

STATE OF MICHIGAN

MICHIGAN SUPREME COURT

SPECTRUM HEALTH HOSPITALS and
SPECTRUM HEALTH UNITED
(Shawn Norman),

SUPREME COURT DOCKET NO.: 151419

Plaintiffs-Appellees,

COURT OF APPEALS DOCKET NO.: 323804

-vs-

CIRCUIT COURT NO.: 14-02515-AV
HON. DONALD JOHNSTON

WESTFIELD INSURANCE COMPANY,

DISTRICT COURT NO.: 13-GC-2025
HON. J. MICHAEL CHRISTENSEN

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**AMICUS CURIAE BRIEF OF MICHIGAN DEFENSE TRIAL COUNSEL IN
SUPPORT OF APPELLANT'S APPLICATION, SUPPLEMENTAL BRIEF AND
IN ACCORDANCE WITH THIS COURT'S JANUARY 29, 2016 ORDER**

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STATEMENT OF QUESTIONS PRESENTED

1. Whether *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), remains a viable precedent in light of *Frazier v Allstate Ins Co*, 490 Mich 381 (2011), and *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013)?

Defendant/Appellant answers: "No"

Plaintiff/Appellee answers: "Yes"

Amicus Curiae MDTC answers: "No"

2. If *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), remains a viable precedent in light of *Frazier v Allstate Ins Co*, 490 Mich 381 (2011), and *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013), should it be overruled?

Defendant/Appellant answers: "Yes"

Plaintiff/Appellee answers: "No"

Amicus Curiae MDTC answers: "Yes"

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae, Michigan Defense Trial Counsel (“MDTC”), is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case.

STATEMENT OF PROCEEDINGS AND FACTS

MDTC relies upon the Procedural History and Detailed Statement of Facts as set forth in Defendant/Appellant Westfield's Application for Leave to Appeal.

STANDARD OF REVIEW

A trial court's grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *DeShambo v Nielsen*, 471 Mich 27; 684 NW2d 332 (2004). A motion for summary disposition under MCR 2.116(C)(10), based on the lack of a genuine issue of material fact, tests whether there is factual support for a claim or defense. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). Summary disposition of all or part of a claim may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10).

When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). The party opposing a summary disposition motion under MCR 2.116(C)(10) has the burden of establishing, by evidentiary materials, that a genuine issue of disputed fact exists that is dispositive to the legal claims. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994); *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1991).

This case presents an issue of statutory interpretation. Issues of statutory interpretation are questions of law that are reviewed de novo. *Oade v Jackson Nat'l Life Ins. Co.*, 465 Mich 244, 250; 632 NW2d 126 (2001); *Donajkowski v Alpena Power Co.*, 460 Mich 243, 248; 596 NW2d 574 (1999).

ARGUMENT

I. *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), is no longer a viable precedent in light of *Frazier v Allstate Ins Co*, 490 Mich 381 (2011) and *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013).

The issue before this Court is whether *Miller v Auto-Owners Ins Co*, 411 Mich 633; 309 NW2d 544 (1981) has been overruled and, if not, whether it should be. It is the MDTC's position that *Miller*, while arguably still precedent, is no longer viable in light of this Court's holdings in *Frazier v Allstate*, 490 Mich 381; 808 NW2d 450 (2011) and *LeFevers v State Farm*, 493 Mich 960, 828 NW2d 678 (2013). Accordingly, this Honorable Court should overrule *Miller* and re-enthroned the Legislature's clear intent when it drafted the parked vehicle exclusion set forth in MCL 500.3106, unless it meets one of the parked vehicle exclusions enumerated in MCL 500.3016(1)(a)-(c) .

When interpreting statutory language, the courts are obligated to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53; 60, 631 NW2d 686 (2001). Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34, 39 (2002) Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory. *Wickens, supra* at 60, 631 NW2d 686. Further, courts are to give undefined statutory terms their plain and ordinary meanings. *Donajkowski, supra* at 248–249, 596 NW2d 574; *Oakland Co Road Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 604, 575 NW2d 751 (1998). In those situations, we may consult dictionary definitions. *Id*

However, if the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). If statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007). The Legislature's use of the words "subject to the provisions of this chapter" in MCL 500.3105 were ignored by the *Miller* Court. The Legislature's use of the word "maintenance" in MCL 500.3106 was also ignored by the *Miller* Court. The simple, unambiguous language of § 3106 left no room for judicial interpretation.

A. *Miller* read an inconsistency into the statute that did not exist so that it could judicially erase "maintenance" from MCL 500.3106.

In *Miller*, Richard Miller was injured when his automobile fell on his chest while he was replacing shock absorbers. As a result of the injury, he filed a claim for no-fault benefits, alleging that his injuries were compensable because they arose out of the maintenance of a motor vehicle under MCL 500.3105(1). MCL 500.3105(1) states in pertinent part:

Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, *maintenance* or use of a motor vehicle as a motor vehicle, **subject to the provisions of this chapter.**

(Emphasis added). Auto-Owners argued that Miller's claim was barred by the parked vehicle exclusion of MCL 500.3106. Under that exception, when an injury involves a parked vehicle, it must meet the enumerated provisions to be compensable in no-fault. Thus, Auto-Owners argued that the injury did not occur during the course of any of the § 3106(1)(a)-(c) exceptions, which provide:

Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:

(a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

(b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.

(c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

The *Miller* Court found that, because the Legislature intended injuries occurring during maintenance of a motor vehicle to be covered and maintenance is usually performed on a parked vehicle, § 3106 would limit coverage beyond what the Court assumed the Legislature intended. *Miller*, 411 Mich at 638 The Court described an “apparent tension between these two sections of the no-fault act: requiring, on the one hand, compensation for injuries incurred in the maintenance of a vehicle but not requiring, on the other hand, compensation for injuries incurred in the maintenance of a *parked* vehicle, with three exceptions.” *Id.* at 638-638. *Miller* unnecessarily read an inconsistency into the statute because it assumed that the Legislature intended all maintenance injuries to be compensable, despite the clear language of MCL 500.3106. The Court broadly interpreted the provisions to argue for public policy and, as Defendant-Appellant explains, the Court “judicially erased” the term maintenance from § 3106. *Miller* argued the policies under § 3105 and § 3106 were actually complimentary because “[n]othing of the policy behind the parking exclusion – to exclude injuries not resulting from the involvement of a vehicle as a motor vehicle – conflicts with the policy of compensating injuries incurred in the course of maintaining (repairing) a motor vehicle.”

Miller at 641. The *Miller* Court completely disregarded the clear, unambiguous language of § 3106(1). An act of judicial construction like the one taken by *Miller* is only proper where the “plain language can be rendered ambiguous by its interaction without statutes.” *Santon v City of Battle Creek*, 237 Mich App 336, 371; 603 NW2d 285, 288 (1999) citing *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). However, such a rule is only applicable if there is a conflict or inconsistency between the statutes. *Ross v Modern Mirror & Glass Co*, 268 Mich App 588, 562; 710 NW2d 59, 62 (2005) citing *Szyszkoski v City of Lansing*, 64 Mich App 94, 97; 235 NW2d 72 (1975). Sections 3015 and 3106 do not conflict and, therefore, the act of judicial construction was improper.

MCL 500.3105 states that it is “subject to the provision of this chapter” and § 3106 dictates when a claimant may recover for injuries arising out of the ownership, operation, maintenance or use of a parked vehicle. Thus, it is inescapable that if an injury involves a parked vehicle, one must first turn to § 3106 to determine coverage, which is what every parked vehicle case has done since *Miller*, with the exception of those cases that adhered to *Miller’s* judicial legislation.

B. Long-standing Michigan precedent mandates that when an incident involves a parked vehicle, the first step is to determine if its meets one of the exceptions under MCL 500.3106(1).

Miller is cited for its interpretation of the rationale behind parked vehicle exclusion and exceptions of MCL 500.3106. In *Miller*, the Court opined that the § 3106(1) parked vehicle exception was intended to limit no-fault benefits to accidental bodily injuries resulting from the “use of a motor vehicle as a motor vehicle” and that the statute’s exceptions pertained “to injuries related to the character of a parked vehicle as a motor vehicle--characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accident.” *Miller supra* at 639-640 *Miller* reasoned that MCL

500.3106(1)(b) was the Legislature's recognition that some parked vehicles may still be *operated* as motor vehicles, creating a risk of injury from such use as a vehicle. *Id.* at 640. Even if this Court finds that *Miller's* explanation for the policy behind the parked vehicle exceptions is accurate, it does not follow that the *Miller* decision to add a fourth exception to MCL 500.3106(1) remained viable after this Court's continued analysis of the statute. The Court has been calling *Miller's* decision to broaden coverage into question for some time and ultimately and unequivocally disavowed it in *LeFevers v State Farm*, 493 Mich 960; 828 NW2d 678 (2013).

Substantively, one of the first times the rationale of *Miller* was considered was *Winter v Automobile Club of Michigan*, 433 Mich 446; 446 NW2d 132 (1989). In *Winter*, a tow truck driver was operating the crane of his parked tow truck to move concrete slabs when he was injured after one of the slabs fell on his hand. The plaintiff argued that the tow truck was being used as a motor vehicle as contemplated under § 3105 and, under *Miller*, he did not need to meet one of the exceptions to the parked vehicle exclusion in § 3106. The Court of Appeals agreed. *Id.* At 456-157. Following *Miller's* rationale, the Court of Appeals reasoned that, provided an injury arose out of an occurrence where the motor vehicle was being used as a motor vehicle, the Legislature intended coverage. *Id.*

The *Winter* Court, likely recognizing that the *Miller* holding had effectively eviscerated § 3106, had to find some way to limit *Miller*. Thus, *Winter* determined that *Miller* applied only to those parked vehicle cases involving maintenance. *Id.* at 457. As a result, the *Winter* plaintiff was not entitled to no-fault benefits because he was not performing maintenance on the vehicle and did not meet one of the § 3106 exceptions.

The dissenting opinion recognized that *Miller's* holding and rationale stood for the proposition that if § 3105 was met, § 3106 did not need to be addressed. Because *Miller*

found that the no-fault act was intended to compensate injuries that arise out of the use of a motor vehicle as a motor vehicle, the dissent observed that, as long as that status was met, coverage would be afforded, regardless of whether the injury would meet one of the § 3106 exceptions. *Id.* at 462.

After *Winter* effectively acknowledged that it judicially erased “maintenance” from § 3106, the Court had another opportunity to address the interplay between sections 3105 and 3106 in *Putkamer v Transamerica Ins. Corp.*, 454 Mich 626; 563 NW2d 683 (1997). In *Putkamer*, the plaintiff was injured when she slipped and fell on ice while entering her parked vehicle. *Id.* at 627. *Putkamer* started its analysis by turning first to § 3106 and *Winter*. *Id.* at 631-632. It held under *Winter* the following applied:

Where the motor vehicle is parked, the determination whether the injury is covered by the no-fault insurer generally is governed by the provisions of subsection 3106(1) alone. See *Winter v Automobile Club of Michigan*, 433 Mich 446, 457; 446 NW2d 132 (1989). There is no need for an additional determination whether the injury is covered under subsection 3105(1). *Id.* at 458, n 10.

Id. at 632-633. The Court then turned to *Miller* to explain that the exceptions to the parked vehicle exclusion were intended to bar recovery where the involvement of the motor vehicle was akin to a stationary object. *Id.* at 633. As such, the *Putkamer* Court found that even if the injury met one of the exceptions under § 3106, it was still necessary to find that the injury was arose out of the use of a motor vehicle as a motor vehicle. *Id.* at 635-636. The Court enumerated a three-part test for injuries involving a parked vehicle. It held:

In summary, where a claimant suffers an injury in an event related to a parked motor vehicle, he must establish that the injury arose out of the ownership, operation, *maintenance*, or use of the parked vehicle by establishing that he falls into one of the three exceptions to the parking exclusion in subsection 3106(1). In doing so under §

3106, he must demonstrate that (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle; and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for. [Id. at 636-636 (emphasis added).]

While not explicitly overruling *Miller*, *Putkamer* did not erase the term “maintenance” from its analysis of § 3106 like *Miller* did. Instead, the *Putkamer* test states that if the injury arose out of maintenance of the parked vehicle, the first step is to determine if there is an applicable exception under § 3106. Thus, the holding in *Putkamer* supports a finding that the Court has continued to distance itself from *Miller*.

About a year after *Putkamer*, this Court again considered what incidents trigger § 3106 and how that section should be analyzed. In *McKenzie v Auto Club Ins Ass'n*, 458 Mich. 214, 225-226; 580 NW2d 424 (1998), the plaintiff was asphyxiated while occupying her parked vehicle. The parties agreed that the injury met the exception under MCL 500.3106(1)(c). The Court discussed what it means to use a motor vehicle *as a motor vehicle* and reasoned “that most often a vehicle is used ‘as a motor vehicle,’ i.e., to get from one place to another” *McKenzie*, 458 Mich at 219. This is known as the transportational function test. *Id.* at 226. The transportational function test has been applied to both § 3105 and the second-prong of the *Putkamer* test¹. This test focuses on the fact that the intention of the no-fault act was to provide coverage for injuries that occur while the vehicle is being used for its transportational function, i.e. to get from one place to another.

¹ As noted by the Michigan Court of Appeals in *Drake v Citizens Ins. Co.*, 270 Mich. App. 22, 35; 715 N.W.2d 387, 395 (2006), “*McKenzie* cited *Putkamer* in a footnote in support of the above language, despite the fact that *Putkamer* never utilized § 3105 in its analysis concerning the parked motor vehicle. To the contrary, *Putkamer* expressly stated that the analysis was controlled by MCL 500.3106. Nonetheless, both *McKenzie* and *Putkamer* held that even if one of the parked-vehicle exceptions applies, it is necessary to determine whether the injury arose out of the use of a motor vehicle as a motor vehicle.”

Another important case to consider when analyzing § 3106 and how it relates to § 3015, if at all, is the case of *Frazier v Allstate*, 490 Mich 381; 808 NW2d 450 (2011). In *Frazier*, the plaintiff placed her coffee mug and work bag on the passenger side of her vehicle with the anticipation of walking around to the driver's side door to enter her vehicle and leave for work. Plaintiff claimed that she fell on ice as she closed the passenger side door. *Frazier v Allstate*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No 292149), p 4 (**Exhibit A**) rev'd 490 Mich 381 (2011). At the Court of Appeals level, the Court first considered whether the injury arose out of the use of plaintiff's vehicle as a motor vehicle and noted that the inquiry turned on "whether the injury is closely related to the transportational function of motor vehicles." *Id.* at 4 citing *McKenzie, supra* at 225-226. The Court of Appeals concluded that it did because she was anticipating entering her vehicle to use it for transportation at the time of the fall. *Id.*

Next, the Court of Appeals in *Frazier* focused on whether the injury met one of the exceptions under § 3106 because it was undisputed that her vehicle was parked at the time of the fall. The Court of Appeals found that the plaintiff was injured by "equipment permanently mounted to the vehicle" because she was injured while operating (closing) the door. *Id.* at 8. In addition, the Court of Appeals found that the plaintiff was alighting from her vehicle at the time of the injury because she had yet to close the door. *Id.* at 14.

This Honorable Court disagreed with the Court of Appeals on all points. First, this Court held that for cases involving parked vehicles, the first inquiry was § 3106, not § 3105. *Frazier* held:

Therefore, in the case of a parked motor vehicle, a claimant **must** demonstrate that his or her injury meets one of the requirements of MCL 500.3106(1) because unless one of those requirements is met,

the injury does not arise out of the use of a vehicle as a motor vehicle, under MCL 500.3105(1). [490 Mich at 386 (emphasis added).]

Thus, *Frazier* stands for the proposition that in all parked vehicle cases, the first step is to turn to § 3106. Thus, this Court disagreed with *Miller* by explicitly holding that the proper inquiry, for any case involving a parked vehicle, first is whether it meets one of the exceptions under § 3016(1). Since Ms. Frazier's injury did not, this Court found there was no need to consider whether the vehicle was being used as a motor vehicle and would pass the *McKenzie* transportational function test. Clearly, and as supported by the plain language of the act, if the incident does not meet one of the parked vehicle exceptions under §3016(1), the inquiry stops there.

The Court in *LeFevers v State Farm Mut Ins Co*, 493 Mich 960; 828 NW2d 678 (2013) affirmatively acknowledged and adopted the specific disavowal of the *Miller* decision. The Court held:

Specifically, *Frazier* effectively disavowed as dicta the portion of *Miller, supra*, stating: "Section 3106(b) recognizes that some parked vehicles may still be operated as motor vehicles, creating a risk of injury from such use as a vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the vehicle as a motor vehicle." 411 Mich at 640. *Frazier* also effectively disavowed the discussion of MCL 500.3106(1)(b) in *Gunsell, supra*, 236 Mich App at 210 n 5. [*LeFevers*, at 961.]

LeFevers was the result of a long history of case law effectively rejecting the application of *Miller*, as it has consistently been found that if a parked vehicle is involved, the first step is to determine whether one of the exceptions under § 3106(1) applies. The Court of Appeals in *Frazier*, reasoned that closing the door was a necessary part of the alighting process because it pertained to the transportational function of the vehicle as one would not drive the vehicle with the door open; this Court disagreed. Likewise, the *Miller* Court

found that maintenance of a vehicle was related to the transportation of the vehicle because maintenance was necessary to drive a vehicle; and, this Court should disagree here. *Miller* failed to consider that the Legislature did not intend to leave the door open indefinitely for those who are injured while performing maintenance. Placing “maintenance” back into § 3106 would not bar all recovery for injuries that occur during maintenance, just those that the Legislature intended.

As set forth in in the foregoing cases, this Court has systematically limited or disavowed *Miller*. The language of MCL 500.3106(1) is clear, and if a parked vehicle is involved, the injury must arise from one of the exceptions found in that section. *Putkamer, supra; Frazier, supra* and *LeFevers, supra*. *Miller* was a decision based on public policy – a policy not supported by the statute.

II. IF MILLER V AUTO-OWNERS INS CO, 411 MICH 633 (1981), IS NOT OVERRULED, IT SHOULD BE DISAVOWED DUE TO ITS BLATANT DISREGARD OF THE STATUTORY LANGUAGE FOUND IN MCL 500.3106.

It is inescapable that the Legislature chose to include the word “maintenance” as part of in MCL 500.3106’s parked vehicle exclusion. Yet, *Miller* took it upon itself to extirpate the word from that section. As a result, conflicting results have plagued the courts ever since.

A. The act of judicial construction by *Miller* has created inconsistencies in MCL 500.3105 and MCL 500.3106 that would not have existed had the Court not erased “maintenance” from §3106 .

As drafted by the Legislature, MCL 500.3106 bars recovery equally for those who are injured during the ownership, operation, maintenance or use of a parked vehicle as a motor vehicle. By deleting the word maintenance, the *Miller* Court granted a new exception that has resulted in inconsistent recovery. For example, had the *Winter* plaintiff

testified only that he was moving the concrete slabs during the maintenance of his vehicle, he would have been entitled benefits under *Miller*. The term "maintenance" has been given a liberal construction. *McMullen v Motors Ins Co*, 203 Mich App 102, 104-105; 512 NW2d 38 (1993). In *McMullen*, the plaintiff was burned by hot water and steam from the radiator of an automobile that his brother was attempting to fix. The plaintiff was afforded no-fault benefits because it was determined that his brother was performing maintenance on the vehicle. *Id.* at 107. However, had the plaintiff been burned by the same hot steam that was emanating from the vehicle without maintenance being performed, no benefits would have been granted. *Id.* at 109.

Likewise, one could envision a similar scenario where a claimant slips on oil that leaked from a broken line while performing an oil change. Under *Miller*, since this repair was to keep the car drivable as a motor vehicle, benefits may be granted. But, if a similar claimant were to slip on oil on the ground while she was entering her vehicle, coverage would not be afforded. In *Hines v Pioneer State Mut. Ins. Co.*, unpublished opinion issued August 10, 2004 (Docket No 247093) (**Exhibit B**), p 16, the Court of Appeals found that if the plaintiff slipped on oil while entering her vehicle, she did not meet one of the exception of MCL 500.3106(1)². Under *Hines*, the oil spill may have been incidental to using the vehicle but it is the same mechanism of injury for both plaintiffs. In another likely scenario, a person performing maintenance on their parked vehicle with no intention to drive it suffers a hand injury when the hood falls on it. That person is entitled to coverage under *Miller*. Conversely, if that same person had just exited their vehicle,

² This unpublished decision is for illustrative purposes. It is an example of how the act judicial construction by *Miller* has expanded the coverage afforded to those performing maintenance, beyond what the Legislature intended when it enacted MCL 500.3106(1).

finished the alighting process, but accidentally closed the door on their hand, coverage would not be afforded under § 3106. These conflicting results are the consequence of *Miller's* judicial legislation.

Had the *Miller* Court not erased maintenance from § 3106, recovery would have been enforced in the manner the Legislature intended, consistently for all injuries involving the ownership, operation and maintenance of motor vehicles. Surely, it did not intend for coverage on cases that are so far removed from the use of a motor vehicle accident, such as the case of *Musall v Golcheff*, 174 Mich App 700; 436 NW2d 451 (1998), where the plaintiff was at a self-serve car wash and was injured by the wash wand before he even started washing his vehicle. *Id.* at 701. The Court found that the plaintiff was performing maintenance, which is for the use of the vehicle, and coverage was afforded under *Miller* and §3105. *Id.* at 704.

1. There are instances where maintenance would be covered under the act and it would be those instances where the vehicle is actually being used for its transportation function at the time of the injury.

The Legislature's intent in enacting the no-fault act was to provide compensation to victims who were injured in automobile accidents. *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). MCL 500.3105 allows coverage for injuries arising out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle as a motor vehicle" and MCL 500.3106 restricts that coverage for all instances arising out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" if the vehicle is parked, unless it meets an exception under § 3106. If the limit of § 3106 is not applied, it allows injuries that occur during maintenance of a parked vehicle to be covered, even when the maintenance is not for the purpose of using the motor

vehicle as a motor vehicle at the time of the injury. See *Musall v Golcheff*, 174 Mich App 700; 436 NW2d 451 (1998).

Plaintiff-Appellee spends a lot of time arguing that it would be a rare scenario where a person would perform maintenance on a vehicle that was not parked. However, there are scenarios where maintenance should be covered under MCL 500.3105 or MCL 500.3106. These scenarios are consistent with the no-fault act's intent to compensate injuries that arise out of the use of a motor vehicle for its transportational purpose at the time of the injury. In *Yates v Hawkeye-Security Ins. Co.*, 157 Mich App 711; 403 NW2d 208 (1987), the plaintiff was injured while a tow truck that was being used to perform maintenance ran into him. The court found that because the injury arose out of the maintenance and the tow truck was not parked, benefits were afforded under MCL 500.3105. *Id.* at 714. Likewise, if an insured is pushing a stalled vehicle and is injured, it would fall under the maintenance provision of § 3015. Regarding maintenance on parked vehicles, injuries are likely to occur under the unreasonably parked exception of MCL 500.3106(1)(a). For example, the vehicle's tire blows while the car is being driven, which forces the driver to park in an unreasonable fashion under § 3106(1)(a).

Notably, these injuries all occur during the use of a motor vehicle for its transportation function at the time of the injury and are specific to the special characteristics of a vehicle. This is consistent with the Court's finding in *McKenzie* when it found that the no-fault act was intended to compensate those injuries that arise during the use of the motor vehicle as a motor vehicle, i.e., to get from one place to another" *McKenzie*, 458 Mich at 219. Inconsistent results have mostly occurred due to the failure to follow the plain language of § 3106 to bar recovery for maintenance injuries involving parked vehicles that do not meet an exception under § 3106, even though those exceptions

were intended to address circumstances when the parked vehicle is being used as a motor vehicle.

The *Miller* Court's public policy rationale was that the Legislature must have intended maintenance-related injuries to be covered, whether the vehicle is parked or not, because the term maintenance appears in § 3015 and maintenance relates to the use of the motor vehicle. But, not all maintenance occurs while the injured person is using the motor vehicle for transportation, or even intends to use the vehicle as a motor vehicle. For example, in the case at hand, Plaintiff-Appellee was changing the tire for his parents in their driveway. This injury likely occurred because of the negligent manner in which he set up the jack, not because the maintenance was occurring at the time the vehicle was being used for its transportation function. The fact the vehicle fell did not relate to any special characteristic of the motor vehicle. The vehicle fell because, like any other stationary object, it was not properly secured. Thus, it actually follows the rationale of § 3105 and § 3106 to bar recovery.

MCL 500.3106 precludes coverage for parked vehicles because those vehicles are usually not being used as motor vehicles for their transportation function, except in those exceptions enumerated under § 3106(1) that relate to the special characteristic of using the vehicle as a motor vehicle. Under 3106(1)(a), the act of parking in a way to cause unreasonable risk of bodily injury is most likely to occur as a result of some unforeseen issue that arose during the use of the vehicle as it was being used for transportation. Under § 3106(1)(b), operating equipment or loading and unloading can occasionally be considered part of the transportational function if the vehicle is being used as a motor vehicle. Under § 3106(1)(c), the act of entering into and alighting from all relate to the necessary use or cessation of use of the vehicle for its transportational purpose.

Notably, *Miller* rationalized that the exceptions under § 3106 were intended to address those cases where the vehicle was being operated as a motor vehicle. *Miller, supra* at 640. However, its decision to extradite “maintenance” from § 3106 allows for benefits when the vehicle is not being operated as a motor vehicle. Placing the term “maintenance” back into the statute is consistent with the plain language of the statute, the Legislature’s intent, and even *Miller’s* overarching rationale. It ensures that injuries arising out of the involvement of a parked vehicle occur at a time the motor vehicle is in a state that relates to its transportational function, the special characteristics of a motor vehicle, and not to injuries arising as a result of some stationary object that fell on a person because he or she failed to properly secure it.

B. If public policy should be applied at all, public policy dictates placing “maintenance” back into 3106 as written by the Legislature.

Plaintiff-Appellee relies solely on a public policy argument that because, in its opinion, an injury occurring during the maintenance of a parked vehicle may rarely meet the requirements of one of the exceptions in MCL 500.3016(1), all maintenance related injuries should bypass § 3106. However, there is public policy against the rewriting of that statutory section as advanced by *Miller*. In *Rory v Continental Ins Co*, 473 Mich 457, 470-471; 703 NW2d 23 (2005), this Court made clear that public policy is not a matter of judicial preference but, rather, must be reflected in the constitution, statutes, or common law. And, this Court has long held that courts may not rewrite statutes under the guise of statutory construction. *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717, 629 NW2d 915 (2001)

1. One goal of the no-fault act is to advance cost containment and limiting recovery to injuries that occur with the use of the motor vehicle advances that goal.

One of the main goals of the no-fault act is to maintain cost-containment and this Court has long been mindful of that goal. *Admire v Auto-Owners*, 494 Mich 10, 29; 831 NW2d 849 (2013) citing *Griffith v State Farm Mut Ins Co*, 472 Mich 521, 539; 697 NW2d 895 (2005). Here, the Legislature chose to include the term “maintenance” in the parked vehicle exclusion and to allow recovery only where the fact pattern meets one of the exceptions. This advances the goal of cost containment. If the Legislature intended every benefit to be extended to every claimant who performs maintenance on a vehicle, it would have deleted “maintenance” from § 3106. Yes, including “maintenance” in § 3106 may limit recovery. Likewise, each exception under § 3106(1) has been limited by this Court, which advances not only the cost-containment goal but reinforces the clear language of the statute.

As noted in *Frazier*, the act of alighting was limited to the extent that closing the vehicle’s door is not part of the alighting process. Once a person has exited the vehicle, with both feet on the ground and are no longer dependent on the vehicle, that person’s activities are not related to the use of the vehicle for its transportation function³. Similarly, the act of loading and/or unloading is limited to the extent that any preparation for those activities would not be covered. (See for example *Dowdy v Motorland Ins. Co.*, 97 Mich

³ This Court recognized that if closing the door were a necessary part of the alighting process, it would leave the door open for a whole breadth of cases. For example, a person who has completely removed themselves from the vehicle, walks away to put down personal property, and then goes back to close the door should not be entitled to benefits and they are not under *Frazier*. The alighting process was complete, the cessation of use of the vehicle, occurred long before the door was closed.

App 242; 293 NW2d 782(1980) holding the unfastening of chains used to secure steel bundles in preparation for delivery was not a covered act under 3106(1)(b)).

The act of entering is limited to physical contact with the vehicle to enter the vehicle, and the intent of the injured person to enter the vehicle is not part of the inquiry. *McCaslin v The Hartford Accident & Indemnity*, 182 Mich App 419, 422; 452 NW2d 834 (1990). (See also *King v Aetna Casualty & Surety Co*, 118 Mich App 648; 325 NW2d 528 (1982), where the plaintiff fell as he was reaching for his car door with his keys in hand.) Conversely, by removing “maintenance” from § 3106, courts have allowed recovery outside the clear language of the statute and the intent of the Legislature.

2. The Reliance Interest Argument Advanced by Plaintiff-Appellee for Affirming this Court’s Holding in *Miller* is unpersuasive.

Plaintiff-Appellant makes the far-reaching assertion that *Miller* should remain precedent because its holding “has become so embedded, so accepted, so fundamental, to everyone’s expectation that to change it would produce not just readjustments, but practical real-world dislocations.” (Plaintiff’s Supplemental Brief, p. 22 quoting *Robinson v City of Detroit*, 462 Mich 439, 613 NW2d 307 (2000)). Plaintiff-Appellant supports this argument by claiming “consumers and insurance companies alike have understood and expected maintenance injuries to be compensable under the *Miller* decision.” (Plaintiff’s Supplemental Brief, p. 23.)

First, “[a]s the *Robinson* majority explained, people normally rely on the words of the statute itself when looking for guidance on how to direct their actions.” *McCormick v Carrier*, 487 Mich 180, 213, 795 N.W. 2d 517, 536 (2010), citing *Robinson*, 462 Mich at 47. In *McCormick*, this Court held that “correcting the errors in the *Kreiner* majority’s interpretation of MCL 500.3135(7) would not present undue hardship to reliance

interests.” *Id.* In so holding, the Court was not persuaded that victims of motor vehicle accidents alter their behavior in reliance on auto cases involving improper statutory construction:

Further, it is unlikely that motor vehicle drivers, and the victims of motor vehicle accidents, have altered their behavior in reliance on Kreiner. As noted by the Robinson majority, where a statute deals with the consequences of accidents, "it seems incontrovertible that only after the accident would . . . awareness [of this Court's caselaw] come," and "after-the-fact awareness does not rise to the level of a reliance interest because to have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." Id. at 466-467. Similarly, this statute generally involves motor vehicle accidents, and it strains credibility to think that the average driver and the average future injured party have altered their behavior in reliance on Kreiner. [McCormick, 487 Mich at 213-214 (emphasis added).]

It equally strains credibility to think that the average future injured person would alter his or her behavior in reliance on *Miller*, a case about whether accidental bodily injury is compensable under the no-fault act when the injury is sustained while maintaining a parked vehicle.

As part of its reliance argument for not overturning *Miller*, Plaintiff-Appellee also asserts “[i]f the Court overrules the decision now, it will result in a windfall to insurance companies who have set and *collected* premiums that account for this known risk.” It is unclear how an insurer experiences a windfall when it appropriately underwrites risk for an expected outcome, especially when that outcome has been confirmed and resulted in the payment of maintenance related no-fault claims for over 30 years. Should *Miller* be overturned, the change in expectation would result in a reassessment of risk by no-fault

insurers, which in turn would lead to a calibration of premiums to reflect the change in precedent.

RELIEF REQUESTED

Simply put, *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981) was an act of judicial legislation that was overruled by *Frazier v Allstate*, 490 Mich 381; 808 NW2d 450 (2011) and *LeFevers v State Farm Mut Ins Co*, 493 Mich 960; 828 NW2s 678 (2013). The clear language of MCL 500.3106 states that it applies to injuries that occur during the maintenance of a parked vehicle. Thus, the statute's exclusion and its enumerated exceptions must be considered when evaluating a claim that involves maintenance of a parked vehicle. If the Court finds that *Miller* was not overruled by *Frazier* or *LeFevers*, it is the Michigan Defense Trial Counsel's position that it is time for this Court to state that *Miller* is no longer viable precedent.

As such, it would follow that Defendant-Appellant is entitled to an Order reversing or vacating the decisions of the Kent County Circuit Court and the 61st Judicial District Court granting Plaintiffs-Appellees' Motion for Summary Disposition and the decision to award of no-fault penalty attorney fees under MCL 500.3148(1) and remand this matter back to the 61st Judicial District Court with instructions to enter summary disposition in favor of Defendant-Appellant Westfield Insurance Company, together with such other relief from this Court as may be deemed warranted under these circumstances

Respectfully Submitted,
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STATE OF MICHIGAN

MICHIGAN SUPREME COURT

SPECTRUM HEALTH HOSPITALS and
SPECTRUM HEALTH UNITED
(Shawn Norman),

SUPREME COURT DOCKET NO.: 151419

Plaintiffs-Appellees,

COURT OF APPEALS DOCKET NO.: 323804

-vs-

CIRCUIT COURT NO.: 14-02515-AV
HON. DONALD JOHNSTON

WESTFIELD INSURANCE COMPANY,

DISTRICT COURT NO.: 13-GC-2025
HON. J. MICHAEL CHRISTENSEN

Defendant-Appellant.

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AMICUS CURIAE BRIEF OF MICHIGAN DEFENSE TRIAL COUNSEL

INDEX OF EXHIBITS

Exhibit A: *Frazier v Allstate*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No 292149).

Exhibit B: *Hines v Pioneer State Mut. Ins. Co.*, unpublished opinion issued August 10, 2004 (Docket No 247093).

STATE OF MICHIGAN
COURT OF APPEALS

MONA LISA FRAZIER,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

December 21, 2010

No. 292149

Macomb Circuit Court

LC No. 2006-003787-NF

MONA LISA FRAZIER,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

No. 293904

Macomb Circuit Court

LC No. 2006-003787-NF

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

In docket number 292149, defendant appeals by right a judgment entered in plaintiff's favor in this no-fault case. We affirm. In docket number 293904, plaintiff appeals by right an order denying her request for penalty attorney fees under MCL 500.3148(1). We reverse. The appeals have been consolidated.

This lawsuit was filed after defendant denied plaintiff's claim for first-party no-fault benefits. According to plaintiff, she slipped and fell on ice while in the process of closing her parked vehicle's passenger door. Although no-fault benefits were initially paid to plaintiff, they were discontinued on the ground that, according to defendant, plaintiff was not near her vehicle when she fell. At trial defendant also argued that none of the exceptions to the parked vehicle exclusion of the no-fault act applied. A jury trial resulted in a verdict in plaintiff's favor. Thereafter, plaintiff filed a motion for penalty interest under MCL 500.3148(1) which was denied. These appeals followed.

Docket Number 292149

Defendant first argues that its motion for directed verdict should have been granted because none of the exceptions, MCL 500.3106(1), to the general exclusion of coverage for parked vehicles apply to the circumstances presented in this case. After review de novo of the trial court's decision, considering the evidence in the light most favorable to plaintiff, we disagree. See *Sniecinski v Blue Cross & Blue Shield of MI*, 469 Mich 124, 131; 666 NW2d 186 (2003).

First we address plaintiff's challenge to our jurisdiction over defendant's issues on appeal. Plaintiff argues that, because defendant's claim of appeal only challenged the order denying its post-trial motion for JNOV, remittitur, or new trial, and not the final judgment, defendant cannot raise any other issues on appeal. We disagree. This Court has jurisdiction because the claim of appeal was timely filed. See MCR 7.204(B). The final judgment is the order that is appealable of right, but there is no jurisdictional requirement that claims of appeal correctly identify the final order or list all the orders being appealed. See MCR 7.204(A). The scope of an appeal from the judgment includes any orders entered by the court prior to the judgment. See *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). Thus, plaintiff's jurisdictional challenge to several of defendant's issues on appeal is without merit. Next, we address the parked vehicle exclusion and its exceptions.

There are two steps involved in the determination whether no-fault benefits are available. *Drake v Citizens Ins Co of America*, 270 Mich App 22, 25; 715 NW2d 387 (2006), citing *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 33; 651 NW2d 188 (2002).

First, it is necessary to determine 'whether the injury at issue is covered,' i.e., whether it is 'accidental,' 'bodily,' and 'aris[es] out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.' *Id.* Second, it is necessary to determine whether the injury is excluded under other provisions in the no-fault act and whether an exception to an exclusion would save the claim. [*Drake*, 270 Mich App at 25.]

In this case, it is undisputed that plaintiff's injury was accidental and bodily. Whether the injury arises out of the use of plaintiff's vehicle as a motor vehicle "turns on whether the injury is closely related to the transportational function of motor vehicles." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998). Plaintiff testified that she put her work bag, coffee, and purse on the passenger side of her truck in anticipation of immediately walking around to the driver's side, entering the vehicle, and driving to work. However, after placing the items in her vehicle, plaintiff stepped aside to close the passenger door and, while in the process of shutting the car door—with her hand still on the door—she slipped and fell flat on her back. Plaintiff testified that her momentum from swinging the car door, combined with the steep incline of the parking lot, may have made her slide a bit on impact with the ground.

On these facts, we conclude that plaintiff's parked vehicle was being used for transportational purposes, i.e., to transport herself and her personal effects to work, at the time

the injury was sustained. Plaintiff claimed that she fell while in the process of closing the vehicle's door so that she could drive to work, which distinguishes the vehicle from other stationary objects. See *id.* at 218-219, 222-223. Thus, the first step of the analysis is satisfied: at the time of plaintiff's injury, her vehicle was being used as a motor vehicle and was more than "incidentally involved" in the incident. See *id.* at 226; *Rice*, 252 Mich App at 34-35. That is, there is a sufficient causal nexus between plaintiff's injuries and the transportation function of her motor vehicle. Next we turn to the second step, whether the parked vehicle exclusion applies to bar no-fault coverage.

MCL 500.3106, in relevant part, provides:

(1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:

* * *

(b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.

(c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

During the trial, plaintiff argued that three exceptions to the parked vehicle exclusion applied because (1) "the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used," i.e., she was in the process of closing the vehicle's door and had her hand on the door when the injury occurred, (2) she was in the process of loading the vehicle when she was injured, and/or (3) the injury was sustained while she was alighting from the vehicle. In support of its motion for directed verdict, defendant argued—as it does on appeal—that none of the §3106(1) exceptions applied because the car door is not considered "equipment permanently mounted on the vehicle," and plaintiff was neither "loading" nor "alighting from" the vehicle when she fell.

The trial court denied defendant's motion for directed verdict. First, the trial court noted its responsibility to interpret the statute at issue. Second, the court noted that there is no statutory definition of "equipment" and the dictionary definitions are not very precise, but one definition provided that equipment "is what is needed or is provided to carry out a particular purpose or function." The court concluded that "a door carries out the specific function of ingress and egress into that vehicle" and "that doors are a part of the equipment of a motor vehicle in the broadest sense." However, whether plaintiff was actually using the equipment, i.e., pushing the door closed, at the time of her fall was a question of fact for the jury. Second, the court held that closing the door is part of the loading process "because to secure any load is the end function of loading." Because plaintiff testified that she had placed items into her vehicle and was closing

the door after loading when the fall occurred, it was an issue for the jury whether that testimony was to be believed. Third, the court directed a verdict as to the issues whether plaintiff was occupying or entering into the vehicle because no testimony was offered to support any such claims. Fourth, the court held that plaintiff was alighting from the vehicle at the time she fell. The court concluded that “reasonable minds could honestly differ on material issues of fact,” particularly with regard to “what she was doing at the time of the fall and the place of the fall.” Thus, directed verdict was denied, except as to the issues of occupying or entering into the vehicle. We agree, for the most part, with the trial court’s conclusions.

In construing statutory language, our goal is to give effect to the intent of the Legislature. *Drake*, 270 Mich App at 30. The statute’s language is construed reasonably, with the purpose of the act kept in mind. *Twentieth Century Fox Home Entertainment, Inc v Dep’t of Treas*, 270 Mich App 539, 544; 716 NW2d 598 (2006). The fair and natural import of the terms used, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). If the plain and ordinary meaning of the language is clear, judicial construction is not necessary and the statute must be applied as written. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

First, we conclude that the passenger car door is “equipment permanently mounted on the vehicle.” In *Miller v Auto Owners*, 411 Mich 633; 309 NW2d 544 (1981), our Supreme Court explained that each of the parked vehicle exceptions describe an instance where, although parked, the vehicle’s involvement in an accident is nonetheless directly related to its character as a motor vehicle as compared to any other stationary object. *Id.* at 639-640. In describing the exception involving “equipment permanently mounted on the vehicle,” MCL 500.3106(1)(b), the *Miller* Court noted:

Section 3106(b) recognizes that some parked vehicles may still be operated as motor vehicles, creating a risk of injury from such use as a vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the vehicle as a motor vehicle. [*Id.* at 640.]

Thus, *Miller* does recognize that a door on a vehicle can be considered “equipment permanently mounted on the vehicle.” Similarly, in *Gunsell v Ryan*, 236 Mich App 204; 599 NW2d 767 (1999), the plaintiff, a mail carrier, “injured his back when he lifted the rear door of defendant’s small semitrailer, which was not working properly.” *Id.* at 206. This Court concluded that “the door was equipment permanently mounted on the vehicle” *Id.* at 210 n 5. According to the phrase its plain and ordinary meaning, MCL 8.3a, we agree that a car door is “equipment permanently mounted on the vehicle.”

However, not every component or type of equipment on a vehicle meets the requirements of the exception. MCL 500.3106(1)(b) requires that the injury be “a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used” Thus, for example, injury following physical contact with components of a vehicle that are not moveable, i.e., cannot be “operated or used,” will not give rise to compensable injury under this exception. Accordingly, rear view mirrors, bumpers, headlights, and taillights could not be in the process of being “operated or used” at the time of injury.

In this case, there were issues of fact as to whether plaintiff's injury was a direct result of physical contact with the door, and whether the passenger door "was being operated or used," i.e., being closed, at the time she sustained injury. Plaintiff testified that, as she stepped aside to close the car door, while in the process of closing the car door and with her hand still on the door, she slipped and fell flat on her back. She also testified that her momentum generated from swinging the car door, combined with the steep incline of the parking lot, may have made her slide a bit on impact with the ground. The jury could have concluded that plaintiff was in physical contact with her car door and that the process of closing the door—including possibly that the shifting of her weight from foot to foot as required to generate the momentum to swing the door shut or the motion of shutting the door considering its weight or just stepping aside to shut the door—caused plaintiff to be off-balance when she stepped on the ice resulting in her fall. However, we disagree with the trial court's conclusion that the "loading" exception applied under the facts of this case. The items were already loaded in plaintiff's vehicle at the time she was attempting to close the door, therefore she was not injured as "a direct result of . . . property being lifted onto or lowered from the vehicle in the loading or unloading process." Nevertheless, the trial court properly denied defendant's motion for directed verdict with regard to the §3106(1)(b) exception to the parked vehicle exclusion.

And we also conclude that, if the jury determined that plaintiff was indeed in the process of closing the passenger door when the injury occurred—as opposed to merely falling in the parking lot as defendant claimed—plaintiff was "alighting" from her vehicle. This Court noted in *Krueger v Lumbermen's Mut Cas & Home Ins Co*, 112 Mich App 511, 515; 316 NW2d 474 (1982), that there is no statutory definition of the term "alighting." Likewise the *Krueger* Court determined that, under the circumstances of that case, it was "unnecessary to attempt a complete definition of the term," but concluded that "an individual has not finished 'alighting' from a vehicle **at least** until both feet are planted firmly on the ground." *Id.* (emphasis supplied). Defendant urged the trial court, and urges us on appeal, to hold that plaintiff had alighted from the vehicle because both of her feet were on the ground. But just as the trial court declined to apply that limited definition to the circumstances in this case, we also decline to do so.

Alighting from a vehicle is a process that does not end when one merely has their feet outside the vehicle. In fact, a person could still be almost completely inside the vehicle while her feet are located outside the vehicle "planted firmly on the ground." In *Hunt v Citizens Ins Co*, 183 Mich App 660, 664; 455 NW2d 384 (1990), citing *Temam v Transamerica Ins Co of Michigan*, 123 Mich App 262, 265; 333 NW2d 244 (1983), this Court held that "entering into" a parked vehicle is a process as well, which is distinguishable from merely preparing to enter into a vehicle, *King v Aetna Cas & Surety Co*, 118 Mich App 648, 651; 325 NW2d 528 (1982). Thus, in *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 632-633; 552 NW2d 671 (1996), this Court held that the plaintiff was considered to be "entering into" the vehicle because "[s]he placed her hand on the vehicle door, opened the door, and took a small step toward the truck" just before slipping and falling on ice. *Id.* at 628, 632-633. Just as "entering into" a vehicle requires one to touch the car door, take a step, and open the car door, one must also touch the car door, take a step, and close the vehicle's door to complete the process of "alighting." That is, the exit from the vehicle is not complete until one has physically removed oneself completely from the interior of the vehicle and closed the vehicle's door.

In this case, plaintiff testified that she was in the process of closing the parked vehicle's passenger door, with her hand still on the door, when she slipped and fell. Thus, she was completing the alighting process when the injury occurred. Unlike the circumstances presented in *Harkins v State Farm Mut Auto Ins Co*, 149 Mich App 98, 101; 385 NW2d 741 (1986) and *Royston v State Farm Mut Auto Ins Co*, 130 Mich App 602, 604; 344 NW2d 14 (1983), plaintiff had not begun to move away from the vehicle before she was injured. Defendant's reliance on the fact that plaintiff testified that she had stepped away from the vehicle to allow the necessary room to close the car door is unavailing. There is no way to close a car door while one is standing between the vehicle and the door itself. Further, as the trial court noted, clearly the transportation function of a motor vehicle cannot be realized while a door on the vehicle is not closed, i.e., plaintiff could not have driven to work with the car door wide open. Thus, the trial court properly denied defendant's motion for directed verdict with regard to the §3106(1)(c) exception to the parked vehicle exclusion.

In summary, the trial court properly decided the legal issues whether the car door was "equipment permanently mounted on the vehicle," and the meaning of "alighting from the vehicle," but we reverse the trial court's determination related to the "loading" exception. Further, considering the evidence in the light most favorable to plaintiff, genuine issues of material fact existed upon which reasonable jurors could differ with regard to whether one, both, or neither of these parked vehicle exceptions were established; thus, defendant's motion for directed verdict was properly denied in this regard. See *Sniecinski*, 469 Mich at 131; *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005).

Next, defendant argues that "numerous" erroneous evidentiary rulings warrant reversal and a new trial. However, in its brief on appeal, defendant only challenges the purported denial of its motion in limine to exclude the affidavit of one of plaintiff's treating physicians, Dr. Christopher Stroud. But it appears that defendant dismissed the motion before the scheduled hearing on it; thus, the trial court never made a decision regarding the motion. Perhaps that is why defendant has improperly failed to address the basis of the trial court's decision, *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004), and, in violation of MCR 7.212(C)(7), has failed to set forth the location in the record where this issue was properly preserved for appellate review. Further, during the trial testimony of defendant's litigation specialist, it was defense counsel who actually moved for the admission of Dr. Stroud's affidavit as an exhibit, and the trial court granted defense counsel's request, admitting the affidavit into evidence. Thus, defendant's argument on appeal is completely without merit. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

Next, defendant argues that the trial court erred in denying its motion for judgment notwithstanding the verdict, remittitur, and/or a new trial because (1) after this case was concluded, plaintiff filed a premises liability complaint alleging that she slipped and fell "while carefully walking on the premises," which is consistent with defendant's theory that plaintiff did not fall while closing her car door, (2) the jury was allowed to decide issues of law, i.e., whether the exceptions to the parked vehicle exclusion applied, and (3) the jury verdict was against the great weight of the evidence with regard to the award of attendant care services. These arguments have no merit.

First, defendant has set forth no legal support for its position that plaintiff is not permitted to pursue a premises liability claim after she was successful in obtaining no-fault benefits through this legal action. Defendant may not merely announce its position and leave it to this Court to discover and rationalize the basis of its claims, nor may it give issues cursory treatment with little or no citation of supporting authority. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Thus, this issue is abandoned. See *id.*

Second, the trial court did not improperly allow the jury to decide issues of law. In denying defendant's motion for directed verdict, the trial court held there were genuine issues of material fact as to "what she was doing at the time of the fall and the place of the fall," i.e., whether plaintiff's theory or defendant's theory should prevail. Again, defendant has failed to set forth the location in the lower court record where this precise issue was preserved in violation of MCR 7.212(C)(7). Further, as plaintiff argues, review of the record reveals that defense counsel expressly indicated approval of the jury instructions and jury verdict form; thus, this issue was waived. See *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 591-592; 657 NW2d 804 (2002).

Third, defendant has not established that the jury verdict was against the great weight of the evidence with regard to the award of attendant care services. A jury's verdict may be overturned if it is against the great weight of the evidence, but will not be set aside if there is competent evidence to support it. MCR 2.611(A)(1)(e); *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). Here, according to the trial testimony, defendant denied no-fault benefits to plaintiff within about four months of her sustaining a fractured ankle requiring surgery. Significant complications followed that required medical intervention and, according to the testimony of plaintiff's medical providers, a registered nurse and certified case manager, plaintiff, and her family members, attendant care services were necessary because of plaintiff's physical limitations. Plaintiff was, at least at some time, confined to a wheelchair. The affidavit of Dr. Stroud, admitted as evidence by defense counsel, also confirms plaintiff's need for such services. Defendant's complaint that plaintiff failed to submit particular documentation after her claim for no-fault benefits was denied is disingenuous in light of the fact that, as defendant's litigation specialist testified, such efforts would have been futile because no payments would have been made on any such claims. Further, it is clear from the record evidence that defendant was aware throughout the course of the litigation, including discovery deposition testimony, that plaintiff required attendant care services. And defendant has not directed us to contradictory, admitted evidence located in the record in this regard. Thus, defendant has not established that the jury verdict was against the great weight of the evidence. In summary, defendant's motion for JNOV, remittitur, or new trial was properly denied. The judgment in docket number 292149 is affirmed.

Docket Number 293904

Plaintiff argues on appeal that the trial court erred in failing to grant her request for penalty attorney fees under MCL 500.3148(1) because defendant's initial refusal to pay no-fault benefits to plaintiff was unreasonable. We agree.

"The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a

question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). This Court reviews de novo questions of law, but we review findings of fact for clear error. *Id.* "A decision is clearly erroneous when 'the reviewing court is left with a definite and firm conviction that a mistake has been made.'" *Id.*, quoting *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). [*Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).]

First, we consider and reject defendant's argument that this Court lacks jurisdiction to consider plaintiff's appeal. Defendant argues that plaintiff's claim of appeal was untimely, but fails to offer authority in support of its argument. Again, it is not sufficient for a party to simply announce a position and leave it to this Court to discover the basis for the claim and elaborate the arguments. *Wilson*, 457 Mich at 243; *Yee*, 251 Mich App at 406. In any case, plaintiff filed a timely motion for reconsideration from the order denying attorney fees, costs, and interest, and this appeal was timely filed from the order deciding that motion. See MCR 7.202(6)(a)(iv); MCR 7.204(A)(1).

Next, we turn to the issue whether the trial court properly held that defendant had a reasonable basis for discontinuing plaintiff's no-fault benefits.

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 proper inquiry is whether the insurer's initial refusal to pay was unreasonable, not whether coverage is ultimately determined to exist. *Shanafelt*, 217 Mich App at 635. A delay, however, "is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Id.* MCL 500.3148(1) requires the court to engage in a fact-specific inquiry to determine whether "the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." *Moore*, 482 Mich at 522, quoting MCL 500.3148(1).

In this case, the trial court denied plaintiff's request for attorney fees, holding that "[t]he question whether Plaintiff was operating her motor vehicle giving rise to no fault benefits for her injury was a key question in this case given Plaintiff's explanation of her injury, thereby making Defendant's denial of her claim reasonable since it was based upon a legitimate outcome determinative question of fact." We disagree with the trial court's analysis and conclusion.

To determine the grounds for defendant's initial refusal to pay plaintiff no-fault benefits, we turn to the testimony in that regard. The April 5, 2007, deposition testimony of defendant's litigation specialist in the special investigation unit (SIU), Jill Conkey, revealed that the first claims adjuster assigned to plaintiff's claim was Mary Mackey and Mackey took a recorded statement from plaintiff. The record evidence includes the recorded statement. In that statement,

plaintiff explained to defendant's representative that she had just placed her purse, coffee mug, and work bag on the front seat of the passenger side of her Ford Ranger truck, which was parked in her carport,¹ and was using her left hand to shut the passenger door "when the next thing I knew I was on the ground." Ice caused her fall. Plaintiff had intended on putting her things in the vehicle, walking around to the driver's side, and driving to work. At that point, according to Conkey, plaintiff qualified for no-fault benefits and benefits were paid.

Conkey further testified that every slip and fall claim for no-fault benefits is automatically referred to the SIU for further investigation; thus, the claim was assigned to an adjuster in the SIU department, Trisha Dzierwa. After further investigation, Dzierwa denied plaintiff's claim on April 12, 2006, and went on maternity leave on April 16, 2006. The claim file was then transferred to Conkey. During Conkey's discovery deposition she was questioned regarding the reason for the termination of plaintiff's no-fault benefits. According to Conkey's testimony:

After Trisha reviewed the medical records that had come in, she noticed a discrepancy in regards to the EMS report² that was in the medical records from the hospital, I believe, where they indicated that she had slipped and fell in the parking lot.

* * *

Trisha relied upon the fact that it stated on here that she slipped on the parking area while walking to her car.

When asked what Conkey was relying on to continue to deny benefits, she referenced the above statements as well as "the subsequent interview with the EMS technicians." Again when asked: "So based on the EMS report and the conversation with the EMS techs and their drawing,³ benefits were terminated, as far as you understand?" Conkey replied in the affirmative. When asked: "And that's what you rely on in continuing to deny the benefits?" Conkey replied in the affirmative. When asked if the interview with the EMS technicians was recorded, Conkey indicated that it was not recorded, but Dzierwa wrote a note in a diary in the file. Apparently the diary note indicated, according to Conkey's testimony, "that they found her in the parking lot and that she was nowhere near her vehicle or a vehicle for it to have happened while she was getting into or out of her vehicle." Conkey testified that she was relying on the same information to continue to deny plaintiff's claim for benefits, but she had no idea where plaintiff fell and agreed that the carport is in the parking lot. Conkey had not been provided with plaintiff's deposition testimony or any photographs of the incident scene, had not been to the scene of the incident, and had not spoken with any other persons who were at the scene of the incident the

¹ Plaintiff was assigned the first (or last, depending on the perspective) parking spot under the carport.

² The report was completed by Darrell Blalock.

³ Conkey testified that she did not know what the diagram specifically represented, there was no document in the claim's file interpreting the diagram, and she did not ask Dzierwa to interpret the diagram.

morning that it happened. Further, plaintiff was never contacted to inquire as to any explanation regarding the purported discrepancies—benefits were simply terminated. All requests for payment, including for medical bills, had been denied since the date of termination.

An affidavit of Tricia Dzierwa, dated May 4, 2007, indicated that she spoke with the EMS drivers who responded to the scene and “they told me that, contrary to [plaintiff’s] representations, she was not near a vehicle when they found her” and “that she was in the middle of the parking lot away from the covered parking space where [plaintiff’s] vehicle was parked and not near her vehicle.” Dzierwa did not record the interview with the EMS technicians and did not obtain signed statements from them either. We note that defendant required plaintiff to provide a signed claim form, a recorded statement, medical records, and other documents in support of her request for no-fault benefits. However, defendant apparently does not require that witness statements or other information its claim representatives acquire during the investigation of such a claim be subject to that same, or any level, of scrutiny with regard to assurances of reliability.

The discovery deposition of Michael Fitzsimmons, one of the two EMS technicians who responded to the incident scene, was taken on May 7, 2007. Contrary to Dzierwa’s claim, Fitzsimmons testified that he seemed to recall that a car was in the last space of the carport and that the closest thing to plaintiff when they located her was the pole by the last parking space in the carport. When asked:

Q. It’s possible she may have fallen by her car door, correct?

A. Correct, it’s possible.

Q. I mean, that’s not very far from where you found her, correct?

A. Correct.

Fitzsimmons admitted that tending to plaintiff’s injuries was the primary concern, not finding out where she fell or what she was doing when she fell.

At trial, Fitzsimmons testified that Blalock authored the EMS run report. Fitzsimmons recalled finding plaintiff lying within a short distance (within three to six feet) from the last carport pole. It was about 5:15 a.m. It was dark outside at the time and the area was not well-lit. He recalled that there was a vehicle in the very last (or, depending on the perspective, very first) parking space in the carport and he also remembered there being black ice. When Fitzsimmons was questioned regarding Dzierwa’s note that “[t]here was not a vehicle even parked in the first available parking spot,” he did not recall telling her that and agreed that he would not have told Dzierwa that in light of his recollection of a vehicle being in that spot. Further, Fitzsimmons did not tell Dzierwa that he found plaintiff “in a walkway;” she was not found in a walkway. When asked if plaintiff was found “a very short distance from [the carport] pole,” he answered in the affirmative. With regard to where plaintiff could have fallen, the following colloquy occurred:

Q. You agree it’s possible that she may have fallen by or while closing her car door?

A. Possible.

Q. Yes. I mean, it's not very far from where you found her correct?

A. Correct.

Q. Okay. Where you found her is an area in the same general proximity of where that last car was parked, correct?

A. Yes.

Q. Okay. You certainly did not find her in the middle of the parking lot, correct?

A. Yeah. I did not find her, no.

Q. Okay. And if Trish Ezierwa [sic], the adjuster from Allstate, indicates in her Allstate record that in her communications with the reporting paramedics that she was found and she attributes to you a statement that she was found in the middle of the parking lot that would not be your recollection of what you told her, correct?

A. Correct.

Darrell Blalock, the other EMS technician on the scene and who authored the EMS run record, gave discovery deposition testimony on May 7, 2007. He testified that the specific details of how the accident occurred and where it occurred were not his primary concern; helping plaintiff with her injury was his primary concern. In fact, when asked "Did you ask her if she was getting into her car?" He replied, "I wouldn't have asked that because it was irrelevant to our treatment."

Blalock also testified at trial. He wrote on the run sheet that "Patient states that she slipped on the parking area while walking to her car." He testified that this statement represented a kind of shorthand memo of what had occurred. Blalock also indicated that plaintiff was found in a parking lot, not a walkway. However, if he said "walkway" it is the same thing as saying the "parking lot" because the walkway ended in the parking lot and plaintiff was found in that area. But, he did not recall telling Dzierwa that plaintiff was found "in a walkway." Blalock did not know if there was a vehicle in the last parking space of the carport; he had no recollection at all either way. He did not recall asking plaintiff where she fell and testified "usually we don't." He was concerned about her injuries; details of what happened and how it happened are "mostly irrelevant." Blalock also testified about the fact that, consistent with his description at his deposition, plaintiff was found within five to six feet of the last carport pole.

Defendant claims that its initial refusal to pay no-fault benefits was reasonable in light of the "factual uncertainty with regards to her fall." However, the requirement is that a "legitimate" factual uncertainty existed and we conclude that defendant has not met its burden in that regard. See *Ross*, 481 Mich at 11. The discontinuation of plaintiff's no-fault benefits was allegedly premised on Blalock's report—which indicated that plaintiff "slipped and fell in the parking lot"

or slipped “while walking to her car”—and an interview with Blalock and Fitzsimmons. Plaintiff did, however, slip and fall in the parking lot because the carport is located in the parking lot. And, in a general sense, she could have been considered to be walking to her car consistent with Blalock’s intention to provide a “shorthand memo” of what occurred. The interview with the EMS technicians was not recorded by Dzierwa, but she claimed in her diary note and subsequent affidavit that she was told by the paramedics that plaintiff was not near a vehicle when she was found; rather, she was in the middle of the parking lot. However, the technicians’ markings on a diagram of the location where plaintiff was found do not comport with Dzierwa’s description—they depict that plaintiff was found within the general vicinity of the last parking space in the carport as she claimed.

Further, the testimony of both EMS technicians clearly refutes such “investigatory” conclusions. Fitzsimmons recalled a vehicle being parked in the last carport space, and agreed that plaintiff could have fallen by her car door considering the location in which she was found. She was not, however, found in “the middle of the parking lot” as Dzierwa claimed. Blalock also recalled that plaintiff was found in the parking area, and not in a walkway and that she was found within five to six feet of the last carport pole—not “in the middle of the parking lot.” Further, as the EMS technicians testified, it was dark and plaintiff had been lying on the ground for some period of time when they arrived. Their primary concern was plaintiff’s welfare and injury, not the precise circumstances which led to her injury. Accordingly, the description of the event provided on their run sheet was merely intended as a short memo of what had occurred. In fact, Blalock testified that he was not concerned with how or where the incident occurred and he would not have even asked plaintiff if she was getting into her car when she fell “because it was irrelevant to our treatment.”

In light of these circumstances we cannot agree with the trial court that defendant’s initial discontinuation of plaintiff’s no-fault benefits was reasonable. The “investigation” of plaintiff’s claim was perfunctory and it was neither completely nor accurately documented; thus, it led to unsupported conclusions to plaintiff’s detriment. The goal of the no-fault insurance system is “to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses.” *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). This goal is completely defeated when an insurer, through its representatives, is permitted to deny such victims their important contractual and statutory rights merely on the ground that a half-hearted and shoddy “investigation” led to contrary and unfounded conclusions—to the insurer’s benefit—about the facts underlying a claim. When reasonable and reliable investigatory methods and practices are employed, a reasonable decision to deny benefits because of a legitimate question of factual uncertainty can exist. In this case, however, we conclude that a reasonable investigation was not conducted prior to the denial of plaintiff’s claim for no-fault benefits. Any factual uncertainty that initially existed was created by—not uncovered by—Dzierwa’s “investigation,” as evidenced by the clear, repeated, and contrary testimony of the EMS technicians involved in this matter. The artificial creation of factual uncertainty through such “investigatory” methods and practices should be neither encouraged nor rewarded. As a consequence of defendant’s actions, plaintiff was forced to endure severe economic hardship and engage in extensive and time-consuming litigation to pursue her rights. Because defendant’s denial of plaintiff’s no-fault benefits was not initially based on a legitimate question of factual uncertainty, the trial court’s denial of plaintiff’s request for attorney fees pursuant to MCL 500.3148(1) is reversed.

The order appealed in docket number 293904 is reversed.

The judgment in docket number 292149 is affirmed. The order denying plaintiff's request for attorney fees, pursuant to MCL 500.3148(1), in docket number 293904 is reversed and this matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff is awarded costs with regard to both appeals. MCR 7.219(A).

/s/ Mark J. Cavanagh

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA HINES, Personal Representative of the
Estate of Jeanette Hines,

UNPUBLISHED
August 10, 2004

Plaintiff-Appellant,

v

No. 247093
Genesee Circuit Court
LC No. 02-073709-NI

PIONEER STATE MUTUAL INSURANCE
COMPANY and LINDEN SQUARE LIMITED
DIVIDEND HOUSING ASSOCIATION, d/b/a
Pine Shore Apartments,

Defendants-Appellees.

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the dismissal of her lawsuit under MCR 2.116(C)(10) in this case involving automobile insurance and premises liability claims. We affirm.

On June 14, 2002, plaintiff filed a complaint in her capacity as the personal representative of the estate of Jeanette Hines (Hines), a deceased person. Plaintiff alleged that in November 2001, Hines “was alighting from an automobile owned and being driven by her daughter^[1] at night time [sic] in the parking lot of the Pine Shore Apartments when she slipped and fell because oil had leaked from an unidentified motor vehicle.” Hines sustained a brain injury from the fall and died from it approximately ten days afterwards.

Plaintiff alleged in Count I of the complaint that Hines did not own an automobile on the date of the accident but that she resided with her daughter, who did own an automobile and had no-fault automobile insurance, including an uninsured motorist policy, through defendant Pioneer State Mutual Insurance Company (Pioneer). Plaintiff claimed that she had been unable to determine the owner or operator of the vehicle from which the oil had leaked and that she

¹ Hines’ daughter, Pamela Hines, and plaintiff share the same name and, in all probability, are the same person, but there is no definitive evidence to this effect in the record. Accordingly, this opinion refers to plaintiff and to Hines’ daughter as separate individuals.

therefore sought uninsured motorist benefits from Pioneer, which refused to pay them. Plaintiff stated that she was “entitled to collect under the uninsured motorist policy for the loss of love[] [and] companionship, and [plaintiff’s] [e]state is entitled to collect for the pain and suffering that [p]laintiff’s [d]ecedent endured prior to her becoming unconscious.”

In Count II of the complaint, plaintiff claimed that defendant Linden Square Limited Dividend Housing Association (Linden Square) owned and operated the parking lot in which Hines fell. Plaintiff alleged that Linden Square acted negligently by allowing the parking lot to become hazardous and by failing to rectify the hazardous condition. Plaintiff stated “[t]hat as a direct and proximate result of the negligent acts of . . . Linden Square . . ., [p]laintiff’s [d]ecedent’s descendants are entitled to collect for their loss of love and companionship.”

Although the complaint is not entirely clear on this point, it appears that, in addition to the uninsured motorist and premises liability claims set forth in Counts I and II of the complaint, plaintiff also sought to recover unpaid personal injury protection (PIP) benefits from Pioneer.²

On July 25, 2002, Pioneer moved for summary disposition of the uninsured motorist claim under MCR 2.116(C)(8) and MCR 2.116(C)(10). In an accompanying brief, Pioneer first claimed that it owed no benefits to plaintiff because there was an insufficient causal nexus between Hines’ fall and the “ownership, maintenance or use of an uninsured motor vehicle.” Pioneer claimed, for example, that the oil might have emanated not from a motor vehicle but from something hauled on a trailer. Pioneer additionally claimed that under the insurance policy at issue, Pioneer was obligated to pay uninsured motorist benefits if “a hit and run vehicle whose operator or owner cannot be identified” hit or caused an object to hit an insured person or a family member. Pioneer claimed that there was no evidence that an uninsured vehicle hit or caused an object to hit Hines.

Plaintiff filed a response to Pioneer’s motion on September 17, 2002, stating that Hines’ accident was indeed caused by the “ownership, maintenance or use of an uninsured motor vehicle” because “[a]n oil leak or spill is a condition that is inherent in the nature of a vehicle.” Plaintiff attached to her response an affidavit from one Darwin Burnett, who averred, “Based upon my experience and my inspection of the parking spot identified as the parking spot where Ms. Hines slipped, the oil spilled in that parking spot appears to have come from a motor vehicle.”³ Plaintiff further alleged in her response that physical contact between Hines and an uninsured vehicle did indeed occur because “[t]he oil was an object cast off by the vehicle and there is a substantial physical nexus between the vehicle and the oil[] [because] the oil is necessary to operate a vehicle.”

² Despite the unclear nature of the complaint with respect to whether plaintiff was suing to recover unpaid PIP benefits, both plaintiff and Pioneer proceeded below and proceed on appeal as if the complaint did in fact seek these benefits.

³ Burnett did not explain in his affidavit how he was qualified to make this assertion.

On October 4, 2002, Pioneer briefly replied to plaintiff's response to its motion for summary disposition, stating, inter alia, that any claimed physical contact between Hines and an uninsured vehicle "is attenuated or inferentially established."

On October 8, 2002, Pioneer moved for summary disposition of plaintiff's PIP claim under MCR 2.116(C)(8) and MCR 2.116(C)(10). In an accompanying brief, Pioneer argued that it owed PIP benefits for injuries relating to a parked vehicle only under certain circumstances, such as when the injured person was occupying, entering into, or alighting from the parked vehicle. Pioneer claimed that Hines "had completed the process of alighting from the vehicle when she was injured and was therefore not alighting from the vehicle at the time she was injured." Pioneer added, "The fact that she was next to the vehicle when she fell gave the vehicle at most an incidental causal connection to her injuries."

Plaintiff filed a response on October 16, 2002, to Pioneer's motion concerning the PIP claim. Plaintiff claimed, inter alia, that Hines was indeed in the process of alighting from the vehicle when she fell. In support of this assertion, plaintiff attached to her response excerpts from the deposition of Hines' daughter, Pamela Hines (Pamela),⁴ in which Pamela stated that the passenger door of the vehicle was still open when she turned and saw Hines on the ground after the accident.

Pamela's deposition was filed with the court on November 5, 2002. In the deposition, she testified as follows: Hines was sixty-six years old and in end-stage kidney failure at the time of the accident. She could walk on her own, but she often used a walker because some of her toes had been amputated and she had a bad back. The accident occurred close to midnight. Pamela drove Hines to her apartment complex in an extended-cab truck. Pamela got out of the driver's side of the truck, pulled out Hines' walker, and walked up to the apartment building to unlock the front door. She then heard a sound and saw that her mother had fallen. She noticed that the passenger door to the truck was still open. Hines asked Pamela to look at her head and stated "that she must have slipped and fallen on something, but she didn't know what." Before the accident, Pamela had noticed both standing oil and an oil stain in the area where Hines fell. Pamela did not see any part of the fall and did not know "if [Hines] tripped or if she slipped[.]" However, Pamela later reiterated that Hines "told me she slipped and fell." Pamela discovered oil stains on Hines' pants after the accident.

On November 25, 2002, the trial court granted Pioneer's motion for summary disposition of the uninsured motorist claim. At the motion hearing on November 4, 2002, the trial court ruled, in part:

. . . we don't know when the leak occurred if it leaked. We can have a bicycle leaking, we could have someone pouring oil or a hundred different possibilities as to this situation, and whether it is more probable than not, I can't say, but

⁴ See note 1, *supra*.

certainly there is nothing close to a continuous sequence of events that would allow this particular aspect of the claim to go forward.

And also, as I previously mentioned, the policy language regarding an uninsured motor vehicle is certainly even tougher and speaks to a vehicle whose operator or owner cannot be identified and which hits or causes an object to hit you or a family member.

So with respect to that part of the claim under (C)(10) the [c]ourt grants summary disposition.

The court denied summary disposition to Pioneer with regard to the PIP claim, stating:

. . . right this minute unless there is some other witness, I'm not completely clear enough to decide whether I could grant this motion. So I'm denying it without prejudice. If I have overlooked some deposition testimony[] [or if] there is some other witness that should be provided, I'd be happy to look at it, but I'm not clear as to whether or not both the mother's feet were, quote, planted firmly on the ground, today. So that part of the motion is denied.

On January 21, 2003, Pioneer filed a new motion for summary disposition of the PIP claim under MCR 2.116(C)(10), arguing that the claim for PIP benefits should be dismissed because there was no evidence that Hines fell while "alighting from" a vehicle as required by MCL 500.3106(1)(c). In a responsive brief, plaintiff argued that Hines clearly had been in the process of alighting from the vehicle at the time of the accident because the truck's door was still open at the time she fell and because she was "lying between the car and its door" after her fall. Pioneer then argued that if Hines' feet had both been on the ground at the time she fell, she would not have been "alighting from" the vehicle at the time of the fall.

The trial court granted Pioneer's motion with respect to the PIP claim on February 24, 2003. At the February 10, 2003, motion hearing, the court stated, in part:

. . . there is no doubt she fell, but the fact is nobody knows how it happened or [during] what stage of the process of exiting the vehicle.

To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation[,] not mere speculation.

Since she can't testify and nobody saw it, the [c]ourt has no evidence. The [c]ourt grants the motion.

Linden Square moved for summary disposition, under MCR 2.116(C)(10), on November 13, 2002, stating that Pamela, "who was the only person present at the time of . . . Hines' fall, did not see how she fell and is unable to explain how the fall occurred." Linden Square argued that "the mere occurrence of a plaintiff's fall is not enough to raise an inference of negligence on the part of defendant." In a responsive brief, plaintiff stated, "It is entirely possible, viewing the

facts in a light most favorable to the [p]laintiff, as required in determining a motion for summary [sic] pursuant to MCR 2.116(C)(10), that Ms. Hines slipped on oil in the parking lot and that reasonable minds could reach this decision based upon the facts presented.” Linden Square filed a reply on January 7, 2003, claiming that Hines’ statement to Pamela that she had slipped was inadmissible hearsay and that plaintiff simply could not establish how or why Hines actually fell.

The court granted Linden Square’s motion on February 4, 2003. The court stated that the evidence of Hines’ statement to Pamela about slipping was hearsay and that “even if the statement came in, it certainly lacked specificity as to the cause of this particular fall[.]” The court stated that “about 50 different things could have caused . . . Hines to slip and/or fall on this particular occasion.” It concluded that “we do not have any evidence actually linking any oily spot to . . . Hines’ fall on this occasion, to the exclusion of others” and that “there is no evidence that would support the claim that has been brought in this case against [Linden Square]”

On appeal, plaintiff claims that the trial court erred in dismissing her premises liability, uninsured motorist, and PIP claims. We review de novo a trial court’s decision to grant summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Here, the trial court granted the pertinent motions under MCR 2.116(C)(10). Under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party, and summary disposition is appropriate if there is no genuine issue with regard to any material fact. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

We find no error with regard to the trial court’s dismissal of the premises liability claim. In *Stefan v White*, 76 Mich App 654, 655; 257 NW2d 206 (1977), the plaintiff filed a negligence suit after she fell in the defendant’s home. At her deposition, the plaintiff stated that she fell but that she did not know what caused the fall. *Id.* at 657. She stated that she did not trip or slip but that she merely fell. *Id.* This Court affirmed the grant of summary disposition to the defendant, stating that the plaintiff’s case was based on mere conjecture. *Id.* at 661. The Court stated, “The mere occurrence of plaintiff’s fall is not enough to raise an inference of negligence on the part of defendant.” We find *Stefan* analogous to the instant case in that plaintiff’s case is based on mere conjecture. Indeed, even assuming the admissibility of Hines’ statement to Pamela that she must have slipped on something, the statement simply does not establish that Hines slipped on oil as opposed to slipping on her walker or some other object. While this case is not as clear-cut as *Stefan* (because in *Stefan*, the plaintiff testified that she did not trip or slip on anything), plaintiff’s claim nevertheless relies on mere conjecture.

Plaintiff contends that reversal is required with respect to the premises liability claim in light of *Vella v Hyatt Corp*, 166 F Supp 2d 1193 (2001). In *Vella*, *id.* at 1195, the plaintiff slipped and fell on the defendant’s premises. She testified that she did not know what caused her fall but that whatever it was, it was “slippery, very slippery.” *Id.* In her lawsuit, plaintiff theorized that the floor had been slippery because the defendant negligently waxed the floor where the fall occurred. *Id.* at 1196. The court denied the defendant’s motion for summary disposition. *Id.* at 1201-1202.

Vella does not mandate reversal in the instant case, for two reasons. First, *Vella* is a federal district court case and is not strictly binding on us. Second, the *Vella* court emphasized the following:

It is apparent from [the deposition testimony] that [p]laintiff's theory is that she fell because the floor was wet and slippery. What her deposition testimony indicates is not that she is uncertain of the cause of her fall, but that she is not exactly sure of what the substance on which she slipped was. Viewing the facts in a light most favorable to [p]laintiff, it is entirely possible that she slipped on wax residue. . . . It is sufficient to survive summary judgment that she establishes a causal connection between the slippery substance and her fall.

In *Vella*, the plaintiff could establish that she fell because of a slippery substance on the floor. Here, the evidence is not so definite; Hines stated "that she that she must have slipped and fallen on something, but she didn't know what." She did not indicate that she fell because of a slippery substance on the ground. *Vella* is distinguishable and does not mandate reversal here.

While it is true that in *Kaminski v Grand Trunk Western Railroad Co*, 347 Mich 417, 422; 79 NW2d 899 (1956), the Supreme Court stated that an actionable theory of causation need not rule out other possible theories, the Court stated as follows in the more recent case of *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994):

Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

Here, plaintiff presented no such "substantial evidence." Reversal is unwarranted with regard to the premises liability claim.

Nor is reversal warranted with regard to the claim for uninsured motorist benefits. The insurance policy at issue here essentially indicated that such benefits would be paid if physical contact between the plaintiff and the uninsured vehicle caused the plaintiff's injury. See *Berry v State Farm Mut Automobile Ins Co*, 219 Mich App 340, 347; 556 NW2d 207 (1996) (discussing the "physical contact" requirement). *Berry* went on to state:

. . . this Court has construed the physical contact requirement broadly to include indirect physical contact, such as where a rock is thrown or an object is cast off by the hit-and-run vehicle, as long as a substantial physical nexus between the disappearing vehicle and the object cast off or struck is established by the proofs. [*Id.*]

Here, assuming, arguendo, that Hines slipped in a puddle of oil, there was insufficient evidence of a substantial physical nexus between a missing vehicle and the oil on the ground. Indeed, it is simply unclear from where the oil emanated and when it was deposited on the ground. See, generally, *Ricciuti v Detroit Automobile Inter-Ins Exchange*, 101 Mich App 683, 686; 300 NW2d 681 (1980) (where the plaintiff skidded on a wet license plate that had fallen off a vehicle at least two days earlier, plaintiff's accident was merely "incidentally or fortuitously related to the ownership, use, or maintenance of a motor vehicle"). We conclude that plaintiff's claim for uninsured motorist benefits borders on the specious, and the trial court did not err in dismissing it.

Finally, although it presents a closer issue than does the uninsured motorist claim, we conclude that the trial court did not err in dismissing the claim for PIP benefits. PIP benefits are available only if the plaintiff's injury arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle[.]" MCL 500.3105(1). When a parked vehicle is involved, the plaintiff may recover PIP benefits if she was entering or alighting from the vehicle at the time she incurred her injuries. MCL 500.3106(1)(c). Plaintiff cites *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997), abrogation in part recognized in *Rice v Auto Club Ins Ass'n*, 252 Mich App 25 (2002), in support of her position with respect to the claim for PIP benefits. In *Putkamer, supra* at 636, the plaintiff was entitled to PIP benefits because "[t]here was no dispute that, after opening the door of her parked vehicle, she lifted her right leg into the vehicle, shifted her weight to her left leg, and slipped on the ice while stepping into the vehicle." Here, by contrast, there is simply insufficient evidence that Hines fell while alighting from the vehicle. Indeed, even though the truck's door was open at the time of her fall, this in no way precludes the possibility that Hines had already disembarked from the truck at the time she fell. If she had "physically left" the vehicle at the time of the fall, then PIP benefits are unavailable. See *Harkins v State Farm Mut Automobile Ins Co*, 149 Mich App 98, 101; 385 NW2d 741 (1986), and *Royston v State Farm Mut Automobile Ins Co*, 130 Mich App 602, 607; 344 NW2d 14 (1983). As stated in *Krueger v Lumberman's Mut Casualty Co*, 112 Mich App 511, 515; 316 NW2d 474 (1982), "an individual has not finished 'alighting' from a vehicle at least until both feet are planted firmly on the ground." It is entirely possible, in this case, that Hines fell *after* planting her feet on the ground. Given this possibility, plaintiff's claim was based on mere conjecture, and the trial court did not err in granting summary disposition to Pioneer with respect to the claim for PIP benefits.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter