

STATE OF MICHIGAN  
IN THE SUPREME COURT

HATTIE MOORE and JAMES  
MOORE,

Plaintiffs-Appellees,

-vs-

SECURA INSURANCE, a Mutual  
Company, a foreign corporation,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 267191

Genesee County Circuit Court

No. 01-71881-NF

No. 02-73203 NF

*Opn 7-3-07  
Rec 8-30-07*

*T. Brown*

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APPL  
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39933*

**DEFENDANT-APPELLANT SECURA INSURANCE'S  
APPLICATION FOR LEAVE TO APPEAL**

**\*\* ORAL ARGUMENT REQUESTED \*\***

**NOTICE OF HEARING**

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**FILED**

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MICHIGAN SUPREME COURT

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## STATEMENT OF ORDER APPEALED

In orders entered on September 7, 2005 and November 22, 2005, the Genesee County Circuit Court awarded Plaintiff, Hattie Moore, attorney fees under MCL 500.3148 of the Michigan No Fault Act. **Exhibit 2.** These orders were affirmed by the Court of Appeals in a published opinion issued on July 3, 2007. **Exhibit 1.** Defendant-Appellant, Secura Insurance, seeks review of the Court of Appeals decision.

## NEED FOR REVIEW

This case presents important issues concerning the award of attorney fees under the No Fault Act and the proper construction and application of MCL 500.3142(2) and MCL 500.3148(1). In its July 3, 2007 opinion, a majority of the Court of Appeals held that Defendant acted unreasonably in terminating Plaintiff's benefits because Defendant failed to reconcile the opinion of its independent medical examiner (IME) with that of Plaintiff's treating physician. In so holding, the majority concluded that MCL 500.3148(1) imposes an affirmative obligation upon an insurer to resolve ambiguous evidence of a claim. The majority's decision was in error because the clear and unambiguous language of the statute does not impose any such obligation and because, in this case, Defendant's IME report did not conflict with Plaintiff's treating physician. It is submitted that this result, as well as the analysis utilized by the majority of the Court of Appeals to achieve it, is inconsistent with the language of the statute and with Michigan case law.

Further, the majority failed to appreciate the distinction between benefits which are determined by a jury to be due at the time of trial from those which are found to be overdue, as that term is defined under MCL 500.3142(2). The majority held that the jury's award of a minimal amount of penalty interest (\$98.71) necessarily meant that the work loss benefits awarded were overdue, entitling Plaintiff to almost \$80,000 in attorney fees under MCL 500.3148(1). As dissenting Judge Wilder noted, based upon all of the documentary evidence submitted at trial, it is clear that the jury did not find any of the benefits it awarded to be overdue but, rather, awarded the small amount of penalty interest which Defendant

admittedly owed Plaintiff from an earlier delayed payment. The majority's refusal to reconcile the verdict's apparent inconsistency in accordance with the logical explanation provided by the record evidence, was fundamentally in error and requires correction by this Court.

Finally, even assuming that Plaintiff was entitled to *some* amount of attorney fees, the majority reversibly erred in failing to require Plaintiff to apportion out those fees which were incurred in seeking overdue benefits from those fees which were incurred in seeking due, but not overdue, benefits. The majority's analysis and conclusion fly in the face of the clear language of the MCL 500.3148(1) as well as this Court's holding in *Proudfoot v State Farm Mutual Ins Co*, 469 Mich 476; 673 NW2d 739 (2003). It is respectfully submitted that the issues raised in this Application concerning the determination of what constitutes "overdue" under MCL 500.3142(2) and the proper construction and application of MCL 500.3148(1) are recurring ones which merit review and elaboration.

## STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. DID THE COURT OF APPEALS REVERSIBLY ERR IN AFFIRMING THE CIRCUIT COURT'S DECISION AWARDING PLAINTIFF ATTORNEY FEES UNDER MCL 500.3148 WHERE THE WORK LOSS BENEFITS AWARDED BY THE JURY WERE NOT OVERDUE AND DEFENDANT DID NOT UNREASONABLY DENY OR DELAY PAYMENT OF BENEFITS?

Plaintiff-Appellee says: "No".

Defendants-Appellants say: "Yes".

The Circuit Court said: "No".

The Court of Appeals said: "No".

- II. EVEN ASSUMING THAT PLAINTIFF WAS ENTITLED TO SOME AMOUNT OF ATTORNEY FEES, DID THE COURT OF APPEALS REVERSIBLY ERR IN NOT REMANDING THE CASE TO THE CIRCUIT COURT FOR A DETERMINATION OF WHAT PORTION OF THE ATTORNEY FEES CLAIMED BY PLAINTIFF WAS ATTRIBUTABLE TO SECURING OVERDUE BENEFITS?

Plaintiff-Appellee says: "No".

Defendants-Appellants say: "Yes".

The Circuit Court said: "No".

The Court of Appeals said: "No".

## STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The instant case arises out of an automobile accident which occurred on September 27, 2000. Plaintiff, Hattie Moore, filed an action in Genesee County Circuit Court in November of 2001 against Defendant, Secura Insurance, seeking personal protection insurance benefits for work loss and replacement services, as well as uninsured motorist benefits arising out of the accident.<sup>1</sup> Plaintiff claimed that a hit-and-run driver struck Plaintiff's vehicle which was traveling on I-475, causing her to spin out of control, strike the median and zigzag across the highway before coming to a stop. **Exhibit 3**, Jury Trial Vol. II, pages 32-38.

In the accident, Plaintiff sustained an acute fracture of the lateral aspect of her right patella which caused a piece or chip of the patella to break off. Plaintiff did not seek medical care until the day following the accident when her right knee became swollen and she developed pain in the right side of her neck and into her right shoulder. The initial response by Plaintiff's family doctor, Dr. Sattar, following the accident was to follow a conservative treatment plan that included immobilization and physical therapy until she underwent arthroscopic surgery for the removal of the chip from the patella. Plaintiff's treating physician initially indicated that she was expected to be off work through November. **Exhibit 3**, Jury Trial Vol. II, pages 193-194.

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<sup>1</sup>Plaintiff's husband, James Moore, also filed a claim for benefits which was derivative of injuries his wife sustained in the accident. Throughout this brief, "Plaintiff" will refer solely to Hattie Moore.

Both prior to and following the accident, Plaintiff was seen by an orthopedic specialist, Dr. Norman Walker. A complicating factor in Plaintiff's treatment was the preexisting severe arthritic conditions of both of plaintiff's knees. **Exhibit 3**, Jury Trial Vol. II, pages 46-50, 56-58. Dr. Walter testified that Plaintiff began treating with him in November of 1999 for severe pain in both of her knees, relating to osteoarthritis. **Exhibit 4**, trial testimony of Dr. Walter, pages 7-9.<sup>2</sup> Dr. Walter saw Plaintiff in February of 2000 as well and indicated that Plaintiff was considering both knee replacement surgery and injection treatments. **Exhibit 4**, pages 27-29, 32. Dr. Walter also testified that he was agreeable to proceed with bilateral knee replacement surgery prior to the accident, which he had determined was medically supportable and only required Plaintiff's approval. **Exhibit 4**, pages 72 - 98. Plaintiff confirmed that Dr. Walter was willing to do the surgery prior to the accident and did not want Plaintiff to have to return to work because her job was hard on her knees. **Exhibit 3**, Jury Trial Vol. II, pages 46-52.

Shortly after the subject accident, Plaintiff treated with Dr. Walter and he diagnosed her with a fracture of her right patella. Dr. Walter put Plaintiff on sick leave at this time. **Exhibit 4**, pages 40-42. Surgery to remove the bone fragment was conducted in January of 2001. **Exhibit 4**, page 47.

On January 22, 2001, at Defendant's request, Plaintiff was examined by Dr. Xeller. **Exhibit 5**, January 24, 2001 report. In the report, Dr. Xeller noted, in addition to obtaining

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<sup>2</sup>Dr. Walter's video deposition was played for the jury at the time of trial. **Exhibit 6**, Jury Trial Vol. III, page 73.

a history<sup>3</sup> and conducting a physical examination, that he also reviewed various medical records. Specifically, in preparation for the initial report of January 24, 2001, Dr. Xeller reviewed the following:

September 28, 2000, x-rays of right shoulder;

September 28, 2000, x-ray of the right knee, as well as a comparison to radiological studies of the knee from October 5, 2000;

Progress notes from Dr. Sattar.

**Exhibit 5**, Bates page 33. Dr. Xeller's diagnoses included: (1) probable fractured patella, right knee or chondral lesion; (2) possible right shoulder impingement versus rotator cuff tear; and (3) cervical strain; resolved. In Dr. Xeller's opinion, Plaintiff could not return to work and needed right knee arthroscopic surgery. Based on the history provided by Plaintiff (which did not include her preexisting arthritic condition), Dr. Xeller concluded that Plaintiff's right knee problem was secondary to the subject accident. **Exhibit 5**, Bates pages 35-36.

On August 30, 2001, Dr. Walter, Plaintiff's treating orthopedic physician, documented that Plaintiff's right knee had improved and that he was uncertain whether the current status of Plaintiff's left knee was related to the automobile accident or just a normal progression of the disease of her knee that preexisted the accident. **Exhibit 6**, pages 58, 70-71. See also **Exhibit 3**, Jury Trial Vol. II, pages 70-71. Dr. Walter further testified that Plaintiff's employment was a source of ongoing exacerbation and was a detrimental factor on the health

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<sup>3</sup>The general medical history obtained by Dr. Xeller did not note Plaintiff's history of arthritic conditions of both of her knees. **Exhibit 5**, Dr. Xeller's January 24, 2001 report, Bates page 33.

of her knees. **Exhibit 4**, page 79. Plaintiff herself testified that, prior to the subject automobile accident, Dr. Walter was recommending that she leave her custodial job at the post office at her earliest opportunity because the job was hard on her knees. **Exhibit 3**, Jury Trial Vol. II, pages 48-50.

In an effort to determine the residual capacity of plaintiff and her ability to return to her employment, Defendant retained the services of a nurse case manager, Mr. Dan Schingeck. **Exhibit 3**, Jury Trial Vol. II, pages 155-157. Mr. Schingeck interviewed Plaintiff at her home, gathered various medical records, conferred with plaintiff's employer, attended an office visit with patient to her orthopedic surgeon, Dr. Walter, and communicated with Dr. Walter and the post office to determine whether any employment was available within any restrictions that Dr. Walter may impose on Ms. Moore. **Exhibit 6**, Jury Trial Vol. III, pages 53-64.

Despite two requests for information regarding Plaintiff's residual abilities by Mr. Schingeck, Plaintiff's treating orthopedic physician, Dr. Walter, refused to respond. Mr. Schingeck then recommended that Defendant request another medical examination of Plaintiff. **Exhibit 6**, Jury Trial Vol. III, pages 59-64; **Exhibit 7**, July 20, 2001 report from Mr. Schingeck to Secura. A second examination by Dr. Xeller was conducted on September 25, 2001. In preparation for drafting his opinion for the October 4, 2001 report, Dr. Xeller reviewed the following medical records:

Progress notes of treating orthopedic surgeons Dr. Walter and Dr. Dass;

An MRI of the right shoulder, February 5, 2001;

Notes of Dr. Walter regarding preexisting conditions to the subject automobile accident;

Radiological study of April, 2001.

**Exhibit 8**, Dr. Xeller's October 4, 2001 report, Bates pages 42-44. Dr. Xeller noted at this time that Plaintiff had a history of osteoarthritis in both knees, with the left knee being worse than the right. It was at this time that Dr. Xeller found that Plaintiff could return to work with certain restrictions and further that she would require total knee replacement of the left knee "not due to the automobile accident, but secondary to preexisting osteoarthritic degeneration" and that she may likewise require a total right knee replacement, as a consequence of the degenerative condition of her knees "which predate the automobile accident of September 27, 2000." He further opined that the accident did not exacerbate the underlying knee pathology. Dr. Xeller opined that, based on the history presented by Plaintiff, she injured her right knee in the subject accident, had arthroscopic surgery with chondroplasty with good results and that no further treatment was needed for her orthopedic complaints relating to the subject accident. **Exhibit 8**, Bates pages 45-46.

Dr. Xeller also provided Defendant with a supplemental report, dated October 17, 2001, which concluded that Plaintiff's complaints in her right shoulder were preexisting and not related to the subject accident. **Exhibit 9**, October 17, 2001 supplemental report. See also **Exhibit 3**, Jury Trial, Vol. II, pages 168-169. Ms. Wilson testified that she did not share the October 4, 2001 report or the supplemental report with Plaintiff's treating physicians because she did not believe that she had the responsibility to do so. *Id.*

Defendant processed and paid all wage loss, albeit late on one occasion, from December of 2000 through October or November of 2001. **Exhibit 3**, Jury trial Vol II, pages 184-191, 204-205. It was then that Defendant's adjuster, Connie Wilson, received the second report from Dr. Xeller. Ms. Wilson confirmed that she did not personally speak with any of Plaintiff's treating physicians nor did she personally review any employment records of Plaintiff's prior to the accident. **Exhibit 3**, Jury Trial Vol. II, pages 158-163. Ms. Wilson sent Plaintiff and Plaintiff's counsel a letter indicating that, based on Dr. Xeller's latest report, Defendant was terminating Plaintiff's benefits. **Exhibit 10**, November 9, 2001 letter. **Exhibit 3**, Jury Trial Vol. II, pages 202-203.

Plaintiff subsequently filed suit which resulted in the matter proceeding through a jury trial. During the trial in this matter, it was admitted by Connie Wilson that due to a malfunction in attempting to establish the issuance of an automatic wage loss benefits checks, wage loss benefits were not timely paid for a period of 60 days. It was her testimony that she experienced difficulty in establishing the automatic pay and when it was discovered, she issued a check on March 29, 2001, that covered a period of 90 days (December 31, 2000 through March 31, 2001). Ms. Wilson admitted that Defendant never paid Plaintiff the 12% interest for the delay in the work loss payment. **Exhibit 3**, Trial Transcript Vol. II, pages 129-130, 198-200.

At trial, Plaintiff made a total claim of \$129,554.80 for unpaid no-fault benefits which was comprised of approximately \$96,000 in wage loss, approximately \$21,000 for household/replacement services and penalty interest in excess of \$11,000. **Exhibit 11**, Jury

Trial Vol. IV, pages 57-59. With respect to personal injury protection benefits, the verdict form returned by the jury read as follows:

## **PART I - PERSONAL INJURY PROTECTION BENEFITS**

### **WORK LOSS**

**QUESTION NO. 1:** Did Hattie Moore sustain work loss arising out of the accidental bodily injury she sustained in the September 27, 2000 motor vehicle accident?

*(Work loss consists of loss of income from work the plaintiff would have performed during the first three years after the date of the accident if the plaintiff had not been injured. Work-loss benefits are computed at 85% of the plaintiff's loss of gross income, but they may not exceed the sum of \$3,898.00 per 30-day period from October 1, 2000 - September 30, 2001, and, \$4,027 per 30-day period from October 1, 2001 - September 30, 2002, and, \$4,070 per 30-day period from October 1, 2002 - September 30, 2002 [sic], nor may they be payable beyond three years after the date of the accidental bodily injury.)*

A. Answer: Y (yes or no)

B. If your answer is "yes," what is the amount of work loss owed to Hattie Moore (include only work loss not already paid by the defendant)?

Answer: \$ 42 K.  
755.

### **REPLACEMENT SERVICE EXPENSES**

**QUESTION NO. 2:** Were replacement service expenses incurred by or on behalf of Hattie Moore arising out of the accidental bodily injury sustained in the September 27, 2000 motor vehicle accident?

*(Replacement service expenses consist of expenses not exceeding \$20 per day reasonably incurred in obtaining ordinary and necessary services in place of those that, if the plaintiff had not been injured, the plaintiff would have performed during the first three years after the date of the accident, not for income, but for the benefit of the plaintiff and her dependent(s). Benefits for replacement service expenses may not exceed \$20 per day nor may they be payable beyond three years after the date of the accidental bodily injury).*

A. Answer: N (yes or no)

B. If your answer is “yes,” what is the amount of replacement service expenses owed to Hattie Moore (include only replacement service expenses not already paid by the defendant)?

Answer: \$ \_\_\_\_\_.

### INTEREST

QUESTION NO. 3: Was payment for any of the expenses or losses to which the Hattie Moore was entitled overdue?

*(Payment for an expense or loss is overdue if it is not paid within 30 days after the defendant receives reasonable proof of the fact and the amount of the claim. An overdue claim bears interest at the rate of 12 percent per annum from the date the expense or loss became overdue.)*

A. Answer: Y (yes or no)

B. If your answer is “yes,” what is the amount of interest owed to Hattie Moore on overdue benefits (include only interest not already paid by the defendant)?

Answer: \$ 98.00

**Exhibit 12**, Jury Verdict Form. With respect to Plaintiff’s claim for uninsured motorist benefits, the jury returned a verdict awarding Plaintiff no damages for economic loss and \$50,000 in damages for non-economic losses. **Exhibit 12**. The jury found that James Moore had not sustained any damages for the loss of consortium of his wife. A judgment consistent with the jury’s verdict was entered in the circuit court on August 22, 2005. **Exhibit 13**, Judgment.

Following entry of judgment in favor of Plaintiff, Plaintiff filed a motion seeking a determination in the circuit court that she was entitled to costs and attorney fees under MCL

500.3148(1). Plaintiff argued that the benefits awarded by the jury were “overdue” under MCL 500.3142(2) because Defendant unreasonably refused to pay her claims for wage loss beginning in November of 2001. Defendant opposed the motion and argued that the jury had determined that the wage loss benefits awarded were not overdue but only became due at the time of trial upon Plaintiff’s presentment of evidence sufficient to sustain her claim, that the penalty interest (\$98) awarded by the jury was reflective only of the interest admittedly owed by Defendant for the March 2001 automatic payment error, and that, even if the benefits awarded by the jury were overdue, Defendant did not act unreasonably in refusing to pay Plaintiff’s claims in November of 2001 based upon its actions to ascertain the true condition of Plaintiff’s medical condition.

A hearing on Plaintiff’s motion for attorney fees was held in the circuit court on September 7, 2005. **Exhibit 14**, transcript of September 7, 2005 motion hearing. The circuit court entered an order granting Plaintiff’s motion on September 7, 2005. **Exhibit 2**, September 7, 2005 order.<sup>4</sup> Plaintiff subsequently filed another motion seeking \$80,937.50 in attorney fees. Defendant opposed the motion on the basis of both the entitlement as well as the amount. A hearing on Plaintiff’s motion was held on November 22, 2005 at which time the circuit court heard testimony from Plaintiff’s counsel, Peter M. Bade. **Exhibit 15**, transcript of November 22, 2005 hearing. The circuit court entered an order awarding Plaintiff fees and costs in the amount of \$79,415.00 **Exhibit 2**, November 22, 2005 order.

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<sup>4</sup>Defendant filed a claim of appeal from this order which was dismissed by the Court of Appeals as premature in an order entered on October 20, 2005.

Defendant timely appealed these orders to the Court of Appeals. A majority of the Court of Appeals panel affirmed the circuit court's award of attorney fees. Judge Wilder dissented. **Exhibit 1.**

The majority first concluded that Plaintiff had submitted reasonable proof of loss in December of 2000, when she filed an "application for benefits" form with Defendant and her employer provided information to Defendant regarding Plaintiff's wage history. The majority rejected Defendant's argument that reasonable proof of Plaintiff's loss was not submitted until the time of trial. The majority next concluded that Defendant acted unreasonably in terminating Plaintiff's benefits in November of 2001 because Defendant did not contact Plaintiff's treating physician following its receipt of Dr. Xeller's IME reports. **Exhibit 1, page 2.** Relying upon *Liddell v Detroit Automobile Inter-Ins Exch*, 102 Mich App 636; 302 NW2d 260 (1981) and three unpublished Court of Appeals opinions, the majority held that Defendant was required under MCL 500.3148(1) to reconcile the opinion of its IME with the opinion of Plaintiff's treating physicians. Because Defendant admittedly did not do so in this case, the majority held that Defendant acted unreasonably in terminating Plaintiff's benefits in November of 2001.

The majority next considered whether the work loss benefits awarded by the jury were "overdue" under MCL 500.3142(2). While the majority was forced to admit that the award of only \$98.71 in penalty interest was "suggestive" of a finding that only one week of benefits was determined to be overdue, the majority refused to find that a vast majority of the benefits awarded were not "overdue." Instead, the majority stated that it would not

“speculate” as to what the jury concluded and held that, so long as the jury found at least some of the benefit payments to be overdue, Plaintiff was entitled to attorney fees under MCL 500.3148(1). **Exhibit 1**, pages 3-4.

Finally, the majority rejected Defendant’s claim that, even assuming that Plaintiff was entitled to some amount of attorney fees, under the plain language of MCL 500.3148(1) and the Michigan Supreme Court’s decision in *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476; 673 NW2d 739 (2003), Plaintiff was only entitled to those fees incurred in securing the limited amount of overdue benefits and the trial court should have required Plaintiff to apportion out those fees from the total amount of fees claimed. The majority stated that it found no support for Defendant’s position in the clear language of the statute, finding, instead, that so long as *the action* includes a claim for overdue benefits and some portion of the fees are incurred in an attempt to secure overdue benefits, Plaintiff is entitled to attorney fees. The majority then concluded that, “[i]t is therefore possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them.” **Exhibit 1**, page 4.

Judge Wilder dissented. Judge Wilder rejected the majority’s conclusion that the \$98.71 in penalty interest awarded by the jury evidenced that the jury determined that any of the work loss benefits were overdue. Recognizing, as the majority did, that the penalty interest award evidenced that the jury found only one week’s worth of work loss benefits to

be overdue, Judge Wilder properly reconciled the apparent inconsistency of the verdict in light of all of the evidence<sup>5</sup> submitted at trial:

During the trial, evidence was introduced that during the time frame that Secura did not dispute plaintiff's entitled to wage loss benefits, there was a three-month period during which Secura admittedly did not timely pay those benefits, allegedly due to a computer malfunction. Secura argued that solely those wage loss benefits were overdue, and that because those overdue benefits had been paid well before the litigation commenced, the penalty interest owed on those admittedly overdue benefits was capped at \$121.50. The jury's award of only \$98.71 in penalty interest constitutes an acceptance of Secura's theory of the case, that only the benefits actually paid before trial were overdue and thus entitled to interest. More importantly, the penalty interest award logically constitutes a rejection by the jury of the plaintiff's theory that plaintiff provided reasonable proof to Secura that the continued payment of wage loss benefits was warranted. If the jury had concluded that reasonable proof of wage loss had been provided to Secura at the time it discontinued wage loss benefits, the jury was required to and would have awarded penalty interest on the \$42,775 it awarded plaintiff for wage loss. The jury obviously determined that the \$42,775 it awarded plaintiff for wage loss was not overdue, and followed the trial court's instructions accordingly.

**Exhibit 1**, page 4 of dissent.

Judge Wilder specifically rejected the majority's construction of MCL 500.3148(1) as requiring an insurer to "go beyond" the opinion of its IME doctor by consulting with the plaintiff's treating physicians, finding no support of such a conclusion in the language of the statute or case law.

Finally, Judge Wilder disagreed with the majority's decision to affirm the total amount of attorney fees awarded. Relying upon *Proudfoot, supra* and the plain language of the statute, and assuming that any amount of fees was attributable to securing one week's worth

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<sup>5</sup>The majority's opinion failed to even mention any of the record evidence regarding Secura's admitted failure to timely pay Plaintiff's benefits for a period of three months.

of overdue benefits, Judge Wilder properly concluded that the trial court was required to apportion out those fees attributable to securing the overdue benefits from those fees which were not. Judge Wilder concluded that, at a minimum, the case should be remanded to the trial court for this determination and a certain reduction in the amount of attorney fees awarded.

Defendant sought reconsideration in the Court of Appeals, which was denied in an order entered on August 30, 2007. Defendant now seeks a reversal of the majority's decision affirming the circuit court's award of attorney fees.

## STANDARD OF REVIEW

Defendant-Appellant seeks review of the circuit court's orders awarding Plaintiff attorneys fees under MCL 500.3148. A trial court's finding that an insurer unreasonably refused to pay or delayed in paying benefits is reviewed for clear error.<sup>6</sup> *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake occurred. *Id.* However, this Court's review of the lower courts' construction and application of MCL 500.3148 is reviewed *de novo*. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

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<sup>6</sup>This Court has granted leave to appeal in the case of *Ross v Auto Owners*, 478 Mich 902; 732 NW2d 529 (2007) and directed the parties to include among the issues to be briefed 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).

## ARGUMENT

### I. THE COURT OF APPEALS REVERSIBLY ERRED IN AFFIRMING THE CIRCUIT COURT'S AWARD OF ATTORNEY FEES UNDER MCL 500.3148 BECAUSE THE WORK LOSS BENEFITS AWARDED BY THE JURY WERE NOT "OVERDUE" AND DEFENDANT DID NOT UNREASONABLY REFUSE TO PAY THE CLAIM OR UNREASONABLY DELAY IN MAKING PROPER PAYMENT.

Generally, attorney fees may not be recovered either as an element of costs or damages unless expressly authorized by statute, court rule, judicial exception or contract. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002). Pursuant to MCL 500.3148(1), the No-Fault Act provides for the award of an attorney fee to a claimant of personal or property protection insurance benefits as follows:

“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.”

The foregoing statute provides for reasonable attorneys fees only for those benefits which are “overdue.” *Proudfoot v State Farm*, 469 Mich 476, 485; 673 NW2d 739, 744 (Mich 2003). If the benefits are overdue, attorney fees may be awarded under the statute if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. Accordingly, an award of attorney fees under §3148 is only proper if (1) the benefits were “overdue”; and (2) the defendant insurer unreasonably refused to pay the claim or delayed in making the payment.

**A. The work loss benefits awarded Plaintiff were not “overdue.”**

“Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and the amount of loss sustained.” MCL 500.3142(2). If benefits are “overdue” within the meaning of §3142(2), “a rebuttable presumption of unreasonable refusal or undue delay arises.” *Combs v Commercial Carriers, Inc*, 117 Mich App 67, 73; 323 NW2d 596 (1982).<sup>7</sup> Based upon the evidence submitted at trial, the jury did not conclude that any of the work loss benefits to which Plaintiff was entitled were “overdue” under MCL 500.3142(2). The Court of Appeals majority erroneously concluded otherwise.

The case of *Beach v State Farm*, 216 Mich App 612; 550 NW2d 580, 588 (1996) is instructive as to the interplay between a jury’s award of penalty interest (or lack thereof) and a trial court’s ability to award attorney fees under §3148. In *Beach*, the plaintiff was injured in a single vehicle accident and suffered injuries to his face and head. The defendant insurer paid the plaintiff benefits for a period of approximately three years following the accident. The plaintiff was then referred by the Department of Social Services to a psychologist for a determination of the plaintiff’s eligibility for a program exchanging volunteer work for welfare benefits. A psychologist examined the plaintiff and concluded that residual effects from the automobile accident were exacerbating the plaintiff’s prior learning disabilities and

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<sup>7</sup>This Court has granted leave to appeal in *Ross v Auto Club Group, supra* at 478 Mich 903, and has asked the parties to include among the issues to be briefed: “. . . (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, [supra]*) consistent with the language of MCL 500.3148(1)?”

recommended that the plaintiff receive vocational and rehabilitation treatment at a facility. The defendant insurer refused to pay for this rehabilitation treatment, claiming that it could not determine whether the plaintiff's rehabilitation was related to the accident or to his preexisting mental deficiencies.

The plaintiff brought suit against the insurer seeking coverage for outstanding rehabilitation bills and a declaratory judgment concerning the insurer's continued obligation to pay for his rehabilitation. A jury awarded the plaintiff \$17,500 and determined that the insurer was required to cover the cost of future vocational and rehabilitation treatment. The jury refused to award the plaintiff any penalty interest under MCL 500.3142. On the basis of the jury's refusal to award penalty interest, the trial court denied the plaintiff's request for attorney fees under MCL 500.3148, even though the trial court stated that it believed that the insurer's refusal to pay was unreasonable.

The defendant insurer appealed a number of issues relative to the judgment and the plaintiff cross-appealed the trial court's refusal to award attorney fees under MCL 500.3148. With respect to the attorney fees issue, the Court of Appeals held that the trial court did not clearly err in refusing to award the plaintiff attorney fees. The Court looked to the language employed in the statute and concluded that the jury's determination that the plaintiff's benefits were not "overdue" for purposes of the penalty interest provision of MCL 500.3142 precluded the trial court from awarding the plaintiff attorney fees under MCL 500.3148(2),

“because the attorney fees are only payable where personal or property protection insurance benefits are ‘overdue.’” *Id* at 550 NW2d 588.<sup>8</sup>

The Michigan Supreme Court in *Proudfoot v State Farm, supra*, made clear the distinction between those benefits found by a jury to be overdue and those not when holding:

Thus, attorney fees are payable only on *overdue* benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying. Here, plaintiff was entitled only to those reasonable attorney fees that were attributable to the \$815.10 architect’s fee. Claims for the modification expenses were not yet “overdue” because they were not yet “incurred.”

*Id* at 744. (Emphasis in original.)

Under *Beach*, the jury’s determination that none of the work loss benefits were overdue, sufficient to award penalty interest under MCL 500.3142, precluded the trial court from awarding Plaintiff attorney fees under MCL 500.3148. In this case, the jury was asked to make a determination whether “payment for any of the expenses or losses to which [Plaintiff] was entitled” was overdue. The jury answered “yes” but awarded only \$98.71 in interest. The jury was given the simple formula by which to determine the interest payable to Plaintiff - 12% per annum from the date the expense or loss became overdue. The jury awarded Plaintiff \$98.71 in interest - or 12% of \$822.52, one week of work loss benefits for which reasonable proof was provided. Plaintiff chose to have the jury determine what was “overdue” and never challenged the jury’s finding. By the jury’s determination that only

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<sup>8</sup>Further, while the Court recognized that its decision regarding the absence of “overdue” benefits rendered moot the determination of the insurer’s reasonableness in denying benefits, the Court noted that it disagreed that the insurer acted unreasonably, in light of the history of the plaintiff’s preexisting condition and bona fide factual uncertainties regarding the plaintiff’s entitlement to continuing benefits. *Id.*

those benefits related to one week's work loss payment were overdue, the trial court was precluded from awarding any attorney fees related to any other benefits found due (but not overdue) by the jury. *Beach, supra* and *Proudfoot, supra*. The suit was not necessary to recover overdue benefits, but the jury did find additional benefits due and so awarded them without penalty interest.

The primary issue addressed in the Court of Appeals majority opinion is whether the \$42,775 in unpaid wage loss benefits awarded by the jury were "overdue" as that term is defined in the No Fault Act, under MCL 500.3142. The record establishes that those benefits in fact did not become due until the time of trial when Plaintiff demonstrated to the satisfaction of the jury that her continued knee problems and resulting inability to work were caused by the subject accident and not her preexisting arthritic condition. As the benefits were not found by the jury to have become due until the time of trial, they could not be "overdue" under MCL 500.3142 until at least thirty days thereafter.

The Court of Appeals fundamentally erred in concluding that the jury found any amount of the unpaid wage loss benefits to be overdue under MCL 500.3142. This position is conclusively supported by the jury's verdict. The jury was specifically instructed, pursuant to MCL 500.3142, to award 12% interest per annum on any overdue benefits which were owed to Plaintiff, excluding any interest that had already been paid by Secura. Had the jury determined that any of the unpaid wage loss benefits it awarded Plaintiff were "overdue" it was required to and would have awarded penalty interest on the \$42,775 it awarded Plaintiff for wage loss – which Plaintiff admitted would total somewhere in excess of \$11,000. However, the jury awarded only \$98.71.

While the Court of Appeals indicated that it would “decline the invitations to speculate” as to why the jury awarded only \$98.71 in penalty interest, speculation was unnecessary. As the Court recognized, the jury’s verdict was apparently inconsistent. This inconsistency is easily reconciled by the fact that the penalty interest award directly correlates to the amount of interest Secura admitted it owed Plaintiff as a result of its mistaken delay in paying Plaintiff during a three month period in 2001. This material fact, omitted from the majority’s opinion, permits and indeed requires a reviewing court to reconcile the verdict’s inconsistency as it is the only logical conclusion to be drawn from the jury’s verdict and the evidence submitted at trial. *Allard v State Farm Ins Co*, 271 Mich App 394, 407; 722 NW2d 268 (2006).

When considered against the admissions and acknowledgments throughout the trial by both parties that, early on, Defendant had made a wage loss payment that was three months overdue and that Plaintiff was thus entitled to an award of interest thereon, it is beyond speculation that the jury’s award of penalty interest related to that overdue payment. Importantly, the jury did not have discretion not to make the \$98.71 award of penalty interest. It was charged by the court that “Plaintiff is *entitled* to 12% interest on any benefit you find overdue,” and as indicated, it was repeatedly made clear to the jury that approximately \$8,000 in wage benefits were paid two months late. At least \$98.71, therefore, necessarily had to be awarded by the jury for that overdue benefit. The jury’s award of only \$98.71 in penalty interest constitutes an acceptance of Defendant’s theory of the case and a rejection of Plaintiff’s theory that she had provided reasonable proof of her loss prior to trial.

Conversely, there was no basis to conclude that the jury found the unpaid, at-issue wage benefits to be “overdue” -- and one need not speculate to so conclude. Again, the jury had no discretion: if the benefits were overdue, it had to award 12% penalty interest on them. At a bare minimum, such an award of penalty interest would have exceeded \$10,000.00 (two years of 12% simple interest per year). The \$98.71 in penalty interest awarded by the jury thus can only constitute a rejection by the jury of Plaintiff’s theory that the unpaid wage loss benefits she sought were overdue. The Court of Appeals majority’s opinion failed to recognize the distinction between the jury’s award of unpaid wage loss benefits as being “due” to Plaintiff and those benefits which were determined by the jury to not be “overdue” within the meaning of MCL 500.3142. Under MCL 500.3148(1), attorney fees are applicable *only* for advising and representing a claimant “in an action for personal or property protection benefits *which are overdue*” (emphasis added).

MCL 500.3142(2) dictates when a benefit is “overdue.” Preliminarily, it is not disputed, “[PIP] benefits are *payable* as loss accrues.” MCL 500.3142(1) (emphasis added). Yet benefits that are “payable” are not necessarily benefits that are “overdue.” Rather, under §3142(2) (emphasis added), “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.” Precisely when the insurer finally was presented with the requisite “reasonable proof” to render a particular payment of benefits due (and thus “overdue” 30 days thereafter) is a determination made by the finder of fact. *English v Home Ins Co*, 112 Mich App 468, 476; 316 NW2d 463 (1981). There is a clear and important difference, then, between a showing at trial that Plaintiff is

entitled to the claimed benefits (i.e., work loss benefits after they were terminated in November of 2001) and a showing that they were ever “overdue.”

Given this statutory scheme, the Court of Appeals erred in finding that Plaintiff provided Secura with reasonable proof of the fact and amount of her loss when she filed an application for benefits in December of 2000. It was the jury’s job to determine when Plaintiff had provided reasonable proof of the fact and amount of loss and it did not find such proof was provided in December of 2000. The jury concluded, consistent with Secura’s position, that such proof was not provided until the time of trial, the first time Plaintiff provided evidence to substantiate her claim that the injuries she incurred in the subject accident continued to prevent her from working. In short, Plaintiff’s “reasonable proof of the fact and of the amount of loss” was presented for the first time at trial (with respect to the at-issue work loss after October 2001), which resulted in Plaintiff’s award of benefits for same (\$42,775), but not with penalty interest since they were not “overdue.” The jury’s award of penalty interest on only one week’s worth of payments, consistent with the testimony regarding Secura’s admitted error in timely paying benefits, totally bars the conclusion that the at-issue benefits were found by the jury to be “overdue.”

Plaintiff argued below that all of the work loss benefits awarded Plaintiff were necessarily overdue because they were incurred by Plaintiff (and not paid by Defendant) prior to trial in this case. However, this argument is without merit because, regardless of when a benefit was incurred, it is not “overdue” within the meaning of the statutory provisions of the No-Fault Act until reasonable proof of the fact and the amount of the loss has been provided to the insurer. Defendant contended all through trial that the work loss benefits claimed by

Plaintiff were not owed because they were not related to the subject accident and therefore a justiciable issue existed. Only upon submission of evidence at trial, upon which the jury determined that benefits were owed, did the benefits become due. The jury was given the option to state that these work loss benefits were overdue but did not do so, as reflected in the jury verdict form. Accordingly, Plaintiff's argument was without merit and did not support the trial court's finding that the benefits awarded by the jury were overdue.

Importantly, based on Plaintiff's own testimony, none of the attorney fees awarded by the trial court were attributable to a claim for overdue benefits. The admittedly late March 2001 payment was not due or overdue at the time of trial - only the interest was admittedly unpaid. Plaintiff testified that she would have prosecuted the instant lawsuit even if Defendant had paid the \$98 penalty interest it owed for the late March 2001 payment. **Exhibit 3**, Jury Trial Vol. II, page 97. Accordingly, no portion of Plaintiff's requested attorney fees was attributable to a claim for overdue benefits. Further, in addition to personal insurance protection benefits, Plaintiff brought this suit to secure uninsured motorist benefits to which she claimed she was entitled. Plaintiff was not entitled to an award of attorney fees for the prosecution of her uninsured motorist benefits claim. MCL 500.3148(1). Accordingly, by Plaintiff's own admission, the suit was brought to obtain benefits which were ultimately found due but not "overdue". The lower courts clearly erred in awarding Plaintiff attorney fees under §3148.

**B. Even if the work loss benefits awarded Plaintiff were “overdue,” Defendant did not unreasonably refuse to pay the claim or unreasonably delay in making proper payment.**

The Court of Appeals majority held that Secura’s termination of Plaintiff’s benefits in November of 2001 was unreasonable because it did not attempt to reconcile the opinion of its IME (Dr. Xeller) with the opinion of Plaintiff’s treating physician (Dr. Walter).<sup>9</sup> The Court of Appeals reversibly erred and failed to conduct a proper *de novo* review, given that MCL 500.3148 imposes no such obligation upon Secura and, regardless, Dr. Xeller’s opinions were not inconsistent with those of Dr. Walter.

Generally, an insurer’s “refusal or delay in payments . . . will not be found ‘unreasonable’ within the meaning of §3148 where the delay is the product of a legitimate question of statutory construction, constitutional law, or even a bona fide factual uncertainty.” *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987), citing *Lidell v DAIIE*, 102 Mich App 636, 650; 302 NW2d 260 (1981). The scope of the inquiry under §3148 is not whether the defendant insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable. *McCarthy v Auto Club Ins Ass’n*, 208 Mich App 97, 105; 527 NW2d 524 (1994). Based on the evidence presented at trial, Defendant presented evidence contemporaneous with Plaintiff’s claim for

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<sup>9</sup>Judge Wilder, in dissent, did not address the reasonableness of Secura’s conduct, given his conclusion that the benefits awarded by the jury were not overdue. However, Judge Wilder specifically rejected the majority’s conclusion that MCL 500.3148 imposes upon an insurer an obligation to reconcile its IME report with the opinions of the plaintiff’s treating physicians.

benefits that raised a bona fide question regarding whether such benefits were owed. The circuit court and Court of Appeals erred in concluding otherwise.

In *English v Home Insurance*, 112 Mich App 468; 316 NW2d 463 (1981), the Court of Appeals denied a request for attorney fees finding that defendant's refusal to pay was a result of a "legitimate, justiciable issue" because the defendant was justified in making a thorough investigation to determine whether the plaintiff's losses were attributable to the accident. The Court found that the plaintiff, until the time of trial, had failed to present reasonable proof of the fact and the amount of benefits to which he was entitled. In the instant case, Defendant was similarly faced with a bona fide factual uncertainty. The question presented was whether or not Plaintiff had recovered following her automobile accident to a condition that preexisted the accident of having severe bilateral arthritic knees that would ultimately required bilateral knee replacement surgery. In addition, Plaintiff had articulated a desire, contrary to medical advice, to continue to work until she qualified for retirement which was the approximate date when the insurer paid benefits.

As of August 2001, prior to Dr. Xeller's second examination of Plaintiff, Dr. Walter was of the opinion that he was uncertain as to the causal relationship between Plaintiff's condition of the left knee being related to the accident or not. Dr. Walter further testified that had anyone spoke to him regarding that entry that his verbal report to them would have been consistent with his written progress note. Further, because of the inability to retain information from Dr. Walter, for whatever reason, Defendant had to obtain a second IME with Dr. Xeller, who, equipped with knowledge of past and current medical records and his prior examination of Plaintiff, was of the opinion that Plaintiff's condition, at that time, was

as a result of the disease which preexisted the subject accident. This was a diagnosis made by two prior treating orthopedic surgeons and Plaintiff's primary care physician, which was severe arthritic bilateral knees and a diagnosis of her requiring bilateral knee replacement surgery. Further, as confirmed by Plaintiff, it was recommended to her by treating orthopedic surgeon, prior to the accident, that she terminate her employment as a janitor with the postal service at her earliest opportunity. All of the foregoing, as well as the fact that Plaintiff intended to retire on or about her first qualification for full retirement benefits, leads to the conclusion that there was "a legitimate, justiciable issue" and Defendant's termination of benefits in November of 2001 was not unreasonable. *English v Home Insurance, supra*.

The Court of Appeals majority concluded that, pursuant to *Liddell, supra*, Defendant was obligated to present Dr. Xeller's report to Plaintiff's treating physicians and attempt to reconcile Dr. Xeller's findings with her treating physician's findings. However, the Court's reliance upon *Lidell* was misplaced because *Lidell* does not impose such a mandatory duty upon Defendant and the facts of *Lidell* were distinguishable from the instant case. In *Liddell*, the insurer took no action to ascertain the true situation of plaintiff's condition in the face of contradictory reports from treating physicians regarding plaintiff's ability to return to work. In that case, the insurer had no physician conduct a medical review, conducted no examination of the plaintiff, obtained no assistance from a nursing consultant, and was found to take no action to ascertain the true condition of the plaintiff's injuries. In *Lidell*, the insurer possessed a report unfavorable to the plaintiff that was followed by two subsequent reports that helped the plaintiff. In the face of these contradictory reports, the insurer's failure to do *anything* to ascertain the truth was held to be unreasonable.

Based upon the facts of that case, the *Lidell* Court held that the insurer was at least required to attempt to reconcile the conflicting reports. The *Lidell* Court did not hold, contrary to the majority's conclusion, that an insurer is required, under all factual circumstances, to consult with the plaintiff's treating physicians to reconcile conflicting diagnoses. Moreover, neither MCL 500.3142 nor MCL 500.3148 impose upon an insurer the burden of resolving ambiguous evidence of a claim. There is nothing in the clear language of the statute which imposes an affirmative obligation upon an insurer to go beyond its IME report and attempt to reconcile potentially conflicting medical reports. See *Stoops v Farm Bureau Ins Co*, unpublished per curiam opinion of the Court of Appeals (Docket Nos. 260454, 261917, March 23, 2006), at page 9:

That case is distinguished from the instant case because in *Liddell* a report unfavorable to the plaintiff was followed by two subsequent reports that helped the plaintiff. Here, the converse occurred. Conflicting reports by the same doctor were followed by two subsequent reports indicating attendant care was unnecessary. **Moreover, under MCL 500.3142(2) a claim for benefits is not overdue until the claimant submits to the insurer "reasonable proof of the fact and of the amount of loss sustained." The statute does not place the burden on the insurer to resolve ambiguous evidence of a claim.**

#### **Exhibit 16.**

Moreover, the facts presented to the jury in this case were distinguishable from those in *Lidell*. Defendant retained the services of a board certified orthopedic surgeon who examined Plaintiff, not on one occasion, but on two occasions. At the first examination, Dr. Xeller rendered a finding that Plaintiff was in need of arthroscopic surgery, based on his exam and a record review of the treatment from various providers, including Plaintiff's primary care physician, Dr. Sattar, Plaintiff's orthopedic shoulder physician, Dr. Dass,

Plaintiff's orthopedic surgeon, Dr. Walter, films and various reports of radiological studies, during both the pre-treatment period and the post accident period. Further, Defendant retained the services of a registered nurse, Dan Schingeck, who conducted an interview of Plaintiff, secured various medical records and attended an office visit with Plaintiff and her orthopedic surgeon. Mr. Schingeck also conferred and communicated with Plaintiff's employer and assessed the availability of employment with her employer when compared to the residuals and limitations imposed upon her by her treating physicians and orthopedic surgeon. The efforts of Defendant here cannot be equated with those of defendant in *Liddell, supra*.

The Court of Appeals also erroneously relied upon the unpublished opinion in *Clack v Allstate*, unpublished per curiam opinion of the circuit court, (Docket No. 192420, January 23, 1998) (attached as **Exhibit 17**) to support its conclusion that Secura acted unreasonably. *Clack* is distinguishable from the instant case in that the initial IME reports relied upon by the defendant insurer in *Clack* actually confirmed the treating plaintiff's physician diagnosis of jaw, back, neck and right knee injuries rendering the plaintiff disabled. Despite those confirming reports, the insurer refused to pay bills associated with that injury. The Court held that the insurer's denial of benefits based on an IME report which confirmed the plaintiff's complaints was unreasonable. In contrast, Dr. Xeller's report, which was based upon his own examination and a review of records of Plaintiff's treating physicians, confirmed what Dr. Walter had noted in August of 2001 - namely that Plaintiff's right knee had improved to pre-accident condition and that complete work restrictions were no longer necessary. The reports received by and relied upon by Defendant did not confirm Plaintiff's

continued disability but rather indicated a change in her medical condition which was indicative of her ability to return to work. Far from providing evidence that conflicted with Dr. Xeller's conclusion, the medical information Secura finally acquired from Plaintiff's treaters lent *support* to this conclusion.

Moreover, in contrast to *Clack*, Defendant did not rely upon one IME report but rather Defendant retained the services of a registered nurse who conducted an interview of Plaintiff, secured various medical records and attended an office visit with Plaintiff and her orthopedic surgeon. Mr. Schingeck also conferred and communicated with Plaintiff's employer and assessed the availability of employment with her employer when compared to the residuals and limitations imposed upon her by her treating physicians and orthopedic surgeon. Accordingly, *Clack* is distinguishable from the instant case and did not support Plaintiff's claim for attorney fees.

Likewise, in the cases of *Villegas v Allstate Ins Co*, unpublished per curiam opinion of the Court of Appeals (Docket No. 235512, July 29, 2003) (attached as **Exhibit 18**), and *Hannawi v American Fellowship Mut Ins Co*, unpublished per curiam opinion of the Court of Appeals (Docket No. 207629, November 12, 1999) (attached as **Exhibit 19**), the insurers were found to have acted unreasonably in terminating benefits because they did so based upon IME reports which confirmed (at least in part) the disputed injury or the disputed causal connection between the accident and the plaintiff's injuries. In contrast, Dr. Xeller's report did not conflict with the information provided by Plaintiff's treating physician and Secura cannot be said to have acted unreasonably, given this fact. Secura could reasonably

conclude, based on the information it had (and, indeed, based on all the evidence submitted at trial), that (a) Plaintiff, even before the automobile accident, required total knee replacement surgery due to severe osteoarthritis, and (b) only hoped to remain working, if possible, up to September of 2001, in order to qualify for full retirement benefits. If so, then any work loss after September of 2001 would *not* be a result of any injury sustained in the automobile accident of September 27, 2000. Accordingly, the Court of Appeals reversibly erred in affirming the circuit court's decision and holding that Secura acted unreasonably in terminating Plaintiff's benefits in November of 2001.

**II. THE CIRCUIT COURT REVERSIBLY ERRED IN AWARDING PLAINTIFF ATTORNEY FEES IN THE AMOUNT OF \$79,415.00.**

To the extent that Plaintiff was entitled to any attorney fees under MCL 500.3148, she was only entitled to those fees associated with prosecuting her claim for personal insurance protection benefits which were overdue. The language of MCL 500.3148(1) and the Michigan Supreme Court's decision in *Proudfoot, supra* makes this abundantly clear - the circuit court was required to apportion out those fees which were attributable to collecting the benefits determined by the jury to be overdue from those fees which were attributable to collecting benefits which were due but not overdue. While Secura contends that none of the benefits awarded by the jury were "overdue," as discussed *supra*, even assuming that the Court of Appeals majority was correct in finding that \$822.52 of the award was overdue,

Plaintiff was only entitled to that portion of the total \$79,415 in fees was attributable to collecting the \$822.52.<sup>10</sup>

At page 4 of its opinion, the Court of Appeals majority concluded that the circuit court did not err by refusing to separate out those attorney fees attributable to collecting only that portion of the verdict which was overdue from those fees attributable to collecting benefits which were determined not to be overdue by the jury. The majority read MCL 500.3148(1) to permit an award of attorney fees when only some payment was delayed, concluding that “[i]t is therefore possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them.” **Exhibit 1.** This conclusion is legally erroneous because it is illogical and directly contrary to the very language of the No Fault Act. While the corollary is true - that is, it is possible for an insurer to have acted reasonably in denying benefits for which it is later deemed liable, *McCarthy v Auto Club Ins Ass’n*, 208 Mich App 97, 105; 527 NW2d 524 (1994) - it is beyond contention that an insurer who does not owe a plaintiff benefits cannot be held to have acted unreasonably in terminating payment of those benefits - benefits for which the insurer is not liable. In that circumstance, an insurer could hardly be said to have acted unreasonably in failing to pay benefits which were overdue when those benefits were never even due in the first place. How can an insurer be penalized for denying or terminating benefits that a jury later concludes were properly denied or terminated? It is simply contrary to the plain language of the statute.

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<sup>10</sup>Judge Wilder agreed and would have, at a minimum, remanded the case to the circuit court for a determination of what portion of the attorney fees was attributable to securing overdue benefits.

The Michigan Supreme Court has clearly held that a plaintiff is not entitled to collect attorney fees for benefits which are not overdue:

Thus, attorney fees are payable only on *overdue* benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying. Here, plaintiff was entitled only to those reasonable attorney fees that were attributable to the \$815.10 architect's fee. Claims for the modification expenses were not yet "overdue" because they were not yet "incurred".

*Proudfoot, supra* at 485. In this case, the Court of Appeals majority distinguished *Proudfoot* on the basis that the benefits at issue in *Proudfoot* had not yet been incurred, while the benefits at issue here had been incurred, even if not all of them were overdue. This distinction of *Proudfoot* was in error. The relevant question under *Proudfoot* and under the plain language of the statute is whether the attorney fees were attributable to benefits which were "overdue." In *Proudfoot*, the benefits were not "overdue" because they were not incurred - indeed they were not even due because they were not incurred. In this case, the fact that the benefits were incurred did not make them any more overdue than those benefits at issue in *Proudfoot*. Accordingly, Plaintiff was, at best, entitled to collect those attorney fees incurred in pursuing collection of that portion of the verdict attributable to the \$98.71 in penalty interest which was found to be "overdue" and the Court of Appeals and circuit court reversibly erred in concluding otherwise.

Further, the circuit court reversibly erred in awarding Plaintiff attorney fees incurred in securing uninsured motorist benefits. Uninsured motorist benefits are contractual in nature and a claimant's entitlement to such benefits does not arise under the No-Fault Act. *Barry v State Farm*, 219 Mich App 340, 346; 556 NW2d 207 (1996). Accordingly, under the plain language of MCL 500.3148, Plaintiff was not entitled to attorney fees for securing uninsured

motorist benefits. The Court of Appeals majority opinion did not address this issue and held merely that the trial court did not abuse its discretion in awarding attorney fees, given the skill, time and labor expended by Plaintiff's counsel.

The trial in this matter was a combined no-fault suit and uninsured motorist benefits claim where many, if not all, of the same expenses, costs and fees would have been necessarily incurred in Plaintiff's pursuit of uninsured motorist benefits. For example, based upon the documentation submitted by Plaintiff's counsel in the trial court, a number of expenses related solely to Plaintiff's uninsured motorist benefits claim and not her no-fault claim. Specifically, the following items were included in Plaintiff's request for attorney fees and but were related to the uninsured motorist claim, for which Plaintiff was not entitled to attorney fees:

Description	Time	Amount
January 22, 2003, preparation for deposition of Kathleen Lambert <i>This entry related to the uninsured motorist adjuster and has no relationship to the no-fault claim.</i>	2.5	437.50
February 4, 2003, preparation for deposition of Sgt. Lipp	1.5	262.50
Attendance at deposition of Sgt. Lipp <i>Sgt. Lipp, the investigating officer related to whether or not contact occurred between the two vehicles triggering the uninsured motorist claim for which plaintiff has not been awarded any attorney fees.</i>	1.5	262.40
February 14, 2003, receipt and review of deposition of Sgt. Lipp	1.0	175.00

June 26, 2003, telephone call to Emmit Jenkins	.2	35.00
<i>Mr. Jenkins was a witness that testified that contact was made triggering uninsured motorist benefits.</i>		
July 10, 2003, preparation of letter to Emmit Jenkins	.6	105.00
November 24, 2003, telephone call to Emmit Jenkins regarding deposition	.3	52.50
December 1, 2003, telephone call to Emmit Jenkins regarding deposition	.3	52.50
Research regarding airfares for Emmit Jenkins	.6	105.00
December 22, 2003, preparation for Emmit Jenkins deposition	2.3	402.50
December 23, 2003, attendance at Emmit Jenkins deposition	2.0	350.00
December 26, 2003, receipt and review of statement for video tape of Emmit Jenkins deposition	.2	35.00
December 29, 2003 correspondence to attorney Diesel with airline receipt`	.2	35.00
January 26, 2004 receipt and review of correspondence with insurance check reimbursement of travel costs witness Emmit Jenkins	.2	35.00
September 8, 2004, preparation of line summary Kathy Lambert deposition	1.2	210.00
Preparation of cross-outline - Kathy Lambert	4.0	700.00
Total	18.6 hours	

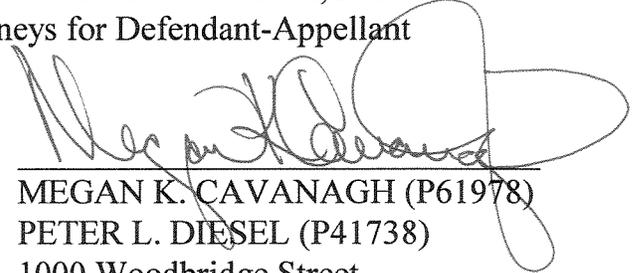
Plaintiff requested and was awarded an hourly rate of \$175. All of the foregoing are unrelated to the no-fault claim and totaled \$3,255.00. In addition, Plaintiff presented these uninsured motorist benefits-related witnesses (i.e. Emmit Jenkins and Kathy Lambert) during trial. See **Exhibit 20**, Jury Trial Vol. I; **Exhibit 6**, Jury Trial Vol. III. Such portions of the trial were clearly unrelated to the claim for no-fault benefits and Plaintiff could not recover attorney fees for these expenses.

In response, Plaintiff argued below that these witnesses were all necessary to prosecute the claim for PIP benefits. However, that argument is without merit as the relevance of these witnesses to the PIP claim is minimal, if not non-existent. For example, Emmit Jenkins' testimony regarding his lay observation of Plaintiff after-the-fact of the accident did not have any rational relationship to Plaintiff's claim for work loss or replacement services. At the very least, the trial court abused its discretion in failing to require Plaintiff's counsel to separate out these uncollectible fees and to decrease the attorney fee award significantly from the \$79,415.00 awarded. Accordingly, a remand for a reduction in the amount of the attorney fee award was, at a minimum, required in this case.

**RELIEF REQUESTED**

Defendant-Appellant, Secura Insurance, respectfully requests that this Court grant leave to appeal or peremptorily reverse the July 3, 2007 opinion of the Court of Appeals.

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Dated: October 10, 2007.  
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## LIST OF EXHIBITS

Exhibit 1	July 3, 2007 Order
Exhibit 2	September 7, 2005 and November 22, 2005 Orders
Exhibit 3	Jury Trial Volume II
Exhibit 4	Trial testimony of Dr. Walter
Exhibit 5	January 24, 2001 report of Dr. Xeller
Exhibit 6	Jury Trial Volume III
Exhibit 7	July 20, 2001 report from Mr. Schingeck to Secura
Exhibit 8	Dr. Xeller's October 4, 2001 report
Exhibit 9	Dr. Xeller's October 17, 2001 supplemental report
Exhibit 10	November 9, 2001 letter
Exhibit 11	Jury Trial Volume IV
Exhibit 12	Jury Verdict Form
Exhibit 13	Judgment
Exhibit 14	Transcript of September 7, 2005 motion hearing
Exhibit 15	Transcript of November 22, 2005 hearing
Exhibit 16	<i>Stoops v Farm Bureau Ins Co</i>
Exhibit 17	<i>Clack v Allstate</i>
Exhibit 18	<i>Villegas v Allstate Ins Co</i>
Exhibit 19	<i>Hannawi v American Fellowship Mut Ins Co</i>
Exhibit 20	Jury Trial Volume I