STATE OF MICHIGAN

COURT OF APPEALS

MONA LISA FRAZIER, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 292149 Macomb Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	LC No. 2006-003787-NF

MONA LISA FRAZIER, Plaintiff-Appellant,	
v	No. 293904 Macomb Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellee.	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 transportational 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 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 *Teman 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 transportational 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 report[2] 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-lighted. 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