

STATE OF MICHIGAN
COURT OF APPEALS

UNIVERSITY REHABILITATION ALLIANCE,
INC.,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant-Appellant.

FOR PUBLICATION
July 22, 2008

No. 272615
Ingham Circuit Court
LC No. 05-000537-NF

Advance Sheets Version

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

HOEKSTRA, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that defendant's delay in making personal protection insurance (PIP) benefit payments to plaintiff was unreasonable.

Kimberly Sterling, defendant's insured, suffered severe brain injuries when her boyfriend allegedly pushed her from a moving motor vehicle. Defendant denied plaintiff's claim for PIP benefits. It claimed that, because Sterling's injuries were caused by a criminal assault, her injuries were exempt from no-fault coverage under MCL 500.3105(4). Plaintiff filed the present action, challenging the propriety of defendant's denial of PIP benefits. After a jury acquitted Sterling's boyfriend of assault, defendant paid the PIP benefits. Thereafter, plaintiff, claiming that defendant's delay in paying the PIP benefits was unreasonable, moved for attorney fees under MCL 500.3148(1). The trial court held that defendant's delay was unreasonable, and it awarded attorney fees to plaintiff. This appeal ensued.

In my opinion, the controlling issue in the present case is whether the trial court erred in holding that defendant's initial denial of plaintiff's claim for PIP benefits was unreasonable. Since submission of this case for decision, our Supreme Court decided *Ross v Auto Club Group*, 481 Mich 1; 748 NW2d 552 (2008). In *Ross*, the Court held that the plaintiff, the sole employee and shareholder of a subchapter S corporation that lost more money than it paid in wages, was entitled to work-loss benefits under MCL 500.3107(1)(b). *Id.* at 7-8. Nonetheless, the Court held that the defendant's initial refusal to pay the work-loss benefits was not unreasonable and, therefore, the plaintiff was not entitled to attorney fees under MCL 500.3148(1). *Id.* at 15. In its opinion, the Court stated:

The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. Accordingly, an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay. The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.

The trial court correctly set forth this rule of law in determining that plaintiff was entitled to attorney fees. The issue is whether it clearly erred in applying this rule and finding that defendant's refusal was not based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. The determinative factor in our inquiry is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable. [*Id.* at 11.]

The Court determined that the defendant's denial of work-loss benefits was reasonable because the "[d]efendant [had] relied on a factually similar Court of Appeals decision to adopt a reasonable position on an issue of first impression." *Id.* at 15. For this same reason, I would reverse the award of attorney fees in the present case.

If defendant had not paid the PIP benefits after Sterling's boyfriend was acquitted of assault and we were forced to decide whether defendant was responsible for paying PIP benefits, we would be addressing an issue of first impression. Plaintiff's attorney acknowledged at oral arguments that no Michigan case has addressed the issue of no-fault coverage in the factual context presented here, and the majority's extensive analysis confirms it. Further, in addressing assaults in motor vehicles occurring in different factual circumstances, the Supreme Court held that no-fault benefits were not available to the assault victims. See *Bourne v Farmers Ins Exch*, 449 Mich 193; 534 NW2d 491 (1995); *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986). In addition, the Court in *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 222; 580 NW2d 424 (1998), stated that "assaults occurring in a motor vehicle are not closely related to the transportational function of a motor vehicle."

I acknowledge that these precedents are distinguishable and, therefore, are not controlling regarding whether defendant would be ultimately responsible for paying PIP benefits. "However, the inquiry is not whether defendant is responsible for the benefits, but only whether defendant's refusal to pay them was unreasonable." *Ross, supra* at 14. Here, I would conclude that it was reasonable, particularly in light of *McKenzie's* apparent blanket statement of exempting from no-fault coverage all injuries resulting from an assault occurring in a motor vehicle, for defendant to maintain that Sterling's injuries were exempt from no-fault coverage.

I would reverse.

/s/ Joel P. Hoekstra