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

ELVIA J. ESTERHAI, Plaintiff-Appellee,	UNPUBLISHED May 24, 2011
v	No. 295441 Bay Circuit Court
FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, Defendant-Appellant.	LC No. 07-003142-NF

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals by right from the trial court's ruling that defendant must pay statutory interest and attorney fees for failure to timely cover plaintiff's medical bills. We affirm the trial court's decision with regard to plaintiff's podiatric care, but we reverse the trial court's decision with regard to plaintiff's cervical care. We remand for further proceedings consistent with this opinion.

I. FACTUAL HISTORY

Plaintiff was injured in 1988 when a semi-truck hit her car from the rear as she waited at a stop light in Bay City, Michigan. She sustained neck, back, and shoulder injuries. She continued for years afterward to experience pain in these areas, as well as limited range of motion in her neck, a persistent tilt of her head, and episodes of numbness in her left fingers and hand. Her injuries eventually necessitated a pair of surgical procedures on her lower back, the second of which involved implanting rods and screws to straighten her back. Defendant does not dispute that, as plaintiff's no-fault insurer at the time of the accident, it is liable for any medical expenses caused by the accident.

In 2006, plaintiff's orthopedic surgeon, Dr. Herbert Roth, suggested an additional surgery to fuse the C6 and C7 vertebrae in plaintiff's neck. Dr. Roth performed the surgery on October 23, 2006. During the surgery, Dr. Roth discovered a "rent," or tear, in plaintiff's C6-C7 posterior longitudinal ligament. The surgery successfully relieved many of plaintiff's symptoms. However, defendant either denied or failed to pay many (but not all) of the bills for the surgery and pre- and post-surgery care. Defendant also paid two bills and denied two bills for toenail care by a podiatrist, which plaintiff claimed was necessary because the rods in her back prevent her from trimming her own toenails.

Defendant argues that it had reason to deny the bills for toenail care based on the information provided with the bills. The medical records provided to defendant state that plaintiff "complains she can't cut her toenails herself, she has had an accident where she has pins and rods placed in her lumbar spine and it is very difficult for her to bend over and cut her nails, she has had this for approximately 2 yrs, she has thick, long, dystrophic, painful nails 2&3 Rt and 1, 4, 5 Lt, she has a hyperkeratotic lesion plantar aspect 5th metatarsal head Rt ft. . . . We debrided all her nails, we trimmed any hyperkeratotic tissue, we advised antifungal QD." A handwritten addition to the record from a later visit states that plaintiff was "unable to self care," and advised daily anti-fungal treatment. A year later, Dr. Roth wrote plaintiff a prescription for podiatric care stating plaintiff "is unable to bend to cut her toe nails." Defendant's adjuster testified that based on this record she believed that plaintiff sought the podiatric care because of a foot condition unrelated to the car accident.

Defendant also argues that it was not clear that plaintiff's last surgery was necessitated by her original trauma. A medical report from 1999 stated that plaintiff had normal range of motion in her neck and hands. A letter from the same doctor in 2003 stated that plaintiff's neck had mild arthritic restrictions. Two examinations by another doctor in 1994 had revealed full or nearly full range of movement in plaintiff's neck. A report from plaintiff's physical therapist in 2001 indicated that plaintiff might actually be contributing to her own muscular imbalances in her neck by overzealous self-manipulation. Similarly, MRIs, X-rays, and CT scans showed plaintiff's cervical spine was normal after the accident but later scans revealed some degenerative changes.

The parties' trial experts disputed whether plaintiff's last surgery was related to the auto accident. Dr. Lou Jacobs, a neurosurgeon retained by defendant, testified that he could find no causal connection between the accident and the neck condition for which plaintiff had surgery. Dr. Jacobs first examined plaintiff in December of 2007, approximately 14 months after her surgery. Dr. Siva Sriharan, on the other hand, testified that the rent Dr. Roth discovered and repaired was caused by the trauma of the auto accident.[1] However, Dr. Sriharan also conceded that if plaintiff had not told him she had been in a car accident, he would have thought her symptoms resulted from age-related degenerative conditions. Plaintiff's other expert witness, Dr. Roth, could not find any evidence of trauma in the scans taken prior to the surgery.

At the conclusion of trial, the jury found defendant liable for plaintiff's medical expenses, but did not find any of the expenses to be overdue. Plaintiff then moved for a partial judgment notwithstanding the verdict (JNOV) on the issue of whether the payments were overdue, which the trial court granted. The court stated that the jury's failure to find for the plaintiff on that issue

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[1] Dr. Sriharan's deposition was taken less than 30 days before trial. Plaintiff argues that defendant had Dr. Sriharan's report prior to the deposition, and more than 30 days before trial. Plaintiff concedes, however, that plaintiff presented no evidence at trial to confirm the date defendant received Dr. Sriharan's report. Defendant's counsel stated during closing argument that defendant had no notice of Dr. Sriharan's theory of causation until the deposition.

was against the great weight of the evidence. The court noted that the original denials were based only on defendant's adjuster's opinions, without any expert support. The court suggested that the jury had been confused by the very complicated nature of the case. The court also granted plaintiff's motion for no-fault attorney fees, finding that defendant unreasonably denied payment of plaintiff's claims.

II. PLAINTIFF'S MOTION FOR JNOV

In *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004), our Supreme Court stated the standard of review for a motion JNOV:

> We review de novo a trial court's decision to grant or deny a motion for judgment notwithstanding the verdict. In conducting this review de novo, we "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." Only when "the evidence viewed in this light fails to establish a claim as a matter of law" is the moving party entitled to judgment notwithstanding the verdict (JNOV). [*Id.* (quoting *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 131; 666 NW2d 186 (2003)].

To illustrate the de novo standard, this Court has stated "[i]f reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005) (internal quotation and citation omitted).

Pursuant to the no-fault act:

> (2) Personal protection 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. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer.
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> (3) An overdue payment bears simple interest at the rate of 12% per annum. [MCL 500.3142(2), (3)].

The purpose of the interest provision is to punish insurers who are tardy in paying claims. *Williams v AAA Michigan*, 250 Mich App 249, 265; 646 NW2d 476 (2002). Of course, the no-fault insurer is not liable at all unless the injury arises "out of the ownership, operation, maintenance or use of a motor vehicle." MCL 500.3105(1). Here, the jury essentially found that plaintiff did not submit reasonable proof of her claim until less than 30 days prior to trial, and therefore the benefits were not overdue.

In *Moore v Secura Ins*, 482 Mich 507; 759 NW2d 833 (2008), the plaintiff made claims for work loss benefits. *Id.* at 512-513. The defendant requested an independent medical exam

(IME), which concluded that the plaintiff could return to work with certain restrictions. *Id.* at 513. The defendant then ceased paying benefits on the grounds that reasonable proof of plaintiff's claim no longer existed. *Id.* at 514. Following trial, the jury awarded plaintiff substantial work loss benefits, but awarded interest only on one week's worth of the benefits. *Id.* The Supreme Court upheld the jury verdict, holding that a verdict should not be overturned "where there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." *Id.* at 518 (internal quotation and citations omitted). The Court concluded that the jury could rationally have found that only one week of work loss benefits was overdue in part because there was doubt regarding whether the plaintiff's injury stemmed from a preexisting condition. *Id.* at 518-519.

Concerning the treatment surrounding plaintiff's neck surgery, we find that the facts in the present case are strongly reminiscent of those in *Moore*. The jury found that plaintiff's benefits were not overdue, and that there was some dispute about the origin of plaintiff's injury. "The jury's conclusion that plaintiff was owed [no-fault] benefits did not also *require* it to conclude that those benefits were overdue." *Moore*, 482 Mich at 518 (emphasis in original). There was evidence that plaintiff had some age-related degenerative changes in her cervical vertebrae. Keeping in mind the jury's opportunity to judge the credibility of the various witnesses, *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 714; 583 NW2d 232 (1998), the jury may have found that only the testimony of Dr. Sriharan constituted reasonable proof of plaintiff's claim that the need for surgery in 2006 was related to the accident. Plaintiff argues that defendant had Dr. Sriharan's report more than 30 days prior to trial. However, plaintiff did not attempt to present this information to the jury, and on de novo review this Court considers only that evidence which was before the jury. See *Craig*, 471 Mich at 77. Moreover, we consider the evidence in the light most favorable to the non-moving party. *Id.* Viewed in that light, we cannot say as a matter of law that the jury reached the wrong conclusion. We therefore vacate that portion of the trial court's JNOV holding that the payments for plaintiff's cervical care were overdue.

Plaintiff's podiatric bills are another matter. Defendant argues that the records show symptoms caused by a fungal infection. Even if true, this is irrelevant. All of the records of plaintiff's foot care reflect that whatever the cause of her symptoms, plaintiff was unable to take care of her feet on her own because of the rods in her back. The records state that plaintiff "can't cut her toenails herself" and "is unable to self care." Plaintiff did testify that it is possible for her to cut her own toenails, but further stated that it is very difficult and causes her soreness and irritation. She also testified that she had a prescription from Dr. Roth stating that she needed help caring for her feet. Because all of the evidence, even viewed in the light most favorable to defendant, shows that plaintiff required help to care for her feet, and that this in turn was related to her injuries from the accident, no reasonable jury could have found that plaintiff failed to present reasonable proof of this claim. We therefore affirm the grant of JNOV as to the timeliness of the payments for plaintiff's podiatric care.

III. ATTORNEY FEES

> The Court reviews de novo issues of statutory interpretation. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "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 the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). This Court reviews de novo questions of law, but we review findings of fact 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.*, quoting *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). Moreover, we review a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.* [*Moore*, 482 Mich at 516].

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

> (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. 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].

This Court has held that MCL 500.3148(1) is intended to ensure prompt payment to insured parties. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994).

A grant of attorney fees under this statute has two prerequisites. First, benefits must be overdue within the meaning of MCL 500.3142. *Moore*, 482 Mich at 517. 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.

The second prerequisite for an award of attorney fees is that the trial court must find the insurer's refusal to pay unreasonable. *Id.*; MCL 500.3148. The trial court in this case found that defendant's refusal to pay was unreasonable.

A refusal to pay or delay in payment is not unreasonable if it is based on a bona fide factual uncertainty. *Moore*, 482 Mich at 520. The insurer does not have a duty to look beyond the medical opinion of its own physicians and the IMEs performed by those physicians. *Id.* at 522. However, the insurer "acts at its own risk in terminating benefits in the face of conflicting medical reports." *Id.* The question is whether the insurer's initial refusal to pay was unreasonable. *Id.* 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). In making this determination, the trial court may give weight to inconsistency in the insurer's actions. See *McKelvie*, 203 Mich App at 337.

As discussed above, all of the evidence shows that plaintiff needed foot care because of the injuries sustained as a result of her auto accident. The medical records clearly show that she was not able to care for her feet properly, and there was no evidence to the contrary. In addition, defendant paid the first two bills it received for plaintiff's foot care, conceding their validity.

Therefore, we conclude that the trial court did not clearly err in holding that defendant unreasonably denied payment for plaintiff's podiatric care.

IV. CONCLUSION

We affirm the trial court's grant of JNOV and the attorney fee award on the issue of plaintiff's podiatric care. However, we reverse the grant of JNOV and the attorney fee award on the issue of plaintiff's cervical care. We vacate the portion of the trial court's October 8, 2009 order[2] that relates to plaintiff's cervical care. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter

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[2] The October 8, 2009 order is entitled, "Order on Plaintiff's Petition for Attorney Fees under the No-Fault Statute and Commencement Date of No-Fault Interest."