

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|---|-----------------------------|
| CYNTHIA A. RAMSEY, | § | |
| | § | No. 443, 2004 |
| Plaintiff Below, | § | |
| Appellant, | § | |
| | § | |
| v. | § | Court Below: Superior Court |
| | § | of the State of Delaware |
| STATE FARM MUTUAL | § | in and for Sussex County |
| INSURANCE COMPANY, | § | C.A. No. 04C-03-014 |
| | § | |
| Defendant Below, | § | |
| Appellee. | § | |

Submitted: January 12, 2005
Decided: February 23, 2005

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 23rd day of February, 2005, upon consideration of the briefs of the parties, it appears to the Court that:

1) Cynthia A. Ramsey appeals from a Superior Court decision holding that she was not entitled to recover for lost wages under 21 *Del.C.* §2118, the personal injury protection (PIP) insurance statute. Ramsey, who was injured in a car accident on October 27, 2003, went to a doctor's appointment and physical therapy during working hours. As a result, she lost \$399 in wages, and sought reimbursement from her insurer, State Farm Mutual Automobile Insurance Company. The trial court granted summary judgment to State Farm on the alternative grounds that: (i) Ramsey

was not disabled, and therefore was not eligible to receive compensation for lost wages; and (ii) since Ramsey chose to schedule her medical appointments during work hours, her lost wages were not “reasonable and necessary.”

2) Under §2118, an insured who suffers a personal injury is entitled to recover “reasonable and necessary expenses incurred within 2 years from the date of the accident for: ... the net amount of lost earnings.” In *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 366 (Del. Super. 1982), the Superior Court concluded that, “the term ‘reasonable’ is deemed to refer to the amount of lost earnings, while ‘necessary’ must be interpreted to mean those lost earnings which are ‘unavoidable’ or ‘inescapable.’” We adopt that formulation.

3) The parties filed cross-motions for summary judgment in the Superior Court, and Ramsey apparently presented no evidence that the appointments with her doctor and physical therapist had to be scheduled during work hours. As a result, the Superior Court found that Ramsey failed to establish that her lost earnings were unavoidable, and therefore “necessary” within the meaning of §2118. On appeal, Ramsey argues that the failure to mitigate damages is an affirmative defense, and that State Farm had the burden to establish that she could have arranged her medical treatment before or after work.

4) We disagree. The PIP statute provides recovery only for “reasonable and necessary” expenses. In order to satisfy that requirement, Ramsey had to establish that her lost wages were unavoidable. Since she offered no evidence on that point, she failed to establish her entitlement to PIP benefits.

5) Having determined that Ramsey’s claim must fail for lack of evidentiary support, we do not reach the Superior Court’s alternative holding that an insured must be disabled in order to recover for lost wages.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice