

STATE OF MICHIGAN
COURT OF APPEALS

EVELYN PROUDFOOT,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 12, 2013

No. 305009
Washtenaw Circuit Court
LC No. 97-004357-NF

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

In this no-fault action seeking payment for attendant care benefits and medical expenses, defendant State Farm Mutual Automobile Insurance Company appeals as of right the trial court's order denying its motion for no-fault attorney fees and the trial court's order granting plaintiff Evelyn Proudfoot's motion for no-fault attorney fees and interest. For the reasons stated in this opinion, we affirm.

The no-fault interest and attorney fee issues currently before us stem from no-fault litigation between the parties that has been ongoing since plaintiff filed her original complaint in November 1997. The instant appeal originated in February 2006, when plaintiff moved to reinstate the case due to defendant's alleged refusal to pay attendant care benefits. The trial court granted plaintiff's motion and the case was reinstated. On March 16, 2006, plaintiff filed an amended complaint alleging breach of contract on the basis of defendant's insurance agreement with the person who injured plaintiff and also requested declaratory relief to determine the amount of attendant care, medical expenses, no-fault interest, and actual attorney fees owed to plaintiff.

The case proceeded to trial, during which plaintiff argued that defendant was liable for attendant care expenses, mileage expenses incurred by plaintiff when traveling to medical appointments, unpaid medical expenses including gauze, dressing, pain relief prescriptions, and pain medication, reimbursement for a lift chair, and interest for defendant's alleged unreasonable delay. Defendant argued that plaintiff failed to provide reasonable proof of her claims. During closing arguments, plaintiff's attorney asked the jury to award \$381,566.86 in allowable expenses and \$100,292.79 in interest.

At the conclusion of the six day trial, the jury returned a verdict finding that \$27,764.86 of allowable expenses were incurred by plaintiff arising out of the accidental bodily injury. The jury further found that plaintiff was entitled to interest on the overdue allowable expense benefits in the amount of \$289.17. The jury verdict form had only two questions: (1) Were allowable expenses incurred by or on behalf of the plaintiff arising out of an accidental bodily injury? And (2) Was payment for any of the expenses which the plaintiff was entitled overdue? Under both questions the form instructs that if the answer is “yes,” the jury must specify the amount of allowable expenses and interest owed by defendant. The form does not require the jury to itemize the allowable expenses; thus, there is no place on the form for the jury to specify which particular allowable expenses were owed to plaintiff or which particular expenses were overdue.

Following the announcement of the jury’s verdict, plaintiff moved for entry of judgment for no-fault attorney fees and taxable costs. Specifically, plaintiff stated that she was asking the trial court to award no-fault attorney fees pursuant to MCL 500.3148 for the unreasonable denial and/or delay of payment of benefits. After hearing arguments from both parties regarding the motion, the trial court entered its order and opinion granting plaintiff’s request for attorney fees and costs. Thereafter, the trial court entered a final judgment granting plaintiff \$27,764.86—the amount of the jury awarded benefits—and no-fault interest in the amount of \$289.17 plus interest accruing on the entire jury award until paid. The trial court further ordered taxable costs in the amount of \$19,767.20, and attorney fees in the amount of \$251,689. Finally, the trial court ordered that judgment interest shall apply to the entire judgment from the date of the filing of the amended complaint until paid.

After entry of the judgment, defendant moved the trial court for no-fault attorney fees under MCL 500.3148(2). Following a hearing, the trial court denied the motion on the record. Defendant now appeals as of right the trial court’s award of attorney fees and no-fault interest in plaintiff’s favor and the trial court’s denial of its request for attorney fees.

On appeal, defendant first argues that the trial court erred by awarding plaintiff attorney fees pursuant to MCL 500.3148(1).

A trial court’s decision to grant or deny a motion for attorney fees presents a mixed question of fact and law. *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 693, 760 NW2d 574 (2008). This Court reviews the trial court’s findings of fact for clear error, and questions of law de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128, 748 NW2d 265 (2008). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made.” *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296, 769 NW2d 234 (2009) (citation and quotation marks omitted). However, this Court reviews for an abuse of discretion a trial court’s ultimate decision whether to award attorney fees. *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.” [*Brown v Home-Owners Ins Co*, 298 Mich App 678, 689-690; 828 NW2d 400 (2012)].

Further, in regard to no-fault attorney fees under MCL 500.3148(1), “[w]hat 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.” *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 514; 791 NW2d 747 (2010).

MCL 500.3148(1) provides:

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.

There are two prerequisites for the award of attorney fees under MCL 500.3148(1). *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008). First, the benefits must be overdue, meaning they were “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). See also *Moore*, 482 Mich at 517. “If a claimant establishes the first prerequisite, a rebuttable presumption arises regarding the second.” *Brown*, 298 Mich App at 690. The burden of justifying refusal or delay is on the insurer. *Id.* at 691. A refusal to pay benefits may be justified by proof that the claim presented a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Id.* The ultimate determination that an insurer owed benefits to the claimant does not alone establish that the delay or refusal was unreasonable. *Id.* The trial court must still “examine the circumstances as they existed at the time the insurer made the decision, and decide whether that decision was reasonable at that time.” *Id.* “An insurer’s initial refusal to pay no-fault benefits can be deemed reasonable even if it is later determined that the insurer was required to pay those benefits.” *Tinnin*, 287 Mich App at 516, quoting *Moore*, 482 Mich at 526.

Further, with respect to a no-fault attorney fee award, *Moore* and *Tinnin* discuss whether and under what circumstances apportionment of the fee award is necessary when the jury’s verdict indicates that not all awarded allowable expenses were overdue.

In *Moore*, 482 Mich at 511, 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 \$98.71 penalty interest award represented exactly 12 percent of one week of the work loss award; thus, the Court concluded that it was clear that the jury determined that only one week of the work loss benefits specifically were overdue. *Id.* at 518-519. Thus, the Court held that “[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, we conclude that those benefits do not qualify as overdue pursuant to MCL 500.3142(2).” *Id.* at 512. Accordingly, *Moore* held that only the amount of benefits on which interest is awarded can be considered overdue, and thus, attorney fees must be apportioned because attorney fees may only be awarded for hours spent recovering the portion of the awarded benefits that were deemed overdue by the jury. *Id.* at 512, 525.

However, in *Tinnin*, this Court held that the trial court did not err by declining to apportion the attorney fee award despite the fact that the jury did not find all the benefits to be overdue because the record supported the trial court's decision that all of the attorney's time for which the plaintiff sought compensation was sufficiently related to securing the overdue benefits. *Tinnin*, 287 Mich App at 521-522. Accordingly, this Court in *Tinnin* concluded that it would not order apportionment of the plaintiff's attorney fee award because MCL 500.3148(1) did not "unambiguously require" apportionment. *Id.* at 522.

Thus, based on *Moore* and *Tinnin*, attorney fees may be awarded only for hours spent recovering benefits deemed overdue by a jury, and fees must be apportioned when it is clear that some of an attorney's time was spent pursuing benefits that were not deemed overdue. However, attorney fees need not be apportioned when the sum of an attorney's time was sufficiently related to securing overdue benefits, even when a jury declines to find that all the benefits were overdue.

In this case, the jury determined that at least some of the benefits were overdue as part of its verdict. The jury verdict form stated that allowable expenses that were not paid by defendant were incurred by plaintiff in the amount of \$27,764.86. The jury verdict form also stated that the payment for some of those expenses was overdue and plaintiff was entitled to \$289.17 in interest for the overdue benefits. Unlike the verdict in *Moore*, the jury verdict in this case did not specify which benefits it determined defendant was liable for; thus, it is not possible in this case to determine which benefits the jury determined were overdue.

On appeal, defendant challenges the trial court's award of attorney fees and the jury's interest award based on the jury's finding that some of the benefits were overdue. In regard to the attorney fee award, defendant specifically maintains that its denial of plaintiff's medical mileage claim was reasonable in light of the bona fide factual uncertainty regarding whether payment had to be in U.S. dollars or British pounds. On these grounds, defendant asserts that no attorney fees should have been awarded because its delay was reasonable. Alternatively, defendant asserts that any attorney fees awarded must be apportioned so that plaintiff receives only the fees related to recovery of the medical mileage claim. Similarly, defendant maintains that the jury erred by concluding the medical mileage benefits were overdue because it paid a reasonable amount toward plaintiff's mileage claim; therefore, the claim could not be overdue as a matter of law. Accordingly, defendant argues, interest should not have been awarded because no benefits were actually overdue.

All of defendant's arguments on appeal rely on its claim that the jury determined that the medical mileage benefits were the only overdue benefits. Defendant maintains that the jury included medical mileage in its award of allowable expenses, and that medical mileage was the only expense that the jury determined was overdue. The basis for defendant's position is an alleged statement made by one of the jurors to the trial court after the trial was over. However, this statement is not part of the record on appeal. Our review is limited to the record established by the trial court, and a party may not expand the record on appeal.¹ *Sherman v Sea Ray Boats*,

¹ Nevertheless, we note that defendant does not offer any tangible evidence of the juror's statement or the basis for the jury's verdict in the form of an affidavit or other documentation.

Inc., 251 Mich App 41, 56; 649 NW2d 783 (2002). The record itself does not support defendant's argument because it contains no documentation regarding the basis for the jury's verdict. Moreover, the verdict form in this case does not specify which allowable expenses the jury found plaintiff was entitled to, nor does it specify which expenses the jury concluded were overdue. Thus, while defendant is correct that the amount of interest awarded clearly indicates that the jury did not find that all the awarded allowable expenses were overdue, there is no evidence to suggest which specific allowable expenses the jury concluded were overdue.

Further, defendant's reliance on *Moore* is misplaced because unlike the verdict in *Moore*, where the jury specified the amount awarded for each particular allowable expense, the jury verdict in this case does not identify which allowable expenses plaintiff was entitled to; nor does it specify which allowable expenses were overdue. Thus, we conclude that apportionment is not possible in this case because there is no basis on which to apportion the fees in light of the fact that the jury's verdict does not identify which benefits were awarded or which benefits were overdue. Therefore, because all of defendant's arguments regarding the interest award and the trial court's attorney fee award are premised on defendant's unsupported medical mileage benefits assertion, we must conclude that the trial court did not clearly err by finding that defendant failed to rebut the presumption of unreasonableness, that its ultimate attorney fee award was not an abuse of discretion,² and that there was no legal error in regard to the jury's interest award.

Finally, defendant argues that the trial court abused its discretion by denying its motion for attorney fees under MCL 500.3148(2). Specifically, defendant maintains that it is entitled to attorney fees because plaintiff's claim was excessive, as demonstrated by the fact that the jury awarded plaintiff only a small percentage of what plaintiff requested.

MCL 500.3148(2) provides:

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. To the extent that personal or property protection insurance benefits are then due or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant for any amount of a fee awarded against him and not offset in this way or otherwise paid.

During closing arguments, plaintiff's attorney specifically discussed the verdict form and asked the jury to award \$381,566.86 in allowable expenses and \$100,292.79 in interest. The jury actually awarded \$27,764.86 in allowable expenses and \$289.17 in interest.

Rather, defendant merely asserts that the trial court informed the parties that a juror informed it that the jury determined that only the medical mileage benefits were overdue.

² We note that defendant makes no argument in regard to the reasonableness of the fee awarded itself on appeal.

To support its claim of entitlement to attorney fees, defendant cites two nonbinding cases: *Healthcall of Detroit, Inc v State Farm Mutual Auto Ins Co*, 632 F Supp 2d 676 (ED Mich, 2009) and *Robinson v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket Nos. 244824 and 245363).³

In *Healthcall* the court held that the defendant was entitled to apportioned attorney fees because the jury specifically found that six of the plaintiff's invoices were fraudulent. *Healthcall*, 632 F Supp 2d at 682-683. Apportionment was "workable" in that case because the jury specifically identified which invoices it determined were fraudulent and which it determined were legitimate. *Id.* at 683. Thus, on the basis of the jury's specific finding of fraud, the trial court granted attorney fees under MCL 500.3148(2). We find this case distinguishable from *Healthcall* because here the jury did not make any explicit findings in regard to fraud, and defendant does not even argue that plaintiff's claims were fraudulent; rather, defendant maintains plaintiff's claims were excessive. Thus, *Healthcall* does not support defendant's position.

In *Robinson*, a panel of this Court held that "a \$4,000 verdict on an \$82,000 claim is evidence that the jury found that plaintiff's claim 'was in some respect fraudulent or so excessive as to have no reasonable foundation.'" *Robinson*, unpub op at 1, quoting MCL 500.4148(2). Without further analysis, this Court in *Robinson* remanded for an award of reasonable attorney fees.

We do not find *Robinson* persuasive, and instead, agree with the reasoning of a more recent unpublished opinion of this Court. In *Richard v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2012 (Docket No. 298650), the defendant argued that the trial court's denial of its motion for attorney fees under MCL 500.31478(2) was an abuse of discretion when the plaintiff asked for \$6 million during case evaluation (lowering the request to \$463,000 during discovery), and the jury only awarded \$40,704.20. *Id.* at 6. Thus, the defendant argued, as does defendant in this case, that the disparity between the jury award and what the plaintiff claimed she was entitled to is evidence that the plaintiff's claim was in part fraudulent or excessive. *Id.* This Court disagreed with the defendant and affirmed the trial court's denial of attorney fees. *Id.* This Court explained:

The mere fact that an ultimate jury award is much less than what a plaintiff claims can be relevant to whether the initial claim was fraudulent or excessive, but it is not dispositive. Defendant relies on *Robinson v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2004 (Docket Nos. 244824 & 245363). Of course, unpublished opinions are only persuasive authority and are not binding on this panel. MCR 7.215(C)(1). In fact,

³ "Decisions from lower federal courts are not binding but may be considered persuasive." *Truel v City of Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010). "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010).

we disagree with the analysis employed in *Robinson*. The *Robinson* Court agreed with the defendant that a \$4,000 verdict on an \$82,000 claim “is evidence” that the jury found that plaintiff’s claim was in some respect fraudulent or so excessive as to have no reasonable foundation. *Robinson*, unpub op at 1. The Court then, without any further analysis, remanded for an award of a reasonable amount of attorney fees. *Id.*

We find that simply remanding without any further analysis was not appropriate because that action did not give the proper deference to the trial court’s findings of fact. Specifically, the *Robinson* panel never considered whether this “evidence” was of such a nature that it left them with a definite and firm conviction that the trial court erred in its conclusion. We do not disagree that a disparity in the amount ultimately awarded and the amount initially sought is *evidence* that the initial claim may have been excessive. But that is entirely different from holding that a disparity *conclusively establishes* that a claim was excessive or fraudulent, necessitating an award of attorney fees. As a result, we do not find *Robinson* persuasive. [*Id.* at 6-7 (emphasis in original).]

The *Richard* panel noted that the trial court denied attorney fees, finding that the plaintiff’s failure to “get everything one wanted” did not automatically render her claim fraudulent or excessive. *Id.* at 6. This Court held that it was not left with a definite and firm conviction that a mistake was made. *Id.*

Similarly, in this case, the disparity between plaintiff’s claim and the jury verdict is not determinative of whether plaintiff’s claim was excessive; rather, it is but one factor to consider. The primary issue in this case was whether plaintiff was entitled to payment for attendant care. Plaintiff and her husband testified regarding plaintiff’s needs and what her husband, who provided the care, did for plaintiff. The deposition of a prosthetics expert who worked with plaintiff was also presented, as well as the testimony of a nurse and a doctor who examined plaintiff for purposes of the trial. Essentially, all of plaintiff’s medical care was provided by doctors in Great Britain, and it is possible that the medical proofs had less of an impact on the jury due to the cultural differences between the British and American systems. Defendant presented contrary testimony to support its argument that plaintiff did not need attendant care, and argued that the fact that plaintiff’s submitted forms lacked detail proved that plaintiff did not really need attendant care. Thus, in light of the conflicting medical and other opinions presented to the jury, the eventual verdict awarding much less than plaintiff requested is not surprising, and does not require the conclusion that plaintiff’s claims were excessive. The fact that the jury awarded plaintiff anything in the face of defendant’s claims that plaintiff was not entitled to any benefits is evidence that plaintiff’s claims were not excessive. Therefore, we affirm the trial court because the record does not support the conclusion that the trial court clearly erred by concluding that the claims were not fraudulent or excessive. Accordingly, the trial court did not abuse its discretion by denying defendant’s motion for attorney fees.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck