STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH STOOPS, Personal Representative of the Estate of KRISTIN STOOPS,

Plaintiff-Appellee/Cross-Appellant/Cross-Appellee,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee/Cross-Appellant.

UNPUBLISHED
March 23, 2006

No. 260454
Wayne Circuit Court
LC No. 02-233990-CZ

JOSEPH STOOPS, Individually and as Personal Representative of the Estate of KRISTIN STOOPS,

Plaintiffs-Appellants,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellee.

No. 261917
Macomb Circuit Court
LC No. 02-004556-CZ

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

The parties in Docket 260454 appeal and cross-appeal the trial court's rulings granting attorney fees to both parties pursuant to MCL 500.3148 following a mixed jury verdict. Defendant also claims the trial court denied it a fair trial by placing time limits on the presentation of its defense to plaintiff's claims for personal protection insurance benefits arising out of an automobile accident. We affirm in part and reverse in part.

In Docket 261917, plaintiffs appeal by right the trial court's order granting summary disposition to defendant on the basis of plaintiffs' concealment, misrepresentation, or fraud regarding the claim in Docket 260454 voided defendant's underinsurance coverage. We affirm.

I. Docket 260454

Plaintiff Kristen Stoops[1] filed an action in Wayne Circuit Court on September 25, 2002 seeking personal protection insurance benefits for attendant care under MCL 500.3107(1)(a) and reimbursement for medical expenses arising out of injuries received in a March 28, 1998 automobile accident. Plaintiff was driving a one-ton Ford F-350 pickup truck insured by defendant in the name of S & S Mason, Inc., a business of plaintiff's husband, Joseph Stoops. A van pulling out of a drive struck the pickup. By outward appearances, the accident was relatively minor. Plaintiff stated at the time that she hurt her left wrist but refused medical treatment. In her a claim for no-fault benefits, plaintiff asserted that during the accident she reached over with her right hand to protect her passenger son while turning the steering wheel sharply with her left, and in doing so, hyperextended her left wrist. Before the accident, plaintiff was already being treated for pain in her left shoulder, elbow and wrist. These injuries apparently arose out of repetitive movements during plaintiff's work at an envelope factory.

After the accident, Dr. Robert Salaman[2] treated plaintiff's wrist conservatively with ice packs and anti-inflammatory drugs. When plaintiff continued to complain of pain in her wrist, Dr. Salaman referred her to Dr. Stephen DeSilva, an orthopedic surgeon. Dr. DeSilva performed arthroscopic surgery on May 29, 1998. Although plaintiff attended physical therapy, she continued to complain of discomfort and pain at levels making physical therapy difficult. Her condition did not improve by her last visit to Dr. DeSilva on July 29, 1999.

On May 19, 1999, plaintiff complained to Dr. Salaman of pain and popping in her left shoulder, pain in her elbow, her neck and jaw. Dr. Salaman performed surgery on her shoulder. Plaintiff complained in August 1999 of elbow pain radiating into her hand, and Dr. Salaman performed elbow surgery on September 28, 1999. After the surgery, plaintiff continued to complain of pain in the left elbow when she attempted activities at home. In December 1999, Dr. Salaman told Plaintiff she could not perform household chores, or activities requiring repetitive use of her hands. According to Dr. Salaman, plaintiff's left wrist was permanently damaged in the automobile accident, as was her left elbow, and her left shoulder.

In the three years after the automobile accident, defendant paid over $100,000 in plaintiff's medical expenses and the statutory maximums for work loss benefits and replacement

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[1] Mrs. Stoops died of natural causes (arteriosclerotic cardiovascular disease) while these appeals have been pending. Her husband Joseph Stoops, the personal representative of her estate, has substituted for the deceased as a party in both cases. We use the singular plaintiff to refer to Kristen Stoops because she was the sole claimant in the Wayne circuit court case, and because Joseph Stoops' individual claim for insurance benefits in the Macomb circuit court case is solely derivative of injuries his wife allegedly sustained in the March 1998 accident.

[2] The parties spell the doctor's name as both "Salaman" and "Solomon."

services benefits of $20.00 per day. See MCL 500.3107(1)(b) & (c). These benefits expired at the end of March 2001.

In July 2001, plaintiff submitted to defendant three computer-generated letters bearing the title "Amber Baker / In-home Nursing Care Giver," which detailed hours that Ms. Baker purportedly spent attending to plaintiff's care. The letters stated Baker began providing plaintiff care on April 20, 2001, and continued to do so through June 30, 2001, seven days week, for eight to ten hours a day.

Plaintiff also submitted to defendant several copies of checks drawn on a personal checking account bearing only plaintiff's name and payable to Amber Baker. Most of these checks were for the amount of $1680 purporting to be in payment for one week of care (56 hours at $30 per hour). Defendant's claims representative learned that Ms. Baker was last employed as a nurse's aide earning $9.50 an hour; defendant paid most but not all of the claimed attendant care at the rate of $9.50 per hour rate rather than the requested $30 per hour. Defendant paid plaintiff $9,452.50 for attendant care through August 2001, but then stopped.

At trial, plaintiff sought compensation for the cost of attendant care provided by Amber Baker in 2001, 2002, and 2003, and for medical expenses of $80,798.85, consisting of $78,281.25 for surgery on plaintiff's shoulder at St. Joseph Mercy Hospital and $2,517.60 for treatment of plaintiff's elbow. In closing argument, plaintiff's counsel requested that the jury award plaintiff medical expenses in the amount of $80,798.85, and $83,111.25 for attendant care expense, which was calculated by multiplying the claimed amount of care hours by $17.50 per hour, and subtracting the $9,452.50 defendant had already paid for attendant care services.

Defendant contended at trial that plaintiff's medical problems were not the result of the automobile accident of March 28, 1998, but from plaintiff's pre-existing condition, and the result of falls and other injuries plaintiff received after the accident. During discovery, defendant also caught plaintiff, her husband Joseph Stoops, and Amber Baker in web of deception regarding the alleged attendant care. First, defendant subpoenaed the bank records of plaintiff's personal checking account, which showed the purported checks plaintiff wrote to Amber Baker were never cashed. In plaintiff's deposition, she admitted the checks were not cashed but that Baker gave them to her husband, Joseph Stoops, who then gave Baker cash and a receipt. Copies of the receipts were mysteriously produced for defense counsel. Next, Joseph Stoops was deposed and he advanced the story that he went behind his wife's back to get the checks back from Baker and gave her cash he obtained by making ATM withdrawals on his business (S & S Mason) account. Although Joseph could not produce records to substantiate the cash withdrawals, he produced a receipt book from which he allegedly wrote contemporaneous receipts to Baker in 2001. This story floundered when defendant produced evidence that the receipt book was not even available until 2002, and the receipt book itself bore a 2002 copyright mark.

The story regarding payment to Amber Baker shifted again at trial. Baker testified she lost the "original" receipts that Joseph had given her in 2001 and when defendant subpoenaed her to produce the receipts, Joseph Stoops provided her "copies." According to Baker, plaintiff would write a check to her, Baker would put the check under a jewelry box on Joseph's dresser, and Joseph would give Baker cash and a receipt. Joseph Stoops testified that in 2001 his business was in trouble and he hid money from his business in his wife's personal account; Stoops got the checks his wife wrote for Baker back from Baker and gave Baker cash so it would

not appear that Baker was his employee. Stoops also testified regarding a jewelry box on his dresser. According to Joseph, Baker would "leave the check [-] I got like a jewelry box thing on my dresser [-] she leaves the check there and I'd leave the money for her" and a receipt. Joseph admitted that he obtained the receipt book in June 2003, and that he manufactured the receipts produced during discovery when Baker said she needed copies.

The jury returned a mixed verdict. It found that although plaintiff had sustained a wrist injury in the accident, that defendant owed nothing for medical expenses for that injury. The jury found that plaintiff's shoulder injury was not related to the accident and therefore defendant was not responsible for medical expenses to treat plaintiff's shoulder. But the jury found plaintiff's elbow was injured in the accident and awarded medical expenses of $2,517.16. Regarding attendant care, the jury found that plaintiff was entitled to compensation of $3,247.50 for 2001, $17,500.00 for 2002, and $3,165.63 for 2003, for a total of $23,913.13. The jury also awarded interest in the amount of $7,786.95. Finally, the jury answered, "yes" to the question whether some of plaintiff's attendant care claim was excessive.

The trial court entered judgment in favor of plaintiff on January 5, 2005 in the amount of $42,004.19, which included additional interest of $7,786.95. Both parties sought attorney fees pursuant to MCL 500.3148. Plaintiff argued she should be awarded attorney fees under § 3148(1) because defendant had unreasonably refused to pay her no-fault claim, and defendant sought an award of attorney fees under § 3148(2) because plaintiff's claim was "in some respect fraudulent or so excessive as to have no reasonable foundation." After several hearings, the trial court entered an order on January 13, 2005 that awarded plaintiff attorney fees of $106,712.50[3] and costs of $16,522.04; it then awarded defendant attorney fees of $65,500.

A. Directed Verdicts

Defendant argues that the trial court erred in its rulings on the parties' various motions for directed verdict. We review de novo a trial court's decision on a motion for a directed verdict. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). We must review all of the evidence presented up to the time of the motion in a light most favorable to the nonmoving party to determine whether a factual question exists. *Id*. A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Id*.

Defendant first contends the trial court erred by not directing a verdict in its favor that plaintiff's claim was "in some respect fraudulent or so excessive as to have no reasonable foundation." MCL 500.3148(2). Defendant's argument is without merit. While defendant raised this issue in its pleadings for the purpose of ultimately recovering its attorney fees, it did not affirmatively assert fraud as a counter-claim against plaintiff. Also, defendant did not assert fraud as an affirmative defense that would void its policy coverage. Rather, defendant asserted that plaintiff's injuries were not related to the automobile accident, and that attendant care

[3] This award consisted of $84,837.50 for Christopher Ambrose, who represented plaintiff throughout the claim process, and $21,875.00 for plaintiff's trial counsel, Robert Darling.

expenses were either not actually incurred or were unnecessary. The trial court properly ruled such factual questions were for the jury to resolve.

Next, defendant argues that the trial court erred by granting plaintiff's motion for directed verdict and subsequently entering an order that stated defendant had failed to create a genuine issue of material fact regarding the elements of a tort action for fraud. We agree.

The record is not clear that plaintiff ever moved for a directed verdict regarding defendant's assertion that plaintiff's claim was, at least in part, fraudulent. Instead, the record reflects that defendant believed its inchoate claim to attorney fees under § 3148(2) presented factual questions for the jury to resolve. Defendant argued that the trial court should read to the jury a modified version of M Civ JI 128.01 for the purpose of determining whether defendant could obtain attorney fees under the statute. In objecting to the proposed instruction, defense counsel stated, "I don't know if it would be the appropriate time for directed verdict or my argument with regard to this . . . jury instruction because I don't believe that there's any evidence that would establish fraud." Ultimately, the trial court correctly ruled that whether attorney fees may be awarded under the statute is for the court, not the jury, to resolve. The trial court further reasoned that although defendant could argue fraud as a defense, i.e., that plaintiff did not actually incur attendant care expenses, or that plaintiff inflated her claim, defendant had not asserted a counter-claim for affirmative relief against plaintiff on the basis of fraud. The court stated, "I'm going to grant the motion for directed verdict on the offensive claim of fraud, and I'm not [going to] instruct the jury on all the elements of fraud in that regard." Nevertheless, the court ruled that defendant could still argue "there was fraud in the submission" of the claim, "I'm just not [going to] give that instruction about fraud and all the elements of it." But, without objection, the trial court included in the verdict form an advisory question: "In plaintiff's claim for attendant care, was some of the claim excessive?" As noted, *supra*, the jury answered "yes."

Even though the trial court did not instruct the jury regarding the elements of the tort of fraud, the record is clear that the trial court did not rule that the evidence defendant produced regarding fraud and material misrepresentation was insufficient to be submitted to the jury as a defense to plaintiff's claim. Quite the contrary, the trial court specifically ruled that the issue raised questions for the jury to resolve. Despite this, plaintiff submitted an order for the court's signature that defendant had failed to create a genuine issue of material fact with respect to the elements of a tort action for fraud, to which defendant objected. In addition to arguing that the proposed order did not reflect the court's ruling, defense counsel predicted that plaintiff's counsel would use the order to assert the doctrine of res judicata to defendant's affirmative defense of fraud or material misrepresentation in the Macomb action for underinsurance benefits. In sum, the trial court did not rule on the issue of fraud, except to decline to instruct the jury on its tort elements, and permit defense counsel to argue fraud to the jury. We conclude that the trial court's October 22, 2004 order granting plaintiff's motion for directed verdict does not accurately reflect the ruling of the court and it is therefore vacated. MCR 7.216(A)(7).[4]

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[4] "The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just: . . . (7) enter any judgment or order or grant further or different relief
(continued…)

B. Attorney Fees

The heart of this appeal concerns attorney fees. Both parties assert the trial court erred in granting attorney fees to the other party, and in determining the amount of a reasonable attorney fee. Generally, attorney fees may not be recovered either as an element of costs or damages unless expressly allowed by statute, court rule, judicial exception, or contract. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002); *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 101-102; 527 NW2d 524 (1994). Here, the statute plainly permits a trial court upon making certain preliminary findings of fact to award attorney fees to either a claimant of personal or property protection insurance benefits or an insurer defending against such a claim. In pertinent part, MCL 500.3148 provides:

> (1) 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 . . . if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.[5]
>
> (2) 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.

We review for clear error a trial court's factual findings regarding § 3148. MCR 2.613(C); *McCarthy, supra* at 103; *Attard v Citizens Ins Co*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake occurred." *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004).

When a trial court determines that an award of attorney fees under § 3148 is appropriate, the court must only award a reasonable fee. The statute does not define reasonable for purpose of awarding an attorney fee, so in *Liddell v DAIIE*, 102 Mich App 636, 651-652; 302 NW2d 260 (1981), this Court adopted the guidelines stated in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor

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as the case may require."

[5] "Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). For benefits to be overdue, allowable expenses must actually have been incurred. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003). If benefits are "overdue" within the meaning of § 3142(2), "a rebuttable presumption of unreasonable refusal or undue delay arises." *Combs v Commercial Carriers, Inc*, 117 Mich App 67, 73; 323 NW2d 596 (1982).

> 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. See generally 3 Michigan Law & Practice, Attorneys and Counselors, § 44, p 275 and Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics.

Likewise, our Supreme Court adopted the *Crawley* factors for the purpose of determining a reasonable attorney fee under § 3148 in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). The Court observed that although "a trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its determination." *Id*. Moreover, a trial court need not detail its findings regarding each factor the court considers. *Id*. "The award will be upheld unless it appears upon appellate review that the trial court's finding on the 'reasonableness' issue was an abuse of discretion." *Id*.

We first review defendant's argument that the trial court erred by declining to rule on its motion for attorney fees on the basis that plaintiff's claim "was in some respect fraudulent." § 3148(2). We also consider at the same time plaintiff's argument in her cross-appeal that the trial court abused its discretion by awarding defendant attorney fees based solely on the jury determination that "some of [plaintiff's] claim [was] excessive." Plaintiff argues that the trial court erred by abdicating to the jury its responsibility to find facts necessary to the application of § 3148(2), and that the trial court also failed to find the additional necessary requirement for attorney fees that a claim must be so "excessive as to have no reasonable foundation." We consider these issues together because they are linked by the parties' arguments below.

On September 15, 2004, in the first of several post-trial hearings on the issue of attorney fees, the trial court heard arguments of the parties regarding whether defendant had "unreasonably refused to pay [plaintiff's] claim or unreasonably delayed in making proper payment." § 3148(1). The trial court ruled in favor of plaintiff on this question, reasoning that (1) at least one of plaintiff's medical bills had not been paid, (2) plaintiff had been prescribed attendant care, and (3) "the jury did find the care was excessive, but nevertheless warranted because there was an award." The court found the determinative factor to be that although plaintiff did not receive all she asked for, she did prevail. Accordingly, the court ruled it would award Mr. Darling $21,875 for 62 hours and initially awarded Mr. Ambrose $203,925. But the court also recognized that defendant prevailed in part, so it awarded defendant attorney fees of $50,000 as an offset to plaintiff's attorney fees. Plaintiff's counsel did not object.

The parties next appeared before the trial court on October 22, 2004 to attempt to settle the terms of a proposed judgment. The trial court sua sponte informed counsel that it had erred by not considering appropriate factors in setting attorney fees for Mr. Ambrose and defense counsel, who had not even submitted an affidavit or itemized statement. The court noted that it had ruled in part out of frustration. The court also observed it was "very comfortable" with the fee request of Mr. Darling, plaintiff's lead trial counsel, finding it "right on the money."

During the course of the October 22 hearing, defense counsel requested a ruling from the trial court under § 3148(2), that plaintiff's claim "was in some respect fraudulent." Mr. Darling responded by stating that, "on September 15th when you heard the motion with regard to attorney fees, you determined that the defendant would receive attorney fees because the verdict [sic] was somewhat excessive. You've already made that determination that it was excessive." Counsel

noted that § 3148(2) provides alternative grounds for awarding attorney fees, and when asked by the court if it had already ruled on "excessiveness," plaintiff's counsel answered, "Correct." The trial court ruled that because the statute provided alternative bases to award attorney fees, and it had found plaintiff's claim was excessive, it would not make a finding regarding fraud.

On October 27, 2004, plaintiff's counsel filed a motion for partial summary disposition regarding defendant's affirmative defense of concealment, misrepresentation, or fraud to plaintiff's claim for underinsurance benefits then pending in Macomb circuit court. Plaintiff asserted in her motion that the trial court's October 22, 2004 order granting plaintiff's motion for directed verdict barred defendant's affirmative defense under principles of res judicata or collateral estoppel. Defendant subsequently sought an order in Wayne circuit court that the trial court had specifically declined to render a ruling on the issue of fraud. Defendant's motion was heard on November 12, 2004.

Defendant sought the order despite transcripts showing that the court had not ruled on the issue because plaintiff argued in the underinsurance case, "a court speaks through its orders." Defendant reminded the trial court that it declined to rule on defendant's claim for attorney fees on the basis that plaintiff's claim was "in some respect fraudulent" because it had already determined that defendant was entitled to attorney fees on the alternative basis that plaintiff's claim was excessive. Plaintiff argued that the order was unnecessary because the court had ruled it would reconsider the issue of attorney fees. Defendant countered that the court intended only to reconsider the amount of the attorney fee awards, not each parties' entitlement to them. The trial court agreed with defendant and found the proposed order comported with its ruling. Accordingly, the trial court entered an order on November 12, 2004 that provides: "the jury having found that some of the claim for Plaintiff's attendant care was excessive and this Court having found the claim was excessive thereby entitling Defendant to attorney fees of this action, the Court hereby declines to rule upon whether or not the claim was in some respects fraudulent under MCL 500.3148(2)."

The trial court held the final hearing on attorney fees on December 23, 2004. Although intended to serve as the "reasonableness" hearing on the amount of attorney fees the parties would be awarded, plaintiff also argued that the trial court should reconsider its ruling that defendant was entitled to attorney fees under § 3148(2). Plaintiff argued for the first time that her claim had a reasonable basis and therefore was not "so excessive as to have no reasonable foundation." The trial court noted it had already ruled: plaintiff prevailed and therefore was entitled to attorney fees. With respect to defendant, the trial court stated, "it's clear from the evidence that the jury found that the claim was excessive, and I agree, I think it was excessive. So I think consequently the defendant is entitled to attorney fees."

On appeal, defendant argues the trial court erred by not also ruling under § 3148(2) that plaintiff's claim "was in some respect fraudulent." Defendant cites no authority for the proposition that a court must rule on an alternative ground for relief after having already granted relief on a different ground. Defendant's failure in this regard constitutes an abandonment of this issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

With respect to plaintiff's counter-claim regarding § 3148(2), the record reveals that the trial court did not rely solely upon the jury's finding that plaintiff's case was excessive but also independently reached the same conclusion. Moreover, plaintiff at one point assured the court it

had already so ruled. "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." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

We agree that § 3148(2) plainly requires that for attorney fees to be awarded to an insurer because a claim is excessive, the claim must be so "excessive as to have no reasonable foundation." Plaintiff argues on appeal that her claims had a reasonable foundation because although the jury rejected one medical claim, plaintiff's treating physicians opined her injuries were related to the automobile accident at issue. Further, with respect to attendant care, plaintiff argues the jury awarded her compensation for the hours of care she claimed albeit at a reduced hourly rate. But, plaintiff did not argue this issue below until the fourth of four hearings in which attorney fees were addressed. At a minimum, the record reflects plaintiff's counsel acquiesced to the trial court believing its ruling that plaintiff's claim was excessive was sufficient to award attorney fees to defendant. "Error requiring reversal must be that of the trial court, and not error to which an aggrieved party contributed by plan or negligence." *Mucci v State Farm Mut Automobile Ins Co*, 267 Mich App 431, 442-443; 705 NW2d 151 (2005). Further, plaintiff sought to foreclose a ruling by the trial court that plaintiff's claim was "in some respect fraudulent" - - a ruling that abundant record evidence would have supported. Under these circumstances, it is simply not fair to allow plaintiff to finesse a non-ruling on whether plaintiff's claim was "in some respect fraudulent" while still being permitted to pack her appellate parachute with respect to so "excessive as to have no reasonable foundation." See, e.g., *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

The record reflects that the trial court readily concluded that defendant should be awarded attorney fees under § 3148(2) when it sua sponte ruled it would do so. This Court will affirm a trial court when it reaches the correct result even if for an incorrect reason. *Ellsworth v Hotel Corp,* 236 Mich App 185, 190; 600 NW2d 129 (1999). In this regard, the reasoning of *Robinson v Allstate Ins Co*, unpublished opinion per curiam of the Court Appeals decided May 11, 2004 (Docket No.'s 244824; 245363) is persuasive. The *Robinson* panel found that a $4000 verdict on an $82,000 claim was evidence that the jury found that the plaintiff's claim "was in some respect fraudulent or so excessive as to have no reasonable foundation" and therefore remanded to the trial court for an "award of a reasonable sum" to the insurer under § 3148(2). *Robinson, supra*, slip op at 2. In sum, we are not left with a definite and firm conviction that the trial court clearly erred by awarding defendant attorney fees under § 3148(2).

Next, defendant argues that the trial court erred by granting plaintiff attorney fees under § 3148(1). A claimant of personal protection insurance benefits is entitled to attorney fees when benefits are overdue[6] "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." As noted already, the trial court's factual findings regarding § 3148(1) are reviewed for clear error. *Attard, supra* at 316-317. With respect to determining whether an attorney fee should be awarded to a no-fault benefits claimant,

[6] See n 5, *supra*.

an insurer's "refusal or delay in payments . . . will not be found 'unreasonable' within the meaning of § 3148 where the delay is the product of a legitimate question of statutory construction, constitutional law, or even a bona fide factual uncertainty." *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987), citing *Liddell*, *supra* at 650. Furthermore, "the scope of inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable." *McCarthy*, *supra* at 105. After a careful review of the record, the parties' arguments, and the trial court's reasoning, we are convinced that the trial court clearly erred by awarding plaintiff attorney fees under § 3148(1).

Defendant presented evidence contemporaneous with plaintiff's claim for attendant care that raised a bona fide question regarding whether such care was necessary. Specifically, defendant points to three forms it received from plaintiff's attending physicians that each checked the box for "no" to the question, "Will the patient require attendant care?" Dr. Noellert, dated September 28, 2001, Dr. Michael Friedlander, dated September 7, 2001, and Dr. Eric Borofsky, dated April 13, 2001, submitted these forms. Plaintiff argues these reports were contradicted by an April 15, 2001 hand-written "prescription" by Dr. Borofsky for eight hours of daily attendant care.[7] Plaintiff asserts that it was incumbent on defendant to reconcile the conflicting reports, citing *Liddell*, *supra* at 651. That case is distinguished from the instant case because in *Liddell* a report unfavorable to the plaintiff was followed by two subsequent reports that helped the plaintiff. Here, the converse occurred. Conflicting reports by the same doctor were followed by two subsequent reports indicating attendant care was unnecessary. Moreover, under MCL 500.3142(2) a claim for benefits is not overdue until the claimant submits to the insurer "reasonable proof of the fact and of the amount of loss sustained." The statute does not place the burden on the insurer to resolve ambiguous evidence of a claim.

In addition, private investigators that defendant hired conducted surveillance and testified plaintiff was performing activities she claimed a caregiver performed. Although the surveillance was limited to a few days and only pertained to outdoor activities, it raised questions regarding both the need for and accuracy of plaintiff's claim for attendant care.

The timing of plaintiff's claim for attendant care also raised questions. Plaintiff's first claim for attendant care was three years after a relatively minor automobile accident, and a month after no-fault work loss and replacement services benefits expired. Further, plaintiff claimed reimbursement for attendant care at the rate of $30 per hour, a rate that was neither supported by the type of care allegedly being provided, nor the qualifications of the caregiver.

In sum, at the point defendant stopped paying plaintiff's attendant care claim, there was evidentiary support for finding defendant possessed legitimate questions regarding both the need for attendant care and whether attendant care expenses had actually been incurred. Thus, a bona fide dispute existed regarding "proof of the fact and of the amount of loss sustained."[8] MCL

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[7] A copy the "prescription" has not been furnished to this Court. Interestingly, Dr. Borofsky did not testify at trial, nor does it appear that he was even deposed.

[8] Indeed, plaintiff in the course of arguing that plaintiff's claim had a reasonable foundation,
(continued…)

500.3142(2); *Attard, supra* at 318. This is so notwithstanding that defendant did not initially obtain an independent medical evaluation of plaintiff. *McCarthy, supra* at 105 (the defendant was entitled to rely on the plaintiff's own treating physician).

The trial court clearly erred by finding that defendant "unreasonably refused to pay" or "unreasonably delayed" paying overdue benefits. The trial court relied on three subsidiary findings to reach this conclusion: (1) the jury awarded plaintiff a $2,517 medical bill for treatment of her elbow, (2) plaintiff had been prescribed attendant care, and (3) plaintiff prevailed because she was awarded attendant care benefits even if they were less than she wanted. For the reasons already discussed, the second and third reasons do not negate the fact that legitimate factual uncertainty existed as to the necessity for and the amount of care hours provided, as well as the dollar value of plaintiff's claim. That plaintiff ultimately prevailed to some extent is not determinative. *Id.*

The trial court also erred by relying on the jury's awarding plaintiff $2,517 for treatment of her elbow. A benefit is not overdue until it has been incurred and has not been paid within thirty days after "an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500. 3142(2).[9] Further, an insurer's refusal or delay in paying a benefit is not unreasonable if before it becomes overdue a "bona fide factual uncertainty" exists whether the incurred expense is causally related to the insured event. See *Gobler, supra* at 66; *Liddell, supra* at 650; See, also, *Proudfoot v State Farm Mut Ins Co,* 469 Mich 476, 485; 673 NW2d 739 (2003). This lawsuit was instituted on September 25, 2002. Nevertheless, defendant continued to pay plaintiff's medical bills through May 2003. At trial, even while the jury was deliberating, counsel for both plaintiff and defendant believed that the only outstanding unpaid medical bills related to treatment of plaintiff's shoulder, which the jury ultimately determined was not related to the insured automobile accident. Only a question from the jury prompted counsel to stipulate that a small portion of the unpaid medical bills, $2,517, related to treatment of plaintiff's elbow.

The record is unclear exactly when the $2,517 expense was incurred, but plaintiff's closing argument at trial indicates that all of the unpaid medical bills were incurred after June 17, 2003 but before May 4, 2004. By June 17, 2003, significant discovery had occurred in this case, including defendant's receipt of medical records relating to plaintiff's treatment, the taking of Amber Baker's and plaintiff's depositions, and obtaining bank records through subpoenas. In addition to uncovering the check-writing scheme, it was discovered that plaintiff had suffered work-related injuries to her neck, shoulder, elbow and wrist before the accident. Further, plaintiff had sustained falls both before and after the accident that might account for her medical problems. Furthermore, in her deposition on June 9, 2003, plaintiff admitted authoring a May 18, 1998 note to her employer that stated her neck, shoulder, and tennis elbow ailments were not the result of the March 1998 automobile accident. Also, plaintiff asserted in the note that only her wrist injury was related to the automobile accident. Further, defendant retained experts during 2003, two of whom opined at trial that plaintiff's injuries were not caused by the

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asserts, "what we have here is a bona fide factual dispute between the parties regarding the cost of attendant care services." Cross-appeal brief at 17.

[9] See n 5, *supra*.

automobile accident at issue. In sum, this evidence establishes that at the time the elbow-related unpaid medical expense was incurred, a bona fide dispute existed whether plaintiff's medical condition was causally related to the auto accident.[10] *Attard, supra* at 317; *Liddell, supra* at 650. Accordingly, even though the jury ultimately awarded plaintiff $2,517 for treatment of her elbow, we are left with a definite and firm conviction that the trial court clearly erred by finding defendant unreasonably refused or unreasonably delayed to pay an overdue medical expense. *Amerisure Ins Co, supra* at 24; See, also, *McCarthy, supra* at 105 ("the scope of inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable").

