STATE OF MICHIGAN

COURT OF APPEALS

CLYDE EVERETT,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
January 26, 2010

No. 287640
Lapeer Circuit Court
LC No. 06-037406-NF

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order awarding plaintiff attorney fees and costs at the conclusion of this automobile no-fault case. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured in a vehicle accident in December 2005 that left him a paraplegic. He needed to make modifications to his home, and Recovery Construction Services submitted a proposal that eventually resulted in a contract for $64,426.69, with $30,000 due upon acceptance. Plaintiff sought first-party benefits from defendant to pay for the modifications, but the parties did not reach a settlement on the claim until February 2008, and it was at that time that plaintiff was finally able to sign the contract for the modifications. Plaintiff then moved for attorney fees under MCL 500.3148, arguing that defendant unreasonably delayed in approving the necessary modifications. Defendant, citing *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476; 673 NW2d 739 (2003), argued that both parties were responsible for the delay and that benefits were not overdue because plaintiff had not yet incurred any expenses.

The trial court decided the motion without oral argument. It noted the timeline of events beginning with filing of the complaint on May 17, 2006, and the several adjournments that occurred at defendant's request. It stated:

> Defendant is well aware of the fact that Plaintiff could not sign any agreement for modification without prior approval by Auto Owners. The contract for modifications required down payment of $30,000.00, which Plaintiff was incapable of making. In this Court's opinion, R[ecovery]C[onstruction]S[ervices] was not looking to Clyde Everett for payment of the $30,000.00, it was looking to its principal, Auto Owners.

The trial court awarded plaintiff $12,728.54 in fees.

On appeal, defendant argues that no benefits were overdue. This case is factually identical to *Proudfoot*, where our Supreme Court held that the plaintiff had not incurred any expenses because he never became legally liable for the expense. Even if benefits were overdue, fees can only be awarded if the insurer "unreasonably" refused or delayed payment. MCL 500.3148(1).

Plaintiff argues that this case is distinguishable from *Proudfoot* because defendant's own actions prevented the contract from being executed. Defendant cannot use its own delay to defeat its liability. *Stanton v Dachille*, 186 Mich App 247, 258; 463 NW2d 479 (1990). Defendant delayed from the beginning by forcing plaintiff to file suit, and the record is replete with evidence that plaintiff and his counsel were frustrated with defendant's lack of response. Finally, plaintiff filed a motion for summary disposition and injunctive relief, asserting that defendant was acting in bad faith and unreasonably delaying payment, which defendant never answered. This prompted defendant to meet with all the necessary parties at plaintiff's house in March 2007, where a plan everyone agreed to was drawn up. Still, defendant did not give final approval of the plan until plaintiff threatened to re-notice the motion for summary disposition. In May 2007, defense counsel indicated to plaintiff's counsel that defendant approved the plan (which plaintiff had already approved), and just needed "details of what had been approved." When nothing further came from defendant, plaintiff re-noticed the motion for July 9, 2007, but defendant asked for another month adjournment. That date was adjourned several more times by defendant. Finally, after defendant unsuccessfully attempted to get plaintiff to waive further first-party benefits and allow them to have a lien on the home in consideration for defendant tendering the full amount of the contract, the parties reached the February 2008 settlement, nearly a year after all parties had agreed to the plan. During all this time, defendant never allowed the work to even begin, despite agreement on most of the modifications.

In response to defendant's argument that no expenses have been incurred, plaintiff argues that plaintiff could not sign the contract without knowing whether defendant would accept it. Likewise, Recovery Construction Services would not begin work without defendant's approval. The case is distinguishable from *Proudfoot* because in that case, the defendant claimed that the plaintiff's architect's proposed modifications were unreasonable. *Proudfoot*, *supra* at 478. Here, defendant provided the contractors and defendant never articulated an objection to the plans drawn up. Defendant, faced with a motion for summary disposition and injunction, could have simply responded that it was waiting to act until plaintiff signed the proposal. But it never made that claim, nor provided any other reason why it would not give its approval.

We review a trial court's decision to grant or deny attorney fees for abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). The trial court has not abused its discretion if the outcome of its decision is within the range of principled outcomes. *Id.* We review factual findings on which the decision is based for clear error. *Id.* Statutory interpretation is a question of law that we consider de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). Whether an insurer's delay is unreasonable is a question of fact that we review for clear error. *Ross v Auto Club Group*, 481 Mich 1; 748 NW2d 552 (2008).

MCL 500.3107 provides in part:

> (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 500.3142(2) provides, in relevant part:
> 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.

> MCL 500.3148(1) 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.

In addition, "[a]n overdue payment bears simple interest at the rate of 12% per annum." MCL 500.3142(3).

The first question, whether defendant was overdue in paying benefits, is an issue of statutory construction where, as here, the relevant facts are not in dispute. In *Proudfoot*, the plaintiff's claim failed because she could not prove she had sustained any loss. *Proudfoot*, *supra* at 484-485. The Court found that the plaintiff had not "incurred" an expense because she had not taken any action to become liable for the costs of modifying her home, citing MCL 500.3107. *Id*. at 484. In the present case, it is also true that plaintiff has not taken any steps that make him legally liable for any expenses. However, MCL 500.3107 does not control the timing of payments; it only defines what expenses are covered. Instead, MCL 500.3142(2) provides the applicable provisions: the claimant must show "reasonable proof of the fact and of the amount of loss sustained." In *Proudfoot*, the amount of loss was unknown because the defendant found the plaintiff's proposed modifications unreasonable, and ultimately needed a jury to make that decision. The Court in *Proudfoot* provided little analysis, simply highlighting the word "sustained" in the statute and making the conclusory statement that the plaintiff "has not sustained a loss associated with the actual home modifications (other than the architect's fee)." *Id*. at 485. The Court only allowed attorney fees for the one, known expense: the architect's fee.

Here, plaintiff provided proof that modifications were needed and defendant did not dispute that at least $30,000 would be required. Confronted with a valid need for a sum certain, defendant simply declined to act. Unlike *Proudfoot*, there was no question that most of the modifications would be made because defendant *already agreed to them*. Defendant apparently was simply trying to wear plaintiff down into conceding to the waiver. Although this is a close

question, we agree with the trial court's finding that plaintiff had proven the fact and amount of the loss sustained.

The second part of the analysis is whether the trial court erroneously awarded fees based on defendant's unreasonable delay. It is true that there is no express finding of unreasonableness in the court's opinion, but the finding is implicit because otherwise fees would not be awarded. Moreover, "an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay. The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Ross*, *supra* at 11.

In this case, plaintiff argued in his summary disposition motion brief that defendant acted in bad faith and unreasonably delayed payment. Defendant made no effort to show that the delay was justified. Although defendant asserts here that both parties were responsible for the delay, it provides no evidentiary support for that. Plaintiff, in contrast, provides ample support. And the trial court was well aware of the length of the proceedings. We cannot conclude that the trial court clearly erred in finding the delay unreasonable.

Affirmed.

/s/ E. Thomas Fitzgerald