STATE OF MICHIGAN

COURT OF APPEALS

JAMES MCCARTHY, Conservator of the Estate of LOUIS DUPREE,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 19, 1997

No. 189268
Wayne Circuit
LC No. 92-234926-NF

Before: Holbrook, Jr., P.J. and White and R.J. Danhof,* JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's request for attorney fees under § 3148 of the no-fault act, MCL 500.3148(1); MSA 24.13148(1). We reverse.

On March 16, 1989, Louis Dupree suffered a traumatic brain injury after being struck by an unidentified automobile while riding a bicycle. Dupree had a past history of alcoholism and drug abuse and had been hospitalized for psychiatric care on a number of occasions before the accident. Part of the care and rehabilitation that Dupree received after the accident involved therapy for his alcoholism, and he relapsed into alcohol use on several occasions. Defendant paid no-fault benefits for Dupree's care and rehabilitation for a period of time following the accident, but then ceased paying further benefits because it believed that the claimed expenses were no longer related to the injuries that Dupree received in the automobile accident.

Plaintiff, as conservator for the Estate of Louis Dupree, subsequently commenced this action to recover unpaid no-fault benefits, seeking approximately $404,250 in unpaid expenses. Following a jury trial, plaintiff was awarded $34,750. The jury award included the entire amount claimed by two care providers, Dr. Richard Feldstein, a psychiatrist, and New Start, Inc, an alcohol treatment program. After trial, plaintiff moved for no-fault attorney fees under MCL 500.3148(1); MSA 24.13148(1), on the basis that defendant's refusal to pay benefits was unreasonable. The trial court granted plaintiff's

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

motion and awarded attorney fees. The court noted that the jury had awarded one hundred percent of the claimed expenses for two care providers and, therefore, concluded that defendant's refusal to pay benefits was unreasonable.

On appeal, defendant argues that the trial court erred in awarding no-fault attorney fees under MCL 500.3148(1); MSA 13148(1). We agree.

Section 3148(1) on the no-fault act provides:

> 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 there is a refusal or delay in payment, a rebuttable presumption of unreasonableness arises and the insurer has the burden to justify the refusal or delay. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). An insurer's refusal or delay in payment will not be found unreasonable where it "is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty." *Id*. A trial court's finding of unreasonable refusal or delay will not be reversed on appeal unless it is clearly erroneous. *Id.*

Allowable expenses under the no-fault act include "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a); MSA 24.13107(1)(a). The requirements for an allowable expense are that (1) the charge be reasonable, (2) the expense be reasonably necessary, and (3) the expense be incurred. *McKelvie*, *supra*; *Davis v Citizens Ins Co*, 195 Mich App 323, 326; 489 NW2d 214 (1992).

In this case, the trial court did not focus on the facts surrounding the disputed expenses in reaching its decision, but instead concluded that defendant's refusal to pay benefits was unreasonable because the jury awarded one hundred percent of the claimed expenses for two care providers. This was clear error because "the scope of inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable." *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 105; 527 NW2d 524 (1994).

The testimony at trial established that the experts who were consulted and who treated Dupree were in disagreement as to whether, after the summer of 1989, Dupree continued to suffer from the effects of his traumatic brain injury and required treatment for those problems. Each of the experts agreed that Dupree was a chronic alcoholic and suffered a significant brain injury in the automobile accident. However, while some of the experts believed that Dupree had recovered from his brain injury by the end of the summer of 1989, others believed that he continued to suffer from the effects of his brain injury and continued to require treatment and care for that injury into the early 1990s. There were also questions regarding whether Dupree's alcoholism could be treated separately from his traumatic

brain injury and whether his alcohol problems were aggravated or enhanced by the automobile accident. Moreover, some of the experts believed that Dupree suffered from schizophrenia before the accident, while others indicated that there was no evidence to support such a diagnosis. The evidence indicates that New Center treated plaintiff for his alcoholism and that Feldstein treated plaintiff for a combination of his alcoholism and brain injury.

We find that the evidence established a bona fide question of factual uncertainty regarding whether the problems for which Dupree was being treated were related to his traumatic brain injury. Therefore, the trial court clearly erred in awarding attorney fees under § 3148 of the no-fault act.

Reversed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert J. Danhof