COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1377

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CRYSTAL MCKEE,

PLAINTIFF-APPELLANT,

V.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Crystal McKee appeals a judgment entered in favor of Allstate Insurance Company denying her costs on the ground that there was a reasonable basis for nonpayment of her claim within thirty days of her demand. McKee argues that she is entitled to 12% interest pursuant to § 628.46(1), STATS., or, alternatively, 5% interest pursuant to § 138.04, STATS.

Because Allstate was reasonably prompt in settling for policy limits once it gathered the information necessary to evaluate her claim, we conclude that McKee is not entitled to prejudgment interest. We further conclude that Allstate's alleged lack of diligence in pursuing the information is not documented. We therefore affirm the judgment.

On August 27, 1994, McKee, as a passenger, was injured in a two-car accident in which she was the sole survivor. McKee's fiancé died in the accident. In a separate claim against the insurer of the other car's driver, McKee recovered $15,000. At the time of the accident, McKee had an automobile policy through Allstate that included underinsured (UIM) benefits. McKee brought this action against Allstate seeking policy limits of $50,000. After a dispute regarding coverage, the trial court determined that the Allstate policy provided McKee UIM benefits in the sum of $50,000. In an order dated September 18, 1996, the court resolved the coverage dispute in McKee's favor and awarded McKee $250 costs as prevailing party on the coverage issue and stayed the balance of the proceedings pending arbitration.

Prior to the arbitration hearing, the parties reached a settlement for the policy limits. It provided that $50,000 would have been assessed against Allstate had an arbitration panel found damages of $65,000 or more.[1] The parties stipulated to the dismissal of this action, except with respect to costs and interest. The stipulation provided that the settlement and release did not affect McKee's right to bring a claim for costs or interest on the $50,000 payment. Although the

[1] Because McKee collected $15,000 from the tortfeasor's insurance company, her total damages must equal or exceed $65,000 in order for her to collect the full $50,000 policy limits.

record is not clear, the parties do not dispute that the date of their verbal settlement was October 24, 1997, and that interest would cease to accrue as of that date.

The trial court found that Allstate had reasonable proof during the discovery process that McKee's damages did not equal or exceed $65,000 and, as a result, that it may not be obligated for the entire $50,000 limit. It concluded that the amount of her damages was not readily ascertainable and that reasonable persons could differ as to the value of her claim. As a result, it determined that McKee was not entitled to recover interest under § 628.46(1), STATS., § 138.04, STATS., or the common law. It further ordered that McKee was not entitled to costs and disbursements.

The record discloses the following facts with respect to McKee's injuries. McKee incurred $17,867.04 in medical expenses. Her August 27, 1994, emergency room records state that McKee was awake and denied loss of consciousness. Multiple bruises, contusions and small lacerations were noted. No fractures were identified at that time. On August 28, there was "extensive bruising and soft tissue swelling present." McKee had suffered a fracture of the right thumb and wrist, fracture of "the left leg and/or ankle," fracture of a number of ribs on both sides of the chest cage, internal injuries with no apparent bleeding, and a cerebral concussion. "[N]o signs of any significant thoracic, intra-abdominal, or central nervous system injuries" were observed. McKee was discharged on August 31.

In September and October, McKee continued to complain of pain. Medical records indicate that X-rays of her spine and knees were negative. A thumb fracture had healed. An examination revealed whiplash, muscle spasms and multiple contusions. On October 20, her doctor also noted that McKee was

doing "extremely well." The doctor, however, reported post-trauma depression. On October 24, 1994, McKee's doctor described her injuries as multiple and severe:

> [I]ncluding fractured right wrist, severe whiplash injury, head injury, severe muscle spasms and contusion of the whole body, cervical spine injury (with no bony abnormality), and especially muscle spasms to the neck and posterior chest. She also has suffered in addition to all of the above, moderate to severe memory loss, and although some of this is showing signs of returning, the memory for the time leading up to, during and immediately following the accident, is a total blank.

The record further discloses that McKee returned to work part-time two weeks after the accident and full-time in December 1994. McKee claimed a wage loss of $6,448. She testified in April of 1997 that she earned $25,000 at the time of the accident as a production manager at a knitting mill and, with raises, currently earned $30,000 in that same position.

In a July 20, 1996, letter, McKee's doctor reviewed her injuries and stated that she continued to have pain in the neck and shoulders, numbness in her right arm and left wrist, pain and swelling in the left ankle, almost daily severe headaches, fatigue and nausea. McKee also suffered from psychological problems, including memory loss.

A neuropsychological report dated May 12, 1997, stated that test results support the impression of incomplete recovery of memory functioning dating to a mild traumatic brain injury, apparently a result of the accident There was also indication of mild to moderate depression and anxiety. On September 23, 1997, a second neuropsychological evaluation, upon referral by Allstate's attorney, diagnosed post-traumatic stress disorder. An October 22, 1997,

vocational report discloses a permanent reduction in earning capacity equal to $10,000 per year for the balance of her worklife. McKee was forty-one years old at the time. There is no dispute that Allstate agreed to settle for policy limits on October 24, 1997.

McKee argues that § 628.46(1), STATS., entitles her to 12% interest on $50,000 from March 21, 1996, the time of her written demand for limits. Under § 628.46(1), a claim is overdue if not paid within thirty days or after the insurer is furnished with written notice of the fact of a covered loss and the amount of the loss.[2] "The only way an insurer can avoid an interest assessment under sec. 628.46(1), STATS., is when it had reasonable proof that it was not responsible for the payment." ***Upthegrove Hardware v. Pennsylvania Lumbermans Mut. Ins. Co.***, 146 Wis.2d 470, 484-85, 431 N.W.2d 689, 696 (Ct. App. 1988). McKee argues that Allstate failed to show reasonable proof that it

[2] Section 628.46(1), STATS., providing for timely payment of claims, states:

> Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after written notice is furnished to the insurer. Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer. For the purpose of calculating the extent to which any claim is overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery. All overdue payments shall bear simple interest at the rate of 12% per year.

was not responsible for payment of her claim. McKee agrees that because she received a $15,000 settlement from the other driver's insurer, her damages would have to equal or exceed $65,000 for Allstate to be liable for the limits of the policy. Nonetheless, she contends that the severity of her injuries was proof that she was entitled to the limits under the policy at the time of her demand.

"[P]rejudgment interest is recoverable at common law in cases, including personal injury cases, where the damages are 'liquidated or liquidable,' that is, where the amount is either liquidated 'or determinable by reference to some objective standard.'" ***Allstate Ins. Co. v. Konicki***, 186 Wis.2d 140, 158, 519 N.W.2d 723, 730 (Ct. App. 1994). Prejudgment interest at 12% under § 628.46, STATS., is appropriate in cases in which an injured plaintiff sues to recover uninsured motorist benefits from his or her insurer. ***Id***. at 160, 519 N.W.2d at 730. However, interest under § 628.46(1) does not apply when "the insurer has reasonable proof to establish that it is not responsible for the payment." ***Id***. For example, if "the coverage issue was fairly debatable," the insurer must be considered to have had the required "proof" of nonresponsibility. ***Id***. As a result, in ***Konicki*** we concluded that the trial court had properly denied the insured's claim for 12% interest under § 628.46.

We acknowledge that at some point an insurer must be deemed to have sufficient information to properly evaluate the loss. Here, however, the issue of coverage was not yet resolved within thirty days of McKee's demand. McKee does not dispute that the insurer had a reasonable basis to argue coverage. The record shows that after the coverage issue was resolved in September 1996, other medical and neuropschological reports and evaluations were completed. Two days after the October 22, 1997, vocational report, the parties agreed to settle for policy limits. On this record, Allstate was reasonably prompt once it gathered its

information. Under these circumstances, we are satisfied that Allstate had "reasonable proof to establish that it [was] not responsible for ... payment" of benefits at appropriate times during this controversy. *See* ***id.*** at 160, 519 N.W.2d at 730.

McKee argues that Allstate was not diligent in pursuing the information necessary to evaluate her claim. Where the record is adequately developed, it may be that a court could find that a lack of diligence in gathering information would foreclose the insurer from asserting the exception in § 628.46(1), STATS. Despite McKee's contention that Allstate "apparently conducted no investigation until August 13, 1997," we conclude that the record and McKee's references to it are insufficiently developed to make this determination. Consequently, the trial court properly denied McKee's prejudgment interest claim.

For the same reasons, we conclude that the trial court properly denied interest under § 138.04, STATS.[3]

> The general rule is that in the absence of agreement to the contrary, liquidated damages bear interest, whereas unliquidated damages do not. In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped; the amount of the claim must be known and determined, or readily determinable.

[3] Section 138.04, STATS., provides:

> Legal rate. The rate of interest upon the loan or forbearance of any money, goods or things in action shall be $5 upon the $100 for one year and according to that rate for a greater or less sum or for a longer or a shorter time; but parties may contract for the payment and receipt of a rate of interest not exceeding the rate allowed in ss. 138.041 to 138.056, 138.09 to 138.12, 218.01 or 422.201, in which case such rate shall be clearly expressed in writing.

De Toro v. DI-LA-CH, Inc., 31 Wis.2d 29, 33, 142 N.W.2d 192, 195 (1966). Because the amount of McKee's damages was not a liquidated claim, interest under § 138.04 is not recoverable.

We further conclude that McKee is not entitled to additional costs. The record shows that the trial court awarded McKee costs in the sum of $250 when it found in her favor on the issue of coverage. McKee cites no authority for her apparent proposition that she is entitled to costs when judgment is entered based upon a stipulated settlement. As a result, we decline to award her relief on this basis.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.