STATE OF MICHIGAN

COURT OF APPEALS

ANNIE MACK, personal representative
of the estate of ALBERT MACK

Plaintiff-Appellee,

v

TRAVELERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 170932
LC No. 86-032213-CK

Before: Saad, P.J., and Marilyn Kelly and M.J. Matuzak,* JJ.

PER CURIAM.

Defendant appeals as of right from orders granting attorney fees and penalty interest to plaintiff for defendant's unreasonable refusal to pay no-fault insurance benefits. MCL 500.3148(1); MSA 24.13148(1), MCL 500.3142; MSA 24.13142.

Defendant argues that its refusal to pay was not unreasonable, because (1) there was a legitimate question of statutory construction and (2) there was a bona fide factual uncertainty. In the alternative, defendant argues that the fees awarded were unreasonable. Lastly, defendant asserts that penalty interest was awarded for too lengthy a period. We affirm.

I

Plaintiff's decedent, Albert Mack, was injured in the parking lot of an auto parts store. While Mr. Mack was leaning over the front of his car to add oil, a van driven by defendant's insured backed up and pinned his legs between the vehicles. Because Mack did not have automobile insurance, he applied for insurance benefits from defendant. Plaintiff filed the instant law suit after defendant denied coverage.

Defendant moved for partial summary disposition on the issue of liability based upon stipulated facts. The trial judge granted the motion on the basis that MCL 500.3113(b); MSA 24.13113(b)

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

precluded benefits to owners of uninsured vehicles involved in an accident. The judge found that Mack's uninsured vehicle was "involved in the accident," because Mack was maintaining the vehicle. Also, it was parked in such a way as to cause an unreasonable risk of bodily injury.

Plaintiff appealed as of right from the judge's decision. This Court reversed, holding that the uninsured vehicle was not involved in the accident for purposes of MCL 500.3113(b); MSA 24.13113(b). We held that none of the statutory exceptions of the parked vehicle provision was applicable. MCL 500.3106; MSA 24.13106, *Mack v Travelers Ins Co*, 192 Mich App 691; 481 NW2d 825 (1992). Relying on the Supreme Court's decision in *Heard v State Farm Mutual Automobile Ins Co*,[1] we concluded that plaintiff was entitled to no-fault benefits as a matter of law.

Upon remand to the trial court, the parties entered into a consent judgment for the payment of personal injury protection benefits to plaintiff. The court then issued an opinion granting plaintiff's motion for prejudgment interest, penalty interest and attorney fees. It found that defendant's refusal to pay benefits had been unreasonable in light of the Supreme Court's decision in *Heard*.

On appeal, defendant argues that the trial judge erred in awarding attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1). We disagree.

II

A trial judge's finding that an insurer's refusal or delay in payment of benefits was unreasonable will not be reversed on appeal unless clearly erroneous. *United Southern Assurance Co v Aetna Life & Casualty Ins Co*, 189 Mich App 485, 492-493; 474 NW2d 131 (1991). MCL 500.3148(1); MSA 24.13148(1) states that an insurer may be charged a reasonable attorney fee if it "unreasonably refused to pay the claim, or unreasonably delayed in making proper payment." An insurer's refusal or delay in payment will not be found unreasonable where it was based on a legitimate statutory or constitutional law construction, or on a bona fide factual uncertainty. *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987); *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994).

Defendant argues that its refusal to pay no-fault benefits was reasonable due to a legitimate question of statutory construction involving the no-fault act, MCL 500.3105(1); MSA 24.13105(1) and MCL 500.3113(b); MSA 24.13113(b).

II

A

First, defendant argues that there was a legitimate question as to whether defendant was "maintaining" his vehicle when the injury occurred. If he was maintaining his vehicle, it would be considered "involved in the accident" under MCL 500.3113(b); MSA 24.13113(b). Plaintiff would not be entitled to coverage.

The Michigan Supreme Court made clear that, given the facts presented here, defendant's injury did not arise from the maintenance and use of an uninsured vehicle as a motor vehicle. *Heard v State*

Farm Ins Co, 414 Mich 139, 154; 324 NW2d 1 (1982). In *Heard*, the Court ruled that pumping gas into a car does not constitute maintenance. According to the Court, an injury arises from maintenance when, for example, a battery or fuel line explodes or when a vehicle falls upon and injures a person. *Heard, supra* at 154.

In the instant case, there was no question that Mack was not injured by the act of putting oil into the car. Instead, another vehicle, owned by defendant's insured, caused the injury when it backed into Mack. As stated by the Court in *Heard*, the only vehicle in use as a motor vehicle at the time of the accident was that driven by defendant's insured. Plaintiff's vehicle was a "tree or pole" for purposes of the act. *Id*. Therefore, there was no legitimate question of statutory construction. *Heard* clearly established that Mack's vehicle was not "involved in the accident" within the meaning of the no-fault act. It was confirmed by this Court's initial ruling in this case. *Mack, supra*. Defendant failed to meet its burden of proving that a reasonable question existed under the facts of this case. *McKelvie v Auto Club Insurance*, 203 Mich App 331, 335; 512 NW2d 74 (1994).

II

B

There was also no bona fide factual uncertainty as to whether Mack's vehicle was parked in such a way as to cause an unreasonable risk of injury. MCL 500.3106(1)(a); MSA 24.13106(1)(a). We previously found undisputed that the vehicle was properly parked within a parking space in the parking lot of the auto-parts store, out of the way of traffic. *Mack, supra*. Therefore, the trial judge did not err in awarding attorney fees to plaintiff.

III

We also hold that the trial judge did not abuse his discretion in determining that $125 was a reasonable hourly rate. *Bloemsma v Auto Club Insurance (After Remand)*, 190 Mich App 686, 689-690; 476 NW2d 487 (1991). The judge properly took into account: (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 between the attorney and client. *Id*. at 689.

Moreover, we find that the judge did not err in determining that defendant should pay attorney fees for the time spent reopening the estate. The reopening was necessitated in this case due to defendant's refusal to pay while Mack was alive. The judge's finding that there was no duplication of fees for the first and third party cases was also not clearly erroneous.

We find that the judge properly awarded penalty interest pursuant to MCL 500.3142; MSA 24.13142. The clear language of the statute compels such interest regardless of the reasonableness of the insurer's decision to withhold benefits. *Davis v Citizens Ins Co*, 195 Mich App 323, 329; 489 NW2d 214 (1992). Defendant urges that the penalty interest should accrue from the date of the previous appellate decision, because it was only then that it learned it was liable for the loss. We disagree, as defendant's interpretation would be contrary to the plain language of the statute.

Moreover, while an insurer is entitled to contest payment of no-fault benefits, it assumes a risk that ultimately it will be liable for the benefits plus penalty interest. *Conway v Continental Ins Co*, 180 Mich App 447, 453; 447 NW2d 761 (1989). The risk of nonpayment also includes the inherent risk of litigation which might be delayed for many reasons, including the inadvertence of the plaintiff.

Defendant must pay penalty interest until the date benefits are paid. *Manley v DAIIE*, 127 Mich App 444, 461; 339 NW2d 205 (1983), rev'd on other grounds, 425 Mich 140 (1986). According to an affidavit submitted by defendant, it paid the benefits to plaintiff on July 2, 1993. Therefore, we clarify that the penalty interest did not continue to accrue beyond that date.

Affirmed.

/s/ Marilyn Kelly
/s/ Michael J. Matuzak

[1] 414 Mich 139; 324 NW2d 1 (1982).