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Constantine Kallas Kallas & Henk PC 28532	dkallas@kallashenk.com	e-Service
James Mellon Mellon Pries, P.C. P23876	jmellon@mellonpries.com	e-Service
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Michele Riker-Semon Kallas & Henk PC 63291	mrikersemon@kallashenk.com	e-Service
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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Riordan, P.J., and Murphy and Boonstra, JJ)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellee,

vs.

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, et al.

Defendant-Appellant.

Supreme Court Docket No. 151215
Court of Appeals Docket Nos. 319709 & 319710
Kalamazoo Circuit Court
LC No. 2012-000202-CK

AMICUS CURIAE BRIEF FILED PURSUANT TO MCR 7.306(D)(2)

BY

MICHIGAN MUNICIPAL LEAGUE

IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted by:

Carson J. Tucker (P62209)
Attorney for *Amicus Curiae*
3365 Riverbend Drive
Ann Arbor, MI 48105
(734) 218-3605

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this case pursuant to Const 1963 Art 6, § 4; MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2) and (7); and MCR 7.302(C)(2)(b) and (4)(a).

QUESTIONS PRESENTED

Amicus curiae herein focus on the second question presented by MMRMA, to wit, whether the police vehicle was "involved in the accident" within the meaning of the statute at issue, MCL 500.3114(5) of Michigan's No-Fault Automobile Insurance Act [1] (the No-Fault Act), and under this Court's 1995 interpretation of an entirely different statutory provision in *Turner v Auto Club Ins Ass'n*. [2] *Amicus curiae* respectfully suggest application of the rules of statutory construction and a review of the *ratio decidendi* of *Turner* requires this Court's consideration of two primary questions arising from MMRMA's Application for Leave to Appeal:

I. MCL 500.3114(5)(a) establishes that the insurer responsible for payment of personal protection insurance (PIP) benefits to a motorcyclist "suffering accidental bodily injury ***arising from a motor vehicle accident*** which shows ***evidence of the involvement of a motor vehicle***" is the insurer of the owner or registrant of "***the motor vehicle involved in the accident***." In this case, the Court of Appeals concluded that a police vehicle pursuing a motorist, where the police vehicle was not in *any causal proximity to the accident*, did not actively *or* passively contribute to the accident, and was not therefore a motor vehicle involved in the motor vehicle accident in which the motorcyclist suffered bodily injury was nonetheless "the motor vehicle involved in the accident" and therefore imposed liability for PIP benefits on the municipality. Did the Court of Appeals commit reversible error interpreting the statute to apply to this circumstance?

***Amicus Curiae* Answer:** Yes. The Court of Appeals interpretation of MCL 500.3114(5)(a) renders almost any "vehicle" on the highway a potential "causal link" in the connective chain of events that may then lead to the bodily injuries suffered by a motorcyclist. To assert the police vehicle that gives chase to a fleeing motorist whose car then strikes a motorcyclist was

[1] MCL 500.3101, *et seq*.

[2] 448 Mich 22; 528 NW2d 681 (1995).

"involved" in the accident where the police vehicle was nowhere near the scene is to extend the plain and unambiguous language of this provision well beyond interpretive recognition. While the No-Fault Act does requires contribution among insurers under MCL 500.3114(5), the language of this specific provision does not support such an expansion in scope as was applied by the Court of Appeals in the case *sub judice*.

II. In 1995, this Court interpreted MCL 500.3121 (which provides for no-fault insurance benefits for ***property damage*** caused by "***ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle***") and MCL 500.3125 (which establishes the priority of insurers responsible for these benefits as being first, insurers of ***owners or registrants*** of "vehicles ***involved in the accident***", and second, ***insurers of operators*** of "vehicles ***involved in the accident***") to hold that a police vehicle that had been in pursuit of a fleeing vehicle was "involved in the accident" when the fleeing vehicle crashed into two other vehicles and then a building. [3] Since that ruling, the Court of Appeals has extended the phrase "involved in the accident" in the property protection benefits provisions (MCL 500.3121 and MCL 500.3125) to the personal protection insurance benefits available to a motorcyclist under MCL 500.3114(5). The latter statute, however, contains markedly different language. Thus, the *extension* of *Turner* is specious, at best. Did the Court of Appeals commit legal error in extending *Turner* to the circumstances of this case?

Amicus Curiae **Answer:** Yes. The causation theory espoused by the *Turner* Court is unsustainable not only under the plain language of the statutory provisions at issue in this case, but too as a means of imposing contribution liability on motor vehicles that have only the most tenuous causal connection to the ultimate damages caused to the injured motorcyclist. The liability imposed by applying *Turner* extends beyond any reasonable boundaries of anticipated and therefore insurable risk. Moreover, it is especially burdensome on governmental entities because they must engage in the performance of their duties despite the ordinary and extraordinary risks associated with the day-to-day functioning of government.

[3] 448 Mich at 36-43. Justice Cavanagh delivered the opinion of the Court. Justice Weaver did not participate. The remaining Justices, Brickley, C.J., Boyle, Mallett, Ryan and Levin concurred.

STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus Curiae, Michigan Municipal League, is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "Legal Defense Fund").

The Michigan Municipal League operates the Legal Defense Fund through a board of directors. This brief *amicus curiae* is authorized by the Legal Defense Fund's Board of Directors, whose membership includes the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Lori Grigg Bluhm, city attorney, Troy; Clyde J. Robinson, city attorney, Kalamazoo; Randall L. Brown, city attorney, Portage; Catherine M. Mish, city attorney, Grand Rapids; Eric D. Williams, city attorney, Big Rapids; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Thomas R. Schultz, city attorney, Farmington and Novi; and William C. Mathewson, general counsel, Michigan Municipal League.

The purpose of the Legal Defense Fund is to represent the interests of its members in litigation and appeals concerning issues of statewide significance for local governments. The disposition of the issues in this case impact these local governments by imposing substantial financial liabilities when the individual agents of these governments are simply performing their duties by enforcing the law. Many members represented by *amicus curiae* maintain self-insured, taxpayer-funded retention amounts which provide primary coverage for numerous government-owned and operated motor vehicles for claims paid pursuant to § 5 of the GTLA[4] (the motor

[4] MCL 691.1401, *et seq.*

vehicle exception [5] to governmental immunity), and for liabilities ostensibly imposed by the No-Fault Act. Some individual member organizations (the individual governmental entities, e.g., counties, cities, townships, villages, statutorily recognized governmental authorities, etc.), may retain deductibles as high as $125,000 per occurrence. Depending on the size of the particular community or organization, however, even a relatively minor deductible can have a large impact on the basic finances of that community or organization.

Moreover, any community that participates in a self-insurance pool like the members represented by *amicus curiae* and MMRMA retain risk as a group, if not individually. Thus, as a group with pooled funds set aside for liabilities, the member organizations share in the fortunes and misfortunes of the whole, and pay for losses or save premium dollars in direct proportion to their shared experience. Therefore, *amicus curiae* has an interest in the outcome of this case and supports the Application for Leave to Appeal filed by MMRMA.

Because the Michigan Municipal League is an association representing various political subdivisions of the state of Michigan and this brief is filed on their behalf, the Michigan Municipal League requests this Court accept this amicus curiae brief without a motion for leave. See MCR 7.306(D)(2) and Section I.C.3. of the Court's Processing of Cases and Administrative Matters.

[5] MCL 691.1405.

BACKGROUND

This case presents an opportunity to determine the proper scope of legal causation under MCL 500.3114(5) of the No-Fault Act when a motorcyclist suffers bodily injury arising from a motor vehicle accident on Michigan roadways. The Court has received an adequate recitation of the facts in the Application for Leave to Appeal and supporting papers. As it relates to the interests of *amicus curiae*, the Court of Appeals reversed the trial court's ruling that a question of fact existed and summarily ruled the police department vehicle was "involved in" the accident in which the motorcyclist collided with the fleeing suspect's motor vehicle. [6]

The Court of Appeals concluded that State Farm, which insured the motorcyclist's personal vehicle, could pass complete liability onto MMRMA for the motorcyclist's injuries under MCL 500.3114(5)(a) since the vehicle driven by the fleeing suspect was uninsured. [7] The panel concluded the police vehicle was involved in the accident despite the fact the police vehicle made no physical contact with the motorcycle or the suspect's vehicle, and indeed was nowhere in close proximity to the accident when it occurred. The panel reasoned MMRMA was an "insurer of *the motor vehicle involved in the accident*" under MCL 500.3114(5)(a) and imposed "priority liability" for PIP benefits on MMRMA, rather than on State Farm. [8]

The Court of Appeals arrived at this conclusion by interpreting MCL 500.3114(5), which provides the "order of priority" of motor vehicle insurers to provide PIP benefits to motorcyclists suffering bodily injury arising from an accident involving a motor vehicle. Since "[m]otorcycles

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[6] *State Farm v MMRMA*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket Nos. 319709 & 39171) (**ATTACHMENT A**, Slip Opinion).

[7] *Id*., Slip Op. at 5-8.

[8] *Id*. (emphasis added).

are excluded from the definition of motor vehicles under the no-fault act", [9] but *motorcyclists are not* excluded from coverage, [10] "a motorcyclist *involved in an accident* which arises out of the ownership, operation, maintenance, or use of a motor vehicle is entitled to no-fault benefits." [11]

In fact, "not only are motorcyclists entitled to PIP benefits despite the fact that there is no requirement that they carry insurance with PIP benefits, the motorcycle insurer is never required to pay PIP benefits through the motorcycle policy" because "[u]nder MCL 500.3114(5), the motorcycle insurance policy is never the source of the payment of PIP benefits." [12] Under this latter provision, an order of "priority" is established among automobile insurers to be statutorily responsible for PIP coverage provided to motorcyclists injured in accidents with (or involving) other motor vehicles. [13] Section 3114(5) provides:

> (5) A person suffering accidental bodily injury ***arising from a motor vehicle accident*** which shows ***evidence of the involvement of a motor vehicle*** while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of ***the motor vehicle involved in the accident***.
>
> (b) The insurer of the operator of the motorcycle involved in the accident.

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[9] *Sanford v Ins Co of North America*, 151 Mich App 747, 749; 391 NW2d 473 (1986); MCL 500.3102(e). Only the owner or registrant of a "motor vehicle" is required to have personal protection insurance (PIP) coverage under the No-Fault Act. Since motorcycles are not considered "motor vehicles", motorcycles are not required to have such coverage. *Perkins v Auto-Owners Ins Co.*, 301 Mich App. 658, 665; 837 NW2d 32 (2013), citing MCL 500.3101(1) and MCL 500.3101(2)(e).

[10] *Underhill v Safeco Ins Co*, 407 Mich 175, 185; 284 NW2d 463 (1979), superseded by statute on other grounds as stated in *Autry v Allstate Ins Co*, 130 Mich App 585, 590, n 1; 344 NW2d 588 (1983).

[11] *Autry*, *supra* at 590, see also *Bromley v Citizens Ins Co. of America*, 113 Mich App 131, 134; 317 NW2d 318 (1982).

[12] *Perkins*, supra at 655-666.

[13] MCL 500.3114(5)(a).

(c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.

(d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

In the case *sub judice* and *assuming without conceding* that the police vehicle insured by MMRMA was "*the motor vehicle involved in the accident*", MMRMA occupied position #1 (subsection (a)), while State Farm, which insured the motor vehicle of Mr. Bongers, the motorcyclist, occupied position #3 (subsection (c)).[14] According to this statutory order of priority, the Court of Appeals concluded MMRMA was principally responsible for payment of PIP benefits paid to the motorcyclist by State Farm.[15]

In interpreting this provision, the Court of Appeals applied this Court's 1995 decision in *Turner*.[16] *Turner* applied different statutory provisions in the No-Fault Act addressing liability by and between insurers of motor vehicles for property damage claims.[17] More importantly, the rationale in *Turner* was based on completely different statutory language, language which arguably led to the *Turner* Court's *ratio decidendi* – that the pursuing police vehicle had been "involved in the accident" which led to the property damage caused by the vehicle being pursued by the police.

Turner has been employed in other cases involving the precise statutory language at issue here. Thus, in *Detroit Medical Center v Progressive Michigan Ins Co*,[18] the Court of Appeals held a motorcyclist injured when taking evasive action and crashing to avoid collision with

[14] Slip Op. at 5-8.

[15] *Id*.

[16] 448 Mich 22; 528 NW2d 681 (1995).

[17] MCL 500.3121; MCL 500.3125.

[18] 302 Mich App 392; 838 NW2d 910 (2013), lv den 495 Mich 934; 843 NW2d 198 (2014).

another vehicle was not entitled to PIP benefits because the motor vehicle was not "involved in the accident" under MCL 500.3114(5). [19]

In *Braverman v Auto Owners Ins Co*, [20] the Court of Appeals held the trial court erred in concluding "as a matter of law" that a tractor trailer stopped and stationary in the turn lane of a road was "involved in the accident" where the deceased motorcyclist apparently "laid down her motorcycle" after the brakes locked up to avoid hitting the trailer. [21] Citing to this Court's reasoning and analysis in *Turner*, the appellate panel remanded on the issue of whether the tractor trailer's lights (tail lights and/or turn signals) were on and activated concluding a question of fact existed as to whether the tractor trailer was "involved in the accident", i.e., whether it "actively or passively contributed" to the accident per this Court's reasoning in *Taylor*. [22]

In *Redford v Auto Club Ins Ass'n*, [23] following the reasoning used by the court in *Detroit Medical*, *supra*, which relied on the *Turner* analysis, the panel could not conclude on the evidence that the motor vehicle was involved in the accident merely because of the motorcyclist's subjective, erroneous perceived need to react another motor vehicle.

These Court of Appeals cases continue to use the *Turner* analysis for assessing liability and priority among insurers for payment of PIP benefits to motorcyclists injured in motor vehicle accidents.

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[19] *Id.* at 398-399.

[20] Unpublished opinion per curiam of the Court of Appeals, issued August 20, 2013 (Docket No. 306492), lv den 495 Mich 934; 843 NW2d 184 (2014) (**ATTACHMENT B**).

[21] *Id.*, Slip Op. at 4.

[22] *Id*. at 4-5.

[23] Unpublished opinion per curiam of the Court of Appeals, issued September 23, 2014 (Docket No. 316740), lv den ___ Mich ___; 862 NW2d 188 (2015) (**ATTACHMENT C**, Slip Opinion).

While there appears to be no true effort to distinguish or otherwise reject the *Turner* analysis, *amicus curiae* respectfully suggests this Court has already precluded the tenuous causation analysis employed by the Court of Appeals in these aforementioned cases, as well as in the case *sub judice*. Attention is directed to this Court's peremptory order in *Utley v MMRMA*, [24] in which this Court reversed a Court of Appeals ruling that a city-owned truck was "involved in the accident" under MCL 500.3114(5) when the truck *stopped in front of a motorcyclist*, the latter of whom then lost control of his motorcycle in stopping or swerving to avoid collision with the truck.

The Court of Appeals held there was a sufficient causal connection between the motorcyclist's injuries and the truck, which had stopped "in the normal course of driving," and concluded the truck was "involved in the accident." This Court reversed, stating: "On the facts in this case, the truck owned by the City of Sterling Heights was not 'involved' in the accident" within the meaning of MCL 500.3114(5). "An order of this Court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." [25]

Finally, at least two members of this Court have recently indicated a need to revisit the *Turner* analysis. [26] In addressing the Court of Appeals analysis [27] of the very question of whether

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[24] 454 Mich 879; 562 NW2d 199 (1997).

[25] *DeFrain v State Farm Mutual Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012) (ZAHRA, J.), citing Const 1963, art. 6, § 6.

[26] *State Farm Mut Auto Ins Co v Michigan Mun Risk Mgmt Auth, Inc.*, 495 Mich 987; 844 NW2d 125 (2014) (MARKMAN, J., dissenting, joined by ZAHRA, J.)

[27] *State Farm Mut Auto Ins Co v Michigan Mun Risk Mgmt Auth, Inc*, Unpublished per curiam opinion of the Michigan Court of Appeals, issued August 13, 2013 (Docket No. 306844) (**ATTACHMENT D**), lv den 495 Mich 987; 844 NW2d 125 (2014).

a police vehicle pursuing a fleeing motorcyclist was "involved in" the motorcyclist's accident even though no one could determine what caused the motorcyclist to crash well ahead of and out of view of the pursuing deputy, Justice Markman stated:

> I would grant leave to appeal. This case, remarkable in its outcome in my judgment, features a speeding and uninsured motorcyclist who was injured when he crashed his motorcycle while fleeing from the police, and who thereafter collected a double no-fault insurance recovery. In particular, I would grant leave to decide …[f]irst, whether a pursuing police vehicle was "involved in the accident" for the purposes of MCL 500.3114(5)(a) of the no-fault insurance act when that police vehicle, after slowing down out of concern for the motorcyclist's safety and for its own ability to navigate a curved dirt road, followed a half-mile and a sharp curve behind the fleeing motorcyclist such that the police vehicle could not even see the motorcycle at the time of the crash. Cf. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 38-40; 528 NW2d 681 (1995) (indicating that a police vehicle is "involved in the accident" of a vehicle it is pursuing when the police vehicle "actively, as opposed to passively, contribute[s] to the accident" and that there must be more than a mere "'but for' connection between" the police vehicle and the accident, "even where a 'but for' standard is narrowed by interposing a requirement of physical proximity" between the police vehicle and the accident…. [28]

Amicus curiae respectfully suggest the issue presented by MMRMA in this case justifies this Court's attention as the issue is of significant public interest and involves legal principles of major significance to the state's jurisprudence. [29]

[28] *Id.*

[29] MCR 7.302(B)(2) and (3).

SUMMARY OF ARGUMENTS

Amicus curiae present the following summary of arguments in this brief for the Court's consideration of MMRMA's Application for Leave to Appeal.

First, the reasoning in the Court of Appeals opinion is contrary to the plain language of the statutory provision it interpreted. There is no reasonable way to interpret the phrase "the motor vehicle involved in the accident" to conclude that the police vehicle in pursuit of the car that ultimately collided with the motorcyclist was "involved in the accident". The plain and unambiguous language of this provision can lead to no other conclusion under the facts of this case.

Second, the reasoning of the Court of Appeals is contrary to *any* reasonable articulation of "proximate" or "legal" causation found in the No-Fault Act and the case law interpreting it. The continued reliance and application by the Court of Appeals on *Turner* as a dispositive interpretation of the statutory provision at issue in this case is unsupportable. Moreover, *Turner* interpreted statutory provisions with entirely different, and indeed broader, language than the statutory provisions at issue in this case. The *Turner* Court's analysis was also flawed because it relied on inconsistent and unreliable sources as the basis for its interpretation and reasoning.

Third, the reasoning of the Court of Appeals has an unnecessary chilling effect on performance of governmental functions, and, particularly as it relates to this case, the law enforcement function. If governmental entities, already strapped by financial difficulties, must engage in an analysis of the risks attendant to choosing between instituting a policy to pursue fleeing criminals or let them get away out of fear that any accident in which the fleeing suspect is involved will lead to untold liabilities on the part of the governmental entity, then the resulting policy is a foregone conclusion. There is no reason to make the decision to engage those

suspected of breaking the law when liabilities cannot be adequately predicted. Every dollar spent by governmental entities litigating, defending and ultimately indemnifying for resulting liabilities constitutes a drain on the financial resources available to their respective communities.

Although this is an "insurance dispute" between two no-fault automobile insurance providers, the net effect of the Court of Appeals holding works a disservice to the taxpayers who fund the underwriting of risk associated with the voluminous activity engaged in by the government. This is especially true for the member entities represented by *amicus curiae*, many of which maintain high, self-insured retention amounts, and which therefore directly bear and must manage the primary layers of risk associated with performing a multitude of governmental functions for their taxpayers on a day-to-day basis. Thus, the first layer of monies spent in paying liabilities imposed by law are monies directly funded by taxpayers for taxpayer services.

Fourth, it should also be noted that the only exceptions to the Government's immunity from suit and liability are supposed to be those narrowly drawn and strictly interpreted *statutory* exceptions in the Governmental Tort Liability Act, MCL 691.1401 *et seq.*[30] "Absent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a

[30] *City of Detroit v Blackeby*, 21 Mich 84, 113, 117; 4 Am Rep 450 (1870) (CAMPBELL, J.) ("***there is no common law liability*** against [the government] and [it] cannot be sued except ***by statute***") (emphasis added). Any relinquishment of common-law immunity must be strictly construed. *Greenfield Constr Co v Mich Dep't of State Hwys*, 402 Mich 172, 193, 194, 197; 261 NW2d 718 (1978), accord *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002); *Ross v Consumers Power Co*, 420 Mich 567, 596-597; 363 NW2d 641 (1984); *Ballard v Ypsilanti Township*, 457 Mich 564, 567-69 and 573-76; 577 NW2d 890 (1998).

governmental function."[31] The ordinary decisions police officers make in their day-to-day performance and discharge of their duties constitute legitimate governmental functions.[32]

In cases in which a government owned and operated motor vehicle is directly involved in a motor vehicle accident, the plaintiff seeking to recover tort damages, i.e., bodily injury and other damages, must prove that his or her injuries were caused by the *negligent* operation of the government owned motor vehicle.[33] In other words, it is a *prima facie* requirement to avoid the government's *suit* immunity that the plaintiff *prove* negligence.[34] This of course includes the requirement to prove legal causation – cause in fact and proximate cause.

To the contrary, the "No-Fault" Act imposes liability for injuries to person and property *without regard to fault*. Application of the "no-fault" scheme to impose liability on the government in the first instance is an aberration from an otherwise broadly applied immunity from suit *and liability* – an immunity that has been construed to uniformly apply at all times to all governmental entities subject *only* to the exceptions *in the GTLA*.[35]

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[31] *Maskery v Bd of Regents of Univ of Michigan*, 468 Mich 609, 613-14; 664 NW2d 165 (2003). See also MCL 691.1401(b) defining "governmental function".

[32] *Mack v City of Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002), citing *Moore v Detroit*, 128 Mich App 491, 496-497; 340 NW2d 640 (1983) and *Graves v Wayne County*, 124 Mich App 36, 40-41; 333 NW2d 740 (1983).

[33] MCL 691.1405. See also *Hannay v MDOT*, 497 Mich 45; 860 NW2d 67 (2014).

[34] *In re Bradley Estate*, 494 Mich 367, 389; 835 NW2d 535 (2013) (stating "[i]f the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable.").

[35] *Ross*, *supra* at 618. This Court has never adequately explained whether, and if so, why governmental entities are financially bound to contribute to the liability scheme in the No-Fault Act. This is in stark contrast to this Court's multitude of decisions ruling that the only avenue through which *any* liability can be imposed on the government is the GTLA. *Bradley*, *supra*. In 1986, the Legislature codified the statutory exceptions to immunity from suit and liability and effectively "put its imprimatur on this Court's giving the exceptions to governmental immunity a

The decision of the Court of Appeals in this case, and those many other cases applying *Turner*, and indeed extending its rationale to completely different statutory provisions allowing this "butterfly effect theory" [36] of causation to prevail to impose contribution liability on the government where a police vehicle merely engages in pursuit of a fleeing vehicle, has strayed far afield of the strict confines of liability that should only be available through the Legislature's narrowly constructed passage in the GTLA. While *amicus curiae* appreciates the importance of Michigan's No-Fault scheme, the epidemic and unchecked spreading of risk to government vehicles having little or no causal nexus to accidents involving motorcycles and vehicles driven by those who decide to drive recklessly and flee lawful police inquiries sets a dangerous precedent for imposing liability in an infinite number of emergent circumstances which by their very nature cannot be controlled or anticipated. Extension of such liability to the government cuts deeply against the Legislature's broad grant of immunity from all liability for the exercise and discharge of day-to-day governmental functions, but for those recognized exceptions in the GTLA.

Other than this inexplicable anomaly of applying the No-Fault Act to governmental entities without explicit *legislative* approval, the *only* relevant statutory exceptions that allow liability to be imposed against the government for injuries incurred as the result of motor vehicle accidents are the motor vehicle exception [37] and the gross-negligence exception. [38] And both of

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narrow reading." *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 148, n 1; 615 NW2d 702 (2000). See also *Ross, supra*.

[36] "In chaos theory, the butterfly effect is the sensitive dependence on initial conditions in which a small change in one state of a deterministic nonlinear system can result in large differences in a later state." See http://en.wikipedia.org/wiki/Butterfly_effect.

[37] MCL 691.1405.

these *statutory* exceptions come with their own *statutory* causation analyses. For the motor vehicle exception to apply, the claimant must prove *negligent* operation of a motor vehicle, and that such negligence *resulted in* injury.[39] For the gross negligence exception to apply, the claimant must prove the government actor's gross negligence was *the proximate cause* of the injury incurred.[40]

Both of these exceptions, unlike the *No-Fault* Act, require a showing of *some level of fault* on the part of the individual governmental actor. The ordinary elements of a tort action – negligence, breach, cause in fact and proximate cause, and damages – are all required to be proved before the Legislature's waiver of immunity from suit and liability can be asserted under the motor vehicle exception. And statutory gross negligence, defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results",[41] sets an even higher standard.

Yet, in cases such as the present, courts and insurance companies apparently assume, with no legal justification, that the Michigan Legislature has sanctioned a special exception to

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[38] MCL 691.1407(2)(c).

[39] MCL 691.1405. To be precise, this exception states that "[g]overnmental agencies shall be liable for bodily injury and property damage *resulting from* the negligent operation by any officer…of a motor vehicle of which the governmental agency is owner…." In *Robinson v City of Detroit*, 462 Mich 439, 456-457; 613 NW2d 307 (2000), this Court narrowly interpreted the phrase "resulting from" to *exclude* personal injury to an innocent occupant of another vehicle caused where a pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object. How any court can reconcile imposing liability against the government where the government officer's actions are even more removed from the end result of a fleeing suspect's unwise choices has not been adequately addressed.

[40] MCL 691.1407(2)(c). Again, in *Robinson*, *supra* at 459, the Court, applying the statutory gross negligence exception to the same factual circumstances, interpreted the phrase "the proximate cause" to mean that the government actor's gross negligence must be *the one, most immediate, efficient, and direct cause preceding an injury.*" (emphasis added).

[41] MCL 691.1407(8)(a).

immunity that resides outside the GTLA when it comes to assessing and apportioning liability for no-fault benefits under the No-Fault Act. To date, there has been no searching and thoughtful explanation of why governmental entities are bound by this statutory scheme when in all other cases this Court has honored the Legislature's uniform and broad immunity granted to all governmental agencies in the GTLA, but for the application of the exceptions contained therein. In other words, it has yet to be explained why the government is subjected to a system that imposes liability *without regard to fault* when this Court has so dutifully interpreted and applied the GTLA which, as a condition precedent to the imposition of any liability on the government, requires a showing of at least negligence, i.e., fault, where injuries are incurred in motor vehicle accidents in which a government-owned and operated vehicle is involved.

All this to say the Legislature's *waiver* of preexisting immunity should be the guidepost and foundation when addressing the government's fiscal liabilities from whatever source they may arise. [42] The fact this case arises from performance by the government of its duty to serve and protect the public makes the inquiry all the more critical as it addresses the core law enforcement function of government. [43] Moreover, accidents that occur during execution of this function are often an unavoidable and inherent consequence of the emergent and dangerous nature of its performance.

Amicus curiae respectfully urges the Court to be mindful of the Legislature's intent in the GTLA to protect governmental entities by providing uniform immunity to all governmental agencies when engaged in a governmental function.

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[42] *Ross*, *supra* at 618 (the GTLA extends immunity from tort liability to all governmental agencies for all liability whenever they are engaged in the exercise or discharge of a governmental function).

[43] *Mack*, *supra* at 204.

ARGUMENT AND ANALYSIS

I. THE COURT OF APPEALS DECISION IS CONTRARY TO THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTORY PROVISION *REQUIRING* AS A PREREQUISITE TO AN INSURER'S OBLIGATION TO CONTRIBUTE PIP BENEFITS THAT THE MOTORCYCLIST SUFFER BODILY INJURY *ARISING FROM A MOTOR VEHICLE ACCIDENT* IN WHICH THE INSURED MOTOR VEHICLE MUST *BE INVOLVED* WHERE THE MOTORCYCLIST IN THIS CASE DID NOT SUFFER INJURY ARISING FROM A MOTOR VEHICLE ACCIDENT WITH THE POLICE VEHICLE.

A. Standard of Review

The Court of Appeals interpreted MCL 500.3114(5) to conclude that MMRMA was required to pay PIP benefits for the motorcyclist's injuries. [44] This Court reviews a lower court's interpretation of a statutory provision as a question of law subject to *de novo* review. [45]

B. Statutory Interpretation

When this Court reviews interpretation of legislative provisions, its primary goal is to consider whether the reviewing court properly discerned the Legislature's intent as expressed in the statute's language. [46] In doing so, it is the Court's "duty to accept [a] statute as expressing the will of our people and to give it complete effect." [47] "[T]he courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives." [48] "The Legislature is

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[44] *State Farm v MMRMA,* Slip Op. at 6-7.

[45] *Grange Ins Co of Michigan v Lawrence*, 494 Mich 475, 489-490; 835 NW2d 363 (2013), citing *Elba Twp v Gratiot County Drain Comm'r*, 493 Mich 265; 831 NW2d 204 (2013).

[46] *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006), citing *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

[47] *Knight Morley v Mich Employment Security Comm'n*, 350 Mich 397, 417; 86 NW2d 549 (1957).

[48] *Rowland v Washtenaw County Road Comm'n*, 477 Mich 197, 214, n 10; 731 NW2d 41 (2007).

presumed to have intended *the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written*." [49] Thus, the Court first looks to the specific statutory language to determine the Legislature's intent. [50]

The meaning of the Legislature is also "found in the *terms and arrangement* of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." [51] Statutory language should thus be given a reasonable construction "considering the provision's purpose and the object sought to be accomplished." [52]

Additionally, when parsing a statute, it is to be presumed "every word is used for a purpose" and effect will be given "to every clause and sentence." [53] Therefore, courts are to avoid an interpretation that makes any part of a statute surplusage or nugatory. [54] Further, a court "may not assume that the Legislature inadvertently made use of one word or phrase instead of another." [55] Arbitrary substitution of words and phrases in a statute to fit a different meaning or to attribute a greater or lesser significance to the provision is prohibited. [56]

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[49] MCL 8.3a; *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002) (emphasis added).

[50] *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 223; 779 NW2d 304 (2009).

[51] *Gross v General Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995) (emphasis added).

[52] *Michigan Humane Society v Natural Resource Comm'n*, 158 Mich App 393, 401; 404 NW2d 757 (1987).

[53] *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

[54] *Id*. at 684.

[55] *Robinson*, *supra* at 459.

[56] *Pohutski*, *supra* at 687-688, 688.

It follows that a court may not impose its own policy choices when interpreting a statute.[57] "[C]ourts may not rewrite the plain statutory language and substitute [its] own policy decisions for those already made by the Legislature."[58] In short, a court has no authority to add words, conditions or restrictions to a statute.[59] As it is the duty of the judiciary to interpret, rather than write, the law, "courts lack authority to venture beyond a statute's unambiguous texts".[60]

C. Analysis

While perhaps not as neatly drafted as it could be, MCL 500.3114(5)(a), clearly requires that for a motorcyclist to be entitled to PIP benefits from an insurer of a motor vehicle the motorcyclist must suffer injury that arises from a motor vehicle accident with the insured motor vehicle. The pertinent language of the provision in the No-Fault Act at issue is as follows:

> (5) A person suffering accidental bodily injury ***arising from a motor vehicle accident*** which shows ***evidence of the involvement of a motor vehicle*** while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of ***the motor vehicle involved in the accident***.
>
> (b) The insurer of the operator of the motorcycle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

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[57] *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999).

[58] *Rowland*, *supra*, citing *Mayor of Lansing v Michigan Public Service Comm'n*, 470 Mich 154, 167; 680 NW2d 840 (2004).

[59] *Id*.

[60] *Bronson Methodist Hospital*, *supra* at 223.

The preliminary and active prerequisite language of this provision must be analyzed as a whole and according to its meaning without attempting to construe it in a manner contrary to its plain import.[61] First, the statute requires PIP benefits to be paid to a motorcyclist who suffers "accidental bodily injury *arising from a motor vehicle accident* which shows *evidence of the involvement of a motor vehicle*…."[62] Next, the order of priority is established among no-fault insurers. The first in line of priority among no-fault insurers to be liable to pay PIP benefits to the injured motorcyclist is "[t]he insurer of the owner or registrant of *the motor vehicle involved in the accident*."[63]

The first part of this subsection contains *two* requirements. The motorcyclist must suffer accidental bodily injury (1) "arising from a motor vehicle accident" which (2) shows evidence of the involvement of *a* motor vehicle...." The order of priority in subsection (a) then provides that "[t]he insurer of the owner or registrant of *the motor vehicle* involved in *the accident*" is first in order of priority.[64]

State Farm urges, as it must, that the MMRMA insured police vehicle was *the motor vehicle involved in the accident* for purposes of the statutory provision assigning priority liability. The dictionary definition of the term "involved" also demonstrates that to be considered within the scope of the provision, the implicated vehicle must be "include[d]" within; must be "an essential feature or consequence" of; or must "occupy or engross" the "*motor*

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[61] MCL 8.3a; *Robertson*, *supra* at 748.

[62] MCL 500.3114(5) (emphasis added).

[63] MCL 500.3114(5) (a) (emphasis added).

[64] MCL 500.3114(5)(a).

vehicle accident" referred to in the first part of the statute.[65] Yet another lay source defines an "involved" object as one that must be "include[d] as a necessary circumstance, condition, or consequence"; or be "combine[d] inextricably (usually followed by *with*)."[66]

The Court of Appeals judicial expansion of the language of the statute to encompass motor vehicles that are not involved in the motor vehicle accident that causes the compensable injury is unsupportable. The first part of the statute *requires* the bodily injury suffered by the motorcyclist to "*aris[e] from a motor vehicle accident*" which shows "evidence of the involvement of a motor vehicle". The next part, which establishes the order of priority, simply implicates the insurer of the motor vehicle that is involved in the accident in which the motorcyclists suffers bodily injury.

The statute inextricably tethers the bodily injury to that which arises from a motor vehicle accident *with*, i.e., *involving*, the motor vehicle implicated by the priority provision. To be sure, there are scenarios in which two or more vehicles can *both* be *the motor vehicle* "involved in" *the* motor vehicle accident in which the motorcyclist is injured.[67] However, the statute's reference to "involvement" of the motor vehicle or motor vehicles in, or with, the accident refers back to the prerequisite language that each of *the motor vehicles* must be equally involved in *the*

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[65] Webster's II New College Dictionary (1995), p. 584. Absent a statutory definition, dictionary definitions of terms used in the No-Fault Act are an acceptable and approved method of interpretation. *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515; 821 NW2d 117 (2012), quoting *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011).

[66] The Random House Dictionary of the English Language, 2d ed (unabridged) (1987), p. 1005.

[67] The interpretation provided also comports with this Court's adherence to ensuring proper distinction is made between the articles "a" and "the" when used in statutory language. See *Paige v City of Sterling Heights*, 476 Mich 495, 507-508; 720 NW2d 219 (2006), quoting *Robinson*, supra at 461-462.

motor vehicle accident. Subsection 5(a) requires each of the involved vehicles to be more than simply a remote or even originating cause of the actions and reactions of the motorists and motorcyclists actually involved in the motor vehicle accident, which ultimately leads to injury far away in time and distance from the "originating" police vehicle in pursuit of the fleeing suspect.

The motorcyclist's injuries must still "aris[e] from a motor vehicle accident" and the implicated insurer's vehicle must be the motor vehicle involved in the accident. Here, the police vehicle was not itself "involved in a motor vehicle accident"; indeed, it was not even part of or in a motor vehicle accident with any other vehicle, motorcycle, or object. The Court of Appeals conclusion is simply unwarranted by the plain language of the provision at issue and the facts of this case.

The Legislature's intent is expressed in the plain language of this provision.[68] Construed directly, and plainly, it is unambiguous. If a motorcyclist suffers injury arising from a motor vehicle accident in which one or more vehicles is *involved*, the insurers of the owners or registrants of those motor vehicles are first in priority; they must apportion liability among themselves equally for PIP benefits paid to the motorcyclist. There is no need to go beyond the language of the statute to broaden the scope of this provision to include vehicles that are clearly *not involved* in the motor vehicle accident, which was the position of the police vehicle in the case *sub judice*.

The Court of Appeals *ignored* the prerequisite provision requiring the motorcyclist suffer "bodily injury arising from a motor vehicle accident" and instead looked only to whether the implicated vehicles were "involved in" the accident. This ignores the inclusion in this particular provision of the additional requirement that the motorcyclist suffer injury in a motor vehicle

[68] *Bronson*, *supra* at 223; *Gross*, *supra* at 160.

accident, as opposed to those other provisions of the No-Fault Act that only look to whether the injury arose out of the use of a motor vehicle as a motor vehicle. This is not insignificant. The Legislature is presumed to have intended the meaning it has expressed and every word, clause and sentence it utilizes in doing so must be given due effect. [69]

The Court of Appeals here *equates* "injury arising from a motor vehicle accident" with injury arising out of the "use of a motor vehicle as a motor vehicle." As explained in greater detail below, these are clearly two different phrases, which appear in different provisions of the No-Fault Act, and which have been attributed different and diverse legal meaning. The Court of Appeals interchange (or substitution) of the one legal clause with the other is prohibited. [70]

Moreover, the liberal interpretation of this provision to conclude the police vehicle that was at one time or may still have been pursuing Mr. Johnson was involved in the accident is contrary to the plain and unambiguous language of this statutory provision. This unwarranted extension of the statute's language also has the consequence of rendering governmental entities liable for merely exercising the critical governmental function of law enforcement. Even if the No-Fault Act can be said to apply to governmental entities to impose liability for benefits notwithstanding the GTLA's narrowly applied and sole exceptions to the government's otherwise preexisting, retained, and inherent immunity from suit and liability, the principle that the government's liability should be restrained to only a small subset of cases preserves its ability to fulfill the duties attendant to the necessary functions of day-to-day governance.

On this basis alone, the Court should at least grant MMRMA's application for leave to appeal to address the Court of Appeals liberal interpretation of the statutory provision.

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[69] MCL 8.3a; *Robertson, supra* at 748; *Pohutski, supra* at 683.

[70] *Robinson, supra* at 459; *Pohutski, supra* at 687-688, 688.

II. *TURNER V AUTO CLUB INSURANCE ASSOCIATION* [71] DOES NOT SUPPORT THE COURT OF APPEALS DECISION IN THIS CASE AND THEREFORE THE COURT OF APPEALS RELIANCE ON *TURNER* TO CONCLUDE THE POLICE VEHICLE WAS "INVOLVED IN" THE MOTOR VEHICLE ACCIDENT WITH THE MOTORCYCLIST WAS REVERSIBLE ERROR.

A. Standard of Review

Whether a case serves as precedent for a subsequent case is a question of law subject to *de novo* review by this Court. [72]

B. Analysis

Not only was the Court of Appeals decision contrary to the plain language of the statutory provisions at issue, its reliance on *Turner* is not persuasive. The *Turner* Court [73] interpreted the phrase "involved in the accident" to mean the implicated motor vehicle must merely "actively, as opposed to passively, *contribute to* the accident." [74] While a "but for" connection was held to be insufficient, the Court concluded the "causal nexus" was "broader" than what is required when assessing whether an accident "arises out of a motor vehicle accident." [75] While the damage at issue in *Turner* was "property damage", as opposed to personal injury, a police vehicle chase began the chain of events that led to the damage, as in this case. As described by the Court:

> The chase lasted for about half a mile, at which point the cars approached the intersection of Woodward and Nine Mile Road. The officer saw that the traffic

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[71] 448 Mich 22; 528 NW2d 681 (1995) (emphasis added).

[72] *Robinson*, supra at 463-468. See also *Pew v Michigan State University*, 307 Mich App 328, 331-335; 859 NW2d 246 (2014).

[73] Justice Cavanagh delivered the opinion of the Court. Justice Weaver did not participate. The remaining Justices, Brickley, C.J., Boyle, Mallett, Ryan and Levin concurred.

[74] *Id*. at 39.

[75] *Id*. at 37-38.

> signal for Woodward was red and slowed down, hoping to deter the stolen vehicle from disregarding the red light. The driver still ignored the signal and proceeded through the intersection, resulting in a multivehicle collision.
>
> First, the vehicle crashed into a pickup truck driven by its owner, Clinton Durfee, on eastbound Nine Mile. Next, the vehicle collided with a truck driven by its owner, Randy Leroy Lemons, also on eastbound Nine Mile. The impact of this crash caused the truck to split in two. The rear portion of the truck smashed into a nearby building on the northeast corner of Woodward and Nine Mile. The truck's gas tank exploded, the building caught on fire, and both the building and its contents were destroyed. The police vehicle did not collide with any of the other vehicles, nor did it incur any damage. [76]

Hence this attenuated relationship between the initiation of a police chase and the resulting property damage was deemed "active contribution" sufficient to conclude that the police vehicle was "involved in" the accident which led to the compensable property damage – the total destruction of the property by fire.

Given the plain import of the statutory language at issue in this case, this premise espoused by the *Turner* Court as a basis for the interpretation forwarded by the Court of Appeals in this case is suspect, at best. First, the property protection benefits which the competing insurers were disputing in *Turner* is addressed in MCL 500.3121(1). Compensable damage is described as "accidental damage to tangible property *arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle*." [77] The priority provision then states that the insurer of the owner of a vehicle "involved in the accident" would be primarily liable. [78] Among multiple insurers in the same order of priority each would contribute equally. [79]

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[76] *Id*. at 25-26.

[77] MCL 500.3121(1) (emphasis added).

[78] MCL 500.3125.

[79] MCL 500.3127.

The first consideration of note when comparing MCL 500.3121 to MCL 500.3114(5), the provision at issue in the case *sub judice,* is that the former uses the more general phrase in the No-Fault Act of "arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle." This phrase appears in other sections of the No-Fault Act, most notably in MCL 500.3105(1), which limits no-fault PIP benefits to injuries "arising out of the 'use of a motor vehicle as a motor vehicle.'" [80]

This phrase, "arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle," has been separately and independently interpreted in a multitude of cases. It is not necessary to peruse the diverse scenarios discussed in which an injury or injuries can be said to arise out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. Those interpretations are irrelevant in regard to the facts under consideration and the provision at issue here. The phrase in the instant case requires more than injury arising out of "*use* of a motor vehicle *as a motor vehicle*." MCL 500.3114(5) actually requires the bodily injury suffered to "aris[e] *from a motor vehicle accident*". The explanation above concerning application of this specific language demonstrates that the analyses employed to determine whether an injury arises out of the mere *use* of a motor vehicle as a motor vehicle lends little aid to a proper holding in this case. The Court of Appeals ignored this significant difference in statutory language.

The following passage from *Turner* illustrates the point of how the *scope* of the property protection benefits provision in *Turner* might encompass more than the personal protection benefits provision at issue in this case:

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[80] *Thornton v Allstate Ins. Co.*, 425 Mich 643, 659; 391 NW2d 320 (1986), quoting MCL 500.3105(1).

> [T]he police officer was using his vehicle as a motor vehicle while he pursued the stolen vehicle. This active use perpetuated the stolen vehicle's flight, which, in turn, resulted in the collision with the other cars and the damage to the nearby property. We consider it to be unimportant that seconds before the multivehicle collision, the police vehicle "backed off and allowed more room between the patrol car and the susp[ect] veh[icle]" in an effort to deter the stolen vehicle from running the red light. Before slowing down, the police vehicle had actively pursued the stolen vehicle, and this pursuit, in part, obviously prompted the stolen vehicle to ignore the red light and collide with the other vehicles. Those collisions directly resulted in the damage to the property. Thus, *the use of the police vehicle as a motor vehicle* had an active link with the damage, making it "involved in the accident" for purposes of [MCL 500.3125], and notwithstanding the fact that the same use could not be said to have given rise to the damage for purposes of [MCL 500.3121(1)]. [81]

The "use" by the police officer of his motor vehicle as a motor vehicle is clearly different, as described in this passage, than the question whether injury "[arose] out of *a motor vehicle accident*" in which the implicated vehicle *was involved*. [82] The Court of Appeals here grossly oversimplified application of these two different statutory provisions to two different factual circumstances covering two different benefits provisions under the No-Fault Act. It concentrated only on the meaning of "involved in" in each of these separate provisions, rather than the operation of the two aspects of the relevant statute at issue as noted above that requires that (1) injuries must "arise from a motor vehicle accident", and (2) the implicated motor vehicle must be involved in that accident.

The fault is not completely with the present Court of Appeals panel. The *Turner* Court also misconstrued this Court's earlier decision in *Heard v State Farm Mutual Automobile Ins Co*, [83] as approving of an *expanded* meaning of the phrase "involved in" when assessing the

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[81] *Turner*, *supra* at 42-43 (emphasis added).

[82] MCL 500.3114(5).

[83] 414 Mich 139; 324 NW2d 1 (1982).

implicated vehicle and no-fault insurers. In *Heard*, the question was whether the plaintiff, who was pumping gas into his own uninsured vehicle, was entitled to recover no-fault PIP benefits when he was struck and pinned against his own vehicle by a vehicle insured by State Farm. [84] In fact, the Court actually *rejected* an expansive view of causation analysis when interpreting the phrase "involved in the accident".

Under MCL 500.3113 a person is not entitled to PIP benefits if he is the owner of an uninsured "motor vehicle involved in the accident." State Farm moved for summary judgment arguing that the plaintiff's vehicle was "involved in the accident" because he was struck and then pinned against his own vehicle by the vehicle insured by State Farm. The Court of Appeals affirmed.

This Court reversed, holding that Plaintiff's "parked vehicle [was] not 'involved in the accident'". [85] Remarkably, the Court reasoned that even though the State Farm vehicle impacted the Plaintiff, and then the Plaintiff's uninsured vehicle, the latter was no different than any other "stationary roadside object[] that can be involved in vehicle accidents." [86] Thus, the Court concluded the plaintiff *was entitled* to PIP benefits – he was not excluded as the owner of an uninsured vehicle "involved in the accident" within the meaning of MCL 500.3113. His vehicle was *not* involved in the accident. [87] The Court explained its reasoning as follows:

> The liability of a no-fault insurer does not depend on there being a "causal relationship" between the accident or injury and a vehicle. While there is often a causal relationship between the insured vehicle and the accident, a no-fault insurer

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[84] *Id*. at 143-145.

[85] *Id*. at 144.

[86] *Id*. at 145.

[87] *Id*.

may be responsible although the insured vehicle is not a cause of the accident. For example, the no-fault insurer of an insured person is subject to liability if the insured person or certain members of his household suffer injury while pedestrians or occupants of other vehicles.

Just as the absence of causal relationship or of its corollary, fault, does not necessarily relieve the no-fault insurer of liability, so too the presence of a "causal relationship" does not resolve the question whether a particular vehicle is "involved" for the purposes of the act. Whether a vehicle is "involved" cannot be determined by abstract reasoning or resort to dictionary definitions. It depends on the meaning derived from the purpose and structure of the no-fault act.

While there will generally (perhaps always) be some causal relationship between the loss incurred and a "vehicle involved in the accident", it does not follow that whenever there is any causal relationship the vehicle is "involved". "But for" causal analysis would "involve" a vehicle which drops off a member of a car pool who, after he reaches the curb, is struck crossing a street; a vehicle which runs out of gas where a person who was an occupant is struck walking along the highway to a service station; and a vehicle left in a parking lot where a person who was an occupant is struck crossing the street. "But for" analysis could even involve a disabled automobile left at home occasioning the use of other transportation setting in motion a chain of events which lead to accidental injury of the owner of the disabled vehicle, members of his family and other persons.

"But for" analysis can, indeed, be limited by interposing a requirement of physical proximity. Because Heard was pinned between his vehicle and the offending vehicle, his vehicle is involved; or because he, rather than a service station attendant, was pumping the gasoline, his vehicle is involved. Heard had, he testified on deposition, been leaning against his vehicle, and State Farm argues that for that reason also his vehicle is involved.

We are persuaded, however, on examination of the no-fault act as a whole, that disqualification for benefits and the distribution of losses between insurance carriers (which depends in some circumstances on the meaning given the term "vehicle involved in the accident", see part *III*) were not meant to depend on such adventitious circumstances. Disqualification and loss distribution does not turn on whether a person is pinned against a gasoline pump, the wall of a service station, a tree, his vehicle, or another vehicle unless the vehicle is being used as a motor vehicle. When a vehicle is parked, it is deemed not to be in use as a motor vehicle, and, for purposes of the act, it is like a gasoline pump, the wall of a service station, or a tree.

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"Injuries involving parked vehicles do not normally involve the vehicle *as a motor vehicle.* Injuries involving parked vehicles typically involve the vehicle in much the same way as any other stationary object (such as a tree, sign post or

> boulder) would be involved. There is nothing about a parked vehicle *as a motor vehicle* that would bear on the accident." [88]

The closest the *Heard* Court came to addressing the question of vehicles *involved* in an accident for purposes of paying PIP benefits to an uninsured individual (or, an individual not covered by a no-fault policy of insurance, i.e., a motorcyclist) was its discussion of MCL 500.3115(1). The Court stated as follows:

> Another section of the act, [MCL 500.3115(1)], provides that a person who is not covered by a no-fault policy who suffers accidental bodily injury while not an occupant of a motor vehicle is entitled to PIP benefits from insurers of owners (or of operators) of "motor vehicles *involved* in the accident". (emphasis supplied.) Suppose a motor vehicle collides with the rear of a properly parked vehicle which moves forward and strikes a pedestrian who is not insured. In the circumstances where another vehicle is involved, it is opposed to a principle of the no-fault act to require the insurer of the parked vehicle-regarded under the act as a "stationary roadside object" to contribute to the payment of PIP benefits. [89]

Reading the *Heard* Court's opinion *in toto*, then, it is evident the Court expressly rejected a *broad* or *attenuated* concept of causation in assessing the phrase "involved in" the accident when examining the liability of the implicated vehicle's insurer, or the statutory liability of another party based on the requirement that a vehicle be "involved in" the accident.

Secondly, although no less important, the provisions examined in *Thornton*, [90] *Turner* [91] and *Heard*, [92] which only require as a prerequisite to entitlement to benefits that an injury arise out of use of a motor vehicle as a motor vehicle, do not contain the critical prerequisite language

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[88] *Id*. at 147-149 (footnotes omitted) (emphasis in original), quoting *Miller v Auto-Owners Ins Co*, 411 Mich 633, 639; 309 NW2d 544 (1981).

[89] *Id*. at 152-153 (footnotes omitted), citing *Miller*, *supra* at 640.

[90] 425 Mich at 659.

[91] 448 Mich at 42-43.

[92] 414 Mich at 147-149.

in MCL 500.3114(5), the provision at issue here, which requires, for the injury to be compensable, that it "aris[e] *from a motor vehicle accident*".[93] MCL 500.3105(1), the provision examined in *Thornton*, provides that PIP benefits are available for injury "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle…." MCL 500.3113(b), the provision examined in *Heard, supra*, excludes PIP benefits coverage if the person seeking benefits is the owner of a motor vehicle "involved in the accident"; thus, the provision merely refers back to the "arising out of use of a motor vehicle as a motor vehicle" language that triggers an entitlement to PIP benefits from MCL 500.3105(1). And, MCL 500.3121, the provision examined in *Turner, supra*, also provides property protection benefits for damage to property that merely "aris[es] out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle…." None of these provisions require the bodily injury for which benefits are sought to "arise *from a motor vehicle accident*". Thus, the Court of Appeals reliance on the reasoning and analysis in *Turner* and *Heard*, for the conclusion it arrived at in this case, was legal error. The provisions examined by the Court in those cases are inapposite to the one under consideration here, which requires that the injuries arise from a motor vehicle accident and that the contributing insurer's motor vehicle be involved in that accident.

The Court of Appeals does not appear to have identified this significant distinction. The tractor-trailer in *Braverman* was not, as a matter of law, "involved in" the accident, even though the Court of Appeals apparently remanded on the question of fact of whether it was "visible" or "invisible" to the decedent.[94] Curiously, according to the panel, if the tractor-trailer did not have

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[93] MCL 500.3114(5).

[94] Unpublished opinion per curiam of the Court of Appeals, issued August 20, 2013 (Docket No. 306492), lv den 495 Mich. 934; 843 NW2d 184 (2014) (**ATTACHMENT B**, Slip Op. at 3-4)

its lights on and was not readily visible to the decedent, it was not "actively" contributing, but if the lights were on, it was. [95]

The "ghost" motor vehicle that was allegedly traveling in a trajectory that would have intersected the path of the motorcyclist in *DMC*, [96] was not "involved in the accident" according to the Court of Appeals panel in that case.

And, in *Redford*, [97] the panel could not conclude that any motor vehicle was involved in the accident merely because of the motorcyclist's subjective, but erroneously perceived need to react to avoid the motor vehicle.

Attention is directed to this Court's peremptory order in *Utley v. MMRMA*, [98] in which this Court reversed an unpublished Court of Appeals opinion [99] finding that a city-owned truck *that stopped in front of a motorcyclist*, the latter of whom then lost control of his motorcycle in stopping or swerving to avoid collision with the truck, was "involved in the accident" under MCL 500.3114(5). The Court of Appeals had determined there was a sufficient causal connection between the motorcyclist's injuries and the pickup truck, which had stopped "in the normal course of driving," to find that the truck was "involved in the accident." [100] This Court

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[95] *Id*. at 5.

[96] 302 Mich App at 394-399.

[97] Unpublished per curiam opinion of the Court of Appeals, issued September 23, 2014 (Docket No. 316740), lv den ___ Mich ___; 862 NW2d 188 (2015) (**ATTACHMENT C**, Slip Op. at 2-4).

[98] 454 Mich 879; 562 NW2d 199 (1997).

[99] *Utley v Michigan Mun Risk Management Authority*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 1996 (Docket No. 173391) (**ATTACHMENT E**, Slip Opinion), rev'd 454 Mich 879; 562 NW2d 199 (1997).

[100] *Id*. at 2-3.

reversed, citing MCL 500.3114(5) and stating simply: "On the facts in this case, the truck owned by the City of Sterling Heights was not 'involved' in the accident." [101]

An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent. [102] This rule of law derives directly from the Michigan Constitution, which provides:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent. [103]

In *People v. Crall*, [104] this Court in a memorandum opinion stated that the "final disposition of an application [for leave to appeal]" which "contains a concise statement of the applicable facts and the reason for the decision" is binding precedent under this constitutional provision. Indeed, the Court of Appeals has stated simply that "Supreme Court peremptory orders are binding precedent when they can be understood." [105]

The police vehicle in this case was no more *involved in* the motor vehicle accident with Mr. Bongers than the implicated vehicles in any of these other cases. Certainly, it was less so than the tractor-trailer in *Braverman*, the ghost vehicle in *DMC*, and the pick-up truck in *Utley*. Regarding the latter case, if the city-owned pick-up truck in *Utley* was not "involved in the

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[101] 454 Mich 879 (1997).

[102] Const 1963, Art 6, § 6. See also *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483-484; 633 NW2d 440 (2001), citing *People v Crall*, 444 Mich 463, 464, n 8; 510 NW2d 182 (1993). Reiterated in *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012).

[103] *Id.*

[104] 444 Mich 463, 464, n 8 (1993).

[105] *People v Phillips (After Second Remand)*, 227 Mich App 28, 38, n 11; 575 NW2d 784 (1997).

accident" even though it was directly in front of the motorcyclist, then how can the police vehicle here be considered to have been a motor vehicle "involved in" the motor vehicle accident in which Mr. Bongers was injured when Mr. Johnson was well ahead of the government vehicle? There is simply no evidence of a causal link between the accident and the police vehicle.

But it is not the absence of evidence of these other causes that puts the onus on MMRMA to contribute. There is no presumption that it must have been the fact the police vehicle was at one time pursuing Mr. Johnson that caused him to run a red light and collide with the motorcycle driven by Mr. Bongers. Yet, the Court of Appeals interpretation presumes MMRMA is to be responsible for this attenuated risk. Even under the most expansive insurance parameters the risk here, as it pertains to the government's operations and functions, would never be insurable.

Yet here, and in the earlier *State Farm v. MMRMA* case, [106] both appellant panels found, consistent with *Turner*, that pursuit of a motorist by a police vehicle implicates the latter as a "vehicle involved in the accident" in almost every instance between the time police begin actively pursuing the fleeing suspect and the time a motorcyclist is involved in an accident.

In the first *State Farm v. MMRMA* case, the uninsured motorcyclist was actually the fleeing suspect. [107] No one knew what caused him to crash and suffer injuries. Another vehicle insured by State Farm was either directly involved by being the vehicle the motorcyclist crashed into as he was navigating curves on a gravel road after having outpaced the deputy pursing him or was avoided by the motorcyclist before he crashed. The motorcyclist's injuries were grave

[106] Unpublished per curiam opinion of the Court of Appeals, issued August 13, 2013 (Docket No. 306844) (**ATTACHMENT D**, Slip Op.), lv den 495 Mich 987; 844 NW2d 125 (2014).

[107] *Id*. at 2.

and he did not remember what happened.[108] The driver of the State Farm vehicle also did not see what happened. The pursuing deputy had lost sight of the motorcyclist long before, both because the motorcyclist was going faster and because the deputy thought it was too dangerous to continue pursuing at a high rate of speed along the gravel road the motorcyclist had turned down in an effort to evade capture.

Here, Mr. Johnson may or may not have been fleeing from officer Anson when he ran through the intersection and collided with the motorcycle driven by Mr. Bongers.[109] The testimony was unclear whether Johnson knew he was still being pursued when he ran the red light and collided with Mr. Bongers.[110] Does the subjective perception of the fleeing suspect make the difference? Such perceptions did not seem to matter in *DMC* and *Redford*, *supra*.

Yet, in both *State Farm v. MMRMA* cases, mere pursuit by a police vehicle alone was deemed sufficient "involvement" by that vehicle in the subsequent accident . What are the outer boundaries of the scope of this *involvement* analysis? If a police officer performing his duties to investigate and ferret out criminal activity simply turns his vehicle around to follow a car to get a closer look is the municipality responsible to provide personal injury benefits if that car hits a motorcyclist while trying to evade the police by making an unexpected turn? What if the driver of a vehicle traveling in the opposite direction stops or slows down suddenly in front of a motorcyclist because he believes the police officer turned around to follow him? Is a motorcyclist in the next county entitled to benefits from the police agency in the neighboring

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[108] *Id.*

[109] **ATTACHMENT A**, Slip Op. at p. 3.

[110] *Id.*

county when a suspect fleeing in his or her vehicle runs into the motorcyclist while deliberately attempting to "cross the county line" to get away from the pursuing local officers?

And this is only the beginning of the government's potential attenuated involvement. What if a motorcyclist collides with a vehicle simply pulling over to allow the police to pass by with their emergency lights on? Does an escort by police vehicles of a funeral procession, which then leads to a traffic accident between a motorcyclist and a car at an intersection being traversed by the procession notwithstanding the direction of the traffic signals mean the governmental entity's police vehicles were "involved in the accident"?

Further, a direct causal link between the police pursuit and Mr. Bongers' injuries is made by the *Turner* analysis engaged in by the Court of Appeals despite the myriad of other *actual* causes that had to intervene to lead to the resultant accident. Mr. Johnson chose to flee after he had already come to a stationary position in his vehicle, as he had pulled over on the side of the road to look for his cell phone. Officer Anson did not engage in an initial pursuit of Johnson, but only did so after Mr. Johnson took off from the stationary position as Officer Anson was approaching on foot – which required Officer Anson to turn around and go back to his car (a Toyota Prius), get into it, and then engage in the pursuit. Mr. Johnson, some distance removed by that point, then chose to continue to evade Officer Anson, albeit this could not have been difficult as the Gran Prix driven by Mr. Johnson was far superior in power to Officer Anson's Prius. Mr. Johnson then further chose to continue to break the law and run a red light, entering the intersection in opposition to traffic that had the right of way, including Mr. Bongers crossing on his motorcycle. How many intervening causes must occur before there is a superseding cause? At what point can it be said the police vehicle in pursuit will no longer be a vehicle

"involved in the accident" which occurs at some unpredictable point later between the pursued vehicle and the injured party seeking benefits?

In *Turner*, the police vehicle's pursuit was significantly attenuated from the ultimate property damage that was the subject of the no-fault benefits determination. Indeed, the Court's description of the chain of calamitous occurrences which led to the ultimate catastrophic property damage paints a picture which would be absurd if it were not true.[111] Yet, the Court concluded the police vehicle was nonetheless involved in the accident.

This leaves one to question whether a similar "chain of events", indeed a virtual "butterfly effect" theory will lead future courts to conclude that police or other emergency vehicles responding to emergencies are responsible for a wide variety of disastrous occurrences befalling other properties and vehicles along the emergency route taken because they are deemed to be "involved in the accident". To consider the possible scenarios in the abstract without the reality of the severe injuries that occur in these cases can quickly reach comical proportions.

This concern is not limited merely to emergency vehicles. The *Turner* causation analysis promises continued imposition of liability on governmental entities for injuries that arise out of the performance by the government of any necessary service (emergent or routine) that "involves" use by the government of motor vehicles. Any number of personal injury and property damage claims can arise by "government vehicles" deemed to be *involved* in the motor vehicle accident. Thus, ambulances, fire trucks, road repair vehicles, snow plows, buses, etc., are included within the ambit of a motor vehicle "involved in" the motor vehicle accident in which the personal injury or property damage occurs.

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[111] 448 Mich at 25-26.

This Court has adhered to the view that at least with respect to immunity legislation, private and public tortfeasors are treated differently because of the necessity that core governmental functions must be unimpeded by constant fear and financial liability associated with litigation and the attribution of responsibility for mere performance of these public duties.[112] In this latter regard, one has to consider whether governmental entities and municipal risk managers will not reconsider their policies of police pursuit and emergency response in light of these burgeoning financial obligations. Of even greater concern is that regardless of the policies and procedures in place, individual governmental employees (including police officers and emergency responders) may have pause to fulfill their duties to enforce the law, to serve and to protect the public to the fullest extent of their ability in a given circumstance.

The reality is, in light of the plain language of the provision at issue and the necessity for *reasonable*, not *absurd*, extensions of no-fault insurance coverage, police or other emergency vehicles are not "involved in the accident" between a fleeing vehicle and a motorcyclist somewhere down the road simply because the government vehicle was in some way responding to an emergency involving the fleeing vehicle, or any other vehicle. A *reasonable* analysis of this statutory language must prevail.

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[112] See, e.g., *Costa v. Community Emergency Medical Services*, 475 Mich. 403, 409-410; 716 NW2d 236 (2006), citing *Robinson v. City of Detroit*, 462 Mich. 439, 459; 716 NW2d 236 (2000) and *Mack v. City of Detroit*, 467 Mich. 186, 203, n. 18; 649 NW2d 47 (2002).

CONCLUSION

The causation analysis applied by the Court of Appeals in this case is far too attenuated to produce a reasoned and just result. Indeed, the uncertainty created by the analysis makes it impossible to adequately assess the risk. This is magnified because the risk here must be borne by the government if it is to fulfill its duty to serve and protect the public. The risk is also multiplied by the sheer volume of the government's engagement in day-to-day functions.

Ultimately, "[t]he liability of the [government] is, of course, properly understood as the liability of state taxpayers, because the state and its various subdivisions have no revenue to pay civil judgments, except that revenue raised from the taxpayers." [113] In the instant case, although the underlying issue concerns access to insurance assets, on the one hand, those procured for the municipality to comply with the No-Fault Act, and, on the other hand, the automobile liability insurance provided by State Farm, the net effect of the Court of Appeals decision *does burden* the public *fisc* because it imposes a liability under the No-Fault Act which would not otherwise be attributable to the government. This creates an additional layer of risk that the government must assume by way of paying for its liabilities. The outcome of this case also creates the incongruous result that the government is liable for injuries that it would not otherwise be liable for under the Governmental Tort Liability Act, because there is no evidence of gross negligence [114] or even negligence [115] on the part of the police officer.

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[113] *Nawrocki*, 463 Mich at 148, n 1.

[114] MCL 691.1407(1), (2)(c); *Robinson*, 462 Mich at 445-46.

[115] MCL 691.1405.

RELIEF REQUESTED

WHEREFORE, *amicus curiae* Michigan Municipal League urges the Court to peremptorily reverse the Court of Appeals decision. In the alternative, the Court should grant MMRMA's Application for Leave to Appeal to fully address this case, along with the others raising a similar issue now before the Court.

Respectfully submitted,

CARSON J. TUCKER (P62209)
Attorney for *Amicus Curiae*
3365 Riverbend Dr.
Ann Arbor, MI 48105
(734) 218-3605

Dated: June 5, 2015

ATTACHMENT A

STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY and QBE INSURANCE CORPORATION,

Defendant-Appellees

and

QBE INSURANCE CORPORATION,

Third-Party-Plaintiff/Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Third-Party-Defendant/Appellee,

and

SECRETARY OF STATE, WHITNEY GRAY, MARTIN BONGERS and WILLIAM JOHNSON,

Third-Party-Defendants.

UNPUBLISHED
February 19, 2015

Nos. 319709 & 319710
Kalamazoo Circuit Court
LC No. 2012-000202-CK

Before: RIORDAN, P.J., and MURPHY and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 319709, plaintiff/third-party defendant State Farm Automobile Insurance Agency ("State Farm") appeals by leave granted[1] the trial court's December 4, 2013 interlocutory order denying its motion for summary disposition on the ground that a genuine issue of material fact exists regarding whether the motor vehicle operated by a police officer was "involved" in the accident underlying this case. In Docket No. 319710, defendant/third-party plaintiff QBE Insurance Corporation ("QBE") appeals by leave granted[2] the trial court's interlocutory order, also dated December 4, 2013, denying QBE's motion for summary disposition on the ground, inter alia, that it could not rescind its policy of insurance. The leave granted to QBE was limited to the issue of whether the trial court erred in denying QBE's motion on the basis of the "innocent party rule."[3] These two interlocutory appeals were consolidated by order of this Court.[4] We reverse in Docket No. 319709, and affirm in Docket No. 319710, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a motor vehicle accident and presents a priority dispute among three insurers: State Farm, QBE, and Michigan Municipal Risk Management Authority ("MMRMA").

On August 12, 2011, Officer Richard Anson of the Parchment Police Department[5] conducted a traffic stop of a 1998 Pontiac Grand Prix GT driven by William Johnson. Anson exited his vehicle and began to approach Johnson's vehicle. Before Anson could reach Johnson's vehicle, Johnson drove away. Anson returned to his vehicle (a Toyota Prius), activated the vehicle's lights and siren, and began to follow defendant. Johnson ran a red light and collided with a motorcycle being operated by Martin Bongers, causing injury to Bongers.

At the time of the accident, MMRMA insured the police vehicle. State Farm insured Bongers' personal vehicle, but not the motorcycle he was riding when hit by Johnson. The Grand Prix driven by Johnson had been purchased by Johnson, but was titled and registered to Whitney Gray, his girlfriend, because Johnson's lack of a driver's license and driving record precluded him from being able to obtain a motor vehicle registration or title in his name. The Grand Prix was uninsured. QBE insured a 1999 Oldsmobile Cutlass that was driven by Gray but

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[1] See *State Farm Mutual Auto Ins Co v Mich Municipal Risk Mgmt Auth*, unpublished order of the Court of Appeals, issued May 23, 2014 (Docket No. 319709).

[2] See *State Farm Mutual Auto Ins Co v Mich Municipal Risk Mgmt Auth*, unpublished order of the Court of Appeals, issued May 23, 2014 (Docket No. 319710).

[3] *Id*.

[4] *Id*.

[5] At some point subsequent to August 12, 2011, Parchment disbanded its police department. According to State Farm, it has been unable to locate Officer Anson in order to depose him. MMRMA indicated before the trial court that it could produce the officer for discovery if State Farm wished to depose him.

titled and registered to Tina M. Poole, although QBE represents that it was unaware that the Cutlass was titled and registered to Poole. QBE's policy listed Gray as the named insured.

State Farm paid no-fault personal injury benefits to Bongers. On April 18, 2012, State Farm brought this suit, naming both MMRMA and QBE as defendants, to determine which of the three insurers had the highest priority and, hence, was responsible for paying no-fault benefits to Bongers; State Farm sought reimbursement of the first-party benefits it paid to Bongers pursuant to MCL 500.3114(5)(a). QBE filed a third-party complaint against State Farm (and other parties).[6] Relative to State Farm, QBE sought a declaration from the trial court that it was not liable to State Farm for any of the PIP benefits paid to Bongers because it was entitled to rescind on grounds of fraud the policy it had issued to Gray.

Johnson testified at his deposition that two days before the accident, he was stopped by the police, fled because he had an outstanding warrant for violating his probation, and managed to evade the police officer chasing him. Johnson testified that on the day of the accident, he pulled his car over to retrieve his dropped cell phone; while his car was pulled over, he saw Anson pull up behind him and exit his car. Johnson admitted that he fled from Anson and saw Anson pursue him with activated lights and sirens. At his deposition, the attorney for MMRMA confronted Johnson with a police report that indicated that he initially told Kalamazoo Township Officer Christian Kloosterman that he did not know that Anson was pursuing him; Johnson stated that he did not remember making that statement and that he had marijuana in his system at the time he spoke with Kloosterman. Johnson stated at the deposition that he remembered Anson pursuing him before the collision. Johnson stated, "The whole time during the chase the police officer was right behind me."

Johnson testified initially that he may have accelerated to over 40 miles per hour (but not over 45 miles per hour), but then repeatedly testified that he did not believe that it "could have been over 40 miles per hour." Johnson denied going faster because of Anson's pursuit, but admitted to running the red light because he was being chased by the police.

The police investigation reports all refer to Anson being engaged in a "vehicle pursuit" and making a radio call indicating that he was in pursuit of a Pontiac Grand Prix. In one of the police reports, Kloosterman indicated that Johnson told him that he did not know that Anson was following him, but that Johnson later acknowledged to Kloosterman that he knew Anson was pursuing him with lights and siren activated.

State Farm moved for summary disposition pursuant to MCR 2.116(C)(10), with regard to the priority of MMRMA. State Farm argued that Johnson's deposition testimony, which had not been refuted, conclusively established that the police vehicle was "involved in" the accident

[6] QBE also sought declaratory relief from the Michigan Secretary of State and damages from Gray and Johnson; none of them are parties to this appeal. Since State Farm already was a party to the action in the lower court (and in fact was its initiator as plaintiff), QBE's claim against State Farm is more properly termed a counterclaim than a third-party complaint. See MCR 2.203; MCR 2.204.

because it was chasing Johnson's vehicle. State Farm then asserted that, because the police vehicle was involved in the accident, the insurer of the police vehicle was higher in priority under MCL 500.3114(5), and consequently was responsible for the payment of first-party no-fault benefits to Bongers.

In its response to State Farm's motion, MMRMA attached an affidavit from Larry D. Petersen, a mechanical engineer and accident reconstruction expert. Peterson opined that Grand Prix driven by Johnson could easily out-accelerate and out-distance the Prius driven by Anson. Peterson also noted that Johnson had successfully fled from police just two days before the accident and opined that Johnson had a demonstrated "predilection to attempt flight when stopped by police." Peterson opined that the manner in which Anson operated the Prius did not actively contribute to the accident; rather, he elaborated, the cause of the accident was Johnson's decision to flee from the police, that Anson was "in a situation where he was at best only able to radio in the Pontiac Grand Prix's travel direction" at the time of the accident, and that the "Toyota Prius Hybrid was neither designed for, nor capable of, nor in a position where it could dictate the driving decisions made by Mr. Johnson." Finally, Petersen opined that Bongers should have seen Johnson's vehicle speeding towards him given the available sightline and that Bongers' failure to see and yield to the Grand Prix before pulling out of a service station driveway was a contributing cause of the accident.

QBE also moved for summary disposition pursuant to MCR 2.116(C)(10). QBE asserted, inter alia, that it was entitled to rescind its policy of insurance provided to Gray because Gray had procured her policy by defrauding QBE. According to QBE, Gray had supplied false information on her application for insurance by affirmatively indicating that the Cutlass was registered to her, when in fact it was registered to Tina Poole, Gray's mother. Had Gray truthfully completed the application, QBE would never have issued the policy. Under such circumstances, QBE argued that it was entitled to rescind the insurance policy issued to Gray, and thus was entitled to be dismissed from the suit.

In support of its argument, QBE provided the application for insurance that had been submitted by Gray, which stated that the named insured "must be the registered owner" of the insured vehicle (the Cutlass). Gray had indicated on the application that she was the registered owner of the vehicle, when in fact the vehicle was registered to Poole. QBE argued that it would not have issued the policy had it been provided accurate information on the application. Gray testified at her deposition that she did not own the Cutlass.[7]

[7] QBE presented the trial court with an alternative argument that Gray had defrauded the Michigan Secretary of State and that Johnson was the true owner of the vehicle that struck Bongers. QBE also presented this argument in its application for leave to appeal; however the order granting leave to appeal limited this Court's consideration to the issue of whether QBE could rescind the policy based on Gray's alleged misrepresentation in applying for the policy of insurance. We therefore do not consider this argument. See MCR 7.205(E)(4) ("Unless otherwise ordered, the appeal is limited to issues raised in the application and supporting brief.")

Following a hearing, the trial court ruled that it was denying both QBE's and State Farm's motions for summary disposition. Regarding State Farm's motion, the trial court found that while it was not convinced by MMRMA's arguments, the question of "whether the police vehicle was in fact involved for purposes of establishing liability is something that should be presented to the trier of fact in this matter, namely the jury." Regarding QBE's motion, the trial court found that Gray "owned the 1999 Oldsmobile and therefore had insurance. She was therefore liable for the vehicle[8] that she nominally owned, the 1998 Grand Prix, which was ultimately driven by Mr. Johnson." The trial court further stated that "as a matter of law I do not believe QBE would be entitled to claim a rescission of those mandatory benefits set forth in the No-Fault Act by statute as they relate to innocent third-parties."

The trial court entered separate orders denying summary disposition to State Farm and QBE on December 4, 2013. With regard to State Farm's motion, the order stated that it was denied "for reasons stated on the record, including, but not limited to, that genuine issues of material fact remain as to the involvement of the motor vehicle operated by the Parchment Police Officer."[9] With regard to QBE's motion, the ordered stated that it was denied

> for the reasons stated on the record, including, but not limited to . . . [i]nsurance coverage required by statute, such as that of the No-Fault Act, MCL 500.3101, *et seq*., cannot be rescinded after an innocent third party has sustained which is the subject of the coverage required by statute . . . .

The order also stated as an additional reason for denial that "[a]ny termination of the registration or title which may be available would not have retroactive effect, so as to alter the state of ownership or registration as of 08/12/2011."

State Farm's and QBE's applications for leave to appeal, which this Court granted, followed.

II. DOCKET NO. 319709

In Docket No. 319709, State Farm argues that the trial court erred in failing to hold as a matter of law that Anson's vehicle was "involved" in the accident for the purposes of the no-fault act, see MCL 500.3114(5), and therefore that MMRMA (the insurer of Anson's vehicle) is at a higher level of priority than State Farm with regard to liability for personal protection insurance (PIP) benefits paid to Bongers. We agree.

We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under

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[8] We presume that this is shorthand for "liable for PIP benefits paid as a result of the accident involving the vehicle" that Gray owned.

[9] Despite the order's use of the phrase "but not limited to," this Court is unable to discern any reason stated on the record for the denial other than the trial court's finding that a question of fact existed as to whether Anson's vehicle was "involved" in the accident.

MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant, *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Bd of Trustees of Policemen & Firemen Retirement Sys v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The question of whether a vehicle is "involved" in a motor vehicle accident so as to trigger entitlement to PIP benefits is a question of law which we review de novo on appeal. *Detroit Med Center v Progressive Mich Ins Co*, 302 Mich App 392, 396; 838 NW2d 910 (2013).

This suit is a dispute between no-fault insurers over their respective liability for first-party no-fault benefits. MCL 500.3114(5) provides:

> A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motorcycle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

At issue in Docket No. 319709 is whether Anson's police vehicle was "involved" in the accident that injured Bongers. Because the accident involved no physical contact between Bongers and the police vehicle, and the incident concerns the potential roles of multiple vehicles, whether the police vehicle was "involved" in the accident requires a determination under the principles announced in *Turner v Auto Club Ins Ass'n*, 448 Mich 22; 528 NW2d 681 (1995). *Auto Club Ins Ass'n v State Automobile Mutual Ins Co*, 258 Mich App 328, 340; 671 NW2d 328 (2003).

Turner involved an accident that occurred following a police chase of a stolen vehicle. *Turner*, 448 Mich at 25-26. Our Supreme Court set forth the following rationale for determining whether a vehicle was "involved" in a multi-vehicle accident despite lack of physical contact:

> [F]or a vehicle to be considered "involved in the accident" under § 3125, the motor vehicle, being operated or used as a motor vehicle, must actively, as opposed to passively, contribute to the accident. Showing a mere "but for" connection between the operation or use of the motor vehicle and the damage is not enough to establish that the vehicle was "involved in the accident." Moreover, physical contact is not required to establish that the vehicle was "involved in the accident," nor is fault a relevant consideration in the determination whether a vehicle is "involved in an accident." Finally, as already indicated by our discussion in part A, the concept of being "involved in the accident" under § 3125 encompasses a broader causal nexus between the use of the vehicle and the damage than what is required under § 3121(1) to show that the damage arose out of the ownership, operation, maintenance, or use of the motor vehicle as a motor vehicle. [*Turner*, 448 Mich at 39.]

Here, as in *Turner*, the instant case involves an officer who decided to pursue a vehicle with activated lights and sirens. Johnson testified that made the decision to flee Anson and knew he was being pursued.[10] Johnson further testified that Anson was "right behind" him for the whole chase, and admitted that he ran the red light because he was being pursued.

Petersen stated in his affidavit that Anson's vehicle was not capable of overtaking Johnson's or maintaining an effective pursuit. However, the fact that a fleeing vehicle is capable of outrunning the police vehicle does not mean that a pursuit is not occurring. Further, Johnson's unconverted testimony was that, notwithstanding the maximum speeds of which their respective vehicles were capable, Anson was "right behind" him for the entire pursuit, which he estimated occurred at speeds of approximately 40 miles per hour or less. Petersen's affidavit does not assert that a Toyota Prius is not capable of maintaining such speeds. The other opinions offered by Petersen in his affidavit concerning Johnson's predilection to flee from police or negligence on the part of Bongers have no bearing on the issue of Anson's vehicle's involvement. See *Turner*, 448 Mich at 39 (". . . nor is fault a relevant consideration in the determination whether a vehicle is 'involved in an accident.' ").

MMRMA's reliance on pre-*Turner* cases is misplaced. Notwithstanding the non-binding nature of these cases, MCR 7.215(J(1), they were specifically distinguished by *Turner* as relating to single vehicle accidents, rather than multivehicle accidents arising out of the use of a motor vehicle other than the police vehicle. See *Turner*, 448 Mich at 35 n 10, citing *Sanford v Ins Co of North Am*, 151 Mich App 747; 391 NW2d 473 (1986); *Peck v Auto Owners Ins Co*, 112 Mich App 329; 315 NW2d 586 (1982). Further, MMRMA's argument, supported by Petersen's

[10] Although Johnson initially made the statement to Kloosterman that he did not know he was being pursued, he recanted that statement later in the same interview and admitted to knowledge of the pursuit.

affidavit, that unlike the car thief in *Turner*, Johnson formed the decision to flee while Anson was outside (and thus not operating) his vehicle, is a distinction without a difference. Even if Johnson's initial decision to flee was not prompted by Anson's use of a motor vehicle, his continuing flight, and specifically his decision to run the red light that caused the accident, certainly was. Anson's use of his vehicle therefore "prompted [Johnson] to ignore the red light and collide with the other vehicle[]." *Turner*, 448 at 42-43.

Even viewing the evidence in the light most favorable to MMRMA, *Liparoto Constr, Inc*, 284 Mich App at 29, there exists no material basis to distinguish this case from *Turner*. Nor is this Court at liberty to find that *Turner* was wrongly decided. See Const 1963, art 6, § 6; see also *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). Nor would finding for defendant be as simple as ignoring *Turner* (which in any event neither the trial court nor this Court can do), as the test for vehicular involvement in *Turner* is based upon and comports with numerous other decisions of this Court that considered the meaning of the phrase "involved in the accident." *Turner*, 448 Mich at 38-39.

We therefore reverse the trial court's denial of State Farm's motion for summary disposition in Docket No. 319709, and remand for entry of summary disposition in favor of State Farm on this issue.[11]

III. DOCKET NO. 319710

In Docket No. 319710, QBE argues that the trial court erred in ruling that the "innocent third-party rule" would bar rescission of the insurance policy issued to Gray. We disagree.

The trial court's ruling in effect granted summary disposition to MMRMA on the issue of QBE's liability for a portion of the PIP benefits paid to Bongers. This is because, if QBE were unable to rescind the policy, it would be the insurer of the titled owner and registrant of Johnson's vehicle (the Grand Prix), which was involved in the accident; QBE would thus be on the same level of priority as MMRMA as the insurer of the Parchment Police Department, the

[11] State Farm also argues that, if this Court reverses the trial court's denial, it is entitled to attorney fees and certain "loss adjustment costs" from MMRMA, which is a higher priority insurer because it processed and paid Bongers' no-fault benefits claim. This issue was not addressed in the trial court's order denying its motion. With respect to discretionary appeals by application, this Court only has jurisdiction to address issues arising from the order appealed. *City of Westland v Kodlowski*, 298 Mich App 647, 659-660; 828 NW2d 67 (2012), lv den in part and rev'd in part on other grounds 495 Mich 871 (2013). Moreover, the issue was not addressed by the trial court and no factual record was developed at the hearing on the issue. Under these circumstances, we decline to address the merits of State Farm's claimed entitlement to reimbursement and attorney fees. Any consideration of this issue or related issues dealing with the amount of no-fault benefits is premature and best left to a determination by the trial court in the first instance.

owner and registrant of Anson's Toyota Prius. See MCL 500.3114(5)(a), MCL 500.3115(1)(a). The fact that QBE did not insure the Grand Prix does not alter potential liability. *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 118-119; 724 NW2d 485 (2006). Thus, the trial court's ruling would, if undisturbed, result in QBE's liability for a pro-rata share of the PIP benefits paid to Bongers. See MCR 500.3114(6), MCR 500.3115(2).

This Court has generally denied an insurer's right to rescind a policy of insurance in order to avoid payment of no-fault benefits to an innocent third party:

> Where a policy of insurance is procured through the insured's intentional misrepresentation of a material fact in the application for insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy of insurance through fraud, an insurer may rescind an insurance policy and declare it void ab initio. *Cunningham v Citizens Ins Co of America*, 133 Mich App 471; 350 NW2d 283 (1984). However, this right to rescind ceases to exist once there is a claim involving an innocent third party. *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993); *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985). See also *Burton v Wolverine Mutual Ins Co*, 213 Mich App 514, 517, n 2; 540 NW2d 480 (1995). [*Hammoud v Metropolitan Property & Casualty Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997).]

Thus, "[o]nce an innocent third party is injured in an accident in which coverage was in effect with respect to the relevant vehicle, the insurer is estopped from asserting fraud to rescind the insurance contract." *Katinsky*, 201 Mich App at 170 (citation omitted).

However, QBE argues that this general rule (the "innocent third-party rule") was abrogated by *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). We disagree. In *Titan*, our Supreme Court held that an excess insurance carrier may avail itself of the equitable remedy of reformation (of contract) to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even though the fraud was easily ascertainable and the claimant is a third party, so long as the remedies are not prohibited by statute. *Id*. at 550, 554, 558, 571.

Bongers's entitlement to PIP benefits is statutory, however, not contractual. See *Harris v ACIA*, 494 Mich 462, 472; 835 NW2d 356 (2013); MCL 500.3114(5). The insurer in *Titan* did not seek to avoid payment of statutorily mandated no-fault benefits; in fact, that insurer acknowledged its liability for the minimum liability coverage limits. *Id*. at 552 n 2. Nor did *Titan* address a claim for PIP benefits from an innocent third party. Thus, the holding of *Titan*, that an insurance carrier may seek reformation to avoid liability for *contractual* amounts in excess of statutory minimums, does not compel a finding that *Titan* overruled the many binding decisions of this Court applying the "innocent third-party rule" in the context of PIP benefits and an injured third party who is statutorily entitled to such benefits. *Id*. at 552. QBE has provided this Court with no authority for the proposition that *Titan* overruled these decisions. We

therefore affirm the trial court's denial of summary disposition in Docket No. 319710 relative to the "innocent third-party rule."[12] We do not address the additional grounds for denial cited by the trial court.

Reversed in Docket No. 319709, and affirmed in Docket No. 319710. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ William B. Murphy
/s/ Mark T. Boonstra

[12] Because we hold that even in the event of fraud, the "innocent third-party rule" would estop QBE from seeking rescission of the policy to avoid liability for Bongers's PIP benefits, we do not address the parties' arguments concerning whether Gray actually committed fraud, which, in any event, was not decided by the trial court in the first instance.

ATTACHMENT B

STATE OF MICHIGAN

COURT OF APPEALS

LESLIE C. BRAVERMAN, as conservator for PAMELLA JEAN SMUTZKI, deceased, Plaintiff-Appellee,	UNPUBLISHED August 20, 2013
v	No. 306492 Oakland Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 2010-110523-NF

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

In this action under the no-fault act, MCL 500.3101 *et seq.*, defendant appeals as of right the trial court's order granting summary disposition in favor of plaintiff. We reverse in part, affirm in part, and remand for further proceedings.

I. FACTS

This case arises from an accident that occurred on September 15, 2006, at approximately 10:00 p.m. Pamella Jean Smutzki, her boyfriend, Jason Harwood, and their friend, Jim Garbasic, were each driving a motorcycle south bound on Haggerty Road between Van Born and Ecorse Roads. In that area, Haggerty is a straight, two-lane road, with one lane of travel in each direction. It is a commercial area with little to no street lighting. The speed limit is 45 miles per hour. Harwood was leading the group of motorcyclists. Smutzki was riding behind him and to his right, toward the shoulder. Garbasic was riding behind her.

At one point, Smutzki accelerated past Harwood on his left. This was unusual because Smutzki and Harwood rode together frequently and Harwood always rode as the lead motorcycle. Harwood was traveling at 35 to 40 miles per hour. When Smutzki passed Harwood, she was looking down toward her right hand, where the throttle is located. Harwood saw Smutzki look up and he saw a tractor-trailer stopped in the lane in front of Smutzki. It appeared to Harwood that Smutzki tried to brake but the brakes locked, so she laid down her motorcycle to avoid hitting the tractor-trailer. Smutzki slid to the right of the tractor-trailer; neither she nor her motorcycle came into contact with it. Harwood did not see the tractor-trailer until Smutzki swerved to avoid it, because according to Harwood, the tractor-trailer did not have any lights or turn signal on. In his incident report, Officer Frederick Sweet wrote that Harwood told him the truck's flashers or turn signals were on. Both Harwood and Garbasic slammed on their brakes to

avoid hitting the tractor-trailer. They were able to stop without making contact or laying down their motorcycles. Smutzki subsequently died from a brain injury she sustained in the accident.

Erwin Lee was driving a Mercury Cougar one and a half to two car-lengths behind the three motorcycles. He did not notice the tractor-trailer until he saw Smutzki jerk and fall to the ground. The tractor-trailer appeared to be sitting in the road. Lee did not remember seeing any brake lights or turn signal on the tractor-trailer, but he could not say with certainty if those lights were on or off. He abruptly stopped and did not hit the motorcycles.

Kirk Kulisch was driving the tractor-trailer. The trailer was 53 feet long and the tractor was 20 feet long. At his deposition, Kulisch testified that he was halfway into the driveway of L&W Plant 1 when the accident occurred. Kulisch was coming from L&W Plant 2, which is 0.25 to 0.75 miles north of Plant 1.[1] Kulisch testified that he turned left out of Plant 2, went through his gears, came to the driveway for Plant 1, turned on his left turn signal, and began making the left turn. Kulisch said that he was not driving "even close" to the speed limit of 45 miles per hour. He explained that the tractor-trailer is "geared so low you're going through three or four gears just to go from 0 to 10 miles per hour." When his tractor-trailer was more than halfway into the driveway of Plant 1, he heard tires screeching and saw a headlight moving back and forth in his rearview mirror. Kulisch explained that the motorcycle had to be at least 20 to 30 feet behind him because if it was closer, it would have been in his blind spot.

Kulisch said that his turn signals were on and his tractor-trailer was well-lit, with "turn signals all down the side, all over the back, even extra ones on that trailer." After he pulled into the driveway of Plant 1, Kulisch got out and confirmed that his lights were working. He explained that the tractor-trailer had over 50 marker lights on the sides and back. The lights are yellow on the sides and red on the back and they automatically turn on when the headlights are turned on. Kulisch was sure that his headlights and the side lights on the trailer were on; he saw the sidelights on the truck in his rearview mirror as he was turning left into the driveway. Kulisch said that when he closed his back door before leaving Plant 2, the red lights on the back of the trailer were on. When police later arrived at the scene, they confirmed that the lights on the tractor-trailer were working.

Plaintiff, as conservator for Smutzki, sought personal injury protection (PIP) benefits from defendant, which insured the tractor-trailer. Plaintiff is only entitled to PIP benefits from defendant if the tractor-trailer was "involved" in the accident, pursuant to MCL 500.3114(5). Initially the trial court held that there was a genuine issue of material fact on that issue because there was a dispute in the testimony as to whether the lights were operating on the tractor-trailer at the time of the accident. Subsequently, however, the trial court granted plaintiff's motion for summary disposition and held that the tractor-trailer was involved as a matter of law because plaintiff reacted to the truck as it proceeded so slowly on the road, essentially causing an obstruction on the roadway.

II. SUMMARY DISPOSITION

[1] According to Kulisch, L&W Plant 1 and Plant 2 are approximately 0.4 miles apart.

First, defendant argues that the trial court erred in granting summary disposition in favor of plaintiff. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Cedroni Assoc v Tomblinson, Harburn Assoc*, 492 Mich 40, 45; 821 NW2d 1 (2012). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A summary disposition motion brought under MCR 2.116(C)(10) should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. This Court reviews de novo issues of law, including issues of statutory construction. *Titan Ins Co v State Farm Mut Auto Ins*, 296 Mich App 75, 83; 817 NW2d 621 (2012).

Under the no-fault act, MCL 500.3101 *et seq.*, a motorcycle is not a "motor vehicle." MCL 500.3101(2)(e). For an injured motorcyclist to recover PIP benefits, the accident must involve a motor vehicle. MCL 500.3105; *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 331 n 1; 671 NW2d 132 (2003). MCL 500.3114(5) establishes the order of priority with respect to which insurer must pay the PIP benefits to the injured motorcyclist:

> A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the *involvement of a motor vehicle* while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle *involved in the accident*.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident. [Emphasis added.]

Thus, if the tractor-trailer was "involved in the accident" that led to Smutzki's injuries and death, then plaintiff can recover PIP benefits from defendant under MCL 500.3114(5)(a).

Generally, when there is physical contact between the injured party and a motor vehicle, that motor vehicle is involved under MCL 500.3114(5). See *Auto Club Ins Ass'n*, 258 Mich App at 339-341. In this case, the parties agree that neither Smutzki nor her motorcycle ever came into contact with the tractor-trailer. However, even if there was no physical contact, a motor vehicle can still be involved in an accident. See *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995); *Frierson v West American Ins Co*, 261 Mich App 732, 736-737; 683 NW2d 695 (2004); *Auto Club Ins Ass'n*, 258 Mich App at 340-341. In *Turner*, 448 Mich at 39, the Supreme Court held:

> [F]or a vehicle to be considered "involved in the accident" under § 3125,[2] the motor vehicle, being operated or used as a motor vehicle, must actively, as opposed to passively, contribute to the accident. Showing a mere "but for" connection between the operation or use of the motor vehicle and the damage is not enough to establish that the vehicle is "involved in the accident[.]" [Footnote added.]

In *Turner*, 448 Mich at 25-26, a police car had its lights activated and was quickly pursuing a stolen vehicle. The stolen vehicle ran a red light and hit two trucks. *Turner*, 448 Mich at 25-26. One of the trucks split into two and crashed into a building, causing a fire and extensive property damage. *Id.* at 26. The police car did not collide with the stolen vehicle or either truck. *Id*. Nonetheless, our Supreme Court held that the police car was involved in the accident because its pursuit of the stolen vehicle prompted that vehicle's driver "to ignore the red light and collide with the other vehicles," so its insurer was responsible for paying property protection benefits with respect to the damaged building. *Id.* at 42-43.

In this case, the trial court reluctantly concluded that the tractor-trailer was involved in the accident as a matter of law because the accident occurred when Smutzki reacted to the tractor-trailer in the road. The court compared the tractor-trailer to the police car in *Turner*, 448 Mich at 42-43, which the Court held was involved in the accident that caused property damage because the police car's lights and speed caused the car it was pursuing to crash into another vehicle, which then crashed into a building. Given this conclusion, the trial court ruled in plaintiff's favor as a matter of law.

We conclude that the trial court erred in holding that the tractor-trailer was involved in the accident as a matter of law. The trial court in essence applied a "but for" analysis by finding that the tractor-trailer was involved because Smutzki was reacting to its *presence* in the road. To be involved in an accident, a vehicle must *actively* contribute to the accident. See *Turner*, 448 Mich at 39. A passive contribution is insufficient. *Id*. Thus, more than just the normal operation of a motor vehicle is required. On a two-lane road, a vehicle seeking to make a left turn must slow or stop, requiring the traffic behind to slow or stop as well. There was no evidence that the tractor-trailer stopped suddenly. In fact, the evidence showed that it was travelling at an extremely slow speed and had been for 0.4 miles, since pulling out of Plant 2. The fact that the tractor-trailer was making or preparing to make a left turn, by itself, does not establish its involvement in the accident. Summary disposition in favor of plaintiff on this basis was improper.

However, defendant was also not entitled to the grant of summary disposition. As plaintiff asserted in her response to defendant's motion for summary disposition, and the trial court recognized in addressing the first motion for summary disposition, there is a genuine issue

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[2] MCL 500.3125 addresses the priority of insurers that are responsible for paying property protection benefits to an individual who has suffered accidental property damage in a motor vehicle accident. This Court subsequently applied the *Turner* analysis to cases involving PIP benefits as well. See *Auto Club Ins Ass'n*, 258 Mich App at 340-341.

of material fact regarding whether the tractor-trailer had any lights on at the time of the accident. Harwood testified that he would have crashed into the tractor-trailer if he were in the lead because it did not have any lights or turn signal on. Lee did not remember seeing any brake lights or turn signal on the tractor-trailer, but he could not definitely say if those lights were on or off. On the other hand, Kulisch testified in detail about the various lights on the tractor-trailer. He was certain that his turn signal was on, along with his marker lights and "fourways." If the tractor-trailer did not have any lights on, this failure could mean that its presence in the road actively contributed to the accident, given that the accident occurred at about 10:00 p.m. on a road with no streetlights and lights were required to be in use at the time. MCL 257.697. In addition, there was some evidence that the tractor-trailer would have been visible from a distance even if it did not have any lights on. Therefore, we remand to the trial court to proceed to trial.

III. DISCOVERY ON SMUTZKI'S INSURANCE COVERAGE

Defendant also asserts that the trial court abused its discretion in prohibiting it from conducting discovery or raising at trial the issue of Smutzki's insurance coverage at the time of the accident. We disagree.

MCL 500.3113(b) provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

Thus, if Smutzki did not have proper coverage on September 15, 2006, the date of the accident, plaintiff cannot recover PIP benefits. See MCL 500.3113(b). In a separate case between plaintiff and Smutzki's insurance provider, Dairyland Insurance Company (the Dairyland case), the trial court determined as a matter of law that Smutzki did, in fact, have coverage on the date in question. Defendant was not a party in that case. When Dairyland did not appeal the trial court's decision, defendant sought to intervene. The trial court denied defendant's motion to intervene because it was filed too late—23 days after the trial court granted summary disposition in favor of plaintiff.

When defendant sought to conduct discovery on this issue in the instant case, plaintiff moved for a protective order, arguing that defendant was bound by the declaratory judgment in the Dairyland case. Plaintiff also filed a motion in limine to prevent defendant from raising the issue of Smutzki's insurance coverage at trial. The trial court granted both motions and defendant challenges these decisions.

"We review for an abuse of discretion a trial court's decision on a motion for a protective order." *Alberto v Toyota Motor Corp*, 289 Mich App 328, 340; 796 NW2d 490 (2010). A trial court's decision to admit or exclude evidence is also reviewed for an abuse of discretion. *Dep't*

of Transp v Gilling, 289 Mich App 219, 243; 796 NW2d 476 (2010). "An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes." *Id*. The application of collateral estoppel is a question of law that this Court reviews de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

The purpose of collateral estoppel is "to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication[.]" *Monat v State Farm Ins Co*, 469 Mich 679, 692-693; 677 NW2d 843 (2004) (quotation marks and citation omitted). "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Id.* at 682-684 (quotation marks, citations, internal brackets, and footnote omitted). Mutuality of estoppel exists when the party asserting collateral estoppel would have been bound by the previous litigation, had the judgment gone against him. *Id.* at 684-685.

First, the Dairyland case resulted in a final judgment. About six months after the trial court granted summary disposition in favor of plaintiff, plaintiff and Dairyland stipulated to the case's dismissal.

Second, defendant had a fair and full opportunity to litigate this issue in the Dairyland case. Defendant admitted that it had notice of the litigation and was monitoring its progress. Nonetheless, it did not move to intervene until 23 days after the trial court granted summary disposition in plaintiff's favor. The trial court denied defendant's motion to intervene because of this delay. Our Court has held that when a party had actual notice of the prior action and could have intervened, collateral estoppel prevents the party from retrying the issue. *Wilcox v Sealey*, 132 Mich App 38, 48; 346 NW2d 889 (1984); see also *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 200; 452 NW2d 471 (1989). The party who fails to intervene "is collaterally estopped from denying the validity and binding effect of the declaratory judgment[.]" *Wilcox*, 132 Mich App at 46. Furthermore, defendant's claim that its interests were not protected in the Dairyland case lacks merit. At the hearing on its motion to intervene, defendant conceded that its interests were identical to Dairyland's interests; in arguing its motion to intervene, defendant stated that Dairyland's counsel was more than competent in defending Dairyland's interests and its own.

Finally, there is mutuality of estoppel. If the trial court had concluded in the Dairyland case that Smutzki lacked proper insurance coverage on September 15, 2006, defendant could have used that judgment in the instant case to assert that plaintiff is not entitled to PIP benefits pursuant to MCL 500.3113(b).

IV. ADMISSIBILITY OF THROTTLE EVIDENCE

Defendant next contends that the trial court abused its discretion in granting plaintiff's motion in limine with respect to any testimony espousing the theory that the throttle on Smutzki's motorcycle may have stuck right before the accident. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 689; 777 NW2d 511 (2009).

At his deposition, Harwood opined that Smutzki braked suddenly and laid down her motorcycle because the throttle stuck. Harwood explained that the throttle on Smutzki's motorcycle stuck one time previously when he was driving it. Harwood also said that when she passed him right before the accident, Smutzki was looking down at her right hand, where the throttle is located. Harwood admitted that he did not know for certain if the throttle stuck:

> *Q.* Okay. And your [sic] hypothesizing that [Smutzki's] throttle may have stuck. That's just a guess, correct?
>
> *A.* That's just a guess on—you know, that's the only thing I could come up with after all this time.

Plaintiff filed a motion in limine seeking to exclude any testimony at trial, from Harwood or another witness, regarding *the theory* that Smutzki's throttle stuck shortly before the accident. In part, plaintiff argued that the testimony was speculative and inadmissible under MRE 602 and MRE 701. MRE 602 provides that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Similarly, MRE 701 states that a non-expert witness may only testify to his opinions or inferences when they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

The trial court granted plaintiff's motion in limine, relying on plaintiff's arguments and noting that Harwood's theory was speculative. This decision was not an abuse of discretion. Harwood can testify to matters on which he does have personal knowledge—like the fact that the throttle stuck once when he was driving Smutzki's motorcycle and the fact that he saw Smutzki looking down, in the direction of her throttle, when she passed him right before the accident occurred. However, he does not have personal knowledge that the throttle stuck on this occasion, so this precise testimony as to this conclusion or theory is inadmissible under MRE 602. It was also not an abuse of discretion for the trial court to conclude that the testimony would not be admissible under MRE 701.

V. ADMISSIBILITY OF KARL V. EBNER'S TESTIMONY

Finally, defendant asserts it should be allowed to call Dr. Karl V. Ebner, an expert toxicologist originally retained by plaintiff, as a witness at trial and to use Dr. Ebner's deposition testimony and report at trial even if he does not testify. We agree in part.

After deciding not to call Dr. Ebner as a witness at trial, plaintiff sought to preclude defendant from calling Dr. Ebner as a witness or using his report or deposition testimony at trial, relying on MCR 2.302(B)(4). Meanwhile, defendant moved for leave to "utilize" Dr. Ebner's testimony. In response, the trial court entered an order prohibiting defendant from using the transcript of Dr. Ebner's deposition at trial, for any purpose, because it was taken as a discovery-only deposition. The court subsequently entered a second order prohibiting defendant from calling Dr. Ebner as a witness at trial or making any reference to him or his report. The court stated that its decision was based on plaintiff's arguments.

"We will not disturb a trial court's decision to exclude evidence unless it is established that it abused its discretion." *City of Westland v Kodlowski*, 298 Mich App 647, 663; 828 NW2d

67 (2012). However, we review questions of law, including the interpretation and application of court rules, de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

The trial court erred by relying on plaintiff's argument that MCR 2.302(B)(4) applies to this issue. MCR 2.302(B)(4)(b) provides:

> A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except
>
> (i) as provided in MCR 2.311,[3] or
>
> (ii) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.[Footnote added.]

Thus, MCR 2.302(B)(4) addresses the *discovery* of materials prepared by a nonwitness expert. In this case, however, defendant has already deposed Dr. Ebner and obtained a copy of his report. Defendant is not seeking "the identity of and facts known or opinions held by" Dr. Ebner; defendant already has this information. Rather, it appears defendant is seeking: (1) to call Dr. Ebner as a witness at trial; (2) to use Dr. Ebner's deposition testimony and report at trial as admissions of a party-opponent pursuant to MRE 801(d)(2); or (3) to use Dr. Ebner's deposition testimony and report to impeach plaintiff's new toxicology expert.

There is no reason that defendant cannot call Dr. Ebner as a witness. As discussed above, MCR 2.302(B)(4)(b) does not apply to the admission of evidence or use of witnesses at trial. Plaintiff briefly argues that defendant cannot call Dr. Ebner as a witness because he was not on defendant's witness list. MCR 2.401(I) requires both parties to file and serve witness lists; the trial court can prohibit a witness from testifying if he is not listed. However, defendant's witness list includes "all witnesses listed on any Witness List by other parties, former or present, to this action" and "all rebuttal witnesses." Dr. Ebner was listed on plaintiff's former witness list, so the first category applies. Dr. Ebner could also be used as a rebuttal witness. Therefore, this argument lacks merit.

With respect to Dr. Ebner's deposition testimony, defendant can only use it at trial for impeachment purposes. Defendant noticed Dr. Ebner's deposition as "discovery-only." Plaintiff objected to the use of the deposition for discovery only, but the court later entered a stipulated order permitting defendant to take the discovery-only depositions of plaintiff's experts, including Dr. Ebner. When a deposition is taken for discovery only, it is not admissible at trial except to impeach. See MCR 2.302(C)(7).

[3] MCR 2.311 addresses physical and mental examinations; thus, it is inapplicable in this case.

Finally, neither Dr. Ebner's deposition testimony nor his report can be used as an admission by plaintiff pursuant to MRE 801(d)(2). MRE 801(d)(2)(C) provides that a statement is not hearsay if it is offered against a party and "a statement by a person authorized by the party to make a statement concerning the subject[.]" In support of its argument, defendant cites *Barnett v Hidalgo*, 478 Mich 151; 732 NW2d 472 (2007). The statements at issue in *Barnett* were affidavits of merit attached to plaintiff's complaint in a medical malpractice case. *Id.* at 160-163. Because an affidavit of merit is submitted as part of the pleadings, it is considered an adoptive admission by the plaintiff. *Id*. at 161. In concluding that the affidavits were the plaintiff's adoptive admissions, and therefore not hearsay, our Supreme Court noted that the plaintiff chose to include those particular affidavits with her complaint *and* called the same experts at trial. *Id*. at 161-162. In this case, plaintiff has not taken any steps to adopt Dr. Ebner's testimony or report as her own admissions. In fact, plaintiff has chosen *not* to call Dr. Ebner as a witness at trial. Therefore, defendant cannot present Dr. Ebner's deposition testimony or report at trial as plaintiff's admissions.

Reversed in part, affirmed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

No costs to either party, neither having prevailed in full. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray

ATTACHMENT C

STATE OF MICHIGAN

COURT OF APPEALS

LISA RENEE REDFORD,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee,

and

STATE FARM MUTUAL AUTO INSURANCE COMPANY, PROGRESSIVE INSURANCE COMPANY, and ALLSTATE INSURANCE COMPANY,

Defendants.

UNPUBLISHED
September 23, 2014

No. 316740
St. Clair Circuit Court
LC No. 11-001813-NF

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant Auto Club Insurance Association's ("ACIA") motion for reconsideration and granting summary disposition under MCR 2.116(C)(10) in favor of ACIA. We affirm.

Plaintiff and her husband, Joseph Redford ("Redford"), were involved in an accident when their motorcycle, driven by Redford, went off of the shoulder of an Arizona highway. Plaintiff alleged that a pickup truck was involved in the accident. Specifically, plaintiff alleged that the motorcycle drifted into the oncoming traffic lane, that the truck was approaching in the oncoming lane, and that Redford lost control of the motorcycle when he swerved abruptly to avoid the truck. The only evidence of the truck's involvement, however, was an oral statement attributed to the truck passenger, David Netz, by the responding officer, Daniel Voelker. Voelker wrote in his report, "I asked Netz what he saw and he said he first noticed the motorcycle heading towards him in his lane." However, Netz later testified that he did not recall telling Voelker that the motorcycle was in the truck's lane of traffic. In addition, Netz testified that he never saw the motorcycle in the truck's lane.

Plaintiff sought personal protection insurance ("PIP") benefits from ACIA under MCL 500.3114(5)(c), which provides that the operator or passenger of a motorcycle who suffers "accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle" may seek benefits from the "motor vehicle insurer of the operator of the motorcycle involved in the accident." ACIA moved for summary disposition and argued that there was no evidence the truck was involved in the accident. The circuit court initially denied ACIA's motion on the ground that there was a factual issue concerning involvement of the truck in the accident. ACIA moved for reconsideration, arguing that Netz's statements were not admissible evidence and that absent Netz's statements there was no evidence of the truck's involvement. The circuit court granted reconsideration and then determined that Netz's oral statement was inadmissible. The court further determined that there was no admissible evidence to establish the truck's involvement in the accident. Because there was no admissible evidence of the truck's involvement, the court concluded that ACIA was entitled to summary disposition.

On appeal, plaintiff argues that the circuit court erred when it determined that Netz's oral statement was inadmissible, and that the court should not have granted summary disposition. We review de novo the circuit court's ruling on the summary disposition motion. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition "is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012).

We review the circuit court's decision to grant a motion for reconsideration for an abuse of discretion. *Aromas Wines and Equip, Inc v Columbia Dist Servs, Inc*, 303 Mich App 441, 451; 844 NW2d 727 (2013). We also review for an abuse of discretion the circuit court's decision to exclude evidence. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012).

MCR 2.116(G)(4) provides, in part, that a party opposing a motion for summary disposition brought under MCR 2.116(C)(10) "may not rest upon the mere allegations or denials of his or her pleading, but must . . . set forth specific facts showing that there is a genuine issue for trial." Because a motion under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint, reviewing courts "consider the substantively admissible evidence actually proffered in opposition to the motion." *Adair v State*, 470 Mich 105, 120; 680 NW2d 386 (2004). Therefore, if the moving party properly supports the motion, the nonmoving party must produce admissible evidence in opposition to the motion. *Id.*

ACIA's liability in this case turns on whether the truck was involved in the accident. MCL 500.3114(5)(c). In *Detroit Med Ctr v Progressive Ins Co*, 302 Mich App 392; 838 NW2d 910 (2013), this Court addressed the issue of whether a motor vehicle was "involved" in a

motorcycle accident under the no-fault act. The motorcyclist in *Detroit Med Ctr* was speeding down a deserted side street, saw headlights from an approaching motor vehicle, applied the motorcycle's brakes, and lost control of the motorcycle. *Id.* at 394. The motorcycle never came into contact with the vehicle, but the motorcyclist sustained serious injuries, and the plaintiff hospital sought PIP benefits from the defendant, the motorcyclist's insurer. *Id.* The circuit court concluded that "the motor vehicle was sufficiently involved in the accident to allow recovery of no-fault benefits." *Id.* The question on appeal was "whether, as a matter of law, the evidence established that the motor vehicle, which did not make physical contact with the motorcycle, was sufficiently involved in the accident to trigger the motorcyclist's entitlement to no-fault benefits." *Id.*

Because the record did not establish "an actual, objective need for the motorcyclist to take evasive action," the Court reversed the circuit court, and explained:

> We can find no causal connection between the motorcyclist's injuries and the use of a motor vehicle as a motor vehicle sufficient to trigger entitlement to no-fault benefits under MCL 500.3105(1). The motorcyclist applied his brakes when he saw the vehicle's headlights approaching. The motorcyclist's evasive action in braking rapidly was in response to seeing the moving vehicle's headlights and because of the braking he fishtailed and lost control of the motorcycle, ultimately causing him to crash. But this does not mean that the motor vehicle was causally connected to the motorcyclist's injuries, that is, that the injury "originated from," "had its origin in," "grew out of," or "flowed from" the use of the vehicle as a motor vehicle.
>
> Rather, the evidence established that the causal connection between the motorcyclist's injuries and the motor vehicle was merely incidental, fortuitous, or "but for." We cannot say that the motor vehicle actively contributed to the accident rather than merely being present. While it is true that "a vehicle which is motionless in a lawful position is less likely to be considered involved," and that "a moving vehicle is much more likely to be held to be involved," that does not equate to a conclusion that the motor vehicle was involved merely because it was moving. There still needs to be a causal connection between the injuries and the motor vehicle. For example, in [*Bromley v Citizens Ins Co of America*, 113 Mich App 131, 133-135; 317 NW2d 318 (1982)], this Court determined that the motor vehicle was involved when that vehicle forced the motorcyclist off the road when the vehicle veered over the center line. And in [*Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 785, 788; 432 NW2d 439 (1988)], the Court arrived at a similar conclusion when a motor vehicle made a sudden and unexpected stop that caused a chain reaction of emergency stops that ultimately resulted in two motorcyclists colliding with each other while attempting to avoid a car in front of them that had stopped.
>
> In this case, there is no evidence that the motorcyclist needed to take evasive action to avoid the motor vehicle. Rather, the evidence only established that the motorcyclist was startled when he saw the approaching headlights and overreacted to the situation. And while fault is not a relevant consideration in

> determining whether a motor vehicle is involved in an accident for purposes of no-fault benefits, we believe that principle is limited to not considering fault in the cause of the accident, not whether the motor vehicle was actually involved in the accident. That is, had the motorcycle actually collided with the motor vehicle, we would not consider whether the motorcyclist or the motor vehicle driver was at fault in causing the accident, nor would we consider whether the motorcyclist could have taken evasive action and avoided the accident. But, where there is no actual collision between the motorcycle and the motor vehicle, we cannot say that the motor vehicle was involved in the accident merely because of the motorcyclist's subjective, erroneous perceived need to react to the motor vehicle. Rather, for the motor vehicle to be considered involved in the accident, the operation of the motor vehicle must have created an actual need for the motorcyclist to take evasive action. That is, there must be some activity by the motor vehicle that contributes to the happening of the accident beyond its mere presence. [*Id.* at 397-399 (some citations omitted).]

In this case, plaintiff argues that Redford took evasive action in response to what he thought was an imminent collision between the motorcycle and the truck. Plaintiff and Redford did not remember how the accident occurred, and Joshua Payne, who was driving the pickup truck, did not see any of the events that preceded the crash.

To present a factual issue concerning whether the motorcycle was traveling in the wrong lane, thereby creating an "actual, objective need" for Redford to take evasive action, plaintiff must establish the admissibility of Voelker's police report or testimony relating the contents of his conversation with Netz at the accident scene. MCR 2.116(G)(4); *Adair*, 470 Mich at 120 (holding that evidence in opposition to a motion for summary disposition must be admissible). Netz's statement, as recorded in Voelker's police report and deposition testimony, "hearsay within hearsay," which is "not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule."[1] MRE 805; see also *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 254; 805 NW2d 217 (2011). Thus, plaintiff must establish that the statements Voelker attributed to Netz are admissible with a hearsay exception.

Plaintiff first argues that Netz's statement was admissible as a present sense impression. We disagree. A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," and is not excluded by the hearsay rule. MRE 803(1); *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009). This exception is justified by "the trustworthiness of the statement, which is based on the substantially contemporaneous nature of

[1] "Hearsay" is a statement, other than the one made by the declarant while testifying at a hearing, offered in evidence to prove the truth of the matter asserted, and is not admissible unless a specific exception applies. MRE 801(c); *Campbell v Human Servs Dep't*, 286 Mich App 230, 245; 780 NW2d 586 (2009).

the statement with the underlying event," and is satisfied if three criteria are met: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *Id.*, citing *People v Hendrickson*, 459 Mich 229, 235-236; 586 NW2d 906 (1998).

Further, "in order to establish the foundation for the admission of a hearsay statement pursuant to the present sense impression exception, other evidence corroborating the statement must be brought forth to ensure its reliability." *Id.* at 106, citing *Hendrickson*, 459 Mich at 238. Plaintiff appears to argue that this independent-proof requirement is invalid because the Michigan Supreme Court justices who decided *Hendrickson* did not agree on how the requirement would be satisfied. This argument lacks merit for three reasons. First, *Hendrickson* has not been overruled, and this Court is "bound by the rule of stare decisis to follow the decisions of our Supreme Court." See *Duncan v State*, 300 Mich App 176, 193; 832 NW2d 761 (2013). Second, the independent-proof requirement was adopted by four justices,[2] and a "decision of four or more of our Supreme Court justices on a specific point of law is binding upon this Court with regard to that point of law." *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992). Finally, this Court reaffirmed the independent-proof requirement. See *Ykimoff*, 285 Mich App at 106. Because "there is neither documentary evidence nor verbal testimony to corroborate the alleged statements," *id.*, Netz's statement that he saw plaintiff and Redford's motorcycle traveling in the wrong lane was not admissible as a present sense impression under MRE 803(1).

Plaintiff next argues that Netz's statement was admissible as an excited utterance. Again, we disagree. The exception to the hearsay rule for excited utterances provides that a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. MRE 803(2); *McCallum v Dep't of Corrections*, 197 Mich App 589, 604; 496 NW2d 361 (1992). To qualify for the exception, the out-of-court statement must meet certain criteria: "(1) that there is a startling occasion, startling enough to produce nervous excitement, and render the utterance spontaneous and unreflecting; (2) that the statement must have been made before there has been time to contrive and misrepresent; and (3) the statement must relate to the circumstances of the occurrence preceding it." *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988) (citation and quotation marks omitted). In deciding the preliminary question of fact whether a startling occasion existed, the circuit court "may consider *any* evidence regardless of that evidence's admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible." *People v Barrett*, 480 Mich 125, 134; 747 NW2d 797 (2008), citing MRE 104(a), MRE 1101(b)(1) (emphasis in original). *Barrett* held that MRE 803(2) "does not premise the admissibility of an excited utterance on the

[2] Justice Brickley stated, in his partial concurrence, that the extrinsic-evidence requirement was not satisfied with additional evidence that the underlying event occurred, but the additional evidence must corroborate the hearsay statement itself. *Hendrickson*, 459 Mich at 251-253 (Brickley, J., concurring in part and dissenting in part).

proponent's ability to establish the existence of a startling event or condition without considering the utterance itself." *Id.* at 137.[3]

The circuit court found that there was "nothing in Officer Voelker's deposition testimony or in his police report to suggest [that Netz] was under any stress or excitement at the time [Voelker] spoke to him" because there were "no references to Netz's demeanor, manner of speech or other conduct to suggest he was still under stress or excitement because a motorcycle was in the wrong lane approaching his vehicle." Voelker testified that he arrived on the scene less than 15 minutes after the accident. Netz estimated that it took Voelker closer to 30 minutes to arrive, and although Netz remarked that "the excitement of everything" may have caused him to inaccurately describe the motorcycle tipping over, Netz did not indicate that he was unduly startled at the time. The circuit court's conclusion that Netz was not under stress or excitement when he spoke to Voelker was not "outside the range of principled outcomes," *Jilek*, 297 Mich App at 665. The court did not abuse its discretion when it found that the spoken statement was not admissible under the excited-utterance exception.

We further conclude that Netz's statement does not come with the recorded-recollection exception to the hearsay rule. The recorded-recollection exception, MRE 803(5), provides that the following are not excluded by the hearsay rule:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Hearsay documents may be admitted under MRE 803(5) if they meet three criteria:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) the declarant must now have an insufficient recollection as to such matters; and (3) the document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*People v Dinardo*, 290 Mich App 280, 293; 801 NW2d 73 (2010) (citation omitted).]

The third element is not present in this case. The record indicates that Netz continues to dispute the accuracy of his initial spoken statement. Nor can the second element be shown because there is no evidence that Netz has an "insufficient recollection" of the events leading up

[3] In so holding, *Barrett* overruled *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989), which established an independent-proof requirement for excited utterances. While *Hendrickson* relied on *Burton* in establishing an independent-proof requirement for present sense impressions, see *Hendrickson*, 459 Mich at 239, *Barrett* did not overrule or mention *Hendrickson*.

to the accident; to the contrary, he affirmatively testified at his deposition that he did not see a motorcycle driving in the wrong lane. Plaintiff's assertion that "Netz expressed uncertainty and inability to recall . . . certain . . . events" is not supported by any citation to the record.[4] A general vagueness in memory does not establish a foundation for the admittance of hearsay under MRE 803(5); rather, the declarant's recollection must have been adversely affected with respect to the specific events described in the proffered statement.

In sum, Netz's spoken statement that he saw the motorcycle in the same lane as the oncoming pickup truck, recorded in Voelker's police report and described by Voelker in his deposition testimony, is hearsay and does not qualify for any exception. Therefore, plaintiff has not shown that the accident was caused by an "actual, objective need" for Redford to take evasive action, there was "no causal connection between [plaintiff's] injuries and the use of a motor vehicle as a motor vehicle sufficient to trigger entitlement to no-fault benefits under MCL 500.3105(1)." *Detroit Med Ctr*, 302 Mich App at 397, 399. Accordingly, summary disposition in favor of ACIA was warranted because there remained no genuine issue of material fact. *McCoig Materials, LLC*, 295 Mich App at 693.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

[4] "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the circuit court." MCR 7.212(C)(7).

ATTACHMENT D

STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED August 13, 2013
v	No. 306844 Shiawassee Circuit Court
MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, INC, Defendant-Appellant/Cross-Appellee.	LC No. 07-05893-CK

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

This insurance dispute arises out of a motorcycle accident that occurred during a police pursuit. Plaintiff seeks to hold defendant liable for a share of the personal injury benefits paid by plaintiff to the injured motorcycle operator.

In the main appeal, defendant, Michigan Municipal Risk Management Authority, Inc, appeals by right from the consent judgment entered by the trial court ordering defendant to pay plaintiff State Farm Mutual Automobile Insurance Company $229,687.29.[1] The judgment reserved the right of both parties to appeal "all issues previously raised for possible appeal." The judgment incorporated several previous orders granting partial summary disposition to the parties on various issues, including the trial court's grant of partial summary disposition to plaintiff on the issue of whether Shiawassee County Deputy Sheriff David Flores' ("Flores") vehicle was "involved" in the accident, the trial court's grant of partial summary disposition to defendant on the issue of whether it was liable for amounts paid to the injured party, Eugene Brothers ("Brothers") by plaintiff that were also paid by Brothers' health insurer (the "double dip" funds), and the trial court's denial as moot of defendant's second and third motions for partial summary disposition. Defendant requests reversal of the trial court's determination that Flores' vehicle was "involved" in the accident, or in the alternative that this Court find that

[1] The parties agreed to stay the enforcement of the consent judgment, without appeal bond, pending appeal by either party.

Brothers was not an "operator" of his motorcycle at the time of the accident, and/or that any benefits incurred prior to March 26, 2007 are barred by the "one year back" rule, and/or that the Michigan Catastrophic Claims Association ("MCCA"), as the real party in interest, is the only entity that can seek to recover amounts in excess of $375,000.

In the cross-appeal, plaintiff appeals by right from the same judgment, and requests reversal of the trial court's grant of summary disposition to defendant on the issue of defendant's liability for the "double dip" funds paid to Brothers.

For the reasons stated below, we (1) affirm the trial court's grant of partial summary disposition to plaintiff on the issue of whether Flores' vehicle was "involved" in the accident; (2) hold that the "one year back" rule does not apply to the instant action; and (3) hold that the MCCA is not the real party in interest in the instant action. In the cross-appeal, we reverse the trial court's grant of summary disposition to defendant with regard to its liability for "double dip" funds.

I. BASIC FACTS AND PROCEDURE

Brothers has no memory of the accident underlying this case. Flores testified that he was on road patrol in a marked patrol vehicle on the day in question. Flores observed Brothers travelling eastbound on his motorcycle at seventy-seven miles per hour; the speed limit was fifty-five miles per hour in that area. Flores turned around at an intersection and began following Brothers; he also engaged his emergency lights and siren. Rather than stop, Brothers continued at an excessive speed and made several turns. Flores stated that the driver's "actions were to me that he was – he was trying to avoid me." Brothers continued to accelerate and began to outdistance Flores' patrol car; Flores testified that he reached speeds of nearly one hundred miles per hour. After several miles of pursuit, the motorcycle turned onto Shipman Road, a dirt road. Flores lost sight of the motorcycle on Shipman Road. Flores considered breaking off pursuit, and slowed down because of the sharp curves on the road—he did, however continue the pursuit at a slower speed. As Flores went around a curve, he "noticed a plume of smoke in the distance" and "could see in the distance a silver Ford Explorer kind of nose down in the edge line of the roadway" about one-quarter mile away. As he approached, Flores saw that the motorcycle was on the right shoulder and the motorcycle operator was on the ground several feet in front of the motorcycle.

Flores ran to the car, and determined that the driver was not injured. Flores stated that he believed "the motorcycle impacted the car or there had been some sort of collision" because the car had damage to its left front side and the motorcycle was on the ground. Flores could not say if Brothers was on the motorcycle at the time of the impact with the Explorer. The driver of the Ford Explorer was Denise Putnam ("Putnam").

The Explorer's left front wheel was broken off; the motorcycle was also damaged. Putnam stated to the investigating officer that she did not see any patrol vehicle in sight at the time of the collision and did not see the patrol vehicle until after the collision occurred and she pushed the airbag out of the way. Witnesses from the vicinity of Shipman Road variously estimated the motorcycle's speed at "70 to 80", "80", and "95 to 100" miles per hour. Two of

the three witnesses stated that they noticed a police car "following" the motorcycle, while the third said that Flores' car passed by "a couple seconds later."

Investigating Officer Thomas Terry stated his opinion, in the police report, as follows:

> Due to the evidence and statements of Deputy Flores and witnesses, it is my determination that the Ford Explorer that was driven by Denise Putnam was traveling northeast on Shipman Road in her lane of travel when the motorcycle driven by Eugene Brothers was evading police. Brothers failed to negotiate the curve and it was evidence [sic] that he lost control of the motorcycle. He went into the opposite lane of travel and collided with the Ford Explorer, which resulted in Brothers being seriously injured.

Officer Terry stated in an affidavit that Brother's motorcycle collided with the Ford Explorer; it continued, "[h]owever, based upon available evidence, it is unknown if Mr. Brothers was on his motorcycle at the time that it collided with the Ford Explorer."

Plaintiff, as Putnam's automobile insurer, paid Personal Injury Protection (PIP) benefits to Brothers, who was uninsured, in the amount of $675,114.16. Putnam's vehicle was either totaled or repaired before defendant was made aware of any potential liability. Defendant is a group self-insurance pool, of which Shiawassee County is a member. Defendant provides No-Fault coverage to Shiawassee County. On December 12, 2006, plaintiff sent a letter to Shiawassee County Sheriff's Department, stating that it had received a claim for PIP benefits on behalf of Brothers, and seeking pro-rata contribution from defendant.

Plaintiff filed suit, seeking a declaratory judgment that defendant[2] was liable for a pro-rata share of the PIP benefits paid by plaintiff to Brothers under the No-Fault Act, and additionally requesting that the trial court require defendant to reimburse plaintiff for 50% of all PIP benefits paid by plaintiff to Brothers to date, and to share in a pro rata basis any future PIP benefit payments made to Brothers. Plaintiff moved for partial summary disposition on the issue of whether Flores' vehicle was "involved" in the accident. The trial court determined that Flores' vehicle was "involved" in a "high speed chase."

Defendant then brought three motions for partial summary disposition. In the first motion, defendant argued that it was not liable for any "double dip" amounts paid by plaintiff; the trial court granted summary disposition in favor of defendant on that motion. In the second and third motions, defendant argued that plaintiff's claims were barred by the one-year back rule, and that attorney fees and penalty interest were not proper in an action where one insurer seeks reimbursement from another. The trial court denied those motions as moot. The parties then entered into the consent judgment with right of appeal reserved as described above.

[2] Shiawassee County was also named as a defendant, but was later voluntarily dismissed from the lawsuit by plaintiff.

II. BROTHERS WAS AN "OPERATOR" OF HIS MOTORCYCLE AT THE TIME OF THE ACCIDENT

Defendant argues that the trial court erred in implicitly determining that Brothers was an "operator" of his motorcycle at the time of the accident. We disagree. This Court reviews a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales*, 458 Mich at 294.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Martin v Ledingham*, 282 Mich App 158, 160; 774 NW2d 328 (2009), rev'd on other grounds 488 Mich 987 (2010).

A. THE TRIAL COURT DID NOT ERR IN RELYING ON CIRCUMSTANTIAL EVIDENCE IN GRANTING PLAINTIFF PARTIAL SUMMARY DISPOSITION

MCL 500.3114(5) provides in relevant part that an injured person may recover PIP benefits from a motor vehicle accident that occurred "while an operator or passenger of a motorcycle." Defendant is correct that "operator" is not defined in the No-Fault Act. However, the Michigan Vehicle Code defines an "operator" of a "motor vehicle"[3] as "every person . . . who is in actual physical control of a motor vehicle upon a highway." MCL 257.36. This Court has referred to the driver of a motorcycle at the time of an accident as the operator. See *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 108; 724 NW2d 485 (2006), lv den 478 Mich 880 (2007). Simply put, it is not necessary for this Court to map out all the contours of the "operator" definition, because the evidence supports the inference that Brothers was driving the motorcycle at the time of the accident, and there is no reasonable construction of the word "operator" that excludes the driver of the motorcycle.

Defendant essentially argues that the trial court impermissibly inferred that Brothers was driving his motorcycle at the time of the accident, although there were no eyewitnesses to the accident. Defendant argues that the trial court instead, in viewing the evidence in a light most favorable to defendant, should have inferred that Brothers was not an operator of his motorcycle

[3] A motorcycle is *not* a motor vehicle under the No-Fault act, MCL 500.3101(e), but *is* a motor vehicle under the Vehicle Code, see MCL 257.33.

at the time of the accident, presumably because he may have become separated from the motorcycle prior to the impact with Putnam's vehicle.

Defendant misapprehends the trial court's duty to view the evidence in the light most favorable to it. Plaintiff, as the initial moving party, had the burden of supporting its position with documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. Once plaintiff did so, defendant had the burden of establishing a disputed issue of fact with its own documentary evidence. *Id*. Here, plaintiff submitted eyewitness testimony that placed Brothers on his motorcycle moments before the accident, and that the motorcycle collided with Putnam's vehicle. Defendant offered no evidence to suggest that Brothers became separated from his motorcycle prior to the accident. Instead, defendant hypothetically raises the specter of that possibility, by citing to (a) the affidavit of Officer Terry (which merely indicates that "it is unknown if Mr. Brothers was on his motorcycle at the time that it collided with the Ford Explorer"; and (b) the findings of an accident reconstruction expert that he could not determine whether Brothers was on his motorcycle at the time of collision.

A trial court may grant a motion for summary disposition based on circumstantial evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). This Court has found that the question of whether a vehicle collided with another vehicle is a question of fact. *Auto Club Ins v State Auto Mut Ins Co*, 258 Mich App 328, 332; 671 NW2d 132 (2003). In *Auto Club Ins Ass'n*, a motorcyclist was involved in a multivehicle accident. *Id*. at 330. The motorcycle definitely hit the car belonging to the plaintiff's insured; what was disputed was whether it also struck the car belonging to the defendant's insured such that the defendant would be liable for a share of the PIP benefits. *Id*.

The defendant in *Auto Club Ins Ass'n* moved for summary disposition, and supported its motion with the testimony of two witnesses who stated that the motorcycle did not hit the defendant's car. *Id*. at 333. Plaintiff responded with the testimony of a witness who testified that the motorcycle definitely hit the second car and he was "almost positive" that the motorcyclist was on his bike at the time of the accident and became separated after hitting the second car. *Id*. at 333-334. Plaintiff also presented a state trooper's testimony that damage to defendant's vehicle and skid marks at the scene lead him to conclude that the vehicle was involved in the accident. *Id*. at 335. The trial court granted the defendant's motion for summary disposition. *Id*. at 331. This Court reversed, concluding that the testimony offered by plaintiff was "sufficient to raise an issue of fact regarding whether there was a collision" between the motorcyclist and defendant's car. *Id*. at 335, 341.

Here, in contrast to *Auto Club Ins Ass'n*, we conclude that since the non-moving party offered no evidence that fully supports its position, but only speculation based on an absence of certainty as reflected in the statement of Officer Terry and the findings of the accident reconstruction expert, the trial court did not err in granting partial summary disposition to plaintiff on this issue of whether Brothers was an "operator" of the motorcycle. Unlike *Auto Club Ins Ass'n*, there is no conflicting testimony that would require the trial court to weigh witness credibility. *Id*. Summary disposition is inappropriate when the truth of a material fact depends on witness credibility. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). Here, to grant summary disposition to defendant, or even deny it to plaintiff, the trial court would have to essentially speculate or engage in conjecture that Brothers had become

separated from his motorcycle prior to the accident, despite no evidence (circumstantial or otherwise) being offered in support of that conclusion. "Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Const Co (On Remand)*, 286 Mich App 460, 464; 708 NW2d 448 (2005). We therefore affirm the trial court's grant of summary disposition on this issue.

B. SPOLIATION OF THE EVIDENCE

This Court's conclusion on this issue is not affected by defendant's argument that plaintiff spoliated evidence. Defendant argues that the trial court should have given it the benefit of an adverse presumption, or at a minimum an adverse inference, as a sanction for plaintiff's failure to allow defendant to inspect Putnam's vehicle before it was totaled or repaired. We review a trial court's decision to sanction a party for spoliation of evidence for an abuse of discretion. *Brenner v Kolk*, 226 Mich App 149, 160-161; 573 NW2d 65 (1997).

"Spoliation [of the evidence] refers to destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v Gen Motors Corp*, 271 F3d 583, 590 (4th Cir 2011). A party has "a duty to preserve evidence" "[e]ven when an action has not been commenced and there is only a potential for litigation." *Brenner*, 226 Mich App at 162. This duty to preserve evidence includes all evidence "that [a party] knows or reasonably should know is relevant to the [anticipated] action." *Id.*

Here, plaintiff had possession of the vehicle that was involved in a motor vehicle accident. Before plaintiff brought suit, the vehicle was either repaired or totaled. Thus, plaintiff failed to preserve relevant evidence before notifying defendant of its claim, and consequently, defendant had no opportunity to inspect the vehicle. We conclude that plaintiff should have preserved Putnam's vehicle in anticipation of its suit; therefore the trial court would have been within its discretion to grant a sanction. *Brenner*, 226 Mich App at 164. However, defendant would not have been entitled to an adverse *presumption*, only an adverse *inference*.

"[A] presumption is a 'procedural device' that entitles the person relying on it to a directed verdict if the opposing party fails to introduce evidence rebutting the presumption." *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005), quoting *Widmayer v Leonard*, 422 Mich 280, 289-90; 373 NW2d 538 (1985). However, "missing evidence gives rise to an adverse presumption only when the complaining party can establish 'intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth.'" *Ward*, 472 Mich at 84, quoting *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957). Therefore, a party can receive an adverse presumption only upon showing that the opposing party intentionally spoliated the evidence, and an adverse presumption requires a trial court to conclude that the spoliated evidence would be adverse to that party's position. *Id.* Defendant has presented no evidence indicating intentional and fraudulent conduct on the part of plaintiff, so as to warrant an adverse presumption.

On the other hand, an adverse inference permits the factfinder to conclude that the spoliated evidence would have been adverse to the opposing party. *Brenner*, 226 Mich App at 155-56.

> A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party. [*Ward*, 472 Mich at 85-86.]

Defendant has not provided this Court with an example of the application of an adverse inference or presumption in the context of a motion for summary disposition. This Court is not obligated to discover and rationalize the basis for a party's claims. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Because defendant was not entitled to an adverse presumption, the trial court did not abuse its discretion by failing to presumptively conclude that Putnam's vehicle would have provided evidence that Brothers was not an operator of his motorcycle at the time of the collision.

An adverse inference, however, *permits* a fact-finder to conclude that the evidence would have been adverse; the fact-finder is still "free to decide for itself." *Lagalo v Allied Corp*, 233 Mich App 514, 520; 592 NW2d 786 (1999), abrogated in part on other grounds by *Kelly v Builders Square*, 465 Mich 29; 632 NW2d 912 (2001). Defendant does not explain how the trial court's alleged failure to give an adverse inference altered the trial court's summary disposition analysis. As plaintiff was the moving party, the trial court was *already* required to consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to defendant. *Martin*, 282 Mich App at 160. Thus, even if defendant were entitled to an adverse inference, it is unclear how this would have altered the trial court's analysis. We therefore conclude that any spoliation on the part of plaintiff did not result in error on the part of the trial court, because even if defendant were entitled to an adverse inference, that would be mere duplication of the trial court's duty to draw inferences in its favor at summary disposition.

III. FLORES' VEHICLE WAS "INVOLVED" IN THE ACCIDENT

MCL 500.3114(5) provides as follows:

> A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

Plaintiff is the insurer of the "owner or registrant" of Putnam's vehicle, and thus falls under subsection (a) in order of priority. Defendant insures Shiawassee County, the owner or registrant of Flores' vehicle. Thus, if both Putnam's and Flores' vehicles were "involved" in the accident, plaintiff and defendant would be insurers in the same order of priority, and plaintiff would be entitled to partial recoupment from defendant pursuant to MCL 500.3114(6) ("[i]f 2 or more insurers are in the same order of priority to provide personal protection insurance benefits under subsection (5), and insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority").

Here, Brothers' injuries arose from a "motor vehicle accident which shows evidence of the involvement of a motor vehicle." The general test for whether injuries arise out of an accident involving a motor vehicle has been stated as follows:

> "[W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." [*Thornton v Allstate Ins Co*, 425 Mich 643, 650; 391 NW2d 320 (1986), quoting *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975).]

The motor vehicle's connection with the injury must be "directly related to its character as a motor vehicle." *Id*. at 659; see also MCL 500.3105(1) ("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."). The record contains sufficient evidence for this Court to conclude that Brothers' injuries arose from a motor vehicle accident involving Putnam's vehicle, which was being used as a motor vehicle at the time of the accident. Having met this threshold, plaintiff must then establish that Flores' vehicle was "involved" in the accident.

Physical contact between the injured party and a motor vehicle being used as a motor vehicle "involves" that vehicle in the accident. See *Auto Club Ins*, 258 Mich App at 339 ("[T]here is no case where there was physical contact between the injured party and a vehicle where the vehicle was found not to be involved."). However, when there is no physical contact between a vehicle and the injured party, the analysis of that vehicle's involvement is governed by *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995). See *Auto Club Ins*, 258 Mich App at 340.

In *Turner*, the Court articulated the test for "involvement" of a motor vehicle in a multi-vehicle accident as follows:

> Combining what we said in *Heard* with the guidance provided by the Court of Appeals, we hold that for a vehicle to be considered "involved in the accident" under § 3125, the motor vehicle, being operated or used as a motor vehicle, must actively, as opposed to passively, contribute to the accident. Showing a mere "but for" connection between the operation or use of the motor vehicle is not enough to establish that the vehicle is "involved in the accident." Moreover, physical

> contact is not required to establish that the vehicle is "involved in an accident." Finally, as already indicated by our discussion in part A, the concept of being "involved in the accident" under § 3125 encompasses a broader causal nexus between the use of the vehicle and the damage than what is required under § 3121 to show that the damage arose out of the ownership, operation, maintenance, or use of the motor vehicle as a motor vehicle. [*Id*. at 39.]

Here, as in *Turner*, this case involves an officer who decided to pursue a vehicle with activated lights. Like *Turner*, Brothers did not pull over, but rather accelerated—Flores testified that he reached speeds of around 100 miles per hour and still could not close the distance to Brothers. Like *Turner*, Flores attempted to "back off" immediately before the crash out of concern for safety. Our Supreme Court concluded that the police vehicle in *Turner* was involved in the accident because:

> the police officer was using his vehicle as a motor vehicle while he pursued the stolen vehicle. This active use perpetuated the stolen vehicle's flight, which, in turn, resulted in the collision with the other cars and the damage to the nearby property. We consider it to be unimportant that seconds before the multivehicle collision, the police vehicle "backed off and allowed more room between the patrol car and the susp[ect] veh[icle]" in an effort to deter the stolen vehicle from running the red light. Before slowing down, the police vehicle had actively pursued the stolen vehicle, and this pursuit, in part, obviously prompted the stolen vehicle to ignore the red light and collide with the other vehicles. [*Id*. at 42-43.]

We reach the same conclusion here. Defendant's attempt to rely on pre-*Turner* cases, *Sanford v Ins Co of North America*, 151 Mich App 747; 391 NW2d 473 (1986) and *Peck v Auto Owners Ins Co*, 112 Mich App 329; 315 NW2d 586 (1982), is unpersuasive. Notwithstanding the non-binding nature of these cases, MCR 7.215(J)(1), these cases were both specifically distinguished by *Turner*:

> Both Ferndale and the Court of Appeals rely on the holdings in *Sanford v Ins Co of North America*, 151 Mich App 747; 391 NW2d 473 (1986), and *Peck v Auto Owners Ins Co*, 112 Mich App 329; 315 NW2d 586 (1982), to support the proposition that Ferndale is not liable for property protection benefits. Reliance on these cases is misplaced because both dealt with single motor vehicle accidents in which the claimants' only chance of collecting benefits hinged on showing that the use of the single motor vehicle (the police car) as a motor vehicle gave rise to the claimant's injures under § 3105(1). Because this is a multivehicle accident situation, and the facts establish that the damage arose out of the functional use of a motor vehicle (the motor vehicle not being the police car), the primary liability of the insurer of the police car turns on whether the police car was "involved in the accident" under § 3125. [*Turner*, 448 Mich at 35 n 10.]

Thus, in a single vehicle accident, liability for a motor vehicle would hinge on *that vehicle* having given rise to the claimant's injuries through its use as a motor vehicle. In contrast, in a multiple vehicle accident, once *a* motor vehicle is established as giving rise to claimant's injuries through its use as a motor vehicle, the question becomes whether a vehicle was "involved" in the

accident, which "encompasses a broader causal nexus" under *Turner*. *Id*. at 39. *Turner* specifically disavowed the use of *Peck* and *Sanford* in deciding a case such as the instant case.

Additionally, we are not persuaded by defendant's attempts to distinguish *Turner*. Defendant argues that it is unknown whether Brothers knew he was being pursued by Flores (and therefore not in flight "perpetuated" by Flores' pursuit) because he was already speeding when he was observed by Flores. However, Flores testified that he pursued Brothers at speeds of up 100 miles per hour with lights and sirens activated, that Brothers made several sharp turns, and that Flores believed Brothers knew he was being pursued. This evidence supports the inference that Brother's actions were in response to Flores' pursuit. Although defendant is entitled to have the evidence viewed in the light most favorable to it, *Martin*, 282 Mich App at 160, the trial court was not required to ignore evidence that Brothers was aware of the pursuit.

Finally, defendant urges this Court, if it does not find *Turner* distinguishable, to find that it was wrongly decided. But a decision of the Supreme Court is binding precedent if it contains "a concise statement of the facts and reasons for each decision." Const 1963, art 6, § 6; see also *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). Thus, this Court is not at liberty to decline to follow *Turner*. Nor would finding for defendant be as simple as ignoring *Turner* (which in any event we cannot do), as the test for vehicular involvement in *Turner* is based upon and comports with numerous other decisions of this Court that considered the meaning of the phrase "involved in the accident." *Turner*, 448 Mich at 38-39.

We therefore affirm the trial court's grant of partial summary disposition on the issue of whether Flores' vehicle was "involved in the accident."

IV. THE "ONE YEAR BACK" RULE DOES NOT APPLY TO PLAINTIFF'S CLAIM

Defendant also argues that the "one year back" rule applies to bar at least a portion of plaintiff's claim. MCL 500.3145(1) provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, *the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced*. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

At issue here is the so-called "one year back rule," i.e., the language that reads "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

As a threshold issue, defendant attempts to cast plaintiff's action as one for subrogation. An action for subrogation arises when an insurer has paid benefits to an insured that it believes another insurer should have paid. *Titan Ins Co v North Pointe Ins*, 270 Mich App 339, 343; 715 NW2d 324 (2006), citing *Fed Kemper Ins Co v Western Ins Cos*, 97 Mich App 204, 209; 293 NW2d 765 (1980). An insurer subrogee in that instance is "substituted for his insured" and acquires no greater rights than those possessed by the injured party. *Id*. at 333-334, quoting *Fed Kemper Ins Co*, 97 Mich App at 209. Thus, in a subrogation action, if MCL 500.3145(1) would bar an injured party's claim, it would bar the subrogee's claim as well. *Id*. at 344.

However, plaintiff's claim arises under MCL 500.3114(6), which provides:

> If 2 or more insurers are in the same order of priority to provide personal protection insurance benefits under subsection (5), an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among all of the insurers.

In considering the almost entirely identical provision found in MCL 500.3115(2),[4] this Court in *Titan Ins Co v Farmers Ins Exch*, 241 Mich App 258, 262; 615 NW2d 774 (2000), noted that the provision:

> provides a specific right of partial recoupment by one no-fault insurer of PIP benefits paid by another no-fault insurer of the same order of priority, *independent of an accident victim's right to payment of PIP benefits*. Thus, this case is distinguishable from those in which an insurer's right to recovery or reimbursement from another insurer was found to be subrogated to the insured's right to recovery and therefore subject to the period of limitation in § 3145. [Emphasis added.]

Thus, this Court in *Titan Ins Co* specifically rejected the notion that a claim for partial recoupment was a subrogation claim. *Id*.; see also *Stonewall Ins Group v Farmers Ins Group*, 128 Mich App 307, 308; 340 NW2d 71 (1983) (referring to an action for recoupment of PIP benefits as a "contribution" action).

[4] "When 2 or more insurers are in the same order of priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers."

At issue in *Titan Ins Co* was the limitations period in MCL 500.3145[5], not the "one year back rule." *Id*. at 260-261. Defendant thus argues that *Titan Ins Co* is not relevant to the instant case. However, *Titan Ins Co*'s recognition that actions for recoupment are not subrogation actions supports the broader conclusion that MCL 500.3145 does not apply to recoupment actions: "While we recognize that plaintiff's claim falls within the no-fault act, we disagree with defendant that because plaintiff seeks reimbursement under the act, its claim automatically falls within the period of limitation provided for in subsection 3145(1)." *Id*. at 262. Additionally, this Court noted that

> [T]he purpose of the no-fault insurance system is "to provide *victims of motor vehicle accidents* assured, adequate and prompt reparation for certain economic losses." Where, as here, a no-fault insurer promptly pays benefits, the purpose of the statute is served. Refusing to apply the limitation period of subsection 3145(1) to a subsequent claim by that no-fault insurer for partial recoupment of benefits paid from another no-fault insurer of equal priority . . . does not thwart that purpose.
>
> Accordingly, we conclude that the circuit court properly held subsection 3145(1) inapplicable to plaintiff's action. [*Id*. at 262-263 (internal citations omitted).]

The reasoning of *Titan Ins Co* applies equally to the "one year back rule" portion of MCL 500.3114(6). When an insurer "promptly pays" benefits, it makes little sense to preclude it from recovering those benefits from another equal-priority insurer if it files suit more than one year after the insured's injury was incurred; this would defeat the purpose of the recoupment subsections: "to accomplish equitable distribution of the loss among such insurers." MCL 500.3114(6); MCL 500.3115(2). To do so also would also encourage piecemeal litigation, as an insurer would have to seek recoupment for each payment of PIP benefits as the one-year mark approached, rather than seeking partial recoupment in one lawsuit. This would frustrate the "no-fault act's purpose of reducing litigation." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 565; 702 NW2d 539 (2005).

Further, defendant has not provided this Court with an example of the application of the "one year back" rule in the context of a partial recoupment action. Defendant's references to *Devillers* and *Cooper v Auto Club Ins Ass'n*, 481 Mich 399; 751 NW2d 443 (2008), are not persuasive. Both *Devillers* and *Cooper* involved insureds who brought an action against an insurer to recover benefits, either after an insurer had discontinued benefits, *Devillers*, 473 Mich at 565, or because the insured alleged that the benefits paid were insufficient, *Cooper*, 481 Mich at 406. Our Supreme Court's discussion of the application of the "one year back rule" to these actions is thus not applicable to the instant case.

We conclude that the "one year back" rule does not bar any portion of plaintiff's claim.

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[5] "An action for recovery of personal protection benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury" absent certain notice requirements or payment by the insurer.

V. THE MCCA WAS NOT THE "REAL PARTY IN INTEREST"

Next, defendant cursorily argues that plaintiff is entitled to seek reimbursement from the MCCA of 100% of benefits paid in excess of $375,000 because, it argues, the MCCA is the real party in interest. As a result, defendant maintains that plaintiff cannot recoup any portion of those amounts from defendant. We disagree.

As a threshold issue, defendant does not explain how the real party in interest statute, MCL 600.2041, applies to the instant case. MCL 600.2041 provides in relevant part that "every action *shall be prosecuted* in the name of the real party in interest . . . ." Emphasis added. Defendant essentially argues that it is not obligated for any amounts paid by plaintiff over $375,000; however, defendant provides no authority for its contention that the real party in interest statute or accompanying caselaw has some bearing on its *defense* of plaintiff's claim. Plaintiff undisputedly has the right to pursue an action for some amount against defendant. See MCL 500.3114(6). Thus, we conclude that the law concerning real parties at interest is inapplicable here. To the extent that defendant, misuse of the term "real party in interest" aside, argues that it is not liable for any amounts paid by plaintiff over $375,000, we disagree for the reasons stated below.

The MCCA is a statutorily created body. See MCL 500.3104. MCL 500.3104 provides in relevant part:

> (1) An unincorporated, nonprofit association to be known as the catastrophic claims association, hereinafter referred to as the association, is created. Each insurer [under the no-fault act] . . . shall be a member of the association . . . .
>
> (2) The association shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence:
>
> * * *
>
> (e) For a motor vehicle accident policy issued or renewed during the period July 1, 2005 to June 30, 2006, $375,000.

Defendant argues that because plaintiff has paid over $375,000 in PIP benefits, it is entitled to 100% reimbursement of amounts in excess of $375,000 and thus is not entitled to recoup any of that portion of its payments from defendant. A similar issue was addressed by this Court in *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454; 651 NW2d 428, lv den 467 Mich 917 (2002). In *Farmers Ins Exch*, like the instant case, an insurer sought partial recoupment of PIP benefits from another insurer of equal priority. *Id*. at 455. The defendant appealed the trial court's ruling that the plaintiff was entitled to recoup half of the total PIP benefits paid and owing to the injured party, arguing that it should not have to recoup amounts already paid to the plaintiff by the MCCA. *Id*. This Court cited the provision creating the MCCA, and noted that this statute must be read in relation to MCL 500.3115(2) (the priority statute at issue, and as noted above, functionally identical to MCL 500.3114(6)). *Id*. at 458. This Court noted that the MCCA had, pursuant to statutory direction, developed a plan for this situation, which required a member to turn over monies recovered from the MCCA if it recovers those sums from a third

party. *Id*. at 459, citing Michigan Catastrophic Claims Association Plan of Operation, Article X, § 10.06. This Court therefore concluded that "when an insurer pays out benefits, it can recoup part of the money paid from another insurer in equal priority, even if the MCCA already has reimbursed the initial insurer." *Id*. at 459.

We conclude that the rationale of *Farmers Ins Exch* supports our conclusion that the MCCA is not the real party in interest in a suit for contribution between insurers of equal priority. Our conclusion is supported by *Transamerica Ins Group v MCCA*, 202 Mich App 514, 517-518; 509 NW2d 540 (1993), where this Court held that the statute governing reimbursement by the MCCA unambiguously provides that insurers may not aggregate their claims; rather "the statute provides for indemnification of member insurers only after an individual insurer has sustained a loss in excess of $250,000 for a single loss occurrence." *Id*.[6] This Court found support for its conclusion in the language of MCL 500.3104(2), which provides that members will receive indemnification only for the amount of "ultimate loss" sustained in excess of the relevant amount. *Id*. at 541-542. An ultimate loss is defined in the statute as "the actual loss amounts which a member is obligated to pay and which are paid or payable by the member." *Id*. at 541.

Therefore, in conformity with *Farmers Ins Exch* and *Transamerica Ins Group*, we hold that an insurer may seek partial recoupment from an insurer of equal priority; if, after recoupment, either insurer (or both) has paid claims in excess of the relevant reimbursement amount, either insurer (or both) may then seek reimbursement from the MCCA for the excess benefits paid. This would comport with MCL 500.3114(6)'s goal of accomplishing "equitable distribution of the loss among all of the insurers" and MCL 500.3104(2)'s restriction of reimbursement by the MCCA to "ultimate loss." A loss would thus not be "ultimate" until it had been "equitably distributed." Defendant has offered no support for its contention that insurers seeking partial recoupment must, in lieu of such recoupment, first proceed against the MCCA for reimbursement of amounts in excess of the statutory threshold, and we do not so find.

We conclude that plaintiff is entitled to seek contribution from defendant, notwithstanding its separate right to seek reimbursement for excess payments from the MCCA.

V. THE TRIAL COURT ERRED IN GRANTING DEFENDANT PARTIAL SUMMARY DISPOSITION AS TO THE "DOUBLE DIP" AMOUNTS PAID BY PLAINTIFF (CROSS-APPEAL)

Brothers' health insurer, Blue Cross Blue Shield of Michigan (BCBSM), paid over $200,000 of PIP benefit claims that were also paid by plaintiff. Defendant argued before the trial court that by virtue of Putnam's coordinated policy (i.e., an automotive insurance policy that makes the insured's health insurer primarily responsible for personal injury protection benefits in return for lower premiums), these funds should not have been dispersed to Brothers by plaintiff,

[6] At the time *Transamerica Ins Group* was decided, MCL 500.3104(2) provided for a threshold amount of $250,000. See MCL 500.3104(2)(a). As noted, the threshold amount that is applicable in this case is $375,000. MCL 500.3104(2)(e).

because it was BCBSM's responsibility to pay these benefits. Defendant further argued that plaintiff mistakenly paid benefits to Brothers as if Brothers had an uncoordinated insurance policy (i.e., an automotive insurance policy that makes the automotive insurer primarily liable for personal injury protection benefits). Thus, defendant argued, it should not be liable for a share of these funds.

The trial court, in granting defendant's first motion for partial summary disposition, stated:

> In the present case, Mr. Brothers [sic] coordinated health plan primarily paid for his medical expenses incurred as a result of the March 21, 2006, accident. Plaintiff's coordinated no-fault automobile insurance plan for third-party Putnam also paid Mr. Brothers [sic] expenses as if Mr. Brothers had purchased an uncoordinated no-fault automobile insurance plan. However, this Court finds no case law or statute that supports § 3109a allowing a coordinated no-fault automobile insurance plan to transform into an uncoordinated no-fault automobile insurance plan.

In support of its ruling, the trial court made reference to MCL 500.3109a, which governs coordinated policies, and provides:

> An insurer providing personal protection insurance benefits under this chapter may offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. Any deductibles and exclusions offered under this section are subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured, and any relative of either domiciled in the same household.

We conclude, however, that MCL 500.3109a is inapplicable to this case. MCL 500.3109a provides that deductibles and exclusion may be offered related to "other health and accident coverage *on the insured*." (Emphasis added). Further, the deductions and exclusions under this section "shall apply only to benefits payable to the person named in the policy, the spouse of the insured, and any relative of either domiciled in the same household." Our Supreme Court has held that MCL 500.3109a is inapplicable with regard to payments made to an injured party not named in the relevant policy nor related to any named insured. See *DeMeglio v Auto Club Ins Ass'n*, 449 Mich 33, 47; 534 NW2d 665 (1995) (BRICKLEY, C.J., lead opinion); see also *Crowley v DAIIE*, 428 Mich 270, 279-280; 407 NW2d 372 (1987). Since Brothers was not the named insured on plaintiff's policy, MCL 500.3109a is inapplicable.

The trial court also made reference, as plaintiff does on cross-appeal, to *Shanafelt v Allstate Insurance Co*, 217 Mich App 625; 552 NW2d 671 (1996). In *Shanafelt*, the plaintiff, an insured, sued her insurer for benefits that were previously paid by her health insurance provider. *Id*. at 639. Because the plaintiff had purchased an uncoordinated policy (and therefore paid a higher premium), this Court held that the language of the policy mandated payment of benefits without a setoff for health insurance. *Id*. at 643.

The trial court further made reference to *Smith v Physicians Health Plan, Inc*, 444 Mich 743; 514 NW2d 150 (1994). In *Smith*, the plaintiff's medical expenses were paid by an uncoordinated auto insurance policy; plaintiff then sought duplicate payments from his coordinated health insurance policy. *Id*. at 748. The plaintiff essentially brought suit to argue that the health insurance policy was primarily liable for medical expenses and that the uncoordinated auto policy entitled him to duplicate benefits. *Id*. The Court disagreed, holding that the auto insurance policy was primarily responsible for benefits due to the coordination clause in the health insurance policy. *Id*. at 759.

Both *Smith* and *Shanafelt* are inapposite to the instant case. *Shanafelt* involved a situation where an *insured* received duplicate benefits because she had, in effect, paid for the privilege by purchasing an uncoordinated auto policy. *Smith* similarly involved an *insured* who was denied duplicate benefits because of a coordinated policy. Neither addressed the situation of benefits paid to an injured party who was not a party to a coordinated insurance policy, which is where Brothers stands in the instant case.

"[W]here no-fault coverage and health coverage are coordinated, the health insurer is primarily liable for [the insured's] medical expenses." *Am Med Sec, Inc v Allstate Ins Co*, 235 Mich App 301, 304; 597 NW2d 244 (1999), lv den 461 Mich 1003 (2000). However, in the absence of coordination, a no-fault insurer is primarily liable for benefits paid to an insured. See *Shanafelt*, 217 Mich App at 642. Here, Brothers' entitlement to benefits arose not from any insurance policy, but from statute, MCL 500.3114(5). See *Harris v Auto Club Ins*, ___ Mich ___; ___ NW2d ___ (2013), slip op at 10. That statute provides simply that an injured party "shall claim personal protection insurance benefits from insurers in the following order of priority: (a) the insurer of the owner or registrant of the motor vehicle involved in the accident." *Id*. Thus, no-fault insurance, not health insurance, was primary in the instant case. See *DeMeglio*, 449 Mich 33 at 47;). See *Harris*, slip op at 10.

It appears that any "windfall" granted to Brothers was in fact granted by his health insurer, not plaintiff. We express no opinion on whether Brothers ultimately should keep his windfall; such a determination would depend on the policy between Brothers and his health insurer.[7] What is clear is that *Smith* does not provide support for the trial court's conclusion that plaintiff was not obligated to pay benefits to Brothers paid by his health insurer, and thus, that defendant was not obligated for any share of those benefits.[8]

[7] See, e.g., *Harris*, slip op at 10-11. In *Harris*, the Court found that a health insurance policy that provided that the insurer would not pay sums "for which you [the insured] legally do not have to pay" shielded the health insurer from liability for PIP benefits paid to an injured motorcyclist pursuant to MCL 500.3114(5)(a), because the injured party was not obligated to pay his medical expenses; rather the insurer with priority under the statute was obligated to pay them as a matter of law. *Id.*

[8] Defendant advances numerous policy arguments regarding the deleterious effect of allowing "double-dipping" on the overburdened Michigan No-Fault system. This Court's decision is

We also reject defendant's contention that the benefits that were paid by Brothers' health insurer were not "reasonable charges *incurred*" by Brothers, and thus plaintiff was not required to pay them under MCL 500.3107 (defining "payable personal protection benefits" as, among others, "all reasonable charges incurred" for the injured person's care, recovery, or rehabilitation). This exact argument was addressed and rejected in *Shanafelt*:

> Defendant's position is untenable. The word "incurred" is not defined in the no-fault act, so we accord the word its plain and ordinary meaning within the context of the statute. A dictionary may be used when determining the meaning of a word. The primary definition of the word "incur" is "to become liable for." *Random House Webster's College Dictionary* (1995). Obviously, plaintiff became liable for her medical expenses when she accepted medical treatment. The fact that plaintiff had contracted with a health insurance company to compensate her for her medical expenses, or to pay directly the health care provider on her behalf, does not alter the fact that she was obligated to pay those expenses. Therefore, one may not reasonable maintain that plaintiff did not incur expenses. Thus, defendant has presented no argument suggesting that plaintiff's expenses were not allowable expenses as that term is used in MCL 500.3107(1)(a). [*Shanafelt*, 271 Mich App at 616-617 (citations omitted).]

Further, when an insurer is designated as the responsible insurer by MCL 500.3114(5)(a), it is legally responsible for PIP coverage as a matter of law. *Harris*, slip op at 10.

We therefore reverse the trial court's grant of partial summary disposition to defendant on the issue of defendant's liability for the so-called "double dip" amounts.

VI. CONCLUSION

In the main appeal, we conclude that the trial court did not err in determining that Flores' vehicle was "involved" in Brothers' accident. Further, there is no support for defendant's contention that Brothers was not an "operator" of his motorcycle at the time of the accident. Our conclusion on the issue of Brothers' status as an "operator" of his motorcycle is not affected by plaintiff's failure to preserve Putnam's vehicle for defendant's examination. Additionally, the "one year back" rule does not apply to the instant action. Finally, the MCCA was not the "real party at interest" in the instant case. We therefore affirm the trial court's grant of partial summary disposition to plaintiff.

In the cross-appeal, we conclude that the trial court erred in granting defendant partial summary disposition with regard to the so-called "double-dip" funds. We therefore reverse the trial court's grant of partial summary disposition to defendant, and remand for further proceedings consistent with this opinion. On remand, the trial court should determine the additional amount owed to plaintiff by defendant relative to any "double dip" funds excluded

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based upon the existing state of the law. Defendant's arguments are better addressed to the Legislature. See *People v Carruthers*, ___ Mich App ___; ___ NW2d ___ (2013), slip op at 9.

from the consent judgment by virtue of the trial court's grant of partial summary disposition to plaintiff.

Affirmed as to the main appeal, reversed as to the cross-appeal, and remanded further proceedings, consistent with this opinion. We do not retain jurisdiction. Having prevailed in full, plaintiff may tax costs. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray

ATTACHMENT E

STATE OF MICHIGAN

COURT OF APPEALS

EDWARD J. UTLEY,

Plaintiff-Appellee,

v

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY,

Defendant-Appellant,

and

CITY OF STERLING HEIGHTS,

Defendant.

UNPUBLISHED
April 26, 1996

No. 173391
LC No. 90-003372-NI

Before: Jansen, P.J., and McDonald and D.C. Kolenda,* JJ.

PER CURIAM.

Defendant Michigan Municipal Risk Management Authority appeals as of right from a final judgment entered on February 10, 1994, in plaintiff's favor in this first party no-fault benefits case. We affirm.

Defendant specifically appeals from an April 7, 1992, order granting plaintiff partial summary disposition. In that order, the trial court found that plaintiff, who was injured while riding his motorcycle, was entitled to no-fault benefits because defendant's city-owned pickup truck was involved in the accident. On appeal, defendant argues that the trial court erred, as a matter of law, in finding that the motorcycle was involved in a motor vehicle accident for purposes of triggering liability for no-fault insurance benefits. We find no error.

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* Circuit judge, sitting on the Court of Appeals by assignment.

The parties stipulated to the statement of facts before trial. The accident occurred on May 7, 1990, at approximately 7:30 a.m. Martin Sowa, a City of Sterling Heights employee, was driving a city-owned pickup truck on Eighteen Mile Road. Sowa was forced to come to a stop as he approached Utica Road. Plaintiff, who was riding a motorcycle, was behind Sowa's truck. Plaintiff looked down at his speedometer. When he looked up again, plaintiff noticed the stopped truck and applied his brakes. Plaintiff lost control of his motorcycle, which fell on its side and slid toward the truck.

Plaintiff filed suit in the Macomb Circuit Court for first party no-fault benefits. He alleged that his injuries were caused by an accident arising out of the ownership, maintenance, or use of a motor vehicle owned by the city. Defendant, the city's insurer, moved for summary disposition, arguing that plaintiff had failed to show that his injuries arose out of an accident involving a motor vehicle within the meaning of MCL 500.3101; MSA 24.13101. The trial court ultimately granted partial summary disposition in plaintiff's favor pursuant to MCR 2.116(C)(9) and (10), finding that the truck was involved in the accident so that plaintiff was entitled to no-fault benefits. The only issue to be determined at trial was the amount of damages. The matter then went to a bench trial, and the trial court found defendant liable for damages amounting to $60,000.

Generally, a person injured while driving a motorcycle is unable to recover no-fault benefits because motorcycles are excluded from the definition of motor vehicles under the no-fault act. MCL 500.3101(2); MSA 24.13101(2). However, a motorcycle involved in an accident with a motor vehicle as defined under the no-fault act may recover benefits from the vehicle owner. MCL 500.3114(5); MSA 24.13114(5). Under § 3101(2)(f), the motor vehicle involved (here, the pickup truck) must be found to be sufficiently "involved" in a "motor vehicle accident" to trigger liability.

The test for determining whether a motor vehicle was involved in a motor vehicle accident is whether there was a causal connection between the injury sustained and the ownership, maintenance, or use of the automobile, and which causal connection is more than incidental, fortuitous, or but for. The injury must be foreseeably identifiable with the normal use, maintenance, and ownership of the motor vehicle. *Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 787; 432 NW2d 439 (1988). The motor vehicle involved need not be the proximate cause of the injury, there need only be a causal connection. *Id.* Further, it is not necessary that the motorcycle actually touch or come in contact with the motor vehicle involved, so long as the necessary causal connection is established. *Bromley v Citizens Ins Co of America*, 113 Mich App 131, 135; 317 NW2d 318 (1982).

We agree with the trial court that there was a sufficient causal connection in this case between plaintiff's injuries and the pickup truck. The pickup truck's stop for traffic was in the normal course of driving. Further, there was a clear causal nexus between the injury sustained and the use of the pickup truck where plaintiff had to apply his brakes when he saw that the pickup truck in front of him was stopping. The trial court did not err in finding that defendant's pickup truck was involved in the accident so that plaintiff is entitled to no-fault benefits. See *Greater Flint HMO, supra*, p 788; *Bradley v Detroit Automobile Inter-Insurance Exchange*, 130

Mich App 34, 42-43; 343 NW2d 506 (1983); *Dep't of Social Services v Auto Club Ins Co*, 173 Mich App 552, 558-559; 434 NW2d 419 (1988).

Affirmed.

/s/ Kathleen Jansen
/s/ Gary R. McDonald
/s/ Dennis C. Kolenda