Michigan Supreme Court
Lansing, Michigan 48909

Opinion

FILED DECEMBER 1, 1998

FRANK GEORGE McKELVIE,

Plaintiff-Appellee,

v No. 110215

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

PER CURIAM

This is a no-fault insurance case. In an earlier appeal, the Court of Appeals upheld an award of attorney fees, concluding that the defendant insurer had unreasonably refused to make certain payments. In a second appeal, the Court of Appeals has ruled that the defendant also must pay appellate attorney fees. We reverse the second judgment of the Court of Appeals and reinstate the order of the circuit court.

I

Plaintiff Frank G. McKelvie was rendered quadriplegic by

approximately $150,000, as well as declaratory relief. It was not a complete victory, though, because the jury determined that some of the disputed expenses were not allowable.

The no-fault statute provides that an insurer is responsible for the insured's attorney fees if the insurer has unreasonably refused to pay a claim:

> 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 fees 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. [MCL 500.3148(1); MSA 24.13148(1).]

The circuit court ruled that ACIA's refusal to pay "the vast majority" of the disputed expenses was unreasonable. However, the court also found that the bill submitted by Mr. McKelvie's counsel was unreasonable. The court reduced counsel's original request for slightly less than $130,000 to an award of approximately $84,000.[4]

ACIA paid Mr. McKelvie the personal protection insurance benefits required by the jury's verdict, and appealed the award of attorney fees. Mr. McKelvie cross-appealed with

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[4] The circuit court later denied ACIA's motion for attorney fees that it had incurred as it defended the unsuccessful portions of Mr. McKelvie's claim. MCL 500.3148(2); MSA 24.13148(2).

that it was a "close" question whether ACIA's refusal had been entirely unreasonable:

> Considering that a delay in payment by an insurer is not unreasonable where the delay is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, *Gobler v Auto-Owners Insurance Co*, 428 Mich 51, 66; 404 NW2d 199 (1987), the Court is also not convinced a no-fault insurer should be additionally penalized when it undertakes an appeal of a close question determined by the trial court.

Mr. McKelvie appealed the denial of appellate attorney fees, and the Court of Appeals reversed in a two to one opinion. 223 Mich App 446; 566 NW2d 658 (1997).[7] The majority concluded that ACIA's unreasonable refusal to pay benefits subjected it to liability for all the attorney fees that were incurred in consequence of the initial refusal:

> Sanctions are to be imposed whenever a trial court finds that an unreasonable delay or unreasonable refusal to pay occurred, as the court found in this case. Here, defendant's unreasonable refusal to pay benefits forced plaintiff to file a complaint and be involved in litigating a suit, which included appeals. Had defendant paid the benefits, as it should have, plaintiff would not have had to instigate the instant litigation. Thus, defendant's initial unreasonable denial of benefits subjects it, pursuant to the statute and consistent with *Bloemsma, supra*, to pay reasonable attorney fees for all litigation arising as a consequence of the initial unreasonable denial.
>
> The dissent states that the appeal was not "an action for personal or property protection insurance benefits which are overdue" because the

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[7] Reh den July 16, 1997 (Docket No. 185572).

II

We adopt the dissenting opinion of Judge SAWYER. As he observed, "in the case at bar, defendant had paid the no-fault benefits before taking the initial appeal and did not raise on appeal any issue related to its liability for those benefits." 223 Mich App 452. Thus, the first appeal by ACIA did not concern the disputed benefits, and the accompanying expense of appellate counsel was not incurred for the purpose of obtaining those benefits:

> Section 3148(1), by its terms, authorizes an award of attorney fees only in conjunction with representation concerning personal or property protection insurance benefits that are overdue. Once such benefits have been paid, they can no longer be overdue. Therefore, any further representation regarding other issues is outside the scope of the statutory authorization for an attorney fee award, whether at the trial level or on appeal.
>
> That is precisely what has happened in the case at bar. Defendant paid the benefits following the adverse decision in the trial court. Furthermore, defendant did not challenge on appeal plaintiff's entitlement to those benefits. Thus, any money expended by plaintiff in the original appeal was not for the purpose of securing payment of those benefits or avoiding recoupment by defendant of benefits already paid. Therefore, the original appeal was not "an action for personal or property protection insurance benefits which are overdue" under § 3148(1). Rather, it was an action related to the payment of attorney fees. Accordingly, § 3148(1), and by extension, *Bloemsma*, is inapplicable. [223 Mich App 452-453.]

We believe that such an approach advances the purpose of

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KELLY, J. (*dissenting*).

The majority's holding effectively permits defendant to circumvent the Legislature's intent in enacting MCL 500.3148(1); MSA 24.13148(1). That intent was to discourage insurance companies, so disposed, from unreasonably withholding personal protection insurance (PIP) benefits from their insureds until ordered to pay them by a court. The discouragement was in the form of an award of attorney fees to insureds obliged to sue to recover PIP benefits to which they were entitled. The penalty provision sought to force insurers

it appealed. Its appeal was solely from the award of trial attorney fees. Consequently, the Court reasons, MCL 500.3148(1); MSA 24.13148(1) does not apply.

The majority appears not to consider that plaintiff would never have been in the appellate court had not the insurance company unreasonably withheld benefits in the first place.

I believe the Court of Appeals dissent is misleading when it asserts that "any money expended by plaintiff in the original appeal was not for the purpose of securing payment of those benefits or avoiding recoupment by defendant of benefits already paid." *Id.* at 453. Indeed, plaintiff had to either fight the appeal or risk recoupment by defendant of his trial attorney fees that defendant had already paid.

Initially, he won on appeal but, because of today's opinion, he must pay his appellate attorney fees from his award of trial attorney fees or from his PIP benefits. By this circumvention, defendant has succeeded in thwarting the intent of the Legislature.

It was approximately a decade ago that a trial court found that this defendant wrongfully refused to pay PIP benefits to its insured Thomas Bloemsma. It was required to pay the benefits plus Mr. Bloemsma's trial attorney fees. It appealed and, pursuant to MCL 500.3148(1); MSA 24.13148(1), was ordered to pay Mr. Bloemsma's appellate attorney fees, as