IN THE SUPREME COURT

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

RANDALL L. ROSS,

Plaintiff-Appellee,

vs. Supreme Court No. 130917

AUTO CLUB GROUP, Court of Appeals No. 262167

Defendant-Appellant. Macomb County Circuit Court No. 04-1913-CZ

BRIEF OF AMICUS CURIAE COALITION PROTECTING AUTO NO-FAULT ("CPAN"), WHICH IS FILED IN SUPPORT OF APPELLEE

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STATEMENT OF JURISDICTION

CPAN states that the jurisdictional summary in Appellant's, Auto Club Group's, brief is complete and correct.

STATEMENT OF INTEREST OF AMICUS CURIAE CPAN

CPAN is a broad-based group formed to preserve the integrity of Michigan's model no-fault automobile insurance system. CPAN's member organizations and associations range from major medical organizations and patient advocacy groups, which are directly involved in first-party no-fault issues, to consumer groups, which have members concerned with third-party claims.

CPAN's membership is comprised of fourteen medical provider organizations and fourteen consumer groups:

Medical Provider Organizations	Consumer Groups
Michigan Academy of Physicians Assistants	Brain Injury Ass'n of Michigan
Michigan Assisted Living Ass'n	Disability Advocates of Kent County
Michigan Ass'n of Centers for Independent Living	Michigan Paralyzed Veterans of America
Michigan Brain Injury Providers Council	Michigan Partners for Patient Advocacy
Michigan Chiropractic Society	Michigan Protection and Advocacy Services
Michigan College of Emergency Physicians	Michigan Rehabilitation Ass'n
Michigan Dental Ass'n	Michigan Citizens Action
Michigan Health & Hospital Ass'n	Michigan Consumer Federation
Michigan Home Health Care Ass'n	Michigan State AFL-CIO
Michigan Orthopedic Society	Michigan Ass'n for Justice
Michigan Orthotics and Prosthetics Ass'n	Michigan Tribal Advocates
Michigan Osteopathic Ass'n	Michigan UAW
Michigan State Medical Society	American Ass'n of Retired Persons
Michigan Nurses Ass'n	Michigan Partners for Patient Advocacy

In its June 15, 2007, order for action on application, the Court asked the parties to brief, inter alia: (1) what the appropriate standard of review is of a trial court's decision on whether to award attorney fees under Section 3148(1) of the Michigan No-Fault Act, MCL 500.3148(1); and (2) whether, when as insurer refuses or delays payment of benefits, a rebuttable presumption that the refusal or delay was unreasonable is consistent with the language of MCL 500.3148(1)?

Aside from no-fault penalty interest under MCL 500.3142, which pales in comparison and must be paid as a matter of course on all overdue benefits, the attorney fee sanction is the primary enforcement mechanism under the Michigan No-Fault Act to penalize no-fault insurers who unreasonably delay or deny payment of no-fault benefits. In Michigan, there is no separate, "bad faith" cause of action when insurance benefits are not paid in a timely fashion. Section 3148(1) is designed to ensure prompt payment of benefits, which is absolutely essential to medical providers who treat auto accident victims. Section 3148(1) also protects those persons injured in auto accidents, who have medical bills that need to be paid, to avoid debt collection and negative credit reporting.

Without MCL 500.3148(1), medical providers would either deduct the cost of hiring an attorney to sue no-fault insurers from payment of medical bills, or sue their own patients. Injured persons would pay out of their own pockets or file bankruptcy to discharge the debts owed to medical providers who treated them. Medical treatment would be disrupted, because of mounting unpaid medical bills.

Section 3148(1) is the key to avoiding such results. But no-fault attorney fees can only ensure prompt payment of benefits, if the trial judge's decision to award them is honored in most cases. As such, continued application of the long-standing rebuttable presumption of

unreasonable payment refusal or delay and the bifurcated clear error/abuse of discretion standard of review on appeal is essential to the integrity of the no-fault system. Moreover, continued application of these long-standing and existing legal principles further the dominant purposes of Section 3148(1), which are to encourage prompt payment of claims and to reduce the possibility (and related expense, delay, and docket congestion) of litigation to obtain payment of benefits.

CPAN and its members are concerned about the likely effect of altering these long-standing and existing legal principles. CPAN believes that Michigan has a superior no-fault system, which was formed for the very purpose of preserving quality health care, and that prompt payment of medical bills remains vital to its proper functioning. CPAN urges this Court to uphold the rebuttable presumption and the bifurcated clear error/abuse of discretion standard of review on appeal, because Section 3148(1), its purpose, and this Court's precedent compels that result.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

CPAN incorporates by reference Appellee's, Randall L. Ross's, counter-statement of facts and procedural history.

ARGUMENT

I. THE APPROPRIATE STANDARD OF REVIEW OF A TRIAL COURT'S DECISION ON WHETHER TO AWARD ATTORNEY FEES UNDER MCL 500.3148(1) IS CLEAR ERROR. THE APPROPRIATE STANDARD OF REVIEW OF THE AMOUNT, IF ANY, OF FEES AWARDED IS AN ABUSE OF DISCRETION.

In its order for action on application, the Court asks for briefing first on the question of

> what is the appropriate standard of review of a trial court's decision on whether to award attorney fees pursuant to MCL 500.3148(1), see *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316; 602 NW2d 633 (1999) (clear error); contrast *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 634-635; 552 NW2d 671 (1996) (abuse of discretion); compare *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006) (waiver is a mixed question of law and fact); *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006) ("the clear error standard has historically been applied when reviewing a trial court's factual findings whereas the abuse of discretion standard is applied when reviewing matters left to the trial court's discretion"; any inherent "legal determinations are reviewed under a de novo standard"). . . .

The answer to the Court's question is that a trial court's finding on whether an insurer "unreasonably" delayed in making or failed to make payment is a question of fact, which is reviewed for clear error; a trial court's determination of the "reasonable" amount, if any, of attorney fees to be awarded is an exercise of sound judgment and, therefore, reviewed for an abuse of discretion.

This bifurcated standard of review is consistent with the historical application of standards of review as discussed by this Court in *Herald, supra*. The plain and unambiguous language of MCL 500.3148(1) dictates that a trial court is to make findings of fact as to whether an insurer unreasonably delayed in making or failed to make payment. Under the historical application of standards of review and the plain language of MCR 2.613(C), such trial-court

factual findings are reviewed for clear error. If a trial court finds that an insurer has acted unreasonably, MCL 500.3148(1) mandates that the trial court award a claimant "reasonable" attorney fees. The determination of "reasonable" fees involves a trial court's weighing of a number of factors, which is an exercise of sound judgment that is historically reviewed for an abuse of discretion.

1. Standard of Review.

Whether the circuit court applied the correct standard of review is a question of law that is reviewed de novo. *In re FG*, 264 Mich App 413, 416-417; 691 NW2d 465 (2005) (citations omitted).

2. The Historical Approach to Standards of Review, and the Plain and Unambiguous Language of MCL 500.3148(1) and MCR 2.613(C), Dictate that Clear Error Review Applies for a Trial Court's Finding of Whether an Insurer Acted Unreasonably.

In *Herald, supra*, this Court took the opportunity, in the context of FOIA cases, to discuss and define appropriate standards of review, noting: "In Michigan, the clear error standard has historically been applied when reviewing a trial court's factual findings whereas the abuse of discretion standard is applied when reviewing matters left to the trial court's discretion." 475 Mich at 471, citing *People v Babcock*, 469 Mich 247, 265, 268-270; 666 NW2d 231 (2003); *Frank W. Lynch & Co. v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001); *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997).

Here, the relevant language of MCL 500.3148(1) provides (emphasis added): ". . . 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." Under the statute's clear and unambiguous language, the legislature has delegated to trial courts the responsibility to make factual findings as to whether insurers

acted unreasonably in delaying or failing to pay benefits. Such factual findings by trial courts have historically been reviewed for clear error. *Herald,* 475 Mich at 471 (citations omitted).

This clear error standard of review is also mandated by the plain language of MCR 2.613(C) (emphasis in original): "**Review of Findings by Trial Court**. Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."

3. The Historical Approach to Standards of Review and This Court's Precedent Dictate that an Abuse of Discretion Review Applies for a Trial Court's Determination of "Reasonable" Attorney Fees Under MCL 500.3148(1).

As noted by this Court in *Herald, supra*, Michigan has historically applied "the abuse of discretion standard . . . when reviewing matters left to the trial court's discretion." 475 Mich at 471 (citations omitted). The plain and unambiguous language of MCL 500.3148(1) (emphasis added) mandates that, if the trial court finds that the insurer unreasonably refused to pay a claim or unreasonably delayed in making proper payment, "[t]he attorney's fee shall be a charge against the insurer in addition to the benefits recovered . . . ." The statute also provides that the awarded fee must be "a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue." (*Id.* (emphasis added).)

In 1982, the Court addressed the appropriate standard of review of a trial court's determination of a "reasonable" fee under MCL 500.3148(1), *Wood v DAIIE*, 413 Mich 573, 577-578; 321 NW2d 653 (1982), holding:

> We agree with defendant that in order for attorney fees to be a charge against the insurer in addition to benefits, the trial court must find that the insurer acted unreasonably. . . .
>
> * * *

> The determination that a party is entitled to attorney fees under the no-fault insurance act does not decide the amount of the award, however. As to this question, we agree with the defendant that the controlling criterion is that the attorney fees be "reasonable". We adopt the guidelines for determining "reasonableness" set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW 217 (1973).
>
> The *Crawley* panel noted that there is no precise formula for computing the reasonableness of an attorney's fee, but said that factors to be considered are:
>
> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. . . ."
>
> See also *Liddell v DAIIE*, 102 Mich App 636, 652; 302 NW2d 260 (1981), which applied the *Crawley* factors to the no-fault insurance scheme. MCL 500.3148(1); MSA 24.13148(1).
>
> While a trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its determination. Further, the trial court need not detail its findings as to each specific factor considered. The award will be upheld unless it appears upon appellate review that the trial court's finding on the "reasonableness" issue was an abuse of discretion.

This Court's abuse-of-discretion holding in *Wood* is consistent with Michigan's historical approach that matters committed to a trial court's discretion include the application of a balancing test. *Herald*, 475 Mich at 472. It is also consistent with the Court's holdings in similar contexts. For instance, in *Mich Tax Mgt Services Co v City of Warren*, 437 Mich 506, 507-512; 473 NW2d 263 (1991), this Court reversed the Court of Appeals, because the Court of Appeals applied a clear error standard of review of a trial court's award of attorney fees under FOIA. Like MCL 500.3148(1), the FOIA provision mandated an award of "reasonable" attorney fees if a person prevailed on a FOIA claim. 437 Mich at 508. This Court noted that "the mandatory character of the award does not relieve the trial court of the obligation to exercise sound judgment in determining a *reasonable* fee." *Id.* at 509 (emphasis in original). The Court

then adopted and quoted the above language of *Wood, supra*, including its holding that: "'The [trial court's] award will be upheld unless it appears upon appellate review that the trial court's finding on the 'reasonableness' issue was an abuse of discretion.'" *Id.* at 509-510, quoting *Wood*, 413 Mich at 588.

The historical approach to standards of review and this Court's precedent dictate that an abuse of discretion review applies for a trial court's determination of "reasonable" attorney fees under MCL 500.3148(1) .

4. The Bifurcated Standard of Review is Consistent with Early, Recent, and Most § 3148(1) Cases.

The bifurcated clear error/abuse of discretion standard of review is consistent with the early cases construing MCL 500.3148(1). See *Butler v DAIIE*, 121 Mich App 727, 742-745; 329 NW2d 781 (1982); *Bradely v DAIIE*, 130 Mich App 34, 45-48; 343 NW2d 506 (1983); *Nelson v DAIIE*, 137 Mich App 226, 233-235; 359 NW2d 536 (1984).

The bifurcated clear error/abuse of discretion standard of review is also consistent with the most recent cases construing MCL 500.3148(1). See *Borgess Med Ctr v Resto*, 273 Mich App 558, 576; 730 NW2d 738 (2007); *Moore v Secura Ins*, ___ Mich App ___; ___ NW2d ___; 2007 WL 1934370 (2007).

In fact, this bifurcated standard of review is consistent with almost every case construing MCL 500.3148(1). As of the date of this amicus brief, there have been 161 appellate citations (published or unpublished) to MCL 500.3148. Next to none have strayed from the historically-correct approach of a clear error standard of review of a trial court's finding of

whether an insurer acted "unreasonably," and an abuse of discretion review of the amount of attorney fees, if any, that a trial court awarded.[1]

5. Appellant and Farm Bureau Mistakenly Invoke a Mixed, De Novo/Clear Error Standard of Review.

Appellant and Farm Bureau contend that trial court findings under MCL 500.3148(1) necessarily involve questions of law, which are reviewed de novo, and questions of fact, which are reviewed for clear error. To begin, the clear and unambiguous language of MCL 500.3148(1) refutes that contention. The statute specifically provides (emphasis added): ". . . 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 other words, a trial court's finding is one of fact: whether an insurer acted unreasonably under the facts of that case. If so, the matter is over; the trial court must award attorney fees. There is nothing in the language of the statutory provision that calls for or even intimates a ruling on a question of law. Instead, a trial court's finding that an insurer acted unreasonably automatically triggers the obligation to pay attorney fees. See *Mich Tax Mgt Services*, 437 Mich at 509, citing *Wood*, 413 Mich at 587-588.

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[1] In its order for action on application, the Court cites to the § 3148(1) cases of *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316; 602 NW2d 633 (1999) (applying a clear error standard of review), and *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 634-635; 552 NW2d 671 (1996) (applying an abuse of discretion standard of review). The *Attard* court's use of a sole, clear error standard of review is easily explained: the *Attard* court affirmed the trial court's finding that the insurer did not "unreasonably" refuse or delay payment of benefits; therefore, that court did not address the issue of the standard of review of the amount of attorney's fees to be awarded. *Shanafelt* is an anomaly that fits in the above-noted next-to-none-have-strayed category. The only explanation for the *Shanafelt* court's mistaken use of a sole, abuse of discretion standard of review is that court relied upon a case that affirmed a trial court's order granting attorney fees for a vexatious appeal, which has nothing to do with MCL 500.3148(1). See *Shanafelt*, 217 Mich App at 634, citing *Wojas v Rosati,* 182 Mich App 477, 480; 452 NW2d 864 (1990).

To support a de-novo standard of review argument, Farm Bureau and (to a lesser extent) Appellant try to bootstrap into the language of MCL 500.3148(1), two of the three permissible bases for an insurer to refuse to make or delay in making payment. That is, Farm Bureau and Appellant try to graft into MCL 500.3148(1), the fact that "a refusal or delay in payments by an insurer will not be found 'unreasonable' within the meaning of § 3148 where the delay is the product of a legitimate question of statutory construction [or] constitutional law. . . ." *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987), citing *Liddell*, 102 Mich at 650.[2]

But whether an insurer allegedly relied on a legitimate question of statutory construction or constitutional law in refusing to make or delaying in making payment, does not necessarily or even ordinarily mean that the trial court has to construe a statute or the constitution in making a finding on unreasonable delay. After all, the no-fault act has been the subject of over 1,000 appellate decisions. Almost all legitimate issues of statutory construction or constitutional law have been decided.

Instead, a trial court normally is determining, and the review on appeal normally addresses, whether the facts of a particular case constitute a legitimate question of statutory construction or constitutional law. That is a factual finding reviewed for clear error. See, for example, *Clute v Gen Accident Assurance Co of Canada*, 177 Mich App 411, 422; 442 NW2d 689 (1989) (although defendant erred in denying coverage, serious and legitimate issues of statutory construction were involved; therefore, the lower court "clearly erred" in finding defendant's failure to pay benefits was unreasonable under MCL 500.3148(1)); *United Southern*

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[2] The third permissible basis for an insurer to refuse to make or delay in making payment is if there is a bona fide factual uncertainty. *Gobler*, 428 Mich at 66, citing *Liddell*, 102 Mich App at 650. Neither Farm Bureau nor Appellant deny that is a finding of fact by the trial court, which must be reviewed for clear error.

Assurance Co v Aetna Life & Cas Ins Co, 189 Mich App 485, 493; 474 NW2d 131 (1991) (emphasis added) ("The trial court found that defendant's refusal to pay property protection benefits was not unreasonable. This finding is not clearly erroneous. There was a legitimate question of statutory construction concerning the meaning of the word 'parked' as used in § 3123(1)(a).")

Sweebe, supra, is apposite. In *Sweebe*, this Court noted that "whether the facts of a particular case constitute a waiver is a question of fact. . . . A trial court's findings of fact are reviewed for clear error." 474 Mich at 154 (citations omitted). Similarly, under MCL 500.3148(1), a trial court determines "whether the facts of a particular case constitute" an unreasonable delay in paying or failure to pay, which is a finding of fact that should be reviewed for clear error.[3]

Not surprisingly, there is absolutely no support in the 161 appellate citations to MCL 500.3148(1) for Appellant's and Farm Bureau's contention that a trial court's findings under the statutory provision automatically involve questions of law. Indeed, while a great number of the 161 cases involve an insurer arguing that it allegedly refused or delayed payment because of a statutory or constitutional question, none of the cases invoke a de novo standard of review of the trial court's finding on whether the insurer's delay or refusal was unreasonable. Instead, almost all apply a clear error standard of review. The few cases that apply a different standard, incorrectly review the finding for an abuse of discretion, not de novo.

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[3] Admittedly, in the rare event where an appellate court must review a trial court's construction of a statute or constitution in passing upon whether the trial court clearly erred in its finding on whether an insurer unreasonably delayed or failed to pay under MCL 500.3148(1), the appellate court should review de novo the trial court's construction of the statute or constitution. *Herald*, 475 Mich at 471-472.

It follows that the Court should reject Appellant's and Farm Bureau's contention that MCL 500.3148(1) requires a mixed, de novo/clear error standard of review. A trial court's finding on "reasonableness" does not necessarily (and rarely does) involve a question of law; instead, the trial court's finding is normally one of fact, which is reviewed for clear error. Further, a trial court's determination of "reasonable" attorney fees, if any, is reviewed for an abuse of discretion.

II. A REBUTTABLE PRESUMPTION OF DELAY DOES NOT CONFLICT WITH THE LANGUAGE OF MCL 500.3148(1) AND IS NOT A MATTER OF STATUTORY CONSTRUCTION; RATHER, THE PRESUMPTION IS A PROCEDURAL DEVICE WITHIN THE PROVINCE OF THE JUDICIARY TO CREATE. THE PRESUMPTION ALSO IS CONSISTENT WITH THIS COURT'S PRECEDENT AND CARRIES OUT THE NO-FAULT ACT'S AND, SPECIFICALLY, MCL 500.3148(1)'S DOMINANT PURPOSES. FURTHER, THE PRESUMPTION DOES NOT SHIFT THE BURDEN OF PROOF TO INSURERS. MOREOVER, THE PRESUMPTION IS NOT INCONSISTENT WITH THE WORD "IF" IN MCL 500.3148(1), AND SIMPLY BECAUSE THE STATUTORY PROVISION IS SILENT DOES NOT MEAN THE PRESUMPTION IS IMPROPER.

In its order for action on application, the Court asks lastly, "when as insurer refuses or delays payment of benefits, is a rebuttable presumption that the refusal or delay was unreasonable (see *Combs v Commercial Carriers, Inc*, 117 Mich App 67, 73; 323 NW2d 596 (1982)) consistent with the language of MCL 500.3148(1)?" The statutory provision is, however, silent regarding such a presumption. Indeed, the rebuttable presumption is not a matter of statutory construction but is a procedural device, which is within the province of the court to create. *Ward v Consolidated Rail Corp,* 472 Mich 77, 84; 693 NW2d 366 (2005); *Johnson v Austin*, 406 Mich 420, 432; 280 NW2d 9 (1979). Further, the rebuttable presumption is consistent with and carries out the dominant purposes of the no-fault act and, specifically, MCL 500.3148(1), which are to insure prompt payment of personal injury protection benefits and to reduce litigation costs and court congestion. *Shavers v Attorney General*, 402 Mich 554, 578-

579; 267 NW2d 72 (1978); *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 133; 485 NW2d 695 (1992). Moreover, contrary to Appellant's and Farm Bureau's contention, a rebuttable presumption does not shift the burden of proof to insurers. MRE 301; *Bieszck v Avis Rent-A-Car Sys, Inc*, 459 Mich 9, 19; 583 NW2d 691 (1998), citing MRE 301.

1. Standard of Review.

CPAN states that Farm Bureau's amicus curiae brief (see pp 9-10) correctly states the standard of review for this issue. As noted, however, in detail below, CPAN does not agree with Farm Bureau's contention that this issue involves a matter of statutory interpretation.

2. A Rebuttable Presumption of Delay Does Not Conflict With the Language of MCL 500.3148(1) and Is Not a Matter of Statutory Construction; Rather, the Presumption is a Procedural Device Within the Province of the Judiciary to Create.

In its entirety, 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.

As Appellant admits in its brief, pp 24-25, nothing in the language of the statutory provision either forbids or requires a rebuttable presumption of delay. The provision is silent about such matters. Thus, the rebuttable presumption, first applied in 1982 in *Combs, supra,* does not conflict with the clear and unambiguous language of the statutory provision.

Indeed, as admitted by Farm Bureau in page 13, note 3, of its brief, and by Appellant in page 26 of its brief, the Court of Appeals has repeatedly and consistently applied—without discussing whether or not it is consistent with the language of MCL 500.3148(1)—the rebuttable presumption announced in *Combs*, beginning in 1983 with *Bradley*, 130 Mich App at 46, and continuing through 2007, with *Resto*, 273 Mich App at 578. Moreover, despite about

100 post-*Combs* appellate decisions involving Section 3148(1), not a single appellate decision has questioned *Combs*.[4]

By analogy, MCL 500.3148(1) does not instruct how a court should "find" that an insurer "unreasonably" refused to pay or delayed in paying a claim. But in 1987, this Court relied on a 1981 Court of Appeals' decision to observe that the rule is that "a refusal or delay in payments by an insurer will not be found 'unreasonable' within the meaning of § 3148 where the delay is the product of a legitimate question of statutory construction, constitutional law, or even a bona fide factual uncertainty." *Gobler*, 428 Mich at 66, citing *Liddell*, 102 Mich App at 650. Because MCL 500.3148(1) is silent regarding how a court should make such a finding, does that mean that *Gobler* and *Liddell* are inconsistent with the statutory provision?

The fact is, a rebuttable presumption is a merely a procedural device. *Ward*, 472 Mich at 84, citing *Widmayer v Leonard*, 422 Mich 280, 289-290; 373 NW2d 538 (1985). See also *Gibson v Dymon*, 281 Mich 137, 140; 274 NW 739 (1937) (citations omitted). As this Court has observed, presumptions may be created "judicially or by law . . . ." *Austin*, 406 Mich at 432 (citation omitted).

> As this Court has also observed, *id.* at 441-442 (citations omitted):
>
> The law is replete with presumptions and inferences drawn from other facts. . . .
>
> Courts create presumptions for a variety of reasons: to avoid an impasse where evidence of the presumed fact is lacking . . .; to produce a result in accordance with human experience . . .; to reach a result deemed to be socially desirable . . . . In such cases the law aids the party making use of the presumption in proving his case. . . .

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[4] While the doctrine of legislative acquiescence is highly disfavored in this state, *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), it is rather remarkable that, if it disagreed with the *Combs'* presumption, the Michigan Legislature has not amended § 3148(1) to prohibit the presumption, given the Court of Appeals' 25-year history of a repeated and consistent application of the presumption.

It follows that a rebuttable presumption of delay is a procedural device that may be created by the judiciary; it is not a matter of statutory construction.[5]

3. The Rebuttable Presumption is Consistent With This Court's Precedent and Carries Out the No-Fault Act's and MCL 500.3148(1)'s Dominant Purposes.

In *Austin, supra*, this Court addressed whether a rebuttable presumption of negligence should be applied to the unidentified owner/driver provision of the Motor Vehicle Accident Claims Act, the precursor to the no-fault act. 406 Mich at 430. That statutory provision—as MCL 500.3148(1) is here—was silent on the subject of presumptions. 406 Mich at 430-431. The posited presumption was to be drawn from situations where drivers fled the scene of an accident without complying with their statutory duty to remain and report. *Id.*

The Court began its analysis by noting that the judiciary may create presumptions "based, among other factors, on . . . fairness and special policy considerations, and similar concerns. . . ." *Id.* at 432. It concluded its analysis, *id.* at 443, as follows:

> The Motor Vehicle Accident Claims Act is remedial. One of its purposes is to provide a remedy to the victim of an unidentified hit-run driver.
>
> * * *
>
> The purposes of the statutes requiring a driver to stop and give information and aid and to make a report and of the statute providing a source of recovery for injuries caused by a hit-run driver support the inference of negligence derived from flight and non-compliance with statutory obligations.

The "fairness and special policy considerations," *Austin*, 406 Mich at 432, of the no-fault act and, specifically, MCL 500.3148(1), more than warrant the *Combs'* presumption. To

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[5] Even if the presumption was a matter of statutory construction, it is improper to construe the Legislature's silence in a manner that would undermine a dominant purpose expressly embodied by the no-fault act. *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 235; 531 NW2d 138 (1995). As discussed in detail below, the presumption is consistent with the dominant purpose expressly embodied by the no-fault act.

begin, like the Motor Vehicle Accident Claims Act, "[t]he no-fault insurance act is remedial in nature and must be liberally construed in favor of persons intended to benefit thereby." *Gobler*, 428 Mich at 61 (citation omitted). Further, in *Shavers*, 402 Mich at 578-579, closely on the heels of its passage, this Court detailed the fairness and special policy considerations of the no-fault act:

> The Michigan No-Fault Insurance Act, which became law on October 1, 1973, was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. . . .
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> . . . The act's personal injury protection insurance scheme, with its comprehensive and expeditious benefit system, reasonably relates to the evidence advanced at trial that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were overcompensated, serious injuries were under compensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination.

This Court then went on to note, *id.* at 621-623:

> The legislative response, the enactment of the no-fault personal injury protection scheme, reasonably relates to the purpose of correcting these evils. These provisions provide, *inter alia,* for payment without regard to fault within 30 days. . . . Such payments may substantially compensate all personal injury victims of motor vehicle accidents for economic loss, including the victims of motor vehicle accidents, who were, under the tort-system, un-compensated or under compensated for their economic losses. Prompt payment provided for under the act may remedy the delays under the tort system. By partially abolishing tort liability to those who suffer personal injuries as a result of motor vehicle accidents, the act may lessen the number of motor vehicle personal injury tort suits in the courts. . . .

Moreover, the specific purpose of MCL 500.3148(1) is an "incentive[] imposed by the no-fault act that encourage[s] the prompt payment of claims." *Auto Club Ins Ass'n*, 440

Mich at 133. See also *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 48; 586 NW2d 395 (1998) (the legislature's intent in enacting MCL 500.3148(1) was that insured persons promptly receive the benefits required by the no-fault act); *Proudfoot v State Farm Mut Ins Co*, 254 Mich App 702, 707-708; 658 NW2d 838 (2003) ("To encourage no-fault insurers to promptly pay an injured party, the Legislature enacted penalty provisions allowing for payment of attorney fees on unreasonably denied claims. . . .") (citation omitted), rev'd in part on other grounds by 469 Mich 478 (2003); *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719, 739; 650 NW2d 129 (2002) (it is clear that the purpose of the penalty provisions of the no-fault act was to insure prompt payment and, in an effort to encourage prompt payment, the legislature enacted MCL 500.3148(1)), quoting *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 14-15; 369 NW2d 243 (1985); *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 629; 550 NW2d 580 (1996) ("The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured.") (citation omitted).

In fact, "the no-fault act and court decisions encourage prompt payment of insurance benefits even when there is some doubt about the insured's entitlement to payment, ..." *MEEMIC v Morris Auto-Owners Ins Co*, 460 Mich 180, 199-200; 596 NW2d 142 (1999). Thus, an insurance company is not allowed to delay payments in hopes that it is entitled to reimbursement and, by doing so, subjects itself to the possibility of paying the other party's attorney fees for acting unreasonably. *Id.* at n 12 (citations omitted).

Other than penalty interest under MCL 500.3142, which pales in comparison, the only possible deterrent available to prevent insurers from defeating the dominant purposes of the no-fault act—to prevent payment delay by insurers and the overburdening of the court system—is the sanction of attorney fees under MCL 500.3148(1). *Conway v Continental Ins Co*, 180

Mich App 447, 452; 447 NW2d 761 (1989) ("The remedy for an insurer's bad faith refusal to perform the no-fault insurance contract is limited to the recovery of attorney fees and interest"), citing *Butt v DAIIE*, 129 Mich App 211; 341 NW2d 474 (1983).[6]

The purpose of § 3148(1) is to give insurers pause before they embark on a path of undermining the dominant policies of the no-fault act by refusing to pay benefits. With that purpose in mind, and after noting that the requirement to award attorney fees is mandatory under § 3148(1) if an insurer acts unreasonably, the *Combs* court found it wise to create a rebuttable presumption of an unreasonable payment refusal or delay when an insurer does not pay benefits within the 30-period under MCL 500.3142. 117 Mich App at 73. The rebuttable presumption is grounded in common sense and effectuates the purpose of the no-fault act and, specifically, § 3148(1).

Unlike the judicial tolling doctrine incorporated into the no-fault act's one-year-back limitation period by *Lewis v DAIIE*, 426 Mich 83; 393 NW2d 167 (1986), which was overruled by this Court in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 581-586; 702 NW2d 539 (2005), the rebuttable presumption is not an "act of judicial *defiance*" (*Devillers*, 473 Mich at 585 (emphasis in original)), but is simply an act of "'exercising [] judicial power and only judicial power'" (*id.* at 583 (quotation omitted)). Also unlike the judicial tolling doctrine overruled by *Devillers*, the impact of the rebuttable presumption in *Combs* has <u>not</u> increasingly taxed the no-fault system. *Devillers*, 473 Mich at 586. Rather, like the construction of the word "claimant" in MCL 500.3148(1) in *Lakeland Nuerocare Ctrs v State Farm Mut Auto Ins Co*, 250

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[6] In addition to attorney fees under § 3148(1) of the no-fault act, for a time following its enactment in 1973 and as a further penalty against insurers who refused to promptly pay claims, plaintiffs pleaded and prevailed on intentional infliction of emotional distress claims against insurers. By 1983, the Michigan Court of Appeals had oft and clearly refuted such additional penalty-type claims. *Butt*, 129 Mich App at 215-219.

Mich App 35, 44; 645 NW2d 59 (2002), the rebuttable presumption "is consistent with the purpose and goal of the no-fault system in that it promotes the reasonable and prompt payment of no-fault benefits to rightful payees, minimizes the likelihood of a no-fault payee's unjustified economic loss, and mitigates the potential for litigation predicated on such claims."

4. The Rebuttable Presumption Does Not Shift the Burden of Proof or Omit the Need For a Trial Court To Make a Factual Finding on Reasonableness.

Appellant and (to a lesser extent) Farm Bureau argue that a rebuttable presumption shifts the burden of proof on the issue of unreasonably failing to make or delaying payment to an insurer. Rebuttable presumptions do not, however, shift the burden of proof. *Bieszck,* 459 Mich at 18-19, citing MRE 301. Such an argument is refuted by the clear and unambiguous language of MRE 301:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Further, a rebuttable presumption has no weight as evidence against rebutting evidence. *Pence v Wessels*, 320 Mich 195, 199-200; 30 NW2d 834 (1948) (quotation omitted). Such presumptions disappear when evidence is introduced from which contrary facts may be found. *In re Miller's Estate*, 300 Mich 703, 711; 2 NW2d 888 (1942), quoting *Mich Aero Club v Shelley*, 283 Mich 401, 410; 278 NW 121 (1938).

Moreover, Appellant and Farm Bureau forget the hoops that claimants must jump through to even get to such a rebuttable presumption. That is, a claimant first has the burden to prove that benefits are "overdue." *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003). That requires the claimant to prove that, under MCL 500.3142, an insurer

was provided "reasonable proof" of both the fact and amount of loss sustained, and that the insurer failed to make payment within 30 days of receiving reasonable proof. *Beach*, 216 Mich App at 629-630 (refusing to construe the term "overdue" in § 3148(1) in a manner that rendered it nugatory and, therefore, holding that the trial court was precluded from awarding plaintiff attorney fees because the jury determined plaintiff's benefits were not overdue for purposes of MCL 500.3142).[7] Then, and only then, does the rebuttable presumption arise. And once a claimant jump through those hoops and is fortunate enough to have a trial court find that the insurer unreasonably delayed or refused payment, a claimant then has the burden of proving the amount of attorney fees to which she or he is entitled.

5. The Rebuttable Presumption is Not Inconsistent With the Word "If" in MCL 500.3148(1), and Simply Because the Statutory Provision is Silent Does Not Mean the Presumption is Improper.

Farm Bureau argues that *Combs*' rebuttable presumption somehow is inconsistent with the word "if" in MCL 500.3148(1). Farm Bureau says the rebuttable presumption eliminates the need for the trial court to "undertake an active determination" to find whether an insurer unreasonably failed to make or delayed payment. Farm Bureau brief, p 12. Case law dictates that trial court's must and do actively make such a finding.

To begin, case law is very clear regarding a trial court's obligation to actively make a finding on the question of unreasonable delay:

> As explained in *McCarthy v Auto Club Ins Ass'n,* 208 Mich App 97, 105; 527 NW2d 524 (1994), when considering whether attorney fees are warranted under the no-fault act, the inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable. Further, this Court has explained that a delay is not reasonable if it is based on a legitimate question of statutory construction, constitutional law, or

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[7] If disputed, a claimant also has the burden of proving that each particular expense submitted for payment was "reasonable" and "necessary." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49-50; 457 NW2d 637 (1990).

> factual uncertainty. *Liddell v DAIIE,* 102 Mich App 636, 650; 302 NW2d 260 (1981). [*Shanafelt*, 217 Mich App at 635.]

See also *Resto*, 273 Mich at 578 (emphasis added) (before attorney fees may be assessed against an insurer, the trial court "must additionally find" that the insurer unreasonably delayed or refused to pay) .

Further, Farm Bureau does not cite to a single post-*Combs* decision, published or unpublished, where a trial court did not actively make such findings. That is because there are no such decisions. As in this case, a trial court always reviews the evidence and makes factual findings as to whether an insurer unreasonably failed to make or delayed payment. Contrary to Farm Bureau's intimations, a rebuttable presumption does not automatically mean a finding that an insurer has unreasonably delayed in making or failed to make proper payment.

Farm Bureau also cites to an impressive array of statutory provisions where the legislature included rebuttable presumptions, arguing the lack of inclusion in § 3148(1) prohibits the presumption at issue. Besides the fact that many of the provisions are part of the same statute or act (and, thus, not nearly as impressive an array as first glance would indicate), the fact that the legislature did not include a rebuttable presumption in § 3148(1) does not mean the judiciary may not create such a presumption. As noted, this Court has observed that presumptions may be created "judicially or by law . . . ." *Austin*, 406 Mich at 432 (citation omitted).

Perhaps the most common example of such judicially-created presumptions, where statutes are silent about such matters, is in the context of safety and penal statutes. That is, this Court has held that the violation of a safety or penal statute creates a rebuttable presumption of negligence. *Klinke v Mitsubishi Motors Corp*, 458 Mich 582, 591-592; 581 NW2d 272 (1998) (citation omitted). This is true not only where a statute is silent about presumptions, but "even where the statute does not directly apply because of its title." *Id.* at n 7.

And there are thousands of safety and penal statutes. Some, including many cited by Farm Bureau, include rebuttable presumptions. Others do not include such presumptions, but a judicial presumption of negligence is nonetheless permitted.

Further, there are hundreds of other recognized presumptions, the reasons for which are often tied closely to the pertinent substantive law, particularly those presumptions created to further a social policy. McCormick, Evidence (6th ed), § 343. Examples of other Michigan judicial presumptions that exist—in spite of a host of statutes related to the subject matter—include, but are not limited to: the failure to produce evidence gives rise to a rebuttable presumption that the evidence was harmful to the non-producing party, *Ward*, 472 Mich at 84-85 (citations omitted); that individuals are presumed to know the law, *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 27, n 7; 614 NW2d 634 (2000) (citation omitted); that an individual who signs an instrument knows the nature of and understands its content, *McKinstry v Valley Obstetrics-Gynecology Clinic*, 428 Mich 167, 184; 405 NW2d 88 (1987) (citations omitted); the presumption against suicide, *Stuckum v Metro Life Ins Co*, 283 Mich 297, 301; 277 NW 891 (1938) (citation omitted); that proof of mailing raises a rebuttable presumption of receipt, *Barstow v Fed Life Ins Co*, 259 Mich 125, 129; 242 NW 862 (1932) (citations omitted).

In short, the fact that the legislature did not include a rebuttable presumption in § 3148(1) does not mean the presumption is improper.

CONCLUSION AND RELIEF REQUESTED

Attorney fees under MCL 500.3148(1) ensure prompt payment of no-fault benefits, because reasonable fees sanction insurers for unreasonably delaying payment of medical bills. Without continuing the long-standing application of MCL 500.3148(1), medical providers will incur even more administrative costs to recover payment after treating auto accident victims. In the United States, administration costs already account for roughly 31

percent of health care expenditures. See, generally, Woolhandler, *Costs of Health Care Administration in the United States and Canada*, 349 New Eng J Med 768 (Aug 21, 2003).

Awarding attorney fees can ensure prompt payment of benefits, only if the trial judge's decision to award them is respected in most cases. The longstanding and existing *Combs'* rebuttable presumption and the bifurcated clear error/abuse of discretion standard of review on appeal is essential to the integrity of the no-fault system, because it respects the fundamental importance of attorney fees in sanctioning non-compliant, recalcitrant insurers. CPAN and its members are concerned about the likely effect of altering these long-standing legal principles.

CPAN believes that Michigan has a superior no-fault system that was formed for the very purpose of preserving quality health care and that prompt payment of medical bills remains vital to its proper functioning. CPAN urges this Court to continue using the *Combs'* rebuttable presumption and the bifurcated clear error/abuse of discretion standard of review of attorney fee awards under MCL 500.3148(1), because the statute, its purpose, and this Court's precedent compel that result, and because attorney fees are needed to ensure prompt payment of no-fault benefits.

Respectfully submitted,

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