

STATE OF MICHIGAN
COURT OF APPEALS

ALICE JO MORALES, as Guardian and
Conservator of ANTONIO MORALES, a legally
incapacitated person, a/k/a ANTHONY
MORALES,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 4, 2002

No. 233826
Missaukee Circuit Court
LC No. 92-002882-NF

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

A jury determined that defendant Auto Owners Insurance Company was estopped from canceling an insurance policy issued to plaintiff. Defendant appeals as of right the judgment ordering defendant to pay prejudgment interest, penalty interest, and attorney fees. We affirm in part, reverse in part, and remand.

This case was previously appealed to this Court¹ and to the Michigan Supreme Court, and a full discussion of the underlying facts is contained in the Supreme Court's opinion.² Relevant to this appeal, following remand by the Supreme Court, the parties stipulated that the medical expenses and services provided were reasonable and the case was submitted to a jury solely on the issue whether the policy was in effect at the time of plaintiff's accident. The jury concluded that defendant was estopped from canceling the policy. The trial court subsequently granted plaintiff's motion for "penalty" interest under MCL 500.3142 and attorney fees under MCL 500.3148. The judgment also provides for the payment by defendant of prejudgment interest.

¹ *Morales v Auto-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued September 3, 1996 (Docket No. 178479).

² *Morales v Auto-Owners Ins Co*, 458 Mich 288; 582 NW2d 776 (1998).

I. Penalty Interest

Defendant contends that the trial court erred by awarding penalty interest under MCL 500.3142(3). We disagree. The judge properly awarded penalty interest pursuant to MCL 500.3142. The clear language of the statute compels such interest regardless of the reasonableness of the insurer's decision to withhold benefits. *Davis v Citizens Ins Co*, 195 Mich App 323, 329; 489 NW2d 214 (1992). Defendant urges that the penalty interest should accrue from the date of the jury's verdict, not the date of the original complaint, because it was only then that it learned it was liable for the loss. We disagree, as defendant's interpretation would be contrary to the plain language of the statute. Moreover, while an insurer is entitled to contest payment of no-fault benefits, it assumes a risk that ultimately it will be liable for the benefits plus penalty interest. *Conway v Continental Ins Co*, 180 Mich App 447, 453; 447 NW2d 761 (1989). The risk of nonpayment also includes the inherent risk of litigation.³

Therefore, under the jury's verdict – which defendant does not challenge – the original policy of insurance continued in effect and defendant failed to pay benefits as required under the policy. Personal injury protection (PIP) benefits are overdue if an insurer fails to pay those benefits within thirty days after the insured provides “reasonable proof of the fact and of the amount of loss sustained.” MCL 500.3142(2).⁴ Once defendant received reasonable proof of the fact and of amount of the loss sustained, it had to pay benefits or be subject to the penalties. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 600; 648 NW2d 591 (2002). The trial court properly awarded penalty interest.

II. Prejudgment Interest

Defendant maintains that the trial court erred by awarding prejudgment interest pursuant to MCL 600.6013 during the four years this case was on appeal because the delay was not the fault of the insurer. We agree. Prejudgment interest does not continue to accrue during the appellate process. See *Dedes v Asch*, 233 Mich App 329, 340, 590 NW2d 605 (1998). We therefore remand this matter to the trial court for a redetermination of the amount of prejudgment interest for which defendant is liable.

³ Defendant's argument is premised on its view that the insurance policy had lapsed but that a new contract of insurance was created by the jury's verdict estopping defendant from denying coverage. This argument ignores our Supreme Court's determination in this case that application of the doctrine of equitable estoppel does not create a new contract of insurance, but rather merely prevents an insurer “from enforcing a single provision in the already existing contract.” *Morales v Auto-Owners Ins Co*, 458 Mich 288, 298; 582 NW2d 776 (1998).

⁴ Defendant does not dispute that plaintiff provided reasonable proof of the fact and of the amount of the loss sustained or that defendant failed to pay PIP benefits within thirty days of that date.

III. Attorney Fees

Lastly, defendant asserts that the trial court erred by awarding attorney fees to plaintiff under MCL 500.3148 for being forced to bring a motion for payment of penalty interest. 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 charged 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 trial court's finding that an insurer unreasonably refused to pay benefits or unreasonably delayed in making proper payment will only be reversed if it is clearly erroneous. *Liddell v DAIIE*, 102 Mich App 636, 650; 302 NW2d 260 (1981). Where benefits are not paid within the statutory period, a rebuttable presumption of unreasonable refusal or undue delay arises. *Combs v Commercial Carriers, Inc*, 117 Mich App 67, 73; 323 NW2d 596 (1982).

The trial court's decision to award attorney fees was based on the fact that plaintiff was forced to bring a post judgment motion for payment of interest and was forced to defend defendant's post judgment motion for relief from judgment on prejudgment interest, a motion that encompassed a claim that defendant should not be compelled to pay interest. As we have determined, our Supreme Court held that if the jury determined that plaintiff could establish that defendant was estopped from denying coverage, the provisions of the insurance policy continued in effect. Under the plain statutory language, defendant would therefore be liable for its failure to timely pay benefits. The jury held that plaintiff proved that defendant was estopped from denying coverage; penalty interest was therefore due based on defendant's failure to timely pay. The trial court's determination that defendant was also liable for attorney fees was based on its conclusion that defendant's challenge to the payment of penalty interest was made without legal basis. We find no clear error in this determination.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh