STATE OF MICHIGAN

COURT OF APPEALS

MORIAH INCORPORATED, doing business as EISENHOWER CENTER,

Plaintiff-Appellant,

v

AMERICAN AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee,

and

FIREMAN'S FUND INSURANCE COMPANY, also known as ARYANS AND FIREMAN'S INSURANCE COMPANY, and ALLIANZ GLOBAL RISKS US INSURANCE COMPANY,

Defendants.[1]

UNPUBLISHED
January 6, 2022

No. 355837
Washtenaw Circuit Court
LC No. 18-000912-NF

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

[1] For purposes of this appeal, American Automobile Insurance Company is the only remaining defendant and appellee. On December 3, 2018, the trial court entered a Stipulated Order of Dismissal Without Prejudice of Fireman's Fund Insurance Company A/K/A Aryans and Fireman's Fund Insurance Company that dismissed Fireman's Fund Insurance Company A/K/A Aryans and Fireman's Fund Insurance Company from the case. Also on December 3, 2018, the court entered an Order to Amend Caption to replace Allianz Global Risks US Insurance Company with American Automobile Insurance Company as the correct defendant.

Plaintiff, Moriah Incorporated, appeals as of right the trial court's order denying plaintiff and plaintiff's counsel's motion to enforce the attorney charging lien, for penalty interest and attorney fees, and dismissing the case. We affirm.

I. BACKGROUND

This is an attorney fee dispute arising out of an action for benefits under the no-fault act, MCL 500.3101 *et seq*. On June 2, 2017, the insured, Gloria Denoyer, was injured in an automobile accident. Denoyer received medical care and services from plaintiff.[2] Plaintiff submitted the bills and supporting documentation for its services to defendant for payment of Denoyer's personal injury protection (PIP) benefits arising from the accident. Defendant allegedly refused or delayed in making payment which caused plaintiff, on July 27, 2018, to retain Christensen Law ("plaintiff's counsel") "to recover unpaid no-fault claims for services it has provided to Gloria Denoyer." The retainer agreement provided that plaintiff's counsel would receive 25% of the amount recovered. In August 2018, plaintiff's counsel sent a letter to defendant's claims' adjuster, Amy Brott, informing defendant that plaintiff had retained counsel and that counsel was asserting "a lien . . . upon any and all settlements and/or judgments resulting from this occurrence."

On August 23, 2018, plaintiff filed a complaint against defendant and other insurers, alleging that defendant was "provided reasonable proof of the fact and of the amount of losses sustained and charges incurred" but refused or neglected to pay the bills due. Plaintiff asserted that the amount still owed by defendant was approximately $208,000. Plaintiff alleged it was entitled to attorney fees under MCL 500.3148 and interest under MCL 500.3142 for the overdue bills because defendant failed to pay them within 30 days of having received reasonable proof of the fact and amount of loss sustained.

On appeal, plaintiff argues that sometime between counsel's July 2018 retainer and the parties' October 2019 facilitation, defendant made payments directly to plaintiff totaling $168,735.56. Plaintiff argues that the payments violated its counsel's attorney lien because the payments were made directly to plaintiff and the checks did not also include plaintiff's counsel's name.

At the facilitation, plaintiff and defendant agreed to settle plaintiff's no-fault benefits claim for $257,597. In August 2020, plaintiff and defendant executed the following release and settlement agreement whereby defendant paid plaintiff $257,597 in exchange for the release of all claims for all services provided to Denoyer through September 30, 2019:[3]

> On behalf of MORIAH INCORPORATED, D/B/A EISENHOWER CENTER, its officers, directors, shareholders, assigns, predecessors, successors, reinsurers, agents, and employees, for and in consideration of the payment of the sum of Two Hundred Fifty-Seven Thousand Five Hundred Ninety-Seven Dollars

[2] On October 5, 2017, Denoyer assigned her right to PIP benefits to plaintiff.

[3] The $257,597 check was written to plaintiff and plaintiff's counsel and is not the subject of the attorney-lien claim.

($257,597.00), the sufficiency and receipt of which is hereby acknowledged, I do hereby RELEASE, REMISE, ACQUIT AND FOREVER DISCHARGE the American Automobile Insurance Company ("AAIC") its officers, directors, shareholders, assigns, predecessors, successors, reinsurers, agents, and employees, and any affiliated company, of and from any and all claims, demands, rights or causes of action of whatever kind, nature, or description, whether known or unknown, asserted, or that could have been asserted, for payment of No Fault benefits under Michigan's No-Fault Insurance Act, MCL 500.3101, et seq, to, for, or on behalf of MORIAH INCORPORATED, D/B/A EISENHOWER CENTER, for all services provided to GLORIA DENOYER through September 30, 2019 in connection with the alleged June 2, 2017, accident (the "accident").

The August 2020 release and settlement agreement also provided that the $168,735.56 payments to plaintiff were "voluntary" and reserved the issue of any attorney lien on those payments for later decision:

> It is further understood and agreed between the parties that no interest, costs, or attorney fees under MCL 500.3142 or MCL 5003148 are being paid as part of this settlement, but that Plaintiff claims an attorney fee on $168,735.56 previously voluntarily paid by AAIC to MORIAH INCORPORATED, D/B/A EISENHOWER CENTER without including MORIAH INCORPORATED, D/B/A EISENHOWER CENTER's attorney's name on the checks, and that AAIC denies such claim is valid; accordingly, this issue will be decided by the [court] by motion, and the claim for the attorney fee on the prospective motion shall be capped at $50,000.00. . . .

In January 2020, the court issued a notice of intent to dismiss the case for no progress. Plaintiff moved to have the case reinstated in April 2020. In its motion, plaintiff argued that the parties' disagreement over details in the release had taken so long that the balance due plaintiff had grown to the point that the settlement was no longer acceptable. The court ordered the parties to attend an August 11, 2020 settlement conference. In November 2020, plaintiff filed a motion to enforce its attorney lien against the $168,735.56, for penalty interest on benefits that were not paid and were 30 days past due, and for reasonable attorney fees.

Defendant argued that the relief plaintiff requested was in the nature of a request for summary disposition. Plaintiff's motion asked the court to find as a matter of law that there was a valid lien applicable to the $168,735.56 and that certain payments triggered penalty interest under § 3142. Thus, the relief requested was akin to relief under MCR 2.116(C)(10). Plaintiff appended several documents to the motion:

1. A letter to defendant's claims adjuster dated August 13, 2018,

2. The applicable retainer agreement,

3. The complaint,

4. The facilitation agreement dated October 1, 2019, and

5. A release and settlement agreement dated August 20, 2020.

The voluminous billing report attached to plaintiff's appellate brief was not attached. Defendant argued in opposition that there was no lien against the $168,735.56 both because it was a voluntarily made payment and not a settlement or judgment, and because defendant had no notice of any lien applicable to a voluntary payment. Defendant also asserted that the payment of the $168,735.56 did not implicate § 3142 interests and penalties. The court denied plaintiff's motion for the reasons stated by defendant.

On appeal, plaintiff raises the same issues concerning its attorney's charging lien, penalty interest, and attorney fees.

II. ATTORNEY CHARGING LIEN

Plaintiff argues that its attorney had a valid charging lien on the $168,735.56 in PIP benefits that were paid directly to plaintiff. We disagree.

A. STANDARD OF REVIEW

We review for an abuse of discretion the trial court's decision to impose an attorney charging lien. *Reynolds v Polen*, 222 Mich App 20, 24; 564 NW2d 467 (1997). "An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes." *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014). "Whether a lien is authorized in a particular case is a question of law" which we review de novo. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 281; 761 NW2d 761 (2008).

A release is a contract that is to be interpreted according to the rules of contract interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13–14; 614 NW2d 169 (2000). Issues of contract interpretation are reviewed de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). "The scope of a release is governed by the intent of the parties as it is expressed in the release." *Cole*, 241 Mich App at 13.

B. ANALYSIS

A charging lien "is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit." *George v Sandor M Gelman, PC*, 201 Mich App 474, 476; 506 NW2d 583 (1993). "The attorney's charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services." *Id*. See 7A CJS Attorney & Client § 540 ("The attorney's charging lien is only a lien on the fruits of the attorney's labor . . ."). The lien is a common-law right and not provided by statute. *Souden v Souden*, 303 Mich App 406, 411; 844 NW2d 151 (2013). "An attorney's lien is not enforceable against a third party unless the third party had actual notice of the lien, or unless circumstances known to the third party are such that he should have inquired as to the claims of the attorney." *Doxtader v Sivertsen*, 183 Mich App 812, 815; 455 NW2d 437 (1990).

Plaintiff argues that its charging lien was valid because (1) defendant had actual notice of the lien, and (2) the $168,735.56 in no-fault benefits was obtained as a result of plaintiff's counsel's labors. We disagree.

Plaintiff cites its complaint, its contingency fee agreement with its counsel, and plaintiff's counsel's August 2018 letter to defendant to support the applicability of its lien. Plaintiff contends that its complaint provided actual notice of its attorney's lien, specifically ¶ 16 which read, "Christensen Law hereby asserts its attorney [sic] on any monies paid that are intended to satisfy any part of Plaintiffs claims." However, this sentence does not mention the word "lien," and plaintiff admits the word was inadvertently omitted from its pleading. In light of this ambiguity, we decline to impute notice to defendant. Plaintiff's retainer agreement with plaintiff's counsel, which does not include the word lien is, at best, notice between plaintiff and plaintiff's counsel. Further, plaintiff fails to argue or explain the circumstance under which defendant had notice of the terms of plaintiff's retainer agreement with its counsel. Plaintiff's counsel's August 2018 letter to defendant's claims adjuster did provide direct notice to defendant of the existence of a lien. In pertinent part, the letter read:

> You may consider this correspondence notice of assertion of a lien on behalf of this office upon any and all settlements and/or judgments resulting from this occurrence.

The letter notified defendant of a lien on "all settlements and/or judgments resulting from this occurrence." However, there was no judgment in this case, and the only settlement between the parties, in August 2020, was for $257,597 and specifically excluded the $168,735.56 at issue in this appeal.

Plaintiff's counsel further argues that the $168,735.56 payments were subject to the attorney charging lien because the money was recovered as a result of his services. That is the subject of a separate dispute between plaintiff's counsel and his client. As between plaintiff and defendant, the facilitation agreement and the subsequent releases all characterize the payment as voluntary.

II. PENALTY INTEREST AND ATTORNEY FEES

Plaintiff contends that it was entitled to penalty interest and attorney fees because defendant failed to pay benefits within 30 days after plaintiff submitted reasonable proof of the fact and amount of loss. We disagree.

A. STANDARD OF REVIEW

We review a trial court's award of penalty interest under MCL 500.3142 for clear error. *Williams v AAA Michigan*, 250 Mich App 249, 265; 646 NW2d 476 (2002). We also review for clear error a trial court's factual findings regarding awarding attorney fees under MCL 500.3148. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316–317; 602 NW2d 633 (1999). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake occurred." *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004).

A release is a contract that is to be interpreted according to the rules of contract interpretation. *Cole*, 241 Mich App at 13–14. Issues of contract interpretation are reviewed de novo. *Archambo*, 466 Mich at 408.

B. ANALYSIS

Penalty interest is governed by MCL 500.3142. Attorney fees are governed by MCL 500.3148. Under MCL 500.3142(2),

> [PIP] 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. . . .

The plain language of MCL 500.3142(2) provides that the 30 day begins to run after the insurer received reasonable proof of the fact and of the amount of loss. "Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits." *Williams*, 250 Mich App at 265. "An overdue payment bears simple interest of the rate of l2% per annum." MCL 500.3142(3). "No-fault penalty interest is intended to penalize an insurer that is dilatory in paying a claim." *Williams*, 250 Mich App at 265.

Michigan adheres to the "American Rule" regarding attorney fees, which provides that "attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides to the contrary." *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994). Under MCL 500.3148(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 that are overdue. The attorney's fee is 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.

Had the judge found that there was a valid lien it would have been capped at $50,000 by the release and settlement agreement. "The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." *Cole*, 241 Mich App at 13. The plain language of the release here states:

> [I]n consideration of the payment of the sum of Two Hundred Fifty-Seven Thousand Five Hundred Ninety-Seven Dollars ($257,597.00), the sufficiency and receipt of which is hereby acknowledged, I do hereby RELEASE, REMISE, *ACQUIT AND FOREVER DISCHARGE the [defendant] its officers, directors, shareholder assigns, predecessors, successors, reinsurers, agents, and employees, and any affiliated company of and from *any and all claims, demands, rights or causes of action of whatever kind, nature, description, whether known or unknown, asserted, or that could have been asserted, for payment of No Fault benefits* under Michigan's No-Fault Insurance Act, MCL 500.3101, *et seq*, to, for, or on behalf of

> [plaintiff], *for all services provided to GLORIA DENOYER through September 30, 2019 in connection with the alleged July 2, 2017, accident* (the "accident").
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> * * *
>
> Plaintiff claims an attorney fee on $168,735.56 previously voluntarily paid by [defendant] to [plaintiff] without including [plaintiff's] attorney's name on the checks, and that [defendant] denies such claim is valid; accordingly, this issue will be decided by the Honorable David S. Swartz by motion, and the claim for the attorney fee on the prospective motion shall be capped at $50,000.00. All parties retain their right to appeal the final decision of Judge Swartz. [Emphasis added.]

The plain language of the settlement agreement encompassed plaintiff's claims for penalty interest and attorney fees. The stated intent of the parties was to release defendant from liability from "any and all claims . . . or causes of action" for no fault benefits. Plaintiff's claims for penalty interest and attorney fees were premised on the payment of no-fault benefits, specifically benefits having been paid untimely, and thus were included in the settlement agreement. The agreement goes on to unambiguously identify that claims "for all services provided to GLORIA DENOYER through September 30, 2019" were intended to be released. This language covers the period up until the parties' October 1, 2019 facilitation and agreement to settle plaintiff's claim. It would have also covered any allegedly late-paid claims. The only attorney fee that was excluded from the release was plaintiff's counsel's attorney charging lien, which we have already addressed, above.

In the alternative, plaintiff failed to demonstrate that it submitted reasonable proof of the fact and of the amount of loss. "[I]n *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 448; 814 NW2d 670 (2012), this Court concluded that no-fault insurers are required to challenge the reasonableness of a medical provider's charges and that medical providers should expect no less." *Auto-Owners Ins Co v Compass Healthcare PLC*, 326 Mich App 595, 609–610; 928 NW2d 726 (2018). "However, medical providers are permitted to challenge [the] failure to fully reimburse them for medical bills as a violation of the no-fault act." *Id*. at 610 (quotation marks and citation omitted). "[T]he ultimate burden of proof regarding the reasonableness of the charges rests with the provider." *Bronson Methodist Hosp*, 295 Mich App at 434.

Plaintiff's contention that defendant unreasonably denied or delayed payment is based on the fact that certain bills were paid beyond 30 days and that to plaintiff's knowledge, no additional information was requested or required for defendant to process payment. Plaintiff created and included in its motion to enforce the charging lien and for interest and attorney fees the following chart:

The following payments were delayed by Defendant and overdue under Section 3142:

Billed Date	Payment Date
9/30/17	7/30/18
1/31/18	6/19/18
4/30/17	7/30/18
11/30/17	7/30/18
5/31/18	8/7/18
7/31/18	9/25/18
7/31/18	9/30/18
8/31/18	10/11/18

Plaintiff's summary chart is insufficient to establish that defendant's delay or denial of benefits was unreasonable. In a case where numerous bills were submitted as evidence, plaintiff's chart fails to identify the specific bills at issue and when reasonable proof was allegedly submitted. Most importantly, the chart is contained within counsel's brief and is not supported by any affidavit or other admissible document. Even considering the additional spreadsheets or ledgers, plaintiff's documents do not address the admissible documents from defendant asserting that additional materials were requested to support the claimed expenses. Nothing in plaintiff's submissions rebuts the fact of the request for additional documentation or supports the reasonableness of those requests, and defendant's explanation for denial or reduction of benefits. Plaintiff's additional claim of attorney fees, if not found to have been barred by the parties' release, is dependent on establishing that defendant's payment of benefits was overdue and consequently, fails for the same reasons as does plaintiff's claim for penalty interest.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher