

STATE OF MICHIGAN  
IN THE SUPREME COURT

On appeal from the Michigan Court of Appeals  
(Hon. Joel P. Hoekstra, Hon. Hildra R. Gage and Hon. Kurtis T. Wilder)

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RANDALL L. ROSS,

Plaintiff-Appellee,

v

AUTO CLUB GROUP,

Defendant-Appellant.

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Supreme Court No. 130917  
Court of Appeals No. 262167  
Macomb Circuit Court No. 2004-001913-CK

**BRIEF OF AMICUS CURIAE  
MICHIGAN HEALTH & HOSPITAL  
ASSOCIATION IN SUPPORT OF  
APPELLEE**

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## STATEMENT OF INTEREST

Amicus Curiae, Michigan Health & Hospital Association, is a membership organization representing all of Michigan's one hundred forty-eight (148) acute care hospitals. Amicus Curiae also represents many psychiatric, rehabilitative, and other specialty hospitals in the State. Amicus Curiae has served its members, and, thereby, the patients they treat, in a leadership role since 1919 by developing and promoting programs and positions that have enhanced Michigan hospitals' ability to deliver comprehensive, high-quality and cost-efficient care.

This case presents issues that will have a far-reaching effect on the ability of Michigan's hospitals to provide and be promptly compensated for medically necessary care furnished to patients injured in motor vehicle accidents. These services represent a significant portion of the care provided by Michigan hospitals, much of which is necessary to treat life-threatening or catastrophic injuries. Under Michigan's no-fault laws, hospitals that provide medical care for persons injured in automobile accidents file claims and are paid directly by no-fault insurers.

One of the main goals of Michigan's no-fault scheme is to encourage prompt payment of these medical expenses, regardless of fault. To this end, the law provides that insurers who delay or deny payment of no-fault benefits will incur additional charges for penalty interest. This penalty serves as an important deterrent against overdue claims.

In an action to recover unpaid benefits, a hospital may also be awarded attorney's fees if the insurance company unreasonably denied or delayed payment. This penalty compensates a hospital forced to engage in a costly, time-consuming process to recover unpaid, overdue no-fault benefits. Although the ultimate burden of proving entitlement to payment for services remains with the hospital, the insurance company bears the burden of going forward with evidence to demonstrate that its refusal or delay in payment was not unreasonable. Shifting this

burden from insurers to Michigan's hospitals and other no-fault claimants will circumvent the purpose of these prompt payment provisions. Furthermore, it will threaten the ability of all claimants, including hospitals and injured patients, to recover benefits that insurers are otherwise obligated by law to pay.

### STATEMENT OF JURISDICTION

For the purposes of this brief, Amicus Curiae accepts and relies on the Statement of the Basis of Jurisdiction submitted by Plaintiff-Appellee.

### STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

For the purposes of this brief, Amicus Curiae accepts and relies on the Counter-Statement of Facts submitted by Plaintiff-Appellee.

## SUMMARY OF ARGUMENT

In its Order Granting Leave to Appeal, this court requested briefing on four issues, two of which impact the ability of Michigan hospitals to receive prompt payment for medical services furnished to patients injured in automobile accidents. As to the first of these issues, the no-fault law, by its operation, creates a "rebuttable presumption" that an insurer's refusal or delay in payment of benefits was unreasonable. As to the second issue, the "unreasonableness" of the insurer's refusal or delay is a finding of fact, and, as such, may only be reversed on appeal if it is clearly erroneous.

## ARGUMENT

### **I. AN INSURER WHO DELAYS OR REFUSES PAYMENT OF NO-FAULT BENEFITS NECESSARILY BEARS THE BURDEN OF DEMONSTRATING THAT THE REFUSAL OR DELAY WAS NOT "UNREASONABLE."**

The goal of Michigan's no-fault insurance system is to provide "assured, adequate, and prompt reparation for certain economic losses" caused by motor vehicle accidents. *Celina Mut Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996) (emphasis added). The underlying premise of no-fault insurance is relatively simple: Each party is paid for economic losses by his or her own insurance company, regardless of anyone's fault. See O'Connell, No-Fault Insurance: What, Why and Where?, 443 Annals Am Acad Pol & Soc Sci 72 (1979). In exchange for assured compensation, the parties avoid a costly, time-consuming process of assessing and assigning "fault." By penalizing insurers who delay or refuse claims payment, the attorney's fee provision of Michigan's no-fault law deters late or overdue claims and thereby, reduces overhead costs and legal fees. O'Connell, *supra* at 72; see MCL 500.3148(1); see also

*McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994); 1 OAG, No 6,865 (August 18, 1995).

Injuries sustained by automobile accident victims are often extensive and even catastrophic. Michigan's no-fault law provides personal protection benefits to cover the costs of medical expenses "reasonably necessary . . . for an injured person's care, recovery, or rehabilitation." MCL 500.3107. These benefits are payable directly to the hospital that cares for a person injured in a motor vehicle accident. See MCL 500.3112. Once the hospital provides "reasonable proof" of the services rendered, the insurance company is obligated to pay the hospital, within a specified period of time. MCL 300.3142(2).

If the insurer denies the claim, or does not pay for the patient's medical expenses in a timely fashion, the hospital may bring a direct action against the insurance company to recover these benefits, on behalf of the patient. *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35; 645 NW2d 59 (2002); see MCL 500.3112. However, this is the costly, time-consuming process the no-fault law was designed to prevent. To compensate hospitals for the costs of litigation, and to penalize an insurer who unreasonably denies or delays payment of benefits, a court may award attorney's fees, "as a charge against the insurer." MCL 500.3148(1).

**A. The Only Way A Court May Determine Whether The Insurer's Delay Or Refusal Was "Unreasonable" Is To Look To The Insurer To Justify Its Decision.**

Automobile no-fault benefits are "overdue," pursuant to MCL 500.3142(2), "if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." It is clear from the language of this provision that a hospital must bear the burden of coming forward with "reasonable proof" of the no-fault claim. If the hospital submits reasonable

proof, but the insurer does not pay the claim within thirty days, the claim is – without qualification or exception – overdue.

If the hospital files an action to recover overdue benefits, the court may award attorney fees if the insurer unreasonably refused or delayed payment. MCL 500.3148(1). Specifically, MCL 500.3148(1) provides that

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.

Before awarding attorney fees under this provision, the trial court must first determine whether the insurer's refusal or delay in payment is "unreasonable." If the court finds that this factual predicate exists, it must award those fees as a charge against the insurer. MCL 500.3148(1). Notably, the legislature used the word "shall" in this provision and, thereby, created a penalty that is mandatory, if the condition of "unreasonableness" exists.

The only conceivable manner in which the court may find "unreasonableness" is to look to the insurer to justify its delay or refusal. Such a justification or reason may be based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. E.g., *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). In other words, unless the insurer can demonstrate that its delay or denial was based on a legitimate question of law or factual uncertainty, that delay or denial is, by definition, "unreasonable."

Requiring a hospital to demonstrate that the insurer's decision was "unreasonable" under this standard is illogical, if not impossible. To bear this burden, the hospital would need to identify every potential question of law and factual uncertainty that the insurer might raise to defend its delay or refusal, and then provide evidence to refute each question or uncertainty. In

other words, this would require the hospital to prove a "negative." As a practical matter, a hospital will rarely, if ever, have access to the discussions, deliberations, policies, and actions that form the basis of an insurer's day-to-day decision-making. Without access to this information, it is impossible for the hospital to know with any level of certainty why the insurer delayed or refused payment. Moreover, the hospital has already borne its statutory burden by providing reasonable proof of the fact and amount of loss. MCL 500.3142(2). If the hospital has carried this burden, then the claim is overdue, and hence, the court should award attorney fees, absent a demonstration by the insurer that its delay was justifiable.

**B. The So-Called "Rebuttable Presumption" Arises By Operation Of The No-Fault Law.**

While lower courts in Michigan, including the Court of Appeals in *Combs v Commercial Carriers Inc*, 117 Mich App 67; 323 NW2d 596 (1982), may have viewed the attorney's fees provision as a "rebuttable presumption," it does not necessarily follow that the courts have "rewritten" the language of the no-fault act. To the contrary, these courts have fulfilled their judicial role by reconciling, harmonizing, and giving natural effect to the words of the legislature, in a manner that is not only logical, but also furthers the underlying purpose of the no-fault system itself.

In essence, MCL 500.3148(1) functions as a "rebuttable presumption." A "presumption is a conclusion of fact that the law requires the fact-finder to draw from another fact or group of facts." Leonard & Gold, Evidence, p 609. The burden of proving the underlying legal claim does not shift. However, the party against whom the presumption is directed bears the burden of producing evidence to rebut or contradict the factual conclusion. MRE 301; *Bieszck v Avis Rent-A-Car Sys, Inc*, 459 Mich 9, 19; 583 NW2d 691 (1998). Certainly, the legislature may, by its

choice of words, create a rebuttable presumption. However, such a "presumption" may also arise by operation of law.

Here, this presumption is grounded in the foundational facts established by MCL 500.3142(2) and 500.3148(1): The hospital provided reasonable proof of the claim; the insurer did not pay the claim within thirty days; and the benefits are now overdue. As described above, the insurer is the only party capable of demonstrating whether its delay or denial of the claim was not "unreasonable." If the insurer does not – or cannot – demonstrate the existence of a legitimate question of statutory construction, constitutional law, or factual uncertainty, then the delay or refusal is, by definition, "unreasonable." In other words, the insurer bears the burden of producing evidence to show the delay or refusal was not "unreasonable." If the insurer cannot meet this burden, no legitimate question exists, and the court must conclude the delay or refusal was, in fact, "unreasonable." If the court concludes the insurer's decision was "unreasonable," the court must award the attorney's fees, as a penalty against the insurer.

**C. Because Attorney's Fees Are a Penalty Against The Insurer, Designed To Deter Delay, The Insurer – Not The Hospital – Must Bear The Burden Of Justifying Such A Delay Or Refusal.**

An insurance company is obligated to make prompt payment of no-fault benefits within thirty days after a hospital provides "reasonable proof of the fact and amount of the loss." MCL 500.3142(1). If an insurer pays promptly, the hospital that provides necessary care and services to patients injured in automobile accidents does not have to allocate time and resources to pursue payment of no-fault benefits. If, on the other hand, the insurer does not pay promptly, and the hospital is forced to initiate legal action to obtain payment, the attorney's fee provision compensates the hospital for the cost of securing legal counsel. This "penalty" further encourages insurers to pay benefits within the specified thirty-day period.

The attorney's fee provision also serves as a powerful deterrent to delays in payment in the first instance. The current statutory scheme provides an incentive, of sorts, for such delays. If a hospital wants to recover all allowable expenses associated with the care of a patient injured in an automobile accident, the hospital must file a lawsuit no later than one year from the date the first expense was incurred. See MCL 500.3145(1); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). Although this rule prevents stale claims and encourages hospitals and other claimants to diligently pursue payment, it may have the effect of encouraging insurance companies to delay payment beyond thirty days and instead "wait out" the one-year period, hoping to create a roadblock to payment.

To deter such potential misconduct, the burden of justifying the refusal or delay must necessarily rest with the insurer. Not only is it counter-intuitive for the hospital to bear this burden, but it also flies in the face of the deterrent effect of the attorney's fee provision. Shifting the burden to the hospital to demonstrate the insurer was "unreasonable" effectively punishes the hospital that played by the rules and makes it more likely a no-fault insurance company will avoid its obligation to pay no-fault benefits.

**II. A TRIAL COURT'S DECISION TO AWARD ATTORNEY FEES IS DISTURBED ON APPEAL ONLY IF THAT DECISION IS CLEARLY ERRONEOUS.**

A trial court's findings of fact may not be set aside unless they are clearly erroneous. MCR 2.613. Whether an insurer's refusal or delay in paying no-fault benefits is "unreasonable" is a question of fact, to be determined by the trial court. See *Liddell v DAIIE*, 102 Mich App 636, 650; 302 NW2d 260 (1981); see also MCL 500.3148(1). Hence, a trial court's finding of unreasonable refusal or delay by an insurer for purposes of awarding attorney fees under the no-

fault law may not be reversed, unless that finding is clearly erroneous. *McKelvie*, 203 Mich App at 334-35.<sup>1</sup>

Awarding attorney fees under MCL 500.3148(1) is not a matter of statutory interpretation. That is, a trial court need not determine what the legislature meant by "unreasonable" because, over the past three decades, Michigan courts have consistently answered this question: A refusal or delay in payment under the no-fault act "is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." E.g., *Lidell*, 102 Mich App at 650.

Moreover, courts apply the "clear error" standard in other, similar contexts. For instance, under a separate provision of Michigan's Insurance Code, if a health insurer does not pay benefits on a timely basis, those benefits bear a 12% per annum penalty interest. MCL 500.2006(4). Whether the claim is "reasonably in dispute," for purposes of assessing this penalty interest, is a question of fact, which appellate courts also review for clear error. *Griswold Props v Lexington Ins Co*, 275 Mich App 801; \_\_\_ NW2d \_\_\_ (2007). Likewise, under the no-fault penalty interest provision, a trial court awards the penalty based on a finding of "overdue payment." This decision, too, involves a question of fact, and as such, is reviewed for clear error. *Williams v AAA Mich*, 250 Mich App 249, 265; 646 NW2d 476 (2002); see MCL 500.3142(2).

## CONCLUSION

Michigan's no-fault law requires prompt payment of no-fault benefits. Attorney's fees are an essential component of this statutory scheme, aimed at deterring late or overdue claims and ensuring that no-fault insurance companies fulfill their payment obligations. The decision of the lower courts in this case should be affirmed, as both decisions preserve the ability of hospitals

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<sup>1</sup> The trial court's decision regarding the amount of attorney's fees is reviewed under the "abuse of discretion" standard. See *Borgess Med Ctr v Resto*, 273 Mich App 558, 576; 730 NW2d 738 (2007); *Butler v DAIE*, 121 Mich

and other claimants to recoup attorney's fees from insurers. Likewise, both decisions preserve the proper "clear error" standard of review of a trial court's decision to award these fees under Michigan's no-fault law.

Respectfully submitted,

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