

STATE OF MICHIGAN
COURT OF APPEALS

DORIS PERNELL,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee,

and

QBE INSURANCE CORPORATION and IPA
INSURANCE PROGRAM ADMINISTRATORS,
L.L.C.,

Defendants.

UNPUBLISHED
December 2, 2008

No. 279825
Wayne Circuit Court
LC No. 05-519094-NF

DORIS PERNELL,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant,

and

QBE INSURANCE CORPORATION and IPA
INSURANCE PROGRAM ADMINISTRATORS,
L.L.C.,

Defendants.

No. 279837
Wayne Circuit Court
LC No. 05-519094-NF

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

ZAHRA, P.J. (*concurring in part and dissenting in part*).

While I concur in the conclusions reached in sections I and III of the majority opinion, I respectfully dissent from the conclusion reached section II of that opinion. Specifically, I conclude the lower court properly denied plaintiff an award of attorney's fees under MCL 500.3148(1). I would affirm the judgment of the lower court.

A reasonable attorney's fee is recoverable under the no-fault act when it is established that an insurer was overdue in the payment of personal or property protection insurance benefits. MCL 500.3148(1). By the plain terms of the statute authorizing these fees, "[t]he 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. . . ." *Id.*

Here, the majority concludes that the benefits to which plaintiff is entitled are payable under the QBE policy of insurance—not the Allstate policy of insurance. Significantly, plaintiff's counsel conceded during oral argument that if this Court concludes that QBE is the insurer from which plaintiff is entitled to no-fault insurance benefits, plaintiff would not be entitled to attorney's fees from Allstate. Notwithstanding this concession, the majority concludes that Allstate should nonetheless pay attorney fees to plaintiff under MCL 500.3148(1) because Allstate was involved in a priority dispute with QBE and "a priority dispute among insurers will not excuse a delay in making timely payment." The majority has, in my opinion, mischaracterized the present case as one involving a priority dispute.

A priority dispute exists where there are two or more insurance policies under which insurance proceeds are arguably payable. Insurance proceeds are arguably payable where there exists some bona fide factual uncertainty to the claim, the resolution of which dictates which of the competing policies of insurance is payable to the insured. A priority dispute is not created merely because an insured claims a right to insurance coverage. Here, the majority embraces the general rule expressed in MCL 500.3114(1) that an accident victim must look first to his or her own insurer, or that of a spouse or resident relative for personal or property protection benefits, to conclude that a priority dispute existed between Allstate and QBE. Significantly, however, as observed by the majority, MCL 500.3114(1) expressly exempts from this general rule claims made by a "person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers." MCL 500.3114(2). In such cases, the injured person "shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. . . ." *Id.* Also exempted from the general rule are claims made by "[a]n employee . . . who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer" MCL 500.3114(3). Under these circumstances, the injured employee "shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle." *Id.*

As observed by the majority, the car plaintiff was operating was used in the course of her employment of transporting passengers for hire. There was no factual dispute in this regard. Thus, by the plain terms of MCL 500.3114(2) and (3), plaintiff should have looked to "the insurer of the vehicle," MCL 500.3114(2), or the "insurer of the furnished vehicle" for her insurance benefits. Under MCL 500.3114(2) and (3), QBE is the insurer who is obligated to provide plaintiff the insurance benefits to which she is entitled. Given the undisputed facts

presented in this case, MCL 500.3114(1) does not support a good faith basis to assert a claim for insurance benefits against Allstate.¹

For these reasons, I conclude Allstate was not unreasonable when it refused to pay the claim made by plaintiff. Therefore, an award of attorney's fees under MCL 500.3148(1) is not warranted. I would affirm the lower court's denial of attorney's fees pursuant to MCL 500.3148(1).

/s/ Brian K. Zahra

¹ This conclusion is buttressed by the fact that the Allstate policy under which plaintiff stakes her claim specifically excludes from coverage "bodily injury to any person while occupying a motor vehicle while being used to carry persons or property for a charge"