STATE OF MICHIGAN

COURT OF APPEALS

LELTON NAIL, Guardian for DENISE NAIL, a Protected Person, Plaintiff-Appellant, v FARMERS INSURANCE EXCHANGE, Defendant-Appellee.	UNPUBLISHED October 18, 2011 No. 299593 Oakland Circuit Court LC No. 2007-084566-NF

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right the trial court's order denying plaintiff's motion for attorney fees pursuant to MCL 500.3148(1). We affirm.

On November 9, 2006, plaintiff was stopped at a red light and her vehicle was rear ended by another vehicle traveling in excess of 55 miles per hour. As a result, she suffered from what her treating doctor concluded was a closed head injury. He prescribed 24-hour attendant care, which her husband provided; defendant initially agreed to pay for this attendant care.

In July 2007, defendant terminated plaintiff's benefits. This decision resulted from a report provided by an independent medical examiner, Dr. Thomas J. Gola, who had examined plaintiff and reviewed her medical records.

The matter eventually proceeded to trial and plaintiff was awarded more than $60,000 for allowable expenses and interest on overdue benefits. Plaintiff subsequently moved for attorney fees pursuant to MCL 500.3148(1). The trial court ultimately denied the motion, finding that defendant's termination of benefits was reasonable. In particular, the trial court's opinion and order denying the motion stated:

[1] Lelton Nail is the named plaintiff in this matter in his capacity as guardian for his wife Denise Nail. However, references to "plaintiff" should be read to designate Denise unless otherwise noted.

> In this case, the defendant retained Dr. Gola to determine whether the plaintiff suffered from "any neurological deficits that would be consistent with traumatic brain injury resulting from this accident." Evaluation Group Report, May 1, 2007, p. 1. Dr. Gola observed several inconsistencies in the plaintiff's test performance. He concluded that the inconsistencies provided "multiple indicators that non-neurological factors had significant bearings on these results. As such, there is significant concern that Ms. Nail's test scores underestimate her actual ability status." Id. at 10. He found "no indication of any significant deterioration in cognitive status ... due to possible traumatic brain injury" and a pattern of test performance that was "inconsistent with central motor system dysfunction associated with mild traumatic brain injury consequences." Id. at 11. He concluded that the plaintiff probably suffered a concussion in the accident, but that in this case "it would be highly unlikely that residual, neuropsychological deficits would arise from a concussive injury." Dr. Gola's report was inconclusive in the sense that he did not assign a specific reason to the plaintiff's unusual test results. However, he was quite clear that he did not think that the plaintiff suffered a serious and continuing neurological injury due to the accident.
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> Based on Dr. Gola's reports, the Court would conclude that it was reasonable for the defendant to cease making payments of no-fault benefits. The fact that the jury found that some payments were overdue does not change this conclusion. Dr. Gola's report gave rise to a legitimate question of factual uncertainty that reasonably supported the decision to deny further payments.

"The trial court's decision to grant or deny attorney fees under the no-fault act presents a mixed question of law and fact." *Univ Rehab Alliance, Inc v Farm Bureau*, 279 Mich App 691, 693; 760 NW2d 574 (2008). "What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). We review questions of law de novo and questions of fact for clear error. *Id*. A finding is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

The no-fault act, MCL 500.3101 *et seq.*, was intended to provide insured persons who have sustained injuries in automobile accidents with "assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). To ensure prompt payment, the act includes a provision for the award of attorney fees. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 334-335; 512 NW2d 74 (1994). MCL 500.3148(1) specifically provides:

> [a]n 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.

A refusal to pay or delay in payment is not unreasonable if, among other reasons, it is based on a bona fide factual uncertainty. *Moore v Secura*, 482 Mich 507, 520; 759 NW2d 833 (2008). As noted earlier, the trial court concluded defendant's decision to terminate benefits was reasonable, specifically stating that Dr. Gola's reports "gave rise to a legitimate question of factual uncertainty." This finding was not clearly erroneous.

We are not convinced that the trial court made a mistake in finding that, at the time the termination of benefits decision was made on July 12, 2007,[2] there was a bona fide factual uncertainty about plaintiff's entitlement to benefits. Indeed, the May 1, 2007, report from Dr. Gola, as well as his June 29, 2007, follow-up correspondence to defendant, contain evidence that there was, in at least one expert's view,[3] a legitimate concern for whether plaintiff actually suffered from a traumatic brain injury. The May 1, 2007 report outlines the complete history provided to Dr. Gola, the medical tests and examinations that plaintiff had had up to that date, and the results of a battery of tests performed by plaintiff for Dr. Gola. Although Dr. Gola did not conclude at that time that plaintiff had not suffered a traumatic brain injury, he specifically outlined why he questioned any such diagnosis. Consequently, the trial court's finding was not clearly erroneous.

Michigan law requires that the insurer "must evaluate that evidence [provided by the plaintiff] as well as evidence supplied by the insurer's doctor before making a reasonable decision regarding whether to provide the benefits sought." *Moore*, 482 Mich at 523. There is nothing in the record to suggest that defendant did not engage in such an analysis, and so that trial court's decision is affirmed.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

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[2] We do conclude that the trial court improperly considered an addendum report provided by Dr. Gola in 2008, as in deciding whether an insurer's decision to terminate or deny benefits is reasonable, the focus must be on the time that the decision was made. See *Ross*, 481 Mich at 11; *Ivezaj v Auto Club Ins Assoc*, 275 Mich App 349, 355; 737 NW2d 807 (2007). For this reason, we also disregard defendant's extensive references in its brief on appeal to the findings of other experts engaged in evaluating plaintiff *after* Dr. Gola's initial examination and the subsequent decision on defendant's part to discontinue plaintiff's benefits.

[3] Dr. Gola's report does contain information that other prior physicians had made some findings that contradicted a conclusion that plaintiff suffered a traumatic brain injury.