

STATE OF MICHIGAN
COURT OF APPEALS

VASEL LUMAJ,

Plaintiff-Appellee,

v

STATE FARM INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 217146

Wayne Circuit Court

LC No. 96-620830-NI

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's orders awarding attorney fees under MCL 500.3148(1); MSA 24.13148(1), denying defendant's motion for mediation sanctions, and denying defendant's motion for summary disposition. We affirm in part, reverse in part, and remand.

Plaintiff and his brother, Gjergi, who was insured by defendant, were in an automobile accident on February 26, 1995. On January 24, 1995, Gjergi had applied for insurance and was issued a policy by defendant. After the accident, defendant contended that Gjergi, with plaintiff's assistance, made material misrepresentations on the application for insurance. Defendant then rescinded its policy of insurance and refused to pay personal protection insurance benefits to plaintiff, who had no insurance of his own, on the basis that plaintiff had lost his innocent third party status by helping Gjergi (1) misrepresent that he lived in Farmington Hills, not in Detroit, and (2) misrepresent that Gjergi lived with other relatives, not with plaintiff, who had numerous driving violations on his record.

Defendant first argues that the trial court erred in ruling that plaintiff was entitled to attorney fees because defendant's refusal to pay insurance benefits was unreasonable. The pertinent statute 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. [MCL 500.3148(1); MSA 24.13148(1).]

Such a refusal or delay in payment is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). The parties here agreed that a factual dispute precluded summary disposition in this case. Because both sides admitted that a factual uncertainty existed, defendant's position was not unreasonable. Accordingly, the trial court erred in awarding plaintiff attorney fees under § 3148(1).

Further, defendant raised a legal issue below that is one of first impression in Michigan: whether a plaintiff-passenger loses his innocent third party status where the plaintiff has helped an insured make material misrepresentations on an insurance application. Although the trial court did not reach the issue, given the uncertainty in the law on this issue, the trial court erred in deciding that defendant's refusal to pay was unreasonable. To the extent the circuit court found that defendant should have rescinded the policy at an earlier date, we merely note that an insurer does not have a duty to discover intentional material misrepresentations. *Hammoud v Metropolitan Property & Cas Ins Co*, 222 Mich App 485, 489; 563 NW2d 716 (1997).

We decline to review defendant's next argument, that plaintiff made excessive claims for damages, because that issue was not properly presented in defendant's statement of questions presented. See *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 309; 600 NW2d 664 (1999). In any event, considering the amount of the mediation award and the jury verdict, plaintiff's claim did not rise to a level "so excessive as to have no reasonable foundation." MCL 500.3148(2); MSA 24.13148(2).

Defendant next argues that the circuit court erred in denying its motion for mediation sanctions. Although both parties had rejected mediation, plaintiff later made an offer of judgment for the exact same amount of the mediation award that he had just rejected. Making an offer of judgment merely to avoid mediation sanctions should not be condoned. Nonetheless, because defendant also rejected the mediation award, we cannot say that the circuit court abused its discretion in denying defendant's motion for mediation sanctions pursuant to the former version of the court rules. See generally, *Reitmeyer v Schultz Equipment & Parts Co, Inc*, 237 Mich App 332; 602 NW2d 596 (1999).

Finally, defendant argues that the circuit court erred in denying its motion for summary disposition regarding whether plaintiff was an innocent third party. Defendant, however, has conceded numerous times at both the circuit court and appellate levels that a genuine issue of material fact existed. Accordingly, the circuit court correctly denied defendant's motion. See *Maiden v Rozwood*, 461 Mich 109, 199-200; 597 NW2d 817 (1999). This Court declines defendant's invitation to review the trial court's findings of fact regarding plaintiff's credibility. See *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Richard A. Bandstra

/s/ Kurtis T. Wilder

/s/ Jeffrey G. Collins