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NO FAULT ATTORNEYS FEES NOT CONSIDERED PART OF VERDICT AMOUNT WHEN DETERMINING SANCTIONS

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In a recently published first-party no-fault decision, *Ivezaj v Auto Club Ins. Ass'n*, ---N.W.2d---, 2007 WL 1203620 (Mich. App.), the Michigan Court of Appeals held that attorney fees are not assessable costs under MCL 500.3148(1) and are therefore not to be considered as part of the verdict amount for the purpose of determining case evaluation sanctions.

The court also held that the rebuttable presumption that a no-fault insurer's denial of benefits is unreasonable cannot be overcome by evidence that the jury found the insurer liable only for a portion of the benefits claimed. Rather, the insurer must show that it had a reasonable basis for denying the claim at the time it initially refused payment.

In this case, the plaintiff was injured in a motor vehicle accident in 2001. She then filed a complaint alleging that her no fault insurer failed to pay Personal Protection Insurance (PIP) benefits. A case evaluation panel determined that the plaintiff's claim was worth \$150,000. The defendant accepted the award amount, but the plaintiff rejected it.

At trial, a jury awarded the plaintiff \$108,000, as well as \$13,000 in interest for the overdue benefits. The trial court also awarded \$40,333 in attorney fees pursuant to MCL 500.3148, as well as \$8,996 in taxable costs pursuant to MCR 2.625. The trial court then determined that the defendant was not entitled to case evaluation sanctions under MCR 2.403(O), because after adjusting the jury verdict through the addition of the award of attorney fees, the plaintiff's verdict exceeded the case evaluation award by more than 10 percent. The defendant appealed.

The appellate court first addressed the defendant's argument that its decision to deny benefits was reasonable and, therefore, the trial court erred in awarding attorney fees. The defendant premised its argument solely on the fact that the jury held it liable for only a small portion of the benefits claimed by the plaintiff. The court rejected this argument, citing the holding in *McCarthy v Auto Club Ins. Ass'n*, 208 Mich. App. 97; 105 N.W.2d 524 (1994). The trial court in *McCarthy* had used the fact that the jury had found the insurer liable for payment to support its holding that the insurer's denial of benefits at

the time the claim was made was unreasonable. The appellate court in *McCarthy* stated, “the scope of the inquiry under § 3148 is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable.” In *McCarthy*, the insurer produced evidence that it based its initial refusal to pay benefits for plastic surgery on the testimony of the plaintiff’s physician that the surgery was unnecessary. Therefore, the court in *McCarthy* held that the denial of benefits was reasonable at the time of the claim because the insurer had a bone fide question of factual certainty as to the necessity of the surgery.

In the present case, however, the appellate court held that the defendant could not use the jury verdict as evidence to rebut the presumption that the denial of benefits was unreasonable, because the defendant could not have known at the time it denied benefits that the jury would only find it liable for a percentage of the plaintiff’s claim. Therefore, relying on *Bloemsma v Auto Club Ins. Co.*, 174 Mich. App. 692; 436 N.W.2d 442 (1989), the court held that it would not disturb the trial court’s findings concerning a claim for attorney fees under MCL 500.3148 unless the finding was clearly erroneous.

The appellate court next considered the defendant’s argument that the trial court erred by adjusting the verdict by adding attorney fees as assessable costs and, therefore, the defendant was entitled to case evaluation sanctions because the plaintiff did not improve her position by at least 10 percent at trial. The court agreed and reversed the trial court’s order denying the defendant case evaluation sanctions.

The appellate court, citing *Dessart v Burak*, 470 Mich. 37; 678 N.W.2d 615 (2004), explained that the term “costs’ ordinarily does not encompass attorney fees unless a statute or court rule defines the term as such” and “MCR 2.403(O) does not define assessable costs.” Therefore, the court held that assessable costs by which a verdict may be adjusted does not include attorneys fees awarded under MCL 500.3148(1). The court also held that attorney fees are not part of a verdict as defined in MCR 2.403(O)(2) and should not be included for case evaluation sanctions purposes. However, the appellate court did state, in footnote 7 of the opinion, that “if the case evaluators incorporated the value of MCL 500.3148(1) attorney fees in determining the value of the case, the statutory award of attorney fees should be considered part of the verdict for purposes of comparison.” However, the court found no evidence that the case evaluators in the Ivezaj case included an award of attorney fees in its evaluation.

Finally, the appellate court held that the trial court erred in awarding taxable costs to the plaintiff. The court stated that because attorney fees should not have been added to the jury verdict, the plaintiff’s award did not meet the threshold at which the plaintiff would not be liable for case evaluation sanctions. Therefore, the court held that because the plaintiff was liable for cost evaluation sanctions the defendant was the prevailing party under MCR 2.625 and entitled to actual costs pursuant to MCR 2.403(O)(6). The court remanded the case to the trial court for determination of the defendant’s costs.

For a complete copy of the Michigan Court of Appeals published decision in *Ivezaj v Auto Club Ins. Ass’n*, ---N.W.2d---, 2007 WL 1203620 (Mich. App.), [click here](#).