STATE OF MICHIGAN

COURT OF APPEALS

DENNIS O'LEARY,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
July 29, 2014

Nos. 313976 & 315878
Wayne Circuit Court
LC No. 10-004800-NF

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

In these consolidated appeals arising from defendant insurer's denial of no-fault benefits to plaintiff, defendant appeals by right the trial court's assessment of attorney fees after the jury trial. We reverse the trial court's award of attorney fees under the no-fault act, vacate the award of attorney fees as case evaluation sanctions, and remand for a re-evaluation of reasonable attorney fees.

I. BASIC FACTS

Plaintiff was involved in a car accident on June 19, 2009. He was transported to St. Mary's Hospital and released that night. Subsequently, on the recommendations of Dr. Martin Kornblum, plaintiff underwent several surgeries, including a neck/cervical surgery and two lumbar surgeries. The neck/cervical surgery was performed on October 22, 2009, and the two lumbar surgeries took place in November 2009 and February 2012.

Defendant initially paid a variety of benefits on behalf of plaintiff. However, Karen Winters, defendant's claims representative, suspended all benefits, for the most part, October 22, 2009, for further investigation. Winters testified that the incoming notes from the providing doctors were inconsistent and that Dr. Kornblum's own notes were "not even very focused." As a result, Winters scheduled an independent medical exam (IME) for plaintiff. She stated that "everyone was reading something different" in the image studies, which "was very inconsistent." She "felt that [the inconsistency] was a reason for [her] to question whether the treatment was related to this accident."

Doctor Philip Mayer, a spinal disorder specialist, conducted the IME in February 2010. He concluded that the two surgeries conducted thus far were not related to the accident. He

testified that the spinal conditions he observed on the MRI appeared to be degenerative. His review of the records did not show evidence of active nerve damage or any neurological defects in the spinal cord that would require surgery. Based on Dr. Mayer's report, Winters issued a letter in March 2010, denying plaintiff's claim for the surgeries because they were unnecessary and unrelated to the accident.

Plaintiff filed the instant lawsuit against defendant, seeking first-party no-fault benefits under Michigan's no-fault act, MCL 500.3101 *et seq.*

At trial, in addition to the testimony of Dr. Mayer, defendant offered the testimony of Dr. Mark Delano, a neuroradiologist who specializes in diagnosing illnesses on the basis of imaging and focuses on brain and spinal cord imaging. Dr. Delano testified that plaintiff had "arthritic degenerative changes" in the spine and spinal canal. He also reviewed the image studies done after plaintiff's back surgeries and found "[n]o sign of bone trauma" or other post-traumatic issues. He opined that plaintiff did not suffer a structural injury to his lumbar or cervical spine. Dr. Delano acknowledged that accidents can aggravate underlying degenerative conditions, but he believed that this did not appear to be the case because the associated abnormalities were missing.

The jury returned a verdict for plaintiff, finding that he sustained an accidental bodily injury arising out of the operation of a motor vehicle. The jury found allowable expenses were incurred, work loss benefits and replacement service expenses were owed, and that payment was overdue, awarding $70,450 in interest. The court entered judgment on these amounts, totaling $347,350.

Plaintiff then moved for attorney fees under both the no-fault act and as case evaluation sanctions. The court granted the motion, concluding that defendant "unreasonably refused to timely pay" the benefits. Defendant moved for reconsideration, arguing that the court was required to hold an evidentiary hearing. The court granted the motion and held an evidentiary hearing. After hearing testimony, the trial court found that defendant unreasonably denied payment of plaintiff's benefits. The court also found that there were several mistakes in the attorney bill submitted and struck several hours. In its written opinion, the court found attorney fees proper under both MCL 500.3148(1) and MCR 2.403(O) and awarded $263,528.

II. ANALYSIS

A. NO-FAULT ATTORNEY FEES

Defendant first argues that the trial court erred in awarding attorney fees under the no-fault act when it reasonably denied the benefits with the information it had at the time. We agree.

A trial court's decision regarding the granting of attorney fees is reviewed for an abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). Determining "whether an insurer acted reasonably presents a mixed question of law and fact." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008) (quotation marks omitted). "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 citation omitted).

Generally, attorney fees are not recoverable unless a statute, court rule, or common-law exception exists. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Here, plaintiff requested attorney fees pursuant to MCL 500.3148(1), which provides, in relevant part, the following:

> 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.

Thus, in order for attorney fees to be awarded under this provision, two requirements must be met.

> 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). [*Moore*, 482 Mich at 517.]

An insurer is not required to reconcile competing or conflicting medical opinions. *Id.* at 521-522. 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." *Id.* The trial court must "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, quoting MCL 500.3148(1).

In this case, defendant does not contest that plaintiff was injured in the auto accident. Indeed, defendant paid a number of claims in this regard, including bills for other services post-surgery that were deemed related to the auto accident. However, defendant's records indicated a factual uncertainty surrounding the necessary nature of the surgeries.

Defendant "must evaluate [the] evidence 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. "[A]n insurer may reasonably rely on the medical opinion of its

physicians and the IMEs the physicians perform" as disclosed in their reports. *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 516; 791 NW2d 747 (2010). Here, defendant relied on the report Dr. Mayer produced as a result of the IME, where he concluded that the surgeries were not related to the automobile accident. This report, especially when coupled with the inconsistent readings of plaintiff's image studies, the lack of focus in Dr. Kornblum's notes, and the lack of any EMG testing for radiculopathy[1], created a reasonable basis to deny benefits.

The trial court instead of considering whether the decision, itself, to deny benefits was reasonable, relied on the amount of time that had lapsed from the date of the first surgery until the benefits were denied. In its final opinion and order granting plaintiff attorney fees, the trial court stated that defendant

> denied benefits as of October 22, 2009 based on an IME which took place in February 2010, four months after the cut-off date. That is unreasonable. As a result, . . . defendant insurer improperly and unreasonably refused to pay the claim.

It is true that a "rebuttable presumption of undue delay arises when benefits are not paid within thirty days after the insurer receives reasonable proof of loss." *Conway v Continental Ins Co*, 180 Mich App 447, 452; 447 NW2d 761 (1989), citing MCL 500.3142(2). However, the no-fault act does not stipulate the time period in which an examination must be scheduled to establish the reasonable proof of loss. It is important to note that no testimony or evidence indicated that defendant had prior knowledge of the surgery and unreasonably delayed setting up the IME. There was no evidence to suggest that the four-month timeframe to schedule and perform the IME was unreasonable. Defendant must learn of the first surgery, defendant must communicate the decision to conduct an IME to plaintiff, an IME physician must be selected, and schedules must be coordinated to set up the actual appointment.

Accordingly, we conclude that the trial court clearly erred in holding that a four-month timeframe to complete an IME, with no other exacerbating circumstances, constituted an unreasonable denial of benefits. Therefore, because the denial of benefits was overdue but not unreasonable, the trial court abused its discretion in awarding plaintiff attorney fees under the no-fault act.

B. REASONABLE HOURLY RATE

Defendant next argues that the trial court erred in allowing plaintiff's attorneys to collect hourly rates of $500, $350, and $175 for three different levels of attorneys who worked on plaintiff's case.

At the outset, we note that, because of our earlier determination, this issue is moot with respect to any attorney fees awarded under the no-fault act. But the trial court also awarded

[1] "Disorder of the spinal nerve roots." *Stedman's Medical Dictionary* (26th ed).

attorney fees as case evaluation sanctions under MCR 2.403(O). Thus, we will address the issue because it still is relevant.

In the context of case evaluation, MCR 2.403(O) governs the awarding of attorney fees:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. . . .
>
> (6) For the purposes of this rule, actual costs are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

"[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008). A trial court's fee analysis begins "by determining the fee customarily charged in the locality for similar legal services" for which "the court should use reliable surveys or other credible evidence of the legal market." *Id.* at 530-531. The customary fee should then be multiplied by the hours expended. *Id.* at 531. This is a starting point, and the court should then consider the "remaining *Wood*[2]/MRPC factors to determine whether an up or down adjustment is appropriate." *Id.* The six *Wood* factors are as follows:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653.]

The eight factors under MRPC 1.5(a) are here, some of which overlap with the *Wood* factors:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;

[2] *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982).

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent." [*Smith*, 481 Mich at 530, quoting MRPC 1.5(a).]

In this instance, the trial court did not adhere to this procedure. Instead of working off a starting point consisting of "the fee customarily charged in the locality for similar legal services," the trial court apparently started with the hourly rates plaintiff was seeking: $600 (attorney with over 10 years' experience), $350 (attorney over eight years' experience), and $275 (attorney between one and three years' experience). The trial court then deviated downward from what plaintiff requested and awarded rates of $500, $350, and $175, respectively. Plaintiff, in support of the rates he was claiming, submitted letters/affidavits from seven other trial lawyers.[3]

Defendant, on the other hand, had submitted to the trial court a fee survey issued by the State Bar of Michigan[4] that detailed various rates, depending on many factors, including the attorney's experience, location, and area of practice. The survey provided, in part, the following hourly rates:

Category	Median Rate	Mean Rate	75th Percentile Rate	95th Percentile Rate

[3] Plaintiff also relied on many non-binding circuit court cases and unpublished cases of this Court, which upheld various hourly rates as being reasonable. However, nearly all of these were either ultimately reversed or issued before the Supreme Court's 2008 decision in *Smith*. E.g., *May v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2003 (Docket No. 234966) (issued before 2008); *Smith v Khouri*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 (Docket No. 262139), vacated 481 Mich 519 (2008); *Bonkowski v Allstate Ins Co*, Oakland Circuit Court Docket No. 01-035172-NF, attorney fee rate vacated in 281 Mich App 154; 761 NW2d 784 (2008); *Augustine v Allstate Ins Co*, Oakland Circuit Court Docket No. 04-56897-NF, attorney fee rate vacated in 292 Mich App 408; 807 NW2d 77 (2011). Further, plaintiff relied on *Juzba v State Farm Mutual Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 26, 2009 (Docket No. 283820), but the attorney fee in that case was $300 per hour, not the $450 that plaintiff asserted was assessed.

[4] The document was entitled, "2010 Economics of Law Practice: Attorney Income and Billing Rate Summary Report," issued January 2011.

Managing Partner	$250	$278	$315	$500
Equity Partner	$250	$282	$350	$475
Senior Associate	$200	$222	$250	$400
Associate	$195	$203	$228	$310
1 to 2 Years Experience	$163	$174	$200	$275
6 to 10 Years Experience	$200	$205	$240	$300
16 to 25 Years Experience	$228	$255	$300	$450
Southfield Office Location	$265	$285	$350	$500
Personal Injury (Defense)	$150	$166	$180	$250
Personal Injury (Plaintiff)	$300	$327	$400	$600
Practice Primarily in Oakland County	$250	$254	$300	$450
Practice Primarily in Wayne County	$230	$255	$300	$485

But the trial court stated that it was discounting the survey because it was "old."[5] In short, the trial court weighed the letters from plaintiff's hand-picked seven attorneys higher than the survey conducted of the State Bar of Michigan, which tabulated responses from 223 personal injury plaintiff attorneys. While the survey was not as current as the trial court desired, it was the most reliable and dependable data that was submitted to the court. The sample size difference alone (7

[5] The survey was conducted in October 2010 and published in January 2011. Plaintiff's counsel sought reimbursement for hours accrued from April 2010 through August 2012.

versus 223) makes this abundantly clear. Regarding the letters plaintiff submitted, while some trial attorneys certainly have charged such rates, that is not the benchmark. *Smith*, 481 Mich at 533. In other words, "reasonable fees are different from the fees paid to the top lawyers by the most well-to-do clients." *Id.*, citing *Coulter v Tennessee*, 805 F2d 146 (CA 6, 1986). Accordingly, the trial court clearly erred.

Since the analysis must begin "by determining the fee customarily charged in the locality for similar legal services," *Smith*, 481 Mich at 530-531, the key factors to start with are the geographic area of the practice and the nature of the legal services. Hence, looking at the data from the most recent survey available at the time, one who has an office in Southfield, as plaintiff's counsel did, has a mean hourly rate of $285. But one who performs personal injury work for plaintiffs has a higher mean hourly rate of $327. The trial court should have used these numbers in arriving at an appropriate baseline. It then could have deviated up or down after taking other considerations into account. For instance, the fact that plaintiff's lead counsel had been practicing for over 16 years would allow the trial court to look at the survey to determine what effect that experience has on the "fees customarily charged." Likewise, the other attorneys' experience could have been evaluated in light of the starting point.[6]

Further, the trial court awarding $500 as an hourly rate for lead plaintiff's counsel is a bit troubling because that would place him between the 75th and 95th percentile for personal injury plaintiff attorneys. This fact alone is not problematic, but counsel testified at the evidentiary hearing this case was one of his first ones at his new law firm and that he was doing "essentially the same" type of work that he performed previously while working as a personal injury defense attorney. Notably counsel testified that before taking the job with his current law firm, his rate was between $135 and $175 per hour, which, according to the survey, corresponded to a range from below the 50th percentile (the median) up to just below the 75th percentile. Thus, it is not evident, based on the market surveys, why lead counsel would be entitled to be compensated at a much higher percentile just because he switched from defense work to plaintiff work, when he admitted that he did not receive any additional legal training after switching law firms.

The trial court also awarded hourly rates of $350 and $175 for the support attorneys. But, as before, the trial court did not start with any baseline, except apparently what plaintiff was seeking. This is erroneous. We iterate that the burden is on the party seeking the fees to establish that the fees are reasonable. *Id.* at 528-529. Our review of the record indicates that plaintiff failed to meet that burden. On remand, the trial court is to conduct the analysis consistent with the procedures described in *Smith* and herein.

C. DISCOVERY

Defendant also argues that the trial court erred by refusing to allow it to perform discovery regarding the issue of attorney fees. We review a trial court's decision on a discovery

[6] We only use experience as an example and do not suggest that it is the only factor. It is merely one of the additional *Woods*/MRPC factors that a court should consider.

motion for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

Michigan has as "an open, broad discovery policy" permitting liberal discovery. *Reed Dairy Farm v Consumers Powers Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Generally, a party may pursue discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." MCR 2.302(B)(1). Nonetheless, relevant documents that were "prepared in anticipation of litigation or for trial by" the other party or their attorney may be obtained through discovery "only on a showing that the party seeking discovery has substantial need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." MCR 2.302(B)(3)(a). Further, even where "a party demonstrates the substantial need and undue hardship necessary to discover work product, that party may discover only factual, not deliberative, work product." *Augustine*, 292 Mich App at 421 (quotation marks omitted).

Augustine, which dealt with a very similar situation, is quite instructful. In *Augustine*, the defendant sought plaintiff's entire litigation file to assist in its challenge of plaintiff's attorney fee claim. *Id.* at 419, 421. This Court noted that at the time the defendant had made the discovery request, it "had been provided a simple, albeit lengthy, billing statement without any corroboration of the time reflected." *Id*. at 421. Additionally, the billing statement was known to be completed retrospectively because plaintiff did not keep contemporaneous billing statements. *Id*. at 416-417, 421-422. Testimony at the evidentiary hearing "was replete with speculation, conjecture, and a denial of knowledge," with both "of plaintiff's lead counsel lack[ing] any specific memory of the time spent on any series of billable events," and the billing summary "did not refresh [the attorney's] recollection of what he did or the time spent on any listed service." *Id*. at 422-423. This Court summarized its reading of the evidentiary hearing by stating that "all that one could reasonably glean from the testimony of plaintiff's attorneys concerning the summary billing statement was that they submitted it, therefore they believed that it was correct, and in fact, they believed that it was an underestimate of the time spent on the matter." *Id*. at 423. As a result, the Court ordered defendant to be afforded discovery on remand. *Id.*

Similar to the *Augustine* Court, we also conclude that "[a] review of the evidentiary hearing causes concern regarding the likelihood that an honest and fair determination of fees could be awarded on this record." *Id.* at 422. Like in *Augustine*, the billing records in the present case were created in retrospect. While this fact is not dispositive in our determination, it coupled with the fact that defendant successfully illustrated how many of the billing entries were flat-out inaccurate,[7] unreasonable,[8] or impossible to happen,[9] raises grave doubts regarding the

[7] Counsel claimed on his billing sheet 22 hours for one attorney for a single day, but counsel testified that those 22 hours were really spread out over two days instead of the single day reflected on the statement.

[8] Plaintiff initially sought compensation for various attorneys to attend different hearings that, in fact, never happened.

accuracy of the other entries on the billing statement. As in *Augustine*, "all that one could reasonably glean from the testimony of plaintiff's attorneys concerning the summary billing statement was that they submitted it, therefore they believed that it was correct, and in fact, they believed that it was an underestimate of the time spent on the matter." *Id*. at 423.

Accordingly, with no discovery, "no genuine inquiry could be made of the party requesting the fees and concomitantly no real challenge could be made by the party opposing the fee request." *Id.* Consequently, defendant met its burden under MCR 2.302(B)(3)(a) by showing a "substantial need of the materials" and unable "to obtain the substantial equivalent of the materials by other means." Thus, on remand, because the issue of attorney fees is still relevant under case evaluation sanctions, the trial court is to afford defendant with discovery consistent with *Augustine*.

III. CONCLUSION

The lower court's award of attorney fees under the no-fault act is reversed. We also vacate the award of attorney fees as case evaluation sanctions and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio

[9] Plaintiff's counsel billed 6.9 hours on the day of plaintiff's deposition, but evidence was introduced that plaintiff arrived less than two hours before the 2-hour deposition. Thus, counsel's claim that "[i]f the deposition ran two or three hours, there would definitely be another three to four hours on top of that just for depositions preparations as well as post deposition discussions with the client . . ." (1) demonstrates how his reconstructing of the past events is speculative and (2) it would have been impossible to prep plaintiff for three to four hours before the deposition when he arrive less than two hours before it began. In an apparent attempt to justify the claimed 6.9 hours, counsel later added, "I may have spent [some of those hours] with [plaintiff] prior to that time." The fact that counsel did not even know just further illustrates the amount of speculation that the entire billing seems to be based on.