

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES THOMAS BLOEMSMA, by
THOMAS B. BLOEMSMA, his next friend,

Aug. 19, 1991
9:35 am

Plaintiff-Appellant,
Cross-Appellee,

v

Nos. 121616; 123235

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee,
Cross-Appellant.

Before: Doctoroff, P.J., and Maher and Cavanagh, JJ.

DOCTOROFF, P.J.

Plaintiff appeals as of right from orders of the circuit court awarding attorney fees and costs to plaintiff. Plaintiff argues that the trial court erred in not awarding attorney fees for services provided at trial and after trial and on appeal and in not awarding actual costs. Defendant cross appeals, asserting that plaintiff's claim for appellate attorney fees and costs is vexatious and frivolous and, therefore, it is entitled to reasonable attorney fees. We reverse and remand.

This case is before us for the second time. In its first opinion, this Court held that the trial court erred in finding that defendant's delay in making personal injury benefit payments to plaintiff was reasonable and remanded for recalculation of penalty interest and judgment interest. Bloemsma v Auto Club Ins Co, 174 Mich App 692; 436 NW2d 442 (1989). This Court also ordered the trial court to award reasonable attorney fees to plaintiff. Id., p 698.

On remand, the trial court issued an opinion dated Friday, June 2, 1989, and filed Monday, June 5, 1989, awarding plaintiff attorney fees in the amount of \$4,269. This award was based on a statement submitted by plaintiff's attorney at trial on December 5, 1986, which itemized services provided through December 4, 1986. The court determined that \$75 per hour was a reasonable fee for the 56.92 hours expended.

On June 5, 1989, plaintiff, prior to receiving notice of the trial court's order, filed a motion for attorney fees and costs, claiming attorney fees for the December 5, 1986, trial and for hours expended after the December 5, 1986, trial. At a hearing on June 12, 1989, the trial court denied plaintiff's request for additional attorney fees, but granted plaintiff's request for costs on appeal. An order in accordance with the trial court's ruling was entered on September 21, 1989. A third order was entered on November 2, 1989, setting forth the costs allowed.

Plaintiff argues that the trial court erred in not awarding attorney fees for services provided at trial and on appeal. Plaintiff contends that he is entitled to an award of those fees because the time spent at trial and on the two appeals was expended in an effort to collect plaintiff's claim.

In this case, attorney fees were granted pursuant to MCL 500.3148(1); MSA 24.13148(1), which states:

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.

In determining the reasonableness of an attorney's fee, the trial court should consider (1) the professional standing and experience of the attorney, (2) the skill, time and labor involved, (3) the amount in question and results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and length of the professional relationship between attorney and client. Wood v DAIE, 413 Mich 573, 588; 321 NW2d 653 (1982). However, the trial court is not limited to these factors and need not detail its findings as to each specific factor. Id. An award of attorney fees will be upheld on appeal unless the trial court's determination on the "reasonableness" issue was an abuse of discretion. Id., Smolen v Dahmann Apartments, Ltd., 186 Mich App 292, 296; 463 NW2d 261 (1990).

The trial court's denial of plaintiff's request for fees beyond those itemized in the statement submitted on the day of trial was based on its conclusion that the case had been remanded for recalculation of attorney fees and not to allow presentation of additional evidence. We agree with plaintiff that the trial court erred. This matter was remanded to the trial court with instructions that it award reasonable attorney fees to plaintiff. The determination of reasonable attorney fees requires that the trial court take into account the totality of the circumstances of the case. Smolen, supra, p 297. We are unable to find any authority for the trial court's conclusion that plaintiff's attorney was prohibited on remand from presenting evidence related to the time, labor and expenses involved in advising and representing plaintiff at trial and thereafter. Clearly, plaintiff was entitled to a reasonable attorney fee for the services rendered on this matter up to and including trial.

Plaintiff also argues that the trial court erred in not awarding attorney fees for the services rendered on appeal. We agree.

This Court held that a statutory provision for attorney fees applies to appellate proceedings when the statute does not place any restrictions on the recovery of attorney fees and does not limit attorney fees to services rendered at the trial court level. Smolen, supra (provision for attorney fees under the Michigan Consumer Protection Act, MCL 445.901 et seq.; MSA 19.418(1) et seq., applies to appellate proceedings.) Although the provision for attorney fees at issue here, MCL 500.3148(1); MSA 24.13148(1), restricts an award of attorney fees to cases in which the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment, no other restrictions are imposed and the award of attorney fees is not limited to services rendered at the trial court level. We conclude that attorney fees for services on appeal can be awarded under MCL 500.3148(1); MSA 24.13148(1). Thus, on remand, the trial court is to consider services rendered on appeal.

Plaintiff also argues that the trial court abused its discretion in determining that \$75 per hour was reasonable and that it failed to consider the contingency fee arrangement. In its opinion, the trial court stated that it considered the factors listed in Wood in determining a reasonable fee, but did not indicate its findings on any of the factors. We are not convinced and will not assume that the trial court abused its discretion in determining that \$75 per hour was reasonable. We also decline to address plaintiff's assertion that the trial court failed to consider the contingency arrangement. The record provided to this Court indicates that plaintiff sought attorney fees based upon the time and labor expended by counsel, and not based upon a contingency fee arrangement. Reversible error must be that of the trial court, and not error to which the appellant contributed by plan or negligence. Smith v Musgrove, 372 Mich 329, 337; 125 NW2d 869 (1964); Harrigan v Ford Motor Co, 159 Mich App 776, 786; 406 NW2d 917 (1987), app dis 431 Mich 905 (1988).

Plaintiff next claims that the trial court erred in not awarding actual costs. In its December 1986, opinion, January 1987, order, and June 1989, opinion, the trial court awarded plaintiff statutory costs. Attached to plaintiff's motion for attorney fees and costs was an itemized statement listing actual costs apparently incurred both in presenting the original action to the trial court and to this Court on appeal. At the June 12, 1989, hearing and in its September 21, 1989, order, the trial court awarded plaintiff taxable costs on appeal.

Plaintiff claims that the trial court erred in allowing only taxable costs, arguing that by providing for an award of a reasonable attorney fee, MCL 500.3148(1); MSA 24.13148(1), authorizes an award of actual costs.

Plaintiff's argument is without merit. The power to tax costs is wholly statutory. Herrera v Levine, 176 Mich App 350, 357; 439 NW2d 378 (1989); Brown v Dep't of State Highways, 126 Mich App 392, 396; 337 NW2d 76 (1983). Costs are not recoverable where there is no statutory authority for awarding them. Id.

Where the language of a statute is clear and unambiguous, judicial interpretation is precluded and this Court should not look beyond the ordinary meaning of the unambiguous language in giving effect to the statute. Wills v Iron County Bd of Canvassers, 183 Mich App 797, 801; 455 NW2d 405 (1990). MCL 500.3148(1); MSA 24.13148(1), clearly provides only for an award of attorney fees. There is no express authorization for an award of actual costs.

We also reject as untimely plaintiff's argument that the trial court should have awarded actual costs pursuant to MCL 600.2591; MSA 27A.2591. Issue and arguments raised for the first time on appeal are not subject to review. Petrus v Dickinson Co Bd of Comm'rs, 184 Mich App 282, 288; 457 NW2d 359 (1990), lv den 435 Mich 879 (1990).

We must, however, reverse the trial court's award of taxable costs on appeal. The trial court was without jurisdiction to tax costs on appeal. Lopez-Flores v Hamburg Twp, 185 Mich App 49, 53; 460 NW2d 268 (1990); Oscoda Chapter of PBB Action Committee, Inc v Dep't of Natural Resources, 115 Mich App 356, 365; 320 NW2d 376 (1982), lv den 417 Mich 905 (1983). Furthermore, by failing to file a bill of costs with this Court as required by MCR 7.219, plaintiff waived his right to costs on the first appeal.

Defendant's claim on cross-appeal that plaintiff's claims on appeal are frivolous and vexatious is without merit.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

s/Martin M. Doctoroff
s/Richard M. Maher
s/Mark J. Cavanagh