90STATE OF MICHIGAN

COURT OF APPEALS

ELVIA J. ESTERHAI,

Plaintiff/Appellee-Cross Appellant,

v

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendant/Appellant-Cross Appellee.

UNPUBLISHED
March 13, 2014

No. 313690
Bay Circuit Court
LC No. 07-003142-NF

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

PER CURIAM.

Defendant appeals by right from the trial court's ruling that it must pay plaintiff attorney fees in the amount of $123,020. Plaintiff cross-appeals the limitation of attorney fees to those costs incurred through the entry of the amended judgment on November 1, 2009, thus denying recovery for appellate costs and also costs in connection with securing delayed payment of additur costs. Because (1) the trial court improperly utilized MCR 2.403(O)(11) in denying case evaluation sanctions to defendant, (2) the trial court failed to adhere to this Court's directive on remand related to the award of attorney fees, and (3) the trial court properly did not award plaintiff attorney fees related to the prior appellate work, we affirm in part, reverse in part, and remand.

This is the second time this case has been to this Court, with the first time being *Esterhai v Farm Bureau Mut Ins Co of Mich*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 295441) (hereinafter "*Esterhai I*"). This case involves a claim brought under Michigan's no-fault insurance act, MCL 500.3101 *et seq.* Plaintiff complained of neck and foot aliments related to injuries from a 1988 car accident. *Id.* at 1. The underlying claims were for cervical care, surgery to the C6 and C7 vertebrae, and podiatric care because plaintiff could not trim her own toenails due to lower back surgery. *Id*. These claims were heard by a jury which "found defendant liable for plaintiff's medical expenses, but did not find any of the expenses to be overdue." *Id*. at 2. The trial court then granted plaintiff partial judgment notwithstanding the verdict (JNOV), finding that the payments were overdue and granting plaintiff's motion for no-fault attorney fees. *Id*. at 2-3. Defendant challenged the grant of statutory interest and attorney fees. *Id*. at 1.

This Court affirmed the grant of JNOV and attorney fees on the issue of plaintiff's podiatric care but reversed the grant of JNOV and attorney fees on the issue of plaintiff's cervical care. *Id.* at 6.

I. DEFENDANT'S APPEAL

A. CASE EVALUATION SANCTIONS

On appeal, defendant first argues that the trial court erred when it invoked MCR 2.403(O)(11) and failed to award case evaluation sanctions. We review a trial court's decision to grant case evaluation sanctions under MCR 2.403(O) de novo. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). The trial court's award of attorney fees and costs is reviewed for an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

In the present case, at case evaluation, plaintiff was awarded $33,000, but both parties rejected the evaluation. Following the trial, the jury returned a verdict in favor of plaintiff in the amount of $22,873.82, but it also determined that none of the benefits were overdue. After the trial court granted plaintiff's motion for JNOV, holding that all the benefits were overdue, the adjusted verdict became $33,479.41. But this Court on appeal reversed the award of JNOV related to the cervical care. This resulted in a further adjusted verdict of $26,132.24.

We note that it is this ultimate verdict after appellate review that the parties are left with that is measured against case evaluation to determine whether sanctions should be imposed. *Keiser v Allstate Ins Co*, 195 Mich App 369, 374-375; 491 NW2d 581 (1992). There is no dispute that this latest adjusted verdict was not more favorable to plaintiff, compared with the initial $33,000 case evaluation award. Accordingly, defendant was entitled to case evaluation sanctions unless an exception applied.

The trial court declined to award case evaluation sanctions by relying on MCR 2.403(O)(11), which provides that "[i]f the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." Plaintiff claims that because the final verdict arose from her motions for additur and JNOV, the trial court properly exercised its discretion in utilizing the exception under MCR 2.403(O)(11). We disagree.

For the purposes of MCR 2.403(O), a "verdict" includes,

> (a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. [MCR 2.403(O)(2).]

With MCR 2.403(O)(11) only referring to subrule (O)(2)(c), it clearly excludes subrule (O)(2)(a), "a jury verdict," which is what the judgment ultimately was based on. The court rule does not provide for relief in situations where the verdict arguably is the result of *both* a motion and a jury verdict. Accordingly, the trial court erred in applying MCR 2.403(O)(11) in denying defendant's motion for case evaluation sanctions.

B. NO-FAULT ATTORNEY FEES

Defendant next argues that the trial court erred in failing to apportion the no-fault attorney fees, contrary to the law of the case established in *Esterhai I*. Application of the law of the case doctrine is a question of law and thus subject to de novo review. *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). Review of a trial court's actions for consistency following an appellate court's ruling and remand is also a question of law subject to de novo review. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

Michigan's no-fault act allows a plaintiff's attorney to recover his attorney fees from the insurer. Specifically,

> MCL 500.3148(1) establishes two prerequisites for the award of attorney fees. 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." 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." MCL 500.3148(1). Therefore, assigning the words in MCL 500.3142 and MCL 500.3148 their common and ordinary meaning, "attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." *Proudfoot v State Farm Mut Ins* Co, 469 Mich 476, 485; 673 NW2d 739 (2003) (emphasis omitted). [*Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008).]

Because of this Court's prior opinion in *Esterhai I*, the law of the case doctrine is implicated. Under this doctrine, an "an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law of the case applies to explicit or implicit issues actually decided. *Id.* The law of the case applies to a court in a subsequent proceeding even where the decision is incorrect. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

In *Esterhai I*, this Court explicitly ruled that, on remand, plaintiff was not to recover any attorney fees related to her cervical care bills:

> Because we hold that the trial court should have upheld the jury finding that the cervical care bills were not overdue, *plaintiff may not recover attorney fees related to those bills*. [*Esterhai I*, unpub op at 5 (emphasis added).]

But on remand, the trial court ultimately awarded plaintiff all of her attorney fees, necessarily including those attorney fees that were solely related to the cervical care bills. Although the trial court labored about how to reconcile this Court's directive with other case law it considered conflicting, that is no excuse for failing to follow this Court's directive. See *Hill*, 276 Mich App at 308. Therefore, the trial court abused its discretion, and we again vacate the award of attorney fees. This Court has already determined that plaintiff is only entitled to attorney fees related to the issue of plaintiff's podiatric care. *Esterhai I*, unpub op at 6. Accordingly, that is all plaintiff is entitled to receive. Contrary to plaintiff's assertion, the fact that this Court did not use the word "apportion" or "apportionment" is of no consequence because its directive is nonetheless clear.

The trial court struggled with the concept of apportionment because it thought that our directive conflicted with *Tinnin v Farmers Ins Exch*, 287 Mich App 511; 791 NW2d 747 (2010). In *Tinnin*, the jury awarded the plaintiff $1,235 for office visits related to physical medicine and rehabilitation treatment but did not award the $90,000 sought for attendant care services. The trial court awarded the plaintiff $57,690 in attorney fees. *Id.* at 514. The defendant argued that this was error because a significant portion of the fees "sought related to [the plaintiff's] unsuccessful claim for attendant care." *Id.* The defendant argued that the trial court must "apportion the award of attorney fees so that plaintiff was compensated only for the time and effort directly attributable to securing the overdue PM&R benefits." *Id.* at 521. This Court disagreed because "the trial court found that all of the attorney's time for which plaintiff sought compensation was sufficiently related to securing the overdue benefits compensable under MCL 500.3148(1). *Id.* Therefore, *Tinnin* does not stand for the blanket proposition that apportionment of attorney fees is not allowed. On the contrary, *Tinnin* shows that apportionment was unnecessary in that case because all of the attorney fees were sufficiently related to the recovery of the overdue benefits.

Our Supreme Court's decision in *Moore v Secura Ins*, 482 Mich 507; 759 NW2d 833 (2008), further supports this view. In *Moore*, the jury awarded the plaintiff $50,000 in noneconomic damages and $42,755 in unpaid work loss benefits. It also awarded the plaintiff $98.71 in penalty interest for overdue work loss benefits. The *Moore* Court noted that a plaintiff's attorney is only entitled to collect attorney fees incurred *to collect benefits that are overdue*. *Id.* at 523-524. And "[b]ecause the jury awarded plaintiff only $98.71 in penalty interest and failed to award penalty interest on the $42,755 awarded in unpaid work loss benefits," the Supreme Court determined that as a matter of law, "those benefits do not qualify as overdue pursuant to MCL 500.3142(2)." *Id.* at 512. Accordingly, the Supreme Court held that "[b]ecause [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.* at 524.

Therefore, based on the above, attorney fees may be awarded only for hours spent recovering benefits deemed overdue. In *Moore*, no attorney fees were warranted because none of the attorney hours were sufficiently related to securing the overdue benefits. *Id.* What made

Tinnin noteworthy was that *all* of the attorney's hours were sufficiently related to securing the overdue benefits. *Tinnin*, 287 Mich App at 521. Neither of these scenarios is present in the instant case since plaintiff's counsel has conceded in an affidavit submitted to the trial court that some of his hours were dedicated solely to the recovery of cervical care benefits. Thus, consistent with *Esterhai I*, on remand, the trial court is to only award those attorney fees that are "sufficiently related" to securing the overdue benefits of plaintiff's podiatric care. We view *Esterhai I* only as imposing a prohibition on the award of attorney fees if those fees were *solely* related to the securing of the bills for plaintiff's cervical care.

II. PLAINTIFF'S CROSS-APPEAL

In plaintiff's cross-appeal, she argues that the trial court erred in limiting her award of attorney fees to up until the time of the amended judgment, which was November 18, 2009. Instead, plaintiff claims that the award of attorney fees should have included appellate time (related to *Esterhai I*) up until August 20, 2010, which is the day that defendant eventually paid the additur amount. Again, we review the award of attorney fees for an abuse of discretion. *Smith*, 481 Mich at 526.

MCL 500.3148(1) allows under certain circumstances, attorney fees "for representing a claimant in an action for personal and property protection insurance benefits which are overdue." Such "benefits" comprise allowable expenses, work loss, and a limited amount for necessary services the injured person can no longer perform for herself. MCL 500.3107(1). Recoverable attorney fees can include "attorney fees for services on appeal." *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991). However, representation not related to the recovery of overdue benefits "is outside the scope of the statutory authorization for an attorney fee award, whether at the trial level or on appeal." *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 48; 586 NW2d 395 (1998) (quotation marks and citations omitted).

Plaintiff contends that her attorney's actions on appeal in *Esterhai I* fall outside this rule because certain amounts by defendant were not paid until August 27, 2010, and certain awarded expenses purportedly remain unpaid. However, the appeal in *Esterhai I* did not involve any services to recover any overdue *benefits*. Instead, the sole issues in *Esterhai I* were related to plaintiff's entitlement to penalty interest, attorney fees, and statutory costs. Thus, any services rendered by plaintiff's attorney in that appeal were not related to the recovery of overdue benefits and, therefore, those services are outside the scope of the statutory authorization. This is similar to what the Supreme Court addressed in *McKelvie*:

> [M]oney expended by plaintiff in the original appeal was not for the purpose of securing payment of those benefits or avoiding recoupment by defendant of benefits already paid. Therefore, the original appeal was not "an action for personal or property protection benefits which are overdue" under [MCL 500.3148(1)]. Rather, it was an action related to the payment of attorney fees. Accordingly, [MCL 500.3148(1)], and by extension, *Bloemsma*, is inapplicable. [*McKelvie*, 459 Mich at 48-49 (quotation marks and citations omitted).]

Accordingly, the trial court did not abuse its discretion in failing to award plaintiff any attorney fees related to services rendered on appeal.

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