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

JB, a legally incapacitated person, by Guardian VERONICA STEIN,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant/Third-Party Plaintiff-Appellant,

and

PROGRESSIVE MARATHON INSURANCE COMPANY,

Third-Party Defendant.

UNPUBLISHED
July 22, 2026
9:11 AM

No. 367360
Washtenaw Circuit Court
LC No. 20-000134-NF

MORIAH, INC., doing business as EISENHOWER CENTER,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

No. 367361
Washtenaw Circuit Court
LC No. 19-000635-NF

Before: MARIANI, P.J., and O'BRIEN and WALLACE, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendant, Farm Bureau General Insurance Co. of Michigan, appeals as of right the trial court's judgments entered for plaintiffs, JB, by his guardian Veronica Stein and Moriah, Inc., doing business as Eisenhower Center.[2] We affirm.

I. BACKGROUND

JB sustained multiple injuries after being hit by a truck in July 2015. At the time, JB was covered by a no-fault policy with defendant, and defendant accordingly paid JB's medical bills following the accident through December 2015. From December 2015 to January 2017, there was no activity on JB's file, so defendant's claims adjuster Susan Domzalski closed the file. In May 2018, JB was admitted to the Eisenhower Center—a rehabilitation facility for traumatic brain injuries (TBIs)—where he received care for a TBI. Defendant refused to pay for this care because Domzalski determined that JB's treatment at the Eisenhower Center was not related to his 2015 accident. This led plaintiffs to bring this action. A jury determined that JB suffered a TBI in the 2015 accident and that Eisenhower Center was treating JB for this injury, and it accordingly returned a verdict in favor of plaintiffs. The trial court thereafter entered judgments against defendant, which included an award of attorney fees.

This appeal followed.

II. SUBPOENAING AN EXPERT WITNESS

Defendant first asserts that the trial court lacked authority to issue a subpoena for Dr. Gerald Shiener to testify as an expert in plaintiffs' case-in-chief because "expert witnesses cannot be compelled by subpoena to provide involuntary testimony." Defendant did not raise this argument below, however, so it is waived.

Shiener was originally retained by the defense, and defendant first disclosed Shiener as an expert when it listed him as a witness in defendant's December 14, 2022 witness list. Plaintiffs objected to this, arguing that Shiener should be struck because he was added to defendant's witness list after the permissible time for doing so had passed, and because defendant did not disclose Shiener as an expert in response to plaintiffs' interrogatories in violation of the court rules governing discovery. Defendant voluntarily struck Shiener from its witness list on January 31, 2023.

On March 8, 2023, plaintiffs filed their own witness list, which included Shiener as a witness. Defendant immediately filed an emergency motion to strike Shiener. Defendant noted that it had voluntarily withdrawn Shiener as its own witness in response to plaintiffs' motion to strike Shiener, and defendant argued that it "would be severely prejudice[d] if the Court were to

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[1] *JB v Farm Bureau Gen Ins Co; Moriah Inc v Farm Bureau Gen Ins Co*, unpublished order of the Court of Appeals, entered August 22, 2023 (Docket Nos. 367360 and 367361).

[2] Progressive Marathon Insurance Company was dismissed from the case and is not a party to this appeal.

allow Plaintiffs to call Dr. Shiener at trial for all the reasons detailed by Plaintiffs in their prior motion seeking to strike Dr. Shiener."

At the hearing on defendant's motion, defense counsel added little to defendant's argument, stating only:

> Your Honor, our position is Doctor Shiener, we withdrew him as witness. He's not on any of the witness lists and they withdrew the motion to strike him based on our withdrawing him as a witness. But they're naming him as a witness on their trial witness list for the first time. And the rest of it I'll rely on my brief.

The trial court ruled that "there is no surprise about [Shiener's] involvement or testimony" because he was listed in defendant's claims file, so the court allowed plaintiff to call Shiener as a witness.

As the foregoing demonstrates, defendant never argued below that the trial court lacked authority to issue a subpoena for Shiener on grounds that "expert witnesses cannot be compelled by subpoena to provide involuntary testimony." Michigan follows the raise-or-waive rule, which provides that an issue not raised in the trial court will be deemed waived on appeal. *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 289; 14 NW3d 472 (2023). While defendant objected to plaintiff's calling Shiener, it did not object on the ground it asserts on appeal, and "an objection on one ground is insufficient to preserve appellate attack on different grounds." *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). This issue is therefore waived, and we decline to reach the merits.

III. ATTORNEY FEES

Defendant next argues that the trial court erred by awarding plaintiffs' attorney fees under MCL 500.3148(1).

MCL 500.3148(1) was amended by 2019 PA 21, but the parties agree that the former version of the statute applies in this case. The former version of MCL 500.3148(1) provided:

> 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. [MCL 500.3148(1), as enacted by 1972 PA 294.]

As explained by our Supreme Court, this statute "provides for attorney fees when an insurance carrier unreasonably withholds benefits," and a trial court's decision to award attorney fees under this statute presents "a mixed question of law and fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). "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." *Id*. Questions of law are reviewed de novo, while questions of fact are reviewed for clear error. *Id*.

“[T]wo prerequisites” must be satisfied before attorney fees can be paid under MCL 500.3148(1)—benefits must be “overdue,” and the insurer must be found to have either unreasonably refused to pay the claim or unreasonably delayed making proper payment. *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008). Defendant on appeal only contests whether it unreasonably refused to pay plaintiffs’ claims.

When an insurer refuses to pay benefits, the insurer has the burden “to justify the refusal.” *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). A refusal is justified if it was “the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.” *Ross*, 481 Mich at 11. “The determinative factor in [this] inquiry is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable.” *Id*.

Defendant contends that the trial court erred by finding that defendant’s initial refusal to pay JB’s benefits was unreasonable because there existed a legitimate factual uncertainty about whether JB’s treatment at Eisenhower was related to a “motor vehicle accident that occurred only three weeks before the Eisenhower admission in 2018.”[3]

It is uncontested that JB was in a motor vehicle accident on April 23, 2018, and that JB began his treatment at Eisenhower shortly thereafter. It is also beyond dispute that a physician who treated JB in July 2018—Dr. Thomas McKeon—wrote in JB’s treatment notes that JB had been staying at a facility “for patients with traumatic brain injury” that was “secondary to an automobile accident that he was in earlier this year.” Defendant further emphasizes that JB “was never diagnosed with a TBI” following his July 2015 accident and before beginning his treatment at Eisenhower. Relying on the foregoing, defendant concludes that there existed a legitimate factual uncertainty about whether JB’s treatment for a TBI at Eisenhower in 2018 was related to JB’s 2015 accident or his 2018 accident.

This argument appears reasonable on the surface, but it falls apart under scrutiny. First and foremost, contrary to defendant’s representations on appeal, plaintiffs presented evidence that JB was indeed diagnosed with a TBI following the 2015 accident, and that defendant had a record in its possession that reflected this diagnosis. In an occupational therapy evaluation from August 2015, JB’s “diagnosis” was listed as “TBI/Multiple fractures,” with a “date of onset” as the date of JB’s accident. A notation on this document reflects that it was “scanned” on October 3, 2015, and Domzalski confirmed at trial that this meant that defendant “had this record back in October of 2015.”

[3] Defendant also contends that there was factual uncertainty about whether JB’s treatment at Eisenhower was related to JB’s “longstanding and unrelated psychiatric issues,” but defendant does not develop this argument any further, thereby abandoning it. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.”).

Next there is the issue of McKeon's note stating that JB had been staying at a facility "for patients with traumatic brain injury" that was "secondary to an automobile accident that he was in earlier this year." This note was taken by McKeon after defendant was admitted for observation for "[s]welling of both lower legs increasing in severity," and the statement that defendant relies on appears in the section of the treatment note titled, "History of Present Illness." It is obvious from this context that McKeon was not opining that JB had suffered a TBI in the April 2018 accident but was merely recording background information that was largely irrelevant to the reason that McKeon was treating JB.

Even assuming that this was not patently obvious from a cursory review of McKeon's treatment note, no one associated with defendant ever followed up with McKeon to clarify what this note meant. An insurer who refuses to seek clarity on an insured's medical condition does so "at its own risk." *Moore*, 482 Mich at 522. It follows that an insurer who fails to "clarify" a physician's favorable finding can be found to have unreasonably relied on the physician's medical opinion to refuse payment, even though, in the abstract, an insurer can "reasonably rely on the medical opinion of its physicians." *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 516-517; 791 NW2d 747 (2010). Here, despite defendant's heavy reliance on the single line from McKeon's treatment note, no one from defendant ever followed up with McKeon to clarify the significance of that single line, which undermines defendant's near-total reliance on McKeon's treatment note.

This bleeds into another flaw in defendant's framing of this issue—defendant ignores how sparsely it investigated JB's injury before concluding that JB's treatment at Eisenhower was related to his 2018 accident. Despite apparently believing that JB suffered a TBI in the 2018 accident, Domzalski did not review the emergency room records from that accident before denying JB's claim. Domzalski also conceded that she did not contact JB's treating physicians to determine whether the TBI for which JB was receiving treatment was a result of the 2015 or the 2018 accident. And Domzalski confirmed that defendant never hired its own medical examiner to determine whether JB suffered a TBI in the 2015 or 2018 accident. While defendant did not have a duty to do any of these things, it refused to do them "at its own risk." *Moore*, 482 Mich at 522.

On this record, the trial court did not clearly err by concluding that defendant unreasonably refused to pay plaintiffs' claims.

Affirmed.

/s/ Philip P. Mariani
/s/ Randy J. Wallace

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O'BRIEN, J. (*concurring*).

I concur in full with the majority opinion. I write separately because, while I am troubled that plaintiff was allowed to call defendant's expert, Dr. Gerald Shiener, as a witness at trial after defendant decided not to, I do not believe that defendant has framed its argument in a way that would allow this Court to get to the crux of the issue.

As the majority recounts, defendant argued below that plaintiff should not be allowed to call Shiener because doing so violated various court rules, which is different than the argument that defendant raises on appeal. Defendant's appellate argument is therefore waived. Even if defendant's appellate argument was not waived, however, it is not clear that defendant would be entitled to relief. Defendant stresses that an expert cannot be subpoenaed to give his or her opinion because an expert "has a property right in his opinion and cannot be made to divulge it in answer to a subpoena." *Klabunde v Stanley*, 384 Mich 276, 282; 181 NW2d 918 (1970). Parties therefore generally do not compel an expert to testify via subpoena but get the expert to agree to testify by paying the expert in exchange for his or her testimony. It follows that, if defendant raised the argument below that it now raises on appeal, then this issue could have been readily resolved by having plaintiffs pay Shiener in exchange for his testimony. Regardless, to the extent that Shiener may have improperly given expert testimony (as opposed to factual testimony) that was beneficial to plaintiffs' case, that testimony was cumulative to other evidence that the jury heard, so it is difficult to see how defendant was prejudiced.

That is not to say that I believe that Shiener, an expert retained by defendant, should have been permitted to testify on plaintiffs' behalf. While defendant has always observed that it originally retained Shiener as an expert, defendant has never argued that this fact should have precluded plaintiffs from calling Shiener as a witness at trial. Had defendant raised this argument, it would have presented a much more interesting issue.

MCR 2.302(B)(4)(b) provides that "[a] party may not discover the . . . opinions held by an expert who has been retained . . . by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except" in circumstances not relevant here. Defendant originally expected to call Shiener as a witness but changed its mind, so Shiener was not expected to be called as a witness by the defense when plaintiffs listed Shiener on their witness list. MCR 2.302 is modeled after FR Civ P 26, and federal courts who have encountered this fact pattern—where one party originally intends to call an expert witness but ultimately decides not to, and then the other party seeks to call the defense's expert to testify—have held that, while the court rule does not explicitly cover this situation, the concern for fairness underlying the rule remains. To account for that concern, some federal courts have held that the proper way to resolve the issue is to conduct the equivalent of a 403 balancing test to determine whether the probative value of the expert's testimony is outweighed by the danger of unfair prejudice. See, e.g., *House v Combined Ins Co of America*, 168 FRD 236, 247 (ND Iowa, 1996); *Ferguson v Michael Foods, Inc*, 189 FRD 408, 409 (D Minn, 1999). Some states that have court rules modeled on FR Civ P 26 and have confronted this issue have adopted a similar approach. See, e.g., *Para v Anderson ex rel Co of Maricopa*, 231 Ariz 91, 94; 290 P3d 1214 (2012); *McClendon v Collins*, 132 Nev 327, 332; 372 P3d 492 (2016); *Sovde by & through Kinney v Scott*, 410 P3d 778, 784 (Colo App, 2017). I would consider adopting a similar approach in Michigan.[1]

As already stated, however, defendant has never framed its argument in a way that presents this issue. This case is therefore not the proper vehicle to address whether this approach should be adopted in Michigan. With that being the case, I concur with the majority opinion in full.

/s/ Colleen A. O'Brien

[1] Defendant stresses on appeal how severely it was prejudiced when the jury was allowed to hear that Shiener was originally hired by defendant, and plaintiffs counter that there was nothing wrong with Shiener testifying about the factual circumstances of his hiring and the information that defendant gave him. Under a 403 balancing test, this information would have almost certainly been excluded because the jury hearing "that the expert called by one party had originally been hired by the other" is generally considered " 'explosive' unfair prejudice." *Ferguson*, 189 FRD at 410. See also *Sovde by & through Kinney*, 410 P3d at 784 (recognizing that "this sort of prejudice" has been called "explosive"); *House*, 168 FRD at 241 (same); *Rubel v Eli Lilly & Co*, 160 FRD 458, 460 (SDNY, 1995) (recognizing that "[o]ne leading commentator aptly has characterized the fact of the prior retention by the adversary as 'explosive' "); *Peterson v Willie*, 81 F3d 1033, 1037 (CA 11, 1996) (citing *Rubel* and recognizing its discussion of the commentator's description of "this prejudicial fact as 'explosive' ").