Because the trial court clearly erred by awarding plaintiff attorney fees under § 3148(1), it is unnecessary to address defendant's argument that the trial court abused its discretion when setting a reasonable amount to award as an attorney fee. We also conclude that defendant has not established the trial court abused its discretion by determining an amount for a reasonable attorney fee to be awarded to defendant. The record reflects that the trial court properly considered the *Crawley* factors in establishing a reasonable attorney fee. Further, the trial court did not abuse its discretion by considering that plaintiff's counsel worked pursuant to a contingent fee agreement while defense counsel would be paid by a financially stable client regardless of the trial outcome. See *Liddell, supra* at 652 ("a contingent fee agreement may be considered as one factor in determining the reasonableness of a fee"). Additionally, the trial court did not abuse its discretion by assigning greater relative value under *Crawley* to the work of plaintiff's counsel. Of course, these comparisons are moot based on our determination that plaintiff is not entitled to attorney fees under § 3148(1).

C. Trial Error

We reject defendant's claim that the trial court denied it a fair trial by imposing time constraints during the presentation of its defense. A trial court has broad discretion to control the conduct of a trial, including the mode, order, and manner of the examination and cross-examination of witness. MRE 611; *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 415; 516 NW2d 502 (1994). When defense counsel objected that the trial court's restrictions were preventing him from presenting a meaningful defense, the trial court responded that defense counsel consumed the great bulk of the time taken during plaintiff's case in chief by cross-examination, particularly through the use of videotapes. In essence, the trial court determined that the defense was beginning to present repetitive and redundant evidence, but would permit defense counsel to do so within time constraints. In light of the jury's verdict, we find defendant's claim of having been denied a fair trial to be utterly without foundation.

In summary, with respect to Docket No. 260454, we reject all of defendant's claims of trial error, except we vacate the directed verdict order of October 22, 2004. We reverse the award of attorney fees to plaintiff but affirm the award of attorney fees to defendant.

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[10] Plaintiff acknowledges that "a genuine and bona fide dispute" existed between the parties whether plaintiff's shoulder problems were related to the accident. Cross-appeal brief at 14-15.

II. Docket 261917

In Docket 261917, plaintiff and her husband Joseph Stoops sought underinsurance benefits from defendant arising out of the March 28, 1998 accident. Plaintiffs filed their complaint in Macomb circuit court on October 2, 2002. Plaintiffs alleged they settled a claim against the other driver for his insurer's $20,000 residual liability policy limits. Plaintiff Kristin Stoops sought compensation for injuries alleged to have been caused in the accident; plaintiff Joseph Stoops sought compensation for loss of consortium.

After the trial in the Wayne circuit court case, defendant moved to amend its answer and affirmative defenses to plaintiffs' complaint. This motion was based on information defendant learned through discovery, including the depositions of Amber Baker, Kristin Stoops, Joseph Stoops, and Brian Hazelwood, a representative of the receipt book manufacturer. Defendant sought to assert the following policy condition of its business auto insurance policy:

> **2. CONCEALMENT, MISREPRESENTATION, OR FRAUD**
>
> This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any other "insured," at any time, intentionally conceal or misrepresent a material fact concerning:
>
> a. This Coverage Form;
>
> b. The covered "auto";
>
> c. Your interest in the covered "auto"; or
>
> d. A claim under this Coverage Form.

The trial court granted defendant's motion on September 27, 2004. Defendant alleged in its amended affirmative defenses that forfeiture occurred because plaintiffs misrepresented the following material facts during the no-fault benefits claim: (1) submitted checks to defendant as evidence of payment to Amber Baker that plaintiffs knew had never been cashed, (2) presented receipts as purported evidence of payment to Amber Baker, (3) Joseph Stoops testified that the receipts were prepared contemporaneous with payment to Amber Baker in 2001, and produced a receipt book as corroboration, and (4) presentation of claims for attendant care that were not performed.

As already noted, plaintiffs moved for partial summary disposition on defendant's affirmative defense on October 27, 2004. Plaintiffs asserted that the October 22, 2004 order granting plaintiff a directed verdict in the Wayne circuit court case barred defendant's affirmative defense under principles of res judicata or collateral estoppel. On December 6, 2004, the trial court heard the motion and denied it, finding that the Wayne circuit court did not render a ruling on fraud that would bar defendant's affirmative defense.

Subsequently, plaintiffs moved for reconsideration and defendant moved for summary disposition on the basis of its affirmative defense, submitting evidence gathered through trial and discovery in the Wayne circuit court case. The trial court ruled on these motions in an opinion

and order issued February 25, 2005. First, the trial court denied plaintiffs' motion for reconsideration. The court reviewed both the transcripts of the proceedings in Wayne circuit court and also that court's November 12, 2004 order declining to rule whether the no-fault claim was in some respects fraudulent. The court ruled that the Wayne judge reached no definitive conclusion on the issue. So, plaintiffs' failed to demonstrate palpable error. MCR 2.119(F)(3).

With respect to defendant's motion for summary disposition brought under MCR 2.116(C)(8) and (C)(10), the trial court recognized that defendant did not attack the validity of plaintiffs' claim for underinsurance benefits but rather asserted a once valid claim no longer existed. "An affirmative defense . . . accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but . . . denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). Accordingly, the trial court correctly determined that defendant's motion could properly be analyzed under MCR 2.116(C)(10). Ultimately, the trial court determined on the basis of the evidence submitted by the parties that reasonable factfinders could only conclude that plaintiffs misrepresented material facts regarding the claim for attendant care benefits, and granted defendant's motion.

We review de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra* at 120. Like the trial court, we must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id*. at 120-121. If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists, and may not rest upon mere allegations or denials in the pleadings. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Granting summary disposition is proper under MCR 2.116(C)(10) "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

Plaintiffs argue that the trial court erred because genuine and material issues of disputed fact remain for trial. We disagree.

First, we reject plaintiffs' argument that the October 22, 2004 directed verdict order barred defendant's affirmative defense on the basis of res judicata for the reason the issue was never decided in the no-fault case. Further, by this opinion we have vacated that order.

Next, we reject plaintiffs' argument that defendant must satisfy a burden of proof higher than the preponderance of the evidence because fraud is alleged. See *Mina v General Star Indemnity Co*, 218 Mich App 678, 685; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866; 568 NW2d 80 (1997). To void an insurance policy on the basis of intentional misrepresentation of a material fact, "an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made

or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it." *Id*. at 686. "A statement is material if it is reasonably relevant to the insurer's investigation of a claim." *Id*.

In essence, plaintiffs contend that viewing the evidence submitted to the trial court in the light most favorable to them, Kristin Stoops was unaware of the fraud being perpetrated behind her back by her husband Joseph Stoops, who did not want checks to be written on his wife's personal checking account because it was really his business account. Thus, plaintiffs argue, there is no evidence Kristin Stoops ever knowingly made a false representation to defendant. Plaintiffs also argue that defendant did not rely, nor was it harmed any false representation. According to plaintiffs, based on Baker's and their testimony, Baker provided services that plaintiffs paid for, albeit in a convoluted, non-business-like manner. For the trial court to conclude otherwise, plaintiffs assert, it must have engaged in fact finding based on weighting credibility. Thus, plaintiffs argue the trial court must be reversed.

Plaintiffs correctly note that a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Moreover, this Court will liberally find the existence of a genuine issue of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). But, plaintiffs' argument misses the mark. First, the issue in this case is not whether Baker provided services to Kristin Stoops, nor whether the Stoops paid for Baker's services, nor even whether defendant paid for no-fault benefits to which Kristin Stoops was not entitled. Those were issues resolved in the Wayne circuit court case. Second, the material question in this case is whether any "insured" under defendant's business auto insurance policy, either Kristen Stoops or Joseph Stoops, "at any time, intentionally conceal[ed] or misrepresent[ed] a material fact concerning . . . [a] claim" under the policy. The plain language of this policy condition does not require that defendant have actually paid a fraudulent claim. See *Mina, supra* at 686. The issue then on defendant's motion for summary disposition on its affirmative defense is whether defendant produced admissible evidence from which reasonable minds could only conclude that the answer to the above question is "yes." If so, the policy condition must be enforced as written. See *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) ("[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written."); See, also, *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 531-532; 620 NW2d 840 (2001) (uninsured-motorist coverage is neither required by statute, nor contrary to the no-fault act).

Here, it is undisputed that Kristin Stoops submitted copies of checks to defendant as evidence of payment for attendant care services. It is also undisputed that the checks were drawn on a personal checking account in Kristin Stoops name and never cleared the bank on which they were drawn. Accepting plaintiffs' story about the checks as being true, the checks were still false evidence of payment for the alleged attendant care expenses. From Kristin Stoops own deposition testimony, it is clear that at some point she knew these checks were false evidence. Further, from plaintiff Joseph Stoops own testimony, he at all times knew the checks were false evidence. Yet, both plaintiffs concealed the truth about the checks from defendant until confronted with bank records to the contrary at their depositions. Moreover, Joseph Stoops admitted that he manufactured false evidence of the alleged cash payment for attendant care benefits in the form of purported 2001 receipts. From this admissible evidence reasonable minds

could not differ, even when viewing the evidence in the light most favorable to plaintiffs, that plaintiffs intentionally concealed or misrepresented material facts regarding a claim under defendant's business auto insurance policy. Thus, reasonable minds could only conclude that the general policy condition regarding concealment or misrepresentation voided the policy's underinsurance coverage. *West, supra* at 183; *Cohen, supra* at 532. Consequently, the trial court properly granted defendant summary disposition under MCR 2.116(C)(10).

III. Conclusion

With respect to Docket No. 260454, we vacate the directed verdict order of October 22, 2004. We reverse the award of attorney fees to plaintiff and affirm the award of attorney fees to defendant; we remand for entry of an amended judgment in accordance with this opinion. We do not retain jurisdiction.

We affirm in Docket No. 261917.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey