STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER MANTEI, Conservator of the Estate of DAVID W. MANTEI,

Plaintiff-Appellee,

v

AMERICAN FELLOWSHIP MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 27, 1999

No. 205153
Genesee Circuit Court
LC No. 95-038488 NF

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

Defendant-Appellant American Fellowship Mutual Insurance Company ("American") appeals by leave granted the trial court's order denying its motion for reconsideration pursuant to MCR 2.119(F) and modifying its award of attorney fees pursuant to MCL 500.3148; MSA 24.13148. We reverse.

I. Basic Facts And Procedural History

David Mantei ("Mantei") suffered severe bodily injury while a passenger in an automobile involved in a collision. American had issued Mantei an automobile insurance policy under which Plaintiff-Appellee Jennifer Mantei, the conservator of Mantei's estate (the "conservator"), sought payment for certain expenses and losses that resulted from the accident. The conservator initially filed suit in mid-January of 1993, claiming that American unreasonably withheld payment of personal protection ("PIP") benefits. That case was submitted to arbitration and the arbitrators determined the conservator was entitled to $30,000 total benefits, $25,009.48 of which was allowable expenses for medical services under the no-fault act, MCL 500.3101 *et seq*.; MSA 24.13101 *et seq*. (the "No-Fault Act"). The arbitrators declined to award the conservator interest, costs, or attorney fees.

Thereafter, the conservator again filed suit alleging the nonpayment of no-fault benefits and claiming attorney fees based on American's unreasonable refusal to pay and/or unreasonable delay in making payments under MCL 500.3148(1); MSA 24.13148(1). The conservator's claim was based

on three expenses consisting of two hospital bills (the "hospital bills claim"), a bill for ambulance service (the "ambulance bill claim"), and the cost of a machine called a Dynavox that is used to assist individuals with severe handicaps communicate (the "Dynavox claim".) The $6,745 expense related to the Dynavox claim was paid by American on behalf of the Catastrophic Claims Association in mid-October of 1995, after the conservator filed the second suit.

In mid-March of 1996, the conservator brought motion for attorney fees and costs, arguing that American's partial payment of benefits only after the conservator had filed suit constituted an unjustifiable delay in payment. In early April of 1996, at a hearing on the motion, the trial court determined that a separate hearing was necessary to determine the reasonableness of the conservator's attorney fees. The trial court stated, "[American is] entitled to a separate finding of attorney fees by the Court. [The conservator's counsel] claims that there was an unreasonable refusal to pay. So at this point I got to find out if the fees are generated by unreasonable action, refusal and all that good stuff, so at this point you got to have a hearing."

In mid-April of 1996, the trial court held the evidentiary hearing. There, the conservator first argued that the motion was properly before the trial court, notwithstanding American's contention that the hearing on costs was improper because an order concluding the case had not yet been entered. The conservator's counsel then testified to his training, experience, and skill as an attorney and, specifically, regarding the work he performed in the instant matter. Counsel stated that he had worked a total of sixty hours on the case with an additional eleven hours of paralegal time. Counsel also indicated that he had a retainer agreement with the conservator under which the conservator agreed to pay the greater of a $200 per hour fee or one-third contingency.

On cross-examination, the conservator's counsel testified that he had written a letter demanding that American pay for the Dynavox unit after he had determined that the expense had been incurred by the conservator under the No-Fault Act. Notwithstanding the conservator's inability to pay for the unit, counsel claimed that a nurse's and a physician's recommendation established that it was necessary and reasonable for Mantei's care and rendered American's denial of payment for the unit unreasonable. The conservator's counsel denied that most of his work on the case constituted an effort to recover attorney fees after the sought-after benefits were paid. Counsel admitted that he filed suit for unspecified damages even though the hospital bills claim, the ambulance bill claim, and the Dynavox claim did not amount to $10,000.

American's claim adjuster Bonnie Dennis ("Dennis") testified that she investigated expenses related to medical treatment that Mantei received for a bronchitis infection developed after the automobile accident. Dennis initially rejected the conservator's request for payment of the bills because she believed the treatment was not related to the accident. Dennis acknowledged that the bills were paid, however, after Mantei's physician verified that the expenses were related to the accident and after Dennis was given the opportunity to review relevant medical records. With respect to the Dynavox unit, Dennis testified that the machine had been rented by American for Mantei's trial, but that American never received an invoice or other document indicating that the conservator had incurred the expense of the unit. Dennis did not dispute the conservator's assertion that she had received a letter from Mantei's nurse indicating the Dynavox unit should be purchased to improve Mantei's communication. Dennis

stated that the Dynavox claim was paid by American after additional documentation expressing Mantei's need for the unit was received from other medical personnel.

The trial court determined that it was irrelevant whether the hospital bills claim was subject to the prior arbitration award because it was unpaid at the time the conservator filed suit. The trial court, therefore, initially considered the hospital bills claim an appropriate basis on which to award attorney fees. The trial court determined the ambulance bill to have been paid prior to the conservator filing suit. Therefore, the trial court subtracted three hours from the conservator's counsel's total hours spent on the case. The trial court then granted the conservator's request for fifty-seven hours of attorney time at $200 per hour and ten hours of paralegal time at $75 per hour as well as taxable costs involved in filing suit and awarded the conservator a total of $12,302.07.

American then brought a motion for reconsideration pursuant to MCR 2.119(F). The trial court determined that the hospital bills claim was disposed of by the arbitration award that was rendered prior to the conservator filing suit. Thus, the trial court ultimately ruled that the hospital bills claim was not a proper basis for attorney fees. The trial court also ruled that it was unnecessary to address the issue of the ambulance bill claim because American had paid that expense prior to the commencement of the conservator's suit.

The trial court then affirmed its prior ruling with respect to attorney fees that were awarded based on American's delayed payment of the Dynavox claim. The trial court reasoned that Dennis' testimony at the evidentiary hearing established that the conservator sought approval of the Dynavox claim long before filing suit. The trial court specifically rejected American's argument that costs must be "incurred" before a denial of benefits may occur under the No-Fault Act. The trial court also determined that neither the fee charged by the conservator's counsel nor the number of hours spent on the case, particularly after the sought-after benefits were obtained, was excessive. As a result, the trial court modified its earlier award of attorney fees, deducting six hours at a rate of $200 per hour.

Thereafter, American filed a claim of appeal that was dismissed by this Court for lack of jurisdiction pursuant to MCR 7.203(A)(1). American's motion for rehearing was also denied by this Court based on American's admission within the affidavit attached to that appeal that no formal dismissal or judgment had yet been filed in the case. In mid-May of 1997, the trial court dismissed American's objection to garnishment and ordered American to transmit $11,919.61 to the conservator's counsel. After American filed bond to stay the execution of that order, this Court granted American's application for leave to appeal.

II. Standard Of Review

A. The Dynavox Claim

American presents multiple arguments on this issue that require different standards of review. American's main argument involves questions of statutory interpretation that this Court reviews de novo on appeal. *State Defender Union Employees, UAW Local 412-Unit 64 v Legal Aid and Defender Ass'n of Detroit*, 230 Mich App 426, 431; 584 NW2d 359 (1998).[1] American's second argument

focuses on the trial court's determination of the reasonableness of delayed benefit payments under MCL 500.3148(1); MSA 24.13148(1). We reverse such decisions only if they are clearly erroneous. *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 628; 550 NW2d 580 (1996).

B. Reasonableness Of Attorney Fees

This Court will uphold a trial court's determination of the reasonableness of attorney fees absent an abuse of discretion. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling, *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997), or the result is so violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias, *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998). The burden of proof as to the reasonableness of fees rests on the party claiming compensation. *In re Condemnation of Private Property for Highway Purposes*, 209 Mich App 336, 339; 530 NW2d 183 (1995); *In re Krueger Estate*, 176 Mich App 241, 249; 438 NW2d 898 (1989).

III. The Dynavox Claim[2]

A. The "Incurred" Standard

Generally, attorney fees are not recoverable unless expressly allowed by statute or court rule. *Matras v Amoco Oil Co*, 424 Mich 675, 695; 385 NW2d 586 (1986); *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). The No-Fault Act provides:

> (1) 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); MSA 24.13148(1).]

Payment of personal protection insurance benefits are payable as loss accrues and such benefits are considered "overdue" if not paid within thirty days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. MCL 500.3142; MSA 24.13142.

Defendant argues that it cannot be liable for attorney fees under MCL 500.3148(1); MSA 24.13148(1) because it never unreasonably refused to pay or unreasonably delayed in paying the Dynavox claim. Defendant relies upon MCL 500.3107(1)(a); MSA 24.13107(1)(a) that requires the expense to have been "incurred" in order for a claim with respect to the unit to have become a payable benefit:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:

> (a) Allowable expenses consisting of 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); emphasis supplied]

The primary goal of interpreting a statute is to give effect to the Legislature's intent. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the statute's language is clear and unambiguous, the court must apply the statute as written. *Howard v Clinton Charter Twp*, 230 Mich App 692, 695; 584 NW2d 644 (1998). However, if reasonable minds could differ as to the statute's meaning, judicial construction is appropriate. *Id*. "A court must look to the object of the statute and the harm that it was designed to remedy and apply a reasonable construction in order to accomplish the statute's purpose. Particular provisions should be read in the context of the entire statute to produce an harmonious whole." *ABC Supply Co v River Rouge*, 216 Mich App 396, 398; 549 NW2d 73 (1996) (citations omitted).

When making a claim for no-fault benefits, the insured has the burden of establishing that an expense was an "allowable expense" and that "reasonable charges" were "incurred for reasonably necessary" services under the No-Fault Act. *Owens v Auto Club Ins Ass'n*, 444 Mich 314, 323-324; 506 NW2d 850 (1993). Moreover, it is well established that the ordinary meaning of "incurred" within the context of the No-Fault Act means to "become liable for" or "subject to" an expense. *Adkins v Auto Owners Ins Co*, 105 Mich App 431, 434; 306 NW2d 312 (1980) (citing *Hoehner v Western Casualty & Surety Co*, 8 Mich App 708, 717; 155 NW2d 231 (1967) (interpreting the term "incurred" in the context of a medical insurance contract)).

In *Shanafelt, supra*, 217 Mich App 628, the plaintiff injured herself when she slipped on ice while entering her parked vehicle. The plaintiff was covered by a health insurance policy from an insurer that was not a party subject to the suit as well as a no-fault automobile policy with the defendant. *Id.*, 629-630. The defendant denied the plaintiff's claim for benefits and the health insurer paid the plaintiff's claim for medical expenses. *Id*. Thereafter, the plaintiff brought suit claiming that the defendant unreasonably refused or delayed in paying her expenses and the trial court ruled in the plaintiff's favor, awarding her attorney fees and costs pursuant to MCL 500.3148(1); MSA 24.13148(1). *Id.*, 630-631, 634-635.

On appeal, the defendant argued that the trial court's award of fees was improper, based partly on the fact that the plaintiff never incurred the expenses that served as the basis for the award because her medical bills were paid directly by the health insurer. *Id*., 635-636. In analyzing that argument, this Court considered the plain, ordinary meaning of the term "incurred" within the context of the statute to mean "to become liable for." *Id*., 638. Using that definition, this Court reasoned that, because the plaintiff was obligated to pay the medical expenses when she accepted medical treatment, notwithstanding her contract with the other insurer to compensate her or to pay the provider directly, the plaintiff's expenses had been "incurred" and were "allowable expenses." *Id*. See also *Majurin v Dep't of Social Services*, 164 Mich App 701, 705-706; 417 NW2d 578 (1987) (using the same definition of "incurred" in regard to the Michigan Social Welfare Act, MCL 400.10; MSA 16.410).

In the present case, it is undisputed that the conservator did not buy or otherwise become liable for the expense of the Dynavox unit and only received the unit after litigation had begun, without presenting American with a bill for the expense. The conservator admits that she asserted the Dynavox claim based on Mantei's physician's prescription of the device and other recommendations from medical personnel.

Nevertheless, the conservator urges this Court to accept a more liberal interpretation of the statute; otherwise, she contends, the policy of the No-Fault Act to provide quick relief to the injured would be frustrated since the conservator would be forced to pay for the Dynavox unit out of her own pocket before being allowed to receive the benefit American agreed to provide. In particular, the conservator argues that *Booth v Auto-Owners Ins Co*, 224 Mich App 724; 569 NW2d 903 (1997) supports her liberal interpretation of the statute. In that case, the plaintiff was severely injured in an automobile accident and required care from her parents on a continual basis. After the defendant insurer refused to pay the parents for the full care that they provided, the plaintiff filed suit. *Id*., 726. The trial court granted the defendant summary disposition, ruling that the plaintiff failed to submit evidence establishing that she incurred expenses because her parents did not charge her for their services. *Id*., 726-727. This Court reversed the trial court's ruling, holding that the plaintiff was not required to be actually billed by her family to have incurred the expense of their treatment. *Id*., 730.

The conservator relies on *Booth* as proof that a less strict definition of "incurred" had been accepted. Importantly, however, this Court did *not* hold that the plaintiff in *Booth* need not provide any proof that she became liable for the expenses at issue. Indeed, *Fortier v Aetna Casualty and Surety Co*, 131 Mich App 784; 346 NW2d 874 (1984), also cited as authority by the conservator, makes it clear that, although formal documentary evidence may not be required to prove that an expense has been incurred, an insured is not altogether relieved of her obligation of proving that she became liable for claimed expenses. *Id*., 790-791.

That distinction is perhaps best illustrated by this Court's holding in *Schaible v Michigan Mutual Ins Co*, 116 Mich App 116; 321 NW2d 860 (1982), in which the plaintiff sued the defendant insurer to recover no-fault benefits in the form of replacement costs due to the death of his wife. The defendant relied on *Adkins, supra*, 105 Mich App 434, arguing that the plaintiff could not prove that he actually incurred any such expenses. *Id*., 121. This Court held that the plaintiff failed to prove that he became obligated to pay for the expenses that he had claimed, stating:

> Plaintiff testified that family members performed various household tasks for him after his wife died. However, he was unable to state with certainty how much time the relatives had spent on his behalf. . . . Since plaintiff did not offer proof that he expended money or became liable to pay for replacement services, the trial court's denial of defendant's motion for a directed verdict was error and the jury's award of $7,200 for replacement services is reversed. [*Id*., 122; See *Moghis v Citizens Ins Co*, 187 Mich App 245, 247; 466 NW2d 290 (1990).][3]

The conservator's strong reliance on *Walker v Farmers Ins Exchange*, 226 Mich App 75, 82-83; 572 NW2d 17 (1997), also does not convince us to adopt a more liberal interpretation of the statute.

Walker specifically addressed whether the defendant insurer was able to offset its future payment of undisputed PIP benefits by the amount of a judgment that had been rendered against the plaintiff. *Id*., 82. While that case considered the effect of a declaratory judgment in regard to future accident-related medical expenses, it cannot logically be viewed as changing the policy long espoused by this Court with respect to the definition of "incurred." We hold therefore, under *Shanafelt*, *supra*, 217 Mich App at 638, that the Dynavox claim was not incurred by the conservator and did not become an allowable expense that rendered benefits payable under MCL 500.3107(1)(a); MSA 24.13107(1)(a) prior to defendant paying the Dynavox claim. Therefore, there were no overdue benefits upon which to base an award of attorney fees under MCL 500.3148(1); MSA 24.13148(1).

B. Unreasonable Refusal Or Delay

Although American incorrectly claims that it is entitled to a jury determination of whether it unreasonably delayed in making payments under the No-Fault Act, we further find that the trial court erred when it based its award of attorney fees on the assumption that American had unreasonably delayed in making payment to the conservator.

Once American paid each of the expenses that were subject to the litigation, it was no longer necessary to determine whether they were reasonable or necessary for Mantei's care, recovery, or rehabilitation and, thus, the question of whether the expense was reasonable and necessary became moot. See MCL 500.3107(1)(a); MSA 24.13107(1)(a). Therefore, the relevant issues at the evidentiary hearing included the legal question of whether American unreasonably delayed in making the payments and, if such delay was determined to have occurred, the amount of fees and costs the conservator was entitled to under MCL 500.3148(1); MSA 24.13148(1).

Given that the issue of reasonableness was a determination for the trial court, American correctly asserts the trial court erroneously found that American unreasonably delayed in making payment. During the initial hearing on the conservator's motion for attorney fees, the trial court recognized the necessity of determining whether American acted unreasonably in delaying payment yet, unexplainably, the trial court viewed that issue as irrelevant throughout the ensuing evidentiary hearing. It is clear from several of the exchanges at the hearing that the trial court viewed the fact that American eventually paid the benefits after litigation had begun as unequivocal proof that American had unreasonably delayed in making payment. In doing so, the trial court presumably considered only the first sentence of MCL 500.3148(1); MSA 24.13148(1), providing attorney fees when a client makes a claim for overdue benefits, and ignored the statute's more specific demand that attorney fees be based on unreasonableness contained in the section's second sentence. See *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998) (explaining that specific statutory sections prevail over generally applicable provisions when in conflict).

It is therefore clear that the trial court assumed that *any* delay by American in paying the claimed benefits was *unreasonable* delay given American's eventual payment of the benefits. There may, however, be justifiable reasons for an insurer to investigate the worthiness of an insured's claims prior to paying benefits. See *Conway v Continental Ins Co*, 180 Mich App 447, 451; 447 NW2d 761 (1989). It is well-settled that "when considering whether attorney fees are warranted under the

No-Fault Act, the inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable. Further, this Court has also explained that a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Shanafelt, supra*, 217 Mich App 635 (citing *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 105; 527 NW2d 524 (1994); *Liddel v DAIIE*, 102 Mich App 636, 650; 302 NW2d 260 (1981)).

Therefore, we hold additionally that the trial court clearly erred by basing its finding that American unreasonably delayed in paying benefits solely on the fact that they were overdue. The trial court presumably only considered the general language of MCL 500.3148(1); MSA 24.13148(1) and failed to realize that basic to an award of fees is an initial determination that the insurer's refusal to pay or delay in making payment was unreasonable. Given our holding with respect to the "incurred" issue, however, it is unnecessary for us to remand for such a determination.

We note that American argues that the trial court erred with respect to its calculation of attorney fees. We do not need to reach this issue given our holdings above, but we do observe that the trial court did not abuse its discretion by shifting the burden of proof to American to disprove the reasonableness of the conservator's claimed attorney fees.

Reversed and remanded for entry of a judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] We recognize that we normally review the amount of an award of attorney fees for an abuse of discretion, *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 634; 552 NW2d 671 (1996) however, because the trial court's decision to award attorney fees and its reasons for upholding a portion of the award on defendant's motion for reconsideration was directly premised on its interpretation of the term "incurred" under MCL 500.3107(1)(a); MSA 24.13107(1)(a), we review the merits of the conservator's claim to attorney fees based on American's delayed payment of the Dynavox claim de novo.

[2] Given that it is undisputed that the ambulance bill claim was paid prior to the conservator's filing suit and given that it is undisputed on appeal that the hospital bills claim was included in the arbitration award, the Dynavox claim is the only basis for an award of attorney fees that is under scrutiny here.

[3] The "Catch-22" situation described in Judge Kaufman's dissent does not apply equally to the present case because the conservator did not receive the Dynavox unit prior to filing suit and, thus, whether the conservator indeed became obligated for the unit is not as unclear as it was in the case of replacement costs for services already rendered in *Schaible*. *Id.*, 126-127.