

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

JOYCE E. OWENS and RICHARD L. OWENS,  
individually and as Guardian to  
KENNETH M. OWENS, a legally  
incapacitated person,

Plaintiffs,

and

HERRICK MEMORIAL HOSPITAL and  
HERRICK MEMORIAL NURSING HOME,

Intervening Plaintiffs,

-v-

Case No. 84-418614-CK

AUTO CLUB INSURANCE ASSOCIATION,  
a Michigan Corporation,

Hon. John H. Gillis, Jr.

Defendant.

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OPINION

This case is presently before the court on defendant Auto Club Insurance Association's (ACIA) motion for rehearing. ACIA seeks rehearing of cross motions for declaration of rights filed by plaintiffs and defendant. Defendant further brings a motion entitled "Motion for Objections to the Entry of Plaintiffs' Order for Declaration of Rights."

By an order of the court dated April 27, 1987, defendant was ordered to pay no-fault insurance benefits to plaintiffs, subject to any factual defenses defendant may have and subject to reimbursement of any government medical benefits which may become available. By the order, the court granted plaintiffs' motion for declaration of rights.

ACIA continues to maintain, however, that it need not pay any first-party no-fault benefits to plaintiffs because it is entitled to set-off certain governmental benefits to which plaintiffs may become entitled,<sup>1/</sup> citing MCLA 500.3109 and Morgan v Evans, 163 Mich App 115 (1987). Essentially, defendant

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<sup>1/</sup> At the time of his accident, Kenneth Owens was an active duty member of the U.S. Coast Guard.

argues that it need not pay any benefits to plaintiff until the set-off issue is resolved. It further asserts that it need not pay benefits if plaintiffs failed to make timely application to the government for military or veterans benefits.

In Morgan, the court held that plaintiff's no fault insurer was entitled to subtract from the benefits owed to plaintiff the amount of governmental benefits that would have been paid if plaintiff had sought treatment at a military facility. Id. at 119. Apparently, the surgery sought by the plaintiff in Morgan may have been available in a government hospital. The military refused to pay for the surgery, however, because, inter alia, it disputed whether the accident caused Mr. Morgan's injury.

In contrast, there is no dispute in the case at bar that Mr. Owen's injury was caused by the automobile accident. Further, there is no factual dispute that the type of rehabilitative care needed by Mr. Owens was unavailable at a V.A. Neurosurgery Center.

For example, plaintiffs present a memorandum written by Steven Levine, M.D., on Veterans Administration letterhead. In the memo, Dr. Levine states, "It is clear to us that a rehabilitation center would care for Kenneth in areas we cannot provide..." (emphasis added). Further, Dr. Levine's deposition reveals that long-term rehabilitation was not available at the V.A. Neurological Service (tr 20). Defendant has presented no evidence to contradict this testimony, other than self-serving denials.

On these facts, the court finds Morgan to be distinguishable from this case. No evidence has been presented to contradict plaintiffs' allegations that long-term care is unavailable at the V.A. facility. There is no dispute in this case as to causation. The court thus concludes that Morgan is not controlling.

Defendant further disputes the court's prior order. It requires defendant to pay the no-fault benefits which are outstanding but permits defendant to present factual defenses at trial and to be reimbursed for any governmental benefits received by plaintiff. In order to establish that it is entitled to rehearing, defendant

must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

MCR 2.119(F).

In general,

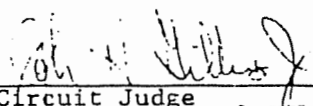
a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted.

Id.

In this case, defendant fails to show a palpable error by which the court and the parties have been misled. Defendant's remaining arguments repeat the allegations made in the previous proceedings. For this reason, the motion for rehearing will be denied. Similarly, the arguments made in defendant's motion for objections pertain to the prior arguments. That motion is also denied.

Finally, because it appears to the court that defendant has unreasonably delayed the payment of no-fault benefits which are due, the court finds that plaintiffs and intervening plaintiffs are entitled to costs and reasonable attorneys' fees incurred in opposing defendant's motion for objections, MCR 2.114(E). No motion is presently before the court, however, which provides proofs as to the amounts of such damages. The court is thus unable at this time to determine an appropriate sanction.

DATED: MAY 2-1988

  
Circuit Judge

JOHN H. GILLIS, JR

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ORDER

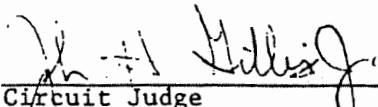
At a session of said court held in the City-  
County Building, Detroit, Michigan, on this:

MAY 2 - 1986

PRESENT: HON. JOHN H. GILLIS, JR.  
Circuit Judge

The matter having come before the court on defen-  
dant's motion for rehearing and motion for objections, the  
court being fully advised, and in accordance with the court's  
opinion issued this same day,

IT IS HEREBY ORDERED that defendant's motions are  
DENIED.

  
Circuit Judge

JOHN H. GILLIS, JR.

BY

DEPUTY CLERK