STATE OF MICHIGAN

COURT OF APPEALS

JAMES MCCARTHY, Conservator of the Estate of LOUIS DUPREE,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

No. 189268
Wayne Circuit
LC No. 92-234926-NF

Before: Holbrook, Jr., P.J. and White and R. J. Danhof,* JJ.

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

The trial court found that "at least with a portion of [plaintiff's claim], it was not a bona fide dispute." Having in mind that defendant did not pay one of the bills until shortly before trial and that the jury awarded one hundred percent of another bill, I conclude that this determination was not clearly erroneous. I conclude, however, that the court abused its discretion in determining[1] the amount of the fee. Considering the results obtained, the fee was excessive.[2]

I would remand with instructions to reconsider the amount of the fee.

/s/ Helene N. White

[1] It is unclear from the record whether the court actually set the figure.

[2] Counsel submitted a bill documenting a total of 289.72 hours and claiming an hourly rate of $190. The court reduced the hourly rate to $125 per hour, as it had with defense counsel's bill in awarding mediation sanctions. The order granting no-fault attorney fees awarded $35,922.50, corresponding to 287.38 hours, just 2.34 hours less than the total hours claimed.

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

noted that the jury had awarded one hundred percent of the claimed expenses for two care providers and, therefore, concluded that defendant's refusal to pay benefits was unreasonable.

On appeal, defendant argues that the trial court erred in awarding no-fault attorney fees under MCL 500.3148(1); MSA 13148(1). We agree.

Section 3148(1) on the no-fault act 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.

When there is a refusal or delay in payment, a rebuttable presumption of unreasonableness arises and the insurer has the burden to justify the refusal or delay. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). An insurer's refusal or delay in payment will not be found unreasonable where it "is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty." *Id.* A trial court's finding of unreasonable refusal or delay will not be reversed on appeal unless it is clearly erroneous. *Id.*

Allowable expenses under the no-fault act include "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). The requirements for an allowable expense are that (1) the charge be reasonable, (2) the expense be reasonably necessary, and (3) the expense be incurred. *McKelvie*, *supra*; *Davis v Citizens Ins Co*, 195 Mich App 323, 326; 489 NW2d 214 (1992).

In this case, the trial court did not focus on the facts surrounding the disputed expenses in reaching its decision, but instead concluded that defendant's refusal to pay benefits was unreasonable because the jury awarded one hundred percent of the claimed expenses for two care providers. This was clear error because "the scope of inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable." *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 105; 527 NW2d 524 (1994).

The testimony at trial established that the experts who were consulted and who treated Dupree were in disagreement as to whether, after the summer of 1989, Dupree continued to suffer from the effects of his traumatic brain injury and required treatment for those problems. Each of the experts agreed that Dupree was a chronic alcoholic and suffered a significant brain injury in the automobile accident. However, while some of the experts believed that Dupree had recovered from his brain injury by the end of the summer of 1989, others believed that he continued to suffer from the effects of his brain injury and continued to require treatment and care for that injury into the early 1990s. There were also questions regarding whether Dupree's alcoholism could be treated separately from his traumatic brain injury and whether his alcohol problems were aggravated or enhanced by the automobile accident. Moreover, some of the

experts believed that Dupree suffered from schizophrenia before the accident, while others indicated that there was no evidence to support such a diagnosis. The evidence indicates that New Center treated plaintiff for his alcoholism and that Feldstein treated plaintiff for a combination of his alcoholism and brain injury.

We find that the evidence established a bona fide question of factual uncertainty regarding whether the problems for which Dupree was being treated were related to his traumatic brain injury. Therefore, the trial court clearly erred in awarding attorney fees under § 3148 of the no-fault act.

Reversed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert J. Danhof