STATE OF MICHIGAN

COURT OF APPEALS

DENISE SCHULTZ, Next Friend of JOSHUA SCHULTZ, a Minor,

Plaintiff-Appellee,

v

BLUE CROSS BLUE SHIELD,

Intervener-Defendant.

and

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellant,

and

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN and FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendants/Cross-Defendants-Appellees,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant/Cross-Defendant.

UNPUBLISHED
March 18, 2010

No. 288128
St. Clair County Circuit Court
LC No. 07-002850-NF

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Plaintiff-Appellee,

and

BLUE CROSS BLUE SHIELD

Intervener-Plaintiff,

v

No. 288224
St. Clair County Circuit Court
LC No. 07-001751-NF

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN and FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendants-Appellees,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY

Defendant-Appellant.

DENISE SCHULTZ, Next Friend of JOSHUA SCHULTZ, a Minor,

Plaintiff-Appellee,

v

No. 288225
St. Clair County Circuit Court
LC No. 07-002850-NF

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN and FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendants/Cross-Defendants-Appellees,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant/Cross Defendant-Appellant,

and

BLUE CROSS BLUE SHIELD,

Intervener-Defendant.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

and

BLUE CROSS BLUE SHIELD,

Intervener-Plaintiff,

v

No. 288423
St. Clair County Circuit Court
LC No. 07-001751-NF

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN and FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendants-Appellees,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

Before: DONOFRIO, P.J., AND METER AND MURRAY, JJ.

PER CURIAM.

These consolidated appeals arise out of claims and cross-claims for personal protection insurance benefits (PIP) under the No Fault Automobile Insurance Law, MCL 500.3101 *et seq*. The trial court granted Farm Bureau General Insurance Company of Michigan and Farm Bureau Mutual Insurance Company of Michigan (collectively Farm Bureau) summary disposition on their defense that their insured's four wheel off road vehicle (ORV) was exempt from the no-fault law pursuant to MCL 324.81106 (ORV exemption) and was therefore, not obligated to provide no-fault benefits to the operator of an off road motorcycle (motorbike) involved in the accident. The trial court denied cross motions for summary disposition by the other parties. The appeals and cross-appeals followed and this Court consolidated the matters. Because the trial court erred in granting Farm Bureau's motion for summary disposition, we reverse the grant of summary disposition. We affirm the remainder of the trial court's opinion and order and remand for further proceedings consistent with this opinion.

I. Introduction

The genesis of these consolidated appeals and cross-appeals is an underlying claim for PIP benefits brought by the next friend of the victim, Joshua Schultz. Schultz was injured in a serious accident when he was operating an off road motorcycle or motorbike on a public road. Also involved in the accident was a four wheel ORV and a pickup truck that were also being operated on the same public road.

Defendant, Nationwide Mutual Fire Insurance Company (Nationwide), although potentially of lower priority for PIP benefits, provided benefits to Schultz under a contract of no-fault insurance with Schultz's parents. Nationwide provided significant PIP benefits in excess of $400,000.00 to Schultz and brought subrogation claims against Farm Bureau and Progressive Michigan Insurance Company (Progressive) claiming that both insurers were obligated to provide PIP benefits to Schultz, and that they were of equal and higher priority than Nationwide for such payments. Nationwide alleged that Farm Bureau is an obligated insurer through the operation of the ORV. Nationwide also alleged that Progressive is an obligated insurer as a result of the pickup truck's involvement in the accident. Schultz separately brought a declaratory action against all three insurers for a determination of coverage for the payment of PIP benefits for the suffered injuries. The trial court consolidated the actions. Each named insurance company moved for summary disposition arguing that it was not obligated to provide PIP benefits. Schultz, supported and joined by Nationwide, moved for summary disposition against Progressive. The trial court granted Farm Bureau's motion for summary disposition on the basis of the ORV exemption, MCL 324.81106, from the no-fault insurance law and denied the other motions. After application and then leave granted, this Court consolidated the appeals.

II. Substantive Facts

On November 24, 2006, Schultz, Eric Peuterbaugh, and Michael Wilson were driving different vehicles on Fox Road in St. Clair County when an accident occurred involving all three individuals. At the time, all three were teenagers residing with their parents. Schultz was riding his motorbike, Peuterbaugh was driving a four-wheeled ORV, and Wilson was driving a pickup truck. According to Dayne DesRosiers, Peuterbaugh's cousin, who also operated an ORV at the time and witnessed the accident, Schultz, Peuterbaugh, and Wilson were attempting to determine the top speed of the motorbike. Testimony indicates that of the vehicles involved in the accident

only the pickup truck had a speedometer, however, Wilson the pickup truck driver denies that there was such a plan.

Schultz was driving his motorbike up and down Fox Road when Peuterbaugh, and then Wilson, turned from a friend's driveway onto the road. Peuterbaugh's ORV was farthest ahead in the group, with Wilson's pickup truck steadily following 30 or 40 yards behind the ORV. Schultz's motorbike approached the pickup truck from behind, passed the pickup truck on the left, and then moved in front of the pickup truck. Wilson estimated Schultz's speed to be between 50 and 60 miles per hour when he passed. Estimates of the pickup truck's speed ranged from 40 to 65 miles per hour.

Schultz drove up beside the ORV. He steered to the right and collided with the ORV, as the ORV struck the motorbike's rear tire. The ORV rolled to the right and Peuterbaugh ended up in a ditch. Schultz was thrown from his motorbike and sustained serious injuries in the accident.

The parties disputed whether Wilson's pickup truck ran over Schultz or the motorbike. According to Wilson's deposition testimony, after the collision between the motorbike and the ORV, his pickup truck hit the motorbike. DesRosiers testified to a scenario in which Schultz, on his motorbike, Peuterbaugh and DesRosiers, both on four wheel ORVs, and Wilson in the pickup truck, traveled down Fox road at a high rate of speed. DesRosiers testified that immediately after the accident, Wilson admitted that he had hit Schultz. Schultz's jacket showed markings on it from the pickup truck's tires.

All agreed that DesRosiers fell back and was not involved in the ultimate accident. At some point, Schultz's motorbike collided with Peuterbaugh's ORV and Schultz was thrown to the road. DesRosiers did not observe any contact between Wilson's pickup truck and Schultz; however, he was certain that Wilson admitted to running Schultz over after Schultz was thrown from his motorbike. Wilson has since stated that he may have only struck the motorbike, but not Schultz.

It appears from the record evidence that Schultz's rear tire and the front left corner of Peuterbaugh's ORV impacted throwing Schultz to the ground. Wilson followed behind at a distance of some 30 to 40 yards and within seconds of the motorbike and ORV impact, Wilson passed through possibly striking the motorbike and clearly imprinting his tire markings on the jacket Schultz was wearing at the time.

Schultz's motorbike and Peuterbaugh's ORV were neither insured nor registered. Each of the teenagers was a resident relative of his parents' household and each had a motor vehicle policy of insurance complying with the Michigan No Fault law. Defendant Nationwide provided no-fault insurance for Denise Schultz, Schultz's mother. Similarly, Farm Bureau insured Ronald Peuterbaugh, Peuterbaugh's father, and Progressive insured Wilson through an insurance policy on the pickup truck with his parents.

III. Procedural History

Nationwide was first to institute an action against the other insurers and cross claims were filed. Denise Schultz, as Schultz's next friend, brought a declaratory action against Nationwide, Farm Bureau, and Progressive, to determine the existence and priority of insurance

coverage and cross claims were filed. The trial court consolidated all claims. Nationwide, Farm Bureau, and Progressive moved for summary disposition under MCR 2.116(C)(10). Each argued that the other two were obligated to provide benefits to Schultz. Schultz moved for summary disposition as well arguing that both Farm Bureau and Progressive were obligated to provide PIP benefits alternatively to Nationwide and that Progressive was estopped from denying such coverage. The trial court agreed that Schultz's motorbike was a motorcycle as defined by the no-fault act for purposes of determining no-fault payment priority under MCL 500.3114(5). The trial court also concluded that Peuterbaugh's ORV was a "motor vehicle" because it was powered by an engine and operated on a highway.

The trial court issued a written opinion titled, "OPINION ON PRIORITY OF INSURERS," and later entered a complementary order granting summary disposition to Farm Bureau. And, the trial court denied the Schultz, Nationwide, and Progressive motions for summary disposition. The trial court also denied reconsideration to Nationwide. Because of the trial court's lengthy and detailed opinion, we summarize it in sections, as follows:

General holdings:

- Michigan's no-fault insurance scheme provides coverage PIP for operators of a motorcycle who are injured in an accident involving a motor vehicle. MCL 500.3114(5).
- For no-fault purposes, a motorcycle is any vehicle that is (1) designed to travel on three or fewer wheels in contact with the ground, and (2) is equipped with a motor larger than fifty cubic centimeters (cc). MCL 500.3101(2)(a).
- MCL 500.3114(5) establishes the priority of coverage, with the highest priority insurer being the insurer of the owner of the motor vehicle involved, followed by the insurer of the operator of the motor vehicle, followed by the insurer of the operator of the motorcycle, followed by the insurer of the owner of the motorcycle.
- The owner of a motorcycle who fails to properly insure his vehicle may not claim PIP benefits. MCL 500.3113.

Holdings with respect to Farm Bureau's obligation:

- The Schultz motorbike is a motorcycle for purposes of determining priority for the payment of PIP, because the motorbike was a two-wheeled vehicle with a 200 cc engine.
- Peuterbaugh's ORV meets the statutory definition of "motor vehicle" for purposes of no-fault because the vehicle was a 4-wheeled vehicle powered by an engine operated on a highway. MCL 500.3101(2)(e).
- Peuterbaugh's motor vehicle in this case is an ORV and is not subject to the obligations of the no-fault insurance provisions. Placing Peuterbaugh's ORV in the chain of priority as a motor vehicle would only serve to subject the ORV to the obligations of the no-fault provisions and would negate that vehicle's release by MCL 324.81106. Because Peuterbaugh's ORV is exempt from the no-fault provisions, his vehicle is not properly considered under the obligations imposed by MCL 500.3114(5). Farm Bureau, as the insurer, is entitled to judgment as a matter of law by operation of MCL 324.81106.

- The trial court declined retroactive application of nascent legislation in the form of House Bill No. 4323 and House Bill No. 5559. 2008 PA 241 amended MCL 500.3101 and its definitions effective July 17, 2008.

Holdings with respect to Progressive's motion for summary disposition:

- Peuterbaugh's ORV is exempt and therefore, Farm Bureau is not in higher priority than Progressive as insurer of Wilson's motor vehicle that Progressive claims is not involved.
- Schultz's motorcycle is also an ORV and exempt from the obligations of the no-fault provisions requiring motorcycle insurance. MCL 500.3103(1). Similarly, MCL 500.3113 disqualification from PIP benefits does not apply. *Nelson v Transamerica Ins Services*, 441 Mich 508, 518; 495 NW2d 370 (1992).

Holdings with respect to Nationwide's motion for summary disposition joined by Schultz against Progressive:

- The first priority for paying PIP to a motorcyclist in a motorcycle accident involving a motor vehicle is the insurer of the owner of the motor vehicle. MCL 500.3114(5)(a).
- Although Progressive denies that the pickup was involved in the accident, despite the allegation of Wilson's admission to having run over Schultz and tire marks from Wilson's pickup on Schultz's jacket, Progressive is not estopped from denying Wilson's involvement by virtue of the accepted offer of judgment in *Schultz v Wilson*, St. Clair County Circuit Court Case No. 07-001361.
- For collateral estoppel to apply, (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; (3) there must be mutuality of estoppel. *Monat v State Farm Insurance Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004).
- The parties in *Schultz v Wilson*, a residual bodily injury or third party claim, were distinct from their insurers. Nationwide was a "legal stranger" to that proceeding and had no right to control the proceedings in that case. Nationwide was not a privy to plaintiff in *Schultz v Wilson*. Where a plaintiff is granted a judgment in an action based on an accident, there is no mutuality of estoppel or identity of parties in a subsequent action by a different plaintiff.
- An offer of judgment accepted does not amount to "actual litigation" of an issue, and an issue is not "actually litigated" until it is submitted for a determination, and thereafter determined. The consent judgment did not involve the actual litigation of the question of Wilson's involvement with the accident. Further, the release memorializing the disposition provides that the parties "admit no liability of any sort by reason of said event, and that said payment and settlement in compromise is made to terminate further controversy respecting all claim for damages."
- Judicial estoppel is not available because there is no "judicial endorsement" of inconsistent positions. Judicial estoppel does not apply to settlements, since such a disposition does not require any "judicial endorsement" of the parties' positions. In the case of a consent judgment or offer of judgment, the court has not determined the matters put in issue, but has merely put its stamp of approval on the parties' agreement disposing of those matters.

- Progressive produced enough evidence that the pickup truck did not play an active role in the accident to create a genuine issue of material fact citing Wilson's denial of active involvement in the accident and the affidavit of their expert, John Wiechel, a professor of engineering and accident reconstruction, that the pickup truck did not cause Schultz's injuries.

IV. Positions on Appeal

In Docket Nos. 288128 and 288423, plaintiffs are aligned and challenge on appeal the trial court's dismissal of Farm Bureau from the actions by application of the ORV exemption to the no-fault law as contained in the Natural Resources and Environmental Protection Act, MCL 324.88106. Farm Bureau reasserts the application of the ORV exemption and thereby denies its inclusion as an insurer of the owner of a motor vehicle involved in a motor vehicle accident with a motorcyclist. Farm Bureau cross-appeals to assert five alternative reasons for affirmation of the grant of summary disposition in its favor:

- The Legislature's enactment of 2008 PA 241, effective July 17, 2008, amending the definitions of MCL 500.3101 applies retroactively to correct erroneous application of the ORV exemption by the courts.
- The No-Fault Act is unconstitutional if ORV accidents without involvement of no-fault vehicles are covered by the no-fault law.
- Farm Bureau is not a priority insurer because Peuterbaugh was not the "owner" of the ORV.
- Farm Bureau is not a priority insurer because Farm Bureau did not insure Peuterbaugh under its insurance contract.
- Nationwide is not entitled to summary disposition because genuine issues of material fact exist regarding the amount of PIP benefits subject to a claim for reimbursement.

In Docket Nos. 288224 and 288225, Progressive appeals from the trial court's opinion and resultant orders in the underlying PIP declaratory and recoupment actions brought by Schultz and Nationwide respectively. Progressive is aligned with Nationwide and Schultz and makes complementary arguments against the granting of the Farm Bureau summary disposition motion. Progressive further asserts that the trial court erred in not finding as a matter of law that the pickup truck was not an involved motor vehicle in the accident with Schultz. Particularly, Progressive reasons that the claimed contact between the truck and Schultz does not correspond with any of the injuries sustained by Schultz. Finally, Progressive claims that Schultz is disqualified from receiving PIP benefits for not insuring his off road motorcycle. Farm Bureau asserts on cross-appeal the same arguments advanced in the companion appeals. Nationwide and Schultz assert on cross-appeal that Progressive is bound to extend PIP benefits by application of the doctrines of collateral estoppel and judicial estoppel. Nationwide and Schultz further claim the trial court erred in not ruling as a matter of law that Wilson's pickup truck was involved in the accident. Finally, Nationwide and Schultz support the trial court's determination that Schultz was not disqualified from receiving PIP benefits for failing to insure his motorbike.

V. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Questions regarding statutory interpretation are also reviewed de novo. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). "The goal of statutory interpretation is to determine and give

effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written." *Id*. at 529-530.

VI. Analysis[1]

A. Farm Bureau

A person suffering accidental bodily injury in a motor vehicle accident is entitled to PIP benefits payable by an insurer without regard to fault. MCL 500.3105. As a general rule, a person who sustains accidental bodily injury in a motor vehicle accident is entitled to recover benefits from his own insurer or the insurer of a resident relative domiciled in the household. MCL 500.3114(1) of the no-fault law describes persons entitled to PIP benefits and establishes an order of priority for the payment of those benefits. With respect to motorcyclists injured in an accident as a result of the involvement of a motor vehicle, the general rule is suppressed and the statute provides an alternative and specific benefit payment scheme. MCL 500.3114(5) applies to accidents involving motorcycles and motor vehicles. The statute provides:

> A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident. [MCL 500.3114(5).]

The parties do not contest that the motorbike is, by definition, a motorcycle. MCL 500.3101(2)(c). In addition, the parties do not contest that at the time of the accident, the ORV was defined as a motor vehicle. MCL 500.3101(2)(e). Nationwide, Schultz, and Progressive dispute the trial court's exclusion of Farm Bureau from the priority scheme. If Farm Bureau, as Peuterbaugh's insurer by virtue of his ownership of the ORV, is included in the benefit calculus, Farm Bureau would share the same priority as Progressive, the insurer of the pickup truck, another motor vehicle involved in the accident. Both Farm Bureau and Progressive would have higher priority than Nationwide, the insurer of Schultz, the operator of the motorbike.

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[1] In the interests of clarity and ease of discussion, we organize our analysis of the issues on appeal by party.

MCL 324.81106 exempts ORVs from the provisions of the no-fault act. The statute provides:

> *An ORV is exempt from* the motor vehicle accident claims act, Act No. 198 of the Public Acts of 1965, being sections 257.1101 to 257.1133 of the Michigan Compiled Laws, and from sections 3101 to 3179 of the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being *sections 500.3101 to 500.3179 of the Michigan Compiled Laws*. [MCL 324.81106 (emphasis added).]

Farm Bureau argues, and the trial court agreed, that the ORV exemption and no-fault law are mutually exclusive such that Farm Bureau must necessarily be outside the benefit calculus. No-fault law and the ORV exemption have, however, been harmonized to effect the purpose of each and provide PIP benefits to injured persons involved in motor vehicle accidents. See *Michigan Millers Mut Ins Co v Farm Bureau General Ins Co*, 156 Mich App 823; 402 NW2d 96 (1986). *Michigan Millers* was a declaratory judgment action to determine the priority of insurers under MCL 500.3114(5) for injuries sustained by a dirt bike driver insured by the plaintiff, in a collision with a pickup truck insured by the defendant. *Id*. at 825-826. The defendant argued that the ORV act's exemption of ORVs from the provisions of the no-fault act precluded application of § 3114(5) for purposes of determining the priority of insurers.[2] *Id*. at 828. The trial court disagreed, and ruled that the defendant was responsible for payment of no-fault benefits to the dirt bike driver under the priority provisions of § 3114(5). *Id*. at 826. The defendant appealed, and this Court affirmed. The *Michigan Millers* Court recognized that the "trail bike meets the no-fault definition of a motorcycle and that, absent the problem allegedly posed by [the ORV exemption], defendant, insurer of the owner of the motor vehicle involved in the accident, would be responsible for payment of no-fault benefits under MCL 500.3114(5)(a)." *Id*. at 828-829.

The *Michigan Millers* Court held that the ORV exemption did not preclude consideration of the ORV driver's status for purposes of determining priority under MCL 500.3114(5), reasoning that:

> An ordinary and plain meaning of "exempt from" is "not subject to." Webster's Third New International Dictionary, Unabridged Edition (1964). See also *Maine Water Co v City of Waterville*, 93 Me 586; 45 A 830 (1900): "The term 'exemption' implies a release from some burden, duty or obligation."

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[2] The Off-Road Recreational Vehicle Act, MCL 257.1601 *et seq*., in effect when *Michigan Millers* was decided was repealed in 1994. 1994 PA 451. The statutory exemption of ORVs from the requirements of the no-fault act under MCL 257.1603 was substantively the same as the current ORV exemption, MCL 324.81106. The now-repealed MCL 257.1603 provided: "An ORV is exempt . . . from the provisions of sections 3101 to 3179 of Act No. 218 of the Public Acts of 1956, as amended, being sections 500.3101 to 500.3179 of the Michigan Compiled Laws."

> Application of § 3 of the ORV act as urged by defendant in this case would extend the section's exemption beyond its plain meaning. Section 3 states that ORV's are exempt from the provisions of the no-fault act. The Legislature did not say that a person's status as operator of an ORV/motorcycle cannot be considered in determining priority of payment of no-fault benefits. Determination of no-fault payment priority under MCL 500.3114(5) in this case neither subjects the trail bike (ORV) to the provisions of the no-fault act nor negates the vehicle's release from the duties imposed by the no-fault act. [*Michigan Millers Mut Ins Co, supra* at 156 Mich App 829-830.]

The Michigan Supreme Court was confronted with issues similar to *Michigan Millers* and the instant case in *Nelson v Transamerica Ins Services*, 441 Mich 508; 495 NW2d 370 (1992). *Nelson* deals squarely with the issues of mutual exclusivity of the ORV exemption and the forfeiture of PIP benefits when a defined motorcycle is uninsured. Nelson was riding an uninsured, off road Kawasaki KX 125 motorcycle when he collided with a pickup truck insured by Transamerica. *Id*. at 511. "The trial court held that because the term motorcycle falls within both the no-fault act and the ORV act, the no-fault act prevails; therefore, all motorcycle owners must obtain public liability insurance or forfeit personal injury protection benefits." *Id*. at 513. This Court affirmed and the Supreme Court reversed. *Id*.

In *Nelson*, then Chief Justice Cavanagh, writing for the Supreme Court acknowledged the problem at issue today. The conflict in the law arose in 1975, when the Legislature amended the no-fault law requiring motorcycles to be insured. *Nelson, supra* at 441 Mich 513. The Legislature did not amend the earlier enacted ORV act in which motorcycles are included in the definition of off road vehicles that are exempt from the insurance requirement. *Id*. The ORV act also enacted earlier in 1975, exempted ORV motorcycles from the no-fault law utilizing the same language as appears in MCL 324.81106. The *Nelson* Court observed,

> As a result, it appears the motorcycle insurance requirement was intended only for on-road motorcycles.
>
> Furthermore, inherent in the definition of ORV is the intention that only off-road vehicles be included. It logically follows that in including the term "motorcycle" in the ORV definition, the Legislature intended to include only motorcycles that were specifically designed for off-road use. Thus, the no-fault act states which vehicles must be insured, and the ORV exemption states which vehicles are exempt from the no-fault act insurance requirement. [*Id*. at 516.]

The *Nelson* Court further stated, "[f]or example, the general category of four-wheel motor vehicles must be insured under the no-fault act, but a smaller subset of four-wheel motor vehicles are exempt under the ORV act." *Nelson, supra* at 441 Mich 516. This statement is germane to an assertion by Farm Bureau that this Court erred in *Morris v Allstate Ins Co,* 230 Mich App 361; 584 NW2d 340 (1998). "Similarly, ORV motorcycles are a subset of the motorcycles otherwise required to be insured. Any motorcycle not designed for use as an ORV is not protected by the ORV exemption and must be insured under the no-fault act." *Nelson, supra* at 441 Mich 516.

The *Nelson* Court went on to specifically reject the defendant's argument that PIP benefits were intended to be forfeited for failure to insure or even register the motorcycle as an ORV by the later amendment to the no-fault law stating,

> If the motorcycle meets the definition of an ORV, it remains an ORV even if it is not registered as an ORV. . . . An ORV is an ORV regardless whether it is registered as such. In amending § 3113 of the act in 1986, the Legislature did not state that ORV motorcycle owners would forfeit benefits for failing to register the vehicle as an ORV. [*Nelson, supra* at 441 Mich 517.]

Before holding that reading the no-fault law and the ORV exemption together results in two classifications of motorcycle, one designed for on-road use requiring insurance and one designed for off-road use exempt from the no-fault act insurance requirement, the *Nelson* Court stated,

> Although ORV motorcycles are exempt from the no-fault act, an injured motorcyclist is entitled to personal injury protection benefits if the injury occurred in a collision involving a motor vehicle. MCL 500.3105. Once it is established that the accident involved a motor vehicle, [as defined in MCL 500.3101(2)(c) now (e)] the motorcyclist will look to the no-fault act priority provision to determine the insurance company liable for paying benefits. MCL 500.3114(5).
>
> If the motorcycle is an ORV, then the driver is not required to carry any insurance and the priority provisions of MCL 500.3114(5) control. [*Nelson, supra* at 441 Mich 517-518.]

Nelson clearly negates the Farm Bureau position in the instant case. The *Nelson* Court made the condition precedent to the entitlement to PIP benefits that the motorcyclist be involved in an accident with a motor vehicle as defined in MCL 500.3101(2)(e). MCL 500.3101(2)(e) defines motor vehicle to mean a vehicle operated or designed for operation on a public highway by power other than muscular power that has more than two wheels. Here, Peuterbaugh's ORV meets the definitional requirements of MCL 500.3101(2)(e). Peuterbaugh's ORV was a Yamaha Banshee ORV having four wheels, engine power, and Peuterbaugh operated it on a public road.

In *Morris, supra,* two ORVs collided with each other. *Morris, supra* at 230 Mich App 363. The plaintiff was an injured passenger who sought PIP benefits from her own no-fault insurer. Whether the two ORVs involved in the accident were "motor vehicles" within the meaning of MCL 500.3101(2)(e) of the no-fault act "depend[ed] on whether they were being operated on a 'public highway' at the time of the accident." *Id*. at 365. If the ORVs were operated on a public highway, the ORVs became "motor vehicles" as defined by the act, and the plaintiff would be entitled to PIP benefits. *Id*. at 366. The defendant in *Morris* argued that the trial court's decision that the ORVs were ORVs was inconsistent with its decision that they were motor vehicles. This Court rejected the argument citing *Nelson* stating, "[i]t is clear from the definitions of motor vehicle, MCL 500.3101(2)(e) and ORV, MCL 257.1601(m) as in force at the time of the accident, now MCL 324.81101(n), that these categories are not mutually exclusive." *Morris, supra* at 230 Mich App 370, citing *Nelson, supra* at 441 Mich 516. The Morris Court went on to state, "[a]gain, the Legislature has apparently seen fit to define motor vehicles as it clearly has and, in fact, intended that, on occasion, no-fault benefits will be

afforded to someone injured as a result of the ownership, operation, maintenance, or use of a motor vehicle that is not required to be registered or insured." *Id*. at 371.

Similarly, in *Allstate Ins Co v Department of Management & Budget*, 259 Mich App 705; 675 NW2d 857 (2003), the driver of his employer's ORV was injured in a collision with a state-owned pickup truck on a public road. *Id*. at 707. The injured ORV driver sought no-fault benefits from his employer's insurer who denied coverage and the defendant Department of Management & Budget, the owner of the pickup truck, who also denied coverage. *Id*. Allstate was the Assigned Claims benefit provider who paid the driver PIP benefits and sought recoupment. In that case, the applicability of the priority provision in MCL 500.3114(4) depended on whether the injured person was "an occupant of a motor vehicle" when his injuries occurred, which in turn depended on whether the ORV was a "motor vehicle" as defined by § 3101(2)(e)[3] of the no-fault act. *Id*. at 712. The Court of Claims concluded that because the ORV was on the road only incidentally, for the purpose of connecting between ORV trails, the driver was not operating it on a public highway as required under the no-fault act for the ORV to qualify as a "motor vehicle." *Id*. at 708-709.

This Court reversed, holding that under these circumstances, an ORV is a "motor vehicle" under the no-fault act for purposes of determining whether the priority provisions of MCL 500.3114(4) or MCL 500.3115(1) apply. *Allstate, supra* at 259 Mich App 715. The *Allstate* Court applied the plain meaning to the definition of motor vehicle, found that the ORV was a motor vehicle, and hence the ORV driver sustained bodily injury while an occupant of a motor vehicle, and the applicable priority of payment provision was MCL 500.3114(4). *Id*. And because the defendant was not the insurer of the owner or the insurer of the operator of the ORV, the defendant was not responsible for payment of no-fault benefits. *Id*. The decision mentions the ORV exemption in a footnote:

> To the extent that Allstate argues that disregarding the purpose of being on the public highway would render nugatory a provision of the Michigan legislation regulating ORVs, MCL 324.81101 *et seq.*, specifically MCL 324.81106, which provides that ORVs are exempt from the insurance code's no-fault automobile provisions, we disagree. Contrary to Allstate's argument, our holding does not prevent an ORV operator injured in a collision with a motor vehicle on a public highway from obtaining no-fault benefits nor does it negate the legislation exempting ORVs from the registration and insurance requirements of the no-fault act, rather, it recognizes the Legislature's clear intent concerning what vehicles are considered motor vehicles under the no-fault act for purposes of determining priority for payment of no-fault benefits. [*Allstate, supra* at 259 Mich App 714-715 n 7 (internal citations omitted).]

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[3] MCL 500.3101(2)(e) defines "motor vehicle" as a vehicle operated or designed for operation on a public highway by power other than muscular power which has more than two wheels.

Here, Farm Bureau continues to argue that the ORV exemption and the no-fault law are mutually exclusive. While Farm Bureau takes exception to the reference to *Nelson* in these later cases, *Morris* and *Allstate*, attempting to discredit the reference, the effort fails. Clearly this Court was referencing *Nelson* and not citing *Nelson* in *Morris* and *Allstate*. The quoted passages from *Nelson* as shown are given to no other meaning than the two statutes are not mutually exclusive. *Nelson* and its progeny unequivocally harmonized the two statutes and determined that the statutes are not mutually exclusive. As such, a motorcycle as defined in the no-fault law when involved in an accident with an ORV on a public road, qualifies the ORV as a motor vehicle by definition in the no-fault law. And, thereby results in a motor vehicle accident under the no-fault law and the entitlement of PIP benefits to one so injured.

The ORV exemption does not preclude an ORV owner or operator's motor vehicle insurer from being considered in determining priority among insurers for the payment of no-fault benefits. MCL 500.3114(5). The trial court's blanket exception approach for ORVs was not intended by the Legislature and is contrary to established law. Having correctly determined that the ORV was a motor vehicle, the trial court should have applied the priority provisions of Section 3114(5). The order of priority places Farm Bureau, insurer of the owner or operator of the motor vehicle involved in the accident, in higher priority for the payment of PIP benefits than Nationwide, the insurer of the operator of the motorcycle.

In other words, to accept Farm Bureau's position is to disregard *Nelson* and its progeny. This Court is required, in the absence of declaring a conflict, to follow the rule of law provided in published decisions of this Court. MCR 7.215(J)(1). We are bound by decisions of the Supreme Court. The opinion and order granting summary disposition to Farm Bureau is reversed.

Farm Bureau asserts alternative arguments in support of its position on appeal. Farm Bureau claims that 2008 PA 241, the July 17, 2008 amendment of MCL 500.3101(2)(e) and addition of section (g) apply retroactively to correct erroneous applications of the ORV exemption by the courts and should be applied retroactively to this November 24, 2006 accident. It argues that because the ORV exemption was not amended and remains in place, "it is inescapable that the Legislature was responding to the misapplication of the previously extant and still extant ORV exemption to the No-Fault Act, thus, this amendment is retroactive to all cases in which final judgments were not entered." The definition of "motor vehicle", MCL 500.3131(2)(e), was amended to add a concluding phrase, "Motor vehicle does not include an ORV." Additionally, MCL 500.3101(2)(g), defining "ORV" was added. The additional section, (g) is interesting, but Farm Bureau does not explain how its adoption is suggestive of anything. The added section provides,

> (g) "ORV" means a motor-driven recreation vehicle designed for off-road use and capable of cross-country travel without benefit of road or trail, on or immediately over land, snow, ice, marsh, swampland, or other natural terrain. ORV includes, but is not limited to, a multitrack or multiwheel drive vehicle, a motorcycle or related 2-wheel, 3-wheel, or 4-wheel vehicle, an amphibious machine, a ground effect air cushion vehicle, an ATV as defined in section 81101 of the natural resources and environmental protection act, 1994 PA 451, MCL 324. 81101, or other means of transportation deriving motive power from a source other than muscle or wind. ORV does not include a vehicle described in this

> subdivision that is registered for use upon a public highway and has the security described in section 3101 or 3103 in effect. [MCL 500.3101(2)(g).]

The amendment of MCL 500.3101(2)(e) and added section (g) do not clarify, as Farm Bureau contends, that it was the Legislature's intent to always or historically to exclude ORVs from the classification of "motor vehicles." If that were the case, the amendment would so say. On the application of retroactivity of a statutory amendment, our Supreme Court has stated, "[we] reemphasize the strong presumption *against* the retroactive application of statutes in the absence of a clear expression by the Legislature that the act be so applied." *Lynch v Flex Technologies,* 463 Mich 578, 588; 624 NW2d 180 (2001) (emphasis added).

Further, this Court explained the rule on retroactive application of statutory amendments, as follows,

> Statutes and statutory amendments are presumed to operate prospectively. Indeed, statutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary. The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself. The rule that legislative intent governs the determination regarding statutory retroactivity controls the analysis, and all other rules of construction and operation are subservient to this principle. [*Davis v State Employees' Retirement Bd,* 272 Mich App 151, 155-156; 725 NW2d 56 (2006) (internal citations and quotations omitted).]

There is no signal, express or implied, that 2008 PA 241 should be applied retroactively. The no-fault law contains within it, sections that are administratively amended, such as the benefits provided in MCL 500.3107, and the statute specifically requires that such amendments apply prospectively only. We also note that the legislative history offers no hint of retroactive application of the amendment of MCL 500.3101. In fact, the enactment of the amendment was tied to another bill, HB 4323 that permitted the operation and travel of ORVs on public roadways, established safety rules, and created liability presumptions. The MCL 500.3101 amendment was clearly in response to HB 4323 and the increased exposure to accidents involving ORVs. We must conclude that 2008 PA 241 amending §3101 applies prospectively only and Farm Bureau's hoped effect to exclude ORVs from consideration as a motor vehicle in the application and entitlement to no-fault benefits is denied.

Farm Bureau further claims that to entitle Schultz to obtain no-fault benefits from Farm Bureau would constitute a violation of due process and equal protection. The assertion is predicated on unsupported propositions. Farm Bureau argues that to require insurers to pay PIP benefits to ORV motorists lacks a rational basis because consumers will necessarily pay higher rates. Forcing Farm Bureau to pay insurance coverage for accidents for which it cannot charge a premium would violate due process. There is no legitimate governmental interest in requiring automobile premium payers to be responsible to bear the expense of providing coverage for an uninsured ORV.

The constitutional arguments are undeveloped and therefore, without merit. Such propositions are meaningless without record support on underwriting or rating structures. When an insurer sets premium rates a separate charge is assessed for no-fault coverage. That coverage

applies to persons suffering accidental bodily injuries and takes into account the actuarial likelihood of incurring a PIP obligation. After all, pedestrians, bicyclists, and motorcyclists are entitled to obtain PIP benefits and Farm Bureau makes no objection to having to respond for such payments. Additionally, Farm Bureau, like other insurers is required to provide benefits to persons for whom no insurance exists when involved in a motor vehicle accident by assignment, and without objection. The actuarial significance of such a PIP obligation is an underwriting event that is included in the rating structure and impacts all insurers equally. Farm Bureau herein forgets that no-fault insurance coverage is linked to and provides protection to persons and tangible property and not, as they suggest, to motor vehicles.

These same Farm Bureau arguments were made in the unpublished opinion, *Shankster v Farm Bureau Mut Ins Co of Michigan,* Docket No. 284850, (unpublished decision of the Court of Appeals, released September 22, 2009). While unpublished opinions are neither precedential nor binding, such opinion may be received, MCR 7.215(C)(1). That panel's analysis of the presented issue is persuasive and provides:

> Defendant's final argument is that the former provisions of the Act, as interpreted here, are unconstitutional on due process and equal protection grounds. We disagree. We review questions of law, including constitutional issues, de novo. *In re Petition of Wayne Co Treasurer*, 478 Mich 1, 6; 732 NW2d 458 (2007). In determining whether a law is constitutional, "'[e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.'" *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174 (2004), quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).
>
> "'The test to determine whether legislation enacted pursuant to police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.'" *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 541; 273 NW2d 829 (1979) (citation omitted). "The test to determine whether a statute enacted pursuant to the police power comports with equal protection is essentially the same," and generally requires the government to treat similarly situated people in a similar manner. *Id*.; see also *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 17; 714 NW2d 664 (2006). One of three tests can be applied to test an equal protection violation depending on the type of classification made by the statute and the nature of the interest affected. *Dawson v Secretary of State*, 274 Mich App 723, 738; 739 NW2d 339 (2007); see also *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 469; 639 NW2d 332 (2001). Classifications that are not based on a suspect class, but instead relate to social or economic legislation, are examined under the traditional rational basis test. *Phillips, supra* at 434.
>
> "Under the rational basis test, a statute is constitutional if it furthers a legitimate government interest and if the challenged classification is rationally related to achieving that interest." *Boulton v Fenton Twp*, 272 Mich App. 456, 467; 726 NW2d 733 (2006). "The legislation is presumed to be constitutional, and is valid if any state of facts known or reasonably assumed supports it." *Id*.

> The rational basis test does not consider the wisdom, need, appropriateness, or the effects of the legislation. *O'Donnell*, *supra* at 541.
>
> Here, defendant challenges the classification made between vehicles that require insurance (i.e., automobiles), and vehicles that are exempt (i.e., ORVs). The legitimate government interest behind the Act is to ensure that motorists driving on Michigan roads obtain prompt payment for economic losses in exchange for some limitation of tort liability, even if those motorists are driving exempt vehicles. Indeed, as our Supreme Court has specifically stated, "it is the policy of the no-fault act that persons, not motor vehicles, are insured against loss." *Lee v Detroit Auto Inter-Ins Exch*, 412 Mich 505, 509; 315 NW2d 413 (1982).
>
> The distinction between motor vehicles in general and the subclass of motor vehicles, consisting of ORVs, that do not require insurance can be attributed to the normal use intended for the vehicle, understanding that automobiles are consistently and almost exclusively driven on public roads, whereas ORVs are not. However, because ORVs are on occasion used on public roadways, the statute allows coverage for motorists who drive and occupy ORVs under that scenario to ensure that they are also provided prompt payment of economic losses in the case of accident on a public highway. See *Shavers v Attorney General*, 402 Mich 554, 623-624; 267 NW2d 72 (1978). This has been contemplated by the Legislature and the courts, and is in furtherance of the legitimate government purpose of providing payment to individual drivers and avoiding tort liability.
>
> Although defendant argues that it did not contemplate the risk involved with insuring the operator or occupant of an ORV, this argument is unconvincing. The coverage required for the operator or occupant of an uninsured ORV is similar to the coverage that would be required for the operator or occupant of any other uninsured vehicle. In either case, defendant would still have to provide coverage, regardless of the particular type of vehicle involved.
>
> Defendant has not overcome the presumption of constitutionality of the no-fault act. See *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 638; 506 NW2d 920 (1993). [*Shankster*, *supra* at slip op pp 4-5.]

We too conclude that Farm Bureau's claim of unconstitutionality is without merit.

Next, Farm Bureau takes a totally unfounded position that Peuterbaugh was a thief. The conclusion is derived from brief testimony from Peuterbaugh that he neither paid for nor asked permission to take the ORV from his grandparents' farm. The record evidence does not support Farm Bureau's proposition. There is no title history or registration history for the Yamaha Banshee. As best as anyone can recall, it came into existence in the 1980s and was kept at Peuterbaugh's grandfather and grandmother's farm in Marlette. The Peuterbaugh family members had full access to the farm, house, barn, and contents. They each had keys and unfettered access since 1985. The grandfather died in 1995 and the grandmother's visits to the farm were very infrequent; once every four or five years. She was unaware of the ORV or if her

husband owned it. She testified that she would not consider Peuterbaugh a thief if he took the ORV parts from the farm.

Peuterbaugh found the ORV in the barn dismantled and missing parts. Peuterbaugh took the parts home some four years prior to the accident. Another family member assisted him in bringing the parts home and his father was fully aware that his son brought the parts home and rebuilt the ORV. Peuterbaugh bought pistons, crank, clutch, carburetors, and tires. After rebuilding the ORV, he rode it exclusively, for all intents and purposes. No one other than Peuterbaugh claimed an interest in the ORV and his possession of it has been open, known, and unfettered.

Farm Bureau contends that if Peuterbaugh is not an owner, the priority for payment of PIP benefits changes to potentially second in line as an operator. MCL 500.3114(5)(b). Farm Bureau's extrapolation that the grandmother is the owner of the ORV and her insurer, coincidently Nationwide, is unsupported by any record evidence. The grandmother was not the title-holder, registrant, or possessor of the ORV. She had no knowledge of its existence and at no time claimed an interest. And, she had no objection to Peuterbaugh taking the parts. By any account, the parts should probably be considered abandoned.

Furthermore, because the ORV at issue is a motor vehicle under the no-fault law, Peuterbaugh is a statutory owner under the same law. Owner is defined in the no-fault law to mean "*a person* renting or *having the use thereof*, under a lease or otherwise *for a period that is greater than 30 days*." MCL 500.3101(h)(i) formerly MCL 500.3101(g)(i) (emphasis added). Clearly Peuterbaugh had the requisite possession, open, known, and unfettered, for a period of years, under at least a license or an equitable interest due to his investment and as such is classified as an owner by definition. It is the definition of owner that is utilized to determine priority, not the actual titled owner or registrant. For example, if the titled owner and registrant of a motor vehicle do not maintain the security required, but grants an exclusive right of use or a possessory interest in the motor vehicle for a period greater than 30 days, the possessor is a statutory owner. Such grantee or permissive user would be an owner by definition and required to maintain the required security as if he were the owner. *Roberts v Titan Ins Co*, 282 Mich App 339, 354-356; 764 NW2d 303 (2009); *Integral Ins Co v Maersk Container Serv Co*, 206 Mich App 325, 332; 520 NW2d 656 (1994). In sum, the record evidence does not support Farm Bureau's assertion that Peuterbaugh is a thief as a matter of law.

Farm Bureau claims that Peuterbaugh is not an insured under its "Family Auto Policy" because of a limiting clause contained within the insurance contract defining insured. Regardless of Peuterbaugh's capacity as an owner or operator, as a noninsured, Farm Bureau claims the policy cannot be reached. This Court interprets an insurance contract similarly to any other contract, looking to the plain language of the insurance policy and interpreting the terms therein in accordance with Michigan's principles of contract construction. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999); *Busch v Holmes*, 256 Mich App 4, 9; 662 NW2d 64 (2003). Farm Bureau and its counsel have taken license in presenting the contractual term in its brief on appeal because part of the contract was deleted and that particular deletion affects the application of the last antecedent rule.

The contract provides:

A. **Definitions**

5. Insured means:

a. You or any family member:

b. Any person who is:

(1) occupying your covered auto; or

(2) not occupying any auto if the accident involved your covered auto; *but only if entitled under the Code to recover personal protection insurance (personal injury protection) benefits under this policy*. [Emphasis added.]

Farm Bureau continues its theme of unlawful use and interprets the contract erroneously in that light. A person is not entitled to be paid PIP benefits if at the time of the accident the person was using the motor vehicle unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle. MCL 500.3113(a). Because Farm Bureau considered Peuterbaugh a thief, it asserts that his use of the parts was unlawful and he is disqualified from obtaining PIP benefits and therefore, he is not an insured and Farm Bureau's policy is not exposed.

But, the italicized language of the contract under the last antecedent rule applies only to the section in which it is contained and its antecedent clause "b., Any person who is:" and not section "a." It is a general rule of grammar and statutory construction that a modifying word or clause is confined solely to the immediately preceding clause or the last antecedent, unless a contrary intention appears. *Stanton v City of Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002); *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). As a consequence, the limiting clause does not apply to the section, "You or any family member." Peuterbaugh is a resident relative of his father's household as separately defined in the policy of insurance. If that were not enough, the factual predicate to MCL 500.3113 disqualification for unlawful use without reasonable belief in the right to use is not borne out. Under the circumstances as they existed, Peuterbaugh had every reason to believe he was entitled to use the found parts to construct and rebuild the ORV. The issue is without merit.

Finally, Farm Bureau claims that Nationwide is not entitled to summary disposition because genuine issues of material fact exist regarding the amount of PIP benefits subject to a claim for reimbursement. We disregard this issue. It is only a fallback issue asserted in the event of a remand on our determination that the trial court erred in granting Farm Bureau's motion for summary disposition. The trial court only decided the PIP liability issues and not issues concerning damages.

B. Progressive

Progressive claims the trial court erred in failing to conclude that the Wilson pickup truck was not involved in the accident. Their claim is premised on their insured's denial of active involvement in the accident and their expert's belief that all accidental bodily injury was caused by the motorbike collision with the ORV and plaintiff being thrown to the ground. Progressive further asserts with support from their expert that Wilson's presence on the roadway neither caused nor influenced the accident between the motorbike and the ORV, nor the resultant injuries to Schultz.

The order of priority under MCL 500.3114(5)(a) starts with "[t]he insurer of the owner or registrant of the motor vehicle *involved in the accident*." MCL 500.3114(5)(a) (emphasis added). As the insurer of Wilson, Progressive's liability to Schultz for no-fault benefits depends on whether Wilson's pickup truck was "involved" in the accident. In order for a vehicle to be considered "involved in the accident," the vehicle "must actively, as opposed to passively, contribute to the accident." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995). Physical contact with the vehicle is not necessary for a vehicle to be "involved" in the accident. *Id*. See also *Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 788; 432 NW2d 439 (1988) ("[I]t is not difficult to imagine a situation in which there may be a causal nexus between a motorist's conduct and an accidental injury quite apart from any physical contact between the insured vehicle and the other vehicles involved."); *Bromley v Citizens Ins Co of America*, 113 Mich App 131, 135; 317 NW2d 318 (1982) (the fact that insured's car did not actually touch the plaintiff's motorcycle was irrelevant as long as the causal nexus between the accident and the car is established).

The trial court correctly denied summary disposition on the issue of the priority for the payment of PIP benefits between Nationwide and Progressive. Photographs of Schultz's jacket with tire marks, DesRosiers's testimony that Wilson admitted to hitting Schultz with his pickup truck, and DesRosiers's testimony that the boys were using the pickup truck to gauge the speed of the motorbike, created fact questions regarding the truck's involvement in the accident. By the time of Nationwide's motion for reconsideration, their expert opined that Wilson was involved in both the accident and resultant injuries. Counsel for Progressive at argument allowed that the evidence is contradictory and together with the affidavit of Nationwide's expert, justiciable questions of fact exist that preclude the granting of a MCR 2.116(C)(10) motion for summary disposition. Nationwide also asserted that the Wilson pickup truck was involved in the accident and Schultz was entitled to receive PIP benefits from Progressive as a matter of law. The questions of fact here referenced will depend heavily on credibility determinations. The trial court also correctly denied Nationwide's motion for summary disposition.

Progressive further asserts that the trial court erred in not disqualifying Schultz from the receipt of PIP benefits because the motorbike was an uninsured motorcycle pursuant to MCL 500.3113(b). The parties agree that the Schultz motorbike met the definition of motorcycle, MCL 500.3101(2)(c). The parties further agree that the motorbike was also an ORV. Progressive maintains that the failure to obtain or maintain required insurance bars an injured party from obtaining benefits. MCL 500.3113(b). MCL 500.3103(1) requires the owner of a motorcycle to "provide security against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by a person arising out of the ownership, maintenance, or use of that motorcycle."

Also at issue in *Nelson, supra*, was the tension between the insurance requirement of MCL 500.3103(1) and the ORV exemption from the no-fault act provisions. *Nelson, supra* at 441 Mich 510-511. The trial court ruled that the plaintiff's failure to insure his motorcycle disqualified him from receiving personal injury protection benefits. This Court affirmed. *Id*. at 512-513. Our Supreme Court reversed. *Id*. at 513. It reconciled the two statutory provisions by distinguishing between on-road motorcycles, for which insurance is required, and off-road motorcycles, which the ORV statute exempts. The *Nelson* Court held that "although motorcycles as defined by the no-fault act must be insured, motorcycles that meet the ORV

definition are exempt from the insurance requirement under § 3103 of the no-fault act." *Id*. at 511. "[A] person injured in a collision involving a motor vehicle and a motorcycle is entitled to collect personal injury protection benefits under § 3105." *Id*. The Court concluded that the 1986 amendment to MCL 500.3113(b) precluding uninsured motorcyclists from receiving no-fault benefits was not "intended to repeal or override the ORV motorcycle exemption." *Id*. at 520. Rather, § 3113(b) "merely disqualifies those 'on' road motorcyclists who fail to obtain public liability insurance from receiving no-fault benefits. Today, ORV motorcyclists are still covered under MCL 500.3114