STATE OF MICHIGAN

COURT OF APPEALS

HATTIE MOORE and JAMES MOORE, Plaintiffs-Appellees, v SECURA INSURANCE, Defendant-Appellant.	FOR PUBLICATION July 3, 2007 9:05 a.m. No. 267191 Genesee Circuit Court LC Nos. 01-071881-NF 02-073203-NF Official Reported Version

Before: Wilder, P.J., and Sawyer and Davis, JJ.

DAVIS, J.

In this no-fault insurance action, defendant appeals both the trial court's decision to grant plaintiff attorney fees and costs and the amount of attorney fees and costs awarded to plaintiff. We affirm.

Plaintiff Hattie Moore was involved in an automobile accident on September 27, 2000. Plaintiff was driving her automobile on I-475, when her automobile was struck on the passenger side by a pickup truck. Plaintiff lost control of her vehicle and crashed into the freeway median. Plaintiff fractured her right kneecap and impinged her right shoulder. The driver of the pickup truck fled the accident scene. Plaintiff filed an application for benefits with defendant insurer, seeking wage loss and first-party personal injury (PIP) benefits. Plaintiff also sought uninsured motorist benefits for pain and suffering. Defendant paid wage loss and injury benefits for approximately one year, and then stopped. Plaintiff brought suit.[1] A jury awarded plaintiff $50,000 in noneconomic damages on the uninsured motorist claim, and $42,755 for unpaid wage loss for the PIP claim. In addition, the jury awarded plaintiff $98.71 in penalty interest for overdue wage loss benefits. After the trial, plaintiff moved for attorney fees pursuant to MCL 500.3148. The trial court granted plaintiff's motion and awarded plaintiff $79,415 in attorney fees and costs. Defendant appeals, arguing that it was clear error to award attorney fees and that, in any event, the amount awarded was an abuse of discretion.

[1] Although the plaintiff's husband also brought a derivative claim, for ease of reference, Hattie Moore will be referred to as the plaintiff throughout this opinion.

We review for clear error a trial court's finding that an insurance company unreasonably refused to pay benefits and its decision to award attorney fees under MCL 500.3148(1). *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999); *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 628; 550 NW2d 580 (1996). A finding is clearly erroneous when, even if there is evidence in the record to support it, this Court is left with the definite and firm conviction that a mistake has been made by the trial court. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004); *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). We review for an abuse of discretion the amount of attorney fees awarded. *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 587-588; 321 NW2d 653 (1982). An abuse of discretion occurs when the trial court's decision results in an outcome that falls outside the principled range of outcomes. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

The statutory basis for the award of attorney fees in this case is MCL 500.3148(1), which 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.

The plain language of this statute provides for the assessment of attorney fees if a plaintiff's benefits are owed by a defendant insurer, payment of those benefits is overdue, and the defendant insurer's delay was unreasonable. However, expenses cannot be overdue unless they are "incurred"; to "incur" means "'to become liable or subject to, [especially] because of one's own actions.'" *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003) (citation omitted). Benefits are overdue if they are not paid within 30 days after the insurer received reasonable proof of the fact of the loss and the amount of the loss. MCL 500.3142(2). "If the insurer's refusal or delay in payment is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, the refusal or delay will not be found unreasonable under MCL 500.3148(1) . . . ." *Beach, supra* at 629. Overdue benefits give rise to a rebuttable presumption of unreasonable refusal or undue delay. *Combs v Commercial Carriers, Inc*, 117 Mich App 67, 73; 323 NW2d 596 (1982). Payment of attorney fees in a no-fault case requires that the insurer unreasonably refused to pay benefits and that those benefits were overdue. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66-67; ___ NW2d ___ (2007).

Defendant does not contend that it did not pay the benefits at issue. Rather, defendant contends that it did not receive reasonable proof of the fact and amount of plaintiff's loss until trial, so the benefits were not "overdue." However, plaintiff in fact filed an "applications of benefits" form with defendant in December 2000, and plaintiff's employer provided employment information indicating plaintiff's wage history. "The statute requires only *reasonable* proof of the amount of loss, not exact proof. MCL 500.3142(2)." *Williams v AAA Michigan*, 250 Mich App 249, 267; 646 NW2d 476 (2002) (emphasis in original). Defendant argues that it reasonably refused to make payments because there existed a legitimate factual uncertainty about plaintiff's injuries. Defendant relies on its retention of a doctor to conduct an independent

medical examination (IME) of plaintiff and that doctor's opinion that plaintiff's injuries from the accident had healed and that her other pain was caused by preexisting conditions. However, defendant did not contact plaintiff's treating physicians and did not disclose the IME doctor's report to plaintiff's treating physicians. The trial court concluded that defendant knew that other doctors had been involved and that it was "incumbent upon the carrier to go beyond" just the IME doctor's opinion and "could have sought further information before exercising the draconian termination of critical benefits for one who is injured." We agree.

This Court has recently reaffirmed that a refusal to pay benefits will not be "unreasonable" if "'the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty.'" *Roberts, supra* at 67, quoting *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994). We are unaware of any outstanding legal or constitutional uncertainties defendant might have had. More importantly, the genesis of the above definition of unreasonableness is in *Liddell v Detroit Automobile Inter-Ins Exch*, 102 Mich App 636, 650; 302 NW2d 260 (1981). In that case, this Court upheld the trial court's award of attorney fees under MCL 500.3148 on the basis of the refusal of the defendant insurer to reconcile the opinion of one doctor that the plaintiff's injuries from an accident no longer precluded him from employment with the contradictory opinions of the plaintiff's treating physicians. *Liddell, supra* at 641, 650-651. Here, as in *Liddell*, defendant insurer terminated plaintiff's work loss benefits without attempting to reconcile the opinions of its independent medical examiner and plaintiff's treating physicians. In fact, defendant did not even contact plaintiff's treating physicians after receiving the IME report, and it did not disclose the IME report to plaintiff's treating physicians. Furthermore, plaintiff's physicians had not communicated to defendant any change in their initial diagnosis. Under these circumstances, the trial court did not clearly err in finding that defendant unreasonably terminated plaintiff's benefits and, therefore, in awarding plaintiff attorney fees and costs pursuant to MCL 500.3148.

Several unpublished opinions of this Court, although not binding pursuant to MCR 7.215(C)(1), have reached similar results. In *Clack v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 1998 (Docket No. 192420), this Court affirmed a finding that an insurer's denial of benefits was unreasonable where the insurer never attempted to resolve the conflict between the plaintiff's doctors' recommendation for treatment and the IME doctor's recommendation. In *Hannawi v American Fellowship Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 1999 (Docket No. 207629), this Court upheld a finding that the insurer unreasonably denied benefits where the IME doctor failed to find evidence of a herniated disc, the plaintiff's doctors subsequently found such evidence through an MRI (magnetic resonance imaging) examination, and the insurer continued to deny benefits. In *Villegas v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2003 (Docket No. 235512), the plaintiff's doctors opined that the plaintiff's injury was caused by an automobile accident, the IME doctor opined that some of the plaintiff's symptoms may have been unrelated to the accident, and this Court upheld a finding that the denial of benefits solely on the basis of the latter opinion was unreasonable. By way of contrast, in *Stoops v Farm Bureau Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket Nos. 260454, 261917), this Court overturned a finding of unreasonableness where some of the plaintiff's own doctors actually supported the insurer's decision to terminate benefits and private investigators determined that the plaintiff was performing activities she claimed caregivers were required to perform. We find these cases

persuasive. Again, we conclude that the trial court properly found the denial of benefits here unreasonable where defendant made no inquiry beyond the opinion of its own IME doctor.

The next question is whether those benefits were overdue. The jury's $98.71 penalty interest award, at the 12 percent rate specified by the trial court, is suggestive of a finding that defendant unreasonably delayed payment of only $822.52, or one week of work loss benefits. The necessary corollary to this finding is that the jury found the remainder of its $42,755 award for unpaid wage loss not to be overdue. We decline the invitations to speculate regarding why the jury so found, or to conclude that this is such a *de minimis* amount so as to be tantamount to a finding that no payments were overdue. The jury is the finder of fact, and we will not second-guess it. Again, it was determined below that the denial of benefits was unreasonable, and the jury found at least some of the benefit payments overdue. The conditions for an award of attorney fees were therefore satisfied. *Roberts, supra* at 66-67.

Finally, defendant argues that the trial court abused its discretion in awarding plaintiff $79,415 in attorney fees when the jury awarded plaintiff only $98.71 in penalty interest. We disagree.

We first note that the attorney fee award itself was determined to be reasonable. There is no precise formula for computing the reasonableness of attorney fees, but the factors to be considered include: (1) the professional standing and experience of the plaintiff's attorney; (2) the skill, time, and labor involved in the plaintiff's no-fault claim; (3) the amount in question and the results achieved by the plaintiff's attorney; (4) the difficulty of the no-fault case; (5) the expenses incurred; and (6) the nature and length of the professional relationship between the plaintiff's attorney and the plaintiff. *Wood, supra* at 588. Plaintiff's attorney provided information about the skill, time, and labor involved in plaintiff's no-fault claim, the result he achieved for plaintiff, the difficulty of the case, and the expenses he incurred for plaintiff. The record created by plaintiff's attorney supports the amount of fees and costs awarded by the trial court. The mere fact that it is disproportionate to the amount of penalty interest is not relevant to the time and effort expended by plaintiff's attorney, the amount of the jury award on plaintiff's PIP claim, or the expenses incurred by plaintiff's attorney in securing that award. This is particularly true given the trial court's correct finding that defendant's termination of plaintiff's benefits was unreasonable. The decision by the trial court fell within the range of principled outcomes, so the trial court did not abuse its discretion when it determined the amount of awardable attorney fees.

Defendant nevertheless argues that the maximum to which plaintiff could be entitled is the *portion* of attorney fees directly attributable to securing the $98.71 penalty interest award, and no more. We find no support for this position in the plain language of the statute. Under, MCL 500.3148(1), attorney fees are available "for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue." Thus, the first condition for an award of attorney fees is that *the action is for overdue benefits*. For a benefit to be "overdue," the insurer must have become liable to pay it. *Proudfoot, supra* at 483-485. The second condition is that "the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." The Legislature's use of the words "the claim" indicates that an insurer must have failed to pay all of it, but the Legislature's use of "delayed in making proper payment," in contrast, indicates that only *some* payment need be

delayed. Furthermore, *this* inquiry "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. It is therefore possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them.

Defendant points out that in *Proudfoot*, our Supreme Court permitted an attorney fee award only for an architect's fee that the plaintiff had paid and that the defendant insurer had not repaid. The Court reversed an award of attorney fees for the cost of modifying the plaintiff's home, which the plaintiff had not yet incurred. Our Supreme Court emphasized that attorney fees were only available in an "'action for personal or property protection insurance benefits *which are overdue*.'" *Proudfoot*, *supra* at 485, quoting MCL 500.3148(1) (emphasis added by the *Proudfoot* Court). "Thus, attorney fees are payable only on *overdue* benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." *Proudfoot, supra* at 485 (emphasis in original). But the significant issue in *Proudfoot* was that none of the modification expenses could be "overdue" because the defendant insurer had not yet become liable for any of them, in turn because the plaintiff had not yet incurred them. *Id*. at 483-484. In this case, defendant insurer *was* found liable for unpaid benefits and found to have unreasonably refused to pay or unreasonably delayed in paying. The fact that the jury apparently determined that only some of the benefits were actually overdue does not negate this being "an action for personal or property protection insurance benefits which are overdue." MCL 500.3148(1). The statute provides for attorney fees in such a circumstance, and the trial court found the fees sought to be reasonable.

Affirmed.

Sawyer, J., concurred.

/s/ Alton T. Davis
/s/ David H. Sawyer