STATE OF MICHIGAN

COURT OF APPEALS

SAMANTHA NORRIS-JURY, Plaintiff-Appellee,	UNPUBLISHED May 20, 2014
v	No. 311148 Ingham Circuit Court
STATE FARM INSURANCE COMPANY, Defendant-Appellant.	LC No. 09-000046-NF

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

In this action for no-fault benefits, defendant appeals by right the trial court's June 14, 2012 order vacating an April 20, 2011 judgment of no cause of action entered after a jury trial and special verdict that determined plaintiff did not sustain an accidental bodily injury as a result of the automobile accident. The trial court entered a "new" judgment that makes no reference to the jury's verdict, limits judgment in favor of defendant to specified surgical expenses, and otherwise renders judgment for plaintiff based on defendant's alleged admissions. Defendant also appeals two related orders the trial court entered, one requiring that defendant pay Medicaid and plaintiff for certain prescription drug expenses and a second awarding plaintiff attorney fees. We reverse and vacate the "new" judgment and the trial courts's two other June 2012 orders and reinstate the original April 20, 2011 judgment of no cause of action.

I. VACATING THE ORIGINAL JUDGMENT AND ENTERING A NEW ONE

A. STANDARDS OF REVIEW

Defendant argues and we agree that the only procedural basis for the trial court to grant plaintiff relief from the original judgment of no cause of action is found in MCR 2.612. "A trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002). The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). Any factual findings of the trial court in ruling on a motion are reviewed for clear error. MCR 2.613(C); *Vittiglio v Vittiglio*, 297 Mich App 391, 398; 824 NW2d 591 (2012). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Bronson Methodist Hosp v Home-Owners Ins Co*, 295 Mich App 431, 442; 814

NW2d 670 (2012). Finally, the construction and application of a court rule presents questions of law this Court reviews de novo on appeal. *Vittiglio*, 297 Mich App 397-398.

B. ANALYSIS

Defendant first argues that plaintiff's motion to settle orders must be considered a motion for relief from judgment, which was not timely filed within one year of judgment as required by MCR 2.612(C)(2).[1] Plaintiff argues that because she alleged fraud as a basis for relief, the one-year time limit does not apply. Plaintiff's argument is without merit. This Court held in *Kiefer v Kiefer*, 212 Mich App 179-182; 536 NW2d 873 (1995), that when a party seeks relief from a final judgment on the basis of fraud, misrepresentation, or other misconduct of the adverse party pursuant to MCR 2.612(C)(1)(c), "the one-year time limit [of MCR 2.612(C)(2)] applies except when the plaintiff brings an independent action that claims either the plaintiff did not have actual notice or there was a fraud on the court." Here, plaintiff did not bring an independent action, so the one-year time limit for filing her motion for relief from judgment applies. But we find that plaintiff timely filed motions in September 2011 alleging essentially the same grounds for relief as plaintiff's untimely motion to settle orders, so the trial court should not be reversed on this basis. On the merits, however, we conclude that the court's decision was an abuse of discretion.

Plaintiff argues in support of the trial court's order vacating the April 20, 2011 judgment and substituting a new amended judgment that the trial court has "unbridled discretion to correct errors" under MCR 2.612(A)(2) and MCR 7.208(A) & (C). But these rules only provide a procedure for correcting an error when an appeal is pending, and plaintiff presents no argument or authority regarding how these rules provide a basis for the trial court's actions in this case. This argument is abandoned because "where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Moreover, the cited rules are patently inapplicable.

Plaintiff also argues that the basis for granting her relief from the original judgment is found in MCR 2.612(C)(1)(c): "Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." When fraud is asserted as the basis for relief from judgment, generally an evidentiary hearing and strict proof of the claim is necessary to grant relief. *Yee*, 251 Mich App at 405; *Kiefer*, 212 Mich App at 179. The allegations of fraud must be specific and relate to a material matter. *Yee*, 251 Mich App at 405; *Baum v Baum*, 20 Mich App 68, 72; 173 NW2d 744 (1969); see also MCR 2.112(B) (in pleading "allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity").

Plaintiff's argument regarding what fraud, misrepresentation, or other misconduct that defendant or defense counsel committed is unclear. In the trial court, plaintiff argued that defense counsel either "misrepresented to that jury as to what this was restricted to and or to this

[1] It should be noted that the one-year time limit of MCR 2.612(C)(2) applies only to reasons for relief stated in MCR 2.612(C)(1)(a) (mistake, inadvertence, surprise, or excusable neglect), (b) (newly discovered evidence), and (c) (fraud, misrepresentation, or other misconduct of an adverse party). See *Rose v Rose*, 289 Mich App 45, 52; 795 NW2d 611 (2010).

court as to what he was stipulating to, or he misrepresented it at the time that he requested the entry of the order. It can't be restrictive at trial, expansive on order." Plaintiff's argument on appeal is even less clear. Apparently, plaintiff contends that defense counsel committed misconduct by narrowing the dispute at trial to plaintiff's knee surgeries. Although the articulated dispute was narrow, the case was tried broadly, and plaintiff submitted a special verdict question to the jury. The jury returned an adverse verdict with broad implications regarding plaintiff's ability to make future claims because it determined she suffered no injury in the accident. Nowhere in plaintiff's argument does she point to a misrepresentation of fact or law by defense counsel that resulted in the jury's verdict or entry of the judgment of no cause of action. Plaintiff does not even come close to alleging fraud.

Fraud requires proof that: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Moreover, "fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Nothing in the record supports that defendant or defense counsel made a material misrepresentation on which plaintiff, the court, or the jury relied resulting in the jury's verdict and the judgment of no cause of action. Indeed, the broad verdict and judgment of which plaintiff complains was the result of how plaintiff's counsel tried the case and the jury's answer in the special verdict form, which she herself submitted to the court and that she helped draft—not any misconduct or fraud by defendant or defense counsel. Applicable by analogy is the rule that appellate relief will not be granted for error of which the purported aggrieved party contributed by plan or negligence. See *Smith v Musgrove*, 372 Mich 329, 331; 125 NW2d 869 (1964); see also, *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

Moreover, the trial court did not find that defendant or defense counsel committed fraud, misrepresentation, or other misconduct that resulted in the jury verdict or in the judgment of no cause of action in accordance with the verdict. Rather, the trial court found that the verdict form was not clear that the only disputed issue related to plaintiff's knees. But the trial court acknowledged that "the jury was instructed that the only issue were the knees and whether or not the knees were injured or aggravated in the accident." Regarding the April 20, 2011 judgment, the court stated "I am setting that order aside, reopening the case, because I don't believe that that order is clear." The court also stated that the judgment "misrepresents the actual stipulation" of defense counsel "that the prescription expenses would be paid." For the stated reasons, the trial court vacated the original no cause judgment, issued a new judgment that removed reference to the jury's finding in the special verdict, limited judgment for defendant to stated expenses, added an alleged admission of defendant regarding plaintiff's other claims, and entered separate orders regarding plaintiff's claims for prescription expenses and attorney fees.

In sum, there is no record evidence to support a finding under MCR 2.612(C)(1)(c) of "[f]raud (intrinsic or extrinsic), misrepresentation, or other misconduct of" defendant or defense counsel to support granting relief from judgment under that subrule. Indeed, the trial court did

not and could not make such a finding. To the extent the trial court attempted to justify its granting plaintiff relief and vacating the original judgment on the basis that the judgment "misrepresents the actual stipulation" of the parties, the trial court clearly erred. The parties' stipulation was a contract to resolve a disputed claim, enforceable according to its plainly expressed terms. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664-665; 770 NW2d 902 (2009). Those terms provided that defendant would pay certain of plaintiff's claims "separate and apart from the lawsuit." Thus, the parties agreed this part of plaintiff's claim would not be part of any judgment entered in the lawsuit. Further, MCR 2.515(B)[2] requires that when a special verdict form is used, "the court shall enter judgment in accordance with the jury's findings," and the original judgment entered here did so. The judgment was not "unclear" because it did not include matters the parties agreed to address "separate and apart from the lawsuit."

The trial court also clearly erred by relying, in part, on an alleged admission of defendant regarding other, non-litigated claims plaintiff asserted that arose from the accident as a basis for granting relief from judgment. While the record supports that defendant voluntarily paid plaintiff's other claims, nowhere in the record is there an admission by defendant of liability. That defendant chose not to dispute and litigate other claims does not amount to an admission of liability. At best, defendant's payment of the other claims might be evidence that defendant believed it was liable for plaintiff's claims of no-fault benefits. See MRE 409 ("Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.") But defendant's payment of plaintiff's other claims is simply not an admission by defendant of its liability. Moreover, including reference to defendant's voluntary payments in the judgment was neither required nor did its absence render the judgment "unclear" so as to justify the trial court's granting relief from judgment.

Finally, plaintiff cites MCR 612(C)(1)(f) as a basis for the trial court's granting her motion for relief from judgment. That subrule provides that the court may relieve a party from a final judgment on the basis of "[a]ny other reason justifying relief from the operation of the judgment." This potentially broad catch-all ground for relief has been circumscribed by many decisions of this Court. In *King v McPherson Hosp*, 290 Mich App 299, 304; 810 NW2d 594 (2010), a special panel quoting *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999), opined:

> In order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. Generally, relief is granted under subsection

[2] The identical subrule was MCR 2.514(B) when the judgment was entered. The special verdict rule was redesignated MCR 2.515 effective September 1, 2011. 489 Mich clxxxvi - clxxxix.

> f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. [Citations omitted.]

Thus, to justify relief from judgment under MCR 612(C)(1)(f) requires "the presence of both extraordinary circumstances *and* a demonstration that setting aside the judgment will not detrimentally affect the substantial rights of the opposing party." *Rose v Rose*, 289 Mich App 45, 58; 795 NW2d 611 (2010) (emphasis added).

In this case, plaintiff satisfied only the first criterion, that MCR 612(C)(1)(a)-(e) do not apply to the circumstances of this case. The trial court's order vacating the original judgment and substituting one that removes the jury's special verdict finding adds matters that the parties agreed would be "separate and apart from the lawsuit," includes an admission of liability by defendant and other findings unsupported by the record or the jury's verdict, and detrimentally affects defendant's substantial rights. Further, no extraordinary circumstance required the granting of relief to achieve justice. *King*, 290 Mich App at 304; *Rose*, 289 Mich App at 58. The case was tried before a jury which did not believe plaintiff's testimony and returned its verdict on a special verdict form that plaintiff's counsel requested and drafted. The original judgment was entered in accordance with the jury's verdict as required by then MCR 2.514(B). There is no injustice in allowing the judgment to stand. To the extent the trial court relied on MCR 612(C)(1)(f) to grant relief and vacate the original judgment of no cause of action, the trial court abused its discretion. *Rose*, 289 Mich App at 49; *Yee*, 251 Mich App at 404.

It follows that the trial court also erred by entering a new "judgment after trial" that included matters for which there is no legal or factual support, such as (1) a purported admission of liability by defendant, (2) a determination of a specified dollar amount "for knee aggravation surgeries . . . to date" for which judgment was entered for defendant, and (3) omission of any reference to the jury's finding that plaintiff did not suffer an accidental bodily injury in the automobile accident.

In addition, the trial court erred by entering a separate order regarding the alleged prescription and Medicaid expenses that the parties agreed would be handled "separate and apart from the lawsuit." As discussed more fully regarding the order for attorney fees, no evidence indicated that defendant intended to refuse or delay honoring its agreement for any reason other than plaintiff's failure to substantiate her claims and to resolve whether the Department of Health would assert a lien for Medicaid payments, and, if so, the amount.

A review of the record indicates that the only injury before the jury was plaintiff's claim that the accident aggravated a preexisting limitation in each of her knees. The jury was never asked to determine if plaintiff suffered injury to any other part of her body and never made any such finding. Accordingly, it was improper for the trial court to enter the June 13, 2012 judgment stating that "[d]efendant admitted they were liable to the Plaintiff on all of her other injuries" and awarding attorney fees because defendant paid those sums. By the same token, any attempt by defendant to assert, based on the language of the verdict form, that the jury concluded that plaintiff had not been injured in any fashion whatsoever is equally mistaken. The jury was explicitly instructed to determine only whether plaintiff had suffered a knee injury or knee aggravation. Just as plaintiff is not entitled to a judgment that suggests greater findings, neither is defendant. Accordingly, we reject defendant's suggestion that the jury's findings or the

judgment as initially entered has any preclusive effect, including res judicata, law of the case, or collateral estoppel, as to claims by plaintiff for injuries in this accident other than those to her knees.

II. ATTORNEY FEES

A. STANDARD OF REVIEW

A trial court's award of or denial of attorney fees under the no-fault act presents a mixed question of law and fact. *Univ Rehab Alliance, Inc v Farm Bureau General Ins Co*, 279 Mich App 691, 693; 760 NW2d 574 (2008). What constitutes reasonableness is a question of law, but whether an insurer's denial of benefits is reasonable presents a question of fact. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). The trial court's findings of fact are reviewed for clear error, which occurs when "'the reviewing court is left with a definite and firm conviction that a mistake has been made.'" *Id*. (citation omitted). The interpretation of a statute and its application to the facts of a given case present questions of law reviewed de novo. *Id*.; *Moore*, 482 Mich at 516. The trial court's ultimate decision to award attorney fees is reviewed for an abuse of discretion. *Bronson Methodist Hosp*, 295 Mich App at 442. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore*, 482 Mich at 516.

B. ANALYSIS

The pertinent statutes provide in part:

> 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(1) (emphasis added).]

> 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*. 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. *For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail* in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery. [MCL 500.3142(2) (emphasis added).]

In *Moore*, 482 Mich at 517, the Court explained the interplay between these statutes:

> MCL 500.3148(1) establishes two prerequisites for the award of attorney fees. First, the benefits must be overdue, meaning "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). Therefore, assigning the words in MCL 500.3142 and MCL 500.3148 their common and ordinary meaning, "attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003) (emphasis omitted).

In addition to the foregoing requirements that benefits be (1) "overdue" and (2) that a no-fault insurer's delay or refusal to pay must be "unreasonable," the plain language of § 3148(1) requires that an award of attorney fees must be in connection with (3) "advising and representing a claimant in an action" for no-fault benefits and (4) that "benefits [are] recovered." MCL 500.3148(1). In this case, the first two requirements cannot be satisfied because the jury returned a special verdict that determined plaintiff did not suffer an accidental bodily injury (or an aggravation of a preexisting one) as a result of an automobile accident. As discussed *supra*, this verdict supported and required the entry of the original April 20, 2011 judgment of no cause of action. MCR 2.515(B). Consequently, no-fault benefits could not be determined to be "due" or "overdue," and any delay or refusal by defendant to pay benefits could not be found to be "unreasonable." See *Frazier v Allstate Ins Co*, 490 Mich 381, 387; 808 NW2d 450 (2011)("because defendant did not owe benefits to plaintiff, its refusal to pay them was not unreasonable, and plaintiff is not entitled to attorney fees under MCL 500.3148(1)"), and *Moore*, 482 Mich at 526 ("we conclude that if an insurer does not owe benefits, then benefits cannot be overdue"). In addition, there were simply no "benefits recovered" "in an action for personal . . . protection insurance benefits" to support an award of attorney fees under § 3148(1).

The trial court initially stated no basis for its decision to award attorney fees, directing defense counsel at the hearing on plaintiff's motion to settle orders "to address perhaps the amount." Later, the trial court ruled it would reduce plaintiff's claim from $160,625 to $142,751.65 by deducting $17,873.35 from the claim requested for services after the date of jury's verdict on February 28, 2011. The trial court justified the award of attorney fees by finding that "the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment [of] . . . the [plaintiff's] prescription out-of-pocket expenses." The trial court's finding was clearly erroneous as a matter of fact and as a matter of law.

First, plaintiff and defendant entered a stipulation or settlement with respect to plaintiff's claims regarding prescription expenses. A settlement agreement is a contract to resolve a disputed claim. *Reicher*, 283 Mich App at 664. It is construed like a contract and is generally enforceable provided it is in writing or "made in open court." MCR 2.507(G); *Myland v Myland*, 290 Mich App 691, 700; 804 NW2d 124 (2010). Michigan courts will enforce the plainly expressed terms of a settlement agreement. *Reicher*, 283 Mich App 664-665; *Crystal Lake Prop Rights Ass'n v Benzie Co*, 208 Mich App 603, 614 (METER, J.), 616 (MURRAY, J., *concurring*); 760 NW2d 802 (2008). Here, the terms of the settlement agreement were that defendant agreed to pay plaintiff's disputed claim for alleged prescription expenses "separate and apart from this lawsuit" and that no claim for attorney fees would be submitted regarding them. Pursuant to the parties' stipulation, defendant's purported refusal or unreasonable delay in paying plaintiff's

claim for alleged prescription expenses cannot form the basis for an award of attorney fees. Plaintiff waived any claim she might have had for attorney fees by entering into the settlement agreement. See *Reicher*, 283 Mich App 658, 665 (settlement of claims under the sales representatives' commissions act (SRCA), MCL 600.2961, waived claims for statutory penalties and attorney fees); see also *Webb v Holzheuer*, 259 Mich App 389, 392; 674 NW2d 395 (2003) (the plaintiffs "waived their right to prejudgment interest by stipulating a judgment without separately negotiating and stipulating the amount of prejudgment interest owed").

Second, an insurer may defend a claim for attorney fees under § 3148(1) by showing that any delay or refusal to pay benefits was reasonable. *Ross*, 481 Mich at 1. "[A] delay in payment by an insurer is not unreasonable where the delay is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty." *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 46; 586 NW2d 395 (1998); see also *Moore*, 482 Mich at 520. In this case, the record discloses abundant factual uncertainty regarding plaintiff's claims for prescription expenses. The record supports that plaintiff never presented to defendant "reasonable proof of the fact and of the amount of loss sustained." The only proof the record supports that plaintiff presented to defendant was an unsubstantiated spreadsheet summary of her claims that she labeled Exhibit 2. Moreover, the record at the time of the settlement (February 28, 2011) and at the time of plaintiff's motion (June 13, 2012) establishes that tremendous uncertainty existed regarding the payment of certain of plaintiff's claims by Medicaid. The only purported records regarding Medicaid that plaintiff provided to defendant were attached to her motion filed on June 6, 2012. But six months earlier, defendant had obtained a letter dated December 27, 2011 from the Department of Community Health indicating that it was not at that time asserting a lien for Medicaid payments for plaintiff, but it may in the future. Based on that information, defendant tendered to plaintiff's counsel by letter dated December 28, 2011, a check in the amount of $4,388.61, the amount plaintiff claimed due for prescription expenses in plaintiff's Exhibit 2. Thus, the settlement payment could hardly be "overdue" when § 3142(2) provides that a "benefit" is "overdue if not paid within 30 days 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained," and no reasonable proof was ever submitted to defendant to substantiate her claims. Further, § 3142(2) provides that a "payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail." Here, defendant tendered payment for the unsubstantiated claim more than five months before it was provided any records of purported Medicaid payments.

In sum, even if defendant's settlement payment could support an attorney fee claim under MCL 500.3148(1), we find there is no evidence to support a finding that the payment was "overdue" or that delay was unjustified: It is undisputed that factual uncertainty existed. MCL 500.3142(2); *Ross*, 481 Mich at 11; *McKelvie*, 459 Mich at 46. Consequently, on this record, the trial court clearly erred by finding that "benefits" were "overdue" and that defendant "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." *Ross*, 481 Mich at 7. Because there is no legal or factual basis for the award of attorney fees in this case, the trial court abused its discretion doing so. *Moore*, 482 Mich at 516.

III. CONCLUSION

We reverse and vacate the "new" judgment and the trial courts's two other June 2012 orders and reinstate the original April 20, 2011 judgment of no cause of action. As the prevailing party, defendant may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Cynthia Diane Stephens