STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Wayne County Circuit Court
Honorable Cynthia D. Stephens

FERN WILLER

Plaintiff-Appellee,

v

TITAN INSURANCE COMPANY,

Defendant-Appellant

Supreme Court No. 133596

Court of Appeals No. 273805

Wayne County Circuit Court
No. 2006-607259-NF

***AMICUS CURIAE* BRIEF OF THE**

MICHIGAN ASSOCIATION FOR JUSTICE ("MAJ")

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STATEMENT OF THE BASIS OF JURISDICTION

Defendant-Appellant, Titan Insurance Company, ("Titan") filed the instant application for leave to appeal after the Court of Appeals denied its delayed application for leave on February 23, 2007. On December 20, 2007, this Honorable Court entered an Order granting the application for leave to appeal. In this Order, the Court asked the parties to submit supplemental briefs addressing the following issue: whether the Defendant was entitled to summary disposition because of the absence of a genuine issue of material fact as to whether the causal connection between the Plaintiff's injuries and her scraping the windshield of her vehicle was anything beyond "incidental, fortuitous or 'but for'" such that the injuries arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" within the meaning of MCL 500.3105(1). MAJ submits this *amicus curiae* brief in response.

INTERESTS OF THE *AMICUS*

The Michigan Association for Justice ("MAJ") is an organization comprised of attorneys primarily engaged in litigation and trial work. MAJ is a major organization representing the interests of injured persons. In particular, those who are injured in motor vehicle accidents with potential entitlement to No-Fault benefits. MAJ routinely assists this Honorable Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state.

STATEMENT OF FACTS

MAJ incorporates by reference Plaintiff-Appellee's statement of facts contained in her Reply Brief and Supplemental Brief in this matter.

ARGUMENT

I. Plaintiff's injuries sustained while scraping her windshield satisfy the causal nexus requirements of MCL 500.3105(1).

A. Introduction.

In its Order for action on application, the Court asked the parties to address the following issue: whether the Defendant was entitled to summary disposition because of the absence of a genuine issue of material fact as to whether the causal connection between the Plaintiff's injuries and her scraping the windshield of her vehicle was anything beyond "incidental, fortuitous or 'but for'" such that the injuries arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle," within the meaning of MCL 500.3105(1).

§ 3105(1) is considered "the gateway section" regarding entitlement to No-Fault benefits:

> (1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

Under the specific facts of this case, we answer that Plaintiff's injuries arose out of her scraping the snow and ice from her windshield, which is integrally related to a vehicle functioning as a motor vehicle. Plaintiff's injuries occurred only because she could not safely or legally operate her vehicle without first scraping the snow and ice from her windshield. Therefore, the act of clearing snow and ice from the windshield as a prerequisite to its safe and legal operation is directly related to the transportational function of a motor vehicle.

B. The transportational function test does not require injuries to arise out of moving vehicles, but rather requires injuries to be integrally related to the transportational function of vehicles.

The Court's order granting leave emphasizes the fundamental requirement under the No-Fault

Law that there must be a causal nexus between the injury and the use of a motor vehicle as a motor vehicle. The causal nexus between the injury and the use of a motor vehicle as a motor vehicle must be more than merely "incidental, fortuitous, or 'but for'". Examples of injuries that take place in or near a vehicle, but do not arise out of the use of a motor vehicle as a motor vehicle are criminal assaults. The *Thornton* case is a classic example where the causal nexus was not met. *Thornton v Allstate*, 425 Mich 643, 660; 391 NW2d 320 (1986). The mere fortuity of being shot while inside a vehicle does not involve the use of a motor vehicle as a motor vehicle. In other words, there is nothing about the car itself that contributed to the injury.

Although the proposition that injuries must be more than merely "incidental, fortuitous or 'but for'" is clear from criminal assault cases, our jurisprudence lacked clear guidance as to what was **more** than merely "incidental, fortuitous, or 'but for'". This clarification was set forth in *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998). Whether an injury arises out of the use of a motor vehicle as a motor vehicle under MCL 500.3105 turns on whether the injury is closely related to the transportational function of motor vehicles. *Id* at 225-226. While a vehicle need not be in motion at the time of injury in order for the injury to "arise out of the use of a motor vehicle as a motor vehicle", the phrase "as a motor vehicle" does require a general determination of whether the vehicle in question was being used, maintained, or operated for transportational purposes. *Id* at 219.

The Court in *McKenzie* noted that a vehicle need not be moving at the time of the injury to arise out of the use of a motor vehicle as a motor vehicle, i.e., out of its transportational function. *Id* at 219, n 6. In addition, it clearly indicated that transporting people or objects is a major part of the transportational function of a motor vehicle, and qualifies as using a motor vehicle as a motor vehicle.

Id at 221.

Generally, it appears that the "transportational function" of a motor vehicle requires a relationship integrally related to the inherent functions of a motor vehicle, such as moving people and cargo. We also know that even though "transportation" implies movement, the transportational function test can be met **without** any movement of a vehicle. For example, injuries taking place with parked motor vehicles clearly satisfy this test under the clear statutory language of MCL 500.3106(1).

In *Miller v Auto Owners Ins Co*, 411 Mich 633, 639-640; 309 NW2d 544 (1981)[1], Justice Levin explained: "[e]ach exception [in MCL 500.3106(1)] pertains to injuries related to the character of a parked vehicle as a motor vehicle–characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents. *Id.* In other words, the parked vehicle exceptions do meet the transportational function test. The point to be made from this is that movement is **not** required to satisfy the transportational function test.

Following this point that a vehicle does not have to be in motion when injuries occur for them to satisfy the transportational function, this Court has found that even an injury occurring while sitting in a car would satisfy this test. *McCarthy v Allstate Ins Co*, 462 Mich 860; 613 NW2d 719 (2000).

C. Plaintiff's injuries arose out of activities integrally related to the transportational function of her motor vehicle.

Here, Plaintiff was in the process of clearing snow and ice from her windshield when she slipped and fell on ice in her driveway. Plaintiff intended to drive to her sister's home and had started

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[1] Significantly, this Court in *Stewart v State of Michigan*, 471 Mich 692, 698; 692 NW2d 376 (2004), cited this rationale behind the parked vehicle exclusion favorably.

her car. In addition, her children were already situated in the car - ready to travel. This accident occurred in the month of March in Michigan, and not surprisingly, the weather involved snow and ice. The question then is whether the act of clearing a car windshield of snow and ice prior to moving it forward is integrally related to the transportational function of a motor vehicle. This question ultimately answers itself - one cannot safely or legally operate a motor vehicle without first clearing the windshield of snow and ice. Stated another way, just as putting the key in the ignition and turning it is integrally related to moving the car, so is clearing a windshield of snow and ice.

As enunciated in *McKenzie*, transporting people or objects is a major component of the transportational function of a motor vehicle and indeed qualifies as **using a motor vehicle as a motor vehicle**. Injuries sustained while a motor vehicle is moving are not the only ones involved in the transportational function of a motor vehicle. Here, Plaintiff's vehicle was running and contained passengers, with the intent to drive it. Because the windshield was covered in snow and ice and prevented Plaintiff from safely operating her vehicle, she had no choice but to clear the snow and ice.

In fact, Plaintiff had a statutory duty under the Motor Vehicle Code to do so before she could legally operate her vehicle:

> MCL 257.709(1) A person **shall not** drive a motor vehicle with any of the following:
>
> (a) A sign, poster, **nontransparent material**, window application, reflective film, or nonreflective film upon or in the front windshield, the side windows immediately adjacent to the driver or front passenger, or the sidewings adjacent to and forward of the driver or front passenger, ... (emphasis added).

Plaintiff's injuries occurred only because she could not continue to use or operate her vehicle without first scraping the snow and ice from her windshield. It is clear that an integral part of operating a motor vehicle requires an unobstructed view through the windshield. In other words,

clearing a windshield of snow and ice is integral to its transportational function in that one cannot drive a vehicle with an obstructed windshield. Because clearing snow and ice from the windshield is required before one can legally and safely operate a motor vehicle, injuries sustained while doing so arise out of the "use of a motor vehicle as a motor vehicle."

CONCLUSION AND RELIEF REQUESTED

This Honorable Court should find that a genuine issue of fact exists, the Defendant is not entitled to Summary Disposition in this matter, and this case should proceed to trial in the Wayne County Circuit Court.

Respectfully submitted.

Dated: February 26, 2008

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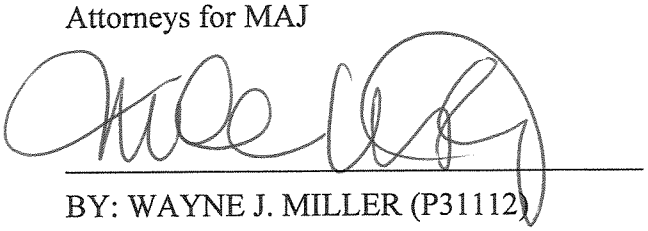

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