STATE OF MICHIGAN

COURT OF APPEALS

LEWIS MATTHEWS III and DEBORAH MATTHEWS, Plaintiffs-Appellees, v REPUBLIC WESTERN INSURANCE COMPANY, Defendant-Appellant, and MICHIGAN DEPARTMENT OF STATE, ASSIGNED CLAIMS FACILITY, Defendant.	UNPUBLISHED March 2, 2006 No. 251333 Wayne Circuit Court LC No. 97-717377-NF

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant, Republic Western Insurance Company, appeals as of right from a judgment in favor of plaintiff, Lewis Matthews III,[1] for personal injury protection ("PIP") benefits under the no-fault automobile insurance act, MCL 500.3101 *et seq.*, including medical expenses, wage loss and replacement services. We affirm.

Plaintiff was injured in an automobile accident while driving in a rented U-Haul truck on a suspended license. Plaintiff was a partner in a business venture to sell hotdogs at the 1996 Olympic Games. In furtherance of their plan, the partners paid the appropriate fee and received a license to sell at the games, and one of the partners rented a U-Haul truck. Plaintiff was driving the U-Haul truck southbound on I-75 in Georgia when he was struck from the rear by a semi-truck. Plaintiff was hospitalized for approximately two weeks and sustained serious injuries,

[1] Because Deborah Matthews' claim is a derivative claim, we refer to Lewis Matthews III, as "plaintiff" throughout this opinion as he suffered the injuries giving rise to this cause of action.

including a closed head injury, neck fractures and scarring. Plaintiff's leg was amputated above the knee as a result of the accident. Following the accident, plaintiff filed an automobile negligence action against the driver of the semi-truck, his employer and the owner of the semi-truck.[2] Plaintiff also instituted the instant first-party action for PIP benefits against defendant, as the insurer of the U-Haul truck.[3] At the conclusion of a jury trial, the jury returned a verdict awarding damages in favor of plaintiff. The trial court entered a judgment in favor of plaintiff in the amount of $449,143.33, plus statutory post-judgment interest accruing after entry and applicable statutory post-judgment penalty interest. In addition, the trial court ordered defendant to pay attorney fees in the amount of $55,000.

Following trial, defendant moved for a JNOV or for amendment of judgment. Defendant claimed that, because the U-Haul truck was not licensed or principally garaged in Michigan, the truck was not insured under a no-fault policy according to the endorsement clause in its policy. Defendant also claimed that the truck was not subject to the requirements of the no-fault act because it was owned by a nonresident and titled in Kentucky and it was not operated in Michigan for more than thirty days in the calendar year preceding the accident. Defendant further claimed that it was entitled to setoff from the settlement awarded to plaintiff in the tort action. Following a hearing on defendant's motion, the trial court denied defendant's motion for JNOV on all grounds. This appeal ensued.

Defendant first argues on appeal that the wrongful conduct rule precludes plaintiff from recovering first-party benefits. Because the law of the case doctrine applies to this issue, we disagree.

Whether law of the case is applicable is a question of law that we review de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The law of the case doctrine eradicates the need for this Court to consider legal questions determined in a previous decision and necessary to reach that decision. *Int'l Union v Michigan*, 211 Mich App 20, 24; 535 NW2d 210 (1995).

> The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. [*Ashker*, *supra* at 13 (internal citation omitted).]

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[2] That tort action settled, and it is not part of this appeal.

[3] Plaintiff also sought benefits from codefendant Assigned Claims Facility ("ACF"), as the governmental entity created to provide no-fault benefits to Michigan residents injured in automobile accidents. The trial court conditionally granted ACF's motion for summary disposition, finding that ACF was not the priority no-fault insurance carrier but also concluding that plaintiff retained the right to reinstitute a cause of action against ACF if the action against defendant was subsequently dismissed.

In the first appeal of this case, this Court held that the trial court erred in granting defendant's motion for summary disposition on the basis of the wrongful conduct rule. In its analysis of the issue, this Court stated: "[T]he connection between plaintiff's suspended license and his injuries is simply too attenuated to establish the causation requirement of the wrongful-conduct rule." *Matthews v Republic Western Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2000 (Docket No. 211928), slip op, p 3. This Court reasoned that plaintiff's status as an unlicensed driver was only a condition, not a cause of the injury. *Id*. at 3-4. The trial court was bound by this ruling, and this Court is similarly bound by this Court's previous ruling on this second appeal. Defendant concedes in its brief on appeal that this Court is bound by the law of the case doctrine on this issue, and asserts that it raises this issue to preserve it for eventual appeal to the Michigan Supreme Court as permitted by MCR 7.302(C)(4)(b). Of course, whether this issue is preserved for further appeal to the Supreme Court is for the Supreme Court to determine.

Defendant next argues that plaintiff was not entitled to recover no-fault benefits because the endorsement clause of its policy precluded coverage under Michigan's no-fault act, and that, therefore, the trial court erred in denying its motion for JNOV. We disagree.

Defendant first asserted this claim in its motion for judgment notwithstanding the verdict ("JNOV"). We review de novo a trial court's decision on a motion for JNOV, *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003), and consider "the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000), citing *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995); *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). A motion for JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Wilkinson, supra* at 391; *Forge, supra* at 204.

We find no error in the trial court's denial of defendant's motion for JNOV on the basis that "the endorsement issue was not raised before the trial [c]ourt." The record supports the trial court's conclusion that, because defendant failed to raise the endorsement issue at trial, when viewing the evidence in the light most favorable to the plaintiff as the nonmoving party, necessarily, the evidence presented to the jury was sufficient to enable plaintiff to prevail. *Badiee v Brighton Area Schools*, 265 Mich App 343, 365; 695 NW2d 521 (2005); *Wilkinson, supra* at 391. The trial court properly denied JNOV based on the newly raised issue relating to the endorsement clause.

Next, defendant asserts that plaintiff was not entitled to no-fault coverage because, consistent with MCL 500.3102(1) and (2), no coverage was required where the U-Haul truck plaintiff was driving at the time of the accident had not been in operation in Michigan for more than thirty days in the year preceding the accident. Defendant contends that the trial court erred in denying its motion for summary disposition filed pursuant to MCR 2.116(C)(10) on this basis.[4] We disagree.

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[4] We note that while defendant's statement of questions presented does not specify the manner in
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> A . . . motion [under MCR 2.116(C)(10)] tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Corley* [*v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004)]. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. MCR 2.116(G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. *Corley, supra* at 278. If the moving party satisfies its burden of production, the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. *Maiden* [*v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999)]. [*By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26-27; 703 NW2d 822 (2005).]

In support of its claim that the U-Haul truck was a Kentucky vehicle which was not required to be registered in Michigan and which had not been in operation in Michigan for more than thirty days in the calendar year preceding the accident, defendant attached to its motion the U-Haul Company's rental income and maintenance ("RIM") statements allegedly providing a list of locations of the U-Haul truck for each day in the year preceding the accident, as well as the affidavit of Anthony Balcerzak, the president of U-Haul Company of Michigan. Balcerzak asserted in his affidavit that the U-Haul truck at issue had not been operated in Michigan "for more than thirty days *in the calendar year* preceding July 14, 1996, the date of the accident." [Emphasis added].

We find no error in the trial court's ruling. Apart from the fact that the allegedly supporting RIM statements in the record are illegible in many instances, the trial court correctly concluded that Balcerczak's affidavit did not resolve the question as to the location of the vehicle between January 1, 1996 and the date of the accident. See Random House Webster's College Dictionary (2nd ed), p 1491, defining the word "year" as "as a period . . . divided into 12 calendar months, now reckoned as beginning January 1 and ending December 31 **(calendar year)**." [Bold in original];" see also Black's Law Dictionary (8th ed), p 1646, defining the word "year" as "[t]welve calendar months beginning January 1 and ending December 31. – Also termed *calendar year*." [Italics in original]. Giving the term, "calendar year" its plain meaning, Balcerzak's affidavit must be read as addressing the location of the truck between January 1, 1995 and December 31, 1995, and not addressing the vehicles location from January 1, 1996 forward. Thus, considering this documentary evidence in the light most favorable to plaintiff as the nonmoving party, *Corley, supra* at 278, the evidence falls short of supporting judgment for defendant as a matter of law on this question.

Defendant next contends that it is entitled to a setoff of the entire amount of the judgment from plaintiff's recovery in a tort case arising out of the same accident. Again, we disagree.

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which defendant contends the trial court erred, defendant's brief on appeal appears to suggest that the error being asserted is the failure to grant summary disposition where the vehicle was not in the state of Michigan for more than 30 days in the preceding calendar year.

