STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA VILLEGAS,

Plaintiff-Appellee,

V

ALLSTATE INSURANCE CO,

Defendant-Appellant.

UNPUBLISHED
July 29, 2003

No. 235512
Kent Circuit Court
LC No. 98-010966-NF

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

In this action for benefits under Michigan's no-fault act, MCL 500.3101, *et seq*, defendant appeals as of right from a June 14, 2001, order awarding attorney fees and costs to plaintiff in the amount of $34,450. We affirm.

Plaintiff was injured in a November 26, 1996 car accident. Following the accident, plaintiff visited various clinics and hospitals for back pain, and ultimately had back surgery. Defendant paid first party no fault benefits to plaintiff from the date of the accident through June 1998, at which time defendant ceased paying these benefits. In October 1998, plaintiff filed the instant suit, alleging that defendant breached its contract of insurance with plaintiff by unreasonably failing to pay, and unreasonably delaying payment of, personal protection benefits owed to plaintiff, contrary to MCL 500.3148. Plaintiff's complaint also sought declaratory relief from the trial court on her claims for care, recovery and rehabilitation; lost wages; and reasonable and necessary replacement services.

After discovery and mediation, the matter was scheduled for trial. On the eve of trial the parties reached a settlement. Under the terms of the settlement, defendant agreed plaintiff $5,000 on her claims for wage loss and replacement services, and to immediately pay all of plaintiff's then outstanding and future medical bills related to injuries received in the November 26, 1996 automobile accident. The parties expressly agreed to reserve for later decision by the trial court the question whether plaintiff was entitled to an award of attorney fees and enforcement of an attorney lien under MCL 500.3148.

Plaintiff subsequently filed a motion for attorney fees, and also contended that defendant had made payments directly to plaintiff's medical providers in deliberate violation of plaintiff counsel's attorney lien. Defendant opposed the motion and after hearing argument on the motion, the trial court scheduled an evidentiary hearing for the presentation of testimony on the

medical evidence. Several hearings were scheduled, and the trial court entertained argument on both the procedural and substantive posture of the case. Eventually, the parties agreed that the trial court could decide the motion based on the briefs and exhibits, including expert deposition testimony regarding the medical evidence, submitted by the parties. Based on the evidence before it, the trial court determined that plaintiff's injury was caused by the automobile accident, and that defendant's refusal to pay and delay in paying the benefits in question had been unreasonable. The trial court awarded attorney fees to plaintiff totaling one third of the amount of medical bills paid to plaintiff's medical providers after defendant had been informed on August 15, 2000 of the existence of plaintiff's counsel's attorney lien. Defendant's motion for reconsideration was denied, and this appeal ensued.

Defendant first claims that the trial court erred by failing to address whether plaintiff was entitled to receive first party benefits before concluding that benefits were unreasonably delayed or withheld. A review of the trial court's May 21, 2001 order quickly disposes of this assertion, as the trial court found in part that "all three doctors who were deposed in this case agree that Plaintiff's herniated discs were caused by her automobile accident of November 26, 1996." This Court reviews a trial court's findings of fact for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* We find no clear error in the trial court's conclusion that plaintiff's injuries were caused by the November 26, 1996 automobile accident.

Defendant next asserts that the trial court erred in finding that it unreasonably delayed in paying first party no fault benefits to plaintiff, because a factual dispute existed as to whether plaintiff was entitled to benefits. Again, we disagree.

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.

"If the insurer's refusal or delay in payment is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, the refusal or delay will not be found unreasonable under MCL 500.3148(1). *Beach v State Farm Mut Ins Co*, 216 Mich App 612, 629; 550 NW2d 580 (1996). The insurer must overcome a rebuttable presumption of unreasonableness and justify its delay or refusal of benefits. *Id*.

"Absent clear error, this Court will not reverse a trial court's finding regarding an unreasonable refusal or delay in paying benefits." *Proudfoot v State Farm Mut Ins Co*, 254 Mich App 702, 712; 658 NW 2d 838 (2003), citing *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999). Clear error does not exist unless the reviewing court is left with the definite and firm conviction on the entire record that a mistake was made. *Id*.

Defendant fails to show that there was clear error in the trial court's ruling. As the trial court noted, defendant refused to continue making benefits payments to plaintiff based solely on the report of Dr. Herkner. Plaintiff's two treating physicians, Dr. Garza and Dr. Gracias, both opined that plaintiff's injury was caused by the accident. Dr. Herkner, who was hired by defendant to conduct an independent medical examination of plaintiff, concluded that at least some of plaintiff's symptoms related to the automobile accident, while some of her symptoms *may* be independent of the accident. This evidence is insufficient to rebut the presumption of unreasonableness needed to justify defendant's delay or refusal of benefits. *Beach, supra* at 629.

Defendant also challenges the trial court's award of $34,450 in attorney fees. We review a trial court's award of attorney fees for an abuse of discretion. *Wood v DAIIE*, 413 Mich 573, 587-588; 321 NW2d 653 (1981). After a review of the record, we conclude that the trial court did not abuse its discretion in rendering the challenged attorney fees award. Although Defendant contends that the trial court failed to hold an evidentiary hearing to determine the reasonableness of the fees, the trial court's order of May 21, 2001 specifies that the defendant stipulated to submit the matter for resolution by the trial court on the briefs and exhibits previously filed by the parties. Defendant provides no evidence to contradict this statement by the trial court. Furthermore, the record does show that on April 10, 2001, plaintiff filed a notice that the hearing on the motion for attorney fees was rescheduled for May 10, 2001, and filed a supplemental brief with attached exhibits, including itemized billing statements, on May 7, 2001. The record contains no documents filed by defendant in response. In the face of defendant's failure to file any contradictory evidence and its stipulation that the trial court could decide the matter on briefs, this issue is waived and defendant cannot now complain that the trial court erred by failing to conduct an evidentiary hearing. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). This result is in keeping with our longstanding policy that precludes the harboring of error as an appellate parachute. *Id*. Accordingly, defendant's arguments[1] have no merit.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

[1] Defendant also argued that "[t]he Trial Court's award of a lien is also contrary to the no-fault act." However, contrary to MCR 7.212(C)(5), defendant failed to list this issue in its questions presented. Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000), citing *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996). Therefore, we decline to address this claim.