

STATE OF MICHIGAN  
IN THE SUPREME COURT

SHAUN BONKOWSKI,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY,  
a foreign corporation,

Defendant-Appellee.

Supreme Court No. 137672

Court of Appeals No. 273945

Oakland County Circuit Court  
No. 01-035172 NF

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**PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF**

**PROOF OF SERVICE**

FILED

JUN 5 2009

CORBIN B. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

137672  
-AT's Suppl

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**STATEMENT OF QUESTION PRESENTED**

**DOES 12% PENALTY INTEREST UNDER THE NO-FAULT ACT, RATHER THAN CEASING TO ACCRUE ONCE A JUDGMENT FOR OVERDUE BENEFITS IS ENTERED, CONTINUE TO ACCRUE UNTIL THE OVERDUE BENEFITS ARE ACTUALLY PAID, AND THE JUDGMENT SATISFIED?**

The trial court answered....."No"

The Court of Appeals answered....."No"

Defendant-Appellee would answer....."No"

Plaintiff-Appellant states the answer is....."Yes"

## STATEMENT OF FACTS

This action involves a claim for personal protection benefits under the Michigan No Fault Automobile Insurance Act, MCL 500.3101, et seq., for expenses incurred following a catastrophic automobile-pedestrian accident on June 3, 2001. As noted in Plaintiff-Appellant's November 13, 2008 Application for Leave to Appeal, Plaintiff Shaun Bonkowski sustained a spinal cord injury which left him a quadriplegic and a traumatic brain injury in the course of the accident. At the time of the accident, Shaun was an insured under a policy of automobile insurance with Defendant Allstate Insurance Company ("Allstate") and was entitled to no-fault insurance coverage from Allstate. Although the Defendant acknowledged its obligation to pay benefits, it failed to properly pay the benefits to which Plaintiff was entitled and suit was consequently filed in the Oakland County Circuit Court. The factual basis for Plaintiff's claim is set forth at great length in the Statement of Facts contained within Plaintiff-Appellant's Application for Leave to Appeal, and incorporated herein by this reference. Trial began on June 28, 2006 and was concluded on July 7, 2006 with a unanimous jury verdict totaling \$1,730,723.67, including \$349,609.67 in no-fault interest.

The verdict form agreed upon by the parties consisted of only two basic questions: (1) "What is the amount of allowable expenses owed to the Plaintiff? Include only expenses not already paid by Defendant;" and (2) "Was payment for any of the expenses or losses to which the Plaintiff was entitled overdue? If your answer is 'yes,' what is the amount of interest owed to the Plaintiff on overdue benefits, including only interest not already paid by the Defendant." The jury was also instructed that Plaintiff was entitled to 12% interest on any benefit which was found to be overdue, i.e., not paid within 30 days after reasonable proof of the fact and amount

of the loss was provided to Allstate. The jury found that Allstate owed Plaintiff \$1,381,114.00 in allowable expenses not already paid and \$349,609.67 in interest on overdue benefits (Tr IV, pp 185, 199-200, 212, 223, 228; Tr V, pp 13-16).

Judgment in Favor of Plaintiff Pursuant to the Verdict of the Jury was entered by the circuit court on July 13, 2006 in the amount of \$1,730,723.67, with Plaintiff being further entitled to taxable costs, attorney fees and interest, including any sums to which Plaintiff was entitled under the Michigan No-Fault Act, the Revised Judicature Act and the Michigan Court Rules, including case evaluation sanctions, as later determined by the circuit court (see Exhibit "A" to Plaintiff-Appellant's Application for Leave to Appeal).

On or about September 18, 2006, Plaintiff presented his proposed Order Granting in Part and Denying in Part Plaintiff's Motion for Costs, Case Evaluation Sanctions and Calculation of Interest and Entry of Judgment, incorporating in part rulings made by the trial court on September 6, 2006 with regard to statutory attorney fees and case evaluation sanctions. The proposed order also included a provision that no-fault interest under MCL 500.3142(3) should continue to accrue after the July 13, 2006 judgment was entered until Allstate had actually paid the benefits the jury had found to be overdue and satisfied the judgment (see 10/4/06 trans., pp 3-5). Defendant Allstate opposed this provision, contending that when the jury awarded expenses and no-fault interest and the verdict was incorporated into a judgment, the matter of the benefits being overdue was resolved and concluded (9/25/06 Objections of Defendant Allstate to Plaintiff's Proposed Order Denying Motion for Judgment Notwithstanding the Verdict and/or New Trial and Order Granting in Part and Denying in Part Plaintiff's Motion for Costs, Case Evaluation Sanctions and Calculation of Interest and Entry of Judgment, p 4). The

trial court ruled that it would order that the 12% penalty interest under MCL 500.3142 would continue to run until the date of the verdict on July 7, 2006 and simply let the appellate courts decide if said interest continued to accrue beyond that point (10/4/06 trans., p 4). The trial court's October 4, 2006 Order Granting in Part and Denying in Part Plaintiff's Motion for Costs, Case Evaluation Sanctions, No-Fault Sanctions and Calculation of Interest and Entry of Final Judgment limited interest to that provided for under MCL 600.6013 (see Exhibit "B" to Plaintiff-Appellant's Application for Leave to Appeal).

Allstate filed a claim of Appeal on or about October 24, 2006.

On November 7, 2006, Plaintiff filed his Claim of Cross-Appeal, alleging in pertinent part that the trial court had erred in failing to order that 12% penalty interest under the No-Fault Act would continue to accrue until the judgment against Defendant was satisfied.

On October 2, 2008, the Court of Appeals issued its opinion, ruling that no-fault interest continued to accrue only until the entry of the judgment, rather than until the judgment was satisfied (see Exhibit "C" to Plaintiff-Appellant's Application for Leave to Appeal).

On November 13, 2008, Plaintiff filed his application for leave to appeal, which included his contention that 12% No-Fault penalty interest continued to accrue until the benefits found by the jury to be overdue were actually paid and the judgment entered in Plaintiff's favor satisfied.

The Michigan Supreme Court entered its Order on April 24, 2009, directing the Clerk to schedule oral argument on whether to grant the application or take other preemptory action under MCR 7.302(G)(1). Pursuant to the 4/24/09 Order, at oral argument the parties were directed to address whether 12% no-fault penalty interest ceased to accrue once the judgment

was entered, and permitted to file supplemental briefs limited to that issue within 42 days of the date of the order. This brief is in response to that order.

## ARGUMENT

**12% PENALTY INTEREST UNDER THE NO-FAULT ACT, RATHER THAN CEASING TO ACCRUE ONCE A JUDGMENT FOR OVERDUE BENEFITS IS ENTERED, CONTINUES TO ACCRUE UNTIL THE OVERDUE BENEFITS ARE ACTUALLY PAID, AND THE JUDGMENT SATISFIED.**

### **A. STANDARD OF REVIEW**

Questions of law are reviewed de novo, *Christiansen v Gerish Tp.*, 239 Mich App 380; 608 NW2d 83 (2000).

### **B. GENERAL RULES RELATING TO THE DOCTRINE OF MERGER, BAR AND RES JUDICATA**

In 46 Am Jur 2d, Judgments, section 451, pp 742-743, the authors state that the general rule of merger is that when a final judgment is rendered in favor of the plaintiff, the original debt, cause of action or underlying obligation is said to be merged into the final judgment, and the plaintiff cannot maintain a subsequent action on any part of the original claim. A new cause of action on a judgment is substituted for the original claim. Upon rendition of the judgment, the cause of action merges into the judgment and that judgment is conclusive as to all matters which were litigated, which properly should have been litigated or might have been litigated in the original action. The doctrine of merger is calculated to promote justice and will be applied with due consideration of the demands of justice and equity; consequently it may be carried no further than the ends of justice require. See also *Caine & Weiner v Barker*, 42 Wash App 835; 713 P2d 1133, 1134-1135 (1986).

Merger is often referred to as a part of the doctrine of res judicata, and with respect to the primary function of the doctrine of merger to bar subsequent actions on the original claim, the two doctrines may be regarded as identical. The doctrine of merger determines the scope of

claims precluded from relitigation by an existing judgment. Under the doctrine, a party suing for the breach of an indivisible contract must sue for all the benefits which have accrued at the time of the suit or be precluded from maintaining a subsequent action for installments omitted. The doctrine of merger serves to prevent splitting of causes of action, 46 Am Jur 2d, Judgments, sec. 452, p 744.

However, the doctrine of merger is not as relentless and destructive as it might at first appear. The merger of a cause of action in a judgment does not mean an annihilation and discharge of the debt for all purposes. When by reason of obtaining a judgment the original claim is extinguished and rights arise upon the judgment, advantages to which the plaintiff is entitled with respect to the original claim may still be preserved despite the judgment. One of the questions which arises out of the doctrine of merger is whether the new obligation under the judgment retains the character or nature of the original obligation, a matter of some importance at times in determining the availability or existence of certain remedies and rights. In this respect, it is clear that the doctrine does not preclude an examination into the character or nature of the obligation for all purposes. The merger by judgment does not destroy all of the identifying characteristics of the cause of action which the judgment determines. The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rule which regards the original claim as merged in the judgment does not preclude a court from ascertaining whether the parties to the judgment are entitled to certain privileges or exemptions, 46 Am Jur 2d, Judgments, sections 458 & 460, pp 750-752; *Jay's Stores, Inc. v Ann Lewis Shops, Inc.*, 15 NY 2d 141; 204 NE2d 638, 641-642 (1965); *Fish Meal Co. v W.C. Brondum*, 135 So2d 825, 830 (Miss 1961); *State ex rel Pullum v Consolidated School*

*District No. 5*, 233 SW2d 702, 705 (Mo 1950); *Milbourn v State*, 32 P2d 291, 292 (Ok 1934); *Letcher County v De Foe*, 151 F2d 987, 991 (CA 6 1945). The incident of the old debt may be carried forward to prevent the inequitable destruction of a right, privilege or exemption, 50 CJS, Judgments, section 934, p 257; *Allison-Bristow Community School District v Iowa Civil Rights Com'n.*, 461 NW2d 456, 459-460 (Iowa 1990); *Caine & Weiner v Barker*, *supra*, at 713 P2d 1135; *American Surety Co. of New York v Wabash Ry. Co.*, 107 F2d 685, 688 (CA 8 1939).

Distinct rights, claims or demands of the parties growing out of the same subject matter which were not put in issue or necessarily involved or adjudicated in the prior action have been held not to be barred by the judgment. A fortiori, a judgment is not a bar to the litigation of any demand or cause of action, which by the nature of the case or form of the action could not have been adjudicated in the former suit. 50 CJS, Judgments, sec. 998, pp 341-342; *Lawlor v National Screen Service Corporation*, 349 US 322, 327-328; 75 SCt 865; 99 LEd 1122 (1955); *McCormick v Hartman*, 306 Mich 346, 350-351; 10 NW2d 910 (1943). Where there is continuing conduct giving rise to successively accruing causes of action, a judgment encompassing one or more of such claims is no bar to a subsequent action on claims becoming due thereafter. A former judgment, for example, constitutes no defense to a cause of action accruing between the same parties and on the same subject matter after its rendition, even if they involve the same legal issues. Thus, the principles of *res judicata* do not bar claims arising from ongoing misconduct that extends or occurs after the first suit. In addition, it has been held that these principles do not apply to bar an independent claim of part of the same cause of action where the case involves a continuing or recurrent wrong. 50 CJS, Judgments, sec. 1006, pp 355-356; *Heller v Plave*, 743 FSupp 1553, 1569 (SD Fla 1990); *Maharaj v Bankamerica Corp.*,

128 F3d 94, 97 (CA 3 1997); *Perez v Danbury Hospital*, 347 F3d 419, 426 (CA 2 2003); *Storey v Cello Holdings, L.L.C.*, 347 F3d 370 (CA 2 2003).

Similarly, judgment for a single breach of a continuing contract or covenant is no bar to a suit for a subsequent breach thereof, nor does a prior action on a claim bar an action on a subsequent claim flowing from the same contract, where the subsequent claim was not viable at the time of the first action. A party can bring successive claims on the same contract for damages that have not accrued as of the time of entry of judgment in the prior action without violating the doctrines of res judicata or merger. When the breach of a contractual obligation that was the subject of an earlier action did not terminate the contract, a subsequent action based on another breach is only barred by the earlier judgment where the second breach occurred before the first action was commenced. 50 CJS, Judgments, sec. 1007, pp 356-357; *Old Forge Const. Co. v City of Syracuse*, 464 NYS2d 67, 68 (AD 4 Dept 1983); *Schuchmann v Air Services Heating & Air*, 199 SW3d 228, 237 (Tenn Ct App 2005); *Allison v Montgomery*, 118 Or App 118; 846 P2d 435, 436 (1993).

Causes of action which are distinct and independent, although arising out of the same act, transaction, series of transactions or set of facts, may be sued on separately, and judgment entered on one such cause is no bar to subsequent actions on others. 50 CJS, Judgments, sec. 1012, p 361.

In 1 Restatement Judgments, 2d, sec. 24, comment f, p 203, the authors, in discussing the dimensions of a "claim" for purposes of the doctrines of merger or bar and the general rules concerning the splitting of causes of action, recognize that material facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in

conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first. In comment f to section 26 of said Restatement, the authors also note that courts, either aided or unaided by statute, may conclude that strong substantive policies favor allowing the plaintiff to “split” his cause of action with respect to cases involving anticipated continuing or recurrent wrongs (at page 240). See also *United States v Ringley*, 750 FSupp 750, 756-757 (WD Va 1990) and *United States v American Heart Research Foundation, Inc.*, 996 F2d 7, 11-12 (CA 1 1993). In comment g, following on the same page, they note that a judgment in a breach of contract action does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action. Comment i also notes that the policies supporting merger or bar may be overcome by other significant policies, and that confined within limits, this concept is central to the fair administration of the doctrine of res judicata (at p 242).

**C. 12% PENALTY INTEREST UNDER MCL 500.3142 CONTINUES TO ACCRUE AFTER THE JUDGMENT IS ENTERED AND PLAINTIFF’S CLAIM FOR SUCH INTEREST IS NOT MERGED INTO THE JUDGMENT**

MCL 500.3142(1) provides that personal protection benefits are payable as loss accrues. Hence, the coverage afforded Shaun Bonkowski was not at an end after entry of the judgment on July 13, 2006. Instead, the policy continued in full force and effect, along with Shaun’s attendant care needs arising out of the accident at issue. As the policy continued in effect, so did Allstate’s obligations under MCL 500.3142. MCL 500.3142 provides that personal protection insurance 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. Under subsection (3), an

overdue payment bears simple interest at the rate of 12% per annum. The statutory text does not include any limitation as to the time during which interest continues to accrue. Under the principles of merger, bar and res judicata discussed above, the entry of the 7/13/06 judgment, which represents an award for overdue benefits and no-fault interest thereon for a finite period of time, cannot preclude Plaintiff's claim for interest on the *still overdue* benefits arising *after* the time judgment was entered, continuing until the judgment was satisfied, as that claim had not yet accrued and did not even exist on July 13, 2006. As noted above, a judgment is not a bar to the litigation of any demand or cause of action, which by its nature, could not have been adjudicated in the former suit, 50 CJS, Judgments, sec. 998, pp 341-342; *Lawlor v National Screen Service Corporation*, 349 US 322, 327-328; 75 S Ct 865; 99 LEd 1122 (1955); *McCormick v Hartman*, 306 Mich 346, 350-351; 10 NW2d 910 (1943). The principles of merger and res judicata do not bar claims arising from ongoing misconduct that extends or occurs after the first suit. A former judgment thus constitutes no defense to a cause of action accruing between the same parties and on the same subject matter after its rendition, even if the same legal issues are involved. 50 CJS, Judgments, sec. 1006, pp 355-356; *Storey v Cello Holdings, L.L.C.*, *supra*; *Maharaj v Bankamerica Corp.*, *supra*; *Heller v Flave*, *supra*.

*Heller* notes that even if the newly accrued claims are based on similar facts of ongoing misconduct to those at issue in the previous action, the claims were not previously available, and are thus not barred by principles of res judicata. In *Storey*, the court stated:

“Claims arising subsequent to a prior action need not, and perhaps could not, have been brought in that prior action; accordingly, they are not barred by res judicata regardless of whether they are premised on facts representing a

continuance of the same course of conduct: That both suits involved essentially the same course of wrongful conduct is not decisive. Such a course of conduct may frequently give rise to more than a single cause of action. While the prior judgment precludes recovery on claims arising prior to its entry, *it cannot be given the effect of extinguishing claims which did not even exist and which could not possibly have been sued upon in the previous case*" (at 347 F3d 383; emphasis added).

Based on the foregoing, the Court of Appeals was clearly incorrect in stating at page 13 of its 10/2/08 Opinion that Plaintiff Shaun Bonkowski's claim for 12% penalty interest for Allstate's *ongoing failure* to pay the benefits owed was extinguished by the judgment under the principles of merger. While Plaintiff's *original claim*, which included the accrual of penalty interest up until the date judgment was rendered, may well have been extinguished, Plaintiff's claim for the penalty for Defendant's ongoing misconduct in failing to pay what was owed thereafter suffered no such fate. The latter claim is simply not considered to be part of the original claim that would be extinguished by judgment under the well-established law of merger and res judicata cited at length above.

In addition, even assuming general principles of merger and bar could somehow extinguish Plaintiff's not yet accrued claim for penalty interest for overdue benefits following entry of the judgment, those principles will yield to strong substantive policies expressed by legislative act. Res judicata [which includes the doctrine of merger here] is a judge-made doctrine based upon practical concerns: hostility to relitigation, wariness about double recovery, and anxiety that resources will be wasted by successive suits where one would have sufficed. The doctrine will

not be applied where other practical concerns outweigh the traditional ones, including cases where its application would frustrate a specific statutory objective, *United States v American Heart Research Foundation, Inc.*, *supra*, at 996 F2d 11; in accord, *United States v Ringley*, *supra*, at 750 FSupp 756-757.

In Michigan, the No-Fault Act, and specifically MCL 500.3142(2) & (3), reflects an intent on the part of the Legislature to provide automobile accident victims with assured, adequate and prompt reparations, *Williams v AAA Michigan*, 250 Mich App 249; 646 NW2d 476, 485 (2002). No-fault interest is awarded as a penalty for the insurer's misconduct in failing to timely pay a claim for benefits supported by reasonable proof of loss, *Regents of the University of Michigan v State Farm Mutual Insurance Company*, 250 Mich App 719; 650 NW2d 129, 138 (2002). It is intended to penalize an insurer that is dilatory in paying a claim. *Attard v Citizens Ins. Co.*, 237 Mich App 311; 602 NW2d 633, 638 (1999). Considering the legislative intent behind MCL 500.3142(2) & (3), it should and appears to have been considered axiomatic that where the insurer has denied payment and forced a plaintiff to litigate the right to recover benefits to judgment, the overdue benefits which have been incorporated into the judgment remain overdue and continue to draw interest at 12% until the judgment is actually satisfied and those benefits finally paid. See *Johnston v DAIE*, 124 Mich App 212; 333 NW2d 517 (1983); lv den 417 Mich 1100.26. The October 2, 2008 contrary ruling of the Court of Appeals in this cause serves to frustrate and undermine the expressed policy of the Legislature, and would substitute, at its current rate, judgment interest at 3.695% for the 12% penalty interest deemed appropriate by the State in the context of overdue, unpaid benefits, thus destroying most of the incentive for prompt payment once judgment has been entered. Rather than bowing to

general rules of merger and res judicata, substantial policy concerns expressed through legislative action take precedence over same. At 1 Restatement, Judgments, sec. 26, comment f, p 240, the authors state that:

“Just as the allowance of several actions with respect to the same transaction may be required by a statutory scheme of regulation, so the courts, unaided by statute, may conclude that strong substantive policies favor such allowance with respect to cases involving anticipated continuing or recurrent wrongs.”

At page 239 of sec. 26 of the Restatement, comment e, the authors also recognize that upon consideration of the entire statutory scheme, the courts may conclude that litigation, which on ordinary analysis might be considered objectionable as repetitive, is intended to be permitted. In this sense, the continued accrual of no-fault penalty interest may be considered a privilege or exemption which survives litigation of the original debt, 46 Am Jur 2d, Judgments, sections 458, 460, pp 750, 752. See also *Allison-Bristow v Iowa Civil Rights Com’n.*, at 461 NW2d 459-460; and *State ex rel Pullum v Consolidated School District No. 5*, *supra*, at 233 SW2d 705, stating:

“The doctrine of the merger of a claim in the judgment thereon has its limitations in the justice of given situation. ‘The judgment does not annihilate the debt, and when the essential rights of the parties are influenced by the original contract, the court will look behind the judgment for the purpose of ascertaining what the original contract was.’ 50 CJS Judgments, sec. 599 nn 75, 80; sec. 600, n 98.”

Similarly, *Jay’s Stores, Inc.*, *supra*, at 204 NW2d 641 emphasized that:

“But merger by judgment does not destroy all of the identifying characteristics or relationships of the cause of action which the judgment determines; and it seems

rather clear that the doctrine was not designed to weaken rights or destroy identities which the prevailing party had in his original cause and which he succeeded in establishing by judgment in his favor.”

The Court of Appeals’ conclusion that its opinion was supported by the general rule of merger was in error. The lower appellate court’s unsupported initial premise for this ruling, stated at page 12 of the 10/2/08 Opinion, that “interest awardable under MCL 500.3142(3) is a substantive element of the damages suffered by plaintiff” also runs contrary to well-established Michigan law. In *Regents of the University of Michigan, supra*, at 650 NW2d 138, the Michigan Court of Appeals held that

“No-fault interest is awarded as a penalty for the insurer’s misconduct and is *not* intended to compensate the insured for damages,” citing *Attard v Citizens Ins. Co. of America*, 237 Mich App 311, 320; 602 NW2d 633 (1999) (emphasis added).

Indeed, *Attard* declined to categorize 12% penalty interest under the no-fault act as substantive damages:

“Unlike prejudgment interest, which is intended to compensate a party for the delay in receiving its damages, no-fault interest is intended to penalize an insurer that is dilatory in paying a claim...

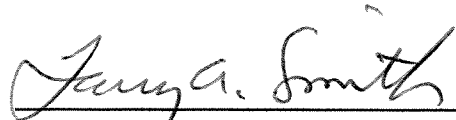
Because the no-fault act’s interest provision is intended to penalize the insurer for its misconduct rather than compensate the insured for damages caused by the insurer, we conclude that a prevailing plaintiff may recover no-fault penalty interest under MCL 500.3142; MSA 24.13142 as a cost subject to prejudgment interest under MCL 600.6013; MSA 27A.6013” (at 602 NW2d 638).

Thus, the Court of Appeals' reasoning was additionally flawed insofar as it held that allowing 12% penalty interest to continue to accrue as long as the overdue benefits remained unpaid and the judgment unsatisfied would constitute an enhancement of Plaintiff's substantive damages (10/2/08 Opinion, p 12). As a penalty, no-fault interest exists independently of the substantive damages of the insured under Michigan law. Plaintiff submits that this status also indicates that the ruling of *Johnston v DAIIE, supra*, holding that a plaintiff was entitled to both judgment interest under MCL 600.6013(2) and no-fault interest pursuant to MCL 500.3142 until the judgment was paid, was correct. Such a ruling is in accordance with both the laws of merger and res judicata, and with that of this state concerning the character of no-fault penalty interest. It does not, as the Court of Appeals found in this action (10/2/08 Opinion, p 14) "authorize [a court] to continue the work of a jury postverdict.

RELIEF

WHEREFORE, Plaintiff-Appellant Shaun Bonkowski prays this Honorable Court enter its order granting his application for leave to appeal, reversing the judgment of the Court of Appeals and reinstating that of the trial court with regard to the award of attorney fees in favor of Plaintiff under the No-Fault Act, awarding Plaintiff attorney fees as case evaluation sanctions under MCR 2.403 in addition to attorney fees awarded to Plaintiff under the No-Fault Act in an amount to be determined by the trial court, providing that 12% penalty interest under MCL 500.3142 continues to accrue until the judgment for overdue attendant care benefits under the No-Fault Act is actually satisfied and awarding Plaintiff-Appellant the reasonable and necessary costs and attorney fees incurred with regard to the instant application for leave to appeal.

Respectfully submitted,



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Dated: June 4, 2009