08112

STATE OF MICHIGAN

COURT OF APPEALS

GAROLD A. GOIDOSIK,

Plaintiff-Appellee,

v

ANNIE HORACE,

Defendant,

and

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

OCT 2 9 1990

No. 119004

Before: Murphy, P.J., and Holbrook, Jr. and Maher, JJ.

PER CURIAM.

Defendant Farm Bureau Mutual Insurance Company of Michigan appeals as of right an order of the Van Bureau Circuit Court granting plaintiff summary disposition pursuant to MCR 2.116(C)(9) and (10) and awarding plaintiff $7,533.29.

Defendant Annie Horace and her husband, Stephen Horace, suffered injuries as a result of an automobile accident. They claimed no-fault benefits from their insurer, defendant Farm Bureau, who paid medical and replacement benefits but not wage loss benefits.

Horace then contacted plaintiff regarding possible additional benefits from Farm Bureau as well as possible third-party claims. Plaintiff and Horace executed a contingency fee agreement in June 1986 whereby plaintiff would seek wage loss benefits from Farm Bureau in return for one-third of any benefits recovered.

Farm Bureau issued an initial draft for wage loss benefits on December 4, 1986. This draft was jointly issued to plaintiff and Annie Horace pursuant to plaintiff's verbal notification to Farm Bureau of his attorney's lien on any benefits paid Horace. By a December 22, 1986, letter, plaintiff

informed Farm Bureau that the initial draft did not cover Horace's claimed benefits. He also stated there had been a breakdown in his attorney-client relationship with Horace due to statements made by Rhonda Kerr, a Farm Bureau claims representative, to the effect that plaintiff's representation of Horace had not been adequate. Plaintiff also restated that he was claiming a lien on all proceeds paid to Horace. Subsequent checks sent to Horace by Farm Bureau, however, were made payable only to Horace.

On September 30, 1987, plaintiff filed this instant action against Farm Bureau and Annie Horace, alleging breach of contract against Horace and tortious interference with contractual rights by Farm Bureau. Plaintiff also asserted a claim against Farm Bureau based on his attorney's lien and claimed attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1). On March 9, 1988, plaintiff filed a default against Horace for failing to take any action in response to plaintiff's complaint.

In April 1989, Farm Bureau moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff responded by moving for summary disposition under (C)(9) and (10). The trial court found that plaintiff was a proper party plaintiff under MCL 500.3148(1); MSA 24.13148(1) and had alleged sufficient facts to state a claim under the statute. The trial court further found that plaintiff had pled sufficient facts to state a claim against Farm Bureau for tortious interference with contractual rights and that plaintiff had perfected his attorney lien and was entitled to summary disposition on this lien based upon the contingent fee agreement with Horace. A judgment in favor of plaintiff against Farm Bureau for $7,533.29 in damages, interest and costs was entered.

I

Defendant first argues that the trial court erred when it found plaintiff to be a proper party plaintiff under MCL 500.3148(1); MSA 24.13148(1). We disagree.

MCL 500.3148(1); MSA 24.13148(1) 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 claim or unreasonably delayed in making proper payment.

From the plain language of the statute, we conclude the trial court was correct in holding plaintiff a proper party to maintain a law suit under the statute. The statute provides that an attorney, not the claimant, is entitled to his or her reasonable fees for advising and representing a claimant in an action for overdue benefits and may maintain a suit for those fees. When, as here, a statute uses clear and unambiguous language, judicial interpretation is precluded. Frasier v Model Coverall Service, Inc, 182 Mich App 741, 744; 453 NW2d 301 (1990).

II

Defendant next argues that if plaintiff is found to be a proper party under the statute, it was error to hold that the issue of undue delay or unreasonable refusal is to be determined by the trier of fact. Defendant asserts this determination is to be made by the trial court as a matter of law and its motion for summary disposition should have been granted.

MCL 500.3148(1); MSA 24.13148(1) clearly provides that attorney fees will be charged to the insurer "if the court finds" unreasonable refusal or delay on the insurer's part in making payment. Thus judicial interpretation to vary this meaning is not permitted. Frasier, supra.

However, we still affirm the trial court's ultimate decision on this issue. Farm Bureau's motion for summary disposition of this issue was brought pursuant to MCR 2.116(C)(10). In this type of motion, the opposing party is given the benefit of all reasonable doubt and must demonstrate that there exists a genuine issue of fact upon which reasonable minds could differ. Dumas v Auto Club Ins Ass'n, 168 Mich App

619, 626; 425 NW2d 480 (1988). Before judgment may be granted, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. Peterfish v Frantz, 168 Mich App 43, 48-49; 424 NW2d 25 (1988).

In the case before us, plaintiff alleged in his complaint that Farm Bureau unreasonably delayed in making payments to Horace. Plaintiff argued that Farm Bureau's first payment in December 1986 for lost wages incurred by Horace in July 1986 was overdue pursuant to MCL 500.3142; MSA 24.13142. Plaintiff also stated the payment was more than thirty days after proof of the loss was provided, giving rise to a rebuttable presumption of undue delay. See Conway v Continental Ins Co, 180 Mich App 447, 452; 447 NW2d 761 (1989), lv den 434 Mich 863 (1990).

It is quite apparent, therefore, that there was a factual dispute as to the unreasonable delay, making summary judgment pursuant to MCR 2.116(C)(10) improper. Although the trial judge was incorrect in stating that the issue of undue delay or unreasonable refusal was to be determined by the trier of fact and not the trial court, he was none the less correct in denying Farm Bureau's motion for summary disposition.

III

Defendant next assigns error to the trial court's denial of its summary disposition motion pursuant to MCR 2.116(C)(8) regarding plaintiff's claim for tortious interference with contractual rights. Defendant argues plaintiff's claim under such a theory fails because it cannot be shown that Farm Bureau was aware of the contract or purposefully or unlawfully interfered with it.

A motion pursuant to MCR 2.116(C)(8) tests the legal basis of the complaint and must be determined by looking at the pleadings alone. Accepting the factual allegations of the complaint and any inferences drawn therefrom as true, such a motion should be granted only if the plaintiff's claim is so

clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Ashworth v Jefferson Screw Products, Inc, 176 Mich App 737, 741; 440 NW2d 417 (1989), lv den 433 Mich 872 (1989).

Although Farm Bureau's motion was filed pursuant to MCR 2.116(C)(8), the transcript and the trial court's opinion clearly indicate that the parties and the court went outside the pleadings in dealing with this issue. Thus, we will treat Farm Bureau's motion on this issue as having been brought under MCR 2.116(C)(10). Ross v Jay Bird Automation, Inc, 172 Mich 603, 606; 432 NW2d 374 (1988). Whether this issue is decided under MCR 2.116(C)(8) or (C)(10), Farm Bureau's motion was properly denied.

The elements which must be shown for a claim of tortious interference with contractual rights are: (1) a contract existed; (2) the contract was breached; (3) the breach was instigated by defendant; and (4) there was no justification for defendant to do so. Jim-Bob, Inc v Mahling, 178 Mich App 71, 95-96; 443 NW2d 451 (1989), lv den 434 Mich 865 (1990).

Farm Bureau concedes there was a contract between plaintiff and Horace concerning possible third-party action but argues that it was breached by plaintiff and not the Horaces when plaintiff withdrew from representation. Plaintiff maintains he was wrongfully discharged by the Horaces and pursuant to the Michigan Code of Professional Conduct had to withdraw. Farm Bureau also denied plaintiff's allegation that one of their representatives told the Horaces that plaintiff was not representing them completely as to third-party litigation. Thus, there was a genuine issue as to a material fact, which party breached the contract, and the trial court's denial of Farm Bureau's motion for summary disposition was correct.

IV

Defendant also assigns error to the trial court's granting plaintiff's motion for summary disposition as to plaintiff's claim based on an attorney's lien. We disagree.

Michigan recognizes a common law attorney's lien on a judgment or fund resulting from the attorney's services. Warner v Traver, 158 Mich App 593, 597; 405 NW2d 109 (1986), lv den 428 Mich 900 (1987). Recovery of no-fault personal protection benefits may constitute a fund to which such a lien would apply. Aetna Casualty & Surety Co v Starkey, 116 Mich App 640, 644; 323 NW2d 325 (1982), lv den 417 Mich 929 (1983).

Farm Bureau's argument in the instant case that plaintiff waived or released his lien by failing to intervene in the subsequent law suit filed by the Horaces is without merit. The funds to which plaintiff seeks to attach his lien were already paid and could therefore not be part of the Horaces' subsequent action. The funds plaintiff seeks to attach were the wage loss benefits received by Horace between December 12, 1986, and February 4, 1987. Farm Bureau does not dispute that plaintiff's services generated these wages nor does it dispute that plaintiff furnished them with notice of the claimed lien.

Thus we conclude the trial court's grant of summary disposition on the lien theory was proper.

V

Lastly, defendant argues it was error to grant plaintiff summary disposition based upon the contingent fee arrangement; rather, if granted at all, the fees should be for the reasonable value of plaintiff's services based upon quantum meruit.

Although this Court has recognized that contingent fee arrangements are enforceable through an attorney's lien, Aetna Casualty & Surety Co, supra, p 649, the clear weight of authority holds that when an attorney rightfully withdraws or is wrongfully discharged from representing a client, the attorney is entitled to compensation for the reasonable value of his services based upon quantum meruit and not the contingent fee arrangement. See Ecclestone, Moffett & Humphrey, PC v Ogne, Jinks, Alberts & Stuart, PC, 177 Mich App 74, 76; 441 NW2d 7 (1989); Law Offices

of Stockler, PC v Semaan, 135 Mich App 545, 550; 355 NW2d 271 (1984); Liddell v DAIIE, 102 Mich App 636, 652; 302 NW2d 260 (1981), lv den 411 Mich 1079 (1981); Ambrose v The Detroit Edison Co, 65 Mich App 485, 491; 237 NW2d 520 (1975).

Our Supreme Court adopted guidelines for determining what constitutes a reasonable attorney fee in Wood v DAIIE, 413 Mich 573, 588; 321 NW2d 653 (1982). Although a trial court is not limited to these factors, the following are to be considered in determining what is a reasonable attorney fee:

(1) The professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

We review a trial court's finding on the reasonableness of attorney fees for an abuse of discretion. Bloemsma v Auto Club Ins Co, 174 Mich App 692, 697; 436 NW2d 422 (1989). We conclude it was an abuse of discretion for the trial court to base the award of attorney fees solely on the contingent fee agreement without considering any of the other factors. Although the contingent fee agreement may certainly be considered as a factor in determining the reasonableness of a fee, it is not in and of itself determinative. Liddell, supra. We remand for a hearing where evidence on the above listed factors can be submitted and a new determination made as to reasonable attorney fees.

Affirmed in part and remanded in part.

/s/ Donald E. Holbrook, Jr.
/s/ Richard M. Maher

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MURPHY, J. (concurring in part and dissenting in part).

I concur in the result reached in the majority opinion. However, I am writing separately because I wish to emphasize that, in my opinion, when the trial court makes a new determination on remand concerning the amount of reasonable attorney fees, it is still free to determine that plaintiff is entitled to the one-third contingency fee to which the parties agreed.

I question the majority's finding that the trial court based its award solely on the contingency fee agreement without considering the other relevant factors. After reviewing the trial court's opinion, I believe that the trial court had considered the relevant factors and made a finding that the one-third contingency fee was, in fact, the quantum meruit measure of the value of plaintiff's services. As noted by the trial court, there was no dispute that the entire amount of wage loss benefits paid to the Horaces by the insurer was generated by and attributable to plaintiff's efforts on their behalf. The breakdown in the attorney-client relationship occurred after plaintiff had completely rendered the services which obtained

payments of benefits to the Horaces and, apparently, did not even involve a dispute over these particular services or fees. Moreover, I note that when the trial court made its finding, it had before it documentation of the actual value of plaintiff's services which had been submitted with his answer to defendant insurer's motion for summary disposition. The Horaces, as plaintiff's clients, have reaped the total benefit of their bargain with plaintiff. I see no reason to excuse them from full performance of their obligation under the contract.

/s/ William B. Murphy