

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS HEMSTREET,

UNPUBLISHED

May 27, 1997

Plaintiff- Appellant,

and

TRAVELERS COMPANIES,

Intervening Plaintiff,

v

No. 193017

Otsego Circuit Court

LC No. 93-5614 CK

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellee.

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).¹ We affirm.

Plaintiff brought this action against defendant claiming that he was entitled to no-fault benefits stemming from a July 23, 1992 accident wherein plaintiff, who was riding a motorcycle, collided with a motor vehicle insured by defendant. Although defendant was statutorily the first in priority for paying plaintiff's medical benefits, plaintiff's health care insurer, Travelers, covered his expenses. To protect his right to recover the medical expenses from defendant, plaintiff brought a first-party action against defendant. Travelers subsequently intervened.

After hearing arguments on a motion for summary disposition brought by Travelers against plaintiff and defendant, the trial court issued an order on November 22, 1995. The interpretation of this decision is at issue in this case. The relevant portion of the trial court's order provides as follows:

Accordingly, Travelers is granted partial summary disposition and it is ordered that:

(1) Travelers is subrogated to the right of Plaintiff in Plaintiff's action against State Farm for the first-party no-fault insurance benefits which have been previously paid by Travelers, to the extent that these benefits are payable pursuant to MCL 500.3107 as arising from the operation, use or maintenance of the motor vehicle insured by State Farm on July 23, 1992.

(2) That Travelers' subrogation rights shall be subject to Plaintiff's claim against any amount recovered against State Farm for reasonable, actual attorney fees and costs incurred to date in prosecuting Plaintiff's action against State Farm.

(3) As this matter is not fully adjudicated on motion, proceeding at trial will determine the following:

* * *

b. The amount, if any, that Plaintiff must receive from funds otherwise payable to Travelers to compensate Plaintiff for actual, reasonable attorney fees and costs incurred to date prosecuting State Farm.

Defendant and Travelers then settled. Defendant paid Travelers \$112,400, which included all interest and penalties to which Travelers may have been entitled. Travelers also agreed it would pay any expenses due plaintiff under paragraph (3)(b) of the trial court's order.

On appeal, plaintiff first argues that the trial court erred in determining that he was not entitled to interest based on defendant's unreasonable delay in paying the \$112,400 in medical expenses. Defendant did not pay them within the thirty-day limit provided for in MCL 500.3142; MSA 24.13142. However, the unreasonable refusal comes into play when a party seeks attorney fees under MCL 500.3148(1); MSA 24.13148(1). It has no bearing on whether a party is entitled to interest on overdue payments. *Davis v Citizens Ins Co of America*, 195 Mich App 323, 328; 489 NW2d 214 (1992). Further, because Travelers is equitably subrogated to plaintiff's rights against defendant, it would be the only one entitled to collect interest from defendant for a refusal to timely pay. However, Travelers waived its rights to all interest and penalties as part of its settlement with defendant.

Next, plaintiff argues that the trial court erred in holding that plaintiff's award of attorney fees should be computed based on an hourly rate. Plaintiff claims that the court should have awarded a contingent fee assessed against the \$112,400 ultimately recovered by Travelers. We find no abuse of discretion. *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990). In its November 22, 1995 order, the trial court specifically noted that proceeding at trial will determine "[t]he amount, if any, that Plaintiff must receive from funds otherwise payable to Travelers to compensate Plaintiff for actual, reasonable attorney fees and costs *incurred to date* prosecuting [defendant]." (emphasis added). This order effectively informed plaintiff's attorney that, because Travelers was subrogated to the right of

plaintiff in plaintiff's action against defendant, he had nothing more to gain by continuing to prosecute defendant. As of the date of this order, plaintiff had recovered *nothing*. Thus, under plaintiff's theory that he is entitled to a one-third contingency fee, he is actually entitled to one-third of nothing. It was only *after* the November 22, 1995 order that Travelers and defendant settled for \$112,400. However, as the trial court correctly noted in its February 29, 1996 order, although a contingent fee was not appropriate, attorney fees at a reasonable hourly rate were justifiable because the trial court's November 22, 1995 order "intended that Travelers bear the expense of pursuing the claim rather than receiving the benefit of plaintiff's counsel's effort as a windfall."

Plaintiff next argues that he was entitled to attorney fees under MCL 500.3148; MSA 24.13148 based on defendant's unreasonable delay in paying for his medical benefits, even after plaintiff had filed suit against defendant to recover them. We find no clear error in the trial court's finding that defendant's delay in payment of benefits was reasonable. *Conway v Continental Ins Co*, 180 Mich App 447, 451-452; 447 NW2d 761 (1989). In *Conway*, the Court set forth the general rules for the awarding of attorney fees in no-fault actions:

The prevailing party in a no-fault action may recover his attorney fees if the insurer acted unreasonably in delaying or refusing payment of the claim In order to award attorney fees to the plaintiff, the trial court must find that the insurer acted unreasonably. *Wood v DAIIE*, 413 Mich 573, 587 (1982). A refusal or delay by an insurer will not be found to be unreasonable where the delay is the result of a legitimate question of statutory construction, constitutional law or a bona fide factual uncertainty. *Wright v League General Ins Co*, 167 Mich App 238, 246-247 (1988). [180 Mich App at 451.]

A rebuttable presumption of unreasonableness arises when benefits are not paid within thirty days after an insurer receives reasonable proof of the claim and the amount of the loss sustained. *Bradley v DAIIE*, 130 Mich App 34, 46; 343 NW2d 506 (1983). However, "[w]here a reasonable dispute exists as to either coverage or the amount of benefits owing, the insurer is allowed to contest the claim under the [no-fault] act without penalty." *Butt v Detroit Auto Inter-Insurance Exchange*, 129 Mich App 211; 341 NW2d 474 (1983).

Here, plaintiff testified at his deposition that defendant's representative contacted him to inquire as to why he was not submitting his medical bills. Through this conversation, defendant became aware that Travelers was paying plaintiff's medical bills as they were being incurred. Defendant then informed plaintiff that it had priority and should have been paying the medical expenses. Plaintiff testified that defendant then waited to pay him until it heard from Travelers because defendant was not sure whether Travelers had a valid claim to the money under a coordination or subrogation clause. The trial court later found that plaintiff was *not entitled* to the money owed by defendant because Travelers was paying the benefits in a timely manner and was subrogated to the rights of plaintiff in his action against defendant. Thus, defendant's refusal to pay plaintiff for the amount owing was not only a reasonable dispute, but was justifiable.

Next, plaintiff argues that the trial court erred in finding that he did not have to file suit to seek reimbursement for expenses. Plaintiff argues that if he had not filed suit when he did, Travelers' claim against defendant would not have been preserved due to the statute of limitations, but Travelers could still have brought an action against him for a breach of health care contract. However, even though the trial court found that plaintiff did not have to hire an attorney, it still provided a means for plaintiff to recover attorney fees from Travelers because it found that it would not be fair to allow Travelers to receive "the benefit of plaintiff's counsel's effort as windfall." Thus, the court ruled as if plaintiff was required to hire an attorney in that it required Travelers to pay for his attorney fees for the expenses incurred in preserving Travelers' claim against defendant.

Finally, plaintiff argues that the trial court violated the law-of-the-case doctrine when it determined that no penalties were due based on defendant's delay in reimbursing Travelers. Plaintiff notes that the November 22, 1995 order provides that plaintiff may be entitled to recover interest for defendant's unreasonable delay. He claims that the trial court violated the law of the case when it took away his opportunity to recover interest when it subsequently granted Travelers' motion for summary disposition. We disagree. The law-of-the-case doctrine only applies "if an *appellate* court has passed on a legal question and remanded the case for further proceedings," see *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992), not if a trial court has passed on a legal question in one order and merely interprets its decision differently in a later order.

Affirmed.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ Stephen J. Markman

¹ The trial court held (1) that plaintiff was entitled to recover from Travelers Companies ("Travelers") his actual costs through November 22, 1995 and attorney fees figured at a reasonable hourly rate for all work performed through November 22, 1995; (2) that defendant was not liable for twelve-percent interest on the benefits payable pursuant to MCL 500.3142; MSA 24.13142; and (3) that defendant was not liable for attorney fees pursuant to MCL 500.3148; MSA 24.13148 because plaintiff's medical expenses were covered in a timely manner by Travelers, plaintiff was not required to hire an attorney to seek reimbursement for the expenses that Travelers paid, and defendant reasonably sought to determine whom it should pay.