

STATE OF MICHIGAN
SUPREME COURT

FERN WILLER,

Plaintiff-Appellee, Supreme Court Docket No. 133596
Court of Appeals Docket No. 273805
Wayne County Circuit Court No. 06-607259-NF
Hon. Cynthia D. Stephens

TITAN INSURANCE COMPANY,

Defendant-Appellant.

PAUL R. SWANSON (P26221)
PAUL R. SWANSON & ASSOCIATES, P.C.
Attorney for Plaintiff-Appellee
333 West Fort Street
Suite 1400
Detroit, Michigan 48226
313.963.1234

RONALD M. SANGSTER, JR. (P39253)
DANIEL T. RIZZO (P62140)
LAW OFFICES OF RONALD M. SANGSTER, PLLC
Attorney for Defendant-Appellant
901 Wilshire Drive
Suite 495
Troy, Michigan 48084
248.269.7040

133596 /
PLAINTIFF-APPELLEE, FERN WILLER'S, REPLY
TO DEFENDANT-APPELLANT'S APPLICATION
FOR LEAVE TO APPEAL

and

PROOF OF SERVICES

FILED
APR 26 2007
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

PAGE

Index of Authorities.....	iii
Index of Exhibits.....	v
Counter-Statement of Questions Involved.....	vi
Counter-Statement of Facts.....	1
Argument.....	2
Conclusion and Relief Requested.....	10

INDEX OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Boyd v WG Wage Shows</u> , 443 Mich 515; 505 NW2d 544 (1993).....	2
<u>Cameron v Auto Ins. Club A'ssn.</u> , 476 Mich 55, 75-76; 718 NW2d 784 (2006).....	6
<u>Daubenspeck v ACIA</u> , 179 Mich App 453; 466 NW2d 292 (1989).....	7, 8
<u>Dewan v Khoury</u> , 477 Mich 888; 722 NW2d 215 (2006).....	5
<u>Ebel v Bruzewski</u> , 296 Mich 654; 296 NW 715 (1941).....	9
<u>Miller v Auto Owners Insurance Company</u> , 411 Mich 633; 309 NW2d 544 (1981).....	2, 3, 4, 7, 10
<u>Murphy v Michigan Bell Telephone Co.</u> , 447 Mich 93, 98; 523 NW2d 310 (1994).....	6
<u>Nowell v Titan Ins. Co.</u> , 466 Mich 478, 482; 648 NW2d 157 (2002).....	6
<u>Paquette v Consumer Power Co.</u> , 316 Mich 501; 25 NW2d 599 (1947).....	8, 9
<u>Robinson v City of Detroit</u> , 462 Mich 439; 613 NW2d 307 (2000).....	2, 3
<u>Salas v Clements</u> , 399 Mich 103; 247 NW2d 889 (1976).....	5
<u>State Treasurer v Schuster</u> , 456 Mich 408, 417; 572 NW2d 628 (1998).....	6
<u>Stewart v State</u> , 471 Mich 692; 692 NW2d 376 (2004).....	5

<u>Strong v Kittenger</u> , 300 Mich 126, 1 NW2d 479 (1942).....	9
<u>STATUTES & OTHER SOURCES:</u>	
1 Comp. Law 1929 (Stat. Ann §9.1602).....	8 fn 1
MCL 257.709(1)(a).....	8
MCL 500.3105.....	2, 4, 5, 6, 7, 8, 10
MCL 500.3106.....	2, 4, 5, 6, 7

INDEX OF EXHIBITS

EXHIBIT

LETTER

Deposition of Fern Willer.....

A

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THIS HONORABLE COURT SHOULD REVERSE THE LONGSTANDING PRECEDENT OF MILLER V AUTO OWNERS INSURANCE COMPANY, 411 MICH 633; 309 NW2d 544 (1981), WHEN JUSTICE LEVIN WRITING FOR THIS COURT CORRECTLY RECONCILED MCL 500.3105 AND MCL 500.3106?

Plaintiff-Appellee answers: **No**

Defendant-Appellant answers: **Yes**

Wayne County Circuit Court: **Unable to Answer**

II. WHETHER PLAINTIFF-APPELLEE'S INJURIES AROSE OUT OF THE OWNERSHIP, OPERATION, MAINTENANCE OR USE OF A MOTOR VEHICLE AS A MOTOR VEHICLE AND DEFENDANT-APPELLANT'S RELIANCE ON DAUBENSPECK V ACIA, 179 MICH APP 453; 446 NW2d 292 (1989), IS MISPLACED WHEN PLAINTIFF-APPELLEE WAS IN THE ACT OF REMOVING SNOW AND ICE OFF OF HER WINDSHIELD WHEN SHE WAS INJURED?

Plaintiff-Appellee answers: **Yes**

Defendant-Appellant answers: **No**

Wayne County Circuit Court: **Yes**

COUNTER-STATEMENT OF FACTS

Plaintiff-Appellee was injured when she was in the process of removing snow and ice off the windshield of her motor vehicle on March 10, 2005. Plaintiff-Appellee testified that she had only been cleaning the vehicle for a minute or so and was using a scraper/brush at the time she fell. (Dep p. 9 lns 20-25) (Exhibit A) This testimony indicates that she was not walking around her car when she fell but rather that she was in the act of cleaning off the ice or snow and was in physical contact with the vehicle at the time of her fall.

Q. Had you just started to clean your car or were you finishing cleaning your car or in the middle of it?

A. I was just like I started cleaning the car about not even a minute

Q. So you were cleaning off the windshield?

A. Yes.

Q. Were you using a scraper or a brush?

A. Yes.

(Willer Dep. p.9 lns. 17-25) (Exhibit A).

After her fall, Ms. Willer contacted Defendant-Appellant requesting No-Fault benefits. Defendant-Appellant denied Ms. Willer's coverage, leading to the instant lawsuit by Plaintiff-Appellee on March 10, 2006. The Wayne County Circuit Court denied Defendant-Appellant's Motion for Summary Disposition based on the park car exception on September 27, 2006. Defendant-Appellant's delayed Application for Leave to Appeal was denied by the Michigan Court of Appeals on February 23, 2007.

ARGUMENT

- I. **THIS HONORABLE COURT SHOULD NOT REVERSE THE LONGSTANDING PRECEDENT OF MILLER V AUTO OWNERS INSURANCE COMPANY, 411 MICH 633; 309 NW2d 544 (1981), WHEN JUSTICE LEVIN WRITING FOR THIS COURT CORRECTLY RECONCILED MCL 500.3105 AND MCL 500.3106.**

Defendant-Appellant seeks to have this Court overturn Miller v Auto Owners Insurance Company, 411 Mich 633; 309 NW2d 544 (1981), solely because, in its view, Miller was “wrongly decided.” Defendant-Appellant suggests that it is this Court's duty to correct all perceived errors of the past. Yet this Court recently has reiterated that the alleged “wrongly decided” nature of a prior decision, standing alone, is insufficient to warrant overruling. However, “the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate.” Robinson v City of Detroit, 462 Mich 439, 465; 613 NW2d 307 (2000).

This Court should not lightly consider overturning a well-reasoned, consistent decision such as Miller. While this Court clearly has the power to overturn its prior decisions, such power is not to be exercised easily. As this Court noted in Boyd v WG Wage Shows, 443 Mich 515; 505 NW2d 544 (1993), when it stated the following:

This Court has stated that a court will not overrule a decision deliberately made unless the Court is convinced not merely that the case was wrongly decided, but also that less injury would result from overruling than from following it. *Dolby v State Hwy. Comm'r*, 283 Mich. 278 N.W. 694 (1938).

.... *This Court has stated that the doctrine of stare decisis applies with full force to decisions construing statutes or ordinances, especially where the Legislature acquiesces in the Court's construction through the continued use of or failure to change the language of a construed statute.* (emphasis added) 443 Mich at 524-26.

Something far more than Defendant-Appellant's plea is needed for this Court to consider overruling twenty-five years of precedent as to a legislative provision, which has never been substantively amended, despite frequent changes to the no-fault law by the legislature as part of on-going tort reform measures. More recently, in Robinson, the current majority on this Court identified those factors to be considered before a case can be overruled:

Courts have cited numerous factors to consider before overruling a prior case. For example, *Helvering v Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940), states:

[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine *more embracing in its scope, intrinsically sounder, and verified by experience.*

We must also recognize that stare decisis is a "principle of policy" rather than "an inexorable command," and that the Court is not constrained to follow precedent when governing decisions are *unworkable* or are *badly reasoned*. (emphasis added) 462 Mich at 464.

This Court continued:

Courts should also review whether the decision at issue defies "*practical workability*," whether *reliance interests* would work an undue hardship, and whether *changes in the law or facts* no longer justify the questioned decision. See, e.g., *Planned Parenthood v Casey*, 505 U.S. 833, 853-856, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). (emphasis added) 462 Mich at 464.

Application of these factors to Miller requires upholding the Miller ruling, even assuming *arguendo* that the case was "wrongly decided."

Upholding Miller would not collide with broader, sounder doctrine verified by experience. On the contrary, Miller upholds key principles underlying the no fault system. The Michigan Supreme Court in Miller looked at the policies underlying MCL

500.3105 and MCL 500.3106 in regards to Mr. Miller's injuries when his motor vehicle fell on him when he was attempting to repair a pair of shock absorbers. Id at 636. Justice Levin, writing the unanimous opinion for the Supreme Court, stated:

This apparent conflict should not be resolved solely by focusing on the term "parked" but, rather, through an assessment of the respective policies appearing from the requirement of coverage in § 3105(1) and the exclusion from that required coverage for parked vehicles in § 3106 as they bear upon the scope of coverage intended by the Legislature.

* * *

The policy underlying the parking exclusion is not so obvious but, once discerned, is comparably definite. 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.

* * *

The stated exceptions to the parking exclusion clarify and reinforce this construction of the exclusion. Each exception pertains to injuries related to the character of a parked vehicle as a motor vehicle--characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents.

Section 3106(a), which excepts a vehicle parked so as to create an unreasonable risk of injury, concerns the act of parking a car, which can only be done in the course of using the vehicle as a motor vehicle, and recognizes that the act of parking can be done in a fashion which causes an unreasonable risk of injury, as when the vehicle is left in gear or with one end protruding into traffic.

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

Section 3106(c) provides an exception for injuries sustained while

occupying, entering or alighting from a vehicle, and represents a judgment that the nexus between the activity resulting in injury and the use of the vehicle as a motor vehicle is sufficiently close to justify including the cost of coverage in the no-fault system of compensating motor vehicle accidents.

Each of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle. The underlying policy of the parking exclusion is that, except in three general types of situations, a parked car is not involved in an accident *as a motor vehicle*. It is therefore inappropriate to compensate injuries arising from its non-vehicular involvement in an accident within a system designed to compensate injuries involving motor vehicles as motor vehicles.

The policies underlying § 3105(1) and § 3106 thus are complementary rather than conflicting. Nothing of the policy behind the parking exclusion--to exclude injuries not resulting from the involvement of a vehicle as a motor vehicle--conflicts with the policy of compensating injuries incurred in the course of maintaining (repairing) a motor vehicle. The terms of the parking exclusion should be construed to effectuate the policy they embody and to avoid conflict with another provision whose effect was intended to be complementary.

Miller's injury while replacing his shock absorbers clearly involved the maintenance of his vehicle as a motor vehicle. Compensation is thus required by the no-fault act without regard to whether his vehicle might be considered "parked" at the time of injury. *Id.* at 637-641.

This Court has cited Justice Levin's parked vehicle exclusion analysis positively in Stewart v State, 471 Mich 692, 698; 692 NW2d 376 (2004).

The Miller Court in interpreting MCL 500.3105 and MCL 500.3106 followed the principals of statutory construction. The Michigan Supreme Court has long held that the fundamental rule of statutory construction is that the "courts are to effectuate the intent of the Legislature when construing a statute." Dewan v Khoury, 477 Mich 888, 890; 722 NW2d 215 (2006). In Salas v Clements, 399 Mich 103, 109; 247 NW2d 889 (1976), the Supreme Court stated a fundamental rule of statutory construction is that "departure from the literal construction of a statute is justified when such construction would produce an

absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question." One of "the most basic principles of statutory construction" is the obligation to attempt to resolve potential statutory conflicts by reading provisions harmoniously. Nowell v Titan Ins. Co., 466 Mich 478, 482; 648 NW2d 157 (2002). "When different statutes address the same subject, courts must endeavor to read them harmoniously and give them reasonable effect." Murphy v Michigan Bell Telephone Co., 447 Mich 93, 98; 523 NW2d 310 (1994). As this Court stated in Cameron v Auto Ins. Club A'ssn., 476 Mich 55, 75-76; 718 NW2d 784 (2006):

It is a long-accepted principle of statutory construction that "[s]tatutes which may appear to conflict are to be read together and reconciled, if possible." People v Bewersdorf, 438 Mich 55, 68; 475 NW2d 231 (1991). Although the two statutes in controversy may appear to be in tension, and while they clearly serve different legislative interests, these statutes nonetheless *can* be reconciled. Id.

As this Court has also recognized in the past, statutes relating to the same subject or sharing a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. State Treasurer v Schuster, 456 Mich 408, 417; 572 NW2d 628 (1998).

Justice Levin's analysis is still valid today; as the policies underlying both section 3105 and 3106 are complementary and can be reconciled, with the overall theory that an injury involving maintenance on a parked vehicle, the parked vehicle is being used as a motor vehicle. Furthermore, if maintenance was not deemed to be an exception under the parked vehicle exception, then there would not be PIP benefits available in most maintenance situations as maintenance is almost always performed on a park vehicle.

Clearly this is not what the Legislature intended when expressly stated maintenance in MCL 500.3105.

II. PLAINTIFF-APPELLEE'S INJURIES AROSE OUT OF THE OWNERSHIP, OPERATION, MAINTENANCE OR USE OF A MOTOR VEHICLE AS A MOTOR VEHICLE AND DEFENDANT-APPELLANT'S RELIANCE ON DAUBENSPECK V ACIA, 179 MICH APP 453; 446 NW2d 292 (1989), IS MISPLACED.

In order to collect no-fault insurance benefits, a plaintiff must qualify for benefits under MCL 500.3105(1) which states:

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

It is Plaintiff-Appellee's position that Ms. Willer's injury arose out of "operation, maintenance or use of a motor vehicle as a motor vehicle" compensable under MCL 500.3105(1). The Michigan Supreme Court addressed the issue of maintenance of a motor vehicle under MCL 500.3105 in the often cited case of Miller, supra. In Miller, the plaintiff was "severely injured when his automobile fell on his chest while he was attempting to replace a pair of shock absorbers." Id. at 636. Defendant-Appellant argued that because the vehicle was parked and none of the §3106 exceptions applied, Plaintiff-Appellee should be disqualified. This Court held that an injury which arises out of the maintenance of a motor vehicle is clearly compensable for PIP benefits under §3105 without regard to whether the vehicle might be considered "parked" at the time of the injury.

Defendant-Appellant argues that Plaintiff-Appellee's injury did not result from the operation and maintenance of her motor vehicle and cites the case of Daubenspeck, supra in support of its position. In Daubenspeck, the Court of Appeals was careful to

delineate the difference between what does and what does not satisfy the causal nexus between the motor vehicle and the injury. The Court held that the injuries sustained by Mr. Daubenspeck after slipping on ice *after* he finished pumping gas but *before* he replaced the gas cap was not causally linked to the maintenance of his motor vehicle. In Daubenspeck, plaintiff argued that refueling constituted maintenance of an automobile pursuant to MCL 500.3105(1). The Court of Appeals affirmed the trial court's grant of Summary Disposition to the defendant and "concluded that plaintiff's injuries arose from his slip and fall and that their connection to the vehicle was merely fortuitous." Id. at 454.

The facts in the instant case differ from those in Daubenspeck in one very important way. In the instant case, Plaintiff-Appellee had a duty imposed by State Law. Plaintiff-Appellee had a duty to clean her windshield before she could operate her vehicle. The plaintiff in Daubenspeck had no such duty to fill his car with gas or even stop at the particular gas station where he was injured. According to MCL 257.709(1)(a):

(1) A person shall not drive a motor vehicle with any of the following:

- (a) A sign, poster, **nontransparent material** . . . upon or in the front windshield, the side windows immediately adjacent to the driver or front passenger . . .

This statute in an earlier and similar form¹ was cited in Paquette v Consumers Power Co., 316 Mich 501; 25 NW2d 599 (1947). In Paquette, the plaintiff had pulled over to clear the frost from his window. As a result of the falling snow, when the plaintiff pulled over he failed to notice that he had not pulled all of the way off the roadway onto the shoulder.

¹ 1 Comp. Laws 1929 (Stat. Ann § 9.1602) "it shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster or other **nontransparent material** upon the front windshield, side wings, side or rear windows of such motor vehicle other than a certificate or other paper required to be so displayed by law." (emphasis added)

As a result of plaintiff's car being partially on the roadway another vehicle collided with plaintiff's vehicle.

What is important to take from Paquette is what the this Court held with relation to the Statute discussing "non transparent material" on a windshield. This Court cited Strong v Kittenger, 300 Mich 126; 1 NW2d 479 (1942), which held that "violation of the statute (FN 1) was held to be *negligence as a matter of law*." Paquette at 509 (emphasis added). This Court also noted that in Ebel v Bruzewski, 296 Mich 654; 296 NW 715 (1941), the Court had held that "driving with windshield so covered with frost that driver cannot see where he is on the highway is *negligence as a matter of law*" Paquette at 509 (emphasis added).

Consequently, the law as it stands in relation to clearing a windshield places Plaintiff-Appellee in quite a quandary. Had she driven or attempted to drive with the snow on her windshield, not only would she likely have been involved in an accident, she would have been in violation of the aforementioned Statute codified as part of the Michigan Vehicle Code and would have consequently subjected herself to a fine for obstructed vision which, at least in 36th District Court, is a \$111.00 **Traffic** fine. It flies in the face of logic to take the position that Plaintiff-Appellee's injury in the instant case is not related to the operation and maintenance of her motor vehicle when she had a statutory obligation pursuant to the Motor Vehicle Code to clean the windshield before she was able to legally operate the vehicle.

Additionally, Plaintiff-Appellee testified that she had only been cleaning the vehicle for a minute or so and was using a scraper/brush at the time she fell. (Dep p. 9 Ins 20-25) (Exhibit A) This testimony indicates that she was not walking around her car

when she fell but rather that she was in the act of cleaning off the ice or snow and was in physical contact with the vehicle at the time of her fall.

Q. Had you just started to clean your car or were you finishing cleaning your car or in the middle of it?

A. I was just like I started cleaning the car about not even a minute

Q. So you were cleaning off the windshield?

A. Yes.

Q. Were you using a scraper or a brush?

A. Yes.

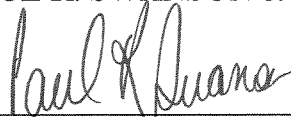
(Willer Dep. p.9 lns. 17-25) (Exhibit A).

Defendant-Appellant argues that there is no causal connection between Plaintiff-Appellee's fall and the injury she sustained. Plaintiff-Appellee reiterates that the fact that Plaintiff-Appellee was in the act of cleaning her windshield at the time she fell and that coupled with her obligation to clean the windshield places her actions and subsequent injury within what was intended by the legislature in the drafting of MCL 500.3105(1) and certainly what this Court intended in Miller.

CONCLUSION AND RELIEF REQUESTED

Wherefore Plaintiff-Appellant respectfully requests that this Honorable Court deny Defendant-Appellant's Application for Leave to Appeal and Remand this case back to the trial court for further proceedings.

Respectfully Submitted,
PAUL R. SWANSON & ASSOCIATES, P.C.



PAUL R. SWANSON (P26221)

Attorney for Plaintiff
333 West Fort Street
Suite 1400
Detroit, Michigan 48226
313.963.1234

Dated: April 25, 2007.