STATE OF MICHIGAN

COURT OF APPEALS

CHERYL CRUMP, Individually and as Co-Guardian for JAMES W. WARREN, and JOHN CRUMP,

Plaintiffs-Appellants/Cross-Appellees,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
January 16, 2007

No. 263406
Genesee Circuit Court
LC No. 02-072839-NF

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiffs Cheryl and John Crump were paid attendant care service benefits for years before filing a complaint to challenge the difference between the amount of benefits paid and a reasonable amount for such services. Plaintiffs also alleged that defendant's representatives advised them that benefits were not payable to family members and added a claim of fraud shortly before trial. Following a jury trial, plaintiffs were awarded $51,695 for attendant care service benefits, but the jury rendered a verdict of no cause of action with regard to the fraud claim. Plaintiffs moved for statutory attorney fees, but the trial court denied the request. Defendant moved for attorney fees based on the case evaluation rule. The trial court granted defendant's motion, but only awarded a portion of the attorney fee requested. Plaintiffs appeal as of right, and defendant filed a cross appeal to challenge the amount of the award of the attorney fee. We affirm.

Plaintiffs first allege that the trial court erred in granting summary disposition of the claims brought by plaintiffs on behalf of James W. Warren (Warren). Plaintiffs also allege that the trial court erroneously imposed a requirement that any underpayment by defendant negatively impacted Warren's care. We disagree. Summary disposition decisions are reviewed de novo on appeal, viewing the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of

disputed fact exists for trial. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court is not bound by a party's choice of labels for her cause of action because to do so would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989).

Although plaintiffs alleged that Warren's cause of action was for breach of contract, review of the complaint reveals that plaintiffs are not seeking to challenge a term of an insurance policy. Rather, plaintiffs are challenging the amount of the payment for attendant care services. It is undisputed that Warren did not incur these costs. That is, he did not make payment to plaintiffs and file suit to recoup the monies paid in breach of his own contract. Rather, plaintiffs are seeking the difference between the amounts paid and the amounts desired. However, MCL 500.3157 provides that a person lawfully rendering treatment to an injured person for accidental bodily injury covered by personal protection insurance may charge a reasonable amount for the services rendered. Additionally, MCL 500.3107(1) provides that personal protection insurance benefits are payable for reasonably necessary services for an injured person's care. Plaintiffs, as the providers of the services, have brought their own claim for the difference between the amount paid for the attendant care services and the amount that they deem reasonable. Accordingly, Warren's claim is merely a duplication of the claim raised by plaintiffs. *Johnston, supra*. Therefore, the trial court did not err in granting defendant's motion for summary disposition of the claim raised on Warren's behalf.

Plaintiffs also allege that the trial court imposed an additional requirement not contained within the no-fault act, MCL 500.3101 *et seq*., when it required them to prove that the services Warren received were of a lesser quality or quantity. This contention is without merit. The trial court did not impose a new requirement on plaintiffs, but rather, noted that there was no distinction between the services claimed by Warren and those claimed by plaintiffs. That is, plaintiffs did not allege that they were unable to provide necessary services as a result of the amount of attendant care benefits paid. Thus, there was no lapse in the services afforded Warren based on the amount of attendant care services paid.[1]

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[1] Plaintiffs contend that the decision rendered in *Hatcher v State Farm Mutual Auto Ins Co*, 269 Mich App 596; 712 NW2d 744 (2006), demonstrates that the cause of action belongs to Warren. However, there are key distinctions between the facts in this case and *Hatcher*. The cause of action alleged in *Hatcher* was one for personal protection insurance benefits. In the present case, plaintiffs were pursuing a claim for breach of contract on behalf of Warren. Moreover, there was a complete failure to make payment of benefits in *Hatcher*. However, in the present case, defendant paid benefits for an extensive period of time, and plaintiffs' challenge to the payment of benefits was based on the amount only. Furthermore, even if the trial court erred in classifying the action as direct or derivative, the remedy at this stage of the proceeding following judgment would be to allow amendment to conform to the evidence. MCR 2.118(C). Accordingly, this claim of error does not provide plaintiffs any relief.

Next, plaintiffs allege that the trial court erred in denying their request for attorney fees pursuant to the no-fault act, MCL 500.3148. We disagree. The decision to award or deny attorney fees under MCL 500.3148(1) is reviewed for clear error. *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 628; 550 NW2d 580 (1996). Clear error occurs only when the appellate court is left with a definite and firm conviction that a mistake has been made. *Herald Company, Inc v Eastern Mich University Bd of Regents*, 475 Mich 463, 470-471; 719 NW2d 19 (2006). MCL 500.3148 addresses attorney fees based on the no-fault act and provides, in relevant part:

> (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.

When interpreting a statute, it is presumed that the Legislature intended the plainly expressed language, and judicial interpretation of the statute will not occur. *Beach, supra* at 629. In *Beach*, this Court explained the underlying rationale of MCL 500.3148:

> The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. If the insured's refusal or delay in payment is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, the refusal or delay will not be found unreasonable under MCL 500.3148(1) …. Where such a delay or refusal exists, however, a rebuttal presumption of unreasonableness arises, and the insurer has the burden of justifying the refusal or delay. [*Beach, supra* at 629 (citations omitted).]

The purpose of the no-fault act is to ensure that benefits are promptly paid to the injured party. In the present case, there is no dispute that benefits were paid on behalf of Warren for years. However, after years of accepting payment, plaintiffs claimed that the amount of payment was unreasonable. Plaintiffs do not allege that services failed to be provided because of the payment amount. MCL 500.3148(1) provides for an attorney fee if the trial court finds that the insurer unreasonably refused to pay the claim. However, that provision is not implicated because it is admitted that defendant did make payment. The second portion of MCL 500.3148(1) provides for an attorney fee if defendant unreasonably delays in making *proper* payment. The second provision is not examined in isolation, but rather, it must be determined whether the delay in payment was the product of legitimate questions of statutory construction, constitutional law, or bona fide factual uncertainty. *Beach, supra*. In the present case, legitimate questions of statutory construction were presented. Plaintiffs raised the issue of reasonableness retroactive to the commencement of payment in the mid-1970s when defendant had been paying for attendant care services for years. Defendant was entitled to raise the question of statutory interpretation regarding the timeliness of the claim. Further, while plaintiffs asserted that it had admissions from defendant's representative that the amount plaintiffs received was a gross underpayment, other evidence from defendant indicated that there was a disagreement among staff that was supported by comparable adult foster care facilities. Under the circumstances, there was a bona fide factual dispute regarding the reasonableness of payment amounts. Therefore, the trial court did not clearly err by denying plaintiffs' request for statutory attorney fees. *Beach, supra*.

Plaintiffs rely on the jury award to conclude that there was a delay in proper payment that was unreasonable. However, the statute provides for an attorney fee when "the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." The plain language of the statute provides for an attorney fee award based on a judicial finding. The plain language of the statute does not provide that a jury award alone is sufficient to satisfy the judicial finding. Therefore, plaintiffs' reliance on the jury award as a basis for attorney fees is without foundation in the statute.

Plaintiffs next allege that the trial court erred in ruling that the Advancing Claims Excellence (ACE) documents were inadmissible. However, the determination of the admissibility of the ACE documents was the subject of a prior appeal. Whether the law of the case applies presents a question of law that is subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

In Docket No. 256558, plaintiff filed an application for leave to appeal the trial court's evidentiary ruling regarding the ACE documents, and the application was granted. In the trial court and on appeal, defendant moved for a stay of proceedings until this Court could rule on the application. Plaintiffs opposed the motion for stay on both occasions, and the case proceeded to trial. The opinion issued in Docket No. 256558 was released after the completion of trial and concluded that the evidentiary issue was waived when plaintiff insisted on proceeding to trial.[2]

An appellate court's decision on a particular issue binds both the lower courts and other appellate panels in subsequent appeals of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). An exception to the application of the law of the case doctrine is invoked when there is a need for independent review of constitutional facts. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991). Another exception is also created where there is an intervening change in the law. *Freeman v DEC Int'l Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). Plaintiffs do not allege that either exception applies. Because we are bound by the prior appellate court decision, this challenge is without merit.

Plaintiffs next allege that the trial court abused its discretion when it denied the motion to call rebuttal witnesses. We disagree. "Admission of rebuttal testimony rests within the sound discretion of the trial judge and will not be disturbed unless a clear abuse is shown." *Nolte v Port Huron Area School District Bd of Education*, 152 Mich App 637, 644-645; 394 NW2d 54 (1986). The relevance of rebuttal evidence that contradicts or negatives evidence offered by the adverse party is tested by whether it is justified by the evidence which it is offered to rebut. *Id.* at 645.

Robert Swartz handled Warren's claim in the mid-1970s when he worked for defendant. He testified, in deposition, that he had contact with Warren's mother and attorneys representing the family. Defendant could not make independent decisions regarding Warren's placement.

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[2] *Crump v State Farm Mutual Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2005 (Docket No. 256558).

Instead, a decision was made in conjunction with the family. Although it was initially believed that Warren would live with his mother, he experienced episodes of violence, and he was placed in a specific foster care facility that was requested by his mother. Later, Warren was moved from a care facility to the home of his uncle. However, before the transfer could be approved, the decision was submitted to a claims committee. Swartz recommended to the committee that the transfer occur, and the committee agreed. Swartz testified that relatives would not be paid for home care if the injured family member required specialized care that needed to be provided by a medical professional. If medical expertise from a special facility was required, it had to be determined whether the family was capable of providing sufficient care before payment could be made.

The day after this deposition testimony was read into the record at trial, plaintiffs attempted to call three witnesses who would testify regarding their experiences with defendant and the representations that were made regarding payment for care by relatives. The trial court denied the request to admit rebuttal testimony, noting that the deposition had been taken two weeks before trial began. Despite knowledge of the content of Swartz' testimony, plaintiffs failed to notify the court of the need to add rebuttal witnesses. The trial court also noted that one of the witnesses was known to counsel for plaintiffs because of prior representation.

On this record, we cannot conclude that the trial court's decision was a clear abuse of discretion. *Nolte*, *supra*. Although the deposition testimony of Swartz was taken a mere two weeks before trial, the claims record was available to plaintiff. In fact, Swartz did not have independent recollection of his dealings with Warren's family and attorneys in the 1970s and needed to utilize the claims record to refresh his memory regarding the handling of the case. Moreover, the offer of proof submitted by plaintiffs failed to delineate whether the factual scenario offered by the rebuttal witnesses was similar to plaintiffs' experience and whether the same claims representatives were involved. Under these circumstances, a clear abuse was not established.[3]

Defendant cross appeals the trial court's award of attorney fees, alleging that the decision constituted an abuse of discretion when the trial court did not articulate legitimate reasons for failing to award the actual amount of attorney fees requested. We disagree. The amount of case

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[3] Plaintiffs also asserted that, although intent was normally irrelevant, in this case intent was at issue, and the rebuttal testimony was necessary to demonstrate fraudulent intent, scheme, or plan. However, case law provides that there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff, and the truth has not been prohibited by the defendant. *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). Swartz testified that, at the time of his involvement in the Warren case file, the family was represented by two attorneys. This was noted in the file because communications generally had to be directed to the attorney when the client was represented. Under the circumstances, irrespective of the representations by defendant, plaintiffs were in a position to know of the statutory entitlement to benefits based on their representation by an attorney. Moreover, there was no offer of proof to indicate whether the rebuttal witnesses were represented by counsel during the relevant time period.

evaluation sanctions is reviewed for an abuse of discretion. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 520; 664 NW2d 263 (2003). An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes. *Radeljak v Daimler Chrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). A party who rejects case evaluation is subject to sanctions if he fails to improve his position at trial. *Elia v Hazen*, 242 Mich App 374, 378; 619 NW2d 1 (2000). A party who rejects an evaluation and does not improve his position after the action proceeds to verdict must pay the opposing party's actual costs. MCR 2.403(O)(1). If sanctions are appropriate, the actual costs to be charged are the costs taxable in any civil action plus a reasonable attorney fee. MCR 2.403(O)(6); *Dessart v Burak*, 470 Mich 37, 40; 678 NW2d 615 (2004).

The trial court did not grant the full amount of attorney fees requested. In determining the amount of attorney fees, the trial court indicated that it had decided early on in the case that a narrow view of attorney fees would be taken in light of the "legal maneuverings" that had transpired by both parties in the case. The trial court also cited to the difficulty of the case, the defense's refusal to participate in any settlement, the court rulings that altered the nature of the case, and the lack of a complete itemization from the defense. The trial court also questioned the contention that a significant amount of preparation time was required, by stating that the case had been "overworked," and the case could have been tried two years earlier.

Following review of the record, we cannot conclude that the trial court abused its discretion. *Elia, supra*. The parties were repeatedly before the trial court for hearings on discovery matters, and orders compelling defendant to produce were entered. Additionally, the parties did engage in extensive gamesmanship. Although defendant filed a motion for partial summary disposition addressing the one-year back rule, defendant filed a motion in limine covering the same subject matter. Plaintiffs indicated that they were filing an amended complaint that would add a claim of fraud, but withdrew the motion, then refiled the motion shortly before a scheduled trial date. The lack of a specific itemization was also troubling. Furthermore, case law provides that defendant is entitled to costs plus a *reasonable* attorney fee; defendant is not entitled to the actual amount of attorney fees requested. *Dessart, supra*. Under these circumstances, the trial court did not abuse its discretion.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Pat M. Donofrio