

IN THE SUPREME COURT
APPEAL FROM THE WAYNE COUNTY CIRCUIT COURT
JUDGE CYNTHIA D. STEPHENS

FERN WILLER,

Plaintiff-Appellee,

V

TITAN INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court Docket No.
Court of Appeals Docket No. 273805
Wayne County Circuit Court No. 2006-607259-NF
Honorable Cynthia D. Stephens

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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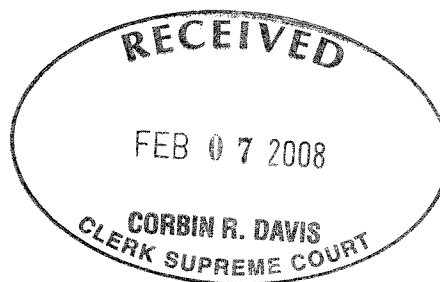


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STATEMENT OF QUESTION PRESENTED FOR SUPPLEMENTAL BRIEFS

- I. Whether the defendant was entitled to summary disposition because of the absence of a genuine issue of material fact as to whether the causal connection between the plaintiff's injuries and her scraping the windshield of her vehicle was anything beyond "incidental, fortuitous or 'but for'" such that the injuries arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" within the meaning of MCL 500.3105(1).

Plaintiff-Appellee answers, "No"

Defendant Appellant answers, "Yes"

The Wayne County Circuit Court answered, "No"

STATEMENT OF FACTS

This case involves the interpretation of the legal concept of “causal connection” in the context of MCL 500.3105(1). This case arises out of injuries sustained by the Plaintiff-Appellee while she was attempting to clear ice and snow from her vehicle windshield on March 10, 2005.

Plaintiff-Appellee testified:

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.

Q. What side of the car were you cleaning?

A. The driver’s side.

Q. To the best of your memory, ma’am, had you already cleaned off the passenger side of the windshield?

A. No.

Tr. Depo. Fern Willer 9:17-10:6 (May 3, 2006) **Exhibit 1.**

Plaintiff-Appellee went on to explain that she had gone out to her vehicle and started it before she fell. Plaintiff-Appellant testified:

Q. Your car was on?

A. Yes.

Q. So it was one of these deals where you start the car and warm it up, and get out and clean it?

A. No, I went out and started by car. My kids got in the car and then I was cleaning it off.

Tr. Depo. WilHer 11:11-17.

Plaintiff-Appellee further stated her recollection:

Q. If you remember, were you cleaning the car, stop and move to another spot, slipped and fall, or were you cleaning it and slipped and fell?

A. I was cleaning it and slipped and fell.

Tr. Depo. 10:20-23.

Plaintiff-Appellee's injuries required two shoulder surgeries, extensive physical therapy and resulted in her losing her job because she was no longer able to carry out the responsibilities associated with her employment.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO SUMMARY DISPOSITION BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE CAUSAL CONNECTION BETWEEN THE PLAINTIFF'S INJURIES AND HER SCRAPING THE WINDSHIELD OF HER VEHICLE WAS ANYTHING BEYOND "INCIDENTAL, FORTUITOUS OR 'BUT FOR.'"

A. Injuries sustained by the Plaintiff while scraping the windshield of her vehicle arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" within the meaning of MCL 500.3105(1).

The statute at issue in this case, MCL 500.3105(1) states, "[u]nder 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." MCL 500.3105(1).

In drafting the No-Fault Automobile Insurance Act set forth at MCL 500.3101, *et. seq.* the Michigan Legislature did not define the terms "operation, maintenance or use." Michigan case law has evolved to define these terms and they have been applied in numerous cases with varying fact patterns. One such case is *McKenzie v Auto Club Insurance Association*, 458 Mich 214, 580 NW 2d 424 (1998). In *McKenzie*, the Plaintiff was injured when he was nonfatally asphyxiated while sleeping in a camper/trailer. *Id.* at 215. Plaintiff filed a claim for Personal Injury Protection ("PIP") benefits pursuant to the No-Fault Act. *Id.* In concluding that the "injury is not covered by the No-Fault Act because it did not arise out of the use of a motor vehicle 'as a motor vehicle' as required by MCL 500.3105" the Court noted "[w]hether an injury arises out of the use of a motor vehicle 'as a motor vehicle' turns on whether the injury is closely related to the transportational function of automobiles." *Id.* at 215.

The *McKenzie* Court thoroughly analyzed the court's role in construing statutes before it attempted to define the statutory term "as a motor vehicle." *Id.* at 217. In so doing, the Court noted that "the rules of statutory construction are well established. First and foremost, we must give effect to the Legislature's intent. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id.* The court went on, "[f]urther, we are to give statutory language its ordinary and generally accepted meaning." *Id.* at 217 (citing *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135-136; 545 NW 2d 642 (1996)). The *McKenzie* Court noted:

[a]s a matter of English syntax, the phrase 'use of a motor vehicle 'as a motor vehicle' would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a motor vehicle" from any other uses. While it is easily understood from all our experiences that most often a vehicle is used "as a motor vehicle," i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum. On those occasions, the use of the motor vehicle would not be "as a motor vehicle," but as a housing facility, advertising display, construction equipment base, public library, or museum display, as it were. It seems then that when we are applying the statute, the phrase "as a motor vehicle" invites us to determine if the vehicle is being used for transportational purposes.

Of course, as § 3106 indicates, a vehicle need not be moving at the time of an injury for the injury to arise out of the use of a motor vehicle as a motor vehicle, i.e., out of its transportational function. See, e.g., *Putkamer*, n. 1 *supra*, 454 Mich. at 636-637, 563 N.W.2d 683 (the plaintiff's injury, incurred when she slipped on ice while entering her vehicle with the intention of traveling to her brother's home, was held to have arisen out of the use of a motor vehicle as a motor vehicle).

* * *

Accordingly, **we are convinced** that the clear meaning of this part of the no-fault act is that the Legislature intended coverage of injuries resulting from

the **use** of motor vehicles when **closely related to their transportational function** and only when engaged in that function.

Moreover, requiring that an injury be closely associated with the transportational function of a vehicle before coverage is triggered has support in much of our prior case law. We acknowledge that the expressed rationale of these cases was not articulated in terms of transportational function, and, indeed, some cannot be reconciled with this approach, but many are consistent with a focus on transportational function to determine whether the injuries at issue in those cases arose out of the use of a motor vehicle “as a motor vehicle.”

McKenzie at 219 (emphasis added).

Clearly, according to *McKenzie*, the language “as a motor vehicle” is limiting language that bears on the causation analysis. MCL 500.3105 That is, the statute, already requires more than mere “use of a motor vehicle” it requires “use of a motor vehicle *as a motor vehicle.*” MCL 500.3105(1) (emphasis added). It is also clear from the language that the Legislature intended “use of a motor vehicle as a motor vehicle” to be a category separate and distinct from operation or maintenance. According to the *McKenzie* Court, the causation analysis turns in large part on whether the vehicle is fulfilling its transportational purpose. This causation analysis is key to the instant case because Plaintiff-Appellee was clearly injured while using her motor vehicle “as a motor vehicle.” MCL 500.3105(1) Plaintiff-Appellee had started the car, readying it for use in its transportational function, to take her children to her sister’s home. It is only logical then to conclude that Plaintiff’s injuries were more than merely fortuitously located in proximity to her automobile. It was because she was using that vehicle that she was injured. In preparing the vehicle for its transportational function, Plaintiff was injured, not merely as a result of the ice and snow, but as a result of the need to clear the obstruction from her windshield before engaging in transportation.

B. There is a causal connection between Plaintiff's injuries and the clearing of ice and snow from the vehicle that is beyond "incidental, fortuitous, or but for."

One of the leading cases specifically addressing the issue of "causal connection" is *Daubenspeck v ACIA*, 179 Mich App 453, 446 NW2d 292(1989). In *Daubenspeck*, the plaintiff was injured as a result of a slip and fall at a gas station after he had pumped gas but before he replaced the gas cap. *Id.* at 454. In *Daubenspeck*, the plaintiff slipped and fell between his vehicle and the gas pump. *Id.* The Court of Appeals held that the injuries arose from a slip and fall on ice and not by the act of refueling the vehicle. *Id.* That panel of the Court of Appeals relied on *Rajhel v Automobile Club Insurance Ass'n*, 145 Mich App 593, 378 NW2d 486 (1985). In *Rajhel* the court denied no-fault benefits for injuries the plaintiff "sustained when she slipped and fell on ice while walking from her disabled car to a tow truck." *Daubenspeck*, *supra*, at 455 (citing *Rajehl* 145 Mich App 593). The court in *Rajehl* went on to note that there was "no causal connection established between the activity and injury sustained." *Rajehl*, *supra* at 595. In so holding the court of Appeals indicated that "simply going to or from a motor vehicle is 'without causal connection with the ownership, maintenance, and use of [a motor vehicle].'" See also *Block v Citizens Insurance Company of America*, 111 Mich App 106, 314 NW2d 536 (1982); *King v Aetna Casualty & Surety Co.*, 118 Mich App 648, 325 NW2d 528 (1982).

This language "simply going to or from" appears to be central to various opinions in the context of auto/snow and ice cases at both the Court of Appeals and Supreme Court Opinions. This language however, distinguishes the instant case from the myriad of other alleged no-fault claims, both published and unpublished. See e.g., *Dearie v Farm Bureau Insurance Co.*, Unpublished opinion per curiam of the Court of Appeals, issued [March 29, 2007] (Docket No.274102) **Exhibit B**, *Nuckles v State Farm Mutual Automobile Insurance Co.*, Unpublished opinion per curiam of the Court of Appeals, issued [April 20, 2006] (Docket No. 264300)

Exhibit C. The “going to or from” analysis is consistent with the Court’s dicta in *Daubenspeck* where it considered “had plaintiff been injured, for example, by fumes emitted from the gas pump or an explosion of the pump, perhaps his claim would have merit.” *Daubenspeck, supra* at 455. It is Plaintiff-Appellee’s position that this is precisely where her case lies. The instant Plaintiff was *not simply going to or from* her vehicle. The instant Plaintiff had already walked safely to her vehicle and proceeded to clear the snow and ice from the driver’s side windshield when she fell. Much like an injury that may result from an exploding gas tank, Plaintiff’s fall was anything but incidental or fortuitously located near a motor vehicle. It was the uniqueness of a vehicle that required that the snow and ice be removed to enable it to be used for its transportational function. In reality, but for the fact that it was necessary for Plaintiff-Appellee clear her windshield, the facts clearly indicate she would not have fallen. She negotiated the driveway safely and even started up her vehicle. The facts essentially provide the benefit of hindsight because we know that had the snow and ice not required her to exit the vehicle to clear it she would have been safely on her way without incident.

The issue of causal connection was further addressed in *Putkamer v Transamerica Insurance Corporation*, 454 Mich 626, 563 NW 2d 683(1997). While *Putkamer* engages in an analysis of the parked vehicle exception to MCL 500.3105 in the context of an entering/exiting set of facts, the Court also engages in a relevant analysis of causal connection which is on-point with the instant case. In *Putkamer*, the Plaintiff was injured when she slipped and fell on ice while stepping into her vehicle. In finding that there was a causal connection relationship between the action of entering the vehicle and the injury, the Court noted “the act of shifting the weight onto one leg created the precarious condition that precipitated the slip and fall on ice.” *Id.* at 636.

Plaintiff-Appellee submits that the causal connection found by the Court in *Putkamer* is very similar to the facts of the instant case. Specifically it was the action of scraping the snow and ice from the vehicle which precipitated the Plaintiff's injuries. Just as in *Putkamer*, the Plaintiff not merely walking around the car as the plaintiffs in *Daubenspeck* and *Rajehl*. Just to the contrary. Plaintiff in the instant case had already walked safely to her car, opened the door, started the engine, grabbed her snow brush, closed the door and had began cleaning the ice and snow when she fell. Plaintiff was specifically asked at her deposition whether she was "cleaning the car, stop and move to another spot, slipped and fall, or were you cleaning it and slipped and fell?" Tr. Dep. Willer 10:20-22. To which she responded "I was cleaning it and slipped and fell." Tr. Dep. Willer 10:23. It is obvious from Plaintiff's sworn testimony that she was in the act of clearing the ice and snow, distinguishing the instant case from cases such as *Daubenspeck* and *Rajehl*. Placing this case squarely within the intended coverage of MCL 500.3105(1).

C. According to the well settled law of *Miller v Auto Owners Insurance Co.*, 411 Mich 633, 309 NW2d 544 (1981) and the definition of maintenance set forth therein, Plaintiff's injuries were clearly a result of maintenance to her motor vehicle.

As this Honorable Court is aware, this Court found in *Miller v Auto Owners Insurance Co.*, that the Plaintiff was engaged in the maintenance of his vehicle when it fell onto his chest while he was replacing the shock absorbers. 411 Mich 633, 636; 309 NW2d 455 (1981). In determining whether the injuries sustained by the Plaintiff were covered by MCL 500.3105 the Court looked to the common definition of maintenance adopted by the Court in as defined by *Liberty Mutual Insurance Co. v Allied Truck Equipment Co.*, 103 Mich App 33, 40; 302 NW2d 588 (1981). In *Liberty*, the Court looked to "Webster's New Collegiate Dictionary which

defines maintenance as ‘keeping in an existing state.’” *Id.* This Court rejected the *Liberty* Court’s definition and instead adopted a broader definition of “maintenance” finding that:

the meaning of the term “maintenance,” in addition to appearing from the common sense of the word, has been established in the case law: “The ‘maintenance’ aspect of the ‘ownership, maintenance, use’ clause covers the act of repairing the covered automobile.” 12 Couch on Insurance (2nd ed), § 45:63, p 152. The policy embodied in the requirement of § 3105(1) that coverage extend to ‘injury arising out of the * * * maintenance * * * of a motor vehicle as a motor vehicle’ thus is to provide compensation for injuries, such as Miller’s, incurred in the course of repairing a vehicle.

Id. at 639.

Later cases have interpreted the intent of the Court in *Miller* to have adopted a broad definition of the term “maintenance.” *Michigan Basic Property Insurance Association v Michigan Mutual Insurance Company*, 122 Mich App 420, 332 NW2d 504 (1983). In *Michigan Basic* the auto garage insurer paid for damages resulting from a fire that occurred while an employee was attempting to replace an exhaust system on his own vehicle after hours. *Id.* at 422. While attempting to remove the old manifold, the plaintiff “had to use a cutting torch to remove a stripped bolt. Sparks from the torch ignited a bucket of waste paint thinner and motor oil. As [the employee] attempted to move the bucket away from the car, it tipped over” causing a fire. *Id.* In *Michigan Basic*, the Defendant argued that the Court should adopt a narrow definition of the term “maintenance” as was used in *Liberty Mutual Insurance Ins. Co v Allied Truck Equip. Co.*, 103 Mich App 33, 302 NW2d 588 (1981). The Court of Appeals refused to adopt this narrow definition of maintenance and held that “the *Liberty Mutual* Court’s discussion of ‘maintenance’ was rejected by the Supreme Court in *Miller v Auto-Owners Ins. Co.*, 411 Mich 633, 309 NW2d 544 (1981), where the Court adopted a broader definition of ‘maintenance.’” *Michigan Basic, supra* at 424.

This broader interpretation of the definition of maintenance was also addressed by the dissent in *Rajhel, supra* at 593. Judge Burns' dissent referenced the *Miller* Court's discussion regarding "efforts to jump-start a car after a cold Michigan night strongly implied that it has not sanctioned a definition of maintenance limited only to repairs." *Id.* The dissent also references another case that applied *Miller* for its definition of maintenance, *Heard v State Farm Mutual Automobile Ins. Co.*, 414 Mich 139, 154; 324 NW2d 1 (1982). In *Heard*, the court reasoned that "[t]his Court has adopted a broad definition of maintenance in order to advance the purposes of the no-fault act." *Rajhel supra* 597 citing *Heard* at 154. The court in *Heard* reasoned,

we have little doubt, however, that most would agree that the purposes of the no-fault act would be defeated by a narrow construction of the term 'maintenance' applied in cases like the present one in which an owner-operator of a vehicle attempted to service the vehicle in a place other than a service facility. If this type of activity is not covered, it is hard to imagine the Legislature's reasons for including the coverage of maintenance. The need for insurance coverage would appear to be far greater in cases of roadside service than in cases of major repairs which are usually performed in facilities covered by other insurance.

Rajhel supra at 597 citing *Heard* at 154 (emphasis added).

In the instant case the manner in which Plaintiff suffered her injuries are very similar to the injuries sustained by the Plaintiff in *Miller*. Additionally, the Court in *Miller* clearly applied a broad definition of the term "maintenance." It is therefore inescapable that in the instant case Plaintiff's injuries are more closely related to the maintenance of her motor vehicle because of the fact that she could not drive her vehicle without first clearing that ice and snow. Much like the replacement of brakes, shocks, or even power steering fluid, the maintenance involved in the clearing of Plaintiff's windshield was a prerequisite for not only operating, but safely operating the vehicle.

In its Application for Leave to Appeal Defendant-Appellant cites several cases on the issue of causation which are factually distinct from the case at bar. One such case is *King v Aetna Casualty & Surety Co.*, 118 Mich App 648, 325 NW 2d 528 (1982). In *King*, the plaintiff was injured when he slipped and fell on ice as he walked toward his motor vehicle. Much like in *Rajhel*, the plaintiff in *King* was walking to his vehicle while holding a bag of groceries and his keys when he fell as he reached toward his vehicle. *Id.* at 650. The court of Appeals found that there was no significant causal relationship between the motor vehicle and the plaintiff's fall. Defendant cites *King* for the lack of causal connection between the action of merely walking to the car and slipping on the ice. *King supra* at 530. As quoted by the Defendant-Appellant, the court in *King* went on in dicta to state that "even if we were to find that plaintiff was 'entering into' his vehicle when the accident occurred we would nevertheless conclude that plaintiff was not entitled to no-fault benefits." *Id.* at 652. What the Defendant-Appellant fails to note in its Brief on Application for Leave is that the Michigan Supreme Court in *Putkamer* expressly states that the analysis of the Court of appeals in *King* "is **wrong**." *Putkamer* 454 Mich at 563 FN 10 (*emphasis added*). In that footnote, the Supreme Court noted that "[t]here is a sufficient causal connection . . ." *Id.* at Fn 10. Additionally, Appellant's reliance on *King* is further misplaced because it is not a maintenance case. Consequently it is distinguishable from the instant case and should be disregarded by this Honorable Court.

D. Failing to find that Plaintiff-Appellee’s injuries were a result of the “operation, maintenance, or use of a motor vehicle as a motor vehicle” within the meaning of MCL 500.3105 encourages insured’s to operate unsafe vehicles rather than to maintain their vehicles for safe operation on the roadways.

In the instant case, Plaintiff-Appellee had a statutory duty to clear her windshield in order to legally operate her vehicle. 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. 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 that the Michigan Supreme Court found driving with an obstructed window to be a per se violation of the aforementioned Statute. The *Paquette* Court cited *Strong v. Kittenger*, 300 Mich 126, 1 NW2d 479 (1942) which held violation of the Statute is “*negligence as a matter of law.*” *Paquette, supra* at 509 (*emphasis added*). This Honorable Court first took this position in *Ebel v. Bruzewski*, 296 Mich 654, 296 NW 715 (1941) where this Court held that “driving with windshield so covered with frost that

¹ 1 Comp. Laws 1929 (Stat. Ann § 9.1602) “[i]t 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*)

driver cannot see where he is on the highway is *negligence as a matter of law.*” *Paquette* at 509 (emphasis added).

Consequently, the Defendant-Appellee’s argument that the Plaintiff-Appellant’s injuries did not arise out of the “operation, maintenance or use of a motor vehicle as a motor vehicle” places Plaintiff-Appellee and those similarly situated in quite a quagmire. Had she driven or attempted to drive with the snow on her windshield, not only would have been in danger of causing an accident, but she also would have been in violation of the aforementioned Statute and subject to a fine for obstructed vision. Such violation in 36th District Court in the City of Detroit, is a \$111.00 fine. **Exhibit D.** Finding that Plaintiff-Appellee’s injury is not related to the “operation, maintenance, use of the motor vehicle as a motor vehicle” when she had a statutory obligation pursuant to the Motor Vehicle Code to clear the windshield of obstruction in order to legally operate the vehicle is contrary to logic and the intent of the Legislature in drafting MCL 500.3105(1).

E. Arguments set forth by the Appellant regarding the parked vehicle exception set forth at MCL 500.3106 are overreaching and beyond the issue that is before this Court.

Plaintiff-Appellee anticipates that Defendant-Appellant will attempt to persuade this court that the issue of the parked vehicle exception set forth at MCL 500.3106 is inextricably related to the issue that the parties were specifically ordered to brief. It is Plaintiff-Appellee’s position that such arguments are beyond the scope of this Court’s Order and are overreaching as they would require this court to overrule almost 30 years of precedent as decided in *Miller v Auto Owners Insurance Co.*, 411 Mich 633 (1981) in order to reach the result that Defendant-Appellant is seeking. This Honorable Court has the responsibility to the long standing principle of *stare decisis*. “Even if one believes that earlier cases applying the rule were

wrongly decided, it does not follow that these cases must be overruled.” *Robinson v City of Detroit*, 462 Mich 439, 465; 613 NW2d 307(2000). Rather, *stare decisis* is generally “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Id.* at 463.

F. Defendant-Appellant is not entitled to summary disposition pursuant to MCR 2.116(C)(10) because Plaintiff-Appellee established a genuine issue of material fact as to the presence of a causal connection between the Plaintiff’s injuries and the scraping of the windshield of her vehicle that is beyond “incidental, fortuitous or ‘but for’” such that the injuries arose out of the “ownership, operation, maintenance or use of a motor vehicle as a motor vehicle” within the meaning of MCL 500.3105(1).

A motion for summary disposition brought under MCR 2.116(C)(10) tests whether a genuine dispute as to any material fact exists. When deciding a motion, the court should give the benefit of any reasonable doubt to the non-moving party, being liberal in finding that a genuine material issue exists. *Anderson v Kemper Ins, Co*, 128 Mich App 249, 340 NW2d 87 (1983). A motion for summary disposition pursuant to MCR 2.116(C)(10) is properly granted *only* when, giving the benefit of doubt to the non-moving party, it is impossible for the record to be developed so as to leave open an issue upon which reasonable minds might differ. *Admiral Insurance Co. v Columbia Casualty Ins Co*, 194 Mich App 300, 310-11; 486 NW2d 351 (1992) (*emphasis added*). See also *Burger v Midland Cogeneration Venture*, 202 Mich App 310, 316; 507 NW2d 827 (1993). After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 597 NW2d 28 (1999); *Hazle v Ford Motor Co.*, 464 Mich 456, 628 NW2d 515 (2001).

It is Plaintiff-Appellee's position that based on the foregoing arguments, a genuine issue of material fact exists as to the whether Plaintiff-Appellee's injuries arose out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. Plaintiff was in the process of clearing the ice and snow from her windshield when she fell. Clearly, Plaintiff has established a question of fact as to whether this activity falls under MCL 500.3105(1) and is a question proper only for a jury to decide at trial. The Circuit Court was correct in denying the Defendant's Motion and preserving this question of fact for the jury.

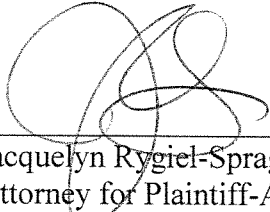
CONCLUSION AND REQUESTED RELIEF

WHEREFORE Plaintiff-Appellee respectfully requests that this Honorable Court Deny Defendant-Appellant's Application for Leave to Appeal and remand this matter back to the Circuit Court for trial.

Respectfully submitted,

PAUL R. SWANSON & ASSOCIATES, P.C.

By: _____


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