STATE OF MICHIGAN

COURT OF APPEALS

ANTOINE LEE, Plaintiff-Appellee,	UNPUBLISHED May 7, 2013
v	No. 303217 Wayne Circuit Court
FARMERS INSURANCE EXCHANGE, Defendant-Appellant.	LC No. 09-020438-NF

ON REMAND

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant, Farmers Insurance Exchange, appealed the trial court's order that granted summary disposition to plaintiff, Antoine Lee. In our prior majority opinion, we held that, despite the seemingly absurd and unfair result, the relevant statutes permitted plaintiff to recover both Medicare *and* personal injury protection payments from defendant to pay for medical expenses arising out of a 1978 vehicle accident in which plaintiff was an uninsured passenger. Consequently, we reluctantly concluded that plaintiff is entitled to such "double dipping," and we affirmed the trial court's grant of summary disposition in favor of plaintiff, who had commenced this suit to recover the PIP benefits from defendant. Our Supreme Court denied leave to appeal, but remanded the matter for us to consider whether the trial court properly awarded plaintiff attorney fees pursuant to MCL 500.3148(1). *Lee v Farmers Ins Exch*, ___ Mich ___; ___ NW2d ___ (2013). We now hold that the trial court did not. We therefore continue to affirm the trial court's grant of summary disposition, but we reverse the award of attorney fees.

Pursuant to MCL 500.3148(1):

> 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.

There appears to be no serious dispute that the benefits at issue here were "overdue," meaning "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). Rather, defendant contends that its refusal to pay was not unreasonable. A refusal to pay creates a rebuttable presumption of unreasonableness; consequently, defendant has the burden of proving that its refusal was reasonable. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). The presumption can be rebutted, and the refusal will be deemed not unreasonable, if the refusal was "the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008).

Although this Court has already determined that defendant's position was legally incorrect, we cannot conclude that it was devoid of even arguable merit or advanced in bad faith. Simply put, as we previously noted, the double recovery allowed in this case is bizarre and unfair, even if this Court has found it to be permitted by the Legislature and our Supreme Court has declined to review that conclusion. More importantly, given our legal system's general predisposition to compensating people for losses while avoiding windfalls, it is not a result one would naturally tend to expect. We do not believe that it was unreasonable for defendant to seek to persuade a court to absolve it of responsibility, nor do we believe that defendant's proffered argument was not based on a legitimate question of statutory interpretation.

Finally, we note that the purpose of MCL 500.3148 "is to ensure prompt payment to the insured." *McKelvie*, 203 Mich App at 335. Here, plaintiff was, in fact, fully paid, and sought in this suit to be paid *again*. Plaintiff was not put in the position of being forced to either absorb medical expenses without compensation or forego treatment. Therefore, plaintiff was not truly in the class of persons intended to be protected by the penalty provision. While not a dispositive concern, this supports our conclusion that defendant's challenge to its continued payment of plaintiff's PIP benefits was not unreasonable.

The trial court's grant of summary disposition in favor of plaintiff is, pursuant to this Court's previous majority opinion in this case, affirmed; however, the trial court's grant of attorney fees to plaintiff pursuant to MCL 500.3148(1) is reversed.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello