remedy . . . is for this Court to remand this matter to the trial court for further articulation of its basis for denying Appellant's request for taxable costs so that its decision can be re-evaluated on appeal.

no statutory authority allowing for these costs. See *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 622-623; 550 NW2d 580 (1996). As another example, plaintiff also sought costs for expert witness fees and transcript fees. In its response, defendant correctly asserted that there is no statutory authority allowing fees for transcripts that were never read into the record or for experts that did not testify at trial. See *Put v FKI Industries, Inc*, 222 Mich App 565, 573; 564 NW2d 184 (1997). In the end, defendant conceded that plaintiff was entitled to collect taxable costs in the amount of $578.71, "which includes $20 for proceedings before the trial, $150 for trial costs, $342.50 for depositions that were read into evidence, and $66.21 in witness fees and mileage." Accordingly, plaintiff's argument that the trial court erred in failing to articulate which costs were granted and which were denied is without merit, and because plaintiff failed to establish the necessary factual predicate for her claim, she is not entitled to any relief on this issue. Cf. *People v Hill*, 257 Mich App 126, 138-139; 667 NW2d 78 (2003) (providing that an appellant "bears the burden of proving the factual predicate of his claim").

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter