

**STATE OF MICHIGAN
IN THE SUPREME COURT**

ON APPEAL FROM THE

COURT OF APPEALS

(Hon. Joel P. Hoekstra, Hon. Hildra R. Gage, and Hon. Kurtis T. Wilder)

MACOMB COUNTY CIRCUIT COURT

(Hon. Donald G. Miller)

RANDALL L. ROSS,

Plaintiff/ Appellee

v

AUTO CLUB GROUP,

Defendant/ Appellant

Supreme Court No. 130971

Court of Appeals No. 262167

Macomb Circuit Court No. 2004-001913-CK

**BRIEF OF *AMICUS CURIAE*
FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN
IN SUPPORT OF APPELLANT**

Respectfully submitted,

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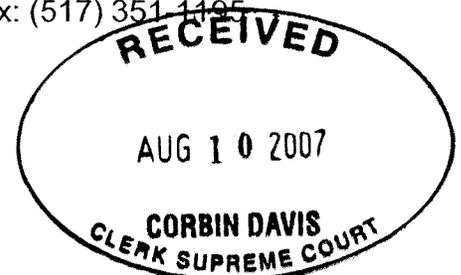


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STATEMENT OF JURISDICTION

Amicus curiae Farm Bureau Mutual Insurance Company of Michigan ("Farm Bureau") accepts and relies on Statement of the Basis of Jurisdiction submitted by Appellant Auto Club Group ("Auto Club") for purposes of this brief.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Farm Bureau accepts and relies on the Statement of Facts submitted by Auto Club for purposes of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Farm Bureau Mutual Insurance Company of Michigan (“Farm Bureau”) is one of the state’s insurers providing mandatory no-fault automobile coverage. As one of the insurers providing no-fault PIP coverage, Farm Bureau has an important interest in this case because the impact of this Court’s rulings on the issues presented will determine the scope of liability for Farm Bureau in providing PIP benefits to its insureds. It also is interested because it recognizes that not all self-employed insureds who are farmers can show loss of income and so it offers an optional coverage for farmer replacement labor. (Exhibit D, Farmer Replacement Labor Endorsement.)

Among the issues being requested to be briefed in this matter are issues regarding taxable income of self-employed persons using sub-chapter S corporations and the award of attorney fees pursuant to MCL 500.3148(1). Exhibit A, Order Granting Leave to Appeal. The improper award of benefits and attorney fees has the potential to skew insurance rates. This Court has declared that no-fault insurance must be “available at fair and equitable rates.” *Shavers v Attorney General*, 402 Mich 554, 559; 267 NW2d 72 (1978). The ability to maintain such rates depends on both insurers and consumers following the rules under the No-Fault Act, including the proper determination of when to award benefits and attorney fees under MCL 500.3148(1). When awards of unwarranted benefits and attorney fees begin to arise in unanticipated and improper contexts, insurers, consumers, and the insurance industry’s ability to stabilize and maintain rates all suffer.

The process of setting no-fault insurance rates is complex and dependent on many factors, as outlined in the Michigan Essential Insurance Act (EIA), 1979 PA 145, MCL 500.2101 *et seq.* MCL 500.2110(1) requires that expenses as well as loss payments be

considered: “due consideration... be given to past and prospective loss experience within and outside this state... [and] to past and prospective expenses...” In addition, MCL 500.2109(2) provides that “the underwriting return of... insurance over a period of time sufficient to assure reliability in relation to the risk associated with that insurance” must be a factor in determining whether a given rate is excessive. So, the ability to anticipate under what circumstances benefits as well as attorney fees are to be awarded under MCL 500.3148(1) is essential to the process of assessing the rates charged to consumers. Therefore, Farm Bureau asks this Court to allow it to add its voice to this problem.

INTRODUCTION

In its order granting leave to appeal, this Court specifically requested briefing on four issues:

(1) 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"); (2) what is the appropriate method of determining whether a claimant is entitled to work loss benefits pursuant to MCL 500.3107(1)(b) for loss of income where the claimant is the sole shareholder and employee of a sub-chapter S corporation, 26 USC 1361 *et seq.*; (3) in evaluating the claimant's work loss claim, what is the relevance, if any, of (a) the sub-chapter S corporation's profit or loss, and (b) the wages the sole shareholder reports to the federal government for income tax purposes; and (4) when an 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)? (Exhibit A, Order Granting Leave)

As to issue one, the proper standard of review of a trial court's decision to grant attorney fees pursuant to MCL 500.3148(1) is a mixed standard of review including reviewing the trial court's factual findings for clear error, while reviewing the trial court's application of those factual findings to MCL 500.3148(1)'s requirements for granting attorney fees, a legal determination, de novo.

As to issues two and three, taxation is intertwined with income in MCL 500.3107(1)(b) and the sub-chapter S form of entity should be considered a form that is equivalent to self-employment.

As to issue four, the prior Court of Appeals' decision holding that MCL 500.3148(1) incorporates a rebuttable presumption that must be disproved by the insurer conflicts with the plain language of the statute. Pursuant to MCL 500.3148(1), attorney fees to be paid by the insurer can only be awarded "if the court finds" that the insurer unreasonably refused or delayed payment of PIP benefits. The plain language "if the court finds" provides for a contingency or condition that the claimant must prove in order to be awarded attorney fees and not a rebuttable presumption that the insurer must disprove.

LAW & ARGUMENT

I. THE PROPER STANDARD OF REVIEW FOR A TRIAL COURT'S DECISION TO AWARD ATTORNEY FEES IS A MIXED STANDARD OF REVIEW INCLUDING CLEAR ERROR REVIEW OF THE TRIAL COURT'S FACTUAL FINDINGS AND DE NOVO REVIEW OF THE TRIAL COURT'S LEGAL CONCLUSIONS.

This Court has requested arguments regarding the appropriate standard of review to be used when reviewing a trial court's award of attorney fees pursuant to MCL 500.3148(1). Exhibit A. Since any award of attorney fees under MCL 500.3148(1) necessarily includes the trial court making both factual and legal determinations, the standard of review is a mixed review where the trial court's factual determinations are reviewed for clear error, while the trial court's legal determinations are reviewed de novo.

MCL 500.3148(1), which addresses the award of attorney fees to claimants under the No-Fault Act, 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.

To award attorney's fees to be paid by the insurer, the Court must find that "the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." In making this determination, the Court must determine the facts behind the insurer's refusal or delay in payment. This factual determination is reviewed for clear error. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000) citing *DiFranco v Pickard*, 427 Mich 32, 58-59; 398 NW2d 896 (1986) ("We reverse a trial court's findings of fact only if they are clearly erroneous.")

However, the factual findings regarding the reasons why an insurer refused or delayed payment do not automatically trigger the payment of attorney fees. The trial court must take those factual findings and apply them to the statutory language of MCL 500.3148(1) to determine if the refusal or delay was unreasonable. The interpretation of a statute, particularly when done in light of a set of facts, is a question of law, which is reviewed de novo on appeal. *Lease Acceptance Corp v Adams*, 272 Mich App 209, 222; 724 NW2d 724 (2006) citing *In re Turpening Estate*, 258 Mich App 464, 465; 671 NW2d 567 (2003). See also *Lincoln v GMC*, 461 Mich 483, 489-490; 607 NW2d 73 (2000) citing *Mager v Dep't of State Police*, 460 Mich 134, 143, n 14; 595 NW2d 142 (1999) and *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999) (Issues concerning the application of statutes are questions of law that are reviewed de novo.)

In making a determination whether or not to award attorney fees under MCL 500.3148(1), a trial court must approach the issue two ways. First, it must determine the facts regarding the refusal or delay in payment and, secondly, it must determine if those facts are legally sufficient to meet the statutory requirements of unreasonableness. This dual approach necessarily incorporates dual or mixed standards of review. *Parent v Los Gatos-Saratoga Joint Union High School District*, 484 F3d 1230, 1231 (9th Cir 2007)¹ citing *P N v Seattle School District*, 458 F3d 983, 985 (9th Cir 2006) (“Although a district court’s denial of attorneys’ fees is typically reviewed for abuse of discretion, ‘any elements of legal analysis and statutory interpretation underlying the district court’s attorneys’ fees decision are reviewed de novo, and factual findings underlying the district court’s decision are reviewed for clear error.’”)

The mixed standard of review in cases where trial courts have to make factual findings and then apply those facts to make legal determination is also supported by other case law. In *Sweebe v Sweebe*, 474 Mich 151; 712 NW2d 708 (2006) citing *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339; 168 NW 425 (1918), this Court found that a mixed standard of reviewed applied in finding whether a waiver existed because the finding required factual and legal determinations in that the court must determine if the facts of the case were sufficient to legally constitute a waiver.

Further, in *People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002), this Court held that there was a mixed standard of review regarding ineffective assistance of counsel. This Court ruled that where the trial court finds certain facts in relation to a claim of ineffective

¹ For the Court’s convenience, a copy of the opinion is attached as Exhibit B.

assistance of counsel, those findings are reviewed for clear error. *LeBlanc*, 465 Mich at 579. Further, the determination by the trial court as to whether those facts establish ineffective assistance of counsel involves a question of constitutional law, which is reviewed de novo. *LeBlanc*, 465 Mich at 579.

A mixed standard of review is also applied when considering evidentiary challenges based on questions of law. In *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003) (internal citations omitted), this Court ruled:

The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion. However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo. Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law.

The holdings in *Sweebe*, *LeBlanc*, and *Katt* demonstrate that when trial courts have to make factual findings and then apply those factual findings in conjunction with legal issues, the appellate courts are to apply a mixed standard of review. Therefore, the proper standard of review of a trial court's award of attorney fees under MCL 500.3148(1) is a mixed standard of review, where this Court reviews the factual findings for clear error but reviews the legal determination of whether those facts are sufficient to meet the statutory requirement regarding reasonableness de novo.

The mixed standard of review dovetails with case law defining unreasonable delay or refusal. "A delay is not unreasonable where it is a product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty." *Joiner v Michigan Mut Ins Co*, 137 Mich App 464, 479, 357 NW2d 875 (1984) citing *English v Home*

Ins Co, 112 Mich App 468, 476; 316 NW2d 463 (1982) and *Liddell v DAIIIE*, 102 Mich App 636, 650; 302 NW2d 260 (1981). One of those prongs is per se fact based. The other two require an assessment of the state of the law.

In the case at bar, the determination of the form of business entity, the reported income amount, and the gross receipts would be ordinary factual findings. The application of the legal standard when accounting concepts are applied with a resulting legal conclusion drawn for whether a person actually has a loss of income is simply a legal conclusion. Like any other legal issue that is dispositive of a dispute, it is and should be reviewed de novo. A rule of law is applied and precedent is being established that will resolve future cases. Until the law is resolved, one cannot say that there is unreasonable delay in paying.

II. THE ASSUMPTION THAT A REBUTTABLE PRESUMPTION OF UNREASONABLENESS EXISTS WHEN AN INSURER REFUSES OR DELAYS PAYMENT IS INCONSISTENT WITH THE PLAIN LANGUAGE OF MCL 500.3148(1).

This Court has also inquired on the question: “when an 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)?” Exhibit A. The plain language of MCL 500.3148(1) bars any incorporation of a “rebuttable presumption” and, in fact, places the burden on the claimant to prove unreasonableness.

A. STANDARD OF REVIEW

The determination of whether or not the language of MCL 500.3148(1) incorporates a rebuttable presumption of unreasonableness is an issue of statutory interpretation.

Issues of statutory interpretation are questions of law that this Court reviews de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The fundamental rule and primary goal of statutory construction is to effectuate the Legislature's intent. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). To accomplish this task, the Court starts by reviewing the text of the statute, and, if the language is unambiguous, the Court must enforce the statute as written because the Legislature is presumed to have intended the meaning expressed. *Casco Twp*, 472 Mich at 571. See also *Kreiner v Fischer*, 471 Mich 109, 129 683 NW2d 611(2004) citing *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) ("In construing statutes we examine the language the Legislature has used. That language is the best indicator of the Legislature's intent.") Finally, every word of a statute should be given meaning such that no word should be treated as surplusage or made nugatory. *People v Warren*, 462 Mich 415, 429 n 24; 615 NW2d 691 (2000).

B. THE PLAIN LANGUAGE OF MCL 500.3148(1), INCLUDING THE USE OF THE LANGUAGE "IF THE COURT FINDS," BARS ANY INCORPORATION OF A REBUTTABLE PRESUMPTION AS THE USE OF "IF" IN THE STATUTE SIGNIFIES A CONDITION OR CONTINGENCY THAT HAS TO BE MET IN ORDER TO GRANT ATTORNEY FEES.

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. (Emphasis added.)

The first sentence states the obvious, that an attorney is entitled to be paid but does not state from whom. It does not say that an insurer must pay nor that a rebuttable

presumption of an insurer's obligation exists. Nor does the second sentence. The language "if the court finds" does not create a rebuttable presumption but rather creates a condition that must be met in order for the insurer to be liable for attorney fees as the word "if" creates a condition, not a presumption.

"It is a well-settled rule of statutory construction in this state that, unless otherwise defined by law, statutory words or phrases are given their plain and ordinary meaning. When appropriate, this Court often refers to dictionary definitions to interpret statutory language." *Reed v Breton*, 475 Mich 531, 552-553; 718 NW2d 770 (2006) (internal citations removed.) The No-Fault Act does not define the word "if." Therefore, this Court is bound to refer to the dictionary definition of "if" to determine if its use creates a condition or a presumption.

The *American Heritage Dictionary of the English Language (4th Ed)* (2004), defines "if," in part, as "in the event that; granting that; on the condition that; a possibility, condition, or stipulation." The *Compact Oxford English Dictionary of Current English (3rd Ed)*, defines "if," in part, as "introducing a conditional clause; on the condition or supposition that" and as "a condition or supposition." The *Cambridge Advanced Learner's Dictionary (2nd Ed)* defines "if" as "used to say that a particular thing can or will happen only after something else happens or becomes true."

As demonstrated by these dictionary definitions, "if" clearly denotes a condition or contingency. By using the definition of "if," MCL 500.3148(1) is properly interpreted, under the rules of statutory construction, as providing that "the attorney's fee shall be a charge against the insurer in addition to the benefits recovered," **on the condition that "the court**

finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.”

The interpretation that “if the court finds” creates a contingency is also supported by the case law from other states. The North Carolina Supreme Court, in *In re Ridge*, 302 NC 375; 275 SE2d 424 (1981)², had to interpret the following statutory language:

Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, however, that in any caveat proceeding under this subdivision, **if the court finds** that the proceeding is without substantial merit, the court may disallow attorneys' fees for the attorneys for the caveators. (Emphasis added.)

In finding that the “if the court finds” phrase creates a contingency, the North Carolina Supreme Court ruled:

By the plain language of the statute the words "if the court finds" renders the proviso with respect to a finding that the case is without merit subjunctive, and the word "may" renders it permissive even in a case where this proviso applies. **The phrase "if the court finds" clearly contemplates a contingency**, the contingency being that the court might in some cases make a finding that a case was without substantial merit. Only in the event of that contingency does the proviso apply, and then the word "may" renders it permissive even in that event. (*In re Ridge*, 302 NC at 379 (emphasis added.))

As recognized by the North Carolina Supreme Court, the only proper interpretation of “if the court finds” is that the phrase creates a contingency that must be established prior to action or finding being made.

The phrase “if the court finds” also contemplates that the trial court has to undertake an active determination of whether or not the contingency has been met. If there was a rebuttable presumption that the contingency is met, the trial court would not have to find

² For the Court’s convenience, a copy of the opinion is attached as Exhibit C.

if the contingency is met but rather must determine if the contingency is not met. This interpretation would effectively rewrite MCL 600.3148(1) to provide that attorney fees are to be awarded except if the Court finds that the refusal or delay in payment was reasonable. Since the Michigan Legislature did not draft MCL 600.3148(1) in such a manner, it must have been the Legislature's intent that the trial court must actively find that the contingency is met before ordering an insurer to pay the claimant's attorney fees.

C. THE PREVIOUS COURT OF APPEALS' OPINIONS INTERPRETING MCL 500.3148(1) WITH A REBUTTABLE PRESUMPTION ARE CONTRARY TO THE PLAIN LANGUAGE OF MCL 500.3148(1).

The incorporation of the rebuttable presumption into MCL 500.3148(1) originated from the Court of Appeals' decision in *Combs v Commercial Carriers, Inc*, 117 Mich App 67; 323 NW2d 596 (1982)³. In creating the rebuttable presumption standard, the Court of Appeals ruled:

We note that the terms of this statute are mandatory, contingent only upon culpable conduct on the part of the insurer.

MCL 500.3142(2); MSA 24.13142(2) provides that personal protection benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of the loss sustained.

Where benefits are not paid within the statutory period, we think a rebuttable presumption of unreasonable refusal or undue delay arises. It is then the

³ The holding in *Combs* has been perpetuated by subsequent published Court of Appeals' decision without any further analysis. See *Borgess Medical Center v Resto*, 273 Mich App 558, 578, 580; 730 NW2d 738 (2007); *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999); *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 629; 550 NW2d 580 (1996); *Johnson v Michigan Mut Ins Co*, 180 Mich App 314, 323; 446 NW2d 899 (1989); *Conway v Continental Ins Co*, 180 Mich App 447, 452; 447 NW2d 761 (1989); *Bloemsma v Auto Club Ins Assoc*, 174 Mich App 692, 696-697; 436 NW2d 442 (1989); *Bradley v DAIIE*, 130 Mich App 34, 46; 343 NW2d 506 (1983); and numerous unpublished opinions. However, none of these cases provide any new rationale to support the *Combs*' holding.

burden of the insurer to explain and justify the refusal or delay. It then becomes the trial court's duty to determine if the refusal or delay is unreasonable. This procedure follows logically from the language of the statutory provisions in question. (*Combs*, 117 Mich App at 73.)

Although the *Combs* court correctly noted that the terms of MCL 500.3148(1) "are mandatory, contingent only upon culpable conduct on the part of the insurer," the court then incorrectly transferred the burden of the contingency onto the insurer by creating a rebuttable presumption that does not exist in the statutory language.

To create the rebuttal presumption, the Court of Appeals relied on MCL 500.3142(2)⁴, which determines when benefits are due. However, MCL 500.3142(2) contains absolutely no language that payments not made within 30 days of a properly submitted claim constitutes an unreasonable refusal or an unreasonable delay of payment, which is required to meet the contingency for awarding attorney fees. Rather, the failure to pay within 30 days only proves a delay. However, delay in-of-itself is not sufficient to award attorney fees under MCL 3148(1). In order to obtain an award of attorney fees, the Plaintiff has to show that the insurer's reasons for the delay were unreasonable in order to satisfy the contingency or condition created by the Legislature's use of "if."

⁴ MCL 500.3142(2) provides:

Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

By creating a rebuttable presumption and shifting the burden of proof onto the insurer, the Court of Appeals impermissibly rewrote MCL 500.3148(1). See *Bukowski v City of Detroit*, 478 Mich 268, 284; 732 NW2d 75 (2007) citing *Hesse v Ashland Oil, Inc*, 466 Mich 21, 30-31; 642 NW2d 330 (2002) (“It is not the function of the courts to rewrite statutes.”) The Court of Appeals’ ruling effectively rewrote MCL 500.3148(1) to read:

The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, unless the insurer can show that it did not unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

Such a rewrite violates the plain language of MCL 500.3148(1). If the Legislature intended to create a rebuttable presumption, the Legislature was fully cognizance that it had the ability to insert the necessary language into the statute.

D. IF THE LEGISLATURE INTENDED TO INCORPORATE A REBUTTABLE PRESUMPTION STANDARD INTO MCL 500.3148(1), THE LEGISLATURE COULD HAVE INCLUDED “REBUTTABLE PRESUMPTION” LANGUAGE INTO THE STATUTE AS IT HAS DONE IN NUMEROUS OTHER STATUTES.

If it was the Michigan Legislature’s intention to include a “rebuttable presumption” within MCL 500.3148(1), the Legislature clearly knew how to include such a presumption. The Legislature has specifically included rebuttable presumptions in numerous statutes including⁵:

MCL 24.261(1): “The filing of a rule under this act raises a **rebuttable presumption** that the rule was adopted....” (Emphasis added.)

⁵ This list does not include the Legislature’s use of the term “prima facie” in 351 statutes, which would also create a “rebuttal presumption.” See *Hazle v Ford Motor Co*, 464 Mich 456, 464; 628 NW2d 515 (2001) citing *Texas Dep’t of Community Affairs v Burdine*, 450 US 248, 254 n7; 101 S Ct 1089; 67 L Ed 2d 207 (1981) (The phrase “prima facie case” denotes, in part, the establishment of a legally mandatory, rebuttable presumption.)

- MCL 24.261(2): “The publication of a rule in the Michigan register, the Michigan administrative code, or in an annual supplement to the code raises a **rebuttable presumption** that...” (Emphasis added.)
- MCL 125.541(4): “If the estimated cost of repair exceeds the state equalized value of the building or structure to be repaired, a **rebuttable presumption** that the building or structure requires immediate demolition exists.” (Emphasis added.)
- MCL 125.985(2): “A special assessment shall be levied against assessable property on the basis of the special benefits to that parcel from the total project. There is a **rebuttable presumption** that a district project specially benefits all assessable property located within the district.” (Emphasis added.)
- MCL 125.990h(2): “An assessment shall be imposed against assessable property only on the basis of the benefits to assessable property afforded by the zone plan. There is a **rebuttable presumption** that a zone plan and any project specially benefits all assessable property in a zone area.” (Emphasis added.)
- MCL 168.476(1): “If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a **rebuttable presumption** that the signature is invalid. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a **rebuttable presumption** that the signature is invalid.” (Emphasis added.)
- MCL 168.552(13): “If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a **rebuttable presumption** that the signature is invalid. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a **rebuttable presumption** that the signature is invalid.” (Emphasis added.)
- MCL 168.961(6): “If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a **rebuttable presumption** that the signature is invalid. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a **rebuttable presumption** that the signature is invalid.” (Emphasis added.)

- MCL 169.961a(4): “If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a **rebuttable presumption** that the signature is invalid. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a **rebuttable presumption** that the signature is invalid.” (Emphasis added.)
- MCL 205.733(1): “The tribunal shall adopt a seal, which when impressed upon a document issued by the tribunal, raises a **rebuttable presumption** of the validity and authenticity of the document.” (Emphasis added.)
- MCL 207.1026(2): “There is a **rebuttable presumption**, subject to proof of exemption under this act,....” (Emphasis added.)
- MCL 207.1114(1): “If the vehicle is more than 5 miles from a reasonably direct route, there is a **rebuttable presumption** that the operator or driver of the vehicle intends to divert the motor fuel from the destination on the shipping paper. If the vehicle is 5 miles or less from a reasonably direct route, there is a **rebuttable presumption** that the operator or driver of the vehicle does not intend to divert the motor fuel from the destination on the shipping paper.” (Emphasis added.)
- MCL 208.1309(3)⁶: “The apportionment provisions of this act shall be **rebuttably presumed** to fairly represent the business activity attributed to the taxpayer in this state.” (Emphasis added.)
- MCL 257.11(2): “There is a **rebuttable presumption** that a person who....” (Emphasis added.)
- MCL 257.401(1): “It is **presumed** that the motor vehicle is being driven with the knowledge and consent of the owner....” (Emphasis added.)
- MCL 257.667a(4): “...proof that the defendant was at the time of the violation the registered owner of the vehicle, shall constitute in evidence a **rebuttable presumption** that the registered owner of the vehicle was the person who committed the violation. The **presumption is rebutted** if the registered owner of the vehicle....” (Emphasis added.)

⁶ This statute will become effective on January 1, 2008.

- MCL 287.1003(3): “In a civil forfeiture proceeding under this act, there is a **rebuttable presumption** that a canid is a wolf-dog cross....” (Emphasis added.)
- MCL 289.823(3): “The determination of the circumstances described in this subsection or subsection (1) or (2) is considered to be a finding as a matter of law and creates a **rebuttable presumption** that the processing operation is operating under generally accepted practices or that the processing operation is not a public or private nuisance.” (Emphasis added.)
- MCL 324.8904(1): “...the defendant named in the citation, complaint, or warrant was the registered owner of the vehicle or vessel at the time of the violation, gives rise to a **rebuttable presumption** that the registered owner of the vehicle or vessel was the driver of the vehicle or vessel at the time of the violation.” (Emphasis added.)
- MCL 324.8904(2): “There is a **rebuttable presumption** that the driver of a vehicle or vessel is responsible for litter that is thrown, dumped, deposited, placed, or left from the vehicle or vessel on public or private property or water.” (Emphasis added.)
- MCL 324.8904(3): “...the defendant named in the citation, complaint, or warrant was the lessee of the vehicle or vessel at the time of the violation, gives rise to a **rebuttable presumption** that the lessee of the vehicle or vessel was the driver of the vehicle or vessel at the time of the violation.” (Emphasis added.)
- MCL 324.8904(4): “...the defendant named in the citation, complaint, or warrant was the titled owner or lessee of the vehicle at the time it was abandoned, gives rise to a **rebuttable presumption** that the defendant abandoned the vehicle.” (Emphasis added.)
- MCL 324.14808(2): “There is a **rebuttable presumption** that a disclosure made pursuant to and in full compliance with this section is voluntary.” (Emphasis added.)
- MCL 324.32722(1): “...there is a **rebuttable presumption** that a new or increased large quantity withdrawal will not cause an adverse resource impact....” (Emphasis added.)

- MCL 333.17031(3): “There is a **rebuttable presumption** that a person who makes a written statement that is filed under this subsection has done so in good faith.” (Emphasis added.)
- MCL 388.1769: “...there is a **rebuttable presumption** that the public school academy did not make the good faith effort required under this section.” (Emphasis added.)
- MCL 400.586g(4): “...there is a **rebuttable presumption** that when acting under the authority of this act, the state long-term care ombudsman does so in good faith.” (Emphasis added.)
- MCL 400.608(2): “It shall be a **rebuttable presumption** that a person knowingly made a claim for a medicaid benefit if....” (Emphasis added.)
- MCL 400.608(3): “If a claim for a medicaid benefit is made by means of computer billing tapes or other electronic means, it shall be a **rebuttable presumption** that the person knowingly made the claim if....” (Emphasis added.)
- MCL 400.608(4): “In any civil or criminal action under this act, the official certificate of the director of social services or the director’s delegate... shall create a **rebuttable presumption** that the record or compilation is authentic.” (Emphasis added.)
- MCL 432.218(4): “The possession of more than 1 of the devices described in subsection (2)(e) permits a **rebuttable presumption** that the possessor intended to use the devices for cheating.” (Emphasis added.)
- MCL 436.1801(8): “There shall be a **rebuttable presumption** that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).” (Emphasis added.)
- MCL 440.1211(3): “A reference to ECU in a contract, security, or instrument without defining ECU is **presumed** to be a reference to the currency basket that is from time to time used as the unit of account of the European community. The **presumption is rebuttable** by showing that the presumption is contrary to the intention of the parties.” (Emphasis added.)

- MCL 445.356(2): “The failure to sell goods, merchandise, commodities, or services in the manner advertised, or the refusal to sell at the price at which it was advertised, or in accordance with other terms and conditions of the advertisement creates a **rebuttable presumption** of an intent to violate this act.” (Emphasis added.)
- MCL 484.2210(3): “There is a **rebuttable presumption** that cost studies, customer usage data, marketing studies, and contracts between providers are trade secrets or commercial or financial information protected under subsection (1).” (Emphasis added.)
- MCL 484.3311(3): “There is a **rebuttable presumption** that costs studies, customer usage data, marketing studies and plans, and contracts are trade secrets or commercial or financial information protected under subsection (1).” (Emphasis added.)
- MCL 487.14401(3)(e): “In any action or proceeding concerning fees, there is a **rebuttable presumption** that a fee is reasonable if....” (Emphasis added.)
- MCL 500.1910(2): “There shall be a **rebuttable presumption** that the following coverages are available from an authorized insurer:....” (Emphasis added.)
- MCL 500.1910(3): “There shall be a **rebuttable presumption** that the following coverages are unavailable from an authorized insurer:....” (Emphasis added.)
- MCL 500.2117(2)(b): “...the certificate creates a **rebuttable presumption** that the dwelling meets the insurer's underwriting rules relating to physical condition.” (Emphasis added.)
- MCL 500.3102(3): “The failure of a person to produce evidence that a motor vehicle or motorcycle has in full force and effect security... creates a **rebuttable presumption**....” (Emphasis added.)
- MCL 552.29: “The legitimacy of all children begotten before the commencement of any action under this act shall be **presumed** until the contrary be shown.” (Emphasis added.)

- MCL 557.205: “There shall be a **rebuttable presumption** that all property, real and personal, acquired by the husband or the wife, or both, after marriage, or on or after the effective date of this act, whichever is later, is community property:....” (Emphasis added.)
- MCL 557.263: “In determining whether this act applies to specific property all of the following **rebuttable presumptions** apply....” (Emphasis added.)
- MCL 570.1107(5): “For purposes of this act, if the real property is owned or leased by more than 1 person, there is a **rebuttable presumption** that an improvement to real property under a contract with an owner or lessee was consented to by any other co-owner or co-lessee.” (Emphasis added.)
- MCL 570.1203(2): “If there is no written contract as required by section 114, the filing of an affidavit under this section creates a **rebuttable presumption** that the owner or lessee has paid the contractor for the improvement.” (Emphasis added.)
- MCL 600.2946(4): “In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a **rebuttable presumption** that the manufacturer or seller is not liable if....” (Emphasis added.)
- MCL 691.1031: “In all civil actions brought in any circuit court of this state affecting elections, dates of elections, candidates, qualifications of candidates, ballots or questions on ballots, there shall be a **rebuttable presumption** of laches if the action is commenced less than 28 days prior to the date of the election affected.” (Emphasis added.)
- MCL 710.33(2): “A person filing a notice of intent to claim paternity shall be presumed to be the father of the child... and shall create a **rebuttable presumption** as to the paternity of that child for purposes of that act. Such a notice shall create a **rebuttable presumption** as to paternity of the child for purposes of dependency or neglect proceedings under chapter 12a.” (Emphasis added.)
- MCL 750.50a(3): “In a prosecution for a violation of subsection (1), evidence that the defendant initiated or continued conduct directed toward a dog described in subsection (1) after being requested to avoid

or discontinue that conduct or similar conduct by a blind, deaf, audibly impaired, or physically limited individual being served or assisted by the dog shall give rise to a **rebuttable presumption** that the conduct was initiated or continued maliciously.” (Emphasis added.)

MCL 750.141a(6): “Evidence of all of the following gives rise to a **rebuttable presumption** that the defendant allowed the consumption or possession of an alcoholic beverage or a controlled substance on or within a premises, residence, or other real property....” (Emphasis added.)

MCL 750.263(5): “Willful possession of more than 25 items of property bearing or identified by a counterfeit mark gives rise to a **rebuttable presumption** that the person possessed those items with intent to deliver them in violation of subsection (2).” (Emphasis added.)

MCL 750.411h(4): “In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a **rebuttable presumption** that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” (Emphasis added.)

MCL 750.411i(5): “In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a **rebuttable presumption** that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” (Emphasis added.)

MCL 750.535(9): “A person who is a dealer in or collector of merchandise or personal property, or the agent, employee, or representative of a dealer or collector of merchandise or personal property who fails to reasonably inquire whether the person selling or

delivering the stolen, embezzled, or converted property to the dealer or collector has a legal right to do so or who buys or receives stolen, embezzled, or converted property that has a registration, serial, or other identifying number altered or obliterated on an external surface of the property, is **presumed** to have bought or received the property knowing the property is stolen, embezzled, or converted. **This presumption is rebuttable.**" (Emphasis added.)

- MCL 750.540h(1): "Evidence of 1 or more of the following facts shall give rise to a **rebuttable presumption** that the conduct that violated section 540c was engaged in knowingly by the defendant with the intent to permit or obtain the unauthorized receipt, acquisition, interception, disruption, decryption, transmission, or retransmission of a telecommunications service...." (Emphasis added.)
- MCL 752.797(6): "It is a **rebuttable presumption** in a prosecution for a violation of section 5 that the person did not have authorization from the owner, system operator, or other person who has authority from the owner or system operator to grant permission to access the computer program, computer, computer system, or computer network or has exceeded authorization unless 1 or more of the following circumstances existed at the time of access...." (Emphasis added.)
- MCL 752.1007(2): "It shall be a **rebuttable presumption** that a person knowingly made a claim for a health care benefit if the person's actual, facsimile, stamped, typewritten, or similar signature is used on the form required for the making of the claim for the health care benefit." (Emphasis added.)
- MCL 752.1007(3): "If a claim for a health care benefit is made by means of computer billing tapes or other electronic means, it shall be a **rebuttable presumption** that the person knowingly made the claim if the person has advised the health care corporation or health care insurer in writing that claims for health care benefits will be submitted by use of computer billing tapes or other electronic means." (Emphasis added.)
- MCL 752.1007(4): "In any civil or criminal action under this act the certificate of an authorized agent of the health care corporation or health care insurer setting forth that documentary material or any compilation thereof is an authentic record or compilation of

records of the health care corporation or health care insurer shall create a **rebuttable presumption** that the record or compilation is authentic.” (Emphasis added.)

MCL 780.951(1): “Except as provided in subsection (2), it is a **rebuttable presumption** in a civil or criminal case that an individual who uses deadly force or force other than deadly force under section 2 of the self-defense act has an honest and reasonable belief that imminent death of, sexual assault of, or great bodily harm to himself or herself or another individual will occur if both of the following apply....” (Emphasis added.)

As these numerous statutes demonstrate, the Michigan Legislature is fully aware that it can create rebuttable presumptions by drafting statutory language that includes that language. What is also important to note is that the Michigan Legislature has specifically incorporated a rebuttable presumption in the No-Fault Act. MCL 500.3102(3) provides:

The failure of a person to produce evidence that a motor vehicle or motorcycle has in full force and effect security complying with this section or section 3101 or 3103 on the date of the issuance of the citation, creates a **rebuttable presumption** in a prosecution under subsection (2) that the motor vehicle or motorcycle did not have in full force and effect security complying with this section or section 3101 or 3103 on the date of the issuance of the citation. (Emphasis added.)

If the Legislature could insert rebuttable presumption language into MCL 500.3102(3), there is no evidence why the Legislature could not insert rebuttable presumption language into MCL 500.3148(1) if it intended to create a rebuttable presumption. The failure to do so must be interpreted to mean that the Legislature did not intend to create a rebuttable presumption in MCL 500.3148(1).

III. THE LOWER COURTS ERRED IN IGNORING THE SUB-CHAPTER S CORPORATE STATUS, WHICH REQUIRES CONSIDERATION OF INCOME AS TAXABLE INCOME.

This Court, in issues two and three, requested arguments regarding the appropriate method of calculating wage loss of a claimant operating a business under sub-chapter S

corporate status. “Income from work” under MCL 500.3107(1)(b) must be construed from the perspective of taxable income in order to provide the proper interpretation of that phrase.

A. STANDARD OF REVIEW

The interpretation of the “income from work” language of MCL 500.3107(1)(b) is an issue of statutory interpretation. Issues of statutory interpretation are questions of law that this Court reviews de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The fundamental rule and primary goal of statutory construction is to effectuate the Legislature's intent. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). To accomplish this task, the Court starts by reviewing the text of the statute, and, if the language is unambiguous, the Court must enforce the statute as written because the Legislature is presumed to have intended the meaning expressed. *Casco Twp*, 472 Mich at 571. See also *Kreiner v Fischer*, 471 Mich 109, 129 683 NW2d 611(2004) citing *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) (“In construing statutes we examine the language the Legislature has used. That language is the best indicator of the Legislature's intent.”) Finally, every word of a statute should be given meaning such that no word should be treated as surplusage or made nugatory. *People v Warren*, 462 Mich 415, 429 n 24; 615 NW2d 691 (2000).

B. THE TERM “INCOME FROM WORK” MUST BE CONSTRUED FROM THE PERSPECTIVE OF TAXABLE INCOME.

The central flaw of the Court of Appeals' decision is the inconsistency in, on the one hand, saying that plaintiff receives income from a corporation and, therefore, the corporate form must be respected, and on the other hand, disregarding the fact that the corporate

form actually selected is a sub-chapter S corporation. A sub-chapter S corporation is essentially a self-employment form that avoids paying corporate tax and passes through income and losses to the shareholder as if there was self-employment⁷. See, e.g., *Holmes v Dep't of Revenue*, 937 F2d 481, 484 (9th Cir, 1991). However, in this case the Court of Appeals treated plaintiff's corporation just like a regular corporation, advertent to the principle that a corporation's separate existence will be respected. 269 Mich App 356, 361-362.

However, if the corporation's separate existence will be respected, then it makes no sense to not also respect the exact form of the corporation's separate existence, since otherwise the corporate form is not being fully respected and as a result a fiction is defeating the substance and the result is to compensate for non-existent loss of income. It is only "loss of income from work" that is compensable under MCL 500.3107(1)(b). Moreover, it is important to keep in mind that while all medical bills are covered for life under No-Fault, which is the major benefit, not all economic losses are covered by the No-Fault Act. See, eg, *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 245; 293 NW2d 594 (1980) ("Furthermore, the act is not designed to provide compensation for all economic losses suffered as a result of an automobile accident injury.")

⁷ The pass-through tax status of the sub-chapter S corporation is provided for by the federal Internal Revenue Code. 26 USC §1366(b) provides that "the character of any item included in a shareholder's pro rata share under paragraph (1) of subsection (a) [which includes income, losses, deductions, and credits] **shall be determined as if such items were realized directly from the source from which realized by the corporation, or incurred in the same manner as incurred by the corporation.**" (Emphasis added.) See also 26 CFR 1.1366-1(a). This pass-through provision basically means that the corporation is ignored and all income, losses, deductions and credits are treated as if the individual himself or herself incurred the income, losses, deductions or credits. This is the same treatment given to sole proprietorships.

As part of the order for issues to be briefed, this Court inquired as to the effect of taxation. Section 3107(1)(b) contextually links work loss income to taxation, since there is an automatic 15% reduction in work loss benefits absent “reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply”. MCL 500.3107(1)(b). Thus, taxation is inextricably intertwined with determining income for work loss benefits. This Court has repeatedly recognized that context is a helpful guide in giving meaning, under the doctrine of *noscitur a sociis*. See, eg, *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005).

We all know what income is and its close connection to tax. This is because there is federal income tax, state income tax, and for certain cities, city income tax. The Legislature recognized that income has a meaning associated with being taxed when it inserted the 15% reduction in the context of Section 3107(1)(b). In light of that, it makes no sense to say that someone can collect work loss benefits for income from work, when they have no income from work as evidenced by a lack of taxation on any such income.

Where, as in this case, there is no actual income to be taxed, it is not a situation of income, let alone income from work. It may be cash flow to the claimant as a result of loans to the corporation. It may be cash flow to the claimant from not paying creditors. But, it is not income from work, let alone actual income, when the form of business passes all income and expenses through to the claimant for determining income, (of course subject to the closely intertwined tax), and there is no income.

This Court has consistently construed the work loss benefit as requiring actual loss of income from work. It first did so in *McDonald v State Farm Mutual Insurance Co*, 419 Mich 146; 350 NW2d 233 (1984). There this Court held that a person disabled in an auto

accident who had a subsequent intervening event, a heart attack, would not be entitled to continuing work loss benefits. On the other hand, in *Marquis v Hartford Accident and Indemnity (After Remand)*, 444 Mich 638, 646-648; 513 NW2d 799 (1994), this Court recognized and affirmed the principle that a work loss benefit could actually continue work loss entitlement beyond the period of disability where a person had lost their job as a result of being unable to attend work from the accident. Again, the consistent principle was that there was actual loss of income from work due to the motor vehicle accident.

In other words, *McDonald* teaches that there must be a true loss of income from work and not from some other reason, but by the same token, where there is that loss of income due to injury in an auto accident, *Marquis* instructs that the loss of income that is compensable is not limited to a period of disability. It is submitted that this is reality based, which cuts through the form. Substance counts, not form.

As a result, the fact that someone has a sub-chapter S corporation that generates no income from work to the person, and yet they can produce a W-2 form, is no more dispositive than the person who could document disability in *McDonald* nor the person who had continuing loss of income notwithstanding the ending of disability in *Marquis*. The W-2 form, if issued by a sub-chapter S corporation that is losing money, is within the control of the claimant. It does not reflect income from work, but rather cash flow from loans or not paying payables to creditors. If the W-2 report is from losses and is not truly from income, the claimant can just as easily continue to issue himself or herself payment reportable on the W-2 after the accident, since the W-2 is a meaningless form that merely

reflects cash flow to the claimant from a business venture that does not actually generate income from work. To pay work loss in this situation would be to subsidize the business losses that preexisted the accident, not compensate for actual loss of income.

Treating the corporate form as respected thus requires further consideration of the specific corporate form. The fact that a sub-chapter S corporation is the form that the claimant has adopted for reporting income, is inextricably intertwined with taxation. Income related to taxation is not only the reality that all of us deal with on a day-to-day basis, i.e., that we must pay income tax on income, but it is also specifically dealt with in the No-Fault Act in Section 3107(1)(b) in recognizing the tax effect. The meaning of “income” must be derived from the associated words and provisions that relate it to taxation. It would thus be ironic and quite contrary to the legislative intent reflected in the term “loss of income from work,” to not respect the fact that for a sub-chapter S corporation, the form for income and taxation is the same as the sole proprietorship that is subject to the rule in *Adams v Auto Club Insurance Association*, 154 Mich App 186; 397 NW2d 262 (1986). The real income in both cases is gross receipts less expenses, since in both cases the income and the expenses flow through to the individual who similarly reports his income for taxation as the net of this equation.

As an *amicus* party, Farm Bureau Mutual additionally points out that it is aware of this dilemma because a large number of its policyholders are farmers who may have no demonstrable loss of income compensable under the statute and yet have a need for cash to continue a farming operation during a period of disability. Therefore, it offers, as an optional coverage, farmer replacement labor coverage as a supplemental coverage. See Exhibit D, the “Farmer Replacement Labor Endorsement”.

This point of this is three-fold. First, it is in recognition that the statute does not provide complete compensation for individuals who may have an uncompensated economic loss (in recognition that not all economic losses are compensable under the Act), but it is not loss of income from work compensable under the statute. Second, where a class of policyholders, e.g., farmers, do pay for supplemental coverage to cover business economic loss not covered by the Act (to hire workers to carry on their farming enterprise), it is doubly unfair for another class of claimants such as Plaintiff to be granted work loss benefits gratis as self-employed business owners who choose to utilize a sub-chapter S corporate form because able to deduct business expenses from gross receipts the same as a sole proprietor. Third, the rule in *Adams v Auto Club* is correct for all self-employed persons, regardless whether operating as a sole proprietor or sub-chapter S corporation, because it treats the same all persons who are basing actual income on gross receipts less expenses. The loss of income from work is and should be computed the same regardless of business form.

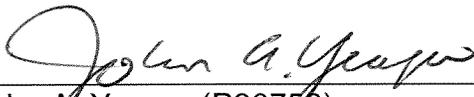
CONCLUSION AND RELIEF REQUESTED

The lower courts should be reversed because the rule in *Adams* should be applied to sub-chapter S corporations as well as any other business form that determines income based on gross receipts less expenses. Regardless, the award of attorney fees should be reversed and the legal standard for attorney fees be corrected because the proper standard of review of a trial court's decision to grant attorney fees under MCL 500.3148(1) is a mixed standard of review (clear error and de novo), and no rebuttable presumption exists under the plain language of MCL 500.3148(1).

Respectfully submitted,

WILLINGHAM & COTE, P.C.

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A

Order

Michigan Supreme Court
Lansing, Michigan

June 15, 2007

Clifford W. Taylor,
Chief Justice

130917

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

RANDALL L. ROSS,
Plaintiff-Appellee,

v

SC: 130917
COA: 262167
Macomb CC: 2004-001913-CK

AUTO CLUB GROUP,
Defendant-Appellant.

On March 7, 2007, the Court heard oral argument on the application for leave to appeal the January 3, 2006 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) 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"); (2) what is the appropriate method of determining whether a claimant is entitled to work loss benefits pursuant to MCL 500.3107(1)(b) for loss of income where the claimant is the sole shareholder and employee of a subchapter S corporation, 26 USC 1361 *et seq.*; (3) in evaluating the claimant's work loss claim, what is the relevance, if any, of (a) the subchapter S corporation's profit or loss, and (b) the wages the sole shareholder reports to the federal government for income tax purposes; and (4) when an 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 Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Inc., and any interested section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

KELLY, J., would deny leave to appeal.



p0612

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 15, 2007

Corbin R. Davis

Clerk

B

LEXSEE 484 F3D 1230



Analysis
As of: Aug 07, 2007

Parent V.S., on behalf of Student A.O., Plaintiff-Appellant, v. LOS GATOS-SARATOGA JOINT UNION HIGH SCHOOL DISTRICT, Defendant-Appellee.

No. 04-17480

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

484 F.3d 1230; 2007 U.S. App. LEXIS 10918

**November 14, 2006, Argued and Submitted, San Francisco, California
May 9, 2007, Filed**

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. CV-04-03675-HRL. Howard R. Lloyd, Magistrate Judge, Presiding. *Sekyra ex rel. Oyer v. Los Gatos-Saratoga Joint Union High Sch. Dist., 2004 U.S. Dist. LEXIS 23628 (N.D. Cal., Nov. 12, 2004)*

Education Act (IDEA), *20 U.S.C. § 1400 et seq.* **[*1232]** (2000). Because the hearing officer determined that student A.O. was deprived of a free and appropriate public education (FAPE), and that A.O. was eligible for special education, A.O. was a prevailing party entitled to an award of attorneys' fees. We reverse the district court's ruling to the contrary and remand for an award of attorneys' fees.

DISPOSITION: REVERSED and REMANDED.

I. Background

COUNSEL: Valerie J. Mulhollen, San Leandro, California, for the appellant.

When A.O. was a student in the Los Gatos-Saratoga Joint Union High School District, her mother filed a petition for a due process hearing pursuant to **[**2]** the IDEA and corresponding provisions of California law. After a due process proceeding, the hearing officer concluded that the school district had denied A.O. her legal right to a FAPE by failing to conduct a timely assessment to determine A.O.'s special education needs and by inappropriately finding A.O. ineligible for special education. However, because the school had started an assessment process during the course of the proceedings, the hearing officer limited his finding of eligibility to the time period of January 24-April 26, 2004 (the latter date being the last day of the hearing). The hearing officer declared A.O. to be the prevailing party to the extent of his ruling.

Gregory A. Wedner, Lozano Smith, Monterey, California, for the appellee.

JUDGES: Before: Mary M. Schroeder, Chief Circuit Judge, Jerome Farris and Johnnie B. Rawlinson, Circuit Judges.

OPINION BY: Johnnie B. Rawlinson

OPINION

[*1231] RAWLINSON, Circuit Judge:

This case presents the issue of when one is a prevailing party under the Individuals with Disabilities

A.O.'s mother sought attorneys' fees in federal

district court on behalf of A.O. pursuant to the IDEA, § 1415(i)(3)(B). The school district moved to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*. Essentially, the school district contended, as it does on appeal, that A.O. was not a prevailing party because the hearing officer's decision was insufficient to materially alter the legal relationship between the parties. Alternatively, the school district contended that any alteration of the relationship [**3] was *de minimis*. The district court agreed with the school district's position and dismissed the complaint for attorneys' fees without leave to amend.

II. Standard of review

Although a district court's denial of attorneys' fees is typically reviewed for abuse of discretion, "any elements of legal analysis and statutory interpretation underlying the district court's attorneys' fees decision are reviewed *de novo*, and factual findings underlying the district court's decision are reviewed for clear error." *P.N. v. Seattle Sch. Dist., No. 1*, 458 F.3d 983, 985 (9th Cir. 2006) (citations omitted). As the district court dismissed for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, the question before this panel is a legal one that should be reviewed *de novo*. See *San Pedro Hotel Co. Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998). Moreover, the district court determined that A.O. "cannot establish that she obtained any affirmative relief or a judgment that materially altered the legal relationship of the parties." The Eighth Circuit has appropriately described this determination as a test of "unmistakably legal [**4] terms" requiring *de novo* review. *Jenkins v. State of Missouri*, 127 F.3d 709, 713-14 (8th Cir. 1997). This precise issue has not been resolved in this Circuit.¹ However, we agree with the reasoning of the Eighth Circuit in *Jenkins*. The question of whether a judgment has materially [*1233] altered the legal relationship of the parties is a legal one. Essentially, the determination represents part of the "legal analysis and statutory interpretation underlying the district court's attorneys' fees decision," *P.N.*, 458 F.3d at 985, and, as such, the appropriate standard of review is *de novo*. See *id.*

¹ In *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006), we applied the abuse of discretion standard without discussion. *Id.* at 1031, 1034. However, we are not bound by a holding "made casually and without analysis, . . . uttered in passing without due consideration of

the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention . . ." *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001); see also *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1082 (9th Cir. 2006).

[**5] III. Analysis

The district court correctly determined that for A.O. to be entitled to attorneys' fees as a prevailing party under the IDEA, she must demonstrate that the hearing officer's order created "a material alteration of the legal relationship of the parties." See *Shapiro v. Paradise Valley Unified School Dist.*, 374 F.3d 857, 864 (9th Cir. 2004). The district court also properly noted that this means the hearing officer's order must give A.O. the ability to "require[] the [school district] to do something [it] otherwise would not have to do." *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000). Additionally, the district court appropriately recognized that "a plaintiff is not the prevailing party if his or her success is purely technical or *de minimis*." *Shapiro*, 374 F.3d at 865 (citation omitted).² Nevertheless, the district court erred in finding that the hearing officer's eligibility determination did not "require[] the [school district] to do something [it] otherwise would not have to do." *Fischer*, 214 F.3d at 1118.

² The district court also correctly noted that the hearing officer's designation of prevailing party status cannot be dispositive in itself, given *Cal. Educ. Code* § 56507(b)(1)'s directive that attorneys' fees may be awarded only pursuant to agreement by the parties, or by a court of competent jurisdiction.

[**6] As demonstrated by the plain meaning of the statute and its accompanying regulations, an eligibility determination is the most important aspect of the IDEA. It is the lynchpin from which all other rights under the statute flow. See 34 C.F.R. § 300.535(b) ("If a determination is made that a child has a disability and needs special education and related services, an IEP [individualized education program] must be developed for the child in accordance with §§ 300.340-300.350."); see also, 34 C.F.R. §§ 300.340-300.350 (providing detailed requirements for the development of eligible children's IEPs); 34 C.F.R. § 300.300 (FAPE requirement triggered by being a "child[] with a disability.").

It is true that the hearing officer purportedly limited his determination of eligibility to a specific time period preceding the issuance of his opinion. As a result of that determination, the district court concluded that there was no prospective relief afforded, and that nothing in the hearing officer's opinion could be judicially enforced. This finding was legally incorrect. The hearing officer only expressed this limitation because the school district was in the process of conducting [**7] an assessment. In essence, the school anticipated that the hearing officer would find that A.O. was a student with a disability and was, therefore, already conducting a reassessment to determine if her eligibility was continuing and, if so, what services she would need. Had the school not been engaged in the reassessment process, the hearing officer would not have limited his eligibility finding to a past period. Once the school properly completed the reassessment, it then was required to develop an appropriate IEP or *disqualify* A.O. if the reassessment demonstrated that she was no longer eligible for special education services. *See 20 U.S.C. § 1414(c)(5)*. The reassessment itself constituted an obligation the school would not have had if there had been no finding that A.O. was a student with a disability. An understanding of this nuance is crucial to the outcome of this case.

[*1234] Once the hearing officer deemed A.O. eligible for special education services as a "child with a disability," the school district could not thereafter have determined that she was not so eligible without conducting a reevaluation. *See id.* ("A local educational agency shall evaluate [**8] a child with a disability in accordance with this section *before* determining that the child *is no longer* a child with a disability." (emphasis added)).

The hearing officer's statement, therefore, that he was making no determination about future eligibility does not mean that there were no significant aspects of the order that were judicially enforceable, thus altering the legal relationship of the parties. For example, on the date the hearing officer's decision was issued, because the hearing officer had found that A.O. *was* previously eligible for special education services, she automatically *remained* eligible. *Id.* Accordingly, the school district was required to develop an IEP for her, absent conducting a new evaluation. *Id.*; *see also 34 C.F.R. § 300.535(b)*.

In other words, prior to the hearing officer's decision, the school district would have been free to discontinue

the assessment process it began during the course of the due process hearing, and could have refused to provide special education services to A.O. The hearing officer's eligibility determination fundamentally limited the school district's options. Because A.O. was officially classified [**9] as a "child with a disability" as a result of the hearing officer's decision, the school at that point, and prospectively, had only two choices: 1) provide A.O. services in accordance with an appropriately developed IEP, *34 C.F.R. § 300.535(b)*; or 2) properly complete the assessment in order to find her ineligible. *20 U.S.C. § 1414(c)(5)*. These actions are ones that, absent the hearing officer's decision, the school district "otherwise would not have to do." *Fischer, 214 F.3d at 1118*. Thus, the district court erred in its determination that the hearing officer's order did not sufficiently alter the nature of the legal relationship between the parties to render A.O. a prevailing party.

A.O.'s victory was not *de minimis* or technical. As previously outlined, the eligibility determination is the lynchpin of all rights under the IDEA. In addition, the hearing officer specifically determined that as a result of the school district's failure to find A.O. eligible, she was denied a FAPE. In *Park*, we recognized the importance of that denial:

Nor are the issues on which Appellant[] prevailed merely technical; rather, they go to the [**10] very essence of the Individuals with Disabilities Education Act. The determination by the Hearing Officer and the district court that [the child] was denied a free and appropriate public education . . . -- *even setting aside the other issues on which Appellant[] prevailed* -- is the most significant of successes possible under the Individuals with Disabilities Education Act.

Park, 464 F.3d at 1036 (emphasis added).³

3 This determination alone might well be dispositive. However, in *Park*, the hearing officer ordered that additional goals be added to the IEP, and that compensatory education services be provided to the child's teachers for the child's benefit. *464 F.3d at 1030-31*. Nevertheless, given the statement that the determination regarding a denial of FAPE *alone* would be sufficient to

confer prevailing party status, *id. at 1036*, *Park* lends strong support to A.O.'s position.

The hearing officer's decision materially altered the legal [**11] relationship between the parties in a manner that cannot be considered *de minimis*, rendering A.O. a prevailing party entitled to the award of attorneys' fees. Accordingly, we reverse the judgment of the district court and remand [*1235] with instructions to calculate and award attorneys' fees.

REVERSED and REMANDED.

DISSENT BY: Jerome Farris

DISSENT

FARRIS, Circuit Judge, dissenting:

Neither the IEP requirement nor the reevaluation requirement apply in the present case, since the regulation and statute from which they arise are triggered only when it is determined that a child presently has a disability. The hearing officer's decision does not support classifying A.O. as such.

The IEP requirement is found in 34 C.F.R. § 300.306(c)(2) (formerly 34 C.F.R. § 300.535(b)): "[i]f a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child." The hearing officer found "that [A.O.] was eligible for special education from January 24, 2004, through April 26, 2004," (emphasis added), and elsewhere stated that he "makes no findings . . . with regard to [A.O.]'s eligibility after April 26, 2004." Since [**12] the decision was issued and dated June 1, 2004, there was no point at which Appellant could rely on it to establish that A.O. "has a disability" as required to enforce 34 C.F.R. § 300.306(c)(2). The best Appellant could show is that during a specified but foregone period, A.O. *had* a disability.

The requirement that a school district reevaluate eligible children before effecting a change in their eligibility does not change this result. That requirement, found in 20 U.S.C. § 1414(c)(5)(A), mandates that "a local educational agency shall evaluate a child with a disability . . . before determining that the child is no longer a child with a disability." The hearing officer's express limitation on the eligibility finding forecloses the

possibility of concluding that A.O. was a "child *with* a disability." His decision supports, at most, the retrospective observation that A.O. was so qualified during a specified period in the past.

The school district had begun its own assessment of A.O. ¹ Under other circumstances, a hearing officer's ability to limit an eligibility determination would not likely be disputed. Consider, for example, a parent who files [**13] suit seeking compensation for resources expended to educate a temporarily disabled child. The hearing officer's decision that the student was disabled for a period of several months the year prior could not be asserted as finding that the "child *has* a disability" under 34 C.F.R. § 300.306(c)(2). Nor can it constitute a determination rendering the student a "child *with* a disability" pursuant to 20 U.S.C. § 1414(c)(5)(A). Thus, while the parent might be entitled to an award of damages, the student's school would not incur obligations under either provision. The fact that the expressly limited period of past eligibility here coincidentally bordered the present does not change this analysis.

1 I disagree with the majority's contention that either the hearing officer's reason for limiting his holding -- or the school district's anticipation of the eligibility determination -- is a nuance the understanding of which is crucial to the case's outcome. Neither impacts the legal effect of the hearing officer's decision.

[**14] Although the ordinary effect of the tandem operation of the IDEA's IEP and reevaluation requirements is that prior eligibility findings automatically result in continuing eligibility, this is not the case when the hearing officer explicitly limits his eligibility finding to a discrete period in the past.

Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025 (9th Cir. 2006), does not change the analysis. *Park* does state that a determination that a child was denied a free and appropriate [*1236] public education "is the most significant of successes possible" under the IDEA. *Id. at 1036*. But even if Appellant achieved this "most significant of successes," she nonetheless failed to effect a material alteration of the legal relationship of the parties and is not a prevailing party. I would therefore affirm the district court's proper denial of attorneys' fees.

C

LEXSEE 302 NC 375



Positive
As of: Aug 07, 2007

In The Matter Of: The Will Of MATTIE T. RIDGE, Deceased

No. 49

SUPREME COURT OF NORTH CAROLINA

302 N.C. 375; 275 S.E.2d 424; 1981 N.C. LEXIS 1051

March 4, 1981, Filed

PRIOR HISTORY: [***1] On petition for discretionary review pursuant to *G.S. 7A-31* filed by caveators of the will of Mattie T. Ridge, deceased, from a decision of the Court of Appeals reported in *47 N.C. App. 183, 266 S.E. 2d 766 (1980)*, vacating an order of *Graham, Judge*, entered at the 27 June 1979 Session of Superior Court, Guilford County, allowing attorneys' fees for caveators' counsel and costs from the estate and remanding the cause to the Superior Court of Guilford County for further hearing. Caveators' petition for discretionary review was allowed on 16 September 1980. This case was docketed in the Fall Term 1980 as Case No. 130 but argued in the Spring Term 1981 as Case No. 49.

DISPOSITION: Reversed and remanded.

COUNSEL: *Edwards, Greeson, Weeks & Turner, by Elton Edwards, for caveators-appellants.*

Wyatt, Early, Harris Wheeler & Hauser, by William E. Wheeler, for propounders-appellees.

JUDGES: MEYER, Justice.

OPINION BY: MEYER

OPINION

[*376] [**424] Mrs. Mattie T. Ridge died testate

in High Point, Guilford County, North Carolina, on 28 November 1978 at the age of 85. On 7 December 1978, Virginia T. Jackson, [***3] a niece of Mrs. Ridge, presented decedent's will and three attached codicils to the Clerk of Superior Court of Guilford County for probate. [**425] The original will, dated 28 May 1970, and three codicils, dated 13 May 1974 (hereinafter referred to as first codicil), 22 November 1974 (hereinafter referred to as second codicil), and 16 October 1975 (hereinafter referred to as third codicil), were admitted to probate in common form as together constituting decedent's last will and testament.

The original will, executed when the testatrix was 76 years old, in general provided for conventional disposition of testatrix's property: specific bequests to her husband, a niece, a church, and a brother, with the residue to be divided one-fifth to her husband, one-fifth to each of her two living brothers, and one-fifth to children of each of her two deceased brothers and named a brother as executor. The first and second codicils were executed when testatrix was 81 years old and the third codicil when she was 82 years old. These codicils substantially changed the distribution of her estate. The first codicil, among other things, included a specific bequest to Virginia Jackson of \$ 5,000. [***4] The second codicil, among other things, designated the share of a deceased brother, Alson Thayer (the caveators' father, who had died since the execution of the will), to nieces and nephews other than Alson Thayer's children, thereby

302 N.C. 375, *376; 275 S.E.2d 424, **425;
1981 N.C. LEXIS 1051, ***4

increasing the share of the estate bequeathed to Virginia Jackson. Virginia Jackson was also named as executrix. The third codicil increased the bequests to several people including Virginia Jackson.

After the will was probated in common form, Virginia Jackson qualified and undertook the administration of decedent's estate.

[*377] On 19 January 1979, Lucy Thayer Koontz, Faye Thayer Kilgore and Marie Thayer McFarlan, the three children of Alson M. Thayer, the brother of decedent who was named in the original will but whose name had been stricken from the will by the second codicil, filed a caveat to the will as probated. The original will was not questioned. The caveat alleged the invalidity of the three codicils attached to the will and asserted that at the time testatrix executed each of the codicils, she lacked testamentary capacity to do so; that undue influence was exerted upon testatrix at the time each codicil was executed; and that [***5] decedent was mistaken as to the nature, contents or identity of each of the three codicils.

On 14 May 1979, caveators withdrew their allegation as to the invalidity of the three codicils on the ground of lack of testamentary capacity.

The matter came on for trial at the 25 June 1979 Special Session of the General Court of Justice, Superior Court Division, High Point, North Carolina, before Judge William T. Graham. At the trial of the case, caveators (having previously waived their allegation of lack of testamentary capacity) waived their allegation as to the invalidity of the three codicils on the ground of mistake, leaving only the allegation of undue influence.

At the close of caveators' evidence, the propounders moved for a peremptory instruction on all issues. Caveators stipulated that the third codicil was properly executed and did not resist a peremptory instruction on that issue. The court allowed propounders' motion for peremptory instruction and submitted to the jury only the issue of *devisavit vel non*. The jury returned a verdict in favor of the propounders, and thereafter judgment was entered by Judge Graham admitting the four instruments to probate in solemn [***6] form as decedent's last will and testament.

Caveators gave notice of appeal and asked to be heard with respect to counsel fees. Counsel for

propounders asked to be heard on the propriety of any award whatsoever of counsel fees for caveators. The court heard argument for propounders and caveators and, finding that the action was brought in good faith, held that caveators as well as propounders were entitled to have their legal fees paid out of the estate. The court then instructed counsel to have time sheets and appropriate orders prepared in accordance with *G.S. 6-21(2)*, leaving the amount blank. On the following day, caveators [*378] presented time records and other information supporting legal services rendered [**426] on their behalf in affidavit form together with proposed orders for attorneys' fees and costs as requested by the court. The court, after hearing evidence of both propounders and caveators as to the fees and costs, awarded propounders \$ 13,000 in attorneys' fees and certain costs and awarded caveators \$ 7,500 in attorneys' fees, all to be paid from the estate. The following day, the court signed a separate order for caveators' costs and for refunding [***7] the \$ 200 cash bond which had been filed when the action was instituted. Propounders appealed from the order contending that the trial court erred in awarding attorneys' fees and costs to caveators both as a matter of law and as an abuse of discretion. Caveators subsequently, on 20 August 1979, filed a stipulation of dismissal of their appeal and by proper order it was dismissed. Propounders appealed from the order of Judge Graham awarding caveators' counsel fees and costs from the estate. The Court of Appeals, in an opinion filed 3 June 1980, vacated Judge Graham's order and remanded the case to the Superior Court of Guilford County for another hearing to determine the propriety of awarding caveators' attorneys' fees and, if found proper, the amount of such fees.

All parties agree that resolution of this cause is governed by *G.S. 6-21*:

Costs allowed either party or apportioned in discretion of court. -- Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

...

(2) Caveats to wills and any action or proceeding which may require the construction of any will or

302 N.C. 375, *378; 275 S.E.2d 424, **426;
1981 N.C. LEXIS 1051, ***7

trust agreement, [***8] or fix the rights and duties of parties thereunder; provided, however, that in any caveat proceeding under this subdivision, if the court finds that the proceeding is without substantial merit, the court may disallow attorneys' fees for the attorneys for the caveators.

...

The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' [*379] fees in such amounts as the court shall in its discretion determine and allow:

....

In the decision of the Court of Appeals, we find the following:

In its order for counsel fees the trial court made no finding or conclusion with respect to whether the proceeding was without substantial merit. Under the evidence in this case, without such a finding we cannot determine whether the trial court properly exercised its discretion in awarding the counsel fees.

For this reason, the order allowing attorneys' fees for caveators' counsel and costs must be vacated and the cause remanded to the Superior Court of Guilford County for another hearing to determine the propriety of awarding attorneys' fees to counsel for caveators and, if found proper, the amount of such [***9] fees.

The clear implication of this portion of the decision is that the trial judge is required to make a specific finding with respect to whether the proceeding was "without 'substantial merit.'" In their briefs and in oral

argument before this Court, appellees conceded that the Court of Appeals erred in remanding the case to the Superior Court for findings with regard to the propriety of awarding counsel fees and costs to caveators and the amount thereof. We agree. We fail to find any statutory *requirement* that a specific finding as to whether or not the case was without substantial merit be made, nor do we find that our case law establishes such a requirement. By the plain language of the statute the words "if the court finds" renders the proviso with respect to a finding that the case is without merit subjunctive, and the word "may" renders it permissive even in a case where this proviso applies. The phrase "if the court finds" clearly contemplates a contingency, the contingency being that the court might in some cases make a finding that a case was without substantial merit. Only in the event of that contingency does [**427] the proviso apply, and then the [***10] word "may" renders it permissive even in that event. Appellees strenuously contend, however, that the caveat had no merit at all and that the court abused its discretion in allowing counsel fees and costs for caveators to be paid from the estate. Therefore, argue appellees, Judge Graham's order awarding costs and attorneys' fees to caveators should be set aside.

[*380] Ordinarily, attorneys' fees are taxable as costs only when expressly authorized by statute. *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E. 2d 21 (1952). G.S. 6-21 specifically authorizes the trial court in its discretion to allow attorneys' fees to counsel for unsuccessful caveators to a will. *In re Coffield's Will*, 216 N.C. 285, 4 S.E. 2d 870 (1939); *In re Will of Slade*, 214 N.C. 361, 199 S.E. 2d 290 (1938) (both cases construing the predecessor to G.S. 6-21). The statute does not *require* the court to award attorneys' fees in such cases but clearly *authorizes* the court to do so. It is a matter in the discretion of the court, both as to whether to allow fees and the amount of such fees. *Godwin v. Trust Company*, 259 N.C. 520, 131 S.E. 2d 456 (1963). The findings of the trial [***11] judge are conclusive on appeal if there is competent evidence in the record to support them. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968), see Strongs, 1 N.C. Index 3rd, Appeal and Error § 57.2. This is true even though there may be evidence in the record which could sustain findings to the contrary. *Id.* We must therefore determine whether the trial judge's award of caveators' attorneys' fees and costs from the estate constituted an abuse of discretion. In order to make that determination we must first consider whether there is competent evidence in the record before

us to support the findings and conclusion of the trial judge.

The Court of Appeals found that the evidence in the case in the trial court strongly supported the propounders' argument that the caveat had no merit at all: that caveators, before trial, abandoned their claims of lack of testamentary capacity and mistake on the part of the testatrix, and that on the remaining issue of undue influence, the record is absolutely void of any evidence to substantiate such claim.

In his order of 27 June 1979 allowing caveators' attorneys' fees and directing that they be taxed against the estate, Judge [***12] Graham made the following findings of fact and conclusion:

1. The action of Caveators in initiating this proceeding was apt and proper, and their claim was reasonable, made in good faith and *prima facie* in the interest of the estate.

2. Upon an affidavit submitted by counsel for the Caveators, which is attached hereto, and statements of such counsel, and upon consideration of the record [*381] in this action and of the nature and complexity of the action, the Court finds that the sum of \$ 7500.00 is a fair and reasonable attorney's fee for counsel of the Caveators;

Upon such findings, the Court, in the exercise of its discretion, concludes that the Caveators should be awarded their costs, including a reasonable attorney's fee;

"Apt" and "proper" both mean that which is fit, suitable and appropriate. Black's Law Dictionary, 94, 1094 (5th Ed. 1979). "Good faith" means honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. *Id.* at 623-24. "*Prima facie*" means at first sight, on the first appearance, on the face of it, so far as can be adjudged from the first disclosure. *Id.* [***13] at 1071. Therefore, "*prima facie* in the best interest of the estate" means on first appearance in the best interest of the estate.

As to the amount of the fees awarded, Judge Graham properly considered the affidavit and statements of counsel for caveators, the record in the proceeding, and the nature and complexity of the caveat proceeding. While the record does not contain a copy of the caveators' counsel's affidavits, we note in the briefs submitted to this Court by the propounders that the caveators' counsel's affidavit showed the number of hours expended by caveators' counsel, the [**428] length of time the attorney had practiced law, his usual charges for litigation, and his opinion of the customary charges for litigation in Guilford County.

We note in the record of the exchange between counsel and Judge Graham concerning whether or not counsel fees and costs should be awarded the caveators, which followed immediately the taking of the verdict, that Judge Graham stated, "Well, I think it is in good faith. It is . . . not obviously the strongest case, but I think it was brought in good faith . . . I think that the caveators are entitled to have their legal fees [***14] paid out of the estate as are the propounders." On the following day, in a hearing on proposed attorneys' fees for both parties, the judge, after allowing certain costs and disallowing others, stated:

As to the case in general, I don't know when I have tried a case that counsel have been as well prepared for as they were in this case. Counsel for propounders was especially well prepared in this matter and was prepared for just [*382] about any eventuality that could have occurred in this case. Caveators' counsel were also prepared

On the caveator's side, the caveator was fully prepared for the case and the case appeared to the Court to have merit. As it went along it obviously did not have as much merit as it could have had.

We note that the propounders' counsel were awarded the amount of \$ 13,000. We find ample competent evidence in the record before us to support the trial judge's finding that the sum of \$ 7,500 was a fair and reasonable fee for counsel of the caveators.

In 1 Wiggins, Wills and Administration of Estates in North Carolina § 55, a number of different circumstances

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are said to be indicia of undue influence: (1) that the testator [***15] was of advanced age and subject to physical and mental weakness; (2) that the testator was in the home of the beneficiary, subject to his constant supervision, and others had little or no opportunity to see him; (3) that there is a variance of testamentary dispositions with the testator's intentions as expressed in a prior will; (4) that the provisions of the will were unnatural; i.e., the testator disinherited the natural objects of his bounty; and (5) that the chief beneficiaries of the will were active in procuring the execution of the will. Dr. Wiggins further notes that the leniency in allowing a wide range of testimony on the issue of undue influence is due to the fact that undue influence has to be shown by circumstantial evidence. *Id.* § 56.

Evidence in the record before us with regard to the foregoing circumstances cited by Wiggins includes the following:

1. The testatrix was 76 years old when she executed her original will but was 81 years old when the first two codicils were executed and 82 years old when the last codicil was executed. She could no longer sign her name and she was crippled from severe rheumatoid arthritis, blind, and steroid dependent. She had [***16] been on medication since 1956 and was chair-ridden and had to be fed by others.

2. The testatrix was dependent upon a housekeeper to attend to her physical needs until she went to a nursing home, and upon a niece, Virginia Jackson, to handle her financial affairs, particularly after giving Virginia Jackson a power of attorney.

[*383] 3 and 4. Testatrix's original will provided for a natural distribution of her estate by making provisions for two living brothers and the children of two deceased brothers. The second codicil, which was written after the testatrix's brother, Alson Thayer (caveators' father) died, did not make provision for Alson's three children as the testatrix had done for her other two deceased brothers' children; instead, the share of the estate Alson Thayer would have taken was designated for the children of testatrix's two other deceased brothers. Evidence from at least two witnesses at the trial indicated that the testatrix showed equal affection for all nieces and nephews as well as other members of her family. Each codicil resulted in her niece, Virginia Jackson, receiving a larger portion of the estate.

5. While the original will was prepared [***17] by an attorney and maintained by him in a lockbox, the three codicils were prepared by [**429] the niece, Virginia Jackson, who was present at the execution of each codicil. The testatrix's attorney testified that he knew only about the first codicil. The first time the third codicil came to light was when Virginia Jackson produced it from her briefcase in the testatrix's attorney's office the day after the funeral, gave it to him and said, "I know you said no more codicils." There was also evidence that Virginia Jackson, following the funeral, told a number of members of the family that she could not permit the testatrix to give \$ 10,000 to Christ United Methodist Church and continue to give money to various other recipients.

In *In re Will of Amelia Everett*, 153 N.C. 83, 68 S.E. 924 (1910), this Court said:

[W]hen a will is executed through the intervention of a person occupying a confidential relation towards the testatrix, whereby such person is the executor and a large beneficiary under the will, such circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, and then the law casts upon him the burden of removing the suspicion [***18] by offering proof that the will was the free and voluntary act of the testator.

Id. at 85, 68 S.E. at 925; see also *McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615 (1943).

The caveators contend that the highly dependent condition of [*384] the testatrix combined with the fiduciary relationship between her and Virginia Jackson, the latter's part in preparing and presiding over the execution of the codicils, and her ever-increasing share of the estate as each codicil was signed, raised at least a strong suspicion of the exercise of undue influence. We agree. Further, with this strong suspicion present, it appeared at least *prima facie* in the best interest of the estate that this cloud be removed and that the will be probated in solemn form. We therefore hold that there was ample evidence to support Judge Graham's finding of

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fact that the action of the caveators in initiating the proceeding was apt and proper and that their claim was reasonable, made in good faith and *prima facie* in the interest of the estate.

Having found ample competent evidence in the record before us to support the findings and conclusion of the trial judge, we conclude that [***19] there was no abuse of discretion on his part in the allowance of caveators' attorneys' fees and costs to be paid from the estate or the amounts thereof.

We do not deem *In re Moore*, 292 N.C. 58, 231 S.E. 2d 849 (1977), relied upon by the propounders, apposite here. In that case, this Court held that *G.S. 6-21(2)* does not authorize the awarding of costs and attorneys' fees to an individual in pressing his claim for appointment as

executor under a will when such individual is disqualified as a matter of law from serving as executor. We note, however, that even there, attorneys' fees were allowed for other activities of the same individual.

We have carefully considered all other assignments of error brought forward by the propounders and find them to be without merit.

The decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court of Guilford County for reinstatement of Judge Graham's orders of 27 June 1979 and 28 June 1979 awarding attorneys' fees and costs to caveators to be paid from the estate.

Reversed and remanded.

A

FARMER REPLACEMENT LABOR ENDORSEMENT

The provisions that apply to Part II - Michigan No-Fault Coverages, also apply to this endorsement unless modified by this endorsement.

A. Insuring Agreement

We will pay reasonable expenses for **farmer replacement labor** if you sustain **bodily injury** due to an **auto accident** covered by this policy.

B. Additional Definition

Farmer replacement labor means the physical labor necessary to replace you so that your farming operation is continued as it would have had you not sustained **bodily injury**.

C. Limit of Liability

1. Our limit of liability for **farmer replacement labor** necessary due to any one occurrence is the per day limit shown in the Declarations as applicable to this endorsement. This is the most we will pay regardless of the number of persons insured or claims made. The period of coverage shall not exceed three years beginning from the date of the **auto accident**.
2. Any amount payable under this endorsement shall be reduced by any amounts payable from any other source that serves the same purpose as the benefits payable under this endorsement for the same **auto accident**.
3. **Farmer replacement labor** does not include any expense incurred after you die.
4. No deductible applies to this endorsement.

D. Additional General Provisions

1. You must fully document the:
 - a. hiring of;
 - b. hours worked by; and
 - c. payment made for;the **farmer replacement labor** for which you claim benefit under this endorsement.
2. Coverage begins the day after the **auto accident**.

All other provisions of this policy apply.