

STATE OF MICHIGAN  
IN THE SUPREME COURT

---

Appeal from the Court of Appeals  
(Joel P. Hoekstra, Hilda R. Gage and Kurtis T. Wilder, JJ.)

---

RANDALL L. ROSS,

Plaintiff-Appellee,

v.

Docket No. 130917

AUTO CLUB GROUP,

Defendant-Appellant.

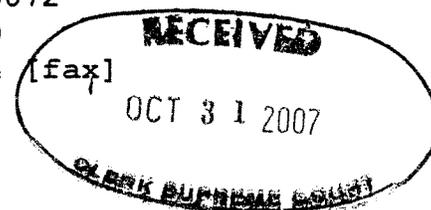
---

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

---

JULES B. OLSMAN (P28958)  
DONNA M. MACKENZIE (P62979)  
OLSMAN MUELLER, P.C.  
Attorneys for Plaintiff-  
Appellee  
2684 West Eleven Mile Road  
Berkley, MI 48072  
(248) 591-2300  
(248) 591-2304 [fax]



**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... iii

STATEMENT OF THE BASIS OF JURISDICITON ..... vi

COUNTER-STATEMENT OF QUESTIONS INVOLVED ..... vii

COUNTER-STATEMENT OF FACTS ..... 1

    A.    Procedural Background ..... 1

    B.    Factual Background ..... 2

INTRODUCTION AND SUMMARY OF ARGUMENTS ..... 4

ARGUMENT ..... 5

    I.    THE TRIAL COURT AND COURT OF APPEALS PROPERLY AWARDED  
PLAINTIFF NO-FAULT BENEFITS FOR LOSS OF WAGES WHERE  
PLAINTIFF SUSTAINED AN ACTUAL LOSS OF INCOME BECAUSE HE WAS  
NO LONGER BEING PAID W-2 WAGES. .... 5

        A.    Standard of Review. .... 5

        B.    Defendant-Appellant cannot ignore MCLA § 500.3107  
simply because the Mr. Ross was the owner and  
employee of a Sub-chapter S corporation. .... 6

            1.    Defendant-Appellant's arguments were  
improperly raised for the first time on  
appeal. .... 6

            2.    Defendant-Appellant has provided this court  
with no rationale, justification or  
authority for disregarding the corporate  
form of a Sub-chapter S corporation. .... 6

        C.    The present case is factually distinguishable  
from *Adams*. .... 9

        D.    Defendant-Appellant completely ignores the plain  
language of MCLA § 500.3107 in an attempt to have  
this Court re-write the No-Fault statute to  
provide that "a no-fault insurer is liable to pay  
benefits for work loss consisting of *taxable  
income*." ..... 14

II. THE TRIAL COURT PROPERLY AWARDED PLAINTIFF ATTORNEY FEES WHERE THE TRIAL COURT DETERMINED THAT THE DEFENDANT PROVIDED "NO LEGITIMATE JUSTIFICATION, NO LEGAL AUTHORITY, NO RATIONAL OR LOGICAL ARGUMENTS" IN SUPPORT OF ITS DECISION TO DENY PLAINTIFF WAGE LOSS BENEFITS. .... 19

A. Standard of review. .... 19

B. Awarding Mr. Ross attorney fees is consistent with the purpose of the No-Fault Insurance Act. 19

C. Awarding Mr. Ross attorney fees is consistent with the plain language of the No-Fault Insurance Act. .... 22

D. Defendant-Appellant's appeal must be dismissed because it cannot show that the trial court's finding of "an unreasonable refusal to pay" was clearly erroneous. .... 26

E. Mr. Ross is entitled to an award of attorney fees because Defendant-Appellant's denial of personal protection insurance benefits was unreasonable pursuant to MCL § 500.3148(1). .... 27

F. Because Defendant-Appellant did not preserve the issue of attorney fees at the trial court level, it cannot raise this issue for the first time on appeal. .... 31

G. Defendant-Appellant waived any objection to the award of attorney fees in this case. .... 35

RELIEF REQUESTED ..... 37

INDEX OF AUTHORITIES

Cases

<i>Adams v. Auto Club Ins Ass'n</i> , 154 Mich App 186, 397 NW2d 262 (1986) .....	passim
<i>Advisory Opinion Re: 1972 PA 294</i> , 389 Mich 441, 208 NW2d 469 (1973) .....	20
<i>Attard v. Citizens Ins Co. of America</i> , 237 Mich App 311, 602 NW2d 633 (1999) .....	23, 27
<i>Bailey v. Jones</i> , 243 Mich 159, 219 NW 629 (1928) .....	35
<i>Beach v. State Farm Mut Automobile Ins Co</i> , 216 Mich App 612, 550 NW2d 580 (1996) .....	21
<i>Belcher v. Aetna Casualty &amp; Surety Company</i> , 409 Mich 231, 293 NW2d 594 (1980) .....	20
<i>Booth Newspapers, Inc. v. University of Michigan Bd. of Regents</i> , 444 Mich 211, 507 NW2d 422 (1993) .....	32
<i>Borgess Medical Center v. Resto</i> , 273 Mich App 558, 730 NW2d 738 (2007) .....	19
<i>Bourne v. Muskegon Circuit Judge</i> , 327 Mich 175, 41 NW2d 515 (1950) .....	6
<i>Buckeye Union Insurance Company v. Johnson</i> , 108 Mich App 46, 310 NW2d 268 (1981) .....	20
<i>Butcher v. Dep't of Treasury</i> , 425 Mich 262, 389 NW2d 412 (1986) .....	32
<i>Butler v. Detroit Auto. Inter-Insurance Exchange</i> , 121 Mich App 727, 329 NW2d 781 (1982) .....	19
<i>Cinderella Theatre Co., Inc. v. United Detroit Theatres Corp.</i> , 367 Mich 424, 116 NW2d 825 (1962) .....	7
<i>Dagenhardt v. Special Machine &amp; Engineering, Inc.</i> , 418 Mich 520, 345 NW2d 164 (1984) .....	32
<i>DiBenedetto v. West Shore Hosp</i> , 461 Mich 394, 605 NW2d 300 (2000) .....	14

<i>Eggleston v. Bio-Medical Applications of Detroit, Inc.</i> , 468 Mich 29, 658 NW2d 139 (2003) .....	5
<i>Frankenmuth Mut. Ins. Co. v. Marlette Homes, Inc.</i> , 456 Mich 511, 573 NW2d 611 (1998) .....	14
<i>In re Forfeiture of Property</i> , 441 Mich 77, 490 NW2d 322 (1992)	32
<i>In re MCI Telecommunications Complaint</i> , 460 Mich 396, 596 NW2d 164 (1999) .....	14
<i>Kirksey v. The Manitoba Public Ins. Corp.</i> , 91 Mich App 12, 477 NW2d 442 (1991) .....	29
<i>Lee v. DAIIE</i> , 412 Mich 505, 315 NW2d 413 (1982) .....	20
<i>Liddell v. DAIIE</i> , 102 Mich App 636, 302 NW2d 260 (1981) .....	28
<i>MacDonald v. State Farm Mutual Ins. Co.</i> , 419 Mich 146, 350 NW2d 233 (1984) .....	5
<i>McCarthy v. Auto Club Ins. Ass'n</i> , 208 Mich App 97, 527 NW2d 524 (1994) .....	27
<i>McKelvie v. Auto Club Ins. Ass'n</i> , 203 Mich App 331, 512 NW2d 74 (1994) .....	21, 26, 27
<i>McPherson v. Auto Owners Insurance Company</i> , 90 Mich App 215, 282 NW2d 289 (1979) .....	20
<i>Miller v. Farm Bureau Mutual Insurance Company</i> , 218 Mich App 221, 553 NW2d 371 (1996) .....	6, 21, 28
<i>Model Laundries &amp; Dry Cleaners v. Amoco Corp.</i> , 216 Mich App 1, 548 NW2d 242 (1996) .....	26
<i>Moghis v. Citizens Ins. Comp. of Amer.</i> , 187 Mich App 245, 466 NW2d 290 (1991) .....	5, 29
<i>O'Donnell v. State Farm</i> , 404 Mich 524, 273 NW2d 829 (1979) ....	20
<i>Ohio Dep't of Taxation v. Kleitch Bros., Inc.</i> , 357 Mich 504, 98 NW2d 636 (1959) .....	32
<i>People v. Snow</i> , 386 Mich 586, 194 NW2d 314 (1972) .....	32, 34
<i>Perin v. Peuler</i> , 373 Mich 531, 130 NW2d 4 (1964) .....	32, 34

*Pompa v. Auto Club Ins. Ass'n*, 446 Mich 460, 521 NW2d 831 (1994) ..... 17

*Ross v. Auto Club Group*, 269 Mich App 356, 711 NW2d 787 (2006) 8, 16, 19, 29

*Schanz v. New Hampshire Ins. Co.*, 165 Mich App 395, 418 NW2d 478 (1988) ..... 31, 35

*Shanafelt v. Allstate Ins Co*, 217 Mich App 625, 552 NW2d 671 (1996) ..... 27, 28

*Shavers v. Attorney General*, 402 Mich 554, 267 NW2d 72 (1978) . 21

*Spencer v. Black*, 232 Mich 675, 206 NW 493 (1925) ..... 6

*Sullivan v. North River Ins.*, 238 Mich App 433, 606 NW2d 383 (1999) ..... 11, 17

*Thornton v. Allstate Ins. Co.*, 425 Mich 643, 391 NW2d 320 (1986) ..... 28

*Wells v. Firestone Tire & Rubber Co.*, 421 Mich 641, 364 NW2d 670 (1984) ..... 7

*Wilson v. State Farm Mutual Automobile Insurance Company*, 934 F2d 261 (10th Cir. 1991) ..... 12, 13, 24

*Wojas v. Rosati*, 182 Mich App 477, 452 NW2d 864 (1990) ..... 26

Statutes

MCL § 500.3105 ..... 20

MCL § 500.3106 ..... 28

MCL § 500.3107 ..... passim

MCL § 500.3142 ..... 1, 33

MCL § 500.3148 ..... passim

MCL § 600.2591 ..... 1, 33

MCL § 600.6013 ..... 1, 33

**STATEMENT OF THE BASIS OF JURISDICTON**

This Court's jurisdiction is based upon Defendant-Appellant's Application for Leave to Appeal, which was granted on June 15, 2007.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. DID THE TRIAL COURT AND COURT OF APPEALS PROPERLY AWARD PLAINTIFF NO-FAULT BENEFITS FOR LOSS OF WAGES WHERE PLAINTIFF SUSTAINED AN ACTUAL LOSS OF INCOME BECAUSE HE WAS NO LONGER PAID W-2 WAGES?

Defendant-Appellant's answer: NO

Plaintiff-Appellee's answer: YES

Court of Appeals' answer: YES

Trial Court's answer: YES

II. DID THE TRIAL COURT AND COURT OF APPEALS PROPERLY AWARD PLAINTIFF ATTORNEY FEES WHERE THE TRIAL COURT DETERMINED THAT THE DEFENDANT PROVIDED "NO LEGITIMATE JUSTIFICATION, NO LEGAL AUTHORITY, NO RATIONAL OR LOGICAL ARGUMENTS" IN SUPPORT OF ITS DECISION TO DENY PLAINTIFF WAGE LOSS BENEFITS?

Defendant-Appellant's answer: NO

Plaintiff-Appellee's answer: YES

Court of Appeals' answer: YES

Trial Court's answer: YES

## COUNTER-STATEMENT OF FACTS

### A. Procedural Background

Defendant never filed a response to Plaintiff's Motion to Allow Entry of Judgment and to Tax Fees and Costs in Accordance with MCLA §§ 500.3142, 500.3148, 600.6013 and 600.2591. (2b-16b) The proposed judgment was never discussed with the court on the March 7, 2005 hearing date. Furthermore, defendant never voiced objections to the proposed judgment to plaintiff's counsel nor to the court on the March 7 hearing date. Instead, plaintiff and defendant stipulated to the entry of plaintiff's proposed judgment. (53a-55a)

There is no transcript of discussions between plaintiff, defendant and the court because no such discussion took place; instead, defendant's counsel signed the proposed order and left the courtroom. In other words, Defendant stipulated to this judgment without making objections and without conducting a hearing before the court.

Furthermore, following Plaintiff's Motion for Summary Disposition, the trial court issued an Opinion and Order granting Plaintiff's Motion for Summary Disposition "in its entirety." (47a-52a) As a result, defendant's Motion for Reconsideration, which was filed on or around March 21, 2005,

more than 14 days from the entry of the court's December 15, 2004 Opinion and Order, was untimely.

**B. Factual Background**

On December 19, 2003, plaintiff Randall Ross was involved in a catastrophic motor vehicle accident when a vehicle traveling westbound on I-94 at or near the North River Road exit crossed the median and struck plaintiff's vehicle head on, causing plaintiff to sustain serious and disabling injuries to his person. Prior to this accident, plaintiff was employed by and owner of a corporate entity, the Michigan Packing Company, Inc. Under plaintiff's insurance contract with defendant Auto Club Group, plaintiff sought wage loss benefits as a result of his inability to work.

Plaintiff's claim for wage loss benefits, however, was denied by defendant. (23a) In an updated report dated March 25, 2004, Plante Moran concluded that the corporate entity, Michigan Packing Company, Inc. continues to operate at a loss. (18a-21a) In fact, in 2003, the operating loss of the business amounted to \$27,662, for a net loss of \$15,512. (20a) Plante Moran also indicated that plaintiff has not supported a wage loss benefit, despite the fact that plaintiff's earnings for work he performed as an employee of the corporate entity in 2003 were comprised of wages in the amount of \$12,150. (20a)

Furthermore, plaintiff's accountant, Chris Kliczinski, has signed an affidavit indicating that in 2003, plaintiff was in fact paid \$12,150 in W-2 wages. (16a)

On April 2, 2004, defendant sent plaintiff a letter indicating that because the corporate entity continued to operate at a loss, Mr. Ross' claim for lost wages for work he performed as an employee of the corporate entity was denied.

(23a)

INTRODUCTION AND SUMMARY OF ARGUMENTS

Despite the fact that Plaintiff was being paid W-2 wages in his capacity as an employee of Michigan Packing Company, Inc., Defendant-Appellant Auto Club Group denied Plaintiff's claim for wage loss on the basis that the corporate entity was operating at a loss. However, Plaintiff was not seeking to recover gross receipts of the corporate entity as part of his wage loss. Instead, pursuant to the plain language of MCLA § 500.3107(1)(b), Plaintiff sought, and is entitled to recover, his actual loss of income, i.e. the W-2 wages that he was being paid, from work that he would have performed during the first three years after the date of the accident had he not been injured. Therefore, the trial court and the Court of Appeals properly granted summary judgment in favor of Plaintiff.

Furthermore, as recognized by both the trial court and the Court of Appeals, the Defendant-Appellant provided "no legitimate justification, no legal authority, no rational or logical arguments" in support of its argument that Plaintiff was not entitled to no-fault wage loss benefits. Therefore, Plaintiff was properly awarded reasonable attorney fees pursuant to MCLA § 500.3148(1) as a result of the willful and intentional refusal of the Defendant-Appellant to pay no-fault benefits that it contracted to pay Plaintiff.

ARGUMENT

**I. THE TRIAL COURT AND COURT OF APPEALS PROPERLY AWARDED PLAINTIFF NO-FAULT BENEFITS FOR LOSS OF WAGES WHERE PLAINTIFF SUSTAINED AN ACTUAL LOSS OF INCOME BECAUSE HE WAS NO LONGER BEING PAID W-2 WAGES.**

MCLA § 500.3107(1)(b) provides, in part, that a no-fault insurer is liable to pay benefits for work loss consisting of the loss of income from work that an injured person would have performed during the first three years after the date of the accident if he had not been injured. The purpose of this statute is to ensure that work loss benefits are available to compensate injured persons for the income they would have received but-for the accident. *MacDonald v. State Farm Mutual Ins. Co.*, 419 Mich 146, 152, 350 NW2d 233 (1984). Work loss includes not only lost wages, but also lost profit that is attributable to personal effort and self-employment. *Moghis v. Citizens Ins. Comp. of Amer.*, 187 Mich App 245, 466 NW2d 290 (1991).

**A. Standard of Review.**

The Michigan Supreme Court reviews *de novo* the interpretation and application of a statute as a question of law. *Eggleston v. Bio-Medical Applications of Detroit, Inc.*, 468 Mich 29, 658 NW2d 139 (2003). If the language of a statute

is clear, no further analysis is necessary or allowed. *Id.* (citing *Miller v. Mercy Mem. Hosp.*, 466 Mich 196, 201, 644 NW2d 730 (2002)).

B. Defendant-Appellant cannot ignore MCL § 500.3107 simply because the Mr. Ross was the owner and employee of a Sub-chapter S corporation.

1. Defendant-Appellant's arguments were improperly raised for the first time on appeal.

It is a longstanding principle that issues raised for the first time on appeal are not properly preserved for Supreme Court review. *Spencer v. Black*, 232 Mich 675, 206 NW 493 (1925). Thus, Defendant-Appellant's attempt to distinguish the status of a Sub-chapter S corporation from other corporations is entirely improper for the reason that Defendant-Appellant never properly raised this argument in either the trial court or the Court of Appeals.

2. Defendant-Appellant has provided this court with no rationale, justification or authority for disregarding the corporate form of a Sub-chapter S corporation.

The corporate entity is distinct although all its stock is owned by a single individual or corporation. *Bourne v. Muskegon Circuit Judge*, 327 Mich 175, 179, 41 NW2d 515 (1950). A corporation's separate existence will be respected, unless doing

so would subvert justice or cause a result that would be contrary to some other clearly overriding public policy. *Wells v. Firestone Tire & Rubber Co.*, 421 Mich 641, 650, 364 NW2d 670 (1984) (citing *Cinderella Theatre Co., Inc. v. United Detroit Theatres Corp.*, 367 Mich 424, 116 NW2d 825 (1962)).

Just as Defendant-Appellant failed to present any evidence in support of its argument in the Court of Appeals, Defendant-Appellant cites no authority to this Court for its argument that the Sub-chapter S corporate status of Michigan Packing Company, Inc. should be treated different from other corporations, or that such a distinction should alter the outcome in this case. Despite this complete lack of authority, Defendant-Appellant argued that "most of a claimant's business expenses as reported on Schedule C of his tax return should strongly be considered as expenses to be deducted in determining work loss benefits under the No Fault Act." In rejecting this argument, the trial court held that:

[b]ecause defendant has failed to provide any authority in support or cogent analysis of this statement, the court is at a loss as to understanding from **what** those business expenses should be deducted.

(50a) (emphasis in original)

The Court of Appeals agreed, specifically stating that "Because plaintiff received wages from the corporation, and

because defendant has presented no evidence to the contrary, the business expenses of the corporation are irrelevant in calculating plaintiff's wage loss, and plaintiff is treated as being in no different position than an employee of any other corporation operating as a loss." *Ross v. Auto Club Group*, 269 Mich App 356, 362, 711 NW2d 787, 791 (2006). The Court further stated:

Defendant presents no evidence to justify the disregard of the long held rule that '[t]he corporate entity is distinct although all its stock is owned by a single individual or corporation.' *Bourne v. Muskegon Circuit Judge*, 327 Mich 175, 179, 41 NW2d 515 (1950). Moreover, '[a corporation's] separate existence will be respected, unless doing so would subvert justice or cause a result that would be contrary to some other clearly overriding public policy. *Wells v. Firestone Tire & Rubber Co.*, 421 Mich 641, 650, 364 NW2d 670 (1984), citing *Cinderella Theatre Co., Inc. v. United Detroit Theatres Corp.*, 367 Mich 424, 116 NW2d 825 (1962).

*Id.* at 361, 711 NW2d at 790.

Instead, Defendant-Appellant cites a Nebraska Supreme Court case that addressed the attribution of income for purposes of child support laws, which is entirely inapplicable to the present case.

C. The present case is factually distinguishable from Adams.

The Michigan Court of Appeals in *Adams v. Auto Club Ins. Ass'n*, 154 Mich App 186, 191, 397 NW2d 262, 264 (1986), determined that the term "loss of income" under MCLA § 500.3107(1)(b) contemplates the deduction of business expenses from gross income where the claimant is a self-employed individual operating a sole proprietorship. *Id.* In *Adams*, the Court determined that business expenses relating to the plaintiff's job as an independent cosmetologist (i.e. chair rental, materials and supplies, advertising, laundry and cleaning, accounting services, utilities, telephone, license and office expenses) should be deducted from gross receipts in determining the lost income of the self-employed claimant under the No-Fault Act. *Id.* Defendant-Appellant entirely relies on *Adams* in support of its denial of no-fault benefits to Mr. Ross.

However, there are numerous factors that distinguish this case from *Adams*. Most importantly, as discussed above, the company that Mr. Ross worked for in the present case was not merely a sole proprietorship, but was a Sub-chapter S Corporation.

Second, unlike the plaintiff in *Adams*, Mr. Ross was being paid W-2 wages for his work as the sole employee of Michigan Packing Company, Inc. In *Adams*, where the plaintiff was not

being paid W-2 wages, the insured was awarded wage loss in an amount equal to the gross receipts from the operation of his business, reduced by the costs of doing business. *Adams*, 154 Mich App at 193, 397 NW2d at 264. In the present case, however, Mr. Ross is seeking the actual amount of wages that he would have earned but-for the accident. Mr. Ross is not claiming gross receipts of the corporate entity as part of his wage loss. In fact, Mr. Ross' wages and business expenses were deducted from gross receipts of the corporate entity to arrive at the net loss for Michigan Packing Company, Inc. Therefore, it is not necessary to look to the gross income of the corporate entity to determine what Mr. Ross would have earned as individual wages, because in this case, Mr. Ross was actually paid individual wages for work he performed as an employee of the corporate entity.

Despite the fact that his business was operating at a loss, in 2003, Mr. Ross was paid W-2 wages in the amount of \$12,150 for work he performed as an employee of the corporate entity. (16a, 18a-21a) Therefore, as a result of Mr. Ross' accident, he has sustained an actual loss of income that would have been earned but-for the accident; in other words, had Mr. Ross not been injured in the accident, he would have continued receiving wages from Michigan Packing Company as an employee of the corporate entity.

A further distinction between the present case and *Adams* is that in the present case, the corporate entity was operating at a loss, rather than a profit. The mere fact that a corporate entity is operating at a loss, however, should not prevent an employee from receiving no-fault benefits for the wage loss that he has sustained as a result of an accident. If the defendant's argument were true, employees of Ford, GM and Chrysler would not be entitled to no-fault benefits for wage loss because those corporate entities are operating at a loss.

In fact, where an individual is unemployed at the time of the accident, that individual is entitled to work-loss benefits if he can prove that but-for the accident, he would have been employed and as a consequence would have suffered actual loss of earnings. *Sullivan v. North River Ins.*, 238 Mich App 433, 606 NW2d 383 (1999). In the present case, had the accident not occurred, Mr. Ross would have continued to be employed and would have consequently continued to receive wages from Michigan Packing Company for work he would have performed as an employee of the corporate entity.

Because of the clear factual distinctions between *Adams* and the present case, the trial judge held that he was:

not convinced that [Adams] adequately addresses the issue, and is not persuaded that defendant's rationale either settles the matter or even creates a question of fact.
--

(48a) Furthermore, the court stated that it was "at a loss as to understand why defendant believes plaintiff is not entitled to wage-loss benefits because his business operated, and continues to operate, at a loss." (50a) The Court of Appeals agreed, expressly stating that "the authority on which defendant relied, did not address the circumstances presented in this case." *Ross* at 363, 711 NW2d at 791.

After determining that *Adams* is inapplicable to the present case, the trial court turned to *Wilson v. State Farm Mutual Automobile Insurance Company*, 934 F2d 261 (10th Cir. 1991). In *Wilson*, the court awarded the plaintiff, a sole proprietor of a law firm, wage loss in an amount equal to her hourly rate multiplied by the hours she could not work due to her injuries, reduced by business expenses. *Id.* at 264. Relying in part on the *Adams* decision by the Michigan Court of Appeals, the Tenth Circuit Court reasoned that:

where, as here, the claimant is a sole proprietor, she wears two hats - one as an employee and one as a business entity. Because the statute provides individual, not business coverage, it is necessary to calculate the sole proprietor's claim for lost income from her position as an employee. In such case, the proper amount of reimbursement equals that part of the gross income of the business that would have been earned by the claimant as individual wages.

*Id.* (emphasis added)

As correctly pointed out by Defendant-Appellant, the *Wilson* court further held that “[t]o compensate the sole proprietor based upon the gross income generated by the proprietorship would be to unfairly compensate her for business expenses, such as overhead or the salaries of her employees.” However, this excerpt from *Wilson* is inapplicable in the present case because Mr. Ross was not a sole proprietor and he did not even seek gross income generated by the corporate entity.

As a result, the trial court held that *Wilson* has “clear and relevant application to the instant issue.” (50a-51a) The court took guidance from the *Wilson* court’s holding that “the loss of gross income per week . . . must be computed on an individual’s gross income and not on the gross sales or income of the individual’s business.” (51a) (emphasis added)

Consistent with the holding of *Wilson*, Mr. Ross in this case is *not* seeking reimbursement for the gross income generated by the corporate entity. Instead, he is merely seeking the W-2 wages that he was paid as an employee of the corporate entity. Recognizing that the amount of reimbursement that Mr. Ross seeks is the gross income as reported on Schedule 2 that he would have earned as individual wages, the trial court correctly held that Defendant-Appellant failed to establish a genuine issue of

material fact, and that Mr. Ross was entitled to judgment as a matter of law. (51a)

D. Defendant-Appellant completely ignores the plain language of MCLA § 500.3107 in an attempt to have this Court rewrite the No-Fault statute to provide that "a no-fault insurer is liable to pay benefits for work loss consisting of taxable income."

The primary goal of statutory construction is to determine and give effect to the intent of the Legislature. *Frankenmuth Mut. Ins. Co. v. Marlette Homes, Inc.*, 456 Mich 511, 515, 573 NW2d 611 (1998). The specific language of the statute is the first source for determining the Legislature's intent, and when the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed and judicial construction is not required or permitted. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411, 596 NW2d 164 (1999). "Courts may not rewrite the plain language of the statute and substitute their own policy decisions for those already made by the Legislature." *DiBenedetto v. West Shore Hosp*, 461 Mich 394, 405, 605 NW2d 300 (2000).

MCLA § 500.3107 provides that personal protection insurance benefits are payable for "work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." Despite this plain language of the statute,

the Defendant-Appellant attempts to have this Court re-write the No-Fault Act to provide that personal protection insurance benefits are payable for "work loss consisting of taxable income that an injured person would have earned during the first 3 years after the date of the accident if he or she had not been injured."

In construing this argument, the Defendant-Appellant relies on Mr. Ross' personal income tax return.<sup>1</sup> However, what Defendant-Appellant entirely fails to recognize is the fact that Mr. Ross' personal income tax return is a joint tax return filed jointly by Mr. Ross and his wife and takes into consideration not only the wages paid to Mr. Ross, but the money earned by his spouse, and includes various deductions and credits received, including credits he and his spouse received for their children.

(17b-36b) The tax returns also account for a partnership owned not only by Mr. Ross and his wife, but other family members as well. As a result, Defendant-Appellant entirely ignores the plain language of the no-fault statute which provides only for loss of income from work that an injured person would have performed.

The joint tax return filed by Mr. Ross and his wife is not a statement of his "income from work," but is instead a

---

<sup>1</sup> During the entire relevant time period, Mr. Ross annually filed two tax returns; the U.S. Individual Income Tax Return and the U.S. Income Tax Return for an S Corporation. (17b-36b)

statement of what the federal government decided that Mr. Ross and his wife are required to pay taxes on pursuant to the extensive federal tax code. In order for Defendant-Appellant's argument to be true, all future Courts would be required to not only take into consideration an injured party's loss of income, but also the party's spouse's income and the entire federal tax code, including the exemptions and credits the party received. To suggest that a Court would need to consider the fact that an injured party received a child tax credit in order to determine that party's loss of income is so outrageous that it borders on a violation of MCR 2.114.

Defendant-Appellant has not provided this Court with any reliable means of using Plaintiff and his wife's taxable income to determine Plaintiff's personal protection benefits. For these reasons, the Court of Appeals dismissed Defendant-Appellant's arguments, expressly stating that "Plaintiff's claim complied with the requirements for work-loss benefits as delineated under the plain language of the statute." Ross at 363, 711 NW2d at 791. Therefore, the Court of Appeals determined that Defendant-Appellant did not raise a legitimate question of statutory construction, where the requirements set forth in the plain language of the statute were met.

Moreover, Defendant-Appellant has not challenged the reasonableness of the wages received by Mr. Ross for work he

performed as an employee of Michigan Packing Company, Inc. In fact, there is nothing in the record that would provide the Defendant-Appellant with any basis whatsoever to challenge the reasonableness of either the work actually performed by Mr. Ross as an employee of Michigan Packing Company, Inc., nor the amount of wages paid to Mr. Ross for his work performed.

Defendant-Appellant's argument is also undermined by the fact that an individual who is unemployed at the time of the accident is entitled to work-loss benefits if he can prove that but-for the accident, he would have been employed and as a consequence would have suffered actual loss of earnings. *Sullivan v. North River Ins.*, 238 Mich App 433, 606 NW2d 383 (1999). Moreover, this Court has previously determined that an individual working a lower-paying part-time job at the time of the accident is not precluded from proving that he would have taken a higher paying full-time job had he not been injured in a car accident. *Pompa v. Auto Club Ins. Ass'n*, 446 Mich 460, 472, 521 NW2d 831, 837 (1994). Similar to the present case, it would be irrational and illogical to suggest that "taxable income" should be utilized to determine the wage-loss of an unemployed individual or someone who is working a lower-paying part-time job at the time of the accident.

It is undisputed that as a result of this accident, Mr. Ross no longer received a wage or any other form of income from

Michigan Packing Company, Inc. Therefore, under MCLA § 500.3107(1)(b), Mr. Ross is rightfully entitled to receipt of the loss of income from work that he would have performed during the first three years after the date of the accident had he not been injured.

II. THE TRIAL COURT PROPERLY AWARDED PLAINTIFF ATTORNEY FEES WHERE THE TRIAL COURT DETERMINED THAT THE DEFENDANT PROVIDED "NO LEGITIMATE JUSTIFICATION, NO LEGAL AUTHORITY, NO RATIONAL OR LOGICAL ARGUMENTS" IN SUPPORT OF ITS DECISION TO DENY PLAINTIFF WAGE LOSS BENEFITS.

Because Defendant-Appellant cannot overcome the rebuttable presumption that its initial decision to deny Mr. Ross' claim for no-fault benefits was based on a legitimate question of statutory construction, the decision by the Michigan Court of Appeals to affirm the trial court's award of attorney fees to Mr. Ross pursuant to MCL § 500.3148(1) was appropriate.

**A. Standard of review.**

A trial court's finding of unreasonableness on the part of the insurance company will be disturbed on appeal only if that finding is clearly erroneous. *Borgess Medical Center v. Resto*, 273 Mich App 558, 576, 730 NW2d 738, 749 (2007), *Butler v. Detroit Auto. Inter-Insurance Exchange*, 121 Mich App 727, 329 NW2d 781 (1982).

**B. Awarding Mr. Ross attorney fees is consistent with the purpose of the No-Fault Insurance Act.**

These cases are not supposed to be litigated. Our Legislature enacted the No-Fault Insurance Act because the

state's previous tort system failed to afford those injured in automobile accidents with appropriate compensation for their injuries. The No-Fault Insurance Act modified the prior tort-based system of reparation by creating a comprehensive scheme of compensation designed to provide sure and speedy recovery following motor vehicle accidents. By enacting the no-fault scheme, our Legislature determined that losses would be recovered without regard to the injured person's fault or negligence. MCL § 500.3105(2), *Belcher v. Aetna Casualty & Surety Company*, 409 Mich 231, 293 NW2d 594 (1980).

The No-Fault Insurance Act's stated purpose is to ensure compensation of persons injured in automobile accidents. *Burk v Warren*, 105 Mich App 556, 307 NW2d 89 (1981). The Act intends that individuals injured in a motor vehicle accident receive benefits promptly and without the necessity of litigation. *Lee v. DAIIE*, 412 Mich 505, 315 NW2d 413 (1982); *O'Donnell v. State Farm*, 404 Mich 524, 273 NW2d 829 (1979).

The No-Fault Insurance Act is remedial in nature. Our appellate courts have determined that the Act must be liberally construed in favor of accident victims in order to effectuate coverage. *Advisory Opinion Re: 1972 PA 294*, 389 Mich 441, 208 NW2d 469 (1973), *McPherson v. Auto Owners Insurance Company*, 90 Mich App 215, 282 NW2d 289 (1979), *Buckeye Union Insurance Company v. Johnson*, 108 Mich App 46, 310 NW2d 268 (1981). As

the Court of Appeals noted in *Miller v. Farm Bureau Mutual Insurance Company*, 218 Mich App 221, 553 NW2d 371 (1996), "Michigan's no-fault insurance system aims to provide victims of automobile-related accidents with assured, adequate and prompt payment for economic losses." *Id.* at 225-26 (citing *Shavers v. Attorney General*, 402 Mich 554, 578-79, 267 NW2d 72 (1978)).

Moreover, the purpose of the attorney fee section of the No-Fault Insurance Act, MCL § 500.3148, is to ensure that the insurer promptly makes payment to the insured. *Beach v. State Farm Mut Automobile Ins Co*, 216 Mich App 612, 629, 550 NW2d 580 (1996) (citing *McKelvie v. Auto Club Ins. Ass'n*, 203 Mich App 331, 512 NW2d 74 (1994)).

Positions such as those taken by Defendant-Appellant in this case have turned our Legislature's intent inside out. Defendant-Appellant's conduct should not be tolerated. See e.g., *Amerisure v Auto-Owners*, 262 Mich App 10, 684 NW2d 391 (2004) (affirming a trial court's decision to award attorney fees under MCL § 500.3148(1) where the insurance company denied under an intentional act exclusion in the policy.) As discussed below, because Defendant-Appellant's failure to pay benefits to Mr. Ross is not based on "a legitimate question of statutory construction, constitutional law, or factual uncertainty," Mr. Ross is entitled to an award of attorney fees pursuant to MCL § 500.3148(1).

Consistent with the purpose of the No-Fault Act, the trial court awarded Mr. Ross his reasonable attorney fees pursuant to MCLA § 500.3148(1) as a result of the willful and intentional refusal of the Defendant-Appellant to pay no-fault benefits that it contracted to pay Mr. Ross. In ordering Defendant-Appellant to pay Mr. Ross' reasonable attorney fees, the trial court held that Defendant-Appellant provided:

no legitimate justification, no legal authority, no rational or logical arguments in support of that argument.

(52a)

The trial court reasoned that to find Defendant-Appellant is not liable for attorney fees when it was "necessary for plaintiff to litigate in order to obtain benefits to which he was entitled, would defeat the purpose of the no-fault act."

(52a)

C. **Awarding Mr. Ross attorney fees is consistent with the plain language of the No-Fault Insurance Act.**

Despite the clear factual distinctions of *Adams* and the present case (see *supra*, Argument I), Defendant-Appellant made the self-serving and erroneous decision to unreasonably rely upon the holding of *Adams*, rather than the plain language of the no-fault statute, to deny Mr. Ross of the benefits rightfully

owed to him. The Court of Appeals expressly held that "the authority on which defendant relied, did not address the circumstances presented in this case. Plaintiff's claim complied with the requirements for work-loss benefits as delineated under the plain language of the statute." Clearly, the Court of Appeals determined that Defendant-Appellant did not raise a legitimate question of statutory construction, where the requirements set forth in the plain language of the statute were met.

Defendant-Appellant's circular reasoning, that because Defendant-Appellant took the position that work loss benefits were not owed to Mr. Ross, Defendant-Appellant cannot be deemed unreasonable for not paying such benefits, is laughable. At no time did the Defendant-Appellant raise a legitimate question of statutory construction as a basis for its denial of benefits to Mr. Ross. See *Attard v. Citizens Insurance Company of America*, 237 Mich App 311, 317 (1999). In fact, during oral argument, Defendant-Appellant ridiculously disputed the definition of "work loss" as defined by this Court.

The reason that Defendant-Appellant provided no justification, no legal authority and no rational argument for its denial of first-party no-fault benefits is simple: Defendant-Appellant refused to pay Mr. Ross the W-2 wages that he lost as a result of the motor vehicle accident, despite the fact

that the no-fault statute specifically provides for payment of "work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." MCL 500.3107(1)(b).

As the trial court and Court of Appeals made clear, Defendant-Appellant's self-serving decision to unreasonably rely on *Adams*, a case that is factually distinct from the present case, is entirely misplaced. Instead, the plain language of the statute provides that Mr. Ross is entitled to benefits.

Defendant-Appellant specifically points out that its unreasonable refusal to pay no-fault benefits in this case was a result of its "belief" that Mr. Ross should be treated similarly to the "self-employed" individual in *Adams*. However, Defendant-Appellant had absolutely no legitimate reason to "believe" such to be true.

Moreover, Defendant-Appellant's suggestion that the trial court "exclusively" relied on *Wilson v. State Farm Mutual Auto Ins Co.*, 934 F2d 261 (10th Cir. 1991), in support of its decision is erroneous. It is clear that the trial court relied primarily on the plain language of the No-Fault statute in arriving at its conclusion.

There is absolutely no evidence to suggest that Defendant-Appellant raised a "legitimate issue of no-fault statutory

construction" in this case. Furthermore, Defendant-Appellant's repeated effort to overturn the award of attorney fees, after failing to object to the award of same in the trial court, is ridiculous. Not only did the defendant entirely neglect to file any written response whatsoever to Plaintiff's Motion to Allow Entry of Judgment and to Tax Fees and Costs in Accordance with MCLA § § 500.3142, 500.3148, 600.6013 and 600.2591 (2b-16b),<sup>2</sup> but the Defendant stipulated to the relief sought in Plaintiff's Motion. In fact, Defendant-Appellant never voiced objections to the proposed judgment to plaintiff's counsel nor to the court on the March 7 hearing date. Instead, plaintiff and defendant stipulated to the entry of plaintiff's proposed judgment.<sup>3</sup> (EXHIBIT 1) Moreover, there is no transcript of discussions between plaintiff, defendant and the court because no such discussion took place; instead, defendant's counsel signed the proposed order and left the courtroom. (EXHIBIT 1) In other words, Defendant stipulated to this judgment without making objections and without conducting a hearing before the court.

---

<sup>2</sup> Defendant-Appellant conveniently omitted from the Docketing Entries submitted to this Court the relevant Motion and Brief submitted by Plaintiff to the trial Court on February 24, 2007. In that Motion, Plaintiff requested entry of judgment and the taxation of fees and costs. (2b-16b)

<sup>3</sup> Although the Order submitted to this Court in Defendant-Appellant's Appendix does not contain the signature of defense counsel, attached as Exhibit 1 is a copy of the Order that was entered by the trial court after Defendant-Appellant stipulated to the relief sought by Plaintiff in his motion. As this Court will see, defense counsel signed the Order before it was entered by the trial court judge.

Because Defendant-Appellant's failure to pay wage loss benefits to Mr. Ross was entirely contrary to the plain language of the No-Fault statute, there is no doubt that the Court of Appeals correctly determined that Defendant-Appellant acted unreasonably in doing so.

D. Defendant-Appellant's appeal must be dismissed because it cannot show that the trial court's finding of "an unreasonable refusal to pay" was clearly erroneous.

A trial court's finding of an unreasonable refusal to pay or delay in paying benefits will not be reversed on appeal unless the finding is clearly erroneous. *McKelvie* at 335, 512 NW2d 74 (1994). A court abuses that discretion "only when the result so violates fact and logic that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias." *Model Laundries & Dry Cleaners v. Amoco Corp.*, 216 Mich App 1, 4, 548 NW2d 242 (1996) (citing *Wojas v. Rosati*, 182 Mich App 477, 480, 452 NW2d 864 (1990)). In short, an abuse of discretion may properly be found only where the court acts in a most injudicious fashion. *Model Laundries*, at 5 n.3, 548 NW2d 242. For the reasons stated below, the trial court's award of attorney fees to Mr. Ross does not violate fact and logic to the point that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias.

E. Mr. Ross is entitled to an award of attorney fees because Defendant-Appellant's denial of personal protection insurance benefits was unreasonable pursuant to MCL § 500.3148(1).

An insurer's refusal or delay with respect to payment creates a rebuttable presumption that places the burden on the insurer to justify its refusal or delay. *Attard v. Citizens Ins Co. of America*, 237 Mich App 311, 317, 602 NW2d 633 (1999); *McKelvie*, at 335, 512 NW2d 74 (1994).

The decision whether to award attorney fees should not be based on whether coverage was ultimately determined to exist, but on whether the insurer's initial refusal to pay was reasonable. *Shanafelt v. Allstate Ins Co*, 217 Mich App 625, 635, 552 NW2d 671 (1996), *McCarthy v. Auto Club Ins. Ass'n*, 208 Mich App 97, 105, 527 NW2d 524 (1994). In fact, 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.

In *Attard*, the Court recognized that "a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Id.*, *Liddell v. DAIIE*, 102 Mich App 636, 650, 302

NW2d 260 (1981). This case obviously does not involve a question of constitutional law and there are no factual disputes whatsoever in this case. Therefore, the question for this Court is whether the Defendant-Appellant can overcome the rebuttable presumption that its initial decision to deny Mr. Ross' claim for no-fault benefits was based on a legitimate question of statutory construction.

In *Shanafelt*, the Court agreed with the trial court's determination that the defendant's failure to pay benefits over a dispute as to the meaning of "entering into" a vehicle as that term is used in MCL § 500.3106(1)(c), was unreasonable. The Court recognized the fact that the Supreme Court has made clear that any injuries one sustains when "entering into" a vehicle as a matter of law "arise from" the use of that vehicle as a motor vehicle. *Thornton v. Allstate Ins. Co.*, 425 Mich 643, 659, 391 NW2d 320 (1986), *Miller v. Auto-Owners Ins. Co.*, 411 Mich 633, 640-641, 309 NW2d 544 (1981) .

Similar to *Shanafelt*, Defendant-Appellant's failure to pay benefits over a dispute as to the meaning of "work loss" was clearly unreasonable. First, the plain language of MCL § 500.3107(1)(b) provides that personal protection insurance benefits are payable for "work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had

not been injured." In addition, Michigan case law is clear that "work loss" includes not only lost wages, but also lost profit that is attributable to personal effort and self-employment. *Kirksey v. The Manitoba Public Ins. Corp.*, 91 Mich App 12, 17, 477 NW2d 442 (1991), *Moghis v. Citizens Ins. Comp. of Amer.*, 187 Mich App 245, 466 NW2d 290 (1991). As the Court of Appeals pointed out, there is no dispute in this case that "plaintiff received wages as an employee of the corporation." *Ross v. Auto Club Group*, 269 Mich App 356, 361, 711 NW2d 787 (2006).

However, Defendant-Appellant disputed the definition of "work loss" without any legal justification whatsoever. Instead, as the Court of Appeals noted, Defendant-Appellant relied upon *Adams v. Auto Club Ins Ass'n*, 154 Mich App 186, 193, 397 NW2d 262 (1986), a case that did not address the circumstances presented in this case. *Ross* at 363, 711 NW2d 787.

Clearly, Defendant-Appellant's discord with the definition of "work loss" as used in the No-Fault Insurance Act was entirely contrary to Michigan's statutes and case law. Moreover, the fact that Defendant-Appellant was the first insurance company to take issue with this definition, and thus create an alleged "question of first impression" does not deem Defendant-Appellant's position reasonable. The question of whether the issue before the Court of Appeals was an "issue of

first impression" was not argued by the parties, and more importantly, the standard for awarding attorney fees is not whether the question presented is an "issue of first impression." Instead, pursuant to MCR 500.1307(1)(b), an attorney fee shall be a charge against the insurer where:

**THE INSURER UNREASONABLY REFUSED TO PAY THE CLAIM OR UNREASONABLY DELAYED IN MAKING PROPER PAYMENT.**

The Court of Appeals specifically agreed with the trial court that Defendant-Appellant unreasonably refused to make proper payment in this case:

Defendant presents no evidence to justify the disregard of the long held rule that "[t]he corporate entity is distinct although all its stock is owned by a single individual or corporation." *Bourne v. Muskegon Circuit Judge*, 327 Mich 175, 179, 41 NW2d 515 (1950).

\* \* \*

Because plaintiff received wages from the corporation, and because defendant has presented no evidence to the contrary, **the business expenses of the corporation are irrelevant in calculating plaintiff's wage loss**, and plaintiff is treated as being in no different position than an employee of any other corporation operating at a loss.

\* \* \*

As we noted above, *Adams, supra* at 193, the authority on which defendant relied, did not address the circumstances presented in this case. **Plaintiff's claim complied with the requirements for work-loss benefits as delineated under the plain language of the statute.** Defendant attempted to impute the corporation's financial position to plaintiff because he was the only shareholder, despite the evidence presented to defendant that **plaintiff received wages from the corporation, that plaintiff and the corporation filed separate tax returns, and that plaintiff's work-loss claim was not predicated on lost profits of the corporation.** Because plaintiff's work-loss claim was not dependent upon the net income of the corporation, and particularly where the record shows that the corporation was not the named policy holder or a named party in this action, we are not left with a definite and firm conviction that a mistake was made.

*Ross* at 361-63, 711 NW2d at 790-92.

Both the trial court and the Court of Appeals correctly determined that Defendant-Appellant unreasonably refused to pay Mr. Ross no-fault wage loss benefits. As a result, this Court should affirm the trial court's award of attorney fees to Mr. Ross.

F. **Because Defendant-Appellant did not preserve the issue of attorney fees at the trial court level, it cannot raise this issue for the first time on appeal.**

An issue which is not preserved at the trial court level cannot be raised for the first time on appeal. *Schanz v. New Hampshire Ins. Co.*, 165 Mich App 395, 408, 418 NW2d 478 (1988).

The Michigan Supreme Court has repeatedly declined to consider arguments not presented at a lower level. *Booth Newspapers, Inc. v. University of Michigan Bd. of Regents*, 444 Mich 211, 507 NW2d 422 (1993) (citing *In re Forfeiture of Property*, 441 Mich 77, 84, 490 NW2d 322 (1992)), *Butcher v. Dep't of Treasury*, 425 Mich 262, 276, 389 NW2d 412 (1986), *Dagenhardt v. Special Machine & Engineering, Inc.*, 418 Mich 520, 345 NW2d 164 (1984), *Ohio Dep't of Taxation v. Kleitch Bros., Inc.*, 357 Mich 504, 516, 98 NW2d 636 (1959)). "We have only deviated from that rule in the face of exceptional circumstances." *Id.* (citing *Perin v. Peuler*, 373 Mich 531, 534, 130 NW2d 4 (1964) (holding that issue resolution was necessary to quell confusion generated by the Court's earlier opinions), *People v. Snow*, 386 Mich 586, 591, 194 NW2d 314 (1972) (addressing the issue to prevent a miscarriage of justice).

Defendant-Appellant entirely failed to preserve the issue of awarding attorney fees to Mr. Ross in the trial court. In fact, Mr. Ross specifically requested an award of attorney fees in his Motion for Summary Disposition. (6a-7a, 13a-14a) However, Defendant-Appellant never responded to Mr. Ross' request for attorney fees in its written response. (25a-27a) In addition, Defendant-Appellant never responded to Mr. Ross' request for attorney fees during oral argument on plaintiff's motion. (38a-46a)

Following Plaintiff's Motion for Summary Disposition, plaintiff filed a Motion to Allow Entry of Judgment and to Tax Fees and Costs in Accordance with MCLA §§ 500.3142, 500.3148, 600.6013 and 600.2591, wherein Plaintiff specifically requested an award of attorney fees in the amount of \$6,387.00. (2b-16b) Defendant-Appellant never filed a written response to Mr. Ross' motion, nor did Defendant-Appellant voice any objections to the motion. At no time did Defendant-Appellant take issue with the attorney fees claimed by Plaintiff. In fact, Defendant-Appellant never challenged the time spent by plaintiff's counsel or the fees claimed by plaintiff's counsel and supported by Affidavits attached to Plaintiff's Motion. (12b-13b, 15b-16b)

Moreover, on March 7, 2005, before the hearing in the trial court was set to take place, defense counsel approved and signed his name to the order proposed by plaintiff's counsel after the parties modified only the date from which the benefits due and owing Mr. Ross should be calculated.<sup>4</sup> (EXHIBIT 1) After signing his name and stipulating to the entry of the order proposed by plaintiff's counsel, defense counsel left the courtroom. (EXHIBIT 1) The parties did not argue Plaintiff's motion in front of the trial court, nor were the proposed order or

---

<sup>4</sup> The Order submitted by Defendant-Appellant in its Appendix is not an accurate reflection of the facts of this case. As this Court will see, the Order submitted by Defendant-Appellant does not contain the signatures of counsel who were present at the motion and who stipulated to entry of the Order by the Court.

Defendant-Appellant's alleged objections discussed with the court. In fact, there is not even a transcript of a proceeding in this matter on that date.

The first time that Defendant-Appellant raised an objection to the trial court's award of attorney fees to Mr. Ross was in an untimely Motion for Reconsideration. (Plaintiff-Appellee's Response to Auto Club's Application for Leave to Appeal, EXHIBIT 7) The trial court responded by pointing out that:

defendant failed to address or oppose plaintiff's request for an award under MCL 500.3148(1) on the basis that defendant willfully and intentionally refused to pay no-fault benefits as required. Aside from the fact that the court agreed with plaintiff's arguments, the court presumed that by not opposing this request, defendant tacitly acquiesced.

(57a) (emphasis added) Because of this untimely filing, Defendant-Appellant challenged the issue of attorney fees for the first time on appeal to the Court of Appeals.

There exist no exigent circumstances in this case that require this Court's review of Defendant-Appellant's argument regarding an award of attorney fees. The present case is unlike *Perin, supra*, where resolution of the issue was necessary to quell confusion generated by the Court's earlier opinions. Moreover, unlike *Snow, supra*, where the Court addressed the legality of a trial court's sentence that was made harsher as a result of the defendant's choice to exercise his constitutional

right to trial by jury to prevent a miscarriage of justice, there is no such injustice that will result from the trial court's award of attorney fees to the plaintiff in the present case. Therefore, Defendant-Appellant's failure to timely raise its argument regarding whether Mr. Ross was entitled to attorney fees in the lower court is not excused, and Defendant-Appellant is precluded from raising this argument on appeal. See *Schanz, supra*.

**G. Defendant-Appellant waived any objection to the award of attorney fees in this case.**

Waiver is the intentional relinquishment of a known right. *Bailey v. Jones*, 243 Mich 159, 219 NW 629 (1928). The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive. *Id.*

As outlined above, Defendant-Appellant failed to raise its argument regarding Mr. Ross' request for an award of attorney fees in its Response to Plaintiff's Motion for Summary Disposition and at the oral argument on plaintiff's motion. Moreover, Defendant-Appellant never filed a response to Plaintiff's Motion to Allow Entry of Judgment and to Tax Fees and Costs, and stipulated to entry of an order awarding the

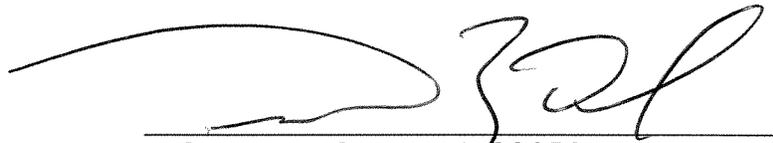
plaintiff attorney fees, thus eliminating the need for oral argument on Plaintiff's motion. The first time that Defendant-Appellant raised any argument regarding Mr. Ross' request for an award of attorney fees was in a Motion for Reconsideration, which was untimely filed. As a result, Defendant-Appellant clearly "neglected and failed to act" in response to Mr. Ross' request for an award of attorney fees. As a result, Defendant-Appellant should not now be permitted to raise this argument.

**RELIEF REQUESTED**

Plaintiff, Randy Ross, respectfully requests that this Honorable Court **AFFIRM** the decisions of both the trial court and the Court of Appeals. Plaintiff was being paid W-2 wages in his capacity as an employee of Michigan Packing Company; therefore, plaintiff is entitled to recover his loss of income, which consists of the W-2 wages that he would have received from work performed during the first three years after the date of the accident had he not been injured.

Because defendant unreasonably denied plaintiff's request for no fault wage loss, plaintiff further requests that this Honorable Court **AFFIRM** the trial court and Court of Appeals' finding that Defendant-Appellant willfully and intentionally refused to pay no-fault benefits which it contracted to pay plaintiff.

OLSMAN MUELLER, P.C.



Jules B. Olsman (P28958)  
Donna M. MacKenzie (P62979)  
Attorneys for Plaintiff-Appellee  
2684 West Eleven Mile Road  
Berkley, MI 48072  
(248) 591-2300

Dated: October 30, 2007

1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

RANDALL L. ROSS,

Plaintiff,

v

AUTO CLUB GROUP,

Defendant.

No. 04 1913 CK

Hon. Donald Miller

\_\_\_\_\_/

JULES B. OLSMAN (P28958)  
DONNA M. MACKENZIE (P62979)  
Attorney for Plaintiff  
2684 West Eleven Mile Road  
Berkley, MI 48072  
(248) 591-2300

DAVID R. TUFFLEY (P21614)  
Attorney for Defendant  
75 North Main Street  
Suite 300  
Mt. Clemens, MI 48043  
(586) 465-8238

\_\_\_\_\_/

**ORDER GRANTING PLAINTIFF'S**  
**MOTION FOR SUMMARY DISPOSITION**  
**AND TAXING FEES AND COSTS IN ACCORDANCE WITH**  
**MCLA §§ 500.3142, 500.3148, 600.6013, and 600.2591**

At a session of said Court, held in the City  
of Mt. Clemens, County of Macomb, State of  
Michigan on \_\_\_\_\_

PRESENT: HONORABLE \_\_\_\_\_

Donald G. Miller  
Circuit Court Judge

The Court having read Plaintiff's Motion for Summary  
Disposition; having read Defendant's Response; having heard  
argument on the record and being fully advised in the premises

hereof;

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Disposition is granted;

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Fees and Costs in this matter will be taxed in accordance with MCLA §§ 500.3142, 500.3148, 600.6013, and 600.2591;

1. The Court specifically finds that Plaintiff is awarded wage loss benefits to be paid by Defendant, calculated as follows:

- a. Plaintiff is awarded eighty-five percent (85%) of his average weekly wage in this case based upon W-2 earning for the calendar year 2003 in the amount of \$12,150 or \$233.66 per week. Plaintiff has not worked since December 19, 2003. Calculated up through ~~March 1, 2005~~ <sup>9-30-04</sup> the benefits due and owing plaintiff are \$9,490.04. This is a 85% of \$14,454.69 which is 40.58 weeks at \$233.66 per week.
- b. Plaintiff is awarded twelve-percent (12%) interest on the no-fault benefits, in the amount of \$1,143.68.
- c. Plaintiff is awarded pre-judgment interest in the amount of \$307.79.
- d. Plaintiff is awarded costs incurred in this matter in the amount of \$335.50.
- e. Plaintiff is awarded attorneys fees in the amount of \$6,387.50, calculated as follows:
  - i. \$5,950.00, for 17 hours by Jules Olsman at the

rate of \$350.

ii. \$437.50, for 3.5 hours Donna MacKenzie at the rate of \$125.

f. The total amount of the judgment as reflected in this paragraph is \$17,664.51.

This judgment is final and disposes of all claims in this case.

\_\_\_\_\_  
Donald G. Miller  
Circuit Court Judge

DONALD G. MILLER  
CIRCUIT JUDGE  
MAR 7 2005  
A TRUE  
CARMELLA SABAUGH, COUNTY CLERK  
BY: K. Wilson Court Clerk

Approved as to  
form:

W. J. Hamer for Plaintiff

Approved as to form

Charles J. [Signature] 23202  
Attorney for Defendant ACIA