MCL 500.3116 provides for reimbursement of first-party benefits from tort claim recovery for certain losses. Under MCL 500.3116, an insurance provider responsible for no-fault benefits may obtain reimbursement from an insured's third-party tort claim in the following situations: (1) accidents that occur outside the state, (2) actions against uninsured owners or operators of motor vehicles, or (3) intentional torts. *Auto Club Ins Ass'n v Henley*, 130 Mich App 767, 770; 344 NW2d 363 (1983). The purpose of this statutory provision for reimbursement is to prevent an injured party from double recovery of economic losses, and its purpose applies with equal force to accidents occurring within or outside of Michigan. *Allstate Ins Co v Jewell*, 182 Mich App 611, 617; 452 NW2d 896 (1990). However, an insurer is prohibited from obtaining reimbursement from the insured's third-party tort recovery for noneconomic loss. *Dunn v Detroit Auto Inter-Insurance Exchange*, 254 Mich App 256, 267; 657 NW2d 153 (2002). The insurer seeking reimbursement or offset has the burden of proving that the insured's recovery was for economic loss. *Jewell*, *supra* at 618. When a settlement agreement fails to characterize the losses covered, a presumption applies that the compensation for the injured party was for noneconomic damages. *Keys v Travelers Ins Co*, 124 Mich App 602, 605; 335 NW2d 100 (1983).

The release plaintiffs signed in connection with their settlement of the underlying tort action specified that "[t]his Release does not pertain to any first-party no-fault insurance benefits paid or payable in connection with this matter." Therefore, the release was not silent regarding the nature of the recovery. The unambiguous language of the release stated that the amount recovered under the settlement agreement did not include first-party benefits. Even if the release language could be construed as ambiguous, defendant failed to offer any proof that a portion of the compensation for the tort action included economic damages. Thus, defendant has no legitimate claim for reimbursement or offset against plaintiff's compensation for the tort action because the release did not provide for payment of economic expenses. Because there was no likelihood of double recovery of economic losses under these circumstances, we conclude that the trial court did not err in denying defendant's motion for JNOV based on its offset claim.

Defendant's final claim on appeal is that the trial court erred in awarding plaintiff attorney fees. We disagree.

This Court reviews a trial court's decision to award or deny attorney fees pursuant to MCL 500.3148(1) for clear error. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 628; 550 NW2d 580 (1996). Reversal is warranted when the trial court's findings of unreasonable refusal or delay are clearly erroneous. *Id*. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Solution Source Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002).

MCL 500.3148(1) provides:

> 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 reason for the no-fault act's attorney-fee penalty provision is to ensure that the insured receives prompt payment. *Beach*, *supra* at 629. Nevertheless, "[a] refusal or delay in payment by an insurer will not be found unreasonable within the meaning of § 3148(1) where the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty." *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994) (citations omitted). Where a delay or refusal exists, a rebuttable presumption of unreasonableness applies, and the insurer bears the burden of justifying its refusal or delay. *Beach*, *supra* at 629.

At trial, the jury heard testimony from plaintiff and two witnesses regarding the purpose and amount of bills incurred as a result of the automobile accident. The jury determined that no-fault benefits were overdue and that no-fault penalty interest should be assessed against defendant in the amount of $75,585. Contrary to defendant's contention that it was not required to pay any attorney fees and costs, the trial court ruled that plaintiff was entitled to reasonable attorney fees because defendant did not have a reasonable basis for refusing to pay no-fault benefits to plaintiff. After the trial court's ruling against defendant, the parties agreed to the amount of $55,000 to be paid in attorney fees. Thereafter, the trial court entered an order granting attorney fees to plaintiff in the amount of $55,000.

The trial court did not err in failing to consider defendant's previously rejected arguments regarding the wrongful conduct rule or the thirty-day rule as defenses for its delay and refusal to pay benefits to plaintiff. Moreover, a jury's finding that PIP benefits are overdue for purposes of the no-fault penalty provision, MCL 500.3142, corresponds with a trial court's decision that PIP benefits were overdue for purposes of the attorney fee penalty provision, MCL 500.3148(1). See *Beach*, *supra* at 629-630. Here, the trial court's decision was supported by the jury's finding that the benefits were overdue. Accordingly, we conclude that the trial court did not commit clear error by awarding reasonable attorney fees to plaintiff pursuant to MCL 500.3148(1).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly