

STATE OF MICHIGAN  
COURT OF APPEALS

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DE ETTA GARDNER,

Plaintiff-Appellee,

and

THERAPY FIRST, LLC d/b/a THERAPY 1ST,

Intervening Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

June 17, 2014

No. 313351

Wayne Circuit Court

LC No. 11-002164-NF

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Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right a judgment for plaintiff in this action personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.*<sup>1</sup> Specifically, defendant challenges the court's award of attorney fees to plaintiff and to intervening plaintiff Therapy First.<sup>2</sup> We reverse and remand.

Plaintiff was involved in a rear end automobile accident on June 5, 2010, and was hospitalized at Botsford Hospital for three days. She had problems with her neck prior to the accident, but the pain allegedly became "severe" after the accident. Plaintiff initially saw her

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<sup>1</sup> The jury found that plaintiff did not incur any allowable expenses, but that she did incur replacement service expenses totaling \$1,720 and that payment for expenses was overdue. The jury also found that Therapy First incurred allowable expenses in its treatment of plaintiff in the amount of \$7,500 and that the payment for expenses was overdue.

<sup>2</sup> The court awarded attorney fees in the amount of \$62,167.39 to plaintiff and attorney fees in the amount of \$57,168.75 to Therapy First.

family physician, but switched to Aaron Goldfein, M.D., because her family physician was concerned that the insurer would not pay for services rendered. Plaintiff submitted a claim for PIP benefits to defendant on June 28, 2010. Dr. Goldfein first saw plaintiff on June 29, 2010. He referred plaintiff to Basha Diagnostics for various tests. An MRI revealed bulging discs in the neck. Dr. Goldfein opined that “the motor vehicle accident caused the cervical injury and radiculopathy.” He prescribed physical therapy, assisted services, and attendant care. Plaintiff attended physical therapy at intervening plaintiff, Therapy First, LLC, from June 29, 2010, through August 4, 2011.

Karen Winters, defendant’s claim representative assigned to plaintiff’s claim, made contact with plaintiff, who was represented by counsel. Winters’ review of the available medical records led her to question whether plaintiff sustained an actual injury in the accident. Winters contacted plaintiff’s attorney on July 6, 2010, in an attempt to obtain information to determine whether plaintiff was a qualified beneficiary. Winters sent medical record authorizations after an August 31, 2010, conference that established plaintiff was an eligible insured person. Defendant qualified plaintiff as a beneficiary on September 3, 2010, and requested that plaintiff submit information and sign medical release authorizations. The signed medical releases were received by defendant in late October 2010. Winters initially entered the claims as compensable, but then changed them to “under investigation” status because of “some sketchy records and MRI findings . . . that showed . . . negative findings in the low back.” Defendant did not receive the requested medical records from Dr. Goldfein’s office. Dr. Goldfein acknowledged receipt of the record request and that he even began filling it out, but he admitted that he never completed the request.

In approximately March or April of 2011, Dr. Neil Friedman was appointed to serve as an independent medical evaluator. He examined plaintiff on June 6, 2011, and issued a report the same day. He concluded that “claimant did not sustain any permanent or temporary impairment” from the accident. Rather, he opined that she appeared “to have suffered simple sprain/strain-type injuries,” and that three or four weeks of physical therapy should have been sufficient to treat plaintiff. Accordingly, defendant paid only those claims relating to the first month of treatment and physical therapy.

Separate verdict forms were submitted for each plaintiff. Regarding plaintiff, the jury found that she sustained an accidental bodily injury from the accident and that she incurred replacement service expenses totaling \$1,720. The jury also found that payment for medical mileage, replacement services, and treatment by Dr. Goldfein, was overdue. Regarding Therapy First, the jury found that it had incurred allowable expenses of \$7,500 in treating plaintiff and that the payment for the expenses was overdue as of October 7, 2010.

On April 27, 2012, the court heard plaintiff’s motion for entry of judgment, including attorney fees. Defendant emphasized the standard required to award attorney fees under MCL 500.3148 and MCL 500.3142, emphasizing that the court was required to make the additional finding that defendant unreasonably refused to pay the claim. The following exchange occurred on the matter:

*The court.* Well, didn’t the jury conclude that?

*Defendant.* What the jury concluded was that there was [sic] overdue benefits, that's the distinction.

There's another statute, section 3142, that's the statute that has to do with penalty interest, okay. That's what the jury was asked to award, and that finding is based on whether they determined the benefits are overdue. Attorney fees have that prong plus another one.

*The court.* [W]hen I instruct a jury . . . don't I instruct them that they're, if they find that the insured unreasonably refused to pay or denied benefits, then they are to award those?

*Defendant.* No. What the instruction talks about is when benefits become overdue.

*The court.* Right.

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*Defendant.* Attorney fees are a different animal. Attorney fees have all those requirements, which they've [plaintiff] satisfied based on the jury's verdict, but it then has the additional second prong, which is —

*The court.* And that's if the Court finds the —

*Defendant.* That's right.

*The court.* — insured unreasonably refused to pay the claim or unreasonably delayed in making the proper payment.

*Defendant.* That's right. That's what the case law makes very clear, that's the second prong.

The court questioned counsel about the delay in securing an independent medical examination (IME). Defendant asserted that because Dr. Goldfein did not provide any records, the only medical opinion on which defendant could rely was the IME, which “says there's no injury,” thus creating a bona fide factual dispute regarding plaintiff's injury, thereby making defendant's delay in paying the claim reasonable. Defendant further argued that if there was an attorney fees award, an evidentiary hearing should be held. The trial court summarized its understanding of the legal position as follows: “There's two prongs, though, to the McCarthy<sup>3</sup>] analysis, and one

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<sup>3</sup> *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97; 527 NW2d 524 (1994). The plaintiff was injured while riding as a passenger in a vehicle involved in a collision. *Id.* at 99. She was injured when her head struck and broke a side window, causing lacerations to her face. *Id.* Following the accident, the plaintiff was treated regularly by Dr. Margaret Skiles, a plastic surgeon, who regularly noted the plaintiff was healing nicely. *Id.* at 100. Skiles “discussed the

is that the court find that the insured unreasonably refused to pay. You've [defendant] primarily addressed that prong. There's a second prong in McCarthy, and that is, or there is an unreasonable delay in making proper payment." Plaintiff responded that the jury did create a presumption of unreasonableness when it found the benefits were overdue. The court summarized the jury award and stated its ruling on the record:

Obviously the jury found that they [the claimed medical bills] were overdue and that they ought to have been paid. The McCarthy standard is that the court finds an insurer unreasonably refused to pay the claim or unreasonably delayed in making a proper payment. The jury found that these bills were overdue and that they were not properly paid, and that the jury awarded those figures.

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. . . Although not what the plaintiff requested, the jury did find that there were unpaid costs and fees that ought to have been paid and that there was a delay in making those payments. As pointed out by counsel, that may be construed as being an unreasonable delay in making the payments, obviously requiring the jury to ultimately award those because they have not been paid in this particular case.

The court then awarded plaintiff the requested attorney fees of \$62,167.39. Plaintiff clarified, "the Court isn't finding as a matter of law based on the jury verdict that the benefits were unreasonable or should have been paid under the *McCarthy* standard?" to which the Court replied, "That's correct."

On June 21, 2012, the court heard Therapy First's motion for attorney fees. The court expressed concern that the claim for \$66,000 in attorney fees, representing five attorneys and paralegals, might have been excessive for what was characterized by the court as, "in essence, a

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possibility of future reconstructive or plastic surgery, but told plaintiff that any determination regarding whether such surgery would be of any benefit would have to wait from nine months to a year to see how plaintiff healed." *Id.* Six months after the accident, a second plastic surgeon, Dr. Chauncey Hipps, "examined plaintiff once and opined that reconstructive surgery could be performed for approximately \$4,900." *Id.* at 99-100, 105. Following trial, a jury awarded the plaintiff \$4,950 in allowable expense for future plastic surgery. *Id.* at 101. The district court then found the insurer "unreasonably failed to make proper investigation into Plaintiff's medical needs and [the insurer] unreasonably refused to pay Plaintiff's claim to have corrective plastic surgery." *Id.* The district court awarded to the plaintiff "attorney fees of \$13,317.39, both as mediation sanctions . . . and as a penalty for unreasonably refusing to pay no-fault insurance benefits, MCL 500.3148." *Id.* The circuit court affirmed. *Id.* This Court found the ruling to be erroneous because "a legitimate or bona fide question of factual uncertainty existed" regarding the plastic surgery. *Id.* at 105. The Court found that the insurer "reasonably was entitled to rely on plaintiff's own treating physician [Skiles] in concluding that plastic surgery was not reasonably necessary, thus giving rise to a legitimate or bona fide question of factual uncertainty." *Id.*

medical collection matter.” The bill was subsequently updated, after which the court awarded Therapy First attorney fees in the amount of \$57,168.75.

Defendant first argues that the court erred in relying on the jury’s verdict in determining the reasonableness of defendant’s decision to deny the claim. Determining “whether an insurer acted reasonably presents a mixed question of law and fact.” *Moore v Secura Ins*, 482 Mich 507, 522; 759 NW2d 833 (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). Questions of law are reviewed de novo, but “a trial court’s findings of fact are reviewed for clear error. A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* (internal quotation marks and citations omitted). The trial court’s ultimate decision to award attorney fees is reviewed for an abuse of discretion. *Bronson Methodist Hosp v Home-Owners Ins Co*, 295 Mich App 431, 442; 814 NW2d 670 (2012).

Under certain circumstances, Michigan’s no-fault act allows a plaintiff’s attorney to recover his attorney fees from the insurer. 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).<sup>4</sup>

“To determine whether the initial refusal to pay was unreasonable, the trial court must give effect to the unambiguous language of MCL 500.3148(1). MCL 500.3148 requires that the trial court engage in a fact-specific inquiry to determine whether ‘the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.’” *Moore*, 482 Mich at 522. An insurer is not required to reconcile competing or conflicting medical opinions. *Id.* at 521. An insurer can justify its refusal or delay in paying a claim “by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.” *Ross*, 481 Mich at 11. The determinative inquiry for this Court “is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable.” *Moore*, 482 Mich App at 525-526. Defendant argues that its action in delaying payment of the benefit was reasonable given the factual uncertainty of plaintiff’s injury.

Clear error will be found where a trial court does not focus on the facts surrounding the disputed expenses, but instead concludes that the refusal to pay was unreasonable because the jury awarded expenses. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 171; 761 NW2d 784 (2008). With regard to plaintiff’s motion for attorney fees, the court consistently referenced the jury’s findings in discussing the reasonableness of defendant’s action. Specifically, the court stated, “Although not what the plaintiff requested, the jury did find that there were unpaid costs and fees that ought to have been paid and that there was a delay in making those payments. As pointed out by counsel, *that may be construed as being an unreasonable delay in making the payments*, obviously requiring the jury to ultimately award those because they have not been paid in this particular case.” [Emphasis added.] Although the court denied, when asked for clarification, that it was finding “as a matter of law based on the jury verdict that the benefits were unreasonable or should have been paid,” the court made no additional findings regarding the reasonableness of defendant’s delay in the payment of benefits. The court did question defendant’s counsel regarding the delay in scheduling the IME, but the court did not find that the delay was unreasonable. The court did not make any findings with regard to whether defendant’s delay in making proper payment was reasonable. Rather, the court’s statements suggest that the court did, in fact, rely on the jury’s verdict in finding an unreasonable delay in making proper payment. The judgment entered by the court following the motion simply relied upon the “reasons stated on the record” to support the judgment award. On this record, we are

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<sup>4</sup> 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).

unable to review the trial court's factual findings and unable to determine whether the trial court abused its discretion in awarding plaintiff attorney fees.

With regard to Therapy First's motion for attorney fees, defendant again argued that the statute requires the court to find "that our delay in payment or denial was unreasonable." The court responded that "in this particular case I believe that the jury found that, that the bill should have been paid by October 7th, regardless of what your adjuster's testimony was at trial." Defendant again argued that the adjustor did all she could do given that Goldfein would not respond to record requests, that defendant's conduct was reasonable, and that "reasonableness of State Farm's conduct is not directly tied to the finding of benefits being overdue." Further, he argued the "jury's determination was made under section 3142 with regard to penalty interest, not the reasonableness decision under 3148, which is your decision to make." To which the court responded, "Right. I understand."

The court found that attorney fees were appropriate, stating, "under the statute, the party prevails, as Therapy First does, you're entitled to attorney's fees," but also recognized "there's these issues of whether it was unreasonable, whether the jury found it unreasonable, whether I found it unreasonable." The court further stated "that the failure to pay was unreasonable in this particular case," notwithstanding defendant's explanation." Again, however, the court referenced the jury's finding that the benefits were overdue and failed to make specific findings regarding the reasonableness of the delay in paying benefits. On this record, we are unable to review the trial court's factual findings and unable determine whether the trial court abused its discretion in awarding Therapy First attorney fees.

In light of our conclusion, we need not address defendant's remaining argument concerning the trial court's failure to conduct an evidentiary hearing regarding the size of the attorney fee award.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey