STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA GRAHAM,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 3, 1995

No. 169943
LC No. 92-007548-NF

Before: Neff, P.J., and McDonald and C. A. Nelson,* JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order awarding plaintiff $29,775 in attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1), and we affirm.

I

The facts of this case are not materially in dispute. Plaintiff, who was insured under one of defendant's automobile insurance policies, was injured as a result of an automobile accident. Defendant, after having ordered an independent medical examination (IME), and performed its other standard review procedures, determined that it should provide medical benefits to plaintiff.

After approximately two years of payment, defendant assigned a new claims adjuster to plaintiff's file. This new adjuster immediately stopped payment of plaintiff's claims, and ordered additional records for plaintiff's file. On obtaining the records the adjuster sent them to a doctor with whom she was apparently familiar for another "IME." Although this doctor did not physically evaluate plaintiff he recommended on the basis of her records that plaintiff's claims be denied because her injuries predated her accident. Accordingly, without further review, defendant denied the remainder of plaintiff's claims.

After the jury returned a verdict in plaintiff's favor, plaintiff sought attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1), for defendant's unreasonable denial of her claims. The trial court, in granting plaintiff's request, concluded that it was unreasonable for defendant's claim adjuster to, in essence, deny payment of plaintiff's claim without examining plaintiff, and without the benefit of prior medical advice. The court also, without actually making a finding of bad faith, questioned the claim adjuster's choice of doctors who, the court noted, agreed with the claim adjuster's decision to deny plaintiff's claim in a cursory manner.

II

On appeal, defendant argues that the trial court erred in finding an unreasonable denial of benefits based only on the timing of the denial in this case. We disagree.

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

The purpose of the penalty provision in MCL 500.3148(1); MSA 24.13148(1), is to ensure prompt payment of benefits to the insured. McKelvie v Auto Club Ins Ass'n, 203 Mich App 331, 335; 512 NW2d 74 (1994). A refusal or delay is not unreasonable when it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. Id. The existence of a delay or refusal, however, raises a rebuttable presumption of unreasonableness, and it is the insurer's burden to justify the delay or refusal. Id.

We review the trial court's determination to award or deny attorney fees for whether it is clearly erroneous. Id. The trial court's decision is not clearly erroneous unless there is no evidence to support it or, after a review of the entire record, we are left with the definite and firm conviction that a mistake has been committed. See Samuel D Begola Services, Inc v Wild Bros, 210 Mich App 636, 639; 534 NW2d 217 (1995); McCarthy v Auto Club Ins Ass'n, 208 Mich App 97, 106; 527 NW2d 524 (1994) (Marilyn Kelly, J. dissenting); Townsend v Brown Corp of Ionia, Inc, 206 Mich App 257, 263; 521 NW2d 16 (1994).

On the basis of the record as set forth above, we are not left with the definite and firm conviction that a mistake was made. Simply stated, we cannot conclude that defendant met its burden of disproving unreasonableness. Defendant paid plaintiff's benefits for two years and halted the payments only on the decision of a claims adjuster who made her decision in the face of professional medical advice to the contrary. Although defendant was able to obtain a medical opinion in its favor, the record bears out the trial court's conclusion that by the time that opinion was obtained, the decision to deny plaintiff further benefits had been made.

Accordingly, we affirm the trial court's decision to grant attorney fees to plaintiff.

III

Defendant next argues that the trial court erred in setting plaintiff's reasonable hourly rate at $150 per hour. Again, we disagree.

On our review of the record, we conclude that the trial court considered the proper criteria in arriving at a reasonable attorney fee, and thus did not abuse its discretion. See Mich Tax Mgmt Services Co v City of Warren, 437 Mich 506, 512; 473 NW2d 263 (1991); In re Condemnation of Private Property for Hwy Purposes, 209 Mich App 336, 341-342; 530 NW2d 183 (1995).

Affirmed.[1]

/s/ Janet T. Neff
/s/ Gary R. McDonald
/s/ Charles A. Nelson

[1] We decline to award plaintiff appellate attorney fees. First, contrary to plaintiff's assertion, defendant did order the transcript of the hearing regarding attorney fees. Further, plaintiff has failed to cite some other authority indicating that she is entitled to attorney fees on appeal.