STATE OF MICHIGAN

COURT OF APPEALS

LINDA MARIE ROBINSON,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
May 11, 2004

No. 244824; 245363
Macomb Circuit Court
LC No. 99-002487-NF

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

In this consolidated no-fault insurance action, defendant Allstate Insurance Company appeals as of right from the trial court orders granting plaintiff Linda Marie Robinson $56,600 in attorney fees and $3560 in taxable costs, and denying defendant attorney fees. This case arises out of defendant's denial of plaintiff's claim for no-fault benefits. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff claimed to have been injured when she was sideswiped as she was entering her vehicle. She alleged that she fractured her elbow and, later, suffered from a variety of other ailments, including hysterical paralysis, and had several hospitalizations. Defendant took the position that there had been no accident and that plaintiff was a malingerer who used medical claims to obtain prescription drugs. Plaintiff originally sought nearly $158,000 in damages, but later waived all but medical expenses and went to trial for approximately $82,000. The jury found that there had been an accident, and that plaintiff was entitled to $4000 for medical expenses relating to the accident. The jury also found that payment was overdue and awarded plaintiff $1920 in interest.

Defendant first argues that the trial court clearly erred by denying its motion for attorney fees under MCL 500.3148(2). We agree.

In general, a trial court's decision to award or deny attorney fees is reviewed for an abuse of discretion. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 627; 550 NW2d 580 (1996). "A trial court's findings regarding the fraudulent, excessive, or unreasonable nature of a claim should not be reversed on appeal unless they are clearly erroneous." *Beach, supra* at 627.

Under MCL 500.3148(2) an insurer is entitled to an award of attorney fees for defending against a claim that was "in some respect fraudulent or so excessive as to have no reasonable foundation." Statutory interpretation is a question of law which this Court reviews de novo on appeal. *People v Stone Transport, Inc*, 241 Mich App 49; 613 NW2d 737 (2000). "The starting point in every case involving construction of a statute is the language of the statute itself." *Hills of Lone Pine v Texel*, 226 Mich App 120, 123; 572 NW2d 256 (1997). If the plain and ordinary meaning of the statute is clear, judicial construction is not permitted. *Borchard-Ruhland, supra* at 284.

Here, defendant argued that the extreme difference in the damages plaintiff requested and the damages the jury actually awarded to plaintiff clearly evidenced that some of the requested damages were excessive or fraudulent; therefore, the court erred in denying defendant attorney fees. In denying defendant's motion, the trial court relied on the jury determination that plaintiff's award of $4000 for medical expenses was overdue. The trial court noted that defendant could have asked the jury for a determination as to whether plaintiff's other alleged damages were fraudulent but failed to do so, and that the jury awarded plaintiff damages for her initial hospital visit. The court acknowledged that the jury found that plaintiff's subsequent hospitalizations were not related to the accident. We do not find any ambiguity in the statutory language, and agree with defendant that a $4000 verdict on an $82,000 claim is evidence that the jury found that plaintiff's claim "was in some respect fraudulent or so excessive as to have no reasonable foundation," and remand for the "award of a reasonable sum." MCL 500.3148(2).

Defendant also argues that the trial court erred in awarding plaintiff attorney fees when it did not find as a matter of law that defendant refused to pay the claim or unreasonably delayed in making proper payment. MCL 500.3148(1). We agree.

MCL 500.3148(1) provides as follows:

> 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.

The purpose behind the no-fault act's attorney fee penalty provision is to ensure that the insurer promptly makes payment to the insured. *Beach, supra* at 612. However, "[a] refusal or delay in payment by an insurer will not be found unreasonable within the meaning of [MCL] 3148(1) where the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty." *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994).

In granting plaintiff's motion for attorney fees pursuant to MCL 500.3148(1), the court reasoned as follows:

> Defendant's argument that a factual uncertainty existed to preclude an award of attorney fees against it is nothing more than an attempt to overturn the jury's verdict that the payment of plaintiff's medical expenses was overdue. The

> jury clearly disbelieved any factual uncertainty existed as to the payment of at least a portion of plaintiff's medical expenses and held such payment was clearly overdue. Defendant may not now collaterally attack the jury's verdict.

A trial court's finding that the benefits are overdue is not the end of the analysis for awarding attorney fees. Under MCL 500.3148(1), a plaintiff is entitled to attorney fees when the benefits it seeks are overdue *and if* the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. The scope of inquiry under MCL 500.3148(1) "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, supra* at 105. MCL 500.3148(1) requires the court to make this finding as a separate determination after the jury determines whether the benefits are overdue. The trial court here did not make a finding regarding whether the delay or refusal was unreasonable. Accordingly, we reverse the award to plaintiff of attorney fees and remand for further findings in this respect.

Next, defendant asserts that the trial court abused its discretion in awarding plaintiff attorney fees in the amount of $56,600 because it did not address the factors a trial court should consider in assessing the reasonableness of an attorney award. In light of our decision to reverse the award and remand on this matter, we decline to review this issue at this time.

Defendant's final claim is that the trial court abused its discretion in declaring plaintiff the prevailing party and in awarding taxable costs in the amount of $3,560. We disagree. An award of costs is reviewed for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d (1996). Under MCR 2.625(A)(1), "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated on the record." MCR 2.625(B) sets out rules to determine the prevailing party: "In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party."

Defendant argues that it should be deemed the prevailing party because the jury only awarded plaintiff a small percentage of the damages she requested. Here, there was only a single cause of action alleged – did plaintiff sustain an accidental bodily injury arising out of the use of a motor vehicle. Plaintiff was clearly the prevailing party under that single cause of action. Contrary to defendant's assertion, "the fact that plaintiff did not obtain the total amount of damages sought does not prohibit him from being the prevailing party under MCR 2.625(B)(2)." *McMillan v Auto Club Ins Ass'n*, 195 Mich App 463, 466; 491 NW2d 593 (1992).

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot