STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS H. GASKIN and MARIBETH WEADOCK, individually and as next friends of their son, DOUGLAS TODD GASKIN,

Plaintiffs-Appellants,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

October 18, 1994

No. 152975
LC No. 89-62685

Before: Holbrook, Jr., P.J., and Murphy and J.C. Kingsley,* JJ.

PER CURIAM.

Plaintiffs Douglas H. Gaskin and Maribeth Weadock, individually and as next friends of their son Douglas Todd Gaskin, appeal as of right from a judgment of the Kent Circuit Court entered pursuant to a jury verdict awarding them $7,500 for the cost of a van conversion package plus interest in this no-fault benefits case. Plaintiffs' post-trial motions for judgment notwithstanding the verdict and for attorney fees and costs were denied by the trial court. Plaintiffs appeal as of right. We reverse.

I

The payment of no-fault personal injury protection benefits includes

> Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. [MCL 500.3107(1)(a); MSA 24.13107(1)(a).]

Three factors must be met for a product, service, or accommodation to be considered an allowable expense under § 3107: (1) the charge must be reasonable; (2) the expense must be reasonably necessary; and (3) the expense must be incurred. Nasser v Auto Club Ins Ass'n, 435 Mich 33, 50; 457 NW2d 637 (1990). Plaintiff has the burden of proof regarding whether the expense of a particular product, service, or accommodation is reasonable and necessary. Id. at 49-50.

Here, we find that plaintiffs sustained their burden by offering unrefuted evidence as to all three factors. The cost of the modified Winnebago minivan was reasonable, and was in fact incurred. In addition, the minivan was reasonably necessary to accommodate Douglas Gaskin's medical limitations, including limited motor skills, bladder and bowel incontinence, and osteopenia (a condition causing a softening of the bones). See Davis v Citizens Ins Co, 195 Mich App 323; 489 NW2d 214 (1992). In particular, one of Douglas' treating physicians testified that Douglas' osteopenia presented unique safety concerns because the act of transferring Douglas from his wheelchair to the seat of a vehicle (as done by one alternate method of transportation) increased the possibility of pathologic

* Circuit judge, sitting on the Court of Appeals by assignment.

fractures, and Douglas had a history of such fractures. Both of Douglas' treating physicians testified at trial that a van was medically necessary and served important rehabilitative purposes that could not be achieved in any other manner.

Defendant's only witness at trial was a claims representative who testified that defendant's position was that the van was not a reasonable and necessary expense. The claims representative testified that defendant had not offered to pay for the $7,500 van conversion package before trial, but that once trial started defendant had changed its stance and conceded that a van conversion package was a reasonably necessary expense. Defendant offered no evidence to controvert the testimony of plaintiff's witnesses that the van was medically necessary.

Although the question whether an expense is reasonable and reasonably necessary is generally one of fact for the jury, it may in some cases be decided by the court as a matter of law. Nasser, supra at 55. Plaintiffs offered unrefuted evidence of reasonableness and necessity. Thus, even viewing the evidence in a light most favorable to defendant, we find that, as a matter of law, the minivan was an allowable expense under § 3107, and the trial court abused its discretion in denying plaintiffs' motion for directed verdict. We remand to the trial court for entry of judgment in favor of plaintiffs for the full amount necessary to reimburse them for their purchase of the minivan.

II

Plaintiffs also appeal from the trial court's denial of their motion for attorney fees.

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 the claim or unreasonably delayed in making proper payment.

A refusal or delay in payment by an insurer will not be found 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 Ins Co, 428 Mich 51, 66; 404 NW2d 199 (1987). When there is refusal or delay, a rebuttable presumption of unreasonableness arises and the insurer has the burden to justify it. McKelvie v Auto Club Ins Ass'n, 203 Mich App 331, 335; 512 NW2d 74 (1994). A trial court's finding of unreasonable refusal or delay in payment will not be reversed on appeal unless it is clearly erroneous. United Southern Assur Co v AETNA Life & Casualty Ins Co, 189 Mich App 485, 492-493; 474 NW2d 131 (1991).

In this case, the trial court denied plaintiffs' motion for attorney fees, finding that the reasonableness and necessity of the minivan was "a legitimate question." Because plaintiffs offered unrefuted evidence of reasonableness and necessity, leading us to conclude that, as a matter of law, the minivan was an allowable expense, we further conclude that the trial court's finding of a legitimate question was clearly erroneous. We find it notable that, at trial, defendant's claims representative identified an internal report in which defendant's employees had recommended the purchase of a van. Accordingly, defendant has failed to rebut the presumption of unreasonableness, and the trial court clearly erred in denying plaintiffs' motion for attorney fees.

Reversed and remanded for entry of judgment in favor of plaintiffs consistent with this opinion. The award of $9,825 as mediation sanction against plaintiff is also set aside. Plaintiffs may tax costs.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ James C. Kingsley