STATE OF MICHIGAN

COURT OF APPEALS

DETROIT MEDICAL CENTER- SINAI-GRACE HOSPITAL, Plaintiff-Appellee,	UNPUBLISHED March 10, 2005
v	No. 251447 Wayne Circuit Court
TITAN INSURANCE COMPANY, Defendant-Appellant.	LC No. 00-037432-NF

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment awarding plaintiff $46,070 in no-fault insurance benefits, no-fault attorney fees, and no-fault penalty interest, after summary disposition was entered in favor of plaintiff. We reverse.

On appeal, defendant first argues that the trial court erred in concluding that Donald Papke's medical expenses were not "incurred" until his discharge from the hospital, and thus the request for benefits timely tolled the one-year limitation period as to all of the hospitalization expenses.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). Additionally, interpretation of the no-fault act is a question of law that this Court reviews de novo. *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004).

The one-year-back rule is found in MCL 500.3145(1), which provides in relevant part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. *If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the*

loss incurred more than 1 year before the date on which the action was commenced. . . . [Emphasis added.]

Pursuant to the one-year-back rule of the statute, even if the limitation period is tolled under the notice of injury or payment of benefits exceptions, the insured can only recover benefits for losses incurred within one year preceding the filing of a complaint. *Hudick v Hastings Mut Ins Co,* 247 Mich App 602, 607; 637 NW2d 521 (2001). There is, however, a caveat. Although the one-year-back rule precludes recovery for expenses incurred more than one year before the date on which an action is commenced, the one-year period is tolled from the date of a specific claim for benefits to the date of a formal denial of liability. *Id.* Defendant's first issue on appeal focuses on when Papke's expenses were incurred in relation to plaintiff's claim for benefits. Defendant's second issue on appeal focuses on whether the one-year limitation period found in MCL 500.3145 remained tolled until the suit was commenced or whether tolling ended beforehand pursuant to a formal denial of liability.

We find it unnecessary to determine whether the trial court erred in concluding that Papke's medical expenses were not "incurred" until his discharge from the hospital as opposed to the dates on which he received medical services. Assuming no error and that the statute was tolled relative to all of the medical expenses associated with Papke's hospitalization, the tolling ended with the October 2000 phone conversation between the parties' personnel, which clearly communicated a denial of liability. Accordingly, plaintiff's November 2000 complaint was untimely and time-barred. The survival of plaintiff's cause of action depends on a finding that there was no formal denial of liability prior to the filing of the complaint, and hence tolling continued until suit was commenced. As a matter of law, such a finding cannot be reached in light of the record.

As noted above, the one-year period is tolled "'from the date of a specific claim for benefits to the date of a formal denial of liability.'" *Hudick, supra* at 607, quoting *Lewis v DAIIE,* 426 Mich 93, 101; 393 NW2d 167 (1986). A "formal denial" of liability must be explicit. *Mt Carmel Mercy Hosp v Allstate Ins Co,* 194 Mich App 580, 587; 487 NW2d 849 (1992). A denial of liability need not be in writing to be "formal." *Id.* "Although the best formal notice is a writing, notice may be sufficiently direct to qualify as formal without being put in writing." *Mousa v State Auto Ins Cos,* 185 Mich App 293, 295; 460 NW2d 310 (1990).

The parties do not dispute that the one-year period was tolled on April 19, 2000, when plaintiff made a specific request or claim for benefits. At issue is whether defendant formally denied the claim, causing the tolling to conclude and the running of the one-year period to resume. On appeal, defendant asserts that notations on a Review Works Explanation of Benefits (EOB) form, along with a subsequent verbal explanation, constituted formal denials of liability.

Arguably, the notations on the EOB form may have constituted a formal denial of liability. However, even if reasonable minds could differ regarding whether defendant's EOB notes were sufficiently explicit and unambiguous to constitute a formal denial, the parties' phone conversation on October 2, 2000, conveyed an explicit formal denial as a matter of law. The parties stipulated that "on October 2nd, 2000, Titan received a phone call from Pam at the Detroit Medical Center Billing Office, asking why Titan had only paid $727.00 for Mr. Papke's bill, at which time Kathy Szczepanski indicated that the expenses incurred by Donald Papke from April 12th, 1999 through April 18th, 1999 were denied as being submitted untimely." This

communication, as stipulated, was explicit and "sufficiently direct to quality as formal without being put in writing." *Mousa, supra* at 295. Therefore, the October 2, 2000, conversation constituted a "formal denial," and the running of the one-year limitation period resumed.

As plaintiff did not commence this action until November 14, 2000, the one-year-back rule of MCL 500.3145 was not satisfied and, regardless of when the expenses were "incurred," the action was time-barred. The trial court erred in entering summary disposition in favor of plaintiff and should have granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Defendant's third argument on appeal is that the trial court erred in awarding no-fault attorney fees because any delay to make payments under the no-fault act was based on a legitimate issue of statutory construction.

This Court reviews a trial court's finding of an unreasonable refusal to pay or delay in paying benefits for clear error. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004).

MCL 500.3148(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.

The decision whether to award attorney fees is not based on whether coverage was ultimately determined to exist, but rather, on whether the insurer's initial refusal to pay was reasonable. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). An insurer's refusal or delay with respect to payment creates a rebuttable presumption that places the burden on the insurer to justify its refusal or delay. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). However, "'[w]hen determining whether attorney fees are warranted for an insurer's delay to make payments under the no-fault act, a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty.'" *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 39; 651 NW2d 188 (2002), quoting *Attard, supra* at 317.

We hold that defendant's refusal to make payment was not unreasonable because it was based on a legitimate question of statutory construction, namely, whether all of Papke's medical expenses were "incurred" within the one-year period before a specific claim for benefits was made. While we decline to render a decision on the issue regarding when expenses are "incurred" under the statute, we have reviewed the matter and conclude that the issue is arguable and subject to legitimate debate.

Defendant's final argument on appeal is that the trial court erred in awarding no-fault penalty interest. We agree.

No-fault penalty interest is designed to penalize an insurer that is dilatory in paying a claim. *Williams v AAA Michigan*, 250 Mich App 249, 265; 646 NW2d 476 (2002). The penalty-interest statute provides, in part, "Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). This Court reviews for clear error a trial court's finding whether a communication qualifies as reasonable proof of a claim. *Williams*, *supra* at 265.

"Penalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits." *Id.* Defendant did not pay Papke's benefits within thirty days of receiving the bill. But given our determination that defendant was not liable for payment of the disputed benefits because the limitation period lapsed, defendant cannot be liable for no-fault penalty interest.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh