RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

IN THE SUPREME COURT

CARLONDA NAISHE SWOOPE,

Plaintiff-Appellant

vs.

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant-Appellee.

Supreme Court No. 166790

Court of Appeals No. 364924
Wayne County Circuit Court
Case No. 21-011402

Daniel Makled (P78777)
DANIEL B. MAKLED LAW
Attorney for Plaintiff-Appellant
23451 Ford Rd
Dearborn, MI 48128
(313) 744-4878

Lori McAllister (P39501)
Erin A. Sedmak (P78282)
DYKEMA GOSSETT PLLC
Attorneys for Defendant-Appellee
201 Townsend St., Suite 900
Lansing, MI 48933
Telephone: (517) 374-9100
lmcallister@dykema.com
esedmak@dykema.com

DEFENDANT-APPELLEE CITIZENS INSURANCE COMPANY OF THE MIDWEST'S ANSWER IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE

ORAL ARGUMENT REQUESTED

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

TABLE OF CONTENTS

COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT viii

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW ix

SUMMARY OF ARGUMENT 1

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS 2

I. The Michigan Automobile Insurance Placement Facility And The Michigan Assigned Claims Plan. 2

II. Factual Background 3

III. Procedural Background 4

A. Trial Court Proceedings 5

B. Proceedings in the Court of Appeals 5

ARGUMENT 6

I. Standards Of Review 6

II. The Court Of Appeals' Holding Is Consistent With The Language Of And Prior Caselaw Interpreting MCL 500.3113(A). 8

A. The Legislature's 2014 Amendment Added A Scienter Requirement Under MCL 500.3113(a) – "Knew Or Should Have Known." 8

B. The Court Of Appeals Applied The Law Correctly To The Facts Here. 11

C. Plaintiff's Arguments Based On Her Subjective Belief Fail. 12

1. An Unauthorized Taking Does Not Require An "Express Prohibition." 13

2. Plaintiff's Argument Depends On The Wrong Scienter Standard. 15

3. Plaintiff's Arguments Regarding Her Purported Subjective Belief Do Not Raise A Genuine Issue Of Fact. 20

III. Plaintiff's Challenges To The Second Factor – Which Plaintiff Conceded Below – Should Be Rejected 21

A. Plaintiff's New Arguments Challenging Whether The Vehicle Was Taken Unlawfully Are Not Preserved Because They Were Not Raised In Either Of The Lower Courts 21

B. The Court Of Appeals Did Not Err Below. 22

1. Because Plaintiff Both Took And Used The Vehicle Without The Owner's Authorization, Distinctions Between A Vehicle Being Taken Versus Used Are Inconsequential In This Case. 23

2. The Court of Appeals' Decision Does Not Conflict With *Monaco*. 25

a. The Crux Of The Holding In Monaco Was The Fact That The Taking Was Authorized By The Vehicle's Owner. 25

b. *Monaco* Does Not Definitively Preclude Finding An Unlawful Use Can Also Constitute An Unlawful Taking. 28

CONCLUSION AND REQUEST FOR RELIEF 35

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

TABLE OF AUTHORITIES

Cases

Ahmed v Tokio Marine America Ins Co,
337 Mich App 1; 972 NW2d 860 (2021) ..... passim

Amerisure Ins Co v Plumb,
282 Mich App 417; 766 NW2d 878 (2009) 27

Bradley v Westfield Ins Co,
___Mich App___; ___NW2d___(2024) 33, 34

Bush v Shabahang,
484 Mich 156; 772 NW2d 272 (2009) 8

Criswell v Avis Rent a Car Sys,
unpublished opinion of the Court of Appeals, issued July 28, 2022,
(Docket No. 355626) 14

Davis v Metlife Ins Co
unpublished opinion of the Court of Appeals, issued Jan. 19, 2023,
(Docket Nos. 359313, 360265) 14

Griswold Props, LLC v Lexington Ins Co,
276 Mich App 551; 741 NW2d 549 (2007) 34

Haksluoto v Mount Clemens Regional Med Center,
500 Mich 304; 901 NW2d 577 (2017) 8

In re Certified Questions from United States Court of Appeals for Sixth Circuit,
416 Mich 558; 331 NW2d 456 (1982) 20

Johnson v Dep't of Natural Resources,
310 Mich App 635; 873 NW2d 842 (2015) 9

Liss v Lewiston-Richards, Inc,
478 Mich 203; 732 NW2d 514 (2007) 13

McNeill-Marks v MidMichigan Med Ctr-Gratiot,
316 Mich App 1; 891 NW2d 528 (2016) 20

Mich Gun Owners, Inc v Ann Arbor Pub Sch,
318 Mich App 338; 897 NW2d 768 (2016),
aff'd 502 Mich 695; 918 NW2d 756 (2018) 18

Moll v Abbott Laboratories, Atlanta, Inc,
444 Mich 1; 506 NW2d 816 (1993)..... 17

Monaco v Home-Owners Ins Co,
317 Mich App 738; 896 NW2d 32 (2016)..... passim

Mull v Citizens Ins Co
unpublished opinion of the Court of Appeals, issued Feb. 17, 2022,
(Docket No. 354725) 13

Pena-Cruz v State Farm Mut Automobile Ins Co
unpublished opinion of the Court of Appeals, issued Mar. 14, 2024,
(Docket No. 364284) 31, 32, 33

People v Vanderpool,
505 Mich 391; 952 NW2d 414 (2020)..... 22

People v Vanderpool,
505 Mich 391; 952 NW2d 414 (2020)..... 22

People v Wolfe,
440 Mich 508; 489 NW2d 748 (1992)..... 29

Potter v Wayne Co,
46 Mich App 174; 207 NW2d 448 (1973)..... 22

Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute,
266 Mich App 39; 698 NW2d 900 (2005)..... 17

Rambin v Allstate Ins Co,
495 Mich 316; 852 NW2d 34 (2014)..... passim

Rasheed v Chrysler Corp,
445 Mich 109; 517 NW2d 19 (1994)..... 20

Rouch World, LLC v Dep't of Civil Rights,
510 Mich 398; 987 NW2d 501 (2022)..... 15, 16, 18, 19

Soaring Pine Capital Real Estate & Debt Fund II, LLC v
Park Street Group Realty Servs, LLC,
511 Mich 89; 999 NW2d 8 (2023)..... 19

South Dearborn Environmental Improvement Ass'n, Inc v
Dep't of Environmental Quality,
502 Mich 349; 917 NW2d 603 (2018)..... 19

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

RECEIVED by MSC 7/19/2024 9:17:32 AM

Spectrum Health Hosps v Farm Bureau Mut Ins Co,
492 Mich 503; 821 NW2d 117 (2012) ..... passim

Walters v Nadell,
481 Mich 377; 751 NW2d 431 (2008) 22

Young v Morrall,
359 Mich 180; 101 NW2d 358 (1960) 22

Statutes

2012 PA 204 2

2014 PA 489 9

2016 PA 346 8

2019 PA 21 8

MCL 257.301(1) 24, 31

MCL 257.310e(4) 25, 27, 28

MCL 257.326 ..... 25, 27, 28

MCL 257.901 24

MCL 500.134(6) 2

MCL 500.3101 2

MCL 500.3113 ..... 8, 15, 18, 19

MCL 500.3113(a) ..... passim

MCL 500.3171 2

MCL 500.3171(1) 3

MCL 500.3173a 2

MCL 500.3173a(4) 5

MCL 500.3174 2

MCL 500.3175 2

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

RECEIVED by MSC 7/19/2024 9:17:32 AM

MCL 500.3176 3

MCL 500.3178 2

MCL 7.305 7

MCL 750.413 ..... 11, 23, 24

MCL 750.414 ..... passim

MCR 500.3113(a) 5

Michigan Penal Code 31

Motor Vehicle Code 30, 31

Rules

MCR 7.305 ..... 7, 32

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellees Citizens Insurance Company of the Midwest ("Citizens") agrees that Plaintiff-Appellant Carlonda Naishe Swoope's Application for Leave to Appeal the December 14, 2023 opinion of the Court of Appeals, which is attached hereto as **Exhibit A**, was timely filed within 42 days of the Court of Appeals granting a request to publish the opinion that was originally released as unpublished, pursuant to MCR 7.305(C)(2)(d).

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals holding below that an unlawful taking within the meaning of MCL 500.3113(a) occurred is erroneous where Plaintiff admitted that she took the vehicle without the owner's authorization, but purportedly had a subjective belief that, had she apprised the owner of the vehicle of a purported emergency, the vehicle owner *would have* given her authorization to take the car.

Plaintiff-Appellant answers:	Yes.
Defendant-Appellee answers:	No.
The trial court answered:	Yes.
The Court of Appeals answered:	No.
This Court should answer:	No.

II. Whether holding that an unlawful taking occurred here conflicts with prior caselaw, including that which sets forth the proposition that an unlawful *use*, absent an unlawful *taking*, is insufficient to exclude one from benefits under MCL 500.3113(a) where Plaintiff voluntarily acted to gain possession of the vehicle, without the owner's authorization, and drove the vehicle away.

Plaintiff-Appellant answers:	Yes.
Defendant-Appellee answers:	No.
The trial court answered:	This issue was not raised in the trial court.
The Court of Appeals answered:	This issue was not raised in the Court of Appeals
This Court should answer:	No.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

SUMMARY OF ARGUMENT

This case involves the unlawful taking of a vehicle within the meaning of MCL 500.3113(a). In the two courts below, Plaintiff did not dispute that she was willingly operating a vehicle taken unlawfully, instead arguing that she did not know the vehicle was taken unlawfully because she assumed that the owner of the vehicle would have granted her authorization to use the vehicle had the owner been apprised of the circumstances. Plaintiff readily admitted in her deposition that she lacked permission to abscond with the vehicle. Predictably, the Court of Appeals held Plaintiff was not entitled to recover personal protection insurance ("PIP") benefits under § 3113(a).

Plaintiff now argues that her subjective belief, that she would have received permission, not only thwarts the scienter element under § 3113(a) from being met – that she "knew or should have known" the vehicle was taken unlawfully – but, for the first time in her Application for Leave, argues it also makes her taking lawful, thus, no "unlawful taking" occurred. Plaintiff roots her argument on her contention that the decision below is error because it conflicts with numerous cases interpreting both the scienter standard and definition of unlawful taking under § 3113(a). Plaintiff is wrong.

First, Plaintiff's argument that an unauthorized taking must follow an "express prohibition" both requires reading language into the statute and is inconsistent with the statute's actual language. *Second*, Plaintiff's argument also requires applying the wrong scienter standard. After amending § 3113(a) in 2014 to encompass the "knew or should have known" standard, the Legislature removed the ability of one to plead subjective ignorance, as Plaintiff attempts to do here, to avoid exclusion from benefits. *Third*, Plaintiff stresses the distinction between an unlawful use and an unlawful taking, but, here, *there was a taking*, making this point entirely inconsequential. While the opinion below incorporates the fact that Plaintiff was unlicensed into

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

its analysis, when read in context, that fact was not the linchpin making this an unlawful taking. There was an unlawful taking here under the plain language of the statute and longstanding judicial precedent.

Put simply, this is not an appropriate case for leave and this Court should deny Plaintiff's Application.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. THE MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY AND THE MICHIGAN ASSIGNED CLAIMS PLAN.

The MAIPF is a nonprofit association in which every insurer authorized to write automobile insurance in Michigan must participate. MCL 500.3301. See also MCL 500.134(6) (the MAIPF is "a nonprofit organization of insurer members…created under chapter 33" of Michigan's Insurance Code). Among its other duties, the MAIPF administers the Michigan Assigned Claims Plan ("MACP") pursuant to MCL 500.3171 through MCL 500.3175, which is part of the Michigan No-Fault Act, MCL 500.3101 *et seq.*[1] The MACP is a statutorily-created plan, MCL 500.3171, that is designed to provide Michigan no-fault personal protection insurance ("PIP") benefits to persons otherwise entitled for coverage under the Act in certain limited circumstances.

Where a claim for benefits under the MACP appears initially eligible, the MAIPF assigns the claim to an insurer, who investigates, adjusts, and pays the claim when the claimant is determined to be eligible. See MCL 500.3173a, MCL 500.3174; MCL 500.3175. However, the assigned insurer is reimbursed for that cost from the MAIPF.

[1] Originally, the Michigan Secretary of State was charged with the organizing and maintaining an "assigned claims facility and plan." MCL 500.3171(1). However, 2012 PA 204 transferred administration of the assigned claims system from the Department of State to the MAIPF. See MCL 500.3171.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

The MAIPF is funded through assessments on each Michigan automobile insurer and self-insurer and include an amount necessary to fund the operation of the MACP, including amounts to pay claims and administer claims. See MCL 500.3171(1), (2). The last two annual assessments were nearly $425 million and $554 million dollars.[2] These assessments are ultimately borne by the driving public, as the cost of auto insurance in every Michigan automobile insurance policy is based in part on the amount of funds required to operate the MACP. See MCL 500.3176. In fact, insurers may display a separate line item on the customer's declaration page, demonstrating their cost for the administration of the MACP.

II. FACTUAL BACKGROUND

On October 26, 2020, Plaintiff's friend, Kandice Valentine, picked her up in Ms. Valentine's 2008 Saturn vehicle and transported Plaintiff to Ms. Valentine's home, where Plaintiff spent the night. (Exhibit B, Pl. Dep., pp. 9-10, 33.) According to Plaintiff, on the morning of October 27, 2020, her mother called her and explained she was suffering chest pain but "the ambulance wasn't coming fast enough." (*Id.* at 10.) Plaintiff testified that she simply took Ms. Valentine's keys and vehicle to drive to her mother. Plaintiff testified as follows:

> Q. And you asked to borrow someone's vehicle; is that correct?
>
> A. *I didn't ask*, I just got the car because I had a family emergency. My mom needed to go to the hospital. So I was trying to hurry up to get to her.
>
> Q. So how did you get the keys to the vehicle?
>
> A. *I just took them*.

(*Id.* at 9) (emphasis added).

[2] https://www.michacp.org/assessment.aspx (last visited June 12, 2024).

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

Plaintiff explained that she had never driven Ms. Valentine's vehicle before, she never asked permission to drive Ms. Valentine's vehicle, and admitted that she lacked permission to drive Ms. Valentine's vehicle that day.

> Q…So have you ever used this vehicle that you – that's involved in this accident before this date?
>
> A. No.
>
> Q. Never at any point?
>
> A. No.
>
> Q. And you didn't ask for permission to use the vehicle?
>
> A. No.
>
> Q. *So is it fair to say you had no permission to operate this vehicle at the time that you were operating it?*
>
> A. *Correct.*

(*Id.* at 10) (emphasis added).

Moreover, Plaintiff lacked a valid driver's license when she took Ms. Valentine's vehicle and had not had a valid driver's license for years. (*Id.* at 8.)

Despite Plaintiff's contention that she took Ms. Valentine's vehicle due to an emergency situation, **Plaintiff elected to stop at Burger King on the way to her mother's home**. (*Id.* at 37.) Plaintiff planned to pick up food for her children who were at her mother's house. (*Id.*) However, after stopping at Burger King, Plaintiff was involved in a motor vehicle accident. (*Id.* at 33-34.)

Subsequently, Plaintiff submitted a signed application for benefits to the MAIPF seeking payment of benefits under the MACP. Plaintiff's claim was assigned to Citizens for payment and handling.

III. PROCEDURAL BACKGROUND

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

A. Trial Court Proceedings

Plaintiff filed this action against Citizens, seeking payment of benefits under the MACP. Following discovery, Citizens filed a motion for summary disposition arguing that Plaintiff was excluded from recovering personal protection insurance ("PIP") benefits under MCR 500.3113(a), which bars recovery where a vehicle was taken unlawfully, because Plaintiff lacked permission to take Ms. Valentine's vehicle and lacked any reasonable basis to believe she had permission to take the vehicle, as he had never driven it previously and lacked a valid driver's license. (Exhibit C, Citizens' MSD.)[3] In response, Plaintiff argued that there was a question of fact that precluded summary disposition because a jury could reasonably conclude that Plaintiff had a *subjective* belief that she had "implied permission" to take Ms. Valentine's vehicle. (Exhibit D, Plaintiff's Resp. to MSD.) The trial court denied the motion on the praecipe without oral argument, stating "[w]hether Plaintiff had permission to use the vehicle is a question of fact for the trier of fact." (Exhibit E, Order Denying MSD.) Citizens thereafter appealed.

B. Proceedings in the Court of Appeals

On appeal, the parties agreed that there was no dispute that Plaintiff willingly operated Ms. Valentine's vehicle and that the taking was unlawful. *The parties agreed that the only issue in dispute was whether Plaintiff knew or should have known the taking was unlawful.* (Exhibit F, Citizens' Brf., p.P. 2-3; Exhibit G, Pl. Brf., p. 2.) Citizens argued that Plaintiff's explanations that (i) she had been friends with Ms. Valentine for 4 years and (2) there was a family emergency, were insufficient to establish a question of fact as to whether Plaintiff could have had a reasonable belief that she had permission to take Ms. Valentine's vehicle.

[3] The motion contained an argument under MCL 500.3173a(4), which is irrelevant to Plaintiff's Application for Leave. Accordingly, this issue is not discussed herein.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

Plaintiff argued that the existence of an emergency and the fact that Plaintiff testified that she had known Ms. Valentine for 4 years precluded summary disposition on the issue. Plaintiff contended that the fact that she stopped at Burger King on the way to her mother's home did not negate the fact that there was a genuine exigency because Plaintiff subjectively believed there was an ongoing emergency. Plaintiff further argued that that a person lacking a valid driver's license is not a basis to conclude that person did not reasonably believe they were entitled to take and operate a vehicle.

The Court of Appeals reversed. The court reasoned that under *Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1; 972 NW2d 860 (2021), a person must take steps to determine whether it is permissible to take another's vehicle and Plaintiff did not do so in this case. (Exhibit A, Opinion, p. 4.) Plaintiff's failure to obtain the owner's permission combined with the fact that Plaintiff knew she lacked a valid driver's license and that a driver's license is required to operate a vehicle was enough to satisfy the third prong – Plaintiff knew or *should have known* the taking was unlawful. (*Id.* at 3-4.) While the parties did not dispute that the vehicle was taken unlawfully, the court addressed the issue and concluded the vehicle was indeed taken unlawfully, albeit the court's analysis on this point was virtually absent, with the court pointing to Plaintiff's own admission that she was unlicensed. (*Id.* at 3.) Finally, the court concluded that, given that Citizens established the prima facie elements of its defense under § 3113(a), the burden shifted to Plaintiff to set forth some documentary evidence raising a question of fact and Plaintiff failed to do so. (*Id.* at 4.) Accordingly, the court concluded that Citizens was entitled to summary disposition.

ARGUMENT

I. STANDARDS OF REVIEW

A party seeking leave to appeal to this Court – a rare remedy – must show that the case meets

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

one of the criteria in MCR 7.305(B)[4]:

> (B) **Grounds**. The application must show that …
>
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
>
> (5) in an appeal of a decision of the Court of Appeals,
> (a) the decision is clearly erroneous and will cause material injustice;…
>
> (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals…

Plaintiff fails to make a showing of any of these grounds. This case concerns an unlawful taking within the meaning of MCL 500.3113(a), where Plaintiff took the vehicle of another person without the owner's authorization and absconded off with the vehicle only to later be involved in a motor vehicle accident. The Court of Appeals appropriately held there was an unlawful taking, as the facts in the record support the three elements of the defense; (1) that a person was willingly operating or using the vehicle at the time of the accident, (2) that the vehicle was taken unlawfully, and (3) the plaintiff knew or should have known the vehicle was taken unlawfully.

Below, the only issue in dispute was whether the third element was established. Nonetheless, the court set forth a cursory analysis of the second element. It is one sentence in this brief analysis, before the court addressed the actual issue in dispute that forms the entire basis of Plaintiff's Application for Leave in which Plaintiff contends that the opinion below conflicts with this Court's holding in *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012) and the Court of Appeals' holding in also *Monaco v Home-Owners Ins Co*, 317 Mich App 738; 896 NW2d 32 (2016). It does not for the reasons explained herein.

[4] Here, Plaintiff has requested leave under MCR 7.305(B)(3) and (B)(5)(a) and (b). Moreover, MCR 7.305(B)(1), (2), (4), and (6) plainly do not apply.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

But also, there is no material injustice here because Plaintiff is not eligible to recover PIP benefits. Even if the Court of Appeals' passing evaluation of the second element – an undisputed issue below – was incomplete or error, the court's ultimate holding was correct. Because there was an unlawful taking within the meaning of § 3113(a), Plaintiff is excluded from recovering PIP benefits.

Should the Court grant leave, this Court reviews a grant of summary disposition *de novo*. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009). Questions of law and the interpretation of statutes are also reviewed *de novo*. *Haksluoto v Mount Clemens Regional Med Center*, 500 Mich 304, 309-310; 901 NW2d 577 (2017).

II. THE COURT OF APPEALS' HOLDING IS CONSISTENT WITH THE LANGUAGE OF AND PRIOR CASELAW INTERPRETING MCL 500.3113(A).

The Court of Appeals' holding in this case is entirely consistent with the plain, unambiguous statutory language and prior caselaw interpreting the statute. The issue in this case below involved the third prong – whether Plaintiff knew or should have known that the motor vehicle was taken unlawfully. In answering that question in the affirmative, the Court of Appeals found that a combination of factors established the third element and that Plaintiff failed to raise any evidence creating a question of fact, thus, Citizens was entitled to summary disposition. The Court of Appeals' reasoning is sound.

A. The Legislature's 2014 Amendment Added A Scienter Requirement Under MCL 500.3113(a) – "Knew Or Should Have Known."

Currently[5], MCL 500.3113 states as follows:

[5] Section MCL 500.3113(a) dates from 2014 and "has not been changed since the 2014 amendment, although it has been reenacted twice in identical form. See 2016 PA 346; 2019 PA 21." *Ahmed*, 337 Mich App at 9 n 3.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

> 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:
>
> > (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.

Accordingly, "the disqualification applies to any person (1) 'willingly operating or willingly using a motor vehicle or motorcycle' that (2) was unlawfully taken by someone, and (3) the person seeking benefits 'knew or should have known' that the motor vehicle was taken unlawfully." *Ahmed*, 337 Mich App at 10.

In 2014, § 3113(a) was amended to its current form. "[T]he amendment of MCL 500.3113(a) through 2014 PA 489 modified the scienter requirement[.]" *Id.* at 24. Prior to amendment, the statute excluded one from payment of PIP benefits where the person "using a motor vehicle or motorcycle which he or she had taken unlawfully, *unless the person reasonably believed that he or she was entitled to take and use the vehicle*." See House Substitute for SB 1140 (emphasis added).[6] This language created a "safe harbor" provision, which allowed a plaintiff to present evidence to avoid exclusion from benefits for unlawfully taking a vehicle "because he believed that he had authority to do so." *Ahmed*, 337 Mich App at 13, quoting *Rambin v Allstate Ins Co*, 495 Mich 316, 333; 852 NW2d 34 (2014). "Under the safe-harbor provision, a person was not disqualified from eligibility for benefits so long as the person had a reasonable belief that the taking of the vehicle was lawful, even if such belief was erroneous." *Id.* at 23.

The 2014 amendment changed the statutory text of subsection 3113(a) to its current form, which incorporates the following scienter requirement: "*the person knew or should have known*

[6] Courts may take judicial notice of a public record. *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015).

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

that the motor vehicle or motorcycle was taken unlawfully." MCL 500.3113(a) (emphasis added). Simply put, the Legislature crafted a scienter standard that would implicate the penalty under § 3113(a) where a person either subjectively possessed actual knowledge that the taking was unlawful; or *objectively*, the person should have been aware that the taking was unlawful. "The present act thus broadened the provision governing disqualification from eligibility for benefits." *Ahmed*, 337 Mich App at 10. This case turns on this statutory change.

Ahmed v Tokio was the first published case to analyze the scienter standard in the amended statute and illustrated the difference in the pre- and post-amendment versions of the statute. In *Ahmed*, the plaintiff, who was an unlicensed driver, lacked subjective, actual knowledge that his use of a rental vehicle was against the owner's prohibition where the plaintiff's wife rented a vehicle under a rental agreement that prohibited an unlicensed driver from operating the vehicle. Under the current statute, "actual knowledge is no longer necessary so long as a plaintiff should have known that he or she was taking a motor vehicle contrary to the owner's directives." *Id.* at 25. "[A] person acts unlawfully under MCL 750.414 if the person takes a motor vehicle or motorcycle knowing that the owner has prohibited the taking…or if the person takes a motor vehicle or motorcycle and 'should have known' that the owner prohibited the taking[.]" *Id.* at 25-26.

Analyzing the facts under the objective portion of that standard, the court held it was satisfied. *Id.* at 27. The court reasoned that the plaintiff knew the vehicle was rented by his wife, who was not the owner of the vehicle; he knew there was a written rental agreement; and he knew he was unlicensed and that only a licensed driver may drive. *Id.* at 26. "Under the 'should have known' standard, plaintiff was obligated to determine the scope of the authorization that the owner…had set under the rental agreement for a nonparty such as himself to take and drive the

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

car." *Id.* "Thus, before simply driving off, plaintiff was obligated to learn the terms of the rental agreement…" *Id.* "[A] person may not simply take what he knows to be another's property *without taking any steps to determine if the owner authorized the taking*." *Id.* at 27 (emphasis added).

Here, Plaintiff could not simply take another's vehicle without taking steps to determine whether the taking is authorized. Her failure to take those steps causes her Complaint to be barred.

B. The Court Of Appeals Applied The Law Correctly To The Facts Here.

Plaintiff is barred from recovering PIP benefits because there was no genuine issue of fact that the scienter requirement was met under MCL 500.3113(a). In this case, the Court of Appeals properly held Citizens established facts demonstrating Plaintiff should have known the taking of Ms. Valentine's vehicle was without authorization, thus, taken unlawfully. See *Spectrum*, 492 Mich at 523 (to determine whether a person took the vehicle unlawfully, the relevant inquiry is whether "the taking was 'without authority' within the meaning of MCL 750.413 or MCL 750.414. If so, then the taking was 'unlawful' within the meaning of MCL 500.3113(a)."). Here, the taking was without authority and Plaintiff raised no evidence creating a question of fact as to whether she knew or should have known the same.

The joyriding statutes provide as follows:

> MCL 750.413 states that "[a]ny person who shall, wilfully and *without authority*, *take possession of and drive or take away* . . . any motor vehicle, belonging to another, shall be guilty of a felony . . . ."
>
> Similarly, MCL 750.414 provides in pertinent part that "[a]ny person who *takes or uses without authority* any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor . . . ."

Id. at 517 (emphasis added).

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

First, the court explained that, like in *Ahmed*, Plaintiff should have known that she was unlicensed, thus, should know she was unable to legally drive. (Exhibit A, Opinion, p. 4.) See also, *Spectrum*, 492 Mich at 518 n 25 ("driving while legally unable may have implications under MCL 500.3113(a) for a person who has taken a vehicle unlawfully because as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle.) (internal quotations omitted). The court stated, "Plaintiff testified she knew her license was suspended when she took the vehicle and therefore, she should have understood that driving the vehicle without a valid license was unlawful." (Exhibit A, Opinion, p. 4), citing *Ahmed*, 337 Mich App at 26-27 (drivers should know their driving status). *Second*, and most significantly, *Plaintiff admitted she did not obtain Ms. Valentine's permission to take the vehicle*. (*Id.*) *Third*, consistent with *Ahmed*, one cannot simply drive off with another's property without taking steps to determine if the taking is authorized and "[b]y plaintiff's own admission, she failed to take any steps to ensure the taking was authorized." (*Id.*) Simply put, it is objectively unreasonable for one to take another's vehicle, particularly where one lacks a license to drive, without taking steps to determine whether the owner of the vehicle consents to the taking. Thus, these factors together establish that the current scienter standard was met in two different ways because Plaintiff both "knew" and "should have known" her taking was unauthorized.

Accordingly, the court properly concluded the third element was met.

C. Plaintiff's Arguments Based On Her Subjective Belief Fail.

Despite not disputing that the taking was unlawful below, in Plaintiff's Application for Leave, Plaintiff now argues, for the first time, that her subjective belief creates a question of fact on both the second and third elements; whether the taking was unlawful and whether she knew or should have known it was unlawful. However, Plaintiff's argument requires inserting language into the statute and employing the wrong scienter standard under § 3113(a).

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

1. An Unauthorized Taking Does Not Require An "Express Prohibition."

Plaintiff argues that, unlike *Ahmed*, here, there was no "express contractual prohibition" that she could reference to ascertain whether she had authorization to take the vehicle. Pl. Lv. App., p. ix, 16, 19-20. From this, Plaintiff contends that an unlawful taking must be a taking in violation of an "express prohibition" for the violation of the joyriding statutes to occur and for the scienter standard to be met. Not so.

There is nothing in the joyriding statutes that limits an unauthorized taking to only one that is in violation of an "express prohibition." The language used in both statutes is "without authority." The word "without" in the phrase "without authority" literally means the absence of or lack of.[7] This Court explained that the authority referenced in the statute is that of the owner, therefore, an unlawful taking under the joyriding is a taking "as that which is unauthorized[.]" *Spectrum*, 492 Mich at 517-18, n 25. As this Court has recognized, "'[a]uthorize' means 'to give authority or formal permission for; sanction.'" *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 212-13; 732 NW2d 514 (2007), quoting Random House Webster's College Dictionary (1997). Simply put, an unlawful taking in violation of the joyriding statutes, within the meaning of § 3113(a) is a taking where the owner of the vehicle did not give formal permission, did not grant authority, or did not otherwise sanction. This includes, but, is not limited to, a taking in violation of an express prohibition.

Plaintiff's argument was rejected in *Mull v Citizens Ins Co*, where the plaintiff argued that because the owner of a motorcycle never "explicitly told" him he was not allowed to use the motorcycle, he could not be precluded from recovery under § 3113(a). *Mull v Citizens Ins Co*,

[7] https://www.merriam-webster.com/dictionary/without (last visited June 21, 2024).

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

unpublished opinion of the Court of Appeals, issued Feb. 17, 2022, *4 (Docket No. 354725).[8] First the court concluded that there was no genuine issue whether there was an unlawful taking "because [the plaintiff] did not receive permission from [the owner] to use the motorcycle." *Id.* at *3. The taking was unlawful due to the absence of permission. Next, the court addressed plaintiff's argument that there was no express prohibition, explaining that "[a]lthough this argument may have had merit under the previous version of the statute, it fails under the current 'knew or should have known' standard." *Id.* at *4.

Likewise, in *Davis v Metlife Ins Co*, "there was no question of fact" that un unlawful taking occurred where a plaintiff "took the keys [to his girlfriend's vehicle]…and drove off" without asking her for permission, even though he had been granted permission on previous occasions and testified that he drove the vehicle about once a week. *Davis v Metlife Ins Co*, unpublished opinion of the Court of Appeals, issued Jan. 19, 2023, *6 (Docket Nos. 359313, 360265). The court also held the third element was met because "no reasonable juror could conclude that plaintiff…did not know that he took the vehicle without authority" because "[b]y his own statement, plaintiff Davis did not have permission to take the vehicle, and so he knew that his taking of the vehicle was unauthorized." *Id.*

Likewise, In *Criswell v Avis Rent a Car Sys*, the court rejected the argument that the taking was lawful because there were no express statements to plaintiff that she could not drive because "there is no requirement for the vehicle owner to make an express statement regarding plaintiff's authority or lack thereof." *Criswell v Avis Rent a Car Sys*, unpublished opinion of the Court of Appeals, issued July 28, 2022, at *3 (Docket No. 355626). The reasoning in these cases are on

[8] Unpublished opinions are cited for their persuasive authority and are attached hereto as Exhibit H. See MCR 7.215(C).

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

point and thwart Plaintiff's argument that "express permission" is not required by the joyriding statutes and instead, there must be an "express prohibition."

Permission is exactly what is required. This is logical, as it is manifestly accepted under any normal standards of decency that one may not simply take off in another's vehicle without the owner's permission. More importantly, it is an interpretation that applies the plain meaning of the statutes, which state "without authority." See *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 410; 987 NW2d 501 (2022) (where a statute is clear and unambiguous, it must be applied as written). "[T]he phrase 'taken unlawfully' in MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner[.]" *Spectrum*, 492 Mich at 518 (emphasis supplied). Here, Plaintiff lacked the authority of the owner.

2. Plaintiff's Argument Depends On The Wrong Scienter Standard.

Plaintiff argues the Court of Appeals erred because its opinion conflicts with this Court's opinions in *Spectrum* and *Rambin* that concerned the former "reasonably believed" safe-harbor provision that examined what a plaintiff reasonably understood at the time of the taking.[9] See App. for Lv., pp. 9, 12. Plaintiff applies the wrong standard.

Plaintiff suggests that *Rambin* is instructive because it stands for the proposition that a subjective belief of having the owner's authorization deems a taking lawful, even if that belief was mistaken. See Pl. Lv. App., pp. 10-12. See also *Monaco*, 317 Mich App at 749 (the pre-amendment § 3113(a) permitted recovery where "the person reasonably believed that he or she was entitled to take and use the vehicle, despite the unlawful taking") (internal quotations omitted).

[9] While the Court of Appeals' decision in *Monaco* post-dated the statutory amendment to MCL 500.3113, the pre-amendment standard was applied in that case because the former version of the statute governed at the time of the accident in that case. See *Monaco*, 317 Mich App at 746-47. Thus, to the extent Plaintiff's Application for Leave implies that the post-amendment statutory language was applied in *Monaco*, it is flatly incorrect. See Lv. App., pp. 14-15.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

In *Rambin*, this Court held that to establish an unlawful taking in violation of MCL 750.414, a person must have possessed the requisite *mens rea* to commit the offense and that because MCL 750.414 was not a strict liability crime, "it contains a *mens rea* element that the taker must intend to take a vehicle 'without authority.'" *Rambin*, 495 Mich at 320. Stated another way, the taker must know the taking is without authority.[10]

However, *Rambin* was superseded by statute as a result of the 2014 amendment substituting the "knew or should have known" standard for the *mens rea* necessary to violate a given criminal statute. See *Ahmed*, 337 Mich App at 22-23 (a legislative change in the language of a statute connotates a different meaning). As recognized in *Ahmed*, if the 2017 amendment "did not change the *mens rea* requirement that *Rambin* held applies in the context of MCL 750.414, the Legislature's enactment of the words 'knew or should have known' would be surplusage and nugatory, contrary to our customary rules of construction." *Id.* at 25. It is an elementary principle of statutory interpretation that courts "must attempt to avoid any construction that would render portions of a statute surplusage or nugatory." *Rouch World*, 510 Mich at 410-11.

By instituting the "knew or should have known" standard, the Legislature removed the possibility that one could simply take off with another's property and then plead subjective ignorance in order to avoid the penalty under § 3113(a), which is precisely what Plaintiff attempts to do here. It is axiomatic that Plaintiff could have simply asked Ms. Valentine for her authorization to take the vehicle. But, she did not. Like the plaintiff in *Ahmed*, Plaintiff failed to take steps to determine the scope of the owner's authorization. It is irrelevant whether an "express

[10] In *Rambin*, the plaintiff was injured while operating a stolen motorcycle. Despite abandoning the motorcycle on the highway and lying to police when questioned, he claimed he was unaware the motorcycle was stolen. This Court held that he was entitled to present evidence at trial to establish that "he did not knowingly lack authority to take the motorcycle because he believed that he had authority to do so." *Rambin*, 495 Mich at 333.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

prohibition" existed in a rental agreement that could be referenced or whether the owner's authorization could have been determined by taking other steps, such as simply asking. What is important is that those steps were not taken – thus authorization was never obtained and the taking was unauthorized – unlawful within the meaning of § 3113(a).

By changing the scienter standard to "knew or should have known", the Legislature allowed the scienter to be met either subjectively, by looking at what the plaintiff actually knew or, objectively, by analyzing what the plaintiff should have known. See *Moll v Abbott Laboratories, Atlanta, Inc*, 444 Mich 1, 17-18; 506 NW2d 816 (1993) ("While the term 'knows' is obviously a subjective standard, the phrase 'should have known' is an objective standard based on an examination of the surrounding circumstances."); *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47-48; 698 NW2d 900 (2005) (explaining that objective knowledge standard is implicated by "knew or should have known" language). Thus, the "knew or should have known" standard, which incorporates an objective component to the standard, perfectly reflects the plain, unambiguous language of the statute. Plaintiff's argument relies on the application of the wrong standard.[11]

[11] Nonetheless, even if the former standard was applied, the evidence in the record here does not establish that Plaintiff had a "reasonable" belief that the taking was authorized. As this Court stated in Spectrum, "driving while legally unable may have implications under MCL 500.3113(a) for a person who *has* taken a vehicle unlawfully because as a matter of law, *one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle*." *Spectrum*, 492 Mich at 518 n 25 (emphasis added). Accordingly, it is unreasonable for Plaintiff to believe she was entitled to use or take the vehicle because she could not operate it legally. It is unreasonable to believe one consents to an unlicensed driver taking and operating one's vehicle in contravention of Michigan law. (Exhibit B, Pl. Dep., p. 8.) It is unreasonable to assume authorization where Plaintiff had never before driven the vehicle and had never before been given authorization to drive the vehicle throughout her 4-year relationship with Ms. Valentine. (*Id.* at 9-10.)

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

To the extent Plaintiff acknowledges the change in statutory language, Plaintiff focuses on language irrelevant to this case – the addition of the words "willingly operating or willingly" to the following portion of the statute: "The person was *willingly operating or willingly* using a motor vehicle…" MCL 500.3113 (emphasis added). See Pl. Lv. App. pp. 13-14, 31-32. To the extent Plaintiff's discussion could be interpreted as an argument that the Legislature did not intent to add a scienter standard for unlawful takings within the meaning of § 3113(a), Plaintiff is wrong for two reasons. *First*, this argument depends on resorting to legislative history to *create* an ambiguity, instead of interpreting the statute according to its unambiguous language. *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 318 Mich App 338, 350 n 6; 897 NW2d 768 (2016), aff'd 502 Mich 695; 918 NW2d 756 (2018) ("Legislative history cannot be used to create an ambiguity where one does not otherwise exist.") (cleaned up). This is improper as "the legislative history of a statute is relevant to the statute's meaning only where the statute is ambiguous." *Rouch World*, 510 Mich at 429.

Second, the Legislative history is not so one-sided. Plaintiff argues the reason for amendment was to ensure that persons who did not participate in the unlawful taking, but who were aware of it and willingly operated the vehicle anyway, were also excluded from benefits under § 3113(a). While this was one legislative goal, there were others evidenced by other changes made to the statute that would not have been necessary to accomplish this single goal, evidencing other goals.

To broaden the statute to encompass persons beyond those who participated in the unlawful taking, the only changes required would be striking the words "which he or she had" and then clarifying that the reasonable belief to avoid exclusion would be a reasonable belief that the person who was using the vehicle or the person who unlawfully took the vehicle was entitled to take and

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

use the vehicle. In fact, the bill originally introduced in the Senate did just that. (Exhibit I, Introduced Bill.) However, as the legislative process progressed, the statute was reworked in several respects, including changing the scienter standard to "knew or should have known." Notably, there is nothing in the Legislative analysis explaining the reason behind these additional changes, except that the analysis of the public act explained it was a response to court cases that interpreted § 3113 and altered the scope of its exclusions. Senate Legislative Analysis, SB 1140 (April 8, 2015). Thus, the Legislature reworked the statute's language to define its intended scope, making "the plain language of the statute" "the most reliable evidence of [the Legislature's] intent[.]" *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, 511 Mich 89, 128-29; 999 NW2d 8 (2023), quoting *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018).

Moreover, the absence of any clear explanation for all of the changes to the statute perfectly demonstrates why resorting to legislative history is disfavored, as it requires speculation. As this Court explained in *Rouch World*, "there are often practical difficulties with discerning legislative intent from legislative history" and "sources like bill analyses, committee reports, and floor debate, which may reflect the views of some group of legislators, are of dubious value."). *Rouch World, LLC*, 510 Mich at 429 n 19. "[L]egislative history is necessarily difficult, as 'dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting on—or perhaps no views at all because they are wholly unaware of the minutiae.'" *Id.*, quoting Scalia & Garner, Reading Law: The Interpretation of Legal Texts (St. Paul: Thomson/West, 2012), p 392. Here, "[t]he plain, unambiguous language of the statute is such that [this Court] need not speculate on its legislative history." *In re Certified Questions from United States Court of Appeals*

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

for Sixth Circuit, 416 Mich 558, 569; 331 NW2d 456 (1982). The statute is unambiguous. Plaintiff has no basis for relying on her subjective belief to harbor her from exclusion under § 3113(a).

3. Plaintiff's Arguments Regarding Her Purported Subjective Belief Do Not Raise A Genuine Issue Of Fact.

Plaintiff failed to raise a genuine issue of material fact. Here, the Court of Appeals explained that because a *prima facie* defense under § 3113(a) was established, the burden shifted to Plaintiff to set forth some documentary evidence raising a question of fact. However, none of the evidence Plaintiff presented did so. (Exhibit A, Opinion, p. 4.)

Plaintiff argued that she testified that she knew Ms. Valentine for 4 years. However, there is nothing about the length of one's relationship that speaks to whether that person would consent to that person's vehicle being taken and driven by an unlicensed driver. Plaintiff also relied on her statement that, in her view, there was a medical emergency. However, again, Plaintiff's purported subjective belief of an emergency does not somehow indicate that Ms. Valentine authorized the taking of the vehicle, or would have authorized it, had Plaintiff requested permission while informing Ms. Valentine of the purported medical emergency. Plaintiff's argument requires layers of speculation. Mere conjecture is insufficient to raise a genuine issue of material fact. *Rasheed v Chrysler Corp*, 445 Mich 109, 130 n 36; 517 NW2d 19 (1994) ("Mere conjecture does not meet the burden" on a party to come "forth with some evidentiary proof that a genuine issue of fact does exist[.]"); *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). ("Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient.").

Here, the taking was unauthorized and Plaintiff did not present any documentary evidence indicating that she was not or should not have been aware that her taking of Ms. Valentine's vehicle was unauthorized. To the contrary, Plaintiff *admitted* she "had no permission to operate this

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

vehicle[.]" (Exhibit B, Pl. Dep., p. 10.) Thus, she *actually knew* the taking was unauthorized. This fact alone forecloses the issue.[12]

The decision below is in conformity with the language of the statute and governing caselaw. The Court of Appeals did not err. Accordingly, this Court should deny leave.

III. PLAINTIFF'S CHALLENGES TO THE SECOND FACTOR – WHICH PLAINTIFF CONCEDED BELOW – SHOULD BE REJECTED.

Plaintiff's argument that there was error below is largely premised on challenges to whether the vehicle was unlawfully taken – the second factor – which Plaintiff did not dispute below. (Pl. Brf. in COA, p. 2.) As an initial matter, Plaintiff[13] raises new arguments for the first time in her Application for Leave, which should not be considered, as they were not properly preserved. Next, Plaintiff's argument that unlawful "use" is not an unlawful "taking" is entirely inconsequential here because Plaintiff plainly both *took* and *used* Ms. Valentine's vehicle. While Plaintiff and the MAJ focus on one sentence in the opinion below regarding Plaintiff operating the vehicle without a license, the opinion does not conflict with *Monaco*, as under the very same reasoning in *Monaco*, Plaintiff is excluded from recovering PIP benefits pursuant to § 3113(a).

A. Plaintiff's New Arguments Challenging Whether The Vehicle Was Taken Unlawfully Are Not Preserved Because They Were Not Raised In Either Of The Lower Courts.

Below, the parties expressly agreed that the first two elements were met and only the third element – scienter – was in dispute. (Exhibit G, Citizens' Brf., p. __; Exhibit H, Pl. Brf., pp. 2-3.) Plaintiff's brief in the Court of Appeals stated:

---

[12] Plaintiff readily conceded in both courts below that she was willingly operating and using Ms. Valentine's vehicle. (Pl. Resp. to MSD. pp. 2-3); (Pl. Brf. in COA, p. 2). This element was never in dispute in this case and was not discussed by the Court of Appeals.

[13] The Michigan Association for Justice ("MAJ") filed an amicus brief in this matter. The MAJ also focuses its arguments on whether the taking in this case was unlawful. This was not an issue in dispute below; thus, it is inappropriate for appellate review.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

> The first and second elements are not in dispute in this case.
>
> The third element of MCL 500.3133(a) (*sic*) requires looking at Ms. Swoope's state of mind and whether she "knew or should have known" that the vehicle was taken without authority. Under the facts of this case reasonable jurors could conclude that Ms. Swoope did not know that she took the vehicle without authority.

(Pl. Brf., p. 2-3) (emphasis in original). Likewise, in the trial court, Plaintiff only challenged whether the scienter element under §3113(a) was met. (Pl. resp. to MSD, pp. 2-4.)

"The failure to raise a question in the lower court precludes the Supreme Court considering it on appeal." *People v Vanderpool*, 505 Mich 391, 413 n 6; 952 NW2d 414 (2020) (quoting *Young v Morrall*, 359 Mich 180, 187; 101 NW2d 358 (1960)). "Michigan generally follows the 'raise or waive' rule of appellate review." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008)). "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention." *Id.* at 388. This is because "appellate courts are courts of review upon a record made in the court below." *Potter v Wayne Co*, 46 Mich App 174, 176; 207 NW2d 448 (1973). Accordingly, Plaintiff's new arguments challenging whether the vehicle was "unlawfully" taken should not be considered, as Plaintiff conceded this point below.

B. The Court Of Appeals Did Not Err Below.

To the extent this Court does consider Plaintiff's new arguments, they should be rejected for three reasons. Plaintiff's emphasis on the distinction between a taking versus a use of a vehicle is meaningless here because Plaintiff *took and used* Ms. Valentine's vehicle. This is not an appropriate case to review this issue, as it is a moot point. *Second*, the Court of Appeals' opinion below, albeit cursory, does not conflict with *Monaco*, albeit *Monaco's* reasoning was flawed. Finally, *Monaco* is not in conflict with *Ahmed*, thus, they do not provide grounds for granting leave either.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

1. Because Plaintiff Both Took And Used The Vehicle Without The Owner's Authorization, Distinctions Between A Vehicle Being Taken Versus Used Are Inconsequential In This Case.

Plaintiff's argument that an unlawful taking differs from an unlawful use is based, in part, on *Spectrum*, where this Court interpreted the phrase "taken unlawfully" in § 3113(a). *Spectrum* does not indicate error below.

In *Spectrum*, this Court considered and rejected two related legal theories that narrowed the scope of unlawful takings subject to § 3113(a). First, this Court held there was no family joy-riding exception to the statute. *Spectrum*, 492 Mich at 510-11. The family joyriding exception excluded teenagers or other family members who joyride in a family member's vehicle without permission from the statute's penalty. *Id.* Similarly, this Court rejected the "chain-of-permissive-use" theory that deemed a third party's use of a vehicle lawful where "a vehicle owner authorizes the vehicle's use by another person (the intermediate user), who in turn authorizes a third person (the end user) to use the vehicle." *Id.* at 509.

This Court explained:

> The word "unlawful" commonly means "not lawful; contrary to law; illegal," and the word "take" is commonly understood as "to get into one's hands or possession by voluntary action." When the words are considered together, the plain meaning of the phrase "taken unlawfully" readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law.
>
> *Id.* at 516-17.

"The Michigan Penal Code contains several statutes that prohibit 'takings,' including two that prohibit 'joyriding,'" – MCL 750.413 and MCL 750.414. *Id.* at 517. "[B]oth joyriding statutes make it unlawful to take any motor vehicle without authority, effectively *defining an unlawful taking of a vehicle as that which is unauthorized*." *Id.* at 517-18 (emphasis added). "Because a taking does not have to be larcenous to be unlawful, the phrase 'taken unlawfully' in MCL

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

500.3113(a) applies to anyone who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal it." *Id.* at 518.

Here, as discussed above, the record establishes that Plaintiff violated MCL 750.413 and MCL 750.414. Plaintiff testified that she gained possession of Ms. Valentine's vehicle because she took the keys and simply drove away with Ms. Valentine's vehicle, taking the vehicle away. (Exhibit B, Pl. Dep., p. 9.) Thus, Plaintiff admits she willfully took possession of Ms. Valentine's car, through a voluntary act, see *Spectrum*, 492 Mich at 517, and drove away. (*Id.* at 9-10.) Moreover, she readily admitted she did so without Ms. Valentine's authority. (*Id.* at 9.) Thus, like the joyriders in *Spectrum*, Plaintiff *came into possession* of Ms. Valentine's vehicle by voluntarily asserting control over it and driving it away, *without authority* to do so, in violation of the law. There is no great mystery as to why Plaintiff did not dispute the second factor below – whether the vehicle was taken unlawfully. The element is plainly met in this case.

Moreover, Plaintiff violated MCL 257.301(1), which states "an individual shall not drive a motor vehicle on a highway in this state unless that individual has a valid operator's or chauffeur's license with the appropriate group designation and indorsements for the type or class of vehicle being driven or towed." While this provision is under the motor vehicle code, it carries criminal penalties through MCL 257.901. Here, Plaintiff was unlicensed when she took and operated Ms. Valentine's vehicle. (Exhibit B, Pl. Dep., p. 8.)

Nonetheless, it is inconsequential whether Plaintiff's violation of MCL 257.301(1) was an unlawful taking, as opposed to an unlawful use, or whether it is an "unlawful" taking within the meaning of § 3113(a) because the statute falls under the Motor Vehicle Code instead of the Michigan Penal Code. Even if the violation of MCL 257.301(1) did not occur, the elements of an unlawful taking are, nonetheless, plainly met here for the reasons above. Accordingly, Plaintiff's

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

argument, based on distinguishing a taking from a use, is a moot point. This Court should deny leave.

2. The Court of Appeals' Decision Does Not Conflict With *Monaco*.

Plaintiff and the MAJ make much ado about *Monaco*, claiming that the court's attention below to the fact that Plaintiff violated MCL 257.301(1) strayed from precedent set in *Monaco*. *Monaco* neither lends Plaintiff or the MAJ the support they seek in challenging the decision below nor provides grounds for condemning *Ahmed*. Their focus on *Monaco* is much ado about nothing.

a. The Crux Of The Holding In *Monaco* Was The Fact That The Taking Was Authorized By The Vehicle's Owner.

Monaco is distinguishable from this case because the taking was not in violation of the joyriding statutes, as it was done with the owner's permission. In *Monaco*, the Court of Appeals concluded that a 15-year old girl, Alison, did not unlawfully take her mother's vehicle because her mother authorized her to take and drive the vehicle. See *Monaco*, 317 Mich App at 749.

The defendant in *Monaco* argued that Alison unlawfully took the vehicle because she was only 15-years old and possessed only a restricted license, thus violating MCL 257.310e(4), despite the fact that she had the owner's permission to drive the vehicle. *Id.* at 746. The defendant also argued that because Alison's mother violated MCL 257.326 by granting her permission to take the vehicle, there was an unlawful taking.[14] *Id.* However, the court's analysis in reaching its conclusion is inapplicable to this case.

[14] Under MCL 257.326, "'[n]o person shall knowingly authorize or permit a motor vehicle owned by him or under his control to be driven by any person in violation of any of the provisions of [the MVC].'" *Monaco*, 317 Mich App at 738. Under MCL 257.310e(4), "'[a] person issued a level 1 graduated licensing status may operate a motor vehicle only when accompanied either by a licensed parent or legal guardian or, with the permission of the parent or legal guardian, a licensed driver 21 years of age or older.'" Put simply, the defendant argued that Alison necessarily unlawfully took the vehicle because she was only 15-years old and possessed only a restricted

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

In reaching its conclusion, the court pointed to the following discussion of the *joyriding statutes* in *Spectrum*:

> The "authority" referred to in the joyriding statutes is obviously the authority of the owner of the vehicle. Accordingly, for purposes of MCL 500.3113(a), a vehicle is "unlawfully taken" if it is taken without the authority of its owner. . . . Therefore, MCL 500.3113(a) does not apply to the lawful owner of a vehicle, even if that person drives it under a circumstance that renders him or her legally unable to operate a vehicle. However, driving while legally unable may have implications under MCL 500.3113(a) for a person who *has* taken a vehicle unlawfully because as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle.

Id. at 748, quoting *Spectrum*, 492 Mich at 518 n 25.

The court reasoned that an owner of a vehicle could never unlawfully take the vehicle without the owner's authorization because an owner would always have his or her own authorization. *Id.* at 748. Thus, an owner, regardless whether the *use* is unlawful, cannot violate the joyriding statutes. See *id.* Stated another way, one cannot joyride in one's own vehicle; thus, a violation of *the joyriding statutes* cannot form the basis of an unlawful taking where one has the owner's authorization to take the vehicle. From that, the court concluded that an unlawful use or operation of a vehicle alone, without an unauthorized taking, cannot form the basis of an unlawful taking within the meaning of § 3113(a). *Id.* at 749.

To buttress its conclusion, the court pointed to statements from *Rambin*, where this Court noted that while MCL 750.414 prohibited both an unlawful taking and an unlawful use, only the language regarding the unlawful taking was relevant to § 3113(a), but, MCL 750.414's prohibitions against both an unlawful taking and unlawful use were both relevant to ascertaining the appropriate *mens rea* under the statute. *Id.*, citing *Rambin*, 495 Mich at 331. This tangential

---

license, despite the fact that she had the owner's permission to drive the vehicle. *Monaco*, 317 Mich App at 746.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

discussion in *Rambin* does not preclude a finding that an unlawful use in conjunction with a taking without the owner's express permission, and without determining the scope of owner's authorization, given the circumstances, is an unlawful taking within the meaning of § 3113(a).

Next, the court in *Monaco* pointed to *Amerisure Ins Co v Plumb*, where the Court of Appeals analyzed the meaning of the phrase "take and use" under the statute's former safe-harbor provision – "unless the person reasonably believed that he or she was entitled to *take and use* the vehicle." 282 Mich App 417, 425; 766 NW2d 878 (2009) (emphasis added). Because the words "take" and "use" were different words and were connected with the conjunction "and", the court concluded that a reasonable belief to both had to be established by a plaintiff. The statute no longer incorporates this phrase, thus, the analysis in *Amerisure* is not relevant to this case. Moreover, the analysis in *Amerisure* does not aid Plaintiff, as the court held that "as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle." *Id.* at 431-32. On that basis, this Court found that "driving while legally unable may have implications under MCL 500.3113(a) for a person who has taken a vehicle unlawfully" because "as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle." *Spectrum*, 492 Mich at 518 n 25.

The court in *Monaco* then analyzed whether Alison's taking was unlawful under MCL 257.326, concluding that "[a]lthough it may have been unlawful for plaintiff, as owner of the car, to authorize or permit Alison to drive the vehicle in violation of the law, *it had no bearing on, nor did it negate, the authorization and permission given by plaintiff for Alison to take the vehicle*." *Monaco*, 317 Mich App at 750. Despite being called on to determine whether a violation of MCL 257.326 or MCL 257.310e(4) could form the basis of an unlawful taking, the court found that the

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

mother's violation of MCL 257.326 did not somehow make Alison's taking unlawful. It is the taking by the person seeking to collect benefits that must be unlawful to implicate § 3113(a) – not whether the owner's authorization was unlawful.[15] While this is true, the court failed to then analyze whether Alison's use of the vehicle in violation of MCL 257.310e(4) formed the basis of an "unlawful taking" within the meaning of § 3113(a). Instead, the court's holding was rooted in the fact that Alison had permission, thus, the taking was not in violation of the *joyriding statutes*.

As explained above, the distinction between an unlawful taking and unlawful use is meaningless here because Plaintiff took Ms. Valentine's vehicle without the owner's authorization, unlike Alison in *Monaco*, who had permission. Thus, under the exact reasoning in *Monaco*, Plaintiff unlawfully took the vehicle within the meaning of § 3113(a) and is not entitled to recover PIP benefits.

b. *Monaco* Does Not Definitively Preclude Finding An Unlawful Use Can Also Constitute An Unlawful Taking.

[15] To the extent MCL 257.310e(4) was considered in the *Monaco* court's analysis, it was done so only as part of the analysis of whether Alison's *mother's* violation of MCL 257.326 formed the basis for an unlawful taking. Stated another way, the court "considered the legality of the taking from the perspective not of Alison, the driver, but from that of her mother, the…owner of the car." *Ahmed*, 337 Mich App at 19 n 8. But, § 3113(a) "examines the legality of the taking from the driver's perspective[.]" *Spectrum*, 492 Mich at 522. Therefore, the court "should have considered whether the taking was unlawful from the perspective of Alison, the driver and the person on whose behalf an 'entitle[ment] to be paid personal protection insurance benefits' was sought." *Ahmed*, 337 Mich App at 19 n 8. Stated another way, the court neglected to answer the very question it was called onto answer – whether a violation of MCL 257.310e(4) forms the basis for an unlawful taking – and, subsequently, whether Alison reasonably believed she was entitled to take and use the vehicle, under the pre-amendment statute that governed at the time of Alison's accident. It is possible that court could have reached the same holding, as it may very well have found it reasonable for Alison, a minor, to believe she was entitled to take and use the vehicle where her mother advised her that she could.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

While *Monaco* reiterated the unremarkable proposition that § 3113(a) pertains only to an "unlawful taking"– a rule established long before *Monaco* – the court's analysis itself did not preclude finding that an unlawful use can also constitute or be paired with an unlawful taking.

Interpreting the phrase "taken unlawfully", in *Spectrum*, this Court explained "the word 'take' is commonly understood as 'to get into one's hands or possession by voluntary action.'" *Spectrum*, 492 Mich at 517. To take possession of something means to exercise control over it. See *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992). The Cambridge English Dictionary defines "take" as "to remove something, especially without permission" or "to move something or someone from one place to another[.]"[16] This definition is consistent with this Court's analysis of a violation of MCL 750.414 as follows: "[f]or a person to take personal property without the authority of the actual owner, there must be some evidence to support the proposition that the person from whom he or she received the property did not have the right to control or command the property." *Rambin*, 495 Mich at 332. Put simply, a taking occurs where one "gets [something] into one's hands" and asserts control to abscond with it.

As the Court of Appeals explained in *Ahmed*, "while it is possible to possess or 'take' a car without 'operating' or driving it, such as by placing it on a flatbed truck and moving it, or by using a tow truck, it is not possible to drive it without also taking it; the act of driving a car can only be accomplished by someone who is in possession of it and operating the controls."[17] *Ahmed*, 337

[16] https://dictionary.cambridge.org/us/dictionary/english/take (last visited Jul. 11, 2024).

[17] For the same reason, using a vehicle often involves driving or operating the vehicle, but there could be situations where a vehicle is used otherwise – such as an anchor or a platform.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

Mich App at 14.[18] Simply put, an unlawful use may encompass a taking, and, thus, some unlawful uses are also unlawful takings.

This point is well illustrated by *Spectrum*, where the court struck down the family joyriding exception that was based off the contention that the "Legislature did not intend that a relative's 'joyride' be considered an unlawful taking under MCL 500.3113(a) because, given that most legislators are parents and grandparents, they may have experienced children who *used* a family vehicle without permission and may have done so themselves." *Spectrum*, 492 Mich at 510-11 (emphasis added). For a family member to unlawfully take a vehicle kept at the family home, the method by which the vehicle is taken is the operation of the vehicle – the *use*. Indeed, the facts of the cases in *Spectrum* contained those facts exactly. Ryan DeYoung was an excluded driver on his wife's insurance policy and was prohibited from driving the family's vehicles. While his wife was sleeping "Ryan took the key to the Bravada out of [his wife's] purse and then took the vehicle…" *Id.* at 513. Likewise, Craig Jr., who was not allowed to drive his father's vehicle because he was unlicensed, unlawfully took the vehicle when he was given the keys by his girlfriend and he took the vehicle. *Id.* at 512.

Moreover, there is no apparent reason why the phrase "unlawful taking" precludes unlawful conduct under the Motor Vehicle Code where a *taking* is involved. While this Court in

[18] Contrary to Plaintiff's contention, *Ahmed* follows *Spectrum*. Moreover, to the extent it is suggested that *Ahmed* conflicts with *Monaco*, this is also untrue. In *Ahmed*, the court noted that because the phrase "taken unlawfully" in the statute had not been amended, it should be interpreted the same as it had under the pre-amendment statute because the language was the same. Thus, *Ahmed*'s interpretation of the phrase "taken unlawfully" is consistent with *Spectrum*, as it was taken directly from *Spectrum*. *Ahmed*, 337 Mich App at 11, citing *Spectrum*, 492 Mich at 537. Moreover, nothing in *Ahmed* concluded that an unlawful use of a vehicle without an unlawful taking subjects one to the penalty under § 3113(a). To the contrary, the court in *Ahmed* found the plaintiff unable to recovery benefits under § 3113(a) because he took the vehicle in contrary to the owner's authorization and should have known the taking was unlawful. *Id.* at 15, 27. *Ahmed* does not conflict with *Monaco*.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

Spectrum held that any taking that violates the Michigan Penal Code is an unlawful taking, it also said the phrase "taken unlawfully" embraced a situation where one gained possession of a vehicle "contrary to Michigan law" – a phrase that does not limit unlawful takings to the Michigan Penal Code. *Id.* at 509, 517. This is not to say that every time a person violates the Motor Vehicle Code, § 3113(a) applies. To the contrary, as the statute dictates, there must be a taking involved. Stated another way, where one takes another's vehicle without authorization while also violating the Motor Vehicle Code, there is an unlawful taking because the driver "should have known" the taking was unlawful. See *Pena-Cruz, infra*.

In this case, the court found that Plaintiff operated the vehicle in violation of the law, which was "unlawful for purposes of MCL 500.3113(a)." (Exhibit A, Opinion, pp. 3-4.) The violation of law was proven by Plaintiff's own testimony that she did not have a valid driver's license. (*Id.*) In order to operate a vehicle in violation of MCL 257.301(1), one must "gain possession" of the vehicle – which means assert control over the vehicle. As the court in *Ahmed* recognized, not all takings necessarily involve operating a vehicle, but to operate a vehicle, one must necessarily "take" the vehicle. Here, Plaintiff took Ms. Valentine's vehicle by operating it and driving it away, just as did the parties in *Spectrum* who committed unlawful takings through identical voluntary actions in gaining possession of the vehicles. The court below found the fact that Plaintiff lacked a license was particularly relevant to its finding that she *should have known* the taking was unlawful, as "one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle." *Spectrum*, 492 Mich at 518 n 25. Simply put, the fact that Plaintiff lacked the owner's authorization combined with the fact that she was unlicensed, thus, not able to legally operate the vehicle places this taking within the purview of § 3113(a).

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

Moreover, contrary to Plaintiff's contention, the cursory analysis of the second factor in this case does not mean that an unlawful use alone constitutes a taking. When read in context, it is apparent that the fact that Plaintiff was unlicensed was one factor, among several, that made Plaintiff's taking an unlawful taking within the meaning of § 3113(a). Plaintiff points to the unpublished opinion, *Pena-Cruz v State Farm Mut Automobile Ins Co* in an effort to convince this Court the standards for review under MCR 7.305 are met. But *Pena-Cruz* did not rely on this case for finding that a violation of the Motor Vehicle Code alone constitutes an unlawful taking for purposes of § 3113(a). Instead, the court found that evidence of such unlawful use – in conjunction with a taking – is relevant to the analysis of whether an unlawful taking under § 3113(a) occurred. The court stated, "*Swoope* did not hold that the plaintiff's taking of the vehicle was unlawful solely because she lacked the owner's express permission; rather, that was merely one factor that the Court considered. And that fact was clearly necessary for *Swoope* to reach the conclusion that it did—if the driver in *Swoope* had the owner's express permission to use the vehicle, then under *Monaco*, the driver's taking of the vehicle was not unlawful." *Pena-Cruz v State Farm Mut Automobile Ins Co*, unpublished opinion of the Court of Appeals, issued Mar. 14, 2024 (Docket No. 364284). slip op. at 15-16.

In *Pena-Cruz*, the issue was whether there was an unlawful taking, where the vehicle's owner neither expressly granted permission nor prohibited the taking and the taker lacked a valid driver's license. *Id.*, slip op. at 5. The plaintiff argued, like Plaintiff here, that express permission is not required and that the fact that he was unlicensed was irrelevant. The court rejected both arguments. First, the court explained that the cases on which the plaintiff relied did not involve the same question as to scienter where there was neither express permission nor a prior express prohibition by the owner. The court's analysis demonstrated that the second and third prong are

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

interdependent. Thus, facts in the record that are informative as to whether the person "knew or should have known" the taking was unlawful are relevant to both the second and third prongs of the analysis. Cf *Ahmed*, 337 Mich App at 14 (recognizing "there is no requirement… that different facts establish each of the elements [under § 3113(a)]").

In concluding an unlawful taking occurred, the court reasoned that the plaintiff did not have the owner's permission, knew he was unlicensed and unable to legally operate the vehicle, and took no steps to determine whether the owner authorized the taking. *Id.*, slip op. at pp. 14-15. Thus, his lack of a driver's license was one factor that made the taking unlawful combined with the owner's lack of permission. See *id.*, slip op. at 15 ("every court considering an owner's lack of express permission merely considered it as one factor in determining whether the person's taking of the vehicle was unlawful."). Put simply, the court in *Pena-Cruz* read *Swoope* in context, understanding that only where there is a taking without the owner's permission but without a prior express prohibition, does a violation of the Motor Vehicle Code become relevant to the analysis of whether the taking was unlawful under § 3113(a).

In contrast to *Pena-Cruz*, another panel of the Court of Appeals incorrectly interpreted *Swoope*, finding it conflicted with *Monaco* and holding it was required to follow *Monaco* under MCR 7.215(J)(1). *Bradley v Westfield Ins Co*, ___Mich App___; ___NW2d___(2024), slip op. at 12. In *Bradley*, the court found the plaintiff, who was unlicensed and operating her mother's vehicle *with her mother's permission*, did not unlawfully take the vehicle within the meaning of § 3113(a). *Id.*, slip op. at 2, 12. Stated another way, in *Bradley*, the sole basis for defendant's argument that there was an unlawful taking was the fact that the plaintiff was unlicensed. *Bradley* is virtually identical to *Monaco*.

RECEIVED by MSC 7/19/2024 9:17:32 AM

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

Nonetheless, the court unnecessarily delved into a discussion of this case, reasoning that "[t]he facts of *Swoope* cannot be meaningfully distinguished from the facts of *Monaco*. In each case, a vehicle was operated *with the owner's permission* but without a valid license." *Id.* (emphasis added). The panel in *Bradley* apparently misunderstood the facts of this case, believing that Plaintiff had Ms. Valentine's permission to take her vehicle and the sole basis of the court's holding in this case was the fact that Plaintiff was unlicensed. As explained above, this is simply incorrect.

Regardless, *Bradley* is a published case and is now binding on Court of Appeals and Michigan's trial courts. Thus, to the extent a judge misinterprets this case to stand for the proposition that a violation of the Motor Vehicle Code alone – without a taking – constitutes an unlawful use, *Bradley* prevents such a conclusion from being applied.

Finally, even if the court's cursory analysis of this factor was substantively incomplete or constituted error, it is insignificant dicta. The only issue in dispute in this case below was whether the scienter requirement was met – which it was. Plaintiff conceded the taking was unlawful below. Because the issue was not in dispute below, the court's comments as to the basis of the unlawful taking were not necessary to the resolution of the case, thus, not necessary to the holding, making it dicta. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007) (stare decisis does not arise from an issue that is addressed and decided but not germane to the controversy in the case, as it is dictum). Regardless, the Court of Appeals' conclusion is sound. Accordingly, this Court should deny leave to appeal.

Accordingly, under § 3113(a), Plaintiff is ineligible to recover no-fault benefits under the MACP and Citizens was properly granted summary disposition. This Court should deny leave.

RECEIVED by MSC 7/19/2024 9:17:32 AM

CONCLUSION AND REQUEST FOR RELIEF

For all of the above reasons, this Court should deny leave to appeal.

Respectfully submitted,

Dated: July 19, 2024

By: */s/ Erin A. Sedmak*
Lori McAllister (P39501)
Erin A. Sedmak (P78282)
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933
Telephone: (517) 374-9152
esedmak@dykema.com

Attorneys for Defendant-Appellee Citizens Insurance Company of the Midwest

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

RECEIVED by MSC 7/19/2024 9:17:32 AM

CERTIFICATE OF COMPLIANCE

I certify that the Defendant-Appellees' Answer in Opposition to Plaintiff-Appellant's Application for Leave to Appeal complies with the type-volume limitation set forth in MCR 7.212(B). This brief uses a 12-point proportional font (Times New Roman), and the word count, based on the word count of the word-processing system used to produce this document, for this brief is 11,369.

Dated: July 19, 2024

By: */s/ Erin A. Sedmak*

Lori McAllister (P39501)
Erin A. Sedmak (P78282)
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933
Telephone: (517) 374-9152
esedmak@dykema.com

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

RECEIVED by MSC 7/19/2024 9:17:32 AM

PROOF OF SERVICE

I hereby certify that on July 19, 2024, I caused the foregoing paper to be filed with the Clerk of the Court using the Court's electronic filing system which will forward a copy via e-mail to all counsel of record.

Dated: July 19, 2024

By: */s/ Erin A. Sedmak*

Lori McAllister (P39501)
Erin A. Sedmak (P78282)
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933
Telephone: (517) 374-9152
esedmak@dykema.com

DYKEMA GOSSETT PLLC • Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

Exhibit A

RECEIVED by MSC 7/19/2024 9:17:32 AM

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

COURT OF APPEALS

CARLONDA NAISHE SWOOPE,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant-Appellant.

UNPUBLISHED
December 14, 2023
APPROVED FOR PUBLICATION
January 25, 2024
9:20 a.m.

No. 364924
Wayne Circuit Court
LC No. 21-011402-NF

Before: LETICA, P.J., and O'BRIEN and CAMERON, JJ.

CAMERON, J.

In this interlocutory appeal arising under Michigan's no-fault act, MCL 500.3101 *et seq.*, defendant, Citizens Insurance Company of the Midwest, appeals by leave granted[1] the order denying its motion for summary disposition under MCR 2.116(C)(10) (no genuine question of fact).[2] We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiff, Carlonda Naishe Swoope, was injured in an October 27, 2020 automobile accident. Plaintiff was driving a car owned by a friend. At the time of the accident, she did not have a valid driver's license. Neither plaintiff, nor the car's owner, maintained an automobile insurance policy. As a result, plaintiff sought personal protection insurance (PIP) benefits for her

[1] *Swoope v Citizens Ins Co*, unpublished order of the Court of Appeals, entered March 24, 2023 (Docket No. 364924).

[2] Defendant also moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim), but it is apparent from the order that the trial court denied summary disposition under subsection (C)(10).

RECEIVED by MSC 7/19/2024 9:17:32 AM

injuries through the Michigan Assigned Claims Plain (MACP). MACP assigned plaintiff's claim to defendant.

Defendant denied coverage and plaintiff filed the instant complaint seeking payment for PIP benefits. Thereafter, defendant moved for summary disposition, arguing there was no genuine question of fact that plaintiff was unlawfully operating the car. The trial court denied the motion. Defendant moved for reconsideration, but that motion was denied. This appeal followed.

II. UNLAWFUL OPERATION

Defendant argues the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(10) because there was no genuine question of fact plaintiff was unlawfully operating the car, and therefore was not entitled to PIP benefits under the no-fault act. We agree.

A. STANDARD OF REVIEW

A (C)(10) motion for summary disposition "tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating these motions, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Id*. (citation omitted). If the movant satisfies this burden,

> The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).]

This case also involves issues of statutory interpretation, which we review de novo. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009).

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) (citations omitted).]

B. LAW AND ANALYSIS

Under the no-fault act, automobile insurers are required to provide PIP benefits for certain injuries related to motor vehicle accidents. *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 252; 901 NW2d 534 (2017). "The no-fault act's initial scope of coverage for PIP benefits is

RECEIVED by MSC 7/19/2024 9:17:32 AM

set forth in MCL 500.3105(1) . . . ." *Id*. This statute states that insurers are "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 . . . ." MCL 500.3105(1). But, "[t]he no-fault act permits an insurer to avoid coverage of PIP benefits under certain enumerated circumstances." *Meemic Ins Co v Fortson*, 506 Mich 287, 303; 954 NW2d 115 (2020). MCL 500.3113(a) articulates one of these circumstances:

> 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:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully. [MCL 500.3113(a).]

In *Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1, 10; 972 NW2d 860 (2021), this Court set forth a three-prong test to evaluate claims under MCL 500.3113(a). *Ahmed* held that "the disqualification applies to any person (1) willingly operating or willingly using a motor vehicle or motorcycle that (2) was unlawfully taken by someone, and (3) the person seeking benefits knew or should have known that the motor vehicle was taken unlawfully." *Id*. (quotation marks omitted). This "should have known" standard requires a person to determine whether they have permission to take a vehicle "because a person may not simply take what he knows to be another's property without taking any steps to determine if the owner authorized the taking." *Id*. at 27. Indeed, "the mere assumption or supposition that it must be permissible to take a third party's property, without more, does not satisfy the 'should have known' standard of MCL 500.3113(a)." *Id*.

"[A]ny violation of the criminal law that leads to a taking of a motor vehicle will constitute an 'unlawful taking' for purposes of MCL 500.3113(a)." *Id*. at 11 n 5. Violations of criminal law include certain provisions of the Michigan Vehicle Code, MCL 257.1 *et seq*. For example, MCL 257.301 concerns the legality of operating a vehicle without a valid driver's license. It states, in part: "[A]n individual shall not drive a motor vehicle on a highway in this state unless that individual has a valid operator's or chauffeur's license with the appropriate group designation and indorsements for the type or class of vehicle being driven or towed." MCL 257.301(1). Violations of this statute are considered "unlawful" for purposes of MCL 500.3113(a) because there are related criminal penalties. See MCL 257.901; see also *Ahmed*, 337 Mich App at 20 n 8 ("Violation of [MCL 257.301 and MCL 257.310e(4)] was 'unlawful' . . . because there are associated criminal penalties.").

Defendant's motion for summary disposition focused on the second and third prong of the *Ahmed* test.[3] It moved for summary disposition, in part, because plaintiff admitted she did not have a valid driver's license at the time of the accident. In support of this assertion, defendant

[3] On appeal, the parties agree the first prong—whether plaintiff operated the vehicle willingly—is not at issue.

attached plaintiff's deposition testimony in which she admitted she did not have a valid license. This information satisfied the second prong because operating a vehicle without a valid license is unlawful for purposes of MCL 500.3113(a).

This evidence also satisfied the third prong, whether plaintiff knew or should have known the motor vehicle was taken unlawfully. Plaintiff testified she knew her license was suspended when she took the vehicle and therefore she should have understood that driving the vehicle without a valid license was unlawful. See, e.g., *Ahmed*, 337 Mich App at 26-27 (drivers should know their driving status). Plaintiff also admitted during her deposition that the vehicle's owner did not give her permission to drive the car. As noted above, the "should have known" standard is only satisfied if the plaintiff took any steps to determine whether "the owner authorized the taking." *Id*. at 27. By plaintiff's own admission, she failed to take any steps to ensure the taking was authorized. Accordingly, defendant satisfied its preliminary burden to demonstrate that there existed no genuine question of fact for a jury to resolve.

The burden then shifted to plaintiff to demonstrate a genuine question of material fact to be resolved at trial. Although plaintiff presented some documentary evidence in support of her response to the motion for summary disposition, none of this evidence showed she had a valid driver's license at the time of the accident. Moreover, she offered no evidence showing the vehicle's owner authorized her use of the vehicle. She, therefore, failed to meet her burden as the nonmoving party. *Quinto*, 451 Mich at 362-363. Summary disposition should have been granted on this basis, and the trial court erred when it concluded otherwise.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Anica Letica
/s/ Colleen A. O'Brien

RECEIVED by MSC 7/19/2024 9:17:32 AM

Exhibit B

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CARLONDA NAISHE SWOOPE,
Plaintiff,
vs. Case No. 21-011402-NF
Hon. Dana Margaret Hathaway
CITIZENS INSURANCE COMPANY OF THE MIDWEST,
Defendant.
/

DEPOSITION OF: CARLONDA NAISHE SWOOPE
DATE: Thursday, March 31, 2022
TIME: 1:05 P.M.
LOCATION: Hall Makled, P.C.
23756 Michigan Avenue
Dearborn, Michigan
REPORTER: Lory Helland, CER-#3778
Certified Reporter

Page 2

APPEARANCES:

DANIEL B. MAKLET P78777
Hall Makled, P.C.
23756 Michigan Avenue
Suite 300
Dearborn, Michigan 48124
313-582-7930
dmakled@hallmakled.com
Appearing on behalf of the Plaintiff.

ARMINIA DUENAS P67090
Conlin, McKenney & Philbrick, P.C.
350 South Main Street
Suite 400
Ann Arbor, Michigan 48104
734-997-2159
aduenas@cmplaw.com
Appearing on behalf of the Defendant.

Page 3

I N D E X

WITNESS PAGE
CARLONDA NAISHE SWOOPE
Examination by Ms. Duenas 7

E X H I B I T S

NUMBER IDENTIFICATION PAGE

None offered.

Page 4

Dearborn, Michigan
Thursday, March 31, 2022
1:05 P.M.
* * *

COURT REPORTER: Before I swear in the deponent, I would like to confirm that all parties agree to allow me to administer the oath to the deponent over the phone. If there is an objection, please state it now.

(No objections.)

CARLONDA NAISHE SWOOPE
having been first duly sworn, was examined and testified as follows:

MS. DUENAS: Let the record reflect that this is the deposition of -- how do you pronounce your first name? Is it Carlonda Swoope?

THE WITNESS: Yes, Carlonda Swoope.

MS. DUENAS: -- of Carlonda Swoope, taken pursuant to Notice and to be used for all purposes under the Michigan Court Rules and the Michigan Rules of Evidence.

Ms. Swoope, my name is Arminia Duenas. I represent Citizens Insurance company, which is an insurance company that's been assigned by the State of Michigan to handle the No-Fault PIP benefits related

RECEIVED by MSC 7/19/2024 9:17:32 AM

to this October 27th, 2020, motor vehicle accident.
Have you ever taken a deposition before?
THE WITNESS: Yes.
MS. DUENAS: When was that?
THE WITNESS: When was that?
MR. MAKLED: She had a dep, Arminia, in her bodily injury case.
MS. DUENAS: Okay, for third party.
Is that the only deposition you've ever had, Ms. Swoope?
THE WITNESS: Yes.
MS. DUENAS: So I'm just going to put a couple of the guidelines on so it's just fresh in our minds.
If your answer is "yes", try to say "yes". If it's "no", please say "no".
If you say "uh huh" or "uh uh", one of us will stop you and try to make sure that it's known for the record if that was a "yes" or a "no" because the court reporter is taking down everything that you're saying, and she cannot make a determination as to what your meaning is. So we want to make sure when you answer a question "yes" or "no", and obviously, not all of your answers are going to be "yes" or "no", but when they are, we want there to be a clear "yes" or a

clear "no".
Everything has to be verbal. So if you gesture in any way we have to verbalize it for the record, because -- although we're on Zoom, it's not being recorded in a, you know, a CD to be taken to court if this had to go to trial, you know, to that effect.
If you don't understand what I'm asking you, just let me know. I'll rephrase it. I'm really -- this is just a discovery dep. I'm just trying to get some information as to your prior medical history and you're limitations and all of that.
So that's pretty much it -- oh, one last thing, with the State of Michigan, there was a completion of an application, and with that completion of an application for the State of Michigan, the only thing that they require is that there be only truthful information, truthful answers.
I know that you're under oath, but it's very important to know that if there -- if it's determined that there was a material misrepresentation in your statement and/or a false statement, a motion can be filed. So I like to give people notice of that because it's pretty significant when it comes to

assigned claims.
Okay?
THE WITNESS: Okay.
E X A M I N A T I O N
BY MS. DUENAS:
Q. Please state your full name for the record and spell your last name, please?
A. Carlonda Naishe Swoope, S-W-O-O-P-E.
Q. Have you been known by any other names?
A. No.
Q. So never married; is that correct?
A. No.
Q. What's your date of birth?
A. [redacted]
Q. How old are you?
A. 33.
Q. And what -- are you a U.S. citizen?
A. Yes.
Q. Were you born in the United States?
A. Yes.
Q. What state were you born in?
A. Michigan.
Q. Have you lived in Michigan your entire life?
A. Yes.
Q. Do you have any restrictions related to driving?

A. Yes.
Q. Are they restrictions given by a doctor?
A. No.
Q. Is it because you don't have a driver's license?
A. Yes.
Q. Have you ever owned a driver's license?
A. Yes.
Q. And what happened to your driver's license?
A. It got revoked because I had tickets to pay and I didn't pay them.
Q. And at that time of this October 27th, 2020, accident, were you driving on a revoked license?
A. Yes. It was suspended, I'm sorry.
Q. I'm sorry, suspended?
A. Yeah.
Q. How long has your driver's license been suspended?
A. I'm not sure.
Q. Has it been years?
A. Yes.
Q. And when you were -- you were driving the vehicle at the time of this accident; is that correct?
A. Yes.
Q. And you knew at the time of the accident that you did not have a valid driver's license; is that correct?
A. Yes.

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

Page 9

Q. And you asked to borrow someone's vehicle; is that correct?
A. I didn't ask, I just got the car because I had a family emergency. My mom needed to go to the hospital. So I was trying to hurry up to get to her.
Q. So how did you get the keys to the vehicle?
A. I just took them.
Q. So are you living with someone that has a vehicle?
A. No.
Q. So where were you when you took the keys to this vehicle?
A. I was at my friend's house in Westland.
Q. What type of vehicle was it?
A. A Saturn Vue.
Q. And whose vehicle -- who's the owner of the vehicle?
A. Kandice Valentine.
Q. You said Kandice Valentine is your friend; is that correct?
A. Yes.
Q. So you're at Kandice's house at the time of the accident -- on the date of accident. What were you doing at Kandice's house in Westland?
A. We were -- I just spent the night over her house and I left that morning to go take care of my mother.

Page 10

Q. How did you get over to the house?
A. She picked me up.
Q. And then tell me how -- so you're there the day before, which would be October 26th; is that correct?
A. Yes.
Q. And you spend the night, and at what point and what time do you take the vehicle?
A. I can't recall exactly what time, but I know it was during the morning, late morning. My mother called me and told me her chest was hurting, and the ambulance wasn't coming fast enough. So I tried to get there as fast as possible.
Q. Okay. Sorry, I thought I was going to --
So have you ever used this vehicle that you -- that's involved in this accident before this date?
A. No.
Q. Never at any point?
A. No.
Q. And you didn't ask for permission to use the vehicle?
A. No.
Q. So is it fair to say you had no permission to operate this vehicle at the time that you were operating it?
A. Correct.
Q. So prior to beginning this deposition, we talked about

Page 11

what type of PIP benefits are being alleged in this accident, and you're not making a wage loss claim; is that correct?
A. Correct.
Q. And you're not making a replacement care claim, which is like someone coming in and cleaning your house or doing household chores; is that correct?
A. Correct.
Q. And you're not making an attendant care claim; is that correct?
A. What's that?
Q. Well, that's like nursing, helping you in and out of the shower, getting dressed.
A. That's correct.
Q. This is purely for medical billing, correct?
A. Yes.
Q. Now, I don't see it on you, that's why I'm asking. I'm also on Zoom. Are you wearing a brace to any part of your body?
A. Not right now, no.
Q. Was there a doctor that prescribed a brace after this accident?
A. Yes.
Q. And what doctor prescribed the brace?
A. Dr. Shukr.

Page 12

Q. Where does Dr. Shukr work out of?
A. Pain Management, Michigan Pain. It's on Woodward.
Q. Let me just -- I'm going to pull up your -- the witness list that I have just so that -- is it Dearborn Pain Specialists?
A. Excuse me?
Q. Or is it -- let's see. This will help me. I'm going to move right to the -- Dr. Shukr. Oh, Shukr, S-H-U-K-R?
A. Yes.
Q. That's Dearborn Pain Specialists. So Dr. Mustafa Mohamad Shukr?
A. Yes.
Q. From Dearborn Pain Specialists, prescribed what type of brace?
A. A back brace, but his -- he has two locations. I go to the one on Woodward.
Q. Have you ever gone to the one in Dearborn?
A. No.
Q. Are you still getting treatment from Dearborn Pain Specialists?
A. Yes.
Q. When's the last time you received treatment?
A. Last month. I had an appointment today, but I had to reschedule because of the deposition.

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

Page 13

Q. And what type of treatment are you getting from Dearborn Pain Specialists?
A. I get back shots.
Q. How often do you get injections to your back?
A. Once a month, but I haven't been getting them because I was supposed to get nerve surgery, but I've been scared to get it. So I've just been prolonging.
Q. When you say "nerve surgery", do you mean that they're going in to burn a nerve?
A. Yes.
Q. And that's to your back?
A. Yes. Back and neck.
Q. Back and neck?
A. Yes.
Q. Now, do you know if anybody at Dearborn Pain Specialists actually ordered your prior medical records and reviewed them before making any type of recommendations with regard to surgery?
A. I believe so.
Q. Did you have any neck or back pain before this accident?
A. No.
Q. And so you're saying that Dr. Shukr prescribed a back brace, but you're not wearing that today, correct?
A. Correct.

Page 14

Q. Did he prescribe any other braces to any other parts of your body outside your back?
A. No.
Q. Now, I don't see a cane in the room. Have you been prescribed a cane for any purpose, any reason after this accident?
A. No.
Q. Are you a smoker?
A. No.
Q. Are you a medical marijuana holder, a cardholder?
A. No.
Q. Do you smoke marijuana?
A. No.
Q. What's your current address?
A. 14109 Riverview Street. I just moved there last April. At the accident, it was 4722 Trumbull Street.
Q. So you say last April, April 2021, correct?
A. Yes.
Q. And are you living with anyone?
A. Just my two children.
Q. And your two children, is one named Lauren; is that correct?
A. Yes.
Q. How old is Lauren?
A. 16.

Page 15

Q. And is it Drayton?
A. Yes.
Q. How old is Drayton?
A. 12.
Q. Now, I have that you also live with your mother; is that correct, or no?
A. I did.
Q. So did you live with your mother when you lived on Trumbull?
A. Yes.
Q. So from the time of this accident -- how long did you live at 4722 Trumbull in Detroit, Michigan?
A. So I got my house in April, but I didn't move out until maybe June, July, maybe.
Q. But at the time of this accident of October 27th, 2020, you were living at 4722 Trumbull Street, Detroit, Michigan, correct?
A. Yes.
Q. And you were living with your mother and your son and your daughter, correct?
A. Yes.
Q. Anybody else you were living with at that time?
A. No.
Q. Okay.
And how long had you lived on Trumbull

Page 16

Street in that address, or at that address?
A. Maybe three years.
Q. Is that a house or an apartment?
A. It's a townhome.
Q. Townhome?
Is that townhome subsidized by Section 8 or the State of Michigan in any way?
A. Yes.
Q. And is that in your mother's name?
A. Yes.
Q. And when you moved out in April but fully moved out in June or July, the house that you're in now at the 14109 Riverview Street, is that also a Section 8 housing?
A. No.
Q. Are you subsidized in any way from the State of Michigan for that particular address?
A. No.
Q. And is that a house or a townhouse?
A. It's a townhouse, yes.
Q. At the time of the October 27th, 2020, accident, were you working?
A. No.
Q. And you're not currently working, correct?
A. Yes.

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 17

Q. And are you receiving Social Security Disability?
A. No.
Q. How are you paying your bills?
A. I know said I -- I said I worked, yes. I worked.
Q. Oh, you do work? You're currently working?
A. Yes.
Q. I'm sorry. I missed that completely. Where are you working? I'm sorry. Where are you working?
A. I work at Amazon.
Q. How long have you worked at Amazon?
A. Since November.
Q. Of last year or the year before?
A. Of last year.
Q. And what do you do there?
A. Just move the little, small package. They have me -- what is it called when you get like --
Q. Restricted?
A. Yeah, I have restrictions, yes.
Q. What type of restrictions do you have?
A. They give me four extra breaks, and I don't lift anything over 20 pounds. Just small packages that I move and scan. I scan it on a robot.
Q. So they hired you after this accident knowing that you had these restrictions?
A. Yes.

Page 18

Q. Were there any letters or anything, to your knowledge, from your doctors that were generated and created for Amazon to say that you could work there?
A. Yes.
Q. What doctor did that?
A. Shukr.
Q. He wrote a letter to Amazon that said that you could work?
A. Yes.
Q. But within those parameters and restrictions, correct?
A. Yes.
Q. And do you work full time?
A. Yes.
Q. And what is full time at Amazon?
A. 10 hours.
Q. Per day?
A. Yes.
Q. That's full time. How many days do you work?
A. Four -- four days.
Q. That's good. Four days at 10 hours per day?
A. It's long.
Q. Yeah, but then you get the three days off, which is nice.
So you moved out of your mom's house. Your mom did not move with you, correct?

Page 19

A. Correct.
Q. And you're only living with your children, there's nobody else in that household, correct?
A. Correct.
Q. And at the time of this accident, which is October 27th, 2020, did your mom own a vehicle?
A. No.
Q. Did you own a vehicle at that time?
A. No.
Q. So there was nobody in the household that had a vehicle or used a vehicle on a regular basis; is that fair to say?
A. Correct.
Q. And you've never been married. So you don't have a spouse that has a policy, correct?
A. Correct.
Q. And I know these are going to sound odd, these questions, like, it's kind of obvious, but I need to ask them so that we have it on the record and that there's no question about it.
So no relative with a motor vehicle?
A. No.
Q. And then you did not have -- to your knowledge, you weren't listed on a personal automobile policy, correct, at the time of the accident?

Page 20

A. Correct.
Q. Did you have health insurance at the time of the October 27th, 2020, accident?
A. Yes.
Q. And what type of health insurance did you have?
A. Molina.
Q. Is that through the State of Michigan?
A. Yes.
Q. Now, at the time of the accident, were you working at all?
A. No.
Q. Prior to this accident, when was the last time you had worked?
A. I can't remember.
Q. Was it like three -- was it more than three years?
A. No. It was shorter than that. It was probably maybe a year.
Q. Why did you stop working?
A. It just wasn't for me anymore.
Q. The job wasn't?
A. Yes.
Q. What type of work did you do?
A. Waitress/dancer.
Q. Where was that at?
A. BT's, Dearborn.

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

Q. What is that?
A. BT's, Dearborn and Tycoon, they're owned by the same people.
Q. At the time of the October 27th, 2020, accident, did you have a primary care physician, a doctor that you would go to if you needed to get a physical or if you had a cold?
A. No.
Q. And you said that you don't have a driver's license, but did you have a state identification card at the time of the accident?
A. Yes.
Q. Do you know if it was the same number as your prior driver's license number because sometimes they just transfer it over?
A. I believe it was the same thing.
Q. We're going to go off the record just to confirm your social security number. So we're off the record currently. What is your social security number?
(Off the record 1:27 P.M.)
(Back on the record 1:27 P.M.)
CONTINUING BY MS. DUENAS:
Q. We'll go back on the record. The last four digits of the social security number is [redacted]. Have you ever used a different social security number?

A. No.
Q. We talked about you have a son and a daughter. Are those your only children?
A. Yes.
Q. Are you left-handed or right-handed?
A. Right.
Q. Do you have any pre-existing medical conditions for which you treat on a regular basis?
A. Just asthma, But that's, you know, here or there. If I need a breathing treatment or something.
Q. I was going to ask, do you have -- are you hospitalized ever for breathing treatments?
A. No. Just when I was a kid.
Q. And so have you ever been diagnosed with high cholesterol?
A. No.
Q. How about high blood pressure?
A. No.
Q. How about diabetes?
A. No.
Q. Have you ever told a doctor prior to this October 27th, 2020, accident that you had anxiety or depression?
A. No.
Q. At the time of the October 27th, 2020, accident, were

you being prescribed any type of medication for any reason?
A. No.
Q. As you sit here today, are you being prescribed any type of medication?
A. Yes.
Q. And what type of medication or tions are you being prescribed?
A. Lidocaine, Norco 7.5 and naproxen and tizanidine or something like that. I can't say the name, but it's T-I-Z-A-N-D-I-N-E (sic), I believe.
Q. And what's that for?
A. For -- for the pain to -- the inflammation.
Q. And then you said Norco; is that correct?
A. Yes.
Q. And that's for pain as well?
A. Yes.
Q. And then you gave another. Is it lidocaine? Is that a patch or a cream?
A. A patch.
Q. And then what was the other last one?
A. Naproxen.
Q. And what is that for, to your knowledge?
A. Inflammation also, I believe.
Q. How often do you take the naproxen?

A. Maybe every other day, depending on if I'm in pain or not.
Q. So is the naproxen as needed?
A. Yes.
Q. And then the -- the other medication for -- that you're taking for -- it's the T-I-Z-A-N-D-I-N-E. What is -- how often are you taking that, is that as needed as well?
A. Yes.
Q. And then the Norco, do you take that pain medication every day?
A. Not every day. Just when I need it. Like, before I start my day, if I feel bad getting out of bed or something like that.
Q. So are all the medications that you're being prescribed after the accident taken as needed on a daily basis when you determine that you need it or if you don't need it?
A. Yes.
Q. And then is that the same with the patch?
A. Yes.
Q. And who's prescribing it?
A. Shukr.
Q. Is that the only doctor that you're currently receiving treatment from?

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

Page 25

A. Yes.
Q. How long has that been the only doctor you're receiving treatment from?
A. For it to be the only doctor, it's been since January.
Q. Of this year or last year?
A. Of this year. I was seeing the physical therapy doctor also for a year.
Q. Is that for Care (sic) Physical Therapy?
A. Yes.
Q. And how long were you getting treatment from -- it's specifically identified as Care Physical Therapy, correct?
A. Yes. Up until January.
Q. Was it right after the accident in October? Was it November to January or how long were you getting treatment there?
A. Yeah. It was like right after the accident, it was November to -- this year in January.
Q. How often were you going?
A. Three times a week.
Q. So to be clear, you're going three times a week from November 2020 to January 2022?
A. Yes.
Q. Did you ever get a bill?
A. No.

Page 26

Q. Did you think that the bills were being paid?
A. Yes.
Q. Is that because you never received a bill? Did you ever have any conversations with anybody in the office regarding any billing?
A. No. I didn't know anything.
Q. Three times a week. So was that Monday, Wednesday, Friday or when would you go?
A. Monday, Wednesday, Thursday. If I missed a day, then I'll make it up on a Friday or something like that.
Q. And how would you get there?
A. Their transportation.
Q. Now, the transportation, did you think that was part of the bill for the Care Physical Therapy or did you think that was a separate bill?
A. I thought it was part of the bill.
Q. Was there ever a conversation that you had with anybody regarding payment for the transportation company?
A. No.
Q. And did you schedule the transportation or did Care Physical Therapy schedule it?
A. Care Physical Therapy scheduled it.
Q. So three times a week, and it never went down from three times a week to two times a week, it was just

Page 27

always three times?
A. Yes.
Q. And to what parts of your body did you get the physical therapy?
A. My back and my neck.
Q. And when the transportation company would pick you up, did they have other people in the vehicle as well going to Care Physical Therapy?
A. Sometimes.
Q. Did you ever have to, when you'd get in the car, be driven to someone else's house before -- to pick up someone before you would go to physical therapy?
A. Yes.
Q. Did you have to sign any paperwork related to the transportation?
A. Not that I can recall.
Q. Did you sign any paperwork as far as Care Physical Therapy that was called -- and I don't, you know, you may remember, you may not remember -- sometimes they give you a form called an assignment. Do you know if you signed any paperwork with regard to Care Physical Therapy that was identified or labeled as an assignment?
A. I'm not sure.
Q. Okay. That makes sense to me. They're fairly --

Page 28

they're getting -- they're more common now, but it's fairly new to have that go on.
So -- so just getting back to your prior medical history, have to ask for -- all these questions specifically. Prior to this accident, had you ever received physical therapy?
A. No.
Q. Prior to this accident, had you ever told the doctor that you had back pain for any reason?
A. No.
Q. Prior to this October 27th, 2020, accident, did you ever tell anybody you had neck pain?
A. No.
Q. How about shoulder pain, be it left or right, before this accident?
A. No.
Q. How about pain in your hip, be it left or right side?
A. No.
Q. Had you ever gone to a chiropractor for any reason before this October 27th, 2020, accident?
A. No.
Q. Did you get -- at any point in your life ever have an image, before this accident, be it x-ray, MRI, or CT Scan, an image of any kind before this accident?
A. I've had an x-ray before.

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

Page 29

Q. To what part of your body, if you recall?
A. My chest to check and see if I had pneumonia, I believe.
Q. Did you get pneumonia a lot due to your asthma when you were younger or was it just one time?
A. One time.
Q. And that was just to check. Were you diagnosed with pneumonia?
A. Yes. I had a little bit of pneumonia in my lungs.
Q. Had you ever been hospitalized for any reason outside of childbirth before this accident?
A. No.
Q. Had you ever been diagnosed with a broken bone before this accident?
A. No.
Q. Had you ever received any type of pain injections before this accident?
A. No.
Q. And had any doctor at any point identified you as disabled before the accident for any reason?
A. No.
Q. Did you have any psychological conditions for which you received treatment, be it depression, anxiety, bipolar, schizophrenia, anything like that before the accident?

Page 30

A. No.
Q. Have you ever had any type of injury resulting from domestic violence?
A. No.
Q. Have you ever been shot by a gun?
A. No.
Q. Have you ever been stabbed?
A. No.
Q. Had you ever had any issues with your foot, either left or right, before this accident?
A. No.
Q. It sounds like before this accident you didn't get a lot of -- you didn't have a lot of medical treatment; is that fair to say?
MR. MAKLED: Object to form and foundation.
MS. DUENAS: Sure.
CONTINUING BY MS. DUENAS:
Q. It doesn't look like you were treating -- or you had any type of injuries before this accident that you treated for; is that correct?
A. Excuse me. Say that again, I'm sorry.
Q. Sure.
Because I can't ask you every question under the sun. I'm trying to get an understanding of your medical history. It looks like it's fairly, you

Page 31

know, unremarkable, but I want to know, have you ever received treatment for any type of injury or medical condition before this accident?
A. No.
Q. How about thyroid? Did you ever have an issue with your thyroid?
A. No.
Q. Because I think I saw -- and I just want to -- I thought I saw an enlarged thyroid. Have you ever gotten treatment for an enlarged thyroid?
A. When I went for my MRI after the accident, they told me that I had one. So yeah.
Q. But that wasn't something that you had issues with or you were getting treatment with before; is that correct?
A. No, correct.
Q. Have you ever been in the military?
A. No.
Q. Have you ever applied for Social Security Disability?
A. No.
Q. Have you ever been convicted of a crime of dishonesty?
A. No.
Q. How about untruthfulness?
A. No.
Q. How about theft?

Page 32

A. No.
Q. Are you a felon?
A. No.
Q. Have you ever had a slip and/or fall that resulted in injury?
A. No.
Q. Have you ever been injured at work and made a workers' compensation claim?
A. No.
Q. Have you been involved in any other motor vehicle accidents outside of the one for which you're here today?
A. No.
Q. Did you graduate from high school?
A. I have my GED.
Q. And did you take any college courses?
A. No, but I took some other classes. Training.
Q. Do you have a license to do any type of work?
A. No.
Q. What's the title of -- your job title at Amazon?
A. I guess it would be sorter.
Q. And you're not required to drive a truck or deliver anything, are you, for Amazon?
A. No.
Q. Do you file taxes yearly?

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 33

A. Yes.
Q. Do you recall how the motor vehicle happened for which we're here today?
A. Yes.
Q. And I keep saying it was October 27th, 2020; is that correct?
A. Yes.
Q. And did you have anybody in the vehicle with you at the time of the accident?
A. No.
Q. And what time of day was it?
A. Late morning.
Q. And we talked about this earlier. You were operating a Saturn, correct?
A. Yes.
Q. And that was the 2008 Saturn owned by Kandice Valentine. Kandice being spelled K-A-N-D-I-C-E, Valentine, correct?
A. Yes.
Q. How long has Kandice Valentine been a friend of yours?
A. Maybe about four years.
Q. And was it dark out or light out?
A. Light.
Q. How long had you been on the road before this accident occurred?

Page 34

A. Maybe about 15, 20 minutes.
Q. And where did the accident occur?
A. 75 and Trumbull.
Q. Just tell me what happened on this day. How did the accident occur?
A. I was in the right lane and the truck was in the left lane and then it just started turning and it ran into me. It started turning right and it ran into me. It kept going, but eventually, it stopped.
Q. So you're in the right lane, the truck is to your left?
A. Yes.
Q. So does the truck -- you said the truck driver turned into you, meaning turned into and struck the left side of the vehicle you were driving?
A. Yes.
Q. You said that you were driving to pick up your mother; is that correct?
A. Yes.
Q. To take her to the hospital?
A. Yes.
Q. And Ms. Valentine's house is noted to be on 1918 Eagle Court, Westland, Michigan. Is that where you were at?
A. Yes.
Q. And then from Westland, you were driving to Detroit on Trumbull to pick up your mother?
A. Yes.
Q. Did you have your seat belt on?
A. Yes.
Q. When the accident occurred, was it one impact or multiple impacts to the vehicle?
A. It was one.
Q. After the truck driver strikes the left side of the car, what do you do?
A. Panic. I just sat there.
Q. Do you get out of the vehicle?
A. Yes, because the guy didn't want to give me his insurance. I just checked my car and everything.
Q. So you're physically able to get out of the vehicle. Did you walk over to the other person to try to get his information?
A. Yes.
Q. Did you call the police at all?
A. Yes.
Q. And did the police ever arrive to the scene?
A. Yes.
Q. And when they arrived, was the truck driver still there?
A. Yes.
Q. Did you ask for an ambulance to come to pick you up?

Page 35

Page 36

A. No, I didn't.
Q. Did the police officer ask you if you needed an ambulance?
A. Yes.
Q. And you declined at that point?
A. Correct.
Q. Did you -- was the car that you were in, that Saturn, drivable after this accident?
A. No.
Q. Was it towed from the scene --
A. Yes.
Q. -- to your knowledge?
Do you know if your mom ever made it to the hospital on this day?
A. Well, that was why I didn't get an ambulance because I wanted to get to her and we went together in a Uber.
Q. So at the scene of the accident, did you call an Uber?
A. Yes.
Q. And the Uber picked you up and then you drove to your mom's house; is that correct?
A. Yes.
Q. And then picked up your mom and drove her to the hospital; is that correct?
A. Yes.
Q. What hospital?

RECEIVED by MSC 7/19/2024 9:17:32 AM

Page 37

A. Harper.
Q. Now when you were driving your mom to the hospital, did you also get checked out at the hospital?
A. Yes.
Q. And were you treated and admitted or treated and released?
A. Treated and released.
Q. Now, I keep seeing something like you stopped and grabbed things for your children at Burger King on your way to your mother's house. Does that make any sense to you?
A. Yes.
Q. What happened there?
A. That's how I got on 75 and Trumbull. I was getting them food to give to my mom. They were at my mom's house.
Q. And then all of you were going to go to the hospital, you and your children and your mother, or no?
A. No, just me and my mother. My daughter was old enough to watch.
Q. And then -- so you pick her up. You both go to Harper Hospital. You're evaluated. Now were you bleeding from any part of your body after this accident?
A. No.
Q. Did you have any cuts at any part -- to any part of

Page 38

your body from this accident?
A. No.
Q. Did you lose consciousness at all?
A. No, not that I can remember.
Q. Are you being treated for a closed-head injury of any kind?
A. No.
Q. Any allegations of memory loss or confusion after this accident?
A. No.
Q. And was your car upon impact pushed into anything, meaning a sign, a curb, another vehicle, anything like that?
A. I don't think so.
Q. So when the police come, do you give a statement to the police officer?
A. Yes.
Q. And you're walking and talking after the accident; is that correct?
A. I was in my vehicle.
Q. So but you never got out of your vehicle?
A. Yes, I did.
Q. So to be clear, did you give a statement to the police officer, the police officer walk up to your window and then take a statement through the car window?

Page 39

A. Yes.
Q. And then after that, the police was done with taking down statements. You get an Uber that comes to drive you and your mom to Harper Hospital?
A. Yes.
Q. And do you know if this car was totaled or repaired?
A. She never repaired it.
Q. Did you take any photos of the vehicle?
A. I have a video.
Q. And when was the video taken?
A. Right afterwards.
Q. The same day?
A. Yes.
Q. And did you take that video?
A. Yes.
Q. And does your -- did you give it to your attorney?
THE WITNESS: Do you have it?
(Witness conferred with her attorney)
THE WITNESS: Yes.
CONTINUING BY MS. DUENAS:
Q. Now, are you saying that you received injuries from this accident?
A. Yes.
Q. What type of injuries did you receive from this accident?

Page 40

A. Neck and back pain.
Q. Okay.
A. I can't stand for longs amount of time. I have a aching pain constantly. It comes and goes.
Q. So I have neck and back and aching pain. Anything else?
A. No.
Q. Were you contacted by any doctor or facility trying to schedule treatment, appointments after this accident?
A. No.
Q. Were you solicited by anybody after this motor vehicle accident?
A. No.
Q. So no one called you up and said, "Hey, we've made an appointment for you to go somewhere for treatment"; is that correct?
A. Correct.
Q. And you said you're -- so when you go to Harper Hospital, do you tell them that you have neck and back pain?
A. Yes.
Q. Any other pain that you indicated, if you can recall?
A. No.
Q. Do you know if there were any images taken, x-rays, CT Scans or MRIs?

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 41

A. They just gave me a x-ray.
Q. Of your back or your neck, which one?
A. Of my back.
Q. And then you were treated and released, correct?
A. Yes.
Q. Was your mom also treated and released?
A. Yes.
Q. Now were you given any type of prescriptions when you left the emergency room?
A. I think they gave me Motrin.
Q. Who's the next -- where do you go next for treatment?
A. I caught -- We Care Physical Therapy.
Q. What is it?
A. We --
Q. Oh, We Care Physical Therapy?
A. Uh huh.
Q. How did you find out about We Care Physical Therapy?
A. I looked it up, just was looking up.
Q. What did you type in to look up physical therapy for We Care?
A. Good physical therapist.
Q. You typed in "good physical therapist", and We Care Physical Therapy came up?
A. Yeah.
Q. I'm going to try that.

Page 42

A. Yeah, maybe because it was of the area I was in, I was close to Southfield and it was right there.
Q. There are -- pick a stone up and throw it, you'll hit a physical therapist in Southfield.
So no one recommended We Care, it's something you Googled and found for yourself?
A. Yes.
Q. Did you get any type of relief from the treatment that was provided at We Care Physical Therapy?
A. Yes.
Q. What type of relief did you receive from We Care?
A. My back became a little bit stronger, even though I still get pain, but it became more manageable to deal with.
Q. Why did you stop treatment with them? Because I see -- you know, in January of 2020? 2022? Why did you stop treatment?
A. Because I had to work.
Q. Okay.
Do you know if there are any bills outstanding due but owed to We Care Physical Therapy?
A. Yes.
Q. And do you know how much is outstanding due and owed?
A. No, I don't.
Q. Did you ever get a bill from We Care Physical Therapy?

Page 43

A. No.
Q. How do you know there's a bill outstanding due and owed?
MR. MAKLED: I have a bill, Arminia, that I'll be sending to you.
MS. DUENAS: Okay.
CONTINUING BY MS. DUENAS:
Q. So is that something that you found out after you -- or before you filed the lawsuit?
A. Yes.
Q. Now, is your attorney also the attorney for your third party?
A. Yes.
Q. So you go to We Care Physical Therapy, you went there for over a year, correct? Three times a week for a year?
A. Yes.
Q. The first time you find out about owing anything is when you filed your lawsuit and you start to look into it, correct? Because there's no bills being sent to your house?
A. Correct.
Q. What do you think of that? What's your -- and I'm just asking your opinion. What's your opinion on a doctor that lets you treat somewhere for over a year

Page 44

and then just lets the bill escalate and escalate? Do you have an opinion about that?
A. No, no.
Q. No? Is that normal to you, because I can't go to my doctor without paying a $25 co-pay, but, you know, is that normal to you?
A. No.
Q. That's why you didn't know that there was a bill that was piling up, correct?
A. Correct.
Q. Okay.
And when you found out that there was a bill that was due and owed by We Care Physical Therapy, did that make you upset?
A. Yeah, yes.
Q. Because would you have liked to have known that there was an issue with payment at some point?
A. Yes.
Q. Do you know if We Care Physical Therapy ever sent any of your bills to your personal health insurance for consideration of payment? Do you know that, if that happened?
A. No.
Q. So do you know if -- and you may not know, but do you know if there is a lien of any kind? And what I mean

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 45

is, did any of your doctors or any facilities for which they've provided treatment on a regular basis send any of your bills to your Molina or Medicaid health insurance? Do you know if that happened?
A. No.
Q. So I see We Care Physical Therapy and then the Dearborn Pain Specialists. How did you get to Dearborn Pain Specialists?
A. Same -- their transportation. I would go there after I left therapy.
Q. No, I mean how did you start going to Dearborn Pain Specialists? How did you find out about them?
A. I was recommended by We Care.
Q. Do you know if We Care has any type of ownership interest in Dearborn Pain Specialists?
A. No, I don't believe so.
Q. Did they schedule appointments with Dearborn Pain Specialists on your behalf?
A. No. I did.
Q. And so did you also schedule your own appointments at We Care Physical Therapy?
A. Yes.
Q. So this is what it sounds like. The same time that you're going to We Care Physical Therapy -- because you would only go to Dearborn Pain Specialists

Page 46

once a month, right?
A. Yes.
Q. You would make sure that the time that you were going to physical therapy is also one of the times that you would go to the Dearborn Pain Specialists, correct?
A. Yes.
Q. And again, I think we talked about this, but I just want to make it clear for the record if I didn't. Do you know if there's a bill that's outstanding due and owed by Dearborn Pain Specialists?
A. Yes.
Q. And you know that there is a bill for Dearborn Pain Specialists? Do you know how much it is?
A. No.
Q. Again, that's -- they never sent a bill to you, did they?
A. No.
Q. So as far as you know, it could be $100, it could be 60,000. You wouldn't know that because you've never actually received a bill before this litigation, right?
A. Right.
Q. And again, that doesn't seem odd to you? Now, knowing that? Is that weird to you, knowing now that they've never sent a bill and some of these bills weren't

Page 47

paid? Does that seem odd to you?
A. Yes.
Q. All right.
So I also see that -- so is Harper Hospital, was it only for -- you only went once for the emergency, the day of the accident?
A. Yes.
Q. And Dearborn Pain Specialists, you are still going to Dr. Shukr once a month, correct?
A. Yes.
Q. And he's providing prescriptions for medications. Does he do that every month or does he do that every three months?
A. Every month.
Q. So you have to go to Dearborn Pain Specialists in order to get your prescriptions refilled, correct?
A. Yes.
Q. And We Care no longer -- or were no longer getting physical therapy there. I see that you went to Focus Imaging at some point; is that correct?
A. Yes.
Q. For MRIs?
A. Yes.
Q. Who prescribed that?
A. Pain Management.

Page 48

Q. Is that Dr. Shukr?
A. Yes.
Q. It seemed like to me -- and just correct me if I'm wrong -- you go to Focused (sic) Imaging and you get a lot of films at one time?
A. Yes.
Q. So let's talk about what type of MRIs were -- did you get, and were they all on one day?
A. Yes.
Q. Go ahead.
A. I just know that they scanned my upper body and my back, I believe. I'm not sure exactly what it's called.
Q. So I see the -- an MRI of your neck?
A. Yes.
Q. And was it -- how long were you at -- it looks like it was Focused Imaging. So were you picked up and taken to Focused Imaging as well?
A. Yes.
Q. Again, did anybody talk to you about having to pay for that transportation?
A. No.
Q. And did you sign anything with regard to the transportation?
A. I can't recall.

RECEIVED by MSC 7/19/2024 9:17:32 AM

Page 49

Q. And did you order the transportation or did Focus Image (sic) order it for you when you made your appointment?
A. The Pain Management ordered it, I believe.
Q. So that would be Dearborn Pain Specialists?
A. Yes.
Q. Again, do you know if they have any type of ownership interest in Focused Imaging?
A. No.
Q. No, you do not know?
A. I don't know.
Q. When Dr. Shukr ordered these MRIs, did he say, "I'm ordering MRIs, you can go anywhere you want", or did he order the MRIs and said that you have an appointment to go to Focused Imaging or that we will schedule the MRIs at Focused Imaging?
A. I can't recall.
Q. So I see that it's an MRI of the neck, the MRI of the lower and upper back, the thoracic and lumbar spine; is that correct?
A. Yes.
Q. And then is that it? Are those the only MRIs that were taken on that day?
A. Yes.
Q. Were there MRIs taken to any other part of your body

Page 50

at any other time after this accident?
A. No.
Q. Do you know if any of those MRIs indicated that you had a disc bulge or herniation? Did you talk to your doctors about it?
A. Yes. I can't remember exactly what they said, but I know they had said I had tears in my neck and in my back.
Q. Tears in your neck and your back?
A. Yes.
Q. We got you at the ER. We have -- we talked about physical therapy. Have you gone to any other locations for physical therapy outside of We Care Physical Therapy?
A. No.
Q. Any other pain management facilities outside of Dearborn Pain Specialists?
A. No.
Q. We got the focal imaging because we talked about the three MRIs, and those were the only MRIs that were taken after the emergency room, correct?
A. Correct.
Q. We talked about the various transportation companies and -- now, I see that you're doing -- are you doing urine tests every time you go to Dearborn Pain

Page 51

Specialists or do you do it every other -- when does that happen?
A. Every time.
Q. Every time, every month?
A. Yes.
Q. Have you ever indicated to Dr. Shukr or anybody at Dearborn Pain Specialists that you had a drug problem at any time?
A. No.
Q. So I'm not quite understanding. Do you know why you have to take a drug screen every time you go there? Has that ever been explained?
A. No.
Q. Because it seems to me that you're being prescribed medication, but you're taking them as needed, correct?
A. Yes.
Q. So they're not always going to be in your system. Have they ever talked to you about a time when they've done a drug screen and they've noticed that you're -- the medications that have been prescribed are not in your system? Have you ever had a conversation like that to any of the doctors?
A. No.
Q. Why do you think you have to take a drug screen every time you go?

Page 52

A. To see if it's in my system. I'm not sure.
Q. But it seems like if it's in your system, you're not -- you don't know if it's being -- and it looks like it's a couple of -- so are you doing the urine, meaning at Dearborn Pain Specialists, after you see the doctor, whatever? Is it normal for you to give a urine sample --
A. Yeah, they --
Q. -- to them?
A. -- as soon as I walk in, they give me a cup.
Q. Are they doing any type of blood draws or anything?
A. No.
Q. Again, have you been -- have you received any billing from any type of drug testing facility saying that there's bills that are due and owed?
A. No.
Q. So would you -- would you think that the drug test or the urine test is going to be screened by the doctor at Dearborn Pain Specialists or do you think that that's going to be sent out somewhere; do you know?
A. I'm not sure.
Q. Now, we talked about all of the facilities and doctors that I have on my witness list. Are there any other doctors or facilities that you're getting treatment

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 53

with or you receive treatment at that we haven't discussed?
A. No.
Q. And you know that at some point you were sent to a doctor on behalf of the insurance company; is that correct?
A. Yes, yes, yes.
Q. And you appeared for that, correct?
A. Yes.
Q. Now, do you know if the insurance company said based on this doctor's evaluation of you that the treatment was no longer reasonable? Do you remember getting a letter like that?
A. Yes.
Q. And you continued to treat after?
A. Yes.
Q. And -- and you knew that at that point after treating, that the insurance company was not going to consider payment after they denied your bills due to this report, correct?
A. Yes.
Q. Did you have any conversations with any of your doctors regarding that report?
A. No.
Q. All right.

Page 54

And do you know -- and you said that you don't need, you can take care of cleaning your house yourself, correct?
A. Yes.
Q. And you can get dressed by yourself and take your own shower?
A. Yes.
Q. Okay.
MS. DUENAS: That's all I have.
MR. MAKLED: All right. Thanks, Arminia.
MS. DUENAS: Thank you very much. Thank you. I will take a copy and a mini.
COURT REPORTER: Electronic?
MS. DUENAS: Yes.
COURT REPORTER: Dan, would you like to order a copy?
MR. MAKLED: I'll take the same.
(Deposition concluded at 2:11 P.M.)
- - -

Page 55

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

Certificate of Notary Public

I certify that this transcript is a complete, true, and correct record of the testimony of the witness held in this case.

I also certify that prior to taking this deposition, the witness was duly sworn or affirmed to tell the truth.

I further certify that I am not a relative or an employee of or an attorney for a party; and that I am not financially interested, directly or indirectly, in the matter.

In witness whereof, I have hereunto set my hand this 8th day of April, 2022, at Rochester Hills, Michigan, County of Oakland, State of Michigan.

LORY A. HELLAND, CER-#3778
Notary Public, Oakland County, Michigan
My Commission Expires: 02/15/26

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Exhibit C

RECEIVED by MSC 7/19/2024 9:17:32 AM

21-011402-NF FILED IN MY OFFICE Cathy M. Garrett WAYNE COUNTY CLERK 6/28/2022 2:51 PM Lori Fletcher

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CAROLINDA NAISHE SWOOPE,

Plaintiff,

vs.

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant.

Case No. 21-011402 -NF
Hon. Dana Margaret Hathaway

Daniel B. Makled (P78777)
Hall Makled P.C.
Attorneys for Plaintiff
23756 Michigan Avenue, Suite 300
Dearborn, Michigan 48123
(313) 582-7930 / (313) 582-7962 (fax)
dmakled@hallmakled.com

Arminia Duenas (P67090)
Conlin, McKenney & Philbrick, P.C.
Attorneys for Defendant CICM
350 South Main St., Suite 400
Ann Arbor, MI 48104
(734) 761-9000 / (734) 761-9001 (fax)
ADuenas@cmplaw.com
Yvonne@cmplaw.com

NOTICE OF HEARING

PLEASE TAKE NOTICE that *Defendant's Motion For Summary Disposition for Nonpermissive Use* will be brought on for hearing before the Honorable Dana Margaret Hathaway on ***a date and time to be set by the court*** or as soon thereafter as counsel may be heard.

Respectfully submitted,
CONLIN, McKENNEY & PHILBRICK, P.C.
Attorneys for Defendant CICM

By: */s/Arminia Duenas*
Arminia Duenas (P67090)
350 S. Main Street, Suite 400
Ann Arbor, MI 48104-2131
(734) 761-9000

Dated: June 28, 2022

PROOF OF SERVICE

The undersigned certifies that she served a copy of the attached documents to be served upon the parties and/or attorneys of record for all parties at their respective business addresses on **June 28, 2022** via:

☐ Overnight Mail ☒ **E-File & Serve**

/s/Yvonne M. Rush
Yvonne M. Rush

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CAROLINDA NAISHE SWOOPE,

Plaintiff,

vs.

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant.

Case No. 21-011402 -NF
Hon. Dana Margaret Hathaway

Daniel B. Makled (P78777)
Hall Makled P.C.
Attorneys for Plaintiff
23756 Michigan Avenue, Suite 300
Dearborn, Michigan 48123
(313) 582-7930 / (313) 582-7962 (fax)
dmakled@hallmakled.com

Arminia Duenas (P67090)
Conlin, McKenney & Philbrick, P.C.
Attorneys for Defendant CICM
350 South Main St., Suite 400
Ann Arbor, MI 48104
(734) 761-9000 / (734) 761-9001 (fax)
ADuenas@cmplaw.com
Yvonne@cmplaw.com

DEFENDANT CITIZENS INSURANCE COMPANY OF THE MIDWEST'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant CITIZENS INSURANCE COMPANY OF THE MIDWEST ("Defendant") by and through its attorneys, CONLIN, McKENNEY & PHILBRICK, P.C., and for its Motion for Summary Disposition states as follows:

1. The accident giving rise to this claim that occurred on or about October 27, 2020, in which Plaintiff Carolinda Swoope ("Plaintiff") alleges she was involved in a vehicle accident that occurred on Trumbull Avenue and Fisher Service Drive in Detroit, Michigan (the "Accident"), and claims to have suffered injuries in the Accident and made claims for No-Fault personal protection insurance ("PIP") benefits.

2. Citizens Insurance Company of the Midwest ("Defendant") is the servicing insurer for the PIP claim by assignment through the Michigan Automobile Insurance Placement Facility (MAIPF), because Plaintiff alleged there was not a policy of no-fault insurance identified that

RECEIVED by MCOA 2/13/2023 1:33:53 PM

would cover the subject accident.

3. On September 2, 2021, Plaintiff filed a complaint alleging that Defendant failed to pay medically necessary, reasonable, and related no-fault PIP benefits and has demanded replacement services, attendant care and medical expenses for the excessive amounts of treatment after this accident. **(Exhibit A, Complaint)**

4. MCL 500.3113(a) states as follows:

> 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. (a) The person was willingly operating or willing using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have know that the motor vehicle or motorcycle was taken unlawfully.

5. In this case, MCL 500.3113(a) bars Plaintiff from obtaining PIP benefits because she took the vehicle unlawfully and did not reasonably believe that she had permission to use the car.

6. Plaintiff violated the MCL 500.3113 when she took Ms. Kandice Valentine's 2008 Saturn Vue, VIN: 3GSCL33P385691872 ("Vehicle") "unlawfully" without the owner's consent, permission, or authorization to take and/or use the Vehicle.

7. In this case, the deposition of Plaintiff was recently conducted, and she testified that unequivocally that she never operated Ms. Valentine's Vehicle prior to the date of the accident and that she did not ask permission to operate the Vehicle on the date of the accident. **(Exhibit B, Plaintiff Deposition).**

8. Plaintiff also testified that she did not have a valid driver's license, and therefore did not have a reason to believe that she was permitted to legally operate any vehicle let alone Ms. Valentine's Vehicle on the date of the accident. **(Exhibit B, Plaintiff's Deposition, pg. 8 lines 8-25)**

9. In her Application for Benefits, Plaintiff made misrepresentations as to her requesting permission to operate Ms. Valentine's vehicle. Plaintiff testified multiple times that

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

she did not ask permission to operate the Vehicle, which makes her use of the Vehicle "unlawful taking". **(Exhibit C, Application of Benefits with Fraud Warning)**

10. Additionally, Plaintiff was provided with the *Fraud Warning* multiple times when applying for No-Fault benefits through MAIPF as follows:

> *A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part or in support of a claim to the Michigan Assigned Claims Plan maintained by the Michigan Automobile Insurance Placement Facility for payment or any other benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under section 4503 that is subject to the penalties imposed under section 4511.* ***A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.*** **(Exhibit C, Application For Benefits with Fraud Warning)**

11. MCL 500.3173a provides that, in the context of Assigned Claims Facility (ACF) no-fault claims, the no-fault claim becomes ineligible for payment of benefits if a person presents or causes to be presented an oral or written statement containing false information concerning a fact or thing material to the claim.

12. Discovery in this matter clearly establishes that Plaintiff has made significant misrepresentations and provided false statements concerning a fact or thing material to her claim. **(Exhibit C, Application For Benefits with Fraud Warning)**

13. Plaintiff indicated in the Application for Personal Injury Protection Benefits, paragraph 42(g), that she asked permission to use the Vehicle, "yes" and (k) that she had permission to operate the Vehicle, "yes", which are significant misrepresentations and false information concerning her claim. **(Exhibit C, Application For Benefits with Fraud Warning)**

14. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a clam by the pleadings alone, unsupported by any other documentary evidence Simko v. Blake, 448 Mich 648, 654, 532 NW2d (1995). A motion for summary disposition should be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v. Dept of Corrections,* 439 Mich 158, 163 (1992).

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

15. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the Complaint. In evaluating a motion brought under MCR 12.116(C)(10), a court considers pleadings, depositions, admissions and documentary evidence filed or submitted in the action, in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109 (1999). A trial court may grant the motion brought under MCR 2.116(C)(10) if there is no genuine issue with respect to any material facts, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446 (1999). However, "[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden,* 461 Mich at 121. The reviewing court should evaluate the motion by "considering the substantively admissible evidence actually proffered in opposition to the motion." *Id.* However, a mere promise to provide evidence to support a claim is insufficient. *Id.*

16. This Court should grant Defendant's summary disposition based on the clear wording of MCL 500.3173a and MCL 500.3113 and rule, as a matter of law, that Plaintiff's claim is ineligible for no-fault PIP payments or benefits because she took the vehicle unlawfully, did not reasonably believe that she had permission to use the vehicle and she made false statements made on her Application for Benefits. **(Exhibit D, Proposed Order)**

WHEREFORE Defendant CITIZENS INSURANCE COMPANY OF THE MIDWEST, respectfully requests this Honorable Court enter an Order granting summary disposition and dismiss Plaintiff's no-fault PIP claims with prejudice and award attorney's fees and costs for the defense of this frivolous matter.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Respectfully submitted,

CONLIN, McKENNEY & PHILBRICK, P.C.
Attorneys for Defendant CICM

By: /s/Arminia Duenas
Arminia Duenas (P67090)
350 S. Main Street, Suite 400
Ann Arbor, MI 48104-213
(734) 761-9000

Dated: June 28, 2022

PROOF OF SERVICE

The undersigned certifies that she served a copy of the attached documents to be served upon the parties and/or attorneys of record for all parties at their respective business addresses on **June 28, 2022** via:

☐ Hand Delivery ☐ Facsimile
☐ Overnight Mail ☒ **E-File & Serve**

/s/Yvonne M. Rush
Yvonne M. Rush

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CAROLINDA NAISHE SWOOPE,

Plaintiff,

vs.

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant.

Case No. 21-011402 -NF
Hon. Dana Margaret Hathaway

Daniel B. Makled (P78777)
Hall Makled P.C.
Attorneys for Plaintiff
23756 Michigan Avenue, Suite 300
Dearborn, Michigan 48123
(313) 582-7930 / (313) 582-7962 (fax)
dmakled@hallmakled.com

Arminia Duenas (P67090)
Conlin, McKenney & Philbrick, P.C.
Attorneys for Defendant CICM
350 South Main St., Suite 400
Ann Arbor, MI 48104
(734) 761-9000 / (734) 761-9001 (fax)
ADuenas@cmplaw.com
Yvonne@cmplaw.com

BRIEF IN SUPPORT OF DEFENDANT CITIZENS INSURANCE COMPANY OF THE MIDWEST'S MOTION TFOR SUMMARY DISPOSITION

NOW COMES Defendant CITIZENS INSURANCE COMPANY OF THE MIDWEST ("Defendant") by and through its attorneys, CONLIN, McKENNEY & PHILBRICK, P.C., and hereby submits its BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION, to wit:

FACTUAL SUMMARY

This Motion is for summary disposition as to the claims of Plaintiff, against Defendant, named assignee of the MACP. Plaintiff submitted an Application for Benefits alleging that she became injured following an October 27, 2020, vehicle accident during which she was operating a 2008 Saturn Vue ("Vehicle") owned by her friend, Ms. Kandice Valentine in which she unlawfully took without a reasonable belief that she had permission to use the Vehicle. (**Exhibit C, Application for Benefits with Fraud Warnings**) In addition, Plaintiff indicated in her

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Application of Benefits that she had permission to operate the uninsured Vehicle, which is a clear false statement and misrepresentation. (**Exhibit C, Application for Benefits with Fraud Warnings**)

Dismissal of Plaintiff's claim in this matter is appropriate on the basis that she unlawfully took and operated the Vehicle, *she lacked permission of the owner to take or operate the Vehicle*, disqualifying her under MCL 500.3113(a), she did not have a driver's license, which also supports that fact that she did not have a reasonable belief that she was legally permitted to operate the vehicle, and she made false statements and misrepresentations in her Application for Benefits as to permissive use. (**Exhibit C, Application for Benefits with Fraud Warnings**) Plaintiff testified that she did not ask permission to use the Vehicle and took same unlawfully, which disqualified her under MCL 500.3113(a) for no-fault PIP benefits related to the subject accident. Due to same, Plaintiff does not have a valid claim for no-fault PIP benefits, and her no-fault PIP claims that arise out of her operation of the Vehicle on October 27, 2020, must be dismissed with prejudice pursuant to MCL 500.3113(a) and MCL 500.3173a(4).

STANDARD OF REVIEW

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone, unsupported by any other documentary evidence. *Simko v Blake*, 448 Mich 648, 654, 532 NW2d 842 (1995). A motion for summary disposition should be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dept of Corrections*, 439 Mich 158, 163 (1992).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the Complaint. In evaluating a motion brought under MCR 2.116(C)(10), a court considers pleadings, depositions, admissions and documentary evidence filed in the action or submitted in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109 (1999). A trial court may grant the motion brought under MCR 2.116(C)(10) if there is no genuine issue with respect to any material

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

facts, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446 (1999). However, "[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden,* 461 Mich at 121. The reviewing court should evaluate the motion by "considering the substantively admissible evidence actually proffered in opposition to the motion." *Id.* However, a mere promise to provide evidence to support a claim is insufficient. *Id.*

LAW AND ANALYSIS

1. Michigan Law Provides that Statutes Must Be Interpreted as Written.

The primary goal of statutory construction is to give effect to the Legislature's intent. *Briggs Tax Serv, LLC v Detroit Public Schools,* 485 Mich 69, 76; 780 NW2d 753 (2010). The court should begin with a review of the statutory language. *Id.* If the statutory language is clear and unambiguous, the court must then presume that the Legislature intended the clear meaning expressed in the statute. *Id.* Judicial construction of an unambiguous statute is neither required nor permitted. *In re MCI Telecom Complaint,* 460 Mich 396, 411, 596 NW2d 164 (1999); see also *Frankenmuth Mut Ins Co v Marlette Homes, Inc,* 456 Mich 511, 515; 573 NW2d 611 (1998).

The primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp,* 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide courts with the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascertaining legislative intent, Michigan courts are mandated to give effect to every word, phrase, and clause in the statute. *Id.* Courts must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id.*

A court should consider the plain meaning of a statute's words and their "placement and purpose in the statutory scheme." *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

119 (1999). "Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted." *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937); see also *People v Wright,* 432 Mich 84, 92, 437 NW2d 603 (1989).

In this case, MCL 500.3173a(4) is a clearly written statute. The intent of the Legislature is clear from the wording of the statute. There is no doubt that the Legislature intended to provide a strong penalty for abuse of the assigned claim plan provisions contained in Michigan's No-Fault Act. There is nothing unclear or ambiguous about the statute.

2. MCL 500.3173a Bars A Person's Claim When That Person Submits False Information In Support of a Claim Made Through the Assigned Claims Plan.

The Legislature has clearly spoken in MCL 500.3173a(4). There is no question that the statute was written to combat the growing fraud prevalent in Michigan No-Fault Claims. The strong wording of MCL 500.3173a was meant to eliminate claims when the person making the claim submits false information in support of the claim.

MCL 500.3173a(4) provides:

> (4) A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan automobile insurance placement facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under section 4503 that is subject to the penalties imposed under section 4511. A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.

The clear wording of MCL 500.3173a(4) establishes strict penalties to be enforced against those who make applications for assigned claim benefits and then proceed to submit false information in support of the claim.

MCL 500.3173a(4) contains a criminal fraud provision and contains a provision that makes the claim ineligible for any payment or benefit. The threshold determination for MCL 500.3173a is whether the person presents or causes to be presented an oral or written statement

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

knowing that the statement contains false information material to the claim. *See* MCL 500.3173a(4). Once it is determined that such false information is presented, the statute provides for criminal penalties and provides for a penalty to the entirety of the claim. *See* MCL 500.3173a(4).

MCL 500.3173a(4) mandates that those who present false information in support of a claim have committed a fraudulent insurance act. Specifically, MCL 500.3173a(4) indicates that false statements made in assigned claimed plan claims amount to fraudulent insurance acts under MCL 500.4503 and are subject to criminal penalties and fines under MCL 500.4511.

Secondly, MCL 500.3173a(4) indicates that the person's claim becomes ineligible for payment or benefits under the assigned claims plan once it is determined that false information is submitted in support of the claim:

> A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.

The clear wording of the statute is that when it is determined that the claim either "contains" or "is supported by" a fraudulent insurance act, i.e. false information material to the claim, the claim is no longer payable. This Court should note that MCL 500.3173a(4) makes the "claim" become ineligible for any "payment." *See* MCL 500.3173a(4) MCL 500.3173a(4) also makes the "claim" ineligible for any "benefits." *See* MCL 500.3173a(4).

MCL 500.3173a(4) deems a claim ineligible upon evidence that false information was supplied for benefits. The clear wording of the statute is that such a claim that was eligible through the ACF becomes ineligible as a penalty for making the fraudulent presentation of information. MCL 500.3173a(4) also establishes that such false statements constitute criminal insurance fraud.

Based on the clear wording of MCL 500.3173a(4), the statute is an expression of the Legislature's power to strip away the assigned claim plan insurance coverage by making the

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

claim ineligible when a person abuses the system. MCL 500.3173a(4) is a clear mandate by the Legislature against those who would abuse the no-fault act and produce false statements in support of an assigned claim, which makes such conduct criminal and a complete bar to further claims through the assigned claims plan.

The use of the term "claim" as being ineligible for "payment" or "benefits" was intended by the Legislature to show that the overall "claim" supported by fraudulent information would not be payable for any future "payment" and was not eligible for any future "benefit."

This Court should note that the use of the word "claim" is a direct reference to MCL 500.3172(1), which provides that a person who is entitled to a "claim" may apply for a claim through the assigned claims plan and obtain "benefits." The wording of MCL 500.3172(1) clearly contemplates that the larger claim can be made to obtain benefits.

In MCL 500.3173a(4), the Legislature utilizes language similar to MCL 500.3172(1), and clearly intends that a "benefit" is a smaller subset of a "claim." This Court should note the use of the plural benefits as the intent to eliminate more than one benefit. Therefore, MCL 500.3172a(4) does not intend to eliminate only the fraudulent benefit but intends to make the entire claim ineligible for any benefits.

There is no question that the Legislature intended that, upon the showing of submission of false information, MCL 500.3172a(4) would make a person's no-fault PIP claim ineligible for any payment or any benefits and would effectively bar the claim.

3. MCL 500.3113(a) Bars a Person's Recovery for No-Fault PIP Benefits if that Person is Operating a Vehicle Through an Unlawful Taking

MCL 500.3113(a) states:

> 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: (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.

In addition, MCL 500.3173 confirms that a person disqualified pursuant to the unlawful

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

taking statute is also disqualified from benefits under the Assigned Claims Plan. "A person who because of a limitation or exclusion in sections 3105 to 3116 is disqualified from receiving personal protection insurance benefits under a policy otherwise applying to his accidental bodily injury is also disqualified from receiving benefits under the assigned claims plan." MCL 500.3173.

The Michigan Supreme Court recently analyzed the two above-cited unlawful takings statutes into context of the Michigan No-Fault Act's disqualification of "unlawful takers" and specifically found that both MCL 750.413 and MCL 750.414 triggered the disqualification in MCL 500.3113(a). Specifically, the Supreme Court in *Spectrum Health v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503 (2012), held that the phrase "taking unlawfully" in MCL 500.3113(a) applies to anyone, including a family member, who takes a vehicle without the authority of the owner, regardless of whether the person intended to steal it. *Id.*

4. Plaintiff is Barred from No-Fault PIP benefits because She did not have Permission to Operate the Vehicle, Was Not Legally Permitted to Operate the Vehicle and Provided False Statements and Misrepresentations in Her Application for Benefits

In this case, Plaintiff, admitted in her Application for Benefits, that in order to use the vehicle she required permission. Specifically, Plaintiff answered "yes" to the question of whether she had permission to drive the accident vehicle. **(Exhibit C, Application of Benefits with Fraud Warnings, paragraph 42 (g) and (k))** However, her responses to questions 42(g) and 42(k) were false statements and misrepresentations, because Plaintiff testified that she did not have any conversation or contact with Ms. Valentine regarding using the vehicle prior to her illegal taking of same on the date of the accident. She had **not been given permission to use the Vehicle** on the day of the Accident.

Q. And you asked to borrow someone's vehicle; is that correct?
A. **I didn't ask**, I just got the car because I had a family emergency. My mom needed to go to the hospital. So I was trying to hurry up to get to her.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

(Exhibit B, Plaintiff's Deposition, pg. 9, lines 1-6)

Although, Plaintiff indicated that she took the Vehicle due to an emergency with her mother, it is simply **untrue**:

- An ambulance was **not** called for her mother.
- Plaintiff grabbed the keys to the Vehicle, did not request permission to operate the Vehicle, and **drove to Burger King on the way to her mother's house. (Exhibit B, Plaintiff's Deposition, pg. 37, line 8-16)**
- Further, after the accident, Plaintiff **ordered an Uber** to pick her up from the scene of the accident and drive to her mother's house. **(Exhibit B, Plaintiff's Deposition, pg. 39, lines 2-5)**
- Both she and her mother were **treated and released on the date of the accident. (Exhibit B, Plaintiff's Deposition, pg. 41, lines 4-7)**

There was clearly **no** emergency, and even if it was, there is no "emergency" exception to the "permissive use" and "lawful taking" requirement. Plaintiff was aware that she had other legal options, such as calling an ambulance for her mother or ordering an Uber, prior to taking the Vehicle.

A taking of a vehicle does **not** have to be larcenous to qualify as "unlawful," and the statute providing that personal protection insurance benefits for bodily injury in automobile accident are not available if the person **using** the vehicle had taken the vehicle unlawfully applies to any person who takes a vehicle without the owner's authority, regardless of whether that person had the intent to steal the vehicle. MCL 500.3113(a).

Besides testifying she did not request or receive permission to use the Vehicle, Plaintiff testified that she **never operated the vehicle prior to the date of the accident**, and therefore had no reasonable expectation that she could operate the Vehicle.

14 So have you ever used this vehicle that
15 you -- that's involved in this accident before this

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

date?
A. **No.**
Q. Never at any point?
A. **No.**
Q. And you didn't ask for permission to use the vehicle?
A. **No.**
Q. So is it fair to say you had no permission to operate this vehicle at the time that you were operating it?
A. **Correct.**

(Exhibit B, Plaintiff's Deposition, pg. 10, lines 14-24)

Plaintiff also stated in her Application for Benefits that she never operated the vehicle prior to the date of the accident but had permission or had obtained permission prior to using the Vehicle. **(Exhibit C, Application for Benefits with Fraud Warnings, paragraph 42 (g) and (k))** It is likely that Plaintiff, as have many before her, misrepresented her permissive use in her Application for Benefits in an effort to avoid immediate rejection of her application. But the undisputed facts discovered through appropriate investigation directly contradict her responses on her application. Plaintiff clearly testifies she never received permission and additionally had no reasonable belief she was permitted, or otherwise authorized to take the Vehicle. The Application for Benefits was also signed by Plaintiff with the attestation that the information contained is true and accurate and with the fraud warning that false statements contained therein (or otherwise submitted as part of or in support of a claim for benefits) constitutes a fraudulent insurance act and makes the claim ineligible for benefits. **(Exhibit C, Application for Benefits with Fraud Warnings)** Her testimony contradicts her prior statement. **(Exhibit B, Plaintiff's Deposition, pg. 9, lines 1-6)**

Q. So how did you get the keys to the vehicle?
A. **I just took them.**

(Exhibit B, Plaintiff's Deposition, pg. 9, lines 7-8)

Furthermore, Plaintiff did not have a valid driver's license on the date of the accident and had no expectation to legally be able to operate the vehicle on the date of loss: At the time of the subject accident, Plaintiff did not have a valid driver's license and had not had a Michigan driver's license for the years prior to the accident. **(Exhibit B, Plaintiff's Deposition, pg. 8,**

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

lines 4-25)

Plaintiff had no reasonable expectation that she could legally operate the vehicle because she was not permitted to operate the Vehicle by the State of Michigan, as she had no driver's license at the time of the subject accident.

Q. Is it because you don't have a driver's license?
A. **Yes.**
Q. Have you ever owned a driver's license?
A. Yes.
Q. And what happened to your driver's license?
A. It got revoked because I had tickets to pay and I didn't pay them.
Q. And at that time of this October 27th, 2020, accident, were you driving on a revoked license?
A. **Yes. It was suspended, I'm sorry.**
Q. I'm sorry, suspended?
A. **Yeah**.
Q. How long has your driver's license been suspended?
A. I'm not sure.
Q. Has it been years?
A. **Yes.**
Q. And when you were -- you were driving the vehicle at the time of this accident; is that correct?
A. **Yes.**
Q. And you knew at the time of the accident that you did not have a valid driver's license; is that correct?
A. **Yes.**

(Exhibit B, Plaintiff's Deposition, pg. 8, lines 4-25)

In addition to Plaintiff taking the Vehicle unlawfully, as a matter of law, she could not reasonably believe that she was entitled to use the Vehicle when she knew that she was unable to legally operate the vehicle. Plaintiff was not a licensed driver at the time of the subject accident and there was no good reason here to believe she entitled to take the Vehicle without permission when it was illegal for her to drive on any Michigan road. Furthermore, if it were driven on a road when it was uninsured and was involved in an Accident and the occupants were injured in the accident, and a claim made to the MACP, such as the case here, then Ms. Valentine would be the person ultimately responsible for all amounts paid under the MACP claims.

If the evidence is viewed in the light most favorable to Plaintiff (meaning her statements

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

are presumed to be true), these statements establish that Plaintiff never operated the Vehicle prior to the subject accident and never asked permission to operate the vehicle on the date of the accident. Plaintiff violated the law by illegally taking Ms. Valentine's Vehicle and is disqualified from benefits pursuant to MCL 500.3113.

CONCLUSION

Taking all evidence together, on October 27, 2020, Plaintiff unlawfully took a vehicle that did not belong to her without permission from the owner of the Vehicle and did not have reasonable belief she was legally permitted to operate the Vehicle without a valid Michigan driver's license. Plaintiff's taking of the Vehicle was unlawful and she made misrepresentations and false statements in her Application for Benefits, and as a result she is disqualified from receiving no-fault PIP benefits and Defendant is entitled to summary disposition.

WHEREFORE Defendant CITIZENS INSURANCE COMPANY OF THE MIDWEST, respectfully requests this Honorable Court enter an Order granting summary disposition and dismiss Plaintiff's no-fault PIP claims with prejudice and award attorney's fees and costs for the defense of this frivolous matter.

Respectfully submitted,

CONLIN, McKENNEY & PHILBRICK, P.C.
Attorneys for Defendant CICM

By: /s/Arminia Duenas
Arminia Duenas (P67090)
350 S. Main Street, Suite 400
Ann Arbor, MI 48104-213
(734) 761-9000

Dated: June 28, 2022

PROOF OF SERVICE

The undersigned certifies that she served a copy of the attached documents to be served upon the parties and/or attorneys of record for all parties at their respective business addresses on **June 28, 2022** via:

☐ Hand Delivery ☐ Facsimile
☐ Overnight Mail ☒ **E-File & Serve**

/s/Yvonne M. Rush
Yvonne M. Rush

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

EXHIBIT

A

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Approved, SCAO | Original - Court, 1st Copy- Defendant | 2nd Copy - Plaintiff, 3rd Copy -Return

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT WAYNE COUNTY	SUMMONS	CASE NO. 21-011402-NF Hon.Dana Margaret Hathaway

Court address : 2 Woodward Ave., Detroit MI 48226 | Court telephone no.: 313-224-2444

Plaintiff's name(s), address(es), and telephone no(s)		Defendant's name(s), address(es), and telephone no(s).
Swoope, Carlonda Naishe	v	Citizens Insurance Company of the Midwest
Plaintiff's attorney, bar no., address, and telephone no Daniel B. Makled 78777 23756 Michigan Ave Ste 300 Dearborn, MI 48124-1853		

Instructions: Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (form MC 21). The summons section will be completed by the court clerk.

Domestic Relations Case

- ☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
- ☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (form MC 21) listing those cases.
- ☐ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

Civil Case

- ☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035
- ☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
- ☐ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
- ☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has

been previously filed in ☐ this court, ☐ _____ Court,

where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk. **SUMMONS**

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

Issue date	Expiration date*	Court clerk
9/2/2021	12/2/2021	Laverne Chapman

Cathy M. Garrett- Wayne County Clerk.

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

MC 01 (9/19) **SUMMONS** MCR 1.109(D), MCR 2.102(B), MCR 2.103, MCR 2.104, MCR 2.105

THIRD JUDICIAL CIRCUIT OF MICHIGAN

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

SUMMONS
Case No.: **21-011402-NF**

PROOF OF SERVICE

TO PROCESS SERVER: You are to serve the summons and complaint not later than 91 days from the date of filing or the date of expiration on the order for second summons. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NONSERVICE

☐ **OFFICER CERTIFICATE** OR ☐ **AFFIDAVIT OF PROCESS SERVER**

I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party (MCR 2.104[A][2]), and that: (notarization not required)

Being first duly sworn, I state that I am a legally competent adult, and I am not a party or an officer of a corporate party (MCR 2.103[A]), and that: (notarization required)

☐ I served personally a copy of the summons and complaint.

☐ I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint, together with _____
List all documents served with the Summons and Complaint

_____

_____ on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

☐ I have personally attempted to serve the summons and complaint, together with any attachments, on the following defendant(s) and have been unable to complete service.

Defendant's name	Complete address(es) of service	Day, date, time

I declare under the penalties of perjury that this proof of service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Service fee $	Miles traveled $	Fee $	
Incorrect address fee $	Miles traveled $	Fee $	**Total fee** $

_____
Signature

_____
Name (type or print)

_____
Title

Subscribed and sworn to before me on _____ (Date), _____ County, Michigan.

My commission expires: _____ (Date) Signature: _____ (Deputy court clerk/Notary public)

Notary public, State of Michigan, County of _____

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with _____ (Attachments)

_____ on _____ (Day, date, time)

_____ on behalf of _____
Signature

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

21-011402-NF FILED IN MY OFFICE Cathy M. Garrett WAYNE COUNTY CLERK 9/2/2021 12:03 PM Laverne Chapman

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CARLONDA NAISHE SWOOPE

Plaintiff, Case No. 21- NF
Hon.

v.

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant.

DANIEL B. MAKLED (P78777)
HALL MAKLED, P.C.
Attorneys for Plaintiff
23756 Michigan Avenue, Suite 300
Dearborn, Michigan 48124
(313) 582-7930 / F: (313) 582-7962
dmakled@hallmakled.com

PLAINTIFF'S COMPLAINT

A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in Wayne County Circuit Court, where it was given docket number 21-002954-NI and was assigned to Judge Dana M. Hathaway.

/s/ DANIEL B. MAKLED

NOW COMES, Plaintiff, CARLONDA NAISHE SWOOPE, by and through her attorneys, HALL MAKLED, P.C., by DANIEL MAKLED, and for her Complaint against the above-named Defendant CITZENS INSURANCE COMPANY OF THE MIDWEST states as follows:

RECEIVED by MSC 7/19/2024 9:17:32 AM

COMMON ALLEGATIONS

1. Plaintiff, Carlonda Naishe Swoope, at all relevant times, was a resident of Detroit, County of Wayne, State of Michigan.
2. Defendant, CITZENS INSURANCE COMPANY OF THE MIDWEST, is an insurance company, licensed to write insurance and conduct business in the State of Michigan, and that Defendant conducts business in Wayne County, Michigan.
3. The amount in controversy exceeds $25,000.00 exclusive of interest and costs and is otherwise within the jurisdiction of that Honorable Court.
4. On or about October 27th, 2020 Plaintiff, Carlonda Naishe Swoope, was the driver of a 2008 Saturn VUE, bearing Michigan license plate number EFT4389, which she was driving in a prudent and careful manner near Trumbull and Fisher in the City of Detroit, County of Wayne, State of Michigan.
5. On or about October 27th, 2020, Dylan James Clark was the driver of a 2017 FTL Truck which motor vehicle was being driven by Dylan James Clark in a careless, reckless, and negligent manner near Trumbull and Fisher in the City of Detroit, County of Wayne, State of Michigan, when said Defendant did strike the car of the Plaintiff, causing her injuries.
6. That as a result of said collision, Plaintiff, Carlonda Naishe Swoope, did suffer, and will continue to experience for an indefinite time into the future, severe and excruciating pain and suffering, humiliation and embarrassment, loss of earnings, and loss of her natural enjoyments of life, due to his injuries which include but are not limited to injuries to his neck, back, legs, arms, loss of consciousness, post-traumatic stress disorder, severe headaches, traumatic brain injury, among others, all of which constitute a serious impairment of body function and/or serious, permanent disfigurement.

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

COUNT I
CLAIM FOR FIRST PARTY BENEFITS AS TO
DEFENDANT, CITZENS INSURANCE COMPANY OF THE MIDWEST

7. Plaintiff hereby adopts and incorporates by reference each and every allegation contained in paragraphs 1 through 6 of that Complaint as if more specifically set forth herein word for word and paragraph by paragraph.

8. Prior to and including October 27th, 2020, Defendant, CITZENS INSURANCE COMPANY OF THE MIDWEST, issued a policy of no-fault insurance, which policy continued in effect during all times relevant and pertinent to the issues for that Court. Claim Number 46-21004095 was assigned by Defendant and Plaintiff is entitled to benefits under that policy.

9. On October 27th, 2020, Plaintiff was involved in a motor vehicle accident which took place in the City of Detroit, State of Michigan. The collision caused her accidental bodily injuries within the meaning of Defendant's policy and the statutory provision of MCL 500.3105.

10. As a result of the collision, Plaintiff has incurred:

    a. Reasonable and necessary expenses for care, recovery, or rehabilitation, pursuant to MCL 500.3107(1)(a);

    b. Reasonable and necessary replacement services pursuant to MCL 500.310(1)(c); and

    c. Other personal protection benefits in accordance with the applicable no-fault provisions

11. Reasonable proof for full payment of all personal protection insurance benefits has been or will be supplied but Defendant has refused to pay or is expected to refuse to pay in the future.

12. Defendant has unreasonably refused to pay or has unreasonably delayed making proper payments to Plaintiff contrary to MCL 500.3142 and .3148 and continues to do so.

RECEIVED by MCOA 2/13/2023 1:33:53 PM

13. That in the event it should be determined that Plaintiff was suffering from any pre-existing conditions on the day and date of the incidents set forth in that Complaint, then, and in such event, it is averred that the aforementioned accident exacerbated, precipitated and aggravated any such pre-existing conditions, and Defendant is responsible for all no-fault benefits arising therefrom.

14. Defendant insurance company has wrongfully withheld payment of allowable expenses forcing Plaintiff, Carlonda Naishe Swoope, to incur other expenses connected with the subject matter of that action, all of which expenses have been needlessly placed upon Plaintiff by the wrongful actions of Defendant. As such, Plaintiff is entitled to obtain from Defendant interest, costs and a reasonable attorney fee pursuant to the provisions of the no-fault statute.

15. Defendant has had sufficient information to pay all claims, and did not do so within the statutory 30 day time period, set forth under the Michigan No-Fault Act. Therefore, Plaintiff is entitled to attorney fees, costs and interest due to that breach. Plaintiff only seeks no-fault benefits that are past due and presently owed, and that Complaint does not seek future no-fault benefits.

WHEREFORE, Plaintiff, Carlonda Naishe Swoope, respectfully requests that judgement be entered in his favor against Defendants, CITZENS INSURANCE COMPANY OF THE MIDWEST, in an amount in excess of $25,000.00 that is fair, just and reasonable, and which sums include all past-due and presently-owed No-Fault benefits together with interest, costs and no-fault attorney fees. This Complaint does not seek future no-fault benefits past the date that that lawsuit resolves by settlement or trial.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Respectfully submitted:

HALL MAKLED, P.C.
Attorneys for Plaintiff

/s/ Daniel B. Makled
Daniel B. Makled (P78777)
HALL MAKLED, P.C.
Attorney for Plaintiff

Dated: September 2nd, 20201

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

EXHIBIT B

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CARLONDA NAISHE SWOOPE,

Plaintiff,

vs. Case No. 21-011402-NF

Hon. Dana Margaret Hathaway

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant.

/

DEPOSITION OF: CARLONDA NAISHE SWOOPE
DATE: Thursday, March 31, 2022
TIME: 1:05 P.M.
LOCATION: Hall Makled, P.C.
23756 Michigan Avenue
Dearborn, Michigan
REPORTER: Lory Helland, CER-#3778
Certified Reporter

Page 2

APPEARANCES:

DANIEL B. MAKLET P78777
Hall Makled, P.C.
23756 Michigan Avenue
Suite 300
Dearborn, Michigan 48124
313-582-7930
dmakled@hallmakled.com
Appearing on behalf of the Plaintiff.

ARMINIA DUENAS P67090
Conlin, McKenney & Philbrick, P.C.
350 South Main Street
Suite 400
Ann Arbor, Michigan 48104
734-997-2159
aduenas@cmplaw.com
Appearing on behalf of the Defendant.

Page 3

I N D E X

WITNESS PAGE

CARLONDA NAISHE SWOOPE

Examination by Ms. Duenas 7

E X H I B I T S

NUMBER IDENTIFICATION PAGE

None offered.

Page 4

Dearborn, Michigan
Thursday, March 31, 2022
1:05 P.M.

* * *

COURT REPORTER: Before I swear in the deponent, I would like to confirm that all parties agree to allow me to administer the oath to the deponent over the phone. If there is an objection, please state it now.

(No objections.)

CARLONDA NAISHE SWOOPE

having been first duly sworn, was examined and testified as follows:

MS. DUENAS: Let the record reflect that this is the deposition of -- how do you pronounce your first name? Is it Carlonda Swoope?

THE WITNESS: Yes, Carlonda Swoope.

MS. DUENAS: -- of Carlonda Swoope, taken pursuant to Notice and to be used for all purposes under the Michigan Court Rules and the Michigan Rules of Evidence.

Ms. Swoope, my name is Arminia Duenas. I represent Citizens Insurance company, which is an insurance company that's been assigned by the State of Michigan to handle the No-Fault PIP benefits related

Page 5

to this October 27th, 2020, motor vehicle accident.
Have you ever taken a deposition before?
THE WITNESS: Yes.
MS. DUENAS: When was that?
THE WITNESS: When was that?
MR. MAKLED: She had a dep, Arminia, in her bodily injury case.
MS. DUENAS: Okay, for third party.
Is that the only deposition you've ever had, Ms. Swoope?
THE WITNESS: Yes.
MS. DUENAS: So I'm just going to put a couple of the guidelines on so it's just fresh in our minds.
If your answer is "yes", try to say "yes". If it's "no", please say "no".
If you say "uh huh" or "uh uh", one of us will stop you and try to make sure that it's known for the record if that was a "yes" or a "no" because the court reporter is taking down everything that you're saying, and she cannot make a determination as to what your meaning is. So we want to make sure when you answer a question "yes" or "no", and obviously, not all of your answers are going to be "yes" or "no", but when they are, we want there to be a clear "yes" or a

Page 6

clear "no".
Everything has to be verbal. So if you gesture in any way we have to verbalize it for the record, because -- although we're on Zoom, it's not being recorded in a, you know, a CD to be taken to court if this had to go to trial, you know, to that effect.
If you don't understand what I'm asking you, just let me know. I'll rephrase it. I'm really -- this is just a discovery dep. I'm just trying to get some information as to your prior medical history and you're limitations and all of that.
So that's pretty much it -- oh, one last thing, with the State of Michigan, there was a completion of an application, and with that completion of an application for the State of Michigan, the only thing that they require is that there be only truthful information, truthful answers.
I know that you're under oath, but it's very important to know that if there -- if it's determined that there was a material misrepresentation in your statement and/or a false statement, a motion can be filed. So I like to give people notice of that because it's pretty significant when it comes to

Page 7

assigned claims.
Okay?
THE WITNESS: Okay.
EXAMINATION
BY MS. DUENAS:
Q. Please state your full name for the record and spell your last name, please?
A. Carlonda Naishe Swoope, S-W-O-O-P-E.
Q. Have you been known by any other names?
A. No.
Q. So never married; is that correct?
A. No.
Q. What's your date of birth?
A. [redacted]
Q. How old are you?
A. 33.
Q. And what -- are you a U.S. citizen?
A. Yes.
Q. Were you born in the United States?
A. Yes.
Q. What state were you born in?
A. Michigan.
Q. Have you lived in Michigan your entire life?
A. Yes.
Q. Do you have any restrictions related to driving?

Page 8

A. Yes.
Q. Are they restrictions given by a doctor?
A. No.
Q. Is it because you don't have a driver's license?
A. Yes.
Q. Have you ever owned a driver's license?
A. Yes.
Q. And what happened to your driver's license?
A. It got revoked because I had tickets to pay and I didn't pay them.
Q. And at that time of this October 27th, 2020, accident, were you driving on a revoked license?
A. Yes. It was suspended. I'm sorry.
Q. I'm sorry, suspended?
A. Yeah.
Q. How long has your driver's license been suspended?
A. I'm not sure.
Q. Has it been years?
A. Yes.
Q. And when you were -- you were driving the vehicle at the time of this accident; is that correct?
A. Yes.
Q. And you knew at the time of the accident that you did not have a valid driver's license; is that correct?
A. Yes.

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 9

Q. And you asked to borrow someone's vehicle; is that correct?
A. I didn't ask, I just got the car because I had a family emergency. My mom needed to go to the hospital. So I was trying to hurry up to get to her.
Q. So how did you get the keys to the vehicle?
A. I just took them.
Q. So are you living with someone that has a vehicle?
A. No.
Q. So where were you when you took the keys to this vehicle?
A. I was at my friend's house in Westland.
Q. What type of vehicle was it?
A. A Saturn Vue.
Q. And whose vehicle -- who's the owner of the vehicle?
A. Kandice Valentine.
Q. You said Kandice Valentine is your friend; is that correct?
A. Yes.
Q. So you're at Kandice's house at the time of the accident -- on the date of accident. What were you doing at Kandice's house in Westland?
A. We were -- I just spent the night over her house and I left that morning to go take care of my mother.

Page 10

Q. How did you get over to the house?
A. She picked me up.
Q. And then tell me how -- so you're there the day before, which would be October 26th; is that correct?
A. Yes.
Q. And you spend the night, and at what point and what time do you take the vehicle?
A. I can't recall exactly what time, but I know it was during the morning, late morning. My mother called me and told me her chest was hurting, and the ambulance wasn't coming fast enough. So I tried to get there as fast as possible.
Q. Okay. Sorry, I thought I was going to --
So have you ever used this vehicle that you -- that's involved in this accident before this date?
A. No.
Q. Never at any point?
A. No.
Q. And you didn't ask for permission to use the vehicle?
A. No.
Q. So is it fair to say you had no permission to operate this vehicle at the time that you were operating it?
A. Correct.
Q. So prior to beginning this deposition, we talked about

Page 11

what type of PIP benefits are being alleged in this accident, and you're not making a wage loss claim; is that correct?
A. Correct.
Q. And you're not making a replacement care claim, which is like someone coming in and cleaning your house or doing household chores; is that correct?
A. Correct.
Q. And you're not making an attendant care claim; is that correct?
A. What's that?
Q. Well, that's like nursing, helping you in and out of the shower, getting dressed.
A. That's correct.
Q. This is purely for medical billing, correct?
A. Yes.
Q. Now, I don't see it on you, that's why I'm asking. I'm also on Zoom. Are you wearing a brace to any part of your body?
A. Not right now, no.
Q. Was there a doctor that prescribed a brace after this accident?
A. Yes.
Q. And what doctor prescribed the brace?
A. Dr. Shukr.

Page 12

Q. Where does Dr. Shukr work out of?
A. Pain Management, Michigan Pain. It's on Woodward.
Q. Let me just -- I'm going to pull up your -- the witness list that I have just so that -- is it Dearborn Pain Specialists?
A. Excuse me?
Q. Or is it -- let's see. This will help me. I'm going to move right to the -- Dr. Shukr. Oh, Shukr, S-H-U-K-R?
A. Yes.
Q. That's Dearborn Pain Specialists. So Dr. Mustafa Mohamad Shukr?
A. Yes.
Q. From Dearborn Pain Specialists, prescribed what type of brace?
A. A back brace, but his -- he has two locations. I go to the one on Woodward.
Q. Have you ever gone to the one in Dearborn?
A. No.
Q. Are you still getting treatment from Dearborn Pain Specialists?
A. Yes.
Q. When's the last time you received treatment?
A. Last month. I had an appointment today, but I had to reschedule because of the deposition.

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 13

Q. And what type of treatment are you getting from Dearborn Pain Specialists?
A. I get back shots.
Q. How often do you get injections to your back?
A. Once a month, but I haven't been getting them because I was supposed to get nerve surgery, but I've been scared to get it. So I've just been prolonging.
Q. When you say "nerve surgery", do you mean that they're going in to burn a nerve?
A. Yes.
Q. And that's to your back?
A. Yes. Back and neck.
Q. Back and neck?
A. Yes.
Q. Now, do you know if anybody at Dearborn Pain Specialists actually ordered your prior medical records and reviewed them before making any type of recommendations with regard to surgery?
A. I believe so.
Q. Did you have any neck or back pain before this accident?
A. No.
Q. And so you're saying that Dr. Shukr prescribed a back brace, but you're not wearing that today, correct?
A. Correct.

Page 14

Q. Did he prescribe any other braces to any other parts of your body outside your back?
A. No.
Q. Now, I don't see a cane in the room. Have you been prescribed a cane for any purpose, any reason after this accident?
A. No.
Q. Are you a smoker?
A. No.
Q. Are you a medical marijuana holder, a cardholder?
A. No.
Q. Do you smoke marijuana?
A. No.
Q. What's your current address?
A. 14109 Riverview Street. I just moved there last April. At the accident, it was 4722 Trumbull Street.
Q. So you say last April, April 2021, correct?
A. Yes.
Q. And are you living with anyone?
A. Just my two children.
Q. And your two children, is one named Lauren; is that correct?
A. Yes.
Q. How old is Lauren?
A. 16.

Page 15

Q. And is it Drayton?
A. Yes.
Q. How old is Drayton?
A. 12.
Q. Now, I have that you also live with your mother; is that correct, or no?
A. I did.
Q. So did you live with your mother when you lived on Trumbull?
A. Yes.
Q. So from the time of this accident -- how long did you live at 4722 Trumbull in Detroit, Michigan?
A. So I got my house in April, but I didn't move out until maybe June, July, maybe.
Q. But at the time of this accident of October 27th, 2020, you were living at 4722 Trumbull Street, Detroit, Michigan, correct?
A. Yes.
Q. And you were living with your mother and your son and your daughter, correct?
A. Yes.
Q. Anybody else you were living with at that time?
A. No.
Q. Okay.
And how long had you lived on Trumbull

Page 16

Street in that address, or at that address?
A. Maybe three years.
Q. Is that a house or an apartment?
A. It's a townhome.
Q. Townhome?
Is that townhome subsidized by Section 8 or the State of Michigan in any way?
A. Yes.
Q. And is that in your mother's name?
A. Yes.
Q. And when you moved out in April but fully moved out in June or July, the house that you're in now at the 14109 Riverview Street, is that also a Section 8 housing?
A. No.
Q. Are you subsidized in any way from the State of Michigan for that particular address?
A. No.
Q. And is that a house or a townhouse?
A. It's a townhouse, yes.
Q. At the time of the October 27th, 2020, accident, were you working?
A. No.
Q. And you're not currently working, correct?
A. Yes.

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 17

Q. And are you receiving Social Security Disability?
A. No.
Q. How are you paying your bills?
A. I know said I -- I said I worked, yes. I worked.
Q. Oh, you do work? You're currently working?
A. Yes.
Q. I'm sorry. I missed that completely. Where are you working? I'm sorry. Where are you working?
A. I work at Amazon.
Q. How long have you worked at Amazon?
A. Since November.
Q. Of last year or the year before?
A. Of last year.
Q. And what do you do there?
A. Just move the little, small package. They have me -- what is it called when you get like --
Q. Restricted?
A. Yeah, I have restrictions, yes.
Q. What type of restrictions do you have?
A. They give me four extra breaks, and I don't lift anything over 20 pounds. Just small packages that I move and scan. I scan it on a robot.
Q. So they hired you after this accident knowing that you had these restrictions?
A. Yes.

Page 18

Q. Were there any letters or anything, to your knowledge, from your doctors that were generated and created for Amazon to say that you could work there?
A. Yes.
Q. What doctor did that?
A. Shukr.
Q. He wrote a letter to Amazon that said that you could work?
A. Yes.
Q. But within those parameters and restrictions, correct?
A. Yes.
Q. And do you work full time?
A. Yes.
Q. And what is full time at Amazon?
A. 10 hours.
Q. Per day?
A. Yes.
Q. That's full time. How many days do you work?
A. Four -- four days.
Q. That's good. Four days at 10 hours per day?
A. It's long.
Q. Yeah, but then you get the three days off, which is nice.
So you moved out of your mom's house. Your mom did not move with you, correct?

Page 19

A. Correct.
Q. And you're only living with your children, there's nobody else in that household, correct?
A. Correct.
Q. And at the time of this accident, which is October 27th, 2020, did your mom own a vehicle?
A. No.
Q. Did you own a vehicle at that time?
A. No.
Q. So there was nobody in the household that had a vehicle or used a vehicle on a regular basis; is that fair to say?
A. Correct.
Q. And you've never been married. So you don't have a spouse that has a policy, correct?
A. Correct.
Q. And I know these are going to sound odd, these questions, like, it's kind of obvious, but I need to ask them so that we have it on the record and that there's no question about it.
So no relative with a motor vehicle?
A. No.
Q. And then you did not have -- to your knowledge, you weren't listed on a personal automobile policy, correct, at the time of the accident?

Page 20

A. Correct.
Q. Did you have health insurance at the time of the October 27th, 2020, accident?
A. Yes.
Q. And what type of health insurance did you have?
A. Molina.
Q. Is that through the State of Michigan?
A. Yes.
Q. Now, at the time of the accident, were you working at all?
A. No.
Q. Prior to this accident, when was the last time you had worked?
A. I can't remember.
Q. Was it like three -- was it more than three years?
A. No. It was shorter than that. It was probably maybe a year.
Q. Why did you stop working?
A. It just wasn't for me anymore.
Q. The job wasn't?
A. Yes.
Q. What type of work did you do?
A. Waitress/dancer.
Q. Where was that at?
A. BT's, Dearborn.

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 21

Q. What is that?
A. BT's, Dearborn and Tycoon, they're owned by the same people.
Q. At the time of the October 27th, 2020, accident, did you have a primary care physician, a doctor that you would go to if you needed to get a physical or if you had a cold?
A. No.
Q. And you said that you don't have a driver's license, but did you have a state identification card at the time of the accident?
A. Yes.
Q. Do you know if it was the same number as your prior driver's license number because sometimes they just transfer it over?
A. I believe it was the same thing.
Q. We're going to go off the record just to confirm your social security number. So we're off the record currently. What is your social security number?
(Off the record 1:27 P.M.)
(Back on the record 1:27 P.M.)
CONTINUING BY MS. DUENAS:
Q. We'll go back on the record. The last four digits of the social security number is [redacted] Have you ever used a different social security number?

Page 22

A. No.
Q. We talked about you have a son and a daughter. Are those your only children?
A. Yes.
Q. Are you left-handed or right-handed?
A. Right.
Q. Do you have any pre-existing medical conditions for which you treat on a regular basis?
A. Just asthma, But that's, you know, here or there. If I need a breathing treatment or something.
Q. I was going to ask, do you have -- are you hospitalized ever for breathing treatments?
A. No. Just when I was a kid.
Q. And so have you ever been diagnosed with high cholesterol?
A. No.
Q. How about high blood pressure?
A. No.
Q. How about diabetes?
A. No.
Q. Have you ever told a doctor prior to this October 27th, 2020, accident that you had anxiety or depression?
A. No.
Q. At the time of the October 27th, 2020, accident, were

Page 23

you being prescribed any type of medication for any reason?
A. No.
Q. As you sit here today, are you being prescribed any type of medication?
A. Yes.
Q. And what type of medication or tions are you being prescribed?
A. Lidocaine, Norco 7.5 and naproxen and tizanidine or something like that. I can't say the name, but it's T-I-Z-A-N-D-I-N-E (sic), I believe.
Q. And what's that for?
A. For -- for the pain to -- the inflammation.
Q. And then you said Norco; is that correct?
A. Yes.
Q. And that's for pain as well?
A. Yes.
Q. And then you gave another. Is it lidocaine? Is that a patch or a cream?
A. A patch.
Q. And then what was the other last one?
A. Naproxen.
Q. And what is that for, to your knowledge?
A. Inflammation also, I believe.
Q. How often do you take the naproxen?

Page 24

A. Maybe every other day, depending on if I'm in pain or not.
Q. So is the naproxen as needed?
A. Yes.
Q. And then the -- the other medication for -- that you're taking for -- it's the T-I-Z-A-N-D-I-N-E. What is -- how often are you taking that, is that as needed as well?
A. Yes.
Q. And then the Norco, do you take that pain medication every day?
A. Not every day. Just when I need it. Like, before I start my day, if I feel bad getting out of bed or something like that.
Q. So are all the medications that you're being prescribed after the accident taken as needed on a daily basis when you determine that you need it or if you don't need it?
A. Yes.
Q. And then is that the same with the patch?
A. Yes.
Q. And who's prescribing it?
A. Shukr.
Q. Is that the only doctor that you're currently receiving treatment from?

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 25

A. Yes.
Q. How long has that been the only doctor you're receiving treatment from?
A. For it to be the only doctor, it's been since January.
Q. Of this year or last year?
A. Of this year. I was seeing the physical therapy doctor also for a year.
Q. Is that for Care (sic) Physical Therapy?
A. Yes.
Q. And how long were you getting treatment from -- it's specifically identified as Care Physical Therapy, correct?
A. Yes. Up until January.
Q. Was it right after the accident in October? Was it November to January or how long were you getting treatment there?
A. Yeah. It was like right after the accident, it was November to -- this year in January.
Q. How often were you going?
A. Three times a week.
Q. So to be clear, you're going three times a week from November 2020 to January 2022?
A. Yes.
Q. Did you ever get a bill?
A. No.

Page 26

Q. Did you think that the bills were being paid?
A. Yes.
Q. Is that because you never received a bill? Did you ever have any conversations with anybody in the office regarding any billing?
A. No. I didn't know anything.
Q. Three times a week. So was that Monday, Wednesday, Friday or when would you go?
A. Monday, Wednesday, Thursday. If I missed a day, then I'll make it up on a Friday or something like that.
Q. And how would you get there?
A. Their transportation.
Q. Now, the transportation, did you think that was part of the bill for the Care Physical Therapy or did you think that was a separate bill?
A. I thought it was part of the bill.
Q. Was there ever a conversation that you had with anybody regarding payment for the transportation company?
A. No.
Q. And did you schedule the transportation or did Care Physical Therapy schedule it?
A. Care Physical Therapy scheduled it.
Q. So three times a week, and it never went down from three times a week to two times a week, it was just always three times?
A. Yes.
Q. And to what parts of your body did you get the physical therapy?
A. My back and my neck.
Q. And when the transportation company would pick you up, did they have other people in the vehicle as well going to Care Physical Therapy?
A. Sometimes.
Q. Did you ever have to, when you'd get in the car, be driven to someone else's house before -- to pick up someone before you would go to physical therapy?
A. Yes.
Q. Did you have to sign any paperwork related to the transportation?
A. Not that I can recall.
Q. Did you sign any paperwork as far as Care Physical Therapy that was called -- and I don't, you know, you may remember, you may not remember -- sometimes they give you a form called an assignment. Do you know if you signed any paperwork with regard to Care Physical Therapy that was identified or labeled as an assignment?
A. I'm not sure.
Q. Okay. That makes sense to me. They're fairly --

Page 27

Page 28

they're getting -- they're more common now, but it's fairly new to have that go on.
So -- so just getting back to your prior medical history, have to ask for -- all these questions specifically. Prior to this accident, had you ever received physical therapy?
A. No.
Q. Prior to this accident, had you ever told the doctor that you had back pain for any reason?
A. No.
Q. Prior to this October 27th, 2020, accident, did you ever tell anybody you had neck pain?
A. No.
Q. How about shoulder pain, be it left or right, before this accident?
A. No.
Q. How about pain in your hip, be it left or right side?
A. No.
Q. Had you ever gone to a chiropractor for any reason before this October 27th, 2020, accident?
A. No.
Q. Did you get -- at any point in your life ever have an image, before this accident, be it x-ray, MRI, or CT Scan, an image of any kind before this accident?
A. I've had an x-ray before.

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 29

Q. To what part of your body, if you recall?
A. My chest to check and see if I had pneumonia, I believe.
Q. Did you get pneumonia a lot due to your asthma when you were younger or was it just one time?
A. One time.
Q. And that was just to check. Were you diagnosed with pneumonia?
A. Yes. I had a little bit of pneumonia in my lungs.
Q. Had you ever been hospitalized for any reason outside of childbirth before this accident?
A. No.
Q. Had you ever been diagnosed with a broken bone before this accident?
A. No.
Q. Had you ever received any type of pain injections before this accident?
A. No.
Q. And had any doctor at any point identified you as disabled before the accident for any reason?
A. No.
Q. Did you have any psychological conditions for which you received treatment, be it depression, anxiety, bipolar, schizophrenia, anything like that before the accident?

Page 30

A. No.
Q. Have you ever had any type of injury resulting from domestic violence?
A. No.
Q. Have you ever been shot by a gun?
A. No.
Q. Have you ever been stabbed?
A. No.
Q. Had you ever had any issues with your foot, either left or right, before this accident?
A. No.
Q. It sounds like before this accident you didn't get a lot of -- you didn't have a lot of medical treatment; is that fair to say?
MR. MAKLED: Object to form and foundation.
MS. DUENAS: Sure.
CONTINUING BY MS. DUENAS:
Q. It doesn't look like you were treating -- or you had any type of injuries before this accident that you treated for; is that correct?
A. Excuse me. Say that again, I'm sorry.
Q. Sure.
Because I can't ask you every question under the sun. I'm trying to get an understanding of your medical history. It looks like it's fairly, you

Page 31

know, unremarkable, but I want to know, have you ever received treatment for any type of injury or medical condition before this accident?
A. No.
Q. How about thyroid? Did you ever have an issue with your thyroid?
A. No.
Q. Because I think I saw -- and I just want to -- I thought I saw an enlarged thyroid. Have you ever gotten treatment for an enlarged thyroid?
A. When I went for my MRI after the accident, they told me that I had one. So yeah.
Q. But that wasn't something that you had issues with or you were getting treatment with before; is that correct?
A. No, correct.
Q. Have you ever been in the military?
A. No.
Q. Have you ever applied for Social Security Disability?
A. No.
Q. Have you ever been convicted of a crime of dishonesty?
A. No.
Q. How about untruthfulness?
A. No.
Q. How about theft?

Page 32

A. No.
Q. Are you a felon?
A. No.
Q. Have you ever had a slip and/or fall that resulted in injury?
A. No.
Q. Have you ever been injured at work and made a workers' compensation claim?
A. No.
Q. Have you been involved in any other motor vehicle accidents outside of the one for which you're here today?
A. No.
Q. Did you graduate from high school?
A. I have my GED.
Q. And did you take any college courses?
A. No, but I took some other classes. Training.
Q. Do you have a license to do any type of work?
A. No.
Q. What's the title of -- your job title at Amazon?
A. I guess it would be sorter.
Q. And you're not required to drive a truck or deliver anything, are you, for Amazon?
A. No.
Q. Do you file taxes yearly?

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 33

A. Yes.
Q. Do you recall how the motor vehicle happened for which we're here today?
A. Yes.
Q. And I keep saying it was October 27th, 2020; is that correct?
A. Yes.
Q. And did you have anybody in the vehicle with you at the time of the accident?
A. No.
Q. And what time of day was it?
A. Late morning.
Q. And we talked about this earlier. You were operating a Saturn, correct?
A. Yes.
Q. And that was the 2008 Saturn owned by Kandice Valentine. Kandice being spelled K-A-N-D-I-C-E, Valentine, correct?
A. Yes.
Q. How long has Kandice Valentine been a friend of yours?
A. Maybe about four years.
Q. And was it dark out or light out?
A. Light.
Q. How long had you been on the road before this accident occurred?

Page 34

A. Maybe about 15, 20 minutes.
Q. And where did the accident occur?
A. 75 and Trumbull.
Q. Just tell me what happened on this day. How did the accident occur?
A. I was in the right lane and the truck was in the left lane and then it just started turning and it ran into me. It started turning right and it ran into me. It kept going, but eventually, it stopped.
Q. So you're in the right lane, the truck is to your left?
A. Yes.
Q. So does the truck -- you said the truck driver turned into you, meaning turned into and struck the left side of the vehicle you were driving?
A. Yes.
Q. You said that you were driving to pick up your mother; is that correct?
A. Yes.
Q. To take her to the hospital?
A. Yes.
Q. And Ms. Valentine's house is noted to be on 1918 Eagle Court, Westland, Michigan. Is that where you were at?
A. Yes.
Q. And then from Westland, you were driving to Detroit on

Page 35

Trumbull to pick up your mother?
A. Yes.
Q. Did you have your seat belt on?
A. Yes.
Q. When the accident occurred, was it one impact or multiple impacts to the vehicle?
A. It was one.
Q. After the truck driver strikes the left side of the car, what do you do?
A. Panic. I just sat there.
Q. Do you get out of the vehicle?
A. Yes, because the guy didn't want to give me his insurance. I just checked my car and everything.
Q. So you're physically able to get out of the vehicle. Did you walk over to the other person to try to get his information?
A. Yes.
Q. Did you call the police at all?
A. Yes.
Q. And did the police ever arrive to the scene?
A. Yes.
Q. And when they arrived, was the truck driver still there?
A. Yes.
Q. Did you ask for an ambulance to come to pick you up?

Page 36

A. No, I didn't.
Q. Did the police officer ask you if you needed an ambulance?
A. Yes.
Q. And you declined at that point?
A. Correct.
Q. Did you -- was the car that you were in, that Saturn, drivable after this accident?
A. No.
Q. Was it towed from the scene --
A. Yes.
Q. -- to your knowledge?
Do you know if your mom ever made it to the hospital on this day?
A. Well, that was why I didn't get an ambulance because I wanted to get to her and we went together in a Uber.
Q. So at the scene of the accident, did you call an Uber?
A. Yes.
Q. And the Uber picked you up and then you drove to your mom's house; is that correct?
A. Yes.
Q. And then picked up your mom and drove her to the hospital; is that correct?
A. Yes.
Q. What hospital?

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 37

A. Harper.
Q. Now when you were driving your mom to the hospital, did you also get checked out at the hospital?
A. Yes.
Q. And were you treated and admitted or treated and released?
A. Treated and released.
Q. Now, I keep seeing something like you stopped and grabbed things for your children at Burger King on your way to your mother's house. Does that make any sense to you?
A. Yes.
Q. What happened there?
A. That's how I got on 75 and Trumbull. I was getting them food to give to my mom. They were at my mom's house.
Q. And then all of you were going to go to the hospital, you and your children and your mother, or no?
A. No, just me and my mother. My daughter was old enough to watch.
Q. And then -- so you pick her up. You both go to Harper Hospital. You're evaluated. Now were you bleeding from any part of your body after this accident?
A. No.
Q. Did you have any cuts at any part -- to any part of

Page 38

your body from this accident?
A. No.
Q. Did you lose consciousness at all?
A. No, not that I can remember.
Q. Are you being treated for a closed-head injury of any kind?
A. No.
Q. Any allegations of memory loss or confusion after this accident?
A. No.
Q. And was your car upon impact pushed into anything, meaning a sign, a curb, another vehicle, anything like that?
A. I don't think so.
Q. So when the police come, do you give a statement to the police officer?
A. Yes.
Q. And you're walking and talking after the accident; is that correct?
A. I was in my vehicle.
Q. So but you never got out of your vehicle?
A. Yes, I did.
Q. So to be clear, did you give a statement to the police officer, the police officer walk up to your window and then take a statement through the car window?

Page 39

A. Yes.
Q. And then after that, the police was done with taking down statements. You get an Uber that comes to drive you and your mom to Harper Hospital?
A. Yes.
Q. And do you know if this car was totaled or repaired?
A. She never repaired it.
Q. Did you take any photos of the vehicle?
A. I have a video.
Q. And when was the video taken?
A. Right afterwards.
Q. The same day?
A. Yes.
Q. And did you take that video?
A. Yes.
Q. And does your -- did you give it to your attorney?
THE WITNESS: Do you have it?
(Witness conferred with her attorney)
THE WITNESS: Yes.
CONTINUING BY MS. DUENAS:
Q. Now, are you saying that you received injuries from this accident?
A. Yes.
Q. What type of injuries did you receive from this accident?

Page 40

A. Neck and back pain.
Q. Okay.
A. I can't stand for longs amount of time. I have a aching pain constantly. It comes and goes.
Q. So I have neck and back and aching pain. Anything else?
A. No.
Q. Were you contacted by any doctor or facility trying to schedule treatment, appointments after this accident?
A. No.
Q. Were you solicited by anybody after this motor vehicle accident?
A. No.
Q. So no one called you up and said, "Hey, we've made an appointment for you to go somewhere for treatment"; is that correct?
A. Correct.
Q. And you said you're -- so when you go to Harper Hospital, do you tell them that you have neck and back pain?
A. Yes.
Q. Any other pain that you indicated, if you can recall?
A. No.
Q. Do you know if there were any images taken, x-rays, CT Scans or MRIs?

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 41

A. They just gave me a x-ray.
Q. Of your back or your neck, which one?
A. Of my back.
Q. And then you were treated and released, correct?
A. Yes.
Q. Was your mom also treated and released?
A. Yes.
Q. Now were you given any type of prescriptions when you left the emergency room?
A. I think they gave me Motrin.
Q. Who's the next -- where do you go next for treatment?
A. I caught -- We Care Physical Therapy.
Q. What is it?
A. We --
Q. Oh, We Care Physical Therapy?
A. Uh huh.
Q. How did you find out about We Care Physical Therapy?
A. I looked it up, just was looking up.
Q. What did you type in to look up physical therapy for We Care?
A. Good physical therapist.
Q. You typed in "good physical therapist", and We Care Physical Therapy came up?
A. Yeah.
Q. I'm going to try that.

Page 42

A. Yeah, maybe because it was of the area I was in, I was close to Southfield and it was right there.
Q. There are -- pick a stone up and throw it, you'll hit a physical therapist in Southfield.
So no one recommended We Care, it's something you Googled and found for yourself?
A. Yes.
Q. Did you get any type of relief from the treatment that was provided at We Care Physical Therapy?
A. Yes.
Q. What type of relief did you receive from We Care?
A. My back became a little bit stronger, even though I still get pain, but it became more manageable to deal with.
Q. Why did you stop treatment with them? Because I see -- you know, in January of 2020? 2022? Why did you stop treatment?
A. Because I had to work.
Q. Okay.
Do you know if there are any bills outstanding due but owed to We Care Physical Therapy?
A. Yes.
Q. And do you know how much is outstanding due and owed?
A. No, I don't.
Q. Did you ever get a bill from We Care Physical Therapy?

Page 43

A. No.
Q. How do you know there's a bill outstanding due and owed?
MR. MAKLED: I have a bill, Arminia, that I'll be sending to you.
MS. DUENAS: Okay.
CONTINUING BY MS. DUENAS:
Q. So is that something that you found out after you -- or before you filed the lawsuit?
A. Yes.
Q. Now, is your attorney also the attorney for your third party?
A. Yes.
Q. So you go to We Care Physical Therapy, you went there for over a year, correct? Three times a week for a year?
A. Yes.
Q. The first time you find out about owing anything is when you filed your lawsuit and you start to look into it, correct? Because there's no bills being sent to your house?
A. Correct.
Q. What do you think of that? What's your -- and I'm just asking your opinion. What's your opinion on a doctor that lets you treat somewhere for over a year

Page 44

and then just lets the bill escalate and escalate? Do you have an opinion about that?
A. No, no.
Q. No? Is that normal to you, because I can't go to my doctor without paying a $25 co-pay, but, you know, is that normal to you?
A. No.
Q. That's why you didn't know that there was a bill that was piling up, correct?
A. Correct.
Q. Okay.
And when you found out that there was a bill that was due and owed by We Care Physical Therapy, did that make you upset?
A. Yeah, yes.
Q. Because would you have liked to have known that there was an issue with payment at some point?
A. Yes.
Q. Do you know if We Care Physical Therapy ever sent any of your bills to your personal health insurance for consideration of payment? Do you know that, if that happened?
A. No.
Q. So do you know if -- and you may not know, but do you know if there is a lien of any kind? And what I mean

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 45

is, did any of your doctors or any facilities for which they've provided treatment on a regular basis send any of your bills to your Molina or Medicaid health insurance? Do you know if that happened?
A. No.
Q. So I see We Care Physical Therapy and then the Dearborn Pain Specialists. How did you get to Dearborn Pain Specialists?
A. Same -- their transportation. I would go there after I left therapy.
Q. No, I mean how did you start going to Dearborn Pain Specialists? How did you find out about them?
A. I was recommended by We Care.
Q. Do you know if We Care has any type of ownership interest in Dearborn Pain Specialists?
A. No, I don't believe so.
Q. Did they schedule appointments with Dearborn Pain Specialists on your behalf?
A. No. I did.
Q. And so did you also schedule your own appointments at We Care Physical Therapy?
A. Yes.
Q. So this is what it sounds like. The same time that you're going to We Care Physical Therapy -- because you would only go to Dearborn Pain Specialists

Page 46

once a month, right?
A. Yes.
Q. You would make sure that the time that you were going to physical therapy is also one of the times that you would go to the Dearborn Pain Specialists, correct?
A. Yes.
Q. And again, I think we talked about this, but I just want to make it clear for the record if I didn't. Do you know if there's a bill that's outstanding due and owed by Dearborn Pain Specialists?
A. Yes.
Q. And you know that there is a bill for Dearborn Pain Specialists? Do you know how much it is?
A. No.
Q. Again, that's -- they never sent a bill to you, did they?
A. No.
Q. So as far as you know, it could be $100, it could be 60,000. You wouldn't know that because you've never actually received a bill before this litigation, right?
A. Right.
Q. And again, that doesn't seem odd to you? Now, knowing that? Is that weird to you, knowing now that they've never sent a bill and some of these bills weren't

Page 47

paid? Does that seem odd to you?
A. Yes.
Q. All right.
So I also see that -- so is Harper Hospital, was it only for -- you only went once for the emergency, the day of the accident?
A. Yes.
Q. And Dearborn Pain Specialists, you are still going to Dr. Shukr once a month, correct?
A. Yes.
Q. And he's providing prescriptions for medications. Does he do that every month or does he do that every three months?
A. Every month.
Q. So you have to go to Dearborn Pain Specialists in order to get your prescriptions refilled, correct?
A. Yes.
Q. And We Care no longer -- or were no longer getting physical therapy there. I see that you went to Focus Imaging at some point; is that correct?
A. Yes.
Q. For MRIs?
A. Yes.
Q. Who prescribed that?
A. Pain Management.

Page 48

Q. Is that Dr. Shukr?
A. Yes.
Q. It seemed like to me -- and just correct me if I'm wrong -- you go to Focused (sic) Imaging and you get a lot of films at one time?
A. Yes.
Q. So let's talk about what type of MRIs were -- did you get, and were they all on one day?
A. Yes.
Q. Go ahead.
A. I just know that they scanned my upper body and my back, I believe. I'm not sure exactly what it's called.
Q. So I see the -- an MRI of your neck?
A. Yes.
Q. And was it -- how long were you at -- it looks like it was Focused Imaging. So were you picked up and taken to Focused Imaging as well?
A. Yes.
Q. Again, did anybody talk to you about having to pay for that transportation?
A. No.
Q. And did you sign anything with regard to the transportation?
A. I can't recall.

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 49

Q. And did you order the transportation or did Focus Image (sic) order it for you when you made your appointment?
A. The Pain Management ordered it, I believe.
Q. So that would be Dearborn Pain Specialists?
A. Yes.
Q. Again, do you know if they have any type of ownership interest in Focused Imaging?
A. No.
Q. No, you do not know?
A. I don't know.
Q. When Dr. Shukr ordered these MRIs, did he say, "I'm ordering MRIs, you can go anywhere you want", or did he order the MRIs and said that you have an appointment to go to Focused Imaging or that we will schedule the MRIs at Focused Imaging?
A. I can't recall.
Q. So I see that it's an MRI of the neck, the MRI of the lower and upper back, the thoracic and lumbar spine; is that correct?
A. Yes.
Q. And then is that it? Are those the only MRIs that were taken on that day?
A. Yes.
Q. Were there MRIs taken to any other part of your body

Page 50

at any other time after this accident?
A. No.
Q. Do you know if any of those MRIs indicated that you had a disc bulge or herniation? Did you talk to your doctors about it?
A. Yes. I can't remember exactly what they said, but I know they had said I had tears in my neck and in my back.
Q. Tears in your neck and your back?
A. Yes.
Q. We got you at the ER. We have -- we talked about physical therapy. Have you gone to any other locations for physical therapy outside of We Care Physical Therapy?
A. No.
Q. Any other pain management facilities outside of Dearborn Pain Specialists?
A. No.
Q. We got the focal imaging because we talked about the three MRIs, and those were the only MRIs that were taken after the emergency room, correct?
A. Correct.
Q. We talked about the various transportation companies and -- now, I see that you're doing -- are you doing urine tests every time you go to Dearborn Pain

Page 51

Specialists or do you do it every other -- when does that happen?
A. Every time.
Q. Every time, every month?
A. Yes.
Q. Have you ever indicated to Dr. Shukr or anybody at Dearborn Pain Specialists that you had a drug problem at any time?
A. No.
Q. So I'm not quite understanding. Do you know why you have to take a drug screen every time you go there? Has that ever been explained?
A. No.
Q. Because it seems to me that you're being prescribed medication, but you're taking them as needed, correct?
A. Yes.
Q. So they're not always going to be in your system. Have they ever talked to you about a time when they've done a drug screen and they've noticed that you're -- the medications that have been prescribed are not in your system? Have you ever had a conversation like that to any of the doctors?
A. No.
Q. Why do you think you have to take a drug screen every time you go?

Page 52

A. To see if it's in my system. I'm not sure.
Q. But it seems like if it's in your system, you're not -- you don't know if it's being -- and it looks like it's a couple of -- so are you doing the urine, meaning at Dearborn Pain Specialists, after you see the doctor, whatever? Is it normal for you to give a urine sample --
A. Yeah, they --
Q. -- to them?
A. -- as soon as I walk in, they give me a cup.
Q. Are they doing any type of blood draws or anything?
A. No.
Q. Again, have you been -- have you received any billing from any type of drug testing facility saying that there's bills that are due and owed?
A. No.
Q. So would you -- would you think that the drug test or the urine test is going to be screened by the doctor at Dearborn Pain Specialists or do you think that that's going to be sent out somewhere; do you know?
A. I'm not sure.
Q. Now, we talked about all of the facilities and doctors that I have on my witness list. Are there any other doctors or facilities that you're getting treatment

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

Page 53

with or you receive treatment at that we haven't discussed?
A. No.
Q. And you know that at some point you were sent to a doctor on behalf of the insurance company; is that correct?
A. Yes, yes, yes.
Q. And you appeared for that, correct?
A. Yes.
Q. Now, do you know if the insurance company said based on this doctor's evaluation of you that the treatment was no longer reasonable? Do you remember getting a letter like that?
A. Yes.
Q. And you continued to treat after?
A. Yes.
Q. And -- and you knew that at that point after treating, that the insurance company was not going to consider payment after they denied your bills due to this report, correct?
A. Yes.
Q. Did you have any conversations with any of your doctors regarding that report?
A. No.
Q. All right.

Page 54

And do you know -- and you said that you don't need, you can take care of cleaning your house yourself, correct?
A. Yes.
Q. And you can get dressed by yourself and take your own shower?
A. Yes.
Q. Okay.
MS. DUENAS: That's all I have.
MR. MAKLED: All right. Thanks, Arminia.
MS. DUENAS: Thank you very much. Thank you. I will take a copy and a mini.
COURT REPORTER: Electronic?
MS. DUENAS: Yes.
COURT REPORTER: Dan, would you like to order a copy?
MR. MAKLED: I'll take the same.
(Deposition concluded at 2:11 P.M.)

Page 55

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

Certificate of Notary Public

I certify that this transcript is a complete, true, and correct record of the testimony of the witness held in this case.

I also certify that prior to taking this deposition, the witness was duly sworn or affirmed to tell the truth.

I further certify that I am not a relative or an employee of or an attorney for a party; and that I am not financially interested, directly or indirectly, in the matter.

In witness whereof, I have hereunto set my hand this 8th day of April, 2022, at Rochester Hills, Michigan, County of Oakland, State of Michigan.

Lory A Helland

LORY A. HELLAND, CSR-#3778
Notary Public, Oakland County, Michigan
My Commission Expires: 02/15/26

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

EXHIBIT C

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

APPLICATION FOR PERSONAL INJURY PROTECTION BENEFITS THROUGH THE MICHIGAN ASSIGNED CLAIMS PLAN

Michigan Automobile Insurance Placement Facility
PO Box 532318 | Livonia, MI 48153-2318 | Phone: 734-464-8111 | Fax: 734 744-8552
www.michacp.org

Please note, "you" referenced throughout this application is defined as the injured person applying for benefits.
This application must be completed, signed and received no later than one (1) year from the date of accident. Incomplete or illegible applications will be returned without assignment to a servicing insurer. Please also submit a copy of the police report, EMS run form and/or any other documentation. All information will be reviewed, however, please note, additional information may be required. **Please be advised, applications made to the Michigan Automobile Insurance Placement Facility should be submitted as soon as possible to expedite the initial determination of an injured person's eligibility for benefits.**

Injured Person Information

1. Name of Injured Person: First Name: Carlonda Middle Name: Naish'e Last Name: Sweeper Suffix:
2. Date of Birth: [redacted]
3. List any and all names you have previously or currently go by
4. Social Security #:
5. Injured Person's Current Address: Street: 4722 Trumbull St Apt #: City: Detroit State: Mich Zip Code: 48208
6. Injured Person's Address at the Time of the Accident: Street: 4722 Trumbull St Apt #: City: Detroit State: Mich Zip Code: 48208
7. Home Phone #
8. Work Phone #
9. Cell Phone #
10. Email Address

11.a. Marital Status: ☐ Married ☐ Separated ☐ Divorced ☑ Never Married ☐ Widowed
b. If "married" or "separated" please provide:
Spouse Name Spouse Address Check here if spouse address is same as injured person's ☐

12. Date of Accident: 10 / 27 / 2020
13. Injured Person's Driver's License # and State or State ID #: [redacted]
14. At the time of the accident, were you a Michigan resident? ☑ Yes ☐ No
a. If no, list state:
15. At the time of the accident, did you have any auto insurance? ☐ Yes ☑ No
a. If yes, list Name of Automobile Insurance Company & Policy Number

Accident Information

16. Accident Location: Street: Trumbull And I-75 City: Det State: Mich Zip Code: 48208
17. Provide a full description of how the accident occurred. Note: If you require additional space, please attach a separate sheet with details as part of this application.
Driver was in the ~~right~~ left lane I was in right At a red light He then started to turn right running into me.
18. Was a police report made? ☑ Yes ☑ No
a. If yes, list name of police department, police report number and date made:
19. What was your position at the time of the accident? ☑ Driver ☐ Passenger ☐ Pedestrian ☐ Motorcyclist ☐ Other
a. If you answered "Passenger", where were you seated in the vehicle? ☐ Passenger Front Seat ☐ Driver Side Back Seat ☐ Middle Back Seat ☐ Passenger Back Seat ☐ Other
20. Was the vehicle a motorcycle? ☐ Yes ☑ No If you answered "Yes" please provide the following:
a. List the name of the owner of the motorcycle:
b. Was the motorcycle insured at the time of the accident? ☐ Yes ☐ No c. Motorcycle Vin #
d. If the motorcycle was insured and you were the owner of the motorcycle, please attach a copy of your proof of motorcycle insurance.
21. Were you contacted by a doctor's office or other person about this claim? ☐ Doctor ☐ Other ☒ None
a. If you answered "Doctor", please provide:
Name of Doctor Address Phone Number
b. If you answered "Other", please provide:
Name Address Phone Number

ACF-01 (01/2018)

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

APPLICATION FOR PERSONAL INJURY PROTECTION BENEFITS THROUGH THE MICHIGAN ASSIGNED CLAIMS PLAN

Injury Information

22. Are you claiming injuries from the accident? ☑ Yes ☐ No a. If yes, describe your injuries:

Back and Neck Pain

23. Were you treated and/or transported by an ambulance/EMS or by any other way to a hospital after the accident? ☑ Yes ☑ No

a. If yes, please provide:

EMS/Ambulance/Person Name	Address	Phone Number

24. Were you treated in a hospital after the accident? ☑ Yes ☐ No a. If yes, what type of treatment did you receive? ☐ In-Patient ☑ Out-Patient

b. If yes, please provide:

Hospital Name	Address	Phone Number
Harper Hospital	3990 John St Detroit MI 48201	313-745-8040

Note: If you were treated at more than 1 hospital, attach a separate sheet with contact information as part of this application.

25. Are you currently or were you treated by a doctor after the accident? ☑ Yes ☐ No

a. If yes, please provide:

Doctor Name	Address	Phone Number
Dearborn Pain Spec 481	13530 Michigan Ave Suite 245	313-789-8663

b. Name of person who referred you to this doctor: _____

Note: If you were treated at more than 1 doctor, attach a separate sheet with contact information as part of this application.

26. Before this accident happened, did you have any of the same injuries as you listed in question 22? ☐ Yes ☑ No

a. If yes, describe which injuries and the doctors/pharmacies you treated with:

Injuries

Doctors/Pharmacy Name	Address	Phone Number	How long were you treating?

Note: If you sought treatment from more than 1 doctor/pharmacy, attach a separate sheet with contact information as part of this application.

27. Please list any medical conditions you had and/or medications you were taking at any time before this accident. None

a. If so, please provide the name, address, phone number(s) and length of treatment:

Doctors/Pharmacy Name	Address	Phone Number	How long were you treating?

Note: If you sought treatment from more than 1 doctor/pharmacy, attach a separate sheet with contact information as part of this application.

28. Do you have a primary care doctor? ☐ Yes ☑ No a. If yes, please provide:

Doctors Name	Address	Phone Number

29. Have you received any medical bills from this accident? ☐ Yes ☑ No

30. Do you expect to receive medical bills from this accident? ☑ Yes ☐ No

31. Did you apply for social security disability benefits at any time before or after this accident? ☐ Yes ☑ No

31b. If yes, please provide all of the dates of your application(s): _____

Medical Insurance

32. Do you have any kind of health insurance? ☑ Yes ☐ No a. If yes, please provide:

Name of Health Insurance Co.	Address	Phone Number
Molina		888-898-7969

Policy or Plan Number: 0068265953 Member Number: _____ Group Number: _____

33. Are you a Medicare Beneficiary? ☑ Yes ☑ No a. If yes, what is your Medicare #: _____

ACF-01 (01/2018)

RECEIVED by MSC 7/19/2024 9:17:32 AM

APPLICATION FOR PERSONAL INJURY PROTECTION BENEFITS THROUGH THE MICHIGAN ASSIGNED CLAIMS PLAN

Employment Information

34. Were you employed at the time of the accident? ☐ Yes ☒ No a. If yes, provide the following information; if no, skip to question 42.

Name, Address and Phone Number of Your Employer	Job Title	Average weekly income at the time of the accident	List the dates of your employment: From	To
N/A		$ N/A		

Note: If you were employed by more than 1 employer, attach a separate sheet with contact information as part of this application.

35. Have you missed any work because of your injuries? ☐ Yes ☒ No a. If yes, what is the first date you missed work? _____

36. Do you have a note from a doctor ordering you to stay home from work? ☐ Yes ☐ No a. If yes, please provide:
Doctors Name Address Phone Number

37. Have you returned to work? ☐ Yes ☒ No
a. If yes, what date did you return to work? _____

38. If not yet returned, have you been given a return date? ☐ Yes ☐ No
a. If yes, return to work date: N/A

39. Were you on the job at the time of the accident? ☐ Yes ☒ No
a. If yes, are you eligible for any benefits under workers compensation? ☐ Yes ☐ No

40. How did you normally get to work before to this accident? I.E. Public Transportation, motor vehicle, etc.
family member / N/A

41. Are you eligible for any benefits under any other wage or salary continuation plan? ☐ Yes ☒ No

Entitlement Information-Note that question 42 refers to the involved motor vehicle you were in, getting into or out of, or were struck by as a pedestrian or if applicable, the motorcycle you were on at the time of the accident.

42. Was there damage to the vehicle you were occupying or struck by? ☐ Yes ☐ No ☐ Unknown If yes, describe the damage to the vehicle:
right side is totaled

a. Was the vehicle towed? ☐ Yes ☒ No If yes, please provide: Name of Towing Company Address Phone Number

b. Was the vehicle repaired? ☐ Yes ☒ No If yes, please provide: Name of Repair Company Address Phone Number

c. Do you know the current location of the involved vehicle? ☒ Yes ☐ No If yes, please provide: Location of Vehicle Address Phone Number
Trombly and I-75

Note: If you were struck by more than 1 vehicle as a pedestrian, attach separate sheet with contact information as part of this application.

d. Did you use the motor vehicle/motorcycle at any time before the date of the accident? ☐ Yes ☒ No ☐ Unknown

e. How often did you use the vehicle/motorcycle?
☐ Daily ☐ Once a Week ☐ Two or More Times Per Week ☐ Less than Once Per Month ☐ Rarely ☒ Other, please explain Active

f. Did you have access to a set of keys to the vehicle/motorcycle? ☐ Yes ☒ No ☐ Unknown

g. Have you ever had to ask permission to use the vehicle/motorcycle? ☒ Yes ☐ No ☐ Unknown

h. Have you ever been denied permission to use the vehicle/motorcycle? ☐ Yes ☒ No ☐ Unknown

i. Did you ever put gas in the vehicle/motorcycle? ☐ Yes ☒ No ☐ Unknown

j. Did you ever pay money toward the purchase or the maintenance of the vehicle/motorcycle? ☐ Yes ☒ No ☐ Unknown

k. Did you have permission to use the vehicle/motorcycle on the date of the accident? ☒ Yes ☐ No ☐ Unknown If Yes, from who? _____

43. List the name of the owner of the vehicle (Note, if you were on a motorcycle, please provide the following information about the vehicle involved in your accident):
First Name Middle Name Last Name
Kourtnie Valentine

Owner's Address and Phone Number
I Dont Know it

a. List the Name of the Registrant of Vehicle involved in the accident if different than the owner: First Name Middle Name Last Name

Registrant's Address and Phone Number I Dont Know

b. Vehicle Involved:

Year	Make	Model	Vehicle Identification Number (VIN)	Plate Number	State the Vehicle is Registered In
2008	Saturn	Vue	3GSCL33P38S691872	EAT 4381	Michigan

c. Did the owner and/or registrant of this vehicle have any automobile insurance on the date of the accident? ☐ Yes ☒ No If yes:
Name of Insurance Company : None Policy #: _____
How did you confirm if the owner/registrant did or did not have insurance? Asked

d. If not you, list the name of the driver of the vehicle: First Name Middle Name Last Name

RECEIVED by MCOA 2/13/2023 1:33:53 PM

e. Did the driver have automobile insurance in effect on the date of the accident? ☐ Yes ☒ No If yes:

Name of Insurance Company : None Policy #: No

How did you confirm if the driver did or did not have insurance? _____

f. How many people were in the vehicle? _____

Please list all passengers in this vehicle at the time of the automobile accident:

Name	Address	Phone Number	Passenger's Insurance Company (if any)	Insurance Policy #
	None			

Note: If more than 5 passengers, attach separate sheet with the above information as part of this application.

44. Were there witnesses to the accident? ☐ Yes ☑ No If yes, please provide:

Witness Name	Address	Phone Number
Witness Name	Address	Phone Number

Note: If more than 2 witnesses, attach separate sheet with contact information as part of this application.

Entitlement Information *(continued)*

45. List all the people who lived in your home at the time of the auto accident and their relationship to you:

Name	Relationship
Rhonda Swoope	Mom
Drayton Swoope	Son
Laiven Swoope	Daughter

If more than 3, attach separate sheet with information as part of this application.

46. Describe all motor vehicles owned by you, your spouse (even if you are separated) or any relative living in your home on the date of the accident: If none, check here: ☑

Owner/Relationship	Year, Make & Model of Vehicle	Vehicle Identification Number	Plate Number	Insurance Co & Policy Number

Note: If more than 3, attach separate sheet with contact information as part of this application.

47. Have you ever made a claim for benefits (i.e. payment of medical bills) due to an injury that was caused by an automobile accident? ☐ Yes ☑ No

a. If yes, please provide:

Name of Insurance Company _____ Claim Number _____

48. Are you filing this claim with the Michigan Automobile Insurance Placement Facility because there is a dispute between two or more insurance companies concerning their obligation to provide you with insurance coverage? ☐ Yes ☒ No

a. If yes, please provide documentation of the dispute and the following:

Name of Insurance Company	Phone Number	Claim Number
Name of Insurance Company	Phone Number	Claim Number

49. Please document what actions you have taken to determine that there is no other auto insurance coverage. This question should be completed to expedite the claims process (attach additional sheet(s) if needed and any supporting documentation).

I asked the owner of the car, they said they didn't have ins.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

APPLICATION FOR PERSONAL INJURY PROTECTION BENEFITS THROUGH THE MICHIGAN ASSIGNED CLAIMS PLAN

Please note, if the top two boxes below are not acknowledged and the application is not signed and dated, the application will be considered incomplete and will be returned to the injured person or the preparer for further completion.

☐ I have reviewed the application in its entirety and attest that the information contained therein is true and accurate. If I am a medical provider and am submitting this application on behalf of the injured person, I attest that I have knowledge of the information provided, have thoroughly investigated and verified all documented information and have knowledge that all the information documented is true and accurate.

☐ I acknowledge I have read the following fraud warning:

FRAUD WARNING

A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan Automobile Insurance Placement Facility for payment or any other benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under section 4503 of the insurance code that is subject to the penalties imposed under section 4511. **A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the Assigned Claims Plan.**

☐ I understand that if benefits are paid to me or for my benefit, the owner of the involved, uninsured vehicle will be financially responsible for reimbursement of all no fault benefits paid and costs associated with this claim pursuant to the Michigan No Fault Act.

☐ If I provided an email address, I understand that future correspondence and information regarding this claim may be exchanged via the email contact provided.

Signature of Injured Person or Representative	Printed Name of Injured Person or Representative	Date:
X [signature]	X Orlando Swope	11/11/2020
Signature of Preparer (if different than above)	**Printed Name of Preparer (if different than above)**	**Date:**
X [signature]	X Haircare Pt	11/11/2020

Who prepared this application? ☐ Injured Person ☐ Attorney ☒ Third Party Biller
☐ Parent ☐ Legal Guardian

Preparer Name and Company:
We Care PT (Haircare)
Address: 17220 W. 12 mile Rd Ste 140
City: Southfield State: MI Zip Code: 48076
Phone Number: 313 948 5354
WeCaretherapyLLC@Gmail.com.

If the preparer is a medical provider: Do you have an assignment of benefits?
☐ Yes ☐ No If Yes, please attach.

Michigan Assigned Claims Plan
c/o Michigan Automobile Insurance Placement Facility
PO Box 532318
Livonia, MI 48153-2318
www.michacp.org Phone: 734-464-8111
Email: info@michacp.org
Fax: 734 744-8552

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

EXHIBIT D

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CAROLINDA NAISHE SWOOPE,

Plaintiff,

vs.

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant.

Case No. 21-011402 -NF
Hon. Dana Margaret Hathaway

Daniel B. Makled (P78777)
Hall Makled P.C.
Attorneys for Plaintiff
23756 Michigan Avenue, Suite 300
Dearborn, Michigan 48123
(313) 582-7930 / (313) 582-7962 (fax)
dmakled@hallmakled.com

Arminia Duenas (P67090)
Conlin, McKenney & Philbrick, P.C.
Attorneys for Defendant CICM
350 South Main St., Suite 400
Ann Arbor, MI 48104
(734) 761-9000 / (734) 761-9001 (fax)
ADuenas@cmplaw.com
Yvonne@cmplaw.com

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan on

_____

Hon. Dana Margaret Hathaway
CIRCUIT COURT JUDGE

This matter having come before the Court on Defendant Citizens Insurance Company of the Midwest's motion for summary disposition and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that Defendant Citizens Insurance Company of the Midwest's Motion for Summary Disposition is granted with prejudice.

RECEIVED by MCOA 2/13/2023 1:33:53 PM

IT IS FURTHER ORDERED that due to Plaintiff's unlawful taking of the vehicle she operated on the date of the accident,Plaintiff's claim for personal injury protections benefits (no-fault PIP benefits) regarding an October 27, 2020 motor vehicle accident is ineligible for benefits. As such, Plaintiff, and any and all providers claiming by or through her have no standing to submit, pursue or receive no-fault PIP benefits from Defendant for the October 27, 2020 motor vehicle accident.

This is a final order, resolves all issues and **closes the case**.

IT IS SO ORDERED.

Hon. Dana Margaret Hathaway
CIRCUIT COURT JUDGE

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Exhibit D

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CAROLONDA NAISHE SWOOPE,

Plaintiff,

vs.

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant.

Case No. 21-011402 -NF
Hon. Dana Margaret Hathaway

Daniel B. Makled (P78777)
Hall Makled P.C.
Attorneys for Plaintiff
23756 Michigan Avenue, Suite 300
Dearborn, Michigan 48123
(313) 582-7930 / (313) 582-7962 (fax)
dmakled@hallmakled.com

Arminia Duenas (P67090)
Conlin, McKenney & Philbrick, P.C.
Attorneys for Defendant CICM
350 South Main St., Suite 400
Ann Arbor, MI 48104
(734) 761-9000 / (734) 761-9001 (fax)
ADuenas@cmplaw.com
Yvonne@cmplaw.com

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

NOW COMES Plaintiff, CARLONDA SWOOPE, by and through her attorneys, HALL MAKLED, P.C., and for her Response to Defendants Motion for Summary Disposition states as follows:

RECEIVED by MCOA 7/19/2024 11:33:53 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

I. TO ESTABLISH THAT PLAINTIFF TOOK THE VEHICLE "UNLAWFULLY" DEFENDANT MUST SHOW AN UNLAWFUL TAKING FROM THE OWNER'S PERSPECTIVE NOT THE DRIVER'S PERSPECTIVE. DEFENDANT HAS NOT DONE THAT AND THUS ITS ARGUMENT FAILS AS A MATTER OF LAW.

First, Defendant is correct that there is no "emergency" exception to the "permissive use" and "lawful taking requirement". Thus, Defendant's mentioning of Burger King, Uber, driving her mother to the hospital, etc. is irrelevant and is meant to potentially distort the Court's view of the Plaintiff. It also does not matter whether the Plaintiff was licensed or ever drove the vehicle before the subject date. This is more irrelevant information provided to the Court to distort the Court's view of the Plaintiff. The only proper inquiry is whether the Plaintiff took the vehicle "lawfully". Plaintiff's position is that she did take the vehicle lawfully. Defendant's position is obviously that Plaintiff took the vehicle "unlawfully". An examination of this issue is set forth below.

MCL 500.3113(a) states as follows:

> **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:**
>
> **(a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully and the person knew or should have known that the motor vehicle was taken unlawfully.**

The proper inquiry is whether the vehicle was unlawfully taken from the ***driver's perspective, not the owner's perspective***. *Spectrum v. Farm Bureau Mut. Ins. Co. of Michigan*, 492 Mich 503, 522; 821 NW2d 117 (2012). In the case at bar, the driver, Carlonda Swoope, testified that the vehicle she drove belonged to Kandice Valentine, her friend of 4 years, for the purpose of a medical emergency related to her mother. (**Exhibit A** – Carlonda Swoope). A jury may reasonably conclude that under these circumstances

RECEIVED by MCOA 7/19/2024 1:33:53 PM

Ms. Swoope believed at all times that she had implied permission to drive the vehicle on the subject date. Therefore, Defendant's motion is without merit and must be denied.

This is supported by caselaw. To illustrate, in *Landon v. Titan Ins. Co.*, 251 Mich. App. 633, 651 NW2d 93 (2002), the court held that the trial court erred in determining that the driver was not entitled to personal injury protection benefits as the driver was entitled to a common law presumption that she had permission to drive the owner's car. *Landon* relied upon *Fout v Dietz*, 401 Mich. 403, 405; 258 N.W.2d 53; (1977) which held that the "operation of a motor vehicle by one who is not a member of the family of the owner gives rise to a rebuttable common-law presumption that the operator was driving the vehicle with the express or implied consent of the owner." *Landon*, supra at 647. In so holding, the court in *Landon* determined that a question of material fact existed as to whether the driver had a reasonable basis for believing she would have the owner's permission to drive the owner's car. *Id* at 651.

Defendant's reliance upon *Spectrum Health Hosps. v. Farm Bureau Mut. Ins. Co. of Michigan,* 492 Mich 503; 821 NW2d 17 (2012) is misplaced and easily distinguishable from the case at bar. In *Spectrum*, the court stated, "[t]o determine whether the end user in Spectrum Health unlawfully took the vehicle, we consider the undisputed facts of this case: **the vehicle's owner expressly told the end user that he was not allowed to drive the vehicle.** Therefore, we conclude that the Court of Appeals erred by affirming the circuit court's grant of summary disposition to Spectrum Health because MCL 500.3113(a) precludes the claimant from receiving PIP benefits in this case." *Spectrum*, supra at 510. (**emphasis added**) That is a far cry from the case at bar. In our case there is nothing in this record to show that Ms. Valentine ever expressly told Ms. Swoope that

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 7/19/2024 1:33:53 PM

she was not allowed to drive the vehicle. Therefore, according to *Spectrum*, since there was no statement from Valentine telling Ms. Swoope that she was not allowed to drive the vehicle, Defendant's motion must be summarily denied.

Another case directly on point is *Rambin v. Allstate Ins. Co.*, 495 Mich 316; 852 NW2d 34 (2014), In *Rambin*, the court held as follows;

> Unlike *Spectrum Health*, ***the present case does not involve the taking of a vehicle against the express prohibition of the vehicle owner.*** Rather, plaintiff presented evidence that, in his view, showed that the person who granted him permission to take the motorcycle on which he was injured was the rightful owner. Against this background, we examine whether MCL 750.414, which makes it a misdemeanor to take or use a vehicle without authority of its owner, is a strict liability crime for purposes of applying MCL 500.3113(a). We hold that MCL 750.414 is not a strict liability crime and that it contains a mens rea element that the taker must intend to take a vehicle "without authority." Accordingly, we affirm the Court of Appeals' decision in so far as it holds that plaintiff is entitled to PIP benefits if the evidence establishes he did not know the motorcycle he had taken was stolen. Rambin, supra at 320.

Rambin requires a showing of knowingly taking without authority or knowingly using without authority. *Id.* at 332. Likewise, here, since Ms. Valentine did not knowingly use the vehicle without authority, Defendant's motion must be denied.

II. PLAINTIFF PROVIDED TRUE STATEMENTS IN HER APPLICATION FOR BENEFITS AND IN HER DEPOSITION.

No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract. *Oade v. Jackson Nat'l Life Ins. Co.*, 465 Mich. 244, (2001). An insurer may deny coverage under an insurance contract where that insurance policy was procured by the policy holder's fraudulent "misrepresentation material to the risk and hazard" attendant in the policy. *Keys v. Pace*, 358 Mich 74, 82-

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 7/19/2024 1:33:53 PM

83; 99 NW2d 547 (1959). Whether a misrepresentation was material and whether it was relied on are generally questions of fact for the jury. *Bergen v. Baker*, 264 Mich App 376, 388-389; 691 NW2d 770 (2004).

In this case Plaintiff's "mens rea" or belief was that she was certainly permitted to use the vehicle of her friend of 4 years for a medical emergency related to her mother. This is not uncommon and in fact it is very likely for a jury to agree with this notion. Turning now to question 43K of the Application the which asked "did you have permission to use the vehicle on the date of the accident? Ms. Swoope checked YES, because of course, her "mens rea" or belief was that she had permission given the circumstances. When the same question asks "If Yes, from who?" Ms. Swoope left that blank. She did not lie, for example, and say that Ms. Valentine gave her permission. (**Exhibit B** – Application for Benefits). So, the question was understood as implicit versus explicit permission to use the vehicle as *Ms. Swoope believed* (this is the proper inquiry as a matter of law).

When then asked during her deposition whether Ms. Valentine gave her *explicit* permission to use the vehicle Ms. Swoope testified truthfully and said no. Had the Application asked whether the owner provided explicit permission to use the vehicle and Ms. Valentine said yes then we would have a misrepresentation/fraud issue here. But that is not the case.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 7/19/2024 1:33:53 PM

III. CONCLUSION

Defendant's entire premise for its motion is its allegation that Ms. Valentine made false statements in support of her claim by falsely representing that she had permission to use the vehicle. **However, Defendant did not procure a statement from Ms. Valentine indicating she had ever told Ms. Swoope that she was not allowed to use her vehicle.** Therefore, the common-law presumption that Ms. Swoope was using the vehicle with the express or implied consent of the owner was unrebutted. Defendant's motion lacks any arguable merit. At the very least, a question of fact exists as to whether Ms. Swoope made any knowingly materially false statements in support of her claim. This question of fact renders summary disposition to be inappropriate.

WHEREFORE, Plaintiff, CARLONDA SWOOPE, respectfully requests that this court deny Defendants' Motion for Summary Disposition.

Respectfully submitted,

HALL MAKLED, P.C.

/s/Daniel B. Makled
DANIEL B. MAKLED (P78777)
Attorney for Plaintiff

Dated: October 4th, 2022

Proof of Service

I hereby certify that on October 4th, 2022, I electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Daniel B. Makled
Daniel B. Makled

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 7/19/2024 1:33:53 PM

EXHIBIT A

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 7/19/2024 1:33:53 PM

Page 33

A. Yes.
Q. Do you recall how the motor vehicle happened for which we're here today?
A. Yes.
Q. And I keep saying it was October 27th, 2020; is that correct?
A. Yes.
Q. And did you have anybody in the vehicle with you at the time of the accident?
A. No.
Q. And what time of day was it?
A. Late morning.
Q. And we talked about this earlier. You were operating a Saturn, correct?
A. Yes.
Q. And that was the 2008 Saturn owned by Kandice Valentine. Kandice being spelled K-A-N-D-I-C-E, Valentine, correct?
A. Yes.
Q. How long has Kandice Valentine been a friend of yours?
A. Maybe about four years.
Q. And was it dark out or light out?
A. Light.
Q. How long had you been on the road before this accident occurred?

Page 34

A. Maybe about 15, 20 minutes.
Q. And where did the accident occur?
A. 75 and Trumbull.
Q. Just tell me what happened on this day. How did the accident occur?
A. I was in the right lane and the truck was in the left lane and then it just started turning and it ran into me. It started turning right and it ran into me. It kept going, but eventually, it stopped.
Q. So you're in the right lane, the truck is to your left?
A. Yes.
Q. So does the truck -- you said the truck driver turned into you, meaning turned into and struck the left side of the vehicle you were driving?
A. Yes.
Q. You said that you were driving to pick up your mother; is that correct?
A. Yes.
Q. To take her to the hospital?
A. Yes.
Q. And Ms. Valentine's house is noted to be on 1918 Eagle Court, Westland, Michigan. Is that where you were at?
A. Yes.
Q. And then from Westland, you were driving to Detroit on

Page 35

Trumbull to pick up your mother?
A. Yes.
Q. Did you have your seat belt on?
A. Yes.
Q. When the accident occurred, was it one impact or multiple impacts to the vehicle?
A. It was one.
Q. After the truck driver strikes the left side of the car, what do you do?
A. Panic. I just sat there.
Q. Do you get out of the vehicle?
A. Yes, because the guy didn't want to give me his insurance. I just checked my car and everything.
Q. So you're physically able to get out of the vehicle. Did you walk over to the other person to try to get his information?
A. Yes.
Q. Did you call the police at all?
A. Yes.
Q. And did the police ever arrive to the scene?
A. Yes.
Q. And when they arrived, was the truck driver still there?
A. Yes.
Q. Did you ask for an ambulance to come to pick you up?

Page 36

A. No, I didn't.
Q. Did the police officer ask you if you needed an ambulance?
A. Yes.
Q. And you declined at that point?
A. Correct.
Q. Did you -- was the car that you were in, that Saturn, drivable after this accident?
A. No.
Q. Was it towed from the scene --
A. Yes.
Q. -- to your knowledge?
Do you know if your mom ever made it to the hospital on this day?
A. Well, that was why I didn't get an ambulance because I wanted to get to her and we went together in a Uber.
Q. So at the scene of the accident, did you call an Uber?
A. Yes.
Q. And the Uber picked you up and then you drove to your mom's house; is that correct?
A. Yes.
Q. And then picked up your mom and drove her to the hospital; is that correct?
A. Yes.
Q. What hospital?

RECEIVED by MSC 7/19/2024 9:17:32 AM
RECEIVED by MCOA 7/19/2024 1:33:53 PM

EXHIBIT B

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 7/19/2024 1:33:53 PM Document received by MCOA

RECEIVED by MSC 7/19/2024 9:17:32 AM

APPLICATION FOR PERSONAL INJURY PROTECTION BENEFITS THROUGH THE MICHIGAN ASSIGNED CLAIMS PLAN

Employment Information

34. Were you employed at the time of the accident? ☐ Yes ☒ No a. If yes, provide the following information; If no, skip to question 42.

Name, Address and Phone Number of Your Employer	Job Title	Average weekly income at the time of the accident	List the dates of your employment: From	To
N/A		$ N/A.		

Note: If you were employed by more than 1 employer, attach a separate sheet with contact information as part of this application.

35. Have you missed any work because of your injuries? ☐ Yes ☒ No a. If yes, what is the first date you missed work? _____

36. Do you have a note from a doctor ordering you to stay home from work? ☐ Yes ☐ No a. If yes, please provide:
Doctors Name Address Phone Number

37. Have you returned to work? ☐ Yes ☒ No
a. If yes, what date did you return to work? _____

38. If not yet returned, have you been given a return date? ☐ Yes ☐ No
a. If yes, return to work date: N/A.

39. Were you on the job at the time of the accident? ☐ Yes ☒ No
a. If yes, are you eligible for any benefits under workers compensation? ☐ Yes ☐ No

40. How did you normally get to work before to this accident? I.E. Public Transportation, motor vehicle, etc.
family member / N/A

41. Are you eligible for any benefits under any other wage or salary continuation plan? ☐ Yes ☒ No

Entitlement Information-Note that question 42 refers to the involved motor vehicle you were in, getting into or out of, or were struck by as a pedestrian or if applicable, the motorcycle you were on at the time of the accident.

42. Was there damage to the vehicle you were occupying or struck by? ☐ Yes ☐ No ☐ Unknown If yes, describe the damage to the vehicle:
right side is totaled

a. Was the vehicle towed? ☐ Yes ☒ No If yes, please provide: Name of Towing Company Address Phone Number

b. Was the vehicle repaired? ☐ Yes ☒ No If yes, please provide: Name of Repair Company Address Phone Number

c. Do you know the current location of the involved vehicle? ☒ Yes ☐ No If yes, please provide: Location of Vehicle Address Phone Number
Trumbull and I-75

Note: If you were struck by more than 1 vehicle as a pedestrian, attach separate sheet with contact information as part of this application.

d. Did you use the motor vehicle/motorcycle at any time before the date of the accident? ☐ Yes ☒ No ☐ Unknown

e. How often did you use the vehicle/motorcycle?
☐ Daily ☐ Once a Week ☐ Two or More Times Per Week ☐ Less than Once Per Month ☐ Rarely ☒ Other, please explain Never

f. Did you have access to a set of keys to the vehicle/motorcycle? ☐ Yes ☒ No ☐ Unknown

g. Have you ever had to ask permission to use the vehicle/motorcycle? ☒ Yes ☐ No ☐ Unknown

h. Have you ever been denied permission to use the vehicle/motorcycle? ☐ Yes ☒ No ☐ Unknown

i. Did you ever put gas in the vehicle/motorcycle? ☐ Yes ☒ No ☐ Unknown

j. Did you ever pay money toward the purchase or the maintenance of the vehicle/motorcycle? ☐ Yes ☒ No ☐ Unknown

k. Did you have permission to use the vehicle/motorcycle on the date of the accident? ☒ Yes ☐ No ☐ Unknown If Yes, from who? _____

43. List the name of the owner of the vehicle (Note, if you were on a motorcycle, please provide the following information about the vehicle involved in your accident):
First Name Middle Name Last Name
Candice Valentine

Owner's Address and Phone Number
I Dont know it

a. List the Name of the Registrant of Vehicle involved in the accident if different than the owner: First Name Middle Name Last Name

Registrant's Address and Phone Number I Dont know.

b. Vehicle Involved:

Year	Make	Model	Vehicle Identification Number (VIN)	Plate Number	State the Vehicle is Registered In
2008	Saturn	Vue	3GSCL33P38S691872	EFT 4389	Michigan

c. Did the owner and/or registrant of this vehicle have any automobile insurance on the date of the accident? ☐ Yes ☒ No If yes:
Name of Insurance Company : None Policy #: _____
How did you confirm if the owner/registrant did or did not have insurance? Asked

d. If not you, list the name of the driver of the vehicle: First Name Middle Name Last Name

RECEIVED by MCOAA 7/19/2024 1:33:53 PM

Exhibit E

RECEIVED by MSC 7/19/2024 9:17:32 AM

21-011402-NF FILED IN MY OFFICE WAYNE COUNTY CLERK 10/21/2022 10:58 AM Korey Pearson

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT WAYNE COUNTY	REQUEST FOR HEARING ON A MOTION (PRAECIPE) ORDER/ADJOURNMENT	CASE NO. 21-011402-NF

2 Woodward Ave., Detroit MI 48226 | Courtroom 1007 CAYMC | Court Telephone No. 313-224-2444

Plaintiff name and address		Defendant name and address
Carlonda Naishe Swoope	v	Citizens Insurance Company of the Midwest
Plaintiff's attorney, bar no., address, and telephone no. Daniel B. Makled, P-78777 23756 Michigan Ave Ste 300 Dearborn, MI 48124-1853 (313) 582-7930		Defendant's attorney, bar no., address, and telephone no. Arminia Duenas, P-67090 350 S Main St Ste 400 Ann Arbor, MI 48104-2131 (734) 761-9000

List additional attorneys on other side

1. Motion Title: Defendant's Motion for Summary Disposition for Nonpermissive Use

2. Moving Party: Defendant Telephone No. (734) 761-9000

3. Please place on the motion calendar for:

21-011402-NF
FILED IN MY OFFICE
WAYNE COUNTY CLERK
8/18/2022 8:25:03AM
CATHY M. GARRETT
/s/ Korey Pearson

Judge Dana Margaret Hathaway	Bar No. 68588	Date: 10/14/2022	Time: 8:30 AM

Adj. To:_____ Adj. To:_____ Adj. To:_____

The motion will be decided [X] without oral argument [ ] with oral argument as indicated above; re-notice with time and Zoom info.

Comment

4. I certify that I have had personal contact with **Plaintiff Counsel** on **8/10/2022** regarding concurrence in the relief sought in this motion and that concurrence has been denied or that I have made responsible and diligent attempts to contact counsel requesting concurrence with motion.

Date: **8/10/2022** Attorney: **Arminia Duenas** Bar No. **67090**

ORDER/ADJOURNMENT

Pursuant to MCR 2.119(E)(3), the Court may dispense with oral argument, IT IS ORDERED THAT THIS MOTION IS:

[ ] ORAL ARGUMENT IS ORDERED via ZOOM on _____ at _____am/pm

[X] DENIED [ ] TAKEN UNDER ADVISEMENT [ ] A written or oral decision will be rendered by _____

[ ] GRANTED [ ] GRANTED IN PART / DENIED IN PART [ ] DISMISSED [ ] IT IS FURTHER ORDERED

Whether Plaintiff had permission to use the vehicle is a question of fact for the trier of fact.

Date 10/24/2022

/s/ Dana Margaret Hathaway
THIRD CIRCUIT COURT JUDGE

RECEIVED by MCOA 2/13/2023 1:33:53 PM

Exhibit F

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN
IN THE COURT OF APPEALS

CAROLINDA NAISHE SWOOPE,

Plaintiff-Appellee,

vs.

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant-Appellant.

COA No. 364924

Wayne County Circuit Court
LC No. 21-011402 -NF

Lower Court Judge
Hon. Dana Margaret Hathaway

Daniel B. Makled (P78777)
Hall Makled P.C.
Attorneys for Plaintiff-Appellee
23756 Michigan Avenue, Suite 300
Dearborn, Michigan 48123
(313) 582-7930 / (313) 582-7962 (fax)
dmakled@hallmakled.com

Arminia Duenas (P67090)
Conlin, McKenney & Philbrick, P.C.
Attorneys for Defendant-Appellant Citizens Insurance Company of the Midwest ("CICM")
350 South Main St., Suite 400
Ann Arbor, MI 48104
(734) 761-9000 / (734) 761-9001 (fax)
ADuenas@cmplaw.com

DEFENDANT-APPELLANT CITIZENS INSURANCE COMPANY OF THE MIDWEST'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

CONLIN, McKENNEY & PHILBRICK, P.C.

By: */s/Arminia Duenas*
Arminia Duenas (P67090)
Attorney for Defendant -Appellant
Citizens Insurance Company of the Midwest
350 S. Main Street, Suite 400
Ann Arbor, MI 48104-2131
(734) 761-9000
aduenas@cmplaw.com

RECEIVED by MCOA 5/12/2023 1:23:00 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

LIST OF EXHIBITS v

JURISDICTIONAL STATEMENT vi

STATEMENT OF QUESTIONS PRESENTED vii

STATEMENT OF FACTS 1

LAW AND ARGUMENT 5

I. THE TRIAL COURT ERRED WHEN DENYING CICM'S MOTION FOR SUMMARY DISPOSITION INDICATING THE QUESTION OF WHETHER PLAINTIFF HAD PERMISSION TO USE THE VEHICLE IS A QUESTION OF FACT FOR THE TRIER OF FACT WHEN PLAINTIFF/ APPELLEE CAROLINDA SWOOPE TESTIFIED THAT SHE NEVER ASKED PERMISSION FROM THE OWNER TO USE THE VEHICLE AND DID NOT HAVE AUTHORITY TO OPERATE THE VEHICLE ON THE DATE OF THE ACCIDENT AND WHEN DISREGARDING PLAINTIFF/APPELLEE CAROLINA SWOOPE'S MARTIAL MISREPRESENTATIONS AND FALSE STATEMENTS IN HER APPLICATION FOR BENEFITS 5

A. Standard of Review 5

B. Plaintiff/ Appellee Carolinda Swoope Is Barred From Recovery of No-Fault PIP Benefits For the Subject Accident Pursuant to MCL 500.3113(a) Because She Was Operating a Vehicle Through An Unlawful Taking And Without Authority 6

1. ***Plaintiff/ Appellee Carolinda Swoope Willingly Operated Ms. Valentine's vehicle.*** 7

2. ***Plaintiff/ Appellee Carolinda Swoope took Ms. Valentine's vehicle unlawfully.*** 8

3. ***Plaintiff/ Appellee Carolinda Swoope knew or should have known that the vehicle was without authority and was an unlawful taking.*** 10

C. Plaintiff/ Appellee Carolinda Swoope Is Ineligible for No-Fault PIP Benefits Pursuant to MCL 500.3173a(4) Because She Admitted She Provided False Statements and Material Misrepresentations In Her Application for Benefits 15

RELIEF REQUESTED.....18

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

TABLE OF AUTHORITIES

CASES

Elena Quinto v Cross & Peters Co,
451 Mich 358, 362; 547 NW2d 314 (1996).....6

Innovative Adult Foster Care, Inc v Ragin,
285 Mich App 466, 475-476; 776 NW2d 398 (2009).....6

Joseph Davis, Sr v Metlife Insurance Company,
Unpublished no. 359313, January 19, 2023..... 8-10, 12, 13

Liparoto Constr, Inc v Gen Shale Brick, Inc,
284 Mich App 25, 29; 772 NW2d 801 (2009).....5

Lowrey v. LMPS & LMPJ, Inc.,
500 Mich 1; 890 NW2d 344 (2016).....6

McCoig Materials, LLC v Galui Constr, Inc,
295 Mich App 684, 693; 818 NW2d 410 (2012).....5

Martha Redmond v. Theresa Heller,
332 Mich App 415, 438; 957 NW2d 357 (2020).....5

Spectrum Health v Farm Bureau Mut Ins Co of Michigan,
492 Mich 503, 508 (2012).....6, 9, 12

Titan Ins Co v Hyten,
491 Mich 547, 553; 817 NW2d 562 (2012).....5

STATUTES

MCL 500.3105.....6
MCL 500.3113.....14
MCL 500.3113(a).....2,-3, 6-7, 9-10, 12, 14
MCL 500.3116.....6
MCL 500.4511..... 15-16
MCL 500.3172(1).....17
MCL 500.3173.....6
MCL 500.3173a.....15
MCL 500.3173a(4)..... 2, 4, 15-18

RULES

MCR 2.116(C)(10).....5
MCR 7.203..... vi

RECEIVED by MCOA 5/12/2023 1:23:00 PM

MCR 7.203(B)(1)..... vi
MCR 7.204..... vi
MCR 7.205..... vi

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

LIST OF EXHIBITS

Application for Benefits	EXHIBIT A
Plaintiff/ Appellee Carolinda Naishe Swoope's Deposition Transcript	EXHIBIT B
CICM'S Motion for Summary Disposition	EXHIBIT C
Plaintiff/ Appellee Carolina Naishe Swoope's Response to CICM Motion	EXHIBIT D
10/24/2022 Order	EXHIBIT E
Motion for Reconsideration	EXHIBIT F
01/23/2023	EXHIBIT G
Register of Actions	EXHIBIT H
Order Granting Leave to Appeal	EXHIBIT I
Joseph Davis, Sr. v. MetLife Insurance Co and MAIPC, Unpublished per curiam of the Court of Appeals issued January 19, 2023 [Docket No. 359313]	EXHIBIT J

RECEIVED by MSC 7/19/2024 9:17:32 AM

JURISDICTIONAL STATEMENT

Defendant/ Appellant Citizens Insurance Company Of The Midwest (referred to as "CICM"), appeals via leave granted regarding two (2) orders entered by the Wayne County Circuit Court: (1) an October 24, 2022 Order Regarding Motion for Summary Disposition that made a determination of Plaintiff/ Appellee Carlonda Naishe Swoope's nonpermissive use of a vehicle at the time of the October 27, 2020 motor vehicle accident and (2) the January 23, 2023 Order Denying CICM's Motion for Reconsideration regarding the Court's ruling regarding the Motion for Summary Disposition.

Appellate jurisdiction is vested in this Court by virtue of MCR 7.203(B)(1), which provides that the Michigan Court of Appeal may grant leave to appeal from a judgment or order of the circuit court which is not a final judgment appealable of right. The Application for Leave to Appeal was filed within 21 days of entry of the January 23, 2022 Opinion and Order denying CICM's Motion for reconsideration of its Motion for Summary Disposition. On March 24, 2023, the Michigan Court of Appeals granted the Application for Leave to Appeal pursuant to MCR 7.203, MCR 7.204 and MCR 7.205 and jurisdiction is vested with the Court.

RECEIVED by MCOA 5/12/2023 1:23:00 PM

STATEMENT OF QUESTIONS PRESENTED

WHETHER THE TRIAL COURT ERRED WHEN IT RULED THAT WHETHER PLAINTIFF/ APPELLEE CAROLINA NAISHE SWOOPE HAD PERMISSION TO USE THE VEHICLE AT THE TIME OF THE ACCIDENT IS A QUESTION OF FACT FOR THE TRIER OF FACT WHEN MS. SWOOPE TESTIFIED THAT SHE NEVER USED THE VEHICLE AND HAS NEVER ASKED PERMISSION TO OPERATE THE VEHICLE

Defendant/ Appellant Citizens Insurance Company of the Midwest answers: "**YES**".

Plaintiff/ Appellee Carolinda Naishe Swoope answers: "**NO**".

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

STATEMENT OF FACTS

This case arises from a claim for Michigan No-Fault Personal Injury Protections (PIP) benefits filed by Plaintiff/ Appellee Carlonda Naishe Swoope ("Plaintiff/ Appellee Carlonda Swoope") related to injuries alleged sustained from an October 27, 2020 motor vehicle accident. On November 11, 2020, Plaintiff/ Appellee Carlonda Swoope completed an Application of Benefits and submitted it to the Michigan Automobile Insurance Placement Facility for assignment of PIP benefits related to the accident. (Exhibit A, AOB)

In her Application for Benefits, Plaintiff/ Appellee Carlonda Swoope made material misrepresentations as to her requesting permission to operate Ms. Kandice Valentine's ("Ms. Valentine") vehicle. She indicated in her Application for Benefits that she had permission to operate the vehicle. Specifically, Plaintiff answered "yes" to the question of whether she had permission to drive the accident vehicle in paragraph 42(k). (Exhibit A, AOB) This matter was assigned to Citizens Insurance Company of the Midwest ("CICM") based on the martial misrepresentation and false statement that she had permission to operate the vehicle at the time of the subject accident.

Plaintiff/ Appellee Carlonda Swoope testified multiple times that she did not ask permission to operate the vehicle, which makes her use of the vehicle an "unlawful taking". Plaintiff/ Appellee Carlonda Swoope testified that she did not have any conversation or contact with Ms. Valentine the owner of the vehicle on the date of the subject accident, regarding the use or operation of the vehicle prior to her unlawful and unauthorized taking of same on the date of the accident. (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 9, lines 1-6)

Besides testifying she did not request or receive permission to use the vehicle, Plaintiff/ Appellee Carlonda Swoope testified that she never asked permission to operate and had never

operated the vehicle *prior* to the date of the accident, and therefore had no reasonable expectation that she could operate the vehicle. (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 10, lines 14-24)

Plaintiff/ Appellee Carlonda Swoope, made material misrepresentations and false statement as to her permissive use of the vehicle in her Application for Benefits to avoid immediate rejection of her application. She clearly testified that she never received permission and additionally had no reasonable belief she was permitted, or otherwise authorized to take the vehicle. The Application for Benefits was also signed by Plaintiff/ Appellee Carlonda Swoope with the attestation that the information contained is true and accurate and with the fraud warning that false statements contained therein (or otherwise submitted as part of or in support of a claim for benefits) constitutes a fraudulent insurance act and makes the claim ineligible for benefits. (Exhibit A, AOB) (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 9, lines 1-6)

On June 28, 2022, CICM filed its motion for summary disposition arguing that due to Plaintiff/ Appellee Carlonda Swoope's material misrepresentations and false statement in her Application for Benefits in violation of MCL 500.3173a(4) and her unlawful taking of the vehicle owned by Ms. Valentine in violation of MCL 300.3113(a), she was ineligible for no-fault PIP benefit related to the subject accident. (Exhibit C, CICM'S Motion for Summary Disposition)

At issue here is MCL 500.3113(a), because the trial court did not address the issue of material misrepresentation and false statements made in the Application for Benefits. MCL 300.3113(a) bars recovery for PIP benefits if, at the time of the accident, "[t]he person was willingly operating or willingly using a motor vehicle that was taken unlawfully, and the person knew or should have known that the motor vehicle was taken unlawfully." For no-fault insurance benefits to be barred under MCL 500.3113(a), Plaintiff/ Appellee Carlonda Swoope must have (1)

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

willingly operated or used Ms. Valentine's vehicle, (2) taken Ms. Valentine's vehicle unlawfully, and (3) known or should have known that Ms. Valentine's vehicle was taken unlawfully.

Plaintiff/ Appellee Carlonda Swoope testified that she willingly operated Ms. Valentine's vehicle without asking permission on the date of the accident and because she did ask for or have permission from owner of the vehicle, Plaintiff/ Appellee Carlonda Swoope knew or should have known that Ms. Valentine's vehicle was taken unlawfully. Plaintiff/ Appellee Carlonda Swoope indicated that she took Ms. Valentine's vehicle due to a family "emergency". (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 9, lines 1-6) Even though there is no exception under MCL 500.3113(a) for emergencies, CICM addressed the alleged emergency in its Motion for Summary Disposition. There is absolutely no evidence to support her "emergency" allegation, as neither she nor her mother called for an ambulance and Plaintiff/ Appellee Carlonda Swoope drove to and stopped at Burger King on the way to the "emergency".

On October 4, 2022, Plaintiff/ Appellee Carlonda Swoope filed her response to CIMC's motion and indicated that she did not knowingly use the vehicle without authority, and therefore it was not an unlawful taking of Ms. Valentine's vehicle. (Exhibit D, Response to CICM's Motion) Plaintiff/ Appellee Carlonda Swoope indicated that she had implied permission to drive the vehicle on the subject date because of the alleged "family emergency" and the fact that Ms. Valentine did not specifically indicate that she could not drive the vehicle and that she was entitled to a common law presumption that she had permission to drive the owner's vehicle.

On October 24, 2022, the Court denied CICM's motion indicating "Whether Plaintiff had permission to use the vehicle is a question of fact for the trier of fact." (Exhibit E, October 24, 2022 Order) The trial Court failed to address the material misrepresentations and false statements made by Plaintiff/ Appellee Carlonda Swoope in her Application for Benefits in violation of

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

MCL 500.3173a(4) in the October 24, 2022 Order.

On November 11, 2022, CICM filed a motion for reconsideration addressing the material misrepresentations and false statements made by Plaintiff/ Appellee Carlonda Swoope in her Application for Benefits in violation of MCL 500.3173a(4) and the fact that no reasonable juror could conclude that Plaintiff/ Appellee Carlonda Swoope did not know she took the vehicle without authority, because, by her own statement Plaintiff/ Appellee Carlonda Swoope she did have permission and could not reasonably believe she had authority because she has never asked permission to use the vehicle. (Exhibit F, Motion for Reconsideration)

On January 23, 2023, despite not addressing the material misrepresentations and false statements made by Plaintiff/ Appellee Carlonda Swoope in her Application for Benefits in violation of MCL500.3173a(4) and the fact that Plaintiff/ Appellee Carlonda Swoope testified that she did not have authority or permission to take Ms. Valentine's vehicle, the trial court denied CICM's motion for reconsideration. (Exhibit G, January 23, 2023 Order) The trial court indicated that CICM did not demonstrate a palpable error by which the court was misled, or that a different disposition of the motion must result from correction of the error". (Exhibit G, January 23, 2023 Order) (Exhibit H, Register of Actions)

On March 24, 2023, the Michigan Court of Appeals granted leave to appeal to CICM. (Exhibit I, Order Granting Leave to Appeal)

CICM now files its Appellant brief on leave granted.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

LAW AND ARGUMENT

I. THE TRIAL COURT ERRED WHEN DENYING CICM'S MOTION FOR SUMMARY DISPOSITION INDICATING THE QUESTION OF WHETHER PLAINTIFF HAD PERMISSION TO USE THE VEHICLE IS A QUESTION OF FACT FOR THE TRIER OF FACT WHEN PLAINTIFF/ APPELLEE CARLONDA SWOOPE TESTIFIED THAT SHE NEVER ASKED PERMISSION FROM THE OWNER TO USE THE VEHICLE AND DID NOT HAVE AUTHORITY TO OPERATE THE VEHICLE ON THE DATE OF THE ACCIDENT AND WHEN DISREGARDING PLAINTIFF/APPELLEE CARLONDA SWOOPE'S MARTIAL MISREPRESENTATIONS AND FALSE STATEMENTS IN HER APPLICATION FOR BENEFITS.

A. Standard of Review

A trial court's ruling on a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id.* "If the moving party properly supports his or her motion, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists." *Martha Redmond v Theresa Heller*, 332 Mich App 415, 438; 957 NW2d 357 (2020). "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." *Id*. (quotation marks and citation omitted). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific

RECEIVED by MCOA 5/12/2023 1:23:00 PM

facts showing that a genuine issue of material fact exists." *Lowrey v. LMPS & LMPJ, Inc,* 500 Mich 1, 7;890 NW2d 344 (2016), quoting *Elena Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (quotation marks omitted). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Lowrey*, 500 Mich at 7, quoting *Quinto*, 451 Mich at 363 (quotation marks omitted). This Court's "review is limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009).

B. Plaintiff/ Appellee Carlonda Swoope is Barred from recovery of No-Fault PIP pursuant to MCL 500.3113(a) Because She Was Operating a Vehicle Through An Unlawful Taking

MCL 500.3113(a) bars a person's recovery for no-fault PIP benefits if that person is operating a vehicle through an unlawful taking. Specifically, MCL 500.3113(a), bars recovery for PIP benefits if, at the time of the accident, "[t]he person was willingly operating or willingly using a motor vehicle that was taken unlawfully, and the person knew or should have known that the motor vehicle was taken unlawfully."

In addition, MCL 500.3173 confirms that a person disqualified pursuant to the unlawful taking statute is also disqualified from benefits under the Assigned Claims Plan. "A person who because of a limitation or exclusion in sections 3105 to 3116 is disqualified from receiving personal protection insurance benefits under a policy otherwise applying to his accidental bodily injury is also disqualified from receiving benefits under the assigned claims plan." MCL 500.3173. The Michigan Supreme Court in *Spectrum Health v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503 (2012), held that the phrase "taking unlawfully" in MCL 500.3113(a) applies to anyone, including a family member, who takes a vehicle without the authority of the owner, regardless of

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

whether the person intended to steal it. *Id.*

"Because a taking does not have to be larcenous to be unlawful, the phrase 'taken unlawfully' in MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner." *Id*. at 518. The relevant inquiry into the determination of an unlawful taking is whether the taking was "without authority."

For no-fault PIP benefits to be barred under MCL 500.3113(a), Plaintiff/ Appellee Carlonda Swoope must have (1) willingly operated or used Ms. Valentine's vehicle, (2) taken Ms. Valentine's vehicle unlawfully, and (3) known or should have known that Ms. Valentine's vehicle was taken unlawfully.

1. Plaintiff/ Appellee Carlonda Swoope Willingly Operated Ms. Valentine's vehicle.

This first element is not in dispute in this case, as Plaintiff/ Appellee Carlonda Swoope testified that she was willingly operating Ms. Valentine's vehicle. (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 9, lines 1-6)

2. Plaintiff/ Appellee Carlonda Swoope took Ms. Valentine's vehicle unlawfully.

Plaintiff/ Appellee Carlonda Swoope testified that she did ask to use Ms. Valentine's vehicle, nor did she have any conversation or contact with Ms. Valentine regarding using the vehicle prior to her unlawful taking of same on the date of the accident. She had not been given permission to use the vehicle on the day of the accident.

Q. And you asked to borrow someone's vehicle; is that correct?

A. I didn't ask, I just got the car because I had a family emergency. My mom needed to go to the hospital. So I was trying to hurry up to get to her.

(Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 9, lines 1-6)

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

Besides testifying she did not request or receive permission to use Ms. Valentine's vehicle, Plaintiff/ Appellee Carlonda Swoope testified that she never operated the vehicle prior to the date of the accident, and therefore had no reasonable expectation that she took the vehicle with authority.

14	Q	---So have you ever used this vehicle that
15		you -- that's involved in this accident before this
16		date?
17	A.	No.
18	Q.	Never at any point?
19	A.	No.
20	Q.	And you didn't ask for permission to use the vehicle?
21	A.	No.
22	Q.	So is it fair to say you had no permission to operate
23		this vehicle at the time that you were operating it?
24	A.	Correct.

(Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 10, lines 14-24)

There is no question of fact that Plaintiff/ Appellee Carlonda Swoope's taking of Ms. Valentine's vehicle on the date of the subject accident was without authority. Plaintiff/ Appellee Carlonda Swoope testified that she took the keys to Ms. Valentine's vehicle and drove off.

7	Q.	So how did you get the keys to the vehicle?
8	A.	I just took them.

(Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 9, lines 7-8)

The Court of Appeals in Joseph *Davis, Sr. v. Metlife Insurance and Michigan Automobile Insurance Placement Facility, No. 359313, unpublished decision, January 19, 2023* agreed with the trial court that there was no question of fact that plaintiff Davis's taking of Edwards's vehicle was without authority. Plaintiff Davis took the keys to Edwards's vehicle and drove off. When asked whether he had permission to operate Edwards's vehicle at the time of the accident, plaintiff Davis stated, "No, not that day I didn't." (Exhibit J, *Davis v. Metlife Insurance Company*, no. 359313, January 19, 2023) There is nothing in the record to support that plaintiff Davis had

RECEIVED by MCOA 5/12/2023 1:23:00 PM

permission to take and use the vehicle, and reasonable minds could not differ that his taking of the vehicle on the night of the accident was without authority and was, therefore, an unlawful taking. (Exhibit J, *Davis v. Metlife Insurance Company*, no. 359313, January 19, 2023)

In this case is similar to in *Joseph Davis, Sr. v. Metlife Insurance and Michigan Automobile Insurance Placement Facility*, because Plaintiff/ Appellee Carlonda Swoope testified that she did not ask permission, have any conversation or contact with Ms. Valentine prior to willfully grabbing the keys to the vehicle and driving away. Similarly, to *Joseph Davis, Sr. v. Metlife Insurance and Michigan Automobile Insurance Placement Facility,* Plaintiff/ Appellee Carlonda Swoope took the keys to Ms. Valentine's Vehicle without authority and drove off. Plaintiff/ Appellee Carlonda Swoope specifically testified that she had **not been given permission to use the Vehicle** on the day of the Accident.

> Q. And you asked to borrow someone's vehicle; is that correct?
> A. **I didn't ask**, I just got the car because I had a family emergency. My mom needed to go to the hospital. So I was trying to hurry up to get to her.
> **(**Exhibit B**,** Plaintiff/ Appellee Carlonda Swoope**,** pg. 9, lines 1-6)

MCL 500.3113(a) does not require a vehicle to be taken against the express prohibition of the vehicle's owner. In *Spectrum*, the Court considered "whether a person injured while driving a motor vehicle that the person had taken contrary to the express prohibition of the owner may avail himself or herself of" no-fault insurance benefits. *Spectrum*, 492 Mich at 508. However, the Court did not establish a requirement that a vehicle owner must expressly prohibit the use of the vehicle for a taking to be unlawful under MCL 500.3113(a).

Due to the fact Plaintiff/ Appellee Carlonda Swoope did not have authority to operate or permission to take and use Ms. Valentine's Vehicle, reasonable minds could not differ that her

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

taking of the vehicle on the night of the accident was without authority and was, therefore, an unlawful taking. (Exhibit J, *Davis v. Metlife Insurance Company*, no. 359313, January 19, 2023, pg. 6)

This case is similar to *Davis v. Metlife,* because Plaintiff/ Appellee Carlonda did not ask permission and simply grabbed the keys and drove off in Ms. Valentine's vehicle. Specifically, when asked whether she had permission to operate Ms. Valentine's vehicle at the time of the accident, Plaintiff/ Appellee Carlonda Swoope stated "No". When asked whether she if she ever used the vehicle at any point before the accident, Plaintiff/ Appellee Carlonda Swoope stated "No". When asked if was fair to say that she had no permission to operate this vehicle at the time of the accident, Plaintiff/ Appellee Carlonda Swoope stated "Correct". There is absolutely nothing in the record to support that Plaintiff/ Appellee Carlonda Swoope had permission to take and use the vehicle, and reasonable minds could not differ that her taking of the vehicle on the day of the accident was without authority and was, therefore an unlawful taking.

3. Plaintiff/ Appellee Carlonda Swoope knew or should have known that the vehicle was without authority and was an unlawful taking.

The third element of MCL 500.3113(a) requires looking at Plaintiff/ Appellee Carlonda Swoope's state of mind whether she "knew or should have known" that the vehicle was taken without authority. By her own testimony, Plaintiff/ Appellee Carlonda Swoope did not have permission to take the vehicle, and so she knew that her taking of the vehicle was unauthorized. Plaintiff/ Appellee Carlonda Swoope indicated that she took Ms. Valentine's vehicle with implied permission to drive the vehicle due to a family emergency. (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 9, lines 1-6) Even though no exception under MCL 500.3113(a) for emergencies exists, CICM addressed the alleged emergency in its Motion for Summary Disposition.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

CICM holds that there is no evidence that any "emergency" existed on the date of the subject accident. Neither Plaintiff/ Appellee Carlonda Swoope nor her mother called for an ambulance for the alleged "emergency". In fact, on the way to the alleged family "emergency" Plaintiff/ Appellee Carlonda Swoope stopped at Burger King to get food. She would have the court belief that she was in such a hurry that she could not ask Ms. Valentine for permission and authority to operate her vehicle, but she had time to stop for Burger King. There is absolutely no evidence to support her "emergency" allegation and Plaintiff/ Appellee Carlonda Swoope' testimony and actions on the date of the accident, do not support evidence no emergency.

- An ambulance was **not** called for her mother.
- Plaintiff/ Appellee Carlonda Swoope grabbed the keys to the vehicle, did not request permission to operate the vehicle, and immediately drove to Burger King to pick up food. (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 37, line 8-16)
- Further, after the accident, Plaintiff/ Appellee Carlonda Swoope ordered an Uber to pick her up from the scene of the accident and drive to her mother's house. (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 39, lines 2-5)

There was clearly **no** emergency, and even if it was, there is no "emergency" exception to the "permissive use" and "lawful taking" requirement. Plaintiff/ Appellee Carlonda Swoope was aware that she had other legal options, such as calling an ambulance for her mother or ordering an Uber, prior to taking the vehicle.

Plaintiff/ Appellee Carlonda Swoope also indicated in her response to CICM's motion that it was not an unlawful taking because Ms. Valentine did not expressly prohibit her from taking the vehicle on the date of the accident or at any time. Due to the fact Plaintiff/ Appellee Carlonda Swoope, in the 4 years of knowing Ms. Valentine, had never asked for permission to operate the vehicle before the date of the accident and never used the vehicle before the date of the accident,

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

there would have been no reason or occasion for Ms. Valentine to expressly prohibit Plaintiff/ Appellee Carlonda Swoope from taking or using of her vehicle. Further, MCL 500.3113(a) does not require a vehicle to be taken against the express prohibition of the vehicle's owner. In *Spectrum*, the Court considered "whether a person injured while driving a motor vehicle that the person had taken contrary to the express prohibition of the owner may avail himself or herself of" no-fault insurance benefits. *Spectrum*, 492 Mich at 508. However, the Court did not establish a requirement that a vehicle owner must expressly prohibit the use of the vehicle for a taking to be unlawful under MCL 500.3113(a).

It would have been unreasonable for any court to hold that an individual must expressly prohibit everyone and anyone from taking their vehicle to be an unlawful taking. Such a requirement would be counter to Michigan law, public policy and common sense.

CICM acknowledges that there is a difference between unlawful taking and driving a vehicle unlawfully. However, the fact that Plaintiff/ Appellee Carlonda Swoope did not have a valid driver's license and was not permitted to legally operate Ms. Valintine's vehicle also speaks to her state of mind.

The Court of Appeals in *Joseph Davis, Sr. v. Metlife Insurance and Michigan Automobile Insurance Placement Facility, No. 359313, unpublished decision, January 19, 2023,* agreed with the trial court that plaintiff Davis knee that he took the vehicle without authority. By his own statement, plaintiff Davis did not have permission to take the vehicle, and so he knew that his taking of the vehicle was unauthorized. The Court of Appeals further held that reasonable minds could not disagree that plaintiff Davis knew or should have known that he was using the vehicle unlawfully because he did not have authority to operate the vehicle and without authorization the

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

vehicle was taken unlawfully. (Exhibit J, *Davis v. Metlife Insurance Company*, no. 359313, January 19, 2023, pg. 6)

This case is similar to *Joseph Davis, Sr. v. Metlife Insurance and Michigan Automobile Insurance Placement Facility, No. 359313, unpublished decision, January 19, 2023*, Plaintiff/ Appellee Carlonda Swoope knowingly took Ms. Valentine's vehicle without authorization, and so the requirement in MCL 500. 3113(a) that "the person knew or should have known that the motor vehicle was taken unlawfully" is also satisfied. Specifically, the Michigan Courts have indicated that if an individual does not ask permission to operate a vehicle and operates the vehicle without permission it is an unlawful taking and knew or should have known that the motor vehicle was taken unlawfully.

Plaintiff/ Appellee Carlonda Swoope had no reasonable expectation that she could legally operate Ms. Valentine's vehicle because she was not permitted to operate any vehicle by the State of Michigan, as she had a suspended driver's license at the time of the subject accident.

Q. Is it because you don't have a driver's license?
A. Yes.
Q. Have you ever owned a driver's license?
A. Yes.
Q. And what happened to your driver's license?
A. It got revoked because I had tickets to pay and I didn't pay them.
Q. And at that time of this October 27th, 2020, accident, were you driving on a revoked license?
A. Yes. It was suspended, I'm sorry.
Q. I'm sorry, suspended?
A. Yeah.
Q. How long has your driver's license been suspended?
A. I'm not sure.
Q. Has it been years?
A. Yes.
Q. And when you were -- you were driving the vehicle at the time of this accident; is that correct?
A. Yes.
Q. And you knew at the time of the accident that you did

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

24 not have a valid driver's license; is that correct?
25 A. Yes.
(Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 8, lines 4-25)

In addition to Plaintiff/ Appellee Carlonda Swoope taking the vehicle without permission or authority, as a matter of law, she could not reasonably believe that she was entitled to use the vehicle when she knew that she was unable to legally operate the vehicle. Plaintiff/ Appellee Carlonda Swoope was not a licensed driver at the time of the subject accident and there was no good reason here to believe she entitled to take the vehicle without permission when it was illegal for her to drive on any Michigan road.

If the evidence is viewed in the light most favorable to Plaintiff/ Appellee Carlonda Swoope (meaning her statements are presumed to be true), these statements establish that Plaintiff/ Appellee Carlonda Swoope knew or should have known that she was using the vehicle unlawfully because she took it without authorization, and so the requirement in MCL 500.3113 that "the person knew or should have known that the motor vehicle…was taken unlawfully" is satisfied. Applying these factors to the record here, it is apparent that the trial court reversibly erred. The question of whether Plaintiff/ Appellee Carlonda Swoope had permission to use the vehicle is clearly not a question of fact for the trier of fact, because Plaintiff/ Appellee Carlonda Swoope testified multiple times that she did not ask permission, did not have permission to operate the vehicle at the time of the accident and did not have authority to operate the vehicle. Plaintiff/ Appellee Carlonda Swoope's testimony leaves no genuine issue of fact for a jury to consider. Consequently, under MCL 500.3113(a), Plaintiff/ Appellee Carlonda Swoope is not eligible for PIP benefits. The trial court's decision, therefore, must be reversed.

RECEIVED by MCOA 5/12/2023 1:23:00 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

C. Plaintiff/ Appellee Carlonda Swoope Is Ineligible and Barred from No-Fault PIP Benefits Pursuant to MCL 500.3173a(4) Because She Admitted She Provided False Statements and Material Misrepresentations In Her Application for Benefits

The Legislature has clearly spoken in MCL 500.3173a(4). There is no question that the statute was written to combat the growing fraud prevalent in Michigan No-Fault Claims. The strong wording of MCL 500.3173a was meant to eliminate claims when the person making the claim submits false information in support of the claim.

MCL 500.3173a(4) provides:

> (4) A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan automobile insurance placement facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under section 4503 that is subject to the penalties imposed under section 4511. A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.

The clear wording of MCL 500.3173a(4) establishes strict penalties to be enforced against those who make applications for assigned claim benefits and then proceed to submit false information in support of the claim.

MCL 500.3173a(4) contains a criminal fraud provision and contains a provision that makes the claim ineligible for any payment or benefit. The threshold determination for MCL 500.3173a is whether the person presents or causes to be presented an oral or written statement knowing that the statement contains false information material to the claim. *See* MCL 500.3173a(4). Once it is determined that such false information is presented, the statute provides for criminal penalties and provides for a penalty to the entirety of the claim. *See* MCL 500.3173a(4).

MCL 500.3173a(4) mandates that those who present false information in support of a claim have committed a fraudulent insurance act. Specifically, MCL 500.3173a(4) indicates that false statements made in assigned claimed plan claims amount to fraudulent insurance acts under MCL

RECEIVED by MCOA 5/12/2023 1:23:00 PM

500.4503 and are subject to criminal penalties and fines under MCL 500.4511.

Secondly, MCL 500.3173a(4) indicates that the person's claim becomes ineligible for payment or benefits under the assigned claims plan once it is determined that false information is submitted in support of the claim:

> A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.

The clear wording of the statute is that when it is determined that the claim either "contains" or "is supported by" a fraudulent insurance act, i.e. false information material to the claim, the claim is no longer payable. This Court should note that MCL 500.3173a(4) makes the "claim" become ineligible for any "payment." *See* MCL 500.3173a(4) MCL 500.3173a(4) also makes the "claim" ineligible for any "benefits." *See* MCL 500.3173a(4).

MCL 500.3173a(4) deems a claim ineligible upon evidence that false information was supplied for benefits. The clear wording of the statute is that such a claim that was eligible through the ACF becomes ineligible as a penalty for making the fraudulent presentation of information. MCL 500.3173a(4) also establishes that such false statements constitute criminal insurance fraud.

Based on the clear wording of MCL 500.3173a(4), the statute is an expression of the Legislature's power to strip away the assigned claim plan insurance coverage by making the claim ineligible when a person abuses the system. MCL 500.3173a(4) is a clear mandate by the Legislature against those who would abuse the no-fault act and produce false statements in support of an assigned claim, which makes such conduct criminal and a complete bar to further claims through the assigned claims plan.

The use of the term "claim" as being ineligible for "payment" or "benefits" was intended by the Legislature to show that the overall "claim" supported by fraudulent information would not be payable for any future "payment" and was not eligible for any future "benefit."

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

This Court should note that the use of the word "claim" is a direct reference to MCL 500.3172(1), which provides that a person who is entitled to a "claim" may apply for a claim through the assigned claims plan and obtain "benefits." The wording of MCL 500.3172(1) clearly contemplates that the larger claim can be made to obtain benefits.

In MCL 500.3173a(4), the Legislature utilizes language similar to MCL 500.3172(1), and clearly intends that a "benefit" is a smaller subset of a "claim." This Court should note the use of the plural benefits as the intent to eliminate more than one benefit. Therefore, MCL 500.3173a(4) does not intend to eliminate only the fraudulent benefit but intends to make the entire claim ineligible for any benefits.

There is no question that the Legislature intended that, upon the showing of submission of false information, MCL 500.3173a(4) would make a person's no-fault PIP claim ineligible for any payment or any benefits and would effectively bar the claim.

In this case, Plaintiff/ Appellee Carlonda Swoope, answered "yes" to the question of whether she had permission to drive the accident vehicle. (Exhibit A, AOB, paragraph 42 (g) and (k)) However, her responses to questions 42(g) and 42(k) were false statements and material misrepresentations, because Plaintiff/ Appellee Carlonda Swoope testified that she did not ask permission and did not have permission from Ms. Valentine to operate or use her vehicle prior to her unlawful and unauthorized taking on the date of the accident. (Exhibit B, Plaintiff/ Appellee Carlonda Swoope Dep, pg. 10, lines 14-24) On the day of the Accident and she grabbed the keys and drove the vehicle without authority.

The Application for Benefits was also signed by Plaintiff/ Appellee Carlonda Swoope with the attestation that the information contained was true and accurate and with the fraud warning that false statements contained therein (or otherwise submitted as part of or in support of a claim

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

for benefits) constitutes a fraudulent insurance act and makes Plaintiff/ Appellee Carlonda Swoope's claim ineligible for benefits. (Exhibit A, AOB)

Plaintiff/ Appellee Carlonda Swoope's taking of the vehicle was unlawful and she made material misrepresentations and false statements in her Application for Benefits, and as a result she is disqualified and barred from receiving no-fault PIP benefits pursuant to MCL 500.3173a(4).

RELIEF REQUESTED

WHEREFORE, Defendant/ Appellant Citizens Insurance Company of The Midwest ("CICM") prays that this Honorable Court (1) reverse the trial court's orders denying its motion for summary disposition regarding nonpermissive use and unlawful taking, (2) grant summary disposition to CICM, and (3) grant any other relief to which CICM is entitled in law and equity.

Respectfully submitted,

Conlin, McKenney & Philbrick, P.C.
Attorneys for Defendant/Appellant CICM

By: */s/ Arminia Duenas*
Arminia Duenas
350 S. Main Street, Suite 400
Ann Arbor, MI 48104-2131
(734) 761-9000
Aduenas@cmplaw.com
(P67090)

Dated: May 12, 2023

CERTIFICATE OF SERVICE

The undersigned certifies that on May 12, 2023, the undersigned electronically filed a copy of the Defendant / Appellant's Appeal Brief in the above-captioned matter by filing into the Court of Appeals e-filing website, and that same is being served upon counsel of record by enclosing the document in a properly addressed envelope with sufficient first-class postage prepaid thereon and depositing same in the U.S. Mail at Ann Arbor, Michigan.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

Conlin, McKenney & Philbrick, P.C.
Attorneys for Defendant/Appellant CICM

By: */s/ Arminia Duenas*
Arminia Duenas
350 S. Main Street, Suite 400
Ann Arbor, MI 48104-2131
(734) 761-9000
Aduenas@cmplaw.com
(P67090)

Dated: May 12, 2023

MCR 7,212(B)(3) Statement Regarding Number of Countable Words

According to the word count of the word-processing system used to prepare the brief, the elements corresponding to MCR 7.212(C) contain 6,646 words.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/12/2023 1:23:00 PM

Exhibit G

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

IN THE COURT OF APPEALS

CAROLINDA NAISHE SWOOPE,

Plaintiff / Appellee

vs.

CITIZENS INSURANCE COMPANY
OF THE MIDWEST

Defendant / Appellant.

COA No. 364924
LC No. 21-011402-NF
(Wayne Circuit Court)

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

INDEX OF EXHIBITS / EXHIBITS A-C

PROOF OF SERVICE

DAN MAKLED LAW

BY: DANIEL B. MAKLED (P78777)
Attorneys for Plaintiff-Appellee
23451 Ford Rd
Dearborn, MI 48128
(313) 744-4878
dmakled@makledlaw.com

Dated: May 27th, 2023

RECEIVED by MCOA 5/27/2023 2:03:38 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES…….....iii

COUNTER-STATEMENT OF APPELLATE JURISDICTION……..……..……iv

COUNTER-STATEMENT OF QUESTIONS PRSENTED……...……...……..v

INDEX OF EXHIBITS…….....……..vi

COUNTER STATEMENT OF FACTS……..……..……..1

LAW AND ARGUMENT……...…….....……..1

I. THE COURT PROPERLY DENIED CITIZEN'S MOTION FOR SUMMARY DISPOSITION BECAUSE REASONABLE MINDS CAN DIFFER ON THE THIRD ELEMENT OF MCL500.3113(a)..……...……2

II. PLAINTIFF PROVIDED TRUE STATEMENTS IN HER APPLICATION FOR BENEFITS AND IN HER DEPOSITION.……..……...……5

III. CONCLUSION and RELIEF REQUESTED……...……6

PROOF OF SERVICE……....7

CERTIFICATE OF WORD COUNT COMPLIANCE……7

RECEIVED by MCOA 5/27/2023 2:03:38 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

INDEX OF AUTHORITIES

Cases **Page(s)**

Amerisure Ins. Co. v. Plumb, 766 N.W.2d 878 (Mich. Ct. App. 2009)……..……3

Bergen v. Baker, 264 Mich App 376, 388-389; 691 NW2d 770 (2004)…….....5

Farmers Insurance Exchange v Young, 489 Mich 909, 909; 796 NW2d 470 (2011)……..…...3

Joseph Davis, Sr v MetLife Insurance and Michigan Automobile Insurance Placement Facility, No. 359313, unpublished decision, January 19, 2023…….3

Keys v. Pace, 358 Mich 74, 82-83; 99 NW2d 547 (1959)……..…..…..5

Oade v. Jackson Nat'l Life Ins. Co., 465 Mich. 244, (2001)……..….5

Spectrum Health v Farm Bureau Mut Ins Co of Michigan, 492 Mich 503 (2012), ….……..….3

Statutes

MCL 500.3113(a)..... 2,3

Court Rules

MCR 7.203(B)(1)..... iv

RECEIVED by MCOA 5/27/2023 2:03:38 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/27/2023 2:03:38 PM

COUNTER-STATEMENT OF APPELLATE JURISDICTION

Plaintiff-Appellee acknowledges that this Court has jurisdiction over this appeal pursuant to MCR 7.203(B)(1).

RECEIVED by MSC 7/19/2024 9:17:32 AM

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE TRIAL COURT ERRED IN DENYING CITIZEN'S MOTION FOR SUMMARY DISPOSTION WHERE THERE WAS A QUESTION OF FACT ON THE THIRD ELEMENT OF MCL 500.3113(a) WHICH REQUIRES LOOKING AT THE MENTAL STATE OF THE TAKER OF A VEHICLE AND WHETHER THEY HAD REASONABLE BELIEF THEY COULD TAKE A VEHICLE IN A SITUATION LIKE THE ONE AT A BAR WHERE MS. SWOOPE'S MOTHER WAS HAVING A MEDICAL EMERGENCY AND NEEDED TO GET TO THE HOSPITAL.**

The Plaintiff-Appellee answers "No."

The Defendant-Appellant answers "Yes."

The Trial Court answers "No."

RECEIVED by MCOA 5/27/2023 2:03:38 PM

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/27/2023 2:03:38 PM

INDEX OF EXHIBITS

Exhibit A	=	Application for Benefits
Exhibit B	=	Carlonda Swoope Transcript
Exhibit C	=	*Joseph Davis v MAIPF*

RECEIVED by MSC 7/19/2024 9:17:32 AM

COUNTER-STATEMENT OF FACTS

This case arises from a claim for Michigan No-Fault Personal Injury Protection (PIP) benefits filed by Plaintiff/Appellee Carlonda Naishe Swoope ("Ms. Swoope") related to injuries she sustained in an October 27, 2020 motor vehicle accident. On November 11, 2020 Ms. Swoope completed an Application for Benefits to the Michigan Automobile Insurance Placement Facility for assignment of benefits related to the accident. This matter was assigned to Citizens Insurance Company of the Midwest ("Citizens").

In her Application for Benefits, Ms. Swoope, in response to question 42(k) answered "yes" to the question of whether she had permission to operate the vehicle. In its Statement of Facts Citizens leaves out the follow-up question to 42(k) which asks "If Yes, from who?_____". Ms. Swoope left the follow up question blank in her Application for Benefits. (**Exhibit A** – Application for Benefits). As will be seen in more detail below Ms. Swoope believed she had implied permission to use her friend's vehicle due to a medical emergency her mother was having.

Ms. Swoope did indeed testify that she did not have explicit permission to use the vehicle. She testified that she was sleeping over her friend of four (4) years, Kandice Valentine's house and that the following morning she woke up to a notification that her mother was having a medical emergency. (**Exhibit B** – Ms. Swoope, pp. 9, 33) Ms. Swoope testified that her mother was in the care and custody of her children while the emergency was ocurring. (**Exhibit B** – p. 37). On the way to her mother Ms. Swoope quickly went through a fast-food drive-through, Burger King, to bring her children food. (**Exhibit B** – p. 37). Ms. Swoope was going to be at the Emergency Room at Harper Hospital with her mother for an extended time and did not want to leave her children without food. (**Exhibit B** - p. 37).

RECEIVED by MCOA 5/27/2023 2:03:38 PM

Between the time Ms. Swoope picked up Burger King for her children and the time she was en-route to her mother's house the subject accident occurred. Ms. Swoope was injured in the accident. She declined going in the ambulance because her mother was still home waiting to go to the hospital. (**Exhibit B** – p. 36). Ms. Swoope took an Uber from the scene of the accident to her mother's house. (**Exhibit B** – p. 36). The Uber then took Ms. Swoope and her mother to Harper Hospital in Detroit, Michigan where they were both evaluated. (**Exhibit B** – p. 36)

Citizens filed its motion for summary disposition accusing Ms. Swoope of making material misrepresentations and false statements in her Application for Benefits. However, the trial court correctly denied the motion while reasoning that "Whether Plaintiff had permission to use the vehicle is a question of fact for the trier of fact."

LAW AND ARGUMENT

I. THE COURT PROPERLY DENIED CITIZEN'S MOTION FOR SUMMARY DISPOSITION BECAUSE REASONABLE MINDS CAN DIFFER ON THE THIRD ELEMENT OF MCL 500.3113(a).

At issue in this case is MCL 500.3113(a), which bars recovery for PIP benefits if, at the time of the accident, "[t]he person was willingly operating or willingly using a motor vehicle that was taken unlawfully, and the person knew or should have known that the motor vehicle was taken unlawfully." For no-fault insurance benefits to be barred under MCL 500.3113(a), Ms. Swoope must have (1) willingly operated or used Valentine's vehicle, (2) taken Valentine's vehicle unlawfully, and (3) known or should have known that Valentine's vehicle was taken unlawfully.

The first and second elements are not in dispute in this case.

The third element of MCL 500.3133(a) requires looking at Ms. Swoope's state of mind and whether she "knew or should have known" that the vehicle was taken without authority. Under

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/27/2023 2:03:38 PM

the facts of this case reasonable jurors could conclude that Ms. Swoope did not know that she took the vehicle without authority.

In *Spectrum Health v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503 (2012) the Michgian Supreme Court cited with approval[1] Justice Markman's concurring opinion in *Farmers Insurance Exchange v Young*, 489 Mich 909, 909; 796 NW2d 470 (2011). In that opinion, Justice Markman explained that the lack of a driver's license is not relevant to whether the individual unlawfully took the vehicle:

> **[MCL 500.3113(a)] is focused on the authority of the owner of the vehicle, not the State of Michigan. That is, for the purposes of § 3113(a), a vehicle may be "unlawfully taken" where it is taken without the authority of its owner, not where a person has taken the vehicle without a valid driver's license, the requisite insurance, or in violation of some other provision of the Motor Vehicle Code.**

Ms. Swoope's lack of a driver's license has no impact on the unlawful taking issue. In his concurring opinion in *Farmers* Justice Markman also explained that different considerations, ***such as an emergency***, may attach when considering whether a person reasonably believed that they were entitled to take and use the vehicle.[2] *Id*. p. 471.

This case is different than *Joseph Davis, Sr v MetLife Insurance and Michigan Automobile Insurance Placement Facility*, No. 359313, unpublished decision, January 19, 2023. (**Exhibit C** – *Joseph Davis v MAIPF*). In that case the third element of MCL 500.3113(a) which requires looking at the state of mind of the taker was not at issue like it is in this case. In *Joseph*, there was

[1] 492 Mich 503, n. 25 ("The 'authority' referred to in the joyriding statutes is obviously the authority of the owner of the vehicle. Accordingly, for purposes of MCL 500.3113(a), a vehicle is "unlawfully taken" if it is taken without the authority of its owner. See *Farmers Ins Exch v Young*, 489 Mich 909; 796 N. W.2d 470 (2011) (Markman, J., concurring).")

[2] *Plumb* also properly recognized that once an "unlawful taking" has been established, the "next step in [the] analysis is to determine whether [the claimant] 'reasonably believed that ... she was entitled to take and use the vehicle.' " 282 Mich.App. at 427, 766 N.W.2d 878. The statute makes clear that at this stage the determinative question is whether a claimant's belief was "reasonable." Whether the use was "legal" will often be a highly relevant factor in making this determination, but may not control in every case. For instance, different considerations might attach in an emergency; in such a circumstance, the illegal operation of a vehicle may not always, "as a matter of law," *id*. at 431, 766 N.W.2d 878, preclude a finding of a "reasonable belief" to use the vehicle under § 3113(a), as it did in *Plumb.*

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/27/2023 2:03:38 PM

no emergency and the plaintiff took the vehicle when he "…became impatient while waiting for Edwards to return to her home to drive him to the store." *Id*. at 1.

In this case there is a question of fact precluding summary disposition on the issue of Ms. Swoope's state of mind when she took the vehicle and whether she reasonably believed she could take the vehicle under the particular circumstances.

Ms. Swoope and the owner of the subject vehicle, Ms. Valentine, had been friends for "about four years" at the time this incident occurred. Ms. Swoope testified that the night before she was spending the night at Ms. Valentine's house. Ms. Swoope testified that "…I left that morning to go take care of my mother". Ms. Swoope testified that she "...got the car because I had a family emergency. My mom needed to go to the hospital. So, I was trying to hurry up to get to her." She further testified that "…My mother called me and told me her chest was hurting, and the ambulance was not coming fast enough. So, I tried to get there as fast as possible." (**Exhibit B** – p. 10).

Citizens' brief argues there could not have possibly been an emergency because Ms. Swoope stopped at Burger King on the way to her mother's house. What Citizens' fails to mention is that Ms. Swoope testified that her children were at her mother's house. Ms. Swoope was getting fast food for her children who would be left alone with the oldest daughter while Ms. Swoope would be away with her mom at the hospital emergency room for an extended time. Ms. Swoope did not stop for fine dining on the way to her mother. She stopped at a fast-food drive-through restaurant to bring her children food and then planned to immediately leave to Harper Hospital with her mother. In fact, it would be irresponsible for Ms. Valentine to not bring food to her children while knowing they were going to be left for an extended period of time.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/27/2023 2:03:38 PM

Citizens' argues that Ms. Valentine could have chosen other options such as calling an ambulance for her mother or ordering an Uber for her mother. In fact, the options do not end there. There could be a plethora of other options that a person who is perceiving an emergency does not think of in the heat of the moment. The salient factor however is that the *state of mind of Ms. Valentine was an emergency state of mind when she took the vehicle*.

A jury may well hear the testimony and evidence and agree with Citizens' take. Other jurors may see it in a different light. For example, other jurors may believe it to be reasonable to take keys from a friend of four years to tend to a mother's medical emergency when a notoriously delayed Detroit ambulance is not coming fast enough.

The point is the issue remains a question for the jury. Citizens wanted the trial court to improperly take this fact issue away from the trier of fact. The trial court did not err in precluding summary disposition because there does exist a question of fact.

II. PLAINTIFF PROVIDED TRUE STATEMENTS IN HER APPLICATION FOR BENEFITS AND IN HER DEPOSITION.

No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract. *Oade v. Jackson Nat'l Life Ins. Co.,* 465 Mich. 244, (2001). An insurer may deny coverage under an insurance contract where that insurance policy was procured by the policy holder's fraudulent "misrepresentation material to the risk and hazard" attendant in the policy. *Keys v. Pace*, 358 Mich 74, 82-83; 99 NW2d 547 (1959). Whether a misrepresentation was material and whether it was relied on are generally questions of fact for the jury. *Bergen v. Baker*, 264 Mich App 376, 388-389; 691 NW2d 770 (2004).

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/27/2023 2:03:38 PM

In this case Ms. Swoope's "mens rea" or belief was that she was certainly permitted to use the vehicle of her friend of 4 years for a medical emergency related to her mother. This is not uncommon and in fact it is very likely for a jury to agree with this notion. Turning now to question 42(k) of the Application which asked "did you have permission to use the vehicle on the date of the accident? Ms. Swoope checked YES, because of course, her "mens rea" or belief was that she had *implied* permission given the circumstances. When the same question asks "If Yes, from who?" **Ms. Swoope left that blank. She did not lie, for example, and say that Ms. Valentine gave her permission.** (**Exhibit B** – Application for Benefits). So, the question was understood as implicit versus explicit permission to use the vehicle as *Ms. Swoope believed* (this is the proper inquiry as a matter of law).

When then asked during her deposition whether Ms. Valentine gave her *explicit* permission to use the vehicle Ms. Swoope testified truthfully and said no. Had the Application asked whether the owner provided explicit permission to use the vehicle and Ms. Swoope said yes then we would have a misrepresentation/fraud issue here. But that is not the case.

III. CONCLUSION

WHEREFORE, Plaintiff-Appellee, Carlonda Naishe Swoope, respectfully requests that the Court of Appeals affirm the trial courts denial of Citizen's Motion for Summary Disposition.

Respectfully submitted,

DAN MAKLED LAW

BY: */s/ Daniel B. Makled*
DANIEL B. MAKED (P78777)
Attorneys for Plaintiff-Appellee
23451 Ford Rd
Dearborn, MI 48128
(313) 744-4878

Dated: May 27th, 2023

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/27/2023 2:03:38 PM

PROOF OF SERVICE

The undersigned certifies that the above document was served upon counsel of record herein at their business addresses as set forth in the caption of these pleadings this 27th day of May 2023 by *Electronic File and Serve*

/s/ Daniel B. Makled
Daniel B. Makled

CERTIFICATE OF WORD COUNT COMPLIANCE

1. This Brief on Appeal of Plaintiff / Appellee complies with the word count limitation of MCR 7.305 and MCR 7.212(B)(1) because:

X This Brief on Appeal contains 2,497 words.

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MCOA 5/27/2023 2:03:38 PM

Exhibit H

RECEIVED by MSC 7/19/2024 9:17:32 AM

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH MULL,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant-Appellant.

UNPUBLISHED
February 17, 2022

No. 354725
Wayne Circuit Court
LC No. 19-006045-NF

Before: RICK, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the order denying its motion for summary disposition in this first-party no-fault action. We reverse and remand for entry of an order granting defendant's motion for summary disposition.

I. BACKGROUND

Plaintiff sustained injuries when he was involved in a motor vehicle accident while driving a motorcycle owned by his girlfriend, Melissa Dutz. Defendant argues plaintiff's admission he did not have permission from Dutz to use the motorcycle on the day of the accident precludes him from collecting benefits under Michigan's no-fault act, MCL 500.3101 *et seq*.

Plaintiff filed a complaint and jury demand against defendant, as insurer of the vehicle plaintiff hit, seeking personal injury protection benefits. Defendant originally moved for summary disposition in lieu of an answer under MCR 2.116(C)(8) and (C)(10), arguing plaintiff was not entitled to no-fault benefits if he was willingly operating a motorcycle without permission. Plaintiff argued he was never explicitly told by Dutz not to operate the vehicle; thus, a question of fact remained as to whether plaintiff had permission to operate the motorcycle. The trial court

[1] *Mull v Citizens Ins Co of the Midwest*, unpublished order of the Court of Appeals, entered December 10, 2020 (Docket No. 354725).

RECEIVED by MSC 7/19/2024 9:17:32 AM

denied defendant's motion for summary disposition, directing the parties to conduct discovery to confirm whether a genuine issue of material fact existed.

After discovery, defendant renewed its motion for summary disposition under MCR 2.116(C)(8) and (C)(10), again arguing the no-fault act precludes a person from collecting benefits if the vehicle was operated without permission from the owner. Plaintiff argued genuine issues of material fact existed regarding whether plaintiff knowingly took the motorcycle without permission. The trial court again denied defendant's motion, stating nothing more than "[t]here is a question of fact as to whether Plaintiff's use of the motorcycle was lawful."

II. ANALYSIS

An order denying a motion for summary disposition is reviewed de novo. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). This Court considers "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in a light most favorable to the party opposing the motion" in its review under MCR 2.116(C)(10).[2] *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013) (quotation marks and citation omitted). Summary disposition is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison*, 481 Mich at 425. Questions of statutory interpretation are also reviewed de novo on appeal. *Rambin v Allstate Ins Co*, 495 Mich 316, 325; 852 NW2d 34 (2014).

At issue is whether plaintiff's use of the motorcycle was unlawful under MCL 500.3113(a). As it did in the trial court, defendant argues plaintiff acted unlawfully when taking the motorcycle, and is precluded from collecting certain benefits under the no-fault statute. Specifically, defendant argues that MCL 500.3113(a) precludes relief to plaintiff. That statute states:

> 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:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.

The Supreme Court has concluded that "[t]he plain meaning of the phrase 'taken unlawfully' readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law." *Spectrum Health Hosps v Farm Bureau Mut Ins of Mich*, 492 Mich

[2] Although defendant moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), the trial court relied on documents beyond the pleadings; thus "we construe the motion as having been granted pursuant to MCR 2.116(C)(10)." *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

RECEIVED by MSC 7/19/2024 9:17:32 AM

503, 517; 821 NW2d 117 (2012). Defendant argues plaintiff took the motorcycle unlawfully under the terms of the "joyriding" statutes, MCL 750.413 and MCL 750.414. MCL 750.413 states:

> Any person who shall, wilfully and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years.

MCL 750.414 states, in relevant part:

> Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $1,500.00.

"[B]oth joyriding statutes make it unlawful to take any motor vehicle without authority, effectively defining an unlawful taking of a vehicle as that which is unauthorized." *Spectrum Health*, 492 Mich at 518. "Because a taking does not have to be larcenous to qualify as unlawful, the phrase 'taken unlawfully' in MCL 500.3113(a) applies to anyone who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal it." *Spectrum Health*, 492 Mich at 518.

There is no genuine issue of material fact that plaintiff's use of the motorcycle was "unauthorized" because he did not receive permission from Dutz to use the motorcycle. Plaintiff testified he knew Dutz would not allow him to ride the motorcycle, even if he asked. As indicated by our Supreme Court, "[b]ecause a taking does not have to be larcenous to be unlawful, the phrase 'taken unlawfully' in MCL 500.3113(a) applies to anyone who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal it." *Spectrum Health*, 492 Mich at 518.[3] Although plaintiff argues he did not intend to steal the motorcycle and Dutz never reported the motorcycle to the police as missing, this argument is based on an incorrect understanding of the term "unlawful" in this context.[4]

---

[3] An amendment to the no-fault statute changed some of the language in this statute. MCL 500.3113(a) previously stated a person was precluded from collecting personal protection insurance benefits if "[t]he person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle." The amended version, "2014 PA 489[,] made substantive changes to MCL 500.3113(a), eliminating the Safe Harbor provision, and imposing instead a scienter requirement." *Ahmed v Tokio Marine American Ins Co*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 352418); slip op at 12. This new standard made it easier for insurance companies to disqualify a plaintiff from receiving benefits. *Ahmed*, ___ Mich App at ___; slip op at 13. Actual knowledge that a plaintiff took a vehicle without authority is not required. *Id*.

[4] Although plaintiff admits to driving the motorcycle without a valid license, "the unlawful operation or use of a motor vehicle is irrelevant with respect to examining the 'taken unlawfully'

RECEIVED by MSC 7/19/2024 9:17:32 AM

Next, analyzing MCL 500.3113(a) requires looking at plaintiff's state of mind and whether he "knew or should have known" that he did not have authority to use the motorcycle, which "examines the legality of the taking from the driver's perspective." *Spectrum Health*, 492 Mich at 522. Examining plaintiff's deposition testimony and statements from his recorded interview, no reasonable juror could conclude other than that plaintiff knew, or should have known, that he did not have Dutz's authority to use the motorcycle. Plaintiff admitted he did not ask Dutz for permission to use the motorcycle on the day of the accident because he knew she would say no. Plaintiff acknowledged in a recorded interview with one of defendant's representatives that he took the motorcycle from Dutz's garage and without Dutz's permission on the day of the accident:

> *Q*. OK. Now does [Dutz] keep the motorcycle with her at her residence or do you take it with you back and forth?
>
> *A*. No, she keeps it at her residence and I took it like a bad boy. I wasn't supposed to take it.
>
> *Q*. Oh. It wasn't stolen, right?
>
> *A*. No, no. Taken…
>
> *Q*. She didn't report it.
>
> *A*. No, no, no. It's taken without her knowledge or permission.

Plaintiff's main argument is, because Dutz never explicitly told plaintiff he was not allowed to use the motorcycle, he cannot be precluded from recovery under the statute. Although this argument may have had merit under the previous version of the statute, it fails under the current "knew or should have known" standard. *Ahmed*, ___ Mich App ___; slip op at 12. Under the applicable statute, the evidence presented reveals no genuine issue of material fact that plaintiff at least should have known he did not have authority to use the motorcycle. Plaintiff and Dutz testified plaintiff's poor health precluded him from driving the motorcycle, and had not used the motorcycle in many years. Plaintiff admitted he did not have permission to use the motorcycle, and Dutz confirmed that fact. To that point, plaintiff considered himself a "bad boy" for using the motorcycle without Dutz's permission. The undisputed material facts presented to the trial court, considered in the light most favorable to plaintiff, show plaintiff knew or should have known he was operating the motorcycle unlawfully.

Thus, the motorcycle was taken unlawfully by plaintiff, and plaintiff knew the motorcycle was taken unlawfully, leaving no genuine issue of material fact for a jury to consider. No reasonable juror could conclude plaintiff did not know he took the motorcycle without authority. The trial court erred in finding a genuine issue of material fact existed under MCR 2.116(C)(10).

---

phrase in MCL 500.3113(a)." *Monaco v Home Owners Ins Co*, 317 Mich App 738, 748-749; 896 NW2d 32 (2016).

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction. Having prevailed in full, defendant may tax costs.

/s/ Michelle M. Rick
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro

RECEIVED by MSC 7/19/2024 9:17:32 AM

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH DAVIS, SR.,

Plaintiff,

and

VHS OF MICHIGAN, INC., doing business as DETROIT MEDICAL CENTER,

Intervening Plaintiff-Appellant,

v

METLIFE INSURANCE COMPANY and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees.

UNPUBLISHED
January 19, 2023

No. 359313
Wayne Circuit Court
LC No. 21-007401-NF

JOSEPH DAVIS, SR.,

Plaintiff-Appellant,

and

VHS OF MICHIGAN, INC., doing business as DETROIT MEDICAL CENTER,

Intervening Plaintiff,

v

No. 360265
Wayne Circuit Court

RECEIVED by MSC 7/19/2024 9:17:32 AM

METLIFE INSURANCE COMPANY and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees.

LC No. 21-007401-NF

Before: CAVANAGH, P.J., and O'BRIEN and Rick, JJ.

PER CURIAM.

In Docket No. 359313, intervening plaintiff, VHS of Michigan, Inc., doing business as Detroit Medical Center, appeals as of right the order granting summary disposition in favor of defendants, MetLife Insurance Company (defendant MetLife) and Michigan Automobile Insurance Placement Facility (defendant MAIPF). In Docket No. 360265, plaintiff, Joseph Davis Sr. (plaintiff Davis), appeals by delayed leave granted the same order granting summary disposition in favor of defendants. We affirm.

I. BACKGROUND

Plaintiff Davis sustained injuries when he was involved in a motor vehicle accident while driving a vehicle owned by his girlfriend, Regina Edwards. Plaintiff Davis received medical treatment for his injuries at intervening plaintiff's facility.

Defendant MetLife insured Edwards's vehicle. As part of its investigation into plaintiff Davis's eligibility for no-fault insurance coverage, defendant MetLife requested that plaintiff Davis participate in an examination under oath (EUO). Plaintiff Davis stated during the EUO that at the time of the accident in June 2020 he lived with his mother and his stepfather. He did not have a driver's license and had not owned a vehicle for 10 years. Plaintiff Davis stated that he would drive Edwards's vehicle once per week before the accident occurred. On the day of the accident, plaintiff Davis became impatient while waiting for Edwards to return to her home to drive him to the store. Plaintiff Davis took the keys for Edwards's vehicle from a table in Edwards's house and "went to do what [he] had to do." Plaintiff Davis stated that Edwards called him and asked where he had taken her vehicle. According to plaintiff Davis, he and Edwards argued and Edwards "was mad and upset that I took the car." The accident occurred when plaintiff Davis was on his way to return the vehicle to Edwards. In response to the question whether he had permission to operate Edwards's vehicle at the time of the accident, plaintiff Davis replied, "No, not that day I didn't."

Defendant MetLife denied plaintiff Davis's claim for no-fault insurance benefits under MCL 500.3113(a) because it determined that at the time of the accident plaintiff Davis was willingly operating a motor vehicle that was taken unlawfully. Defendant MetLife also denied the claim because other insurance coverage was reportedly available to plaintiff Davis through relatives in his household. Defendant MAIPF also denied plaintiff Davis's claim for no-fault insurance benefits on the ground that plaintiff Davis had no-fault insurance benefits through relatives in his household.

RECEIVED by MSC 7/19/2024 9:17:32 AM

Plaintiff Davis filed a complaint alleging breach of contract for MetLife's unreasonable refusal to pay personal protection insurance (PIP) benefits and for MAIPF's failure to appoint an insurer to immediately pay no-fault insurance benefits owed to him. Intervening plaintiff also filed a complaint alleging that it was entitled to reimbursement for all reasonable charges incurred for the services and products provided for plaintiff Davis's care, recovery, or rehabilitation arising out of the subject accident.

Defendant MAIPF filed an answer to plaintiff Davis's and intervening plaintiff's complaints, denying that it unreasonably refused payment of no-fault insurance benefits. Defendant MetLife moved for summary disposition under MCR 2.116(C)(8) and (10) in lieu of answering the complaints, arguing that plaintiff Davis was not entitled to no-fault benefits because there was no genuine issue of material fact that plaintiff Davis took and operated Edwards's vehicle unlawfully at the time of the subject accident. Defendant MAIPF concurred with defendant MetLife's motion. In response to the motion, intervening plaintiff and plaintiff Davis asserted that a question of fact existed regarding whether plaintiff Davis was "prohibited" from taking Edwards's vehicle on the date of the accident.

The trial court, after a hearing, granted defendants' motion for summary disposition and dismissed plaintiffs' claims. The court found that there was no evidence that plaintiff Davis had Edwards's permission to use the vehicle on the date of the accident. The court concluded that under MCL 500.3113(a), plaintiff Davis was disqualified from receiving PIP benefits because he willingly operated a vehicle that was unlawfully taken, and he knew or should have known that the vehicle was unlawfully taken.[1]

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 242; 964 NW2d 50 (2020) (citation omitted). Although the trial court did not specify the grounds for granting defendant MetLife's motion for summary disposition, it relied on documentary evidence to support its decision. Accordingly, MCR 2.116(C)(10) is the appropriate basis for review. *BC Tile & Marble, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582; 794 NW2d

[1] The trial court denied plaintiff Davis's motion for reconsideration, which asserted that the trial court granted defendants' motion without any development of facts regarding whether plaintiff Davis took Edwards's vehicle unlawfully. Plaintiff Davis asserted that the appropriate question when determining whether the vehicle was taken unlawfully was not whether plaintiff Davis had permission to take the vehicle but, rather, whether plaintiff Davis committed a criminal act when he took the vehicle. Plaintiff attached to his motion an affidavit signed by Edwards and an affidavit signed by himself. Any reliance that intervening plaintiff or plaintiff Davis place on the affidavits in support of their arguments on appeal is misplaced because the affidavits were not signed until November 2, 2021, which was after the hearing on defendants' motion for summary disposition. The affidavits were not presented to the trial court until November 24, 2021, which was after the court had entered the November 5, 2021 order granting summary disposition in favor of defendants.

RECEIVED by MSC 7/19/2024 9:17:32 AM

76 (2010). The trial court granted summary disposition in favor of defendant MAIPF under MCR 2.116(I)(2). Because defendant MAIPF concurred in defendant MetLife's motion for summary disposition, in analyzing the trial court's decision to grant summary disposition under MCR 2.116(I)(2), we will utilize the standard of review that applies to a motion under MCR 2.116(C)(10).

A trial court may properly grant a motion for summary disposition under MCR 2.116(C)(10) "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "If the moving party properly supports his or her motion, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists." *Redmond v Heller*, 332 Mich App 415, 438; 957 NW2d 357 (2020). "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." *Id*. (quotation marks and citation omitted). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Lowrey*, 500 Mich at 7, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (quotation marks omitted). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Lowrey*, 500 Mich at 7, quoting *Quinto*, 451 Mich at 363 (quotation marks omitted). This Court's "review is limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009).

III. ANALYSIS

Plaintiff Davis and intervening plaintiff argue that the trial court erred by granting summary disposition in favor of defendants because a genuine issue of material fact remained regarding whether plaintiff Davis unlawfully took Edwards's vehicle.

At issue here is MCL 500.3113(a), which bars recovery for PIP benefits if, at the time of the accident, "[t]he person was willingly operating or willingly using a motor vehicle that was taken unlawfully, and the person knew or should have known that the motor vehicle was taken unlawfully." For no-fault insurance benefits to be barred under MCL 500.3113(a), plaintiff Davis must have (1) willingly operated or used Edwards's vehicle, (2) taken Edwards's vehicle unlawfully, and (3) known or should have known that Edwards's vehicle was taken unlawfully. The first element is not in dispute in this case.

RECEIVED by MSC 7/19/2024 9:17:32 AM

Regarding the second element, in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 516-517; 821 NW2d 117 (2012), the Court interpreted the phrase "taken unlawfully"[2] in the context of MCL 500.3113(a):

> In determining the Legislature's intended meaning of the phrase "taken unlawfully," we must accord the phrase its plain and ordinary meaning, and we may consult dictionary definitions because the no-fault act does not define the phrase. The word "unlawful" commonly means "not lawful; contrary to law; illegal," and the word "take" is commonly understood as "to get into one's hands or possession by voluntary action." When the words are considered together, the plain meaning of the phrase "taken unlawfully" readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law. [Citations omitted.]

The *Spectrum* Court went on to explain two examples of a taking "contrary to Michigan law":

> The Michigan Penal Code contains several statutes that prohibit "takings," including two that prohibit "joyriding," MCL 750.413 and MCL 750.414. MCL 750.413 states that "[a]ny person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony . . . ." Similarly, MCL 750.414 provides in pertinent part that "[a]ny person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor . . . ." Thus, both joyriding statutes make it unlawful to take any motor vehicle without authority, effectively defining an unlawful taking of a vehicle as that which is unauthorized. [*Id*. at 517-518 (citations omitted).]

"Because a taking does not have to be larcenous to be unlawful, the phrase 'taken unlawfully' in MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner." *Id*. at 518. Thus, "any person who takes a vehicle contrary to a provision of the Michigan Penal Code—including MCL 750.413 and MCL 750.414, informally known as the 'joyriding' statutes—has taken the vehicle unlawfully within the meaning of MCL 500.3113(a)." *Id*. at 537. See also *Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1, 10-11; 972 NW2d 860 (2021) (stating that "[a]s used in MCL 500.3113(a), the word 'unlawfully' means contrary to the criminal law, for example, any violation of the Michigan Penal Code."). The relevant inquiry into the determination of an unlawful taking is whether the taking was "without authority."

[2] While the operative language in MCL 500.3113(a)—"taken unlawfully"—has not changed since *Spectrum*, other parts of that statute have changed. When *Spectrum* was decided, MCL 500.3113(a) stated that a person was not entitled to PIP benefits if the person "was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle."

RECEIVED by MSC 7/19/2024 9:17:32 AM

MCL 500.3113(a) "examines the legality of the taking from the *driver's* perspective . . . . ." *Id.* at 522.

We agree with the trial court that there was no question of fact that plaintiff Davis's taking of Edwards's vehicle was without authority. Plaintiff Davis took the keys to Edwards's vehicle and drove off. When asked whether he had permission to operate Edwards's vehicle at the time of the accident, plaintiff Davis stated, "No, not that day I didn't." There is nothing in the record to support that plaintiff Davis had permission to take and use the vehicle, and reasonable minds could not differ that his taking of the vehicle on the night of the accident was without authority and was, therefore, an unlawful taking.[3]

The third element of MCL 500.3113(a) requires looking at plaintiff Davis's state of mind and whether he "knew or should have known" that the vehicle was taken without authority. Under the facts of this case, no reasonable juror could conclude that plaintiff Davis did not know that he took the vehicle without authority. By his own statement, plaintiff Davis did not have permission to take the vehicle, and so he knew that his taking of the vehicle was unauthorized. Reasonable minds could not disagree that plaintiff Davis knew or should have known that he was using the vehicle unlawfully—since he was the one who knowingly took it without authorization, and so the requirement in MCL 500.3113(a) that "the person knew or should have known that the motor vehicle . . . was taken unlawfully" is satisfied.

Accordingly, the evidence, viewed in the light most favorable to plaintiffs, showed that the vehicle was taken unlawfully by plaintiff Davis, and that plaintiff Davis knew the vehicle was taken unlawfully, leaving no genuine issue of fact for a jury to consider. Consequently, under MCL 500.3113(a), plaintiff Davis is not eligible for PIP benefits, and the trial court did not err by granting summary disposition in favor of defendant MetLife.

Finally, plaintiff Davis and intervening plaintiff are barred from recovering no-fault insurance benefits through defendant MAIPF under MCL 500.3173. MCL 500.3173 provides:

> A person who because of a limitation or exclusion in sections 3105 to 3116 . . . is disqualified from receiving personal protection insurance benefits under a policy otherwise applying to his accidental bodily injury is also disqualified from receiving benefits under the assigned claims plan.

Because, under MCL 500.3173, an individual who is disqualified from receiving no-fault insurance benefits under an insurance policy pursuant to MCL 500.3113 is also disqualified from receiving no-fault insurance benefits under the assigned claims plan, neither plaintiff Davis, nor

---

[3] Contrary to plaintiff Davis's and intervening plaintiff's assertions, MCL 500.3113(a) does not require a vehicle to be taken against the express prohibition of the vehicle's owner. In *Spectrum*, the Court considered "whether a person injured while driving a motor vehicle that the person had taken contrary to the express prohibition of the owner may avail himself or herself of" no-fault insurance benefits. *Spectrum*, 492 Mich at 508. However, the Court did not establish a requirement that a vehicle owner must expressly prohibit the use of the vehicle for a taking to be unlawful under MCL 500.3113(a).

intervening plaintiff, can recover no-fault insurance benefits through defendant MAIPF. Thus, the trial court also did not err by granting summary disposition in favor of defendant MAIPF.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Colleen A. O'Brien
/s/ Michelle M. Rick

RECEIVED by MSC 7/19/2024 9:17:32 AM

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 7/19/2024 9:17:32 AM

STATE OF MICHIGAN

COURT OF APPEALS

LAKINA CRISWELL,

Plaintiff-Appellant,

v

AVIS RENT A CAR SYSTEM, LLC, and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees.

UNPUBLISHED
July 28, 2022

No. 355626
Wayne Circuit Court
LC No. 19-007669-NF

Before: M. J. KELLY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the final order granting defendant, Avis Rent a Car System, LLC's, motion for summary disposition under MCR 2.116(C)(10).[1] We affirm.

I. FACTUAL BACKGROUND

This case arises out of an automobile accident. Plaintiff's cousin, Pandora Hamilton, was driving a vehicle she rented from defendant, and had picked plaintiff up to go shopping. As they were driving, Hamilton told plaintiff she was feeling sick and needed to go "to the ER because she said her [blood] pressure was up." They switched seats and plaintiff began driving Hamilton to the hospital. During the journey, plaintiff was involved in a collision with another vehicle. Plaintiff requested defendant pay personal protection insurance (PIP) benefits to her, but defendant refused because plaintiff was not a party to, nor was she an authorized driver on, the rental agreement.

Plaintiff filed a complaint alleging breach of contract for defendant's unreasonable refusal to pay PIP benefits. After discovery, defendant moved the trial court for summary disposition

[1] Defendant, the Michigan Automobile Insurance Placement Facility (MAIPF), was previously dismissed from the action.

RECEIVED by MSC 7/19/2024 9:17:32 AM

pursuant to MCR 2.116(C)(10), arguing that plaintiff was precluded from obtaining PIP benefits by MCL 500.3113(a), because she unlawfully operated the rental vehicle without defendant's authority or permission. The trial court, after a hearing, granted defendant's motion for summary disposition and dismissed plaintiff's claim for PIP benefits, holding that plaintiff "was an unauthorized driver of the . . . rental vehicle such that her use and operation of the rental vehicle constituted an unlawful taking pursuant to MCL 500.3113(a) and the . . . Rental Agreement thereby disqualifying Plaintiff from recovering [PIP] benefits against [defendant]." This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny summary disposition. *Varela v Spanski*, 329 Mich App 58, 68; 941 NW2d 60 (2019). The de novo standard of review means we review the issues independently, without deference to the trial court's decision. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009) (citation omitted).

A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the evidence, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The moving party can satisfy its burden of showing there is no genuine issue of material fact by: (1) submitting evidence that negates an essential element of the nonmoving party's claim or (2) demonstrating that the nonmoving party's evidence cannot establish an essential element of the nonmoving party's claim or defense. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). Once the moving party meets that burden, the burden shifts to the nonmoving party to submit evidence establishing there is a genuine issue of material fact. *Id*. at 362, citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

III. LAW AND ANALYSIS

Plaintiff argues the trial court erred in granting defendant's motion for summary disposition because she did not unlawfully take the rental vehicle.

The Michigan no-fault provides in relevant part:

> A person is not entitled to be paid [PIP] benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully. [MCL 500.3113(a)]

As can be seen, MCL 500.3113(a) has three elements: (1) plaintiff was willingly operating the rental vehicle; (2) the rental vehicle was taken unlawfully; and (3) plaintiff knew, or should have known, that the motor vehicle was taken unlawfully.

"Unlawfully" means "contrary to Michigan law," *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503, 516-517; 821 NW2d 117 (2012), meaning that "any person who takes a vehicle contrary to a provision of the Michigan Penal Code . . . has taken the vehicle unlawfully

RECEIVED by MSC 7/19/2024 9:17:32 AM

for purposes of MCL 500.3113(a)." *Spectrum*, 492 Mich at 509. Put another way, "[b]ecause a taking does not have to be larcenous to be unlawful, the phrase 'taken unlawfully' in MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner." *Id*., at 518.

> "[T]ake" means to get something into one's hands or possession through a voluntary act. This would necessarily involve either a transfer of possession or control of an object from one person to another or the gaining of possession or control of an unattended object that is not in anyone's control or possession. [*Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 600; 808 NW2d 1 (2010) (internal citation omitted).]

The trial court properly granted summary disposition to defendant because, under MCL 500.3113(a), the undisputed material facts show that plaintiff was not entitled to PIP benefits as an unauthorized driver. First, plaintiff willingly operated the rental vehicle. MCL 500.3113(a). Plaintiff testified that she "suggested" driving because of Hamilton's condition. There is no evidence plaintiff was coerced or forced into driving the vehicle; rather the record indicates she voluntarily drove the vehicle.

Second, the rental vehicle was taken unlawfully. MCL 500.3113(a). As noted above, "take" means "to get something into one's hands or possession through voluntary act," *Henry Ford*, 288 Mich App at 600, and requires one to gain "possession or control of an object" from another person. *Id*. Likewise, "the phrase 'taken unlawfully' in MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner," regardless of whether that taking is larcenous. *Spectrum*, 492 Mich at 518. Here, plaintiff had possession and control of the vehicle because she was driving the vehicle. As the trial court stated, the owner of the vehicle was defendant, not Hamilton, and defendant did not give plaintiff express or implied authority to drive the vehicle. This conclusion is further supported by the language in the rental agreement, which expressly states that no "additional drivers are allowed without prior written consent." Therefore, it is irrefutable that plaintiff took the rental vehicle unlawfully.

Third, evidence shows that plaintiff knew, or should have known, the vehicle was taken unlawfully. MCL 500.3113(a). Plaintiff testified she knew it was a rental vehicle because Hamilton's vehicle had been in the repair shop. Therefore, plaintiff reasonably knew, or should have known, that driving the rental vehicle would be unlawful.

In seeking to avoid this conclusion, plaintiff argues that, unlike in *Spectrum*, 492 Mich at 516-517, she did not knowingly take the vehicle because she did not know that it was unlawful to do so under the exigent circumstances she was facing at the time. However, plaintiff does not cite any authority establishing an "exigent circumstances" exception to MCL 500.3113(a), and the Supreme Court has clearly stated that "MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner." *Spectrum*, 492 Mich at 518. In addition, as discussed above, plaintiff's testimony establishes that she knew she lacked authority to drive the rental car.

Plaintiff also seeks to distinguish *Spectrum* on the basis that unlike in *Spectrum*, there were no express statements to plaintiff that she could not drive Hamilton's rental vehicle. However, plaintiff's argument ignores that there is no requirement for the vehicle owner to make an *express*

RECEIVED by MSC 7/19/2024 9:17:32 AM

statement regarding plaintiff's authority or lack thereof. Instead, "MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner." *Spectrum*, 492 Mich at 518. Additionally, plaintiff operates on the assumption that this grant of authority would have had to come from Hamilton, but fails to recognize that it is the authority of the owner (defendant) not the renter (Hamilton) that matters.[2]

Plaintiff also contends that because she was not a party to the rental contract and was never given a copy of the contract to read, defendant somehow authorized her to drive its rental vehicle. Aside from the fact this argument is largely unsupported, plaintiff's position, if anything, provides additional support for the conclusion that she was not a party to the rental contract, and therefore had no authority to drive the rental vehicle. In addition, a rental agreement provision excluding additional drivers can serve as an express prohibition against taking a vehicle for the purposes of MCL 500.3113(a).

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Stephen L. Borrello

[2] Plaintiff relies on *Rambin v Allstate Ins Co*, 495 Mich 316; 852 NW2d 34 (2014), superseded by statute as stated in *Ahmed v Tokio Marine Am Ins Co*, 337 Mich App 1, 25; 972 NW2d 860 (2021), to argue that the circumstances justified her driving the rental vehicle. However, in addition to the fact that *Rambin* was superseded by statute, plaintiff's argument is belied by the fact she did not have authority from defendant to drive the rental vehicle. Indeed, plaintiff testified that she knew the vehicle was a rental and not one owned by Hamilton.

Exhibit I

RECEIVED by MSC 7/19/2024 9:17:32 AM

RECEIVED by MSC 7/19/2024 9:17:32 AM

SENATE BILL No. 1140

November 12, 2014, Introduced by Senator SMITH and referred to the Committee on Insurance.

A bill to amend 1956 PA 218, entitled

"The insurance code of 1956,"

by amending section 3113 (MCL 500.3113), as amended by 1986 PA 93.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 3113. 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:

(a) The person was using a motor vehicle or motorcycle ~~which he or she had~~ **THAT WAS** taken unlawfully, unless the person reasonably believed that he or she **OR THE DRIVER** was entitled to ~~take and~~ use the **MOTOR** vehicle **OR MOTORCYCLE**.

(b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the

SENATE BILL No. 1140

security required by section 3101 or 3103 was not in effect.

(c) The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and **THE MOTOR VEHICLE OR MOTORCYCLE** was not insured by an insurer ~~which~~ **THAT** has filed a certification in compliance with section 3163.

(D) THE PERSON WAS OPERATING A MOTOR VEHICLE OR MOTORCYCLE AS TO WHICH HE OR SHE WAS NAMED AS AN EXCLUDED OPERATOR AS ALLOWED UNDER SECTION 3009(2).

RECEIVED by MSC 7/19/2024 9:17:32 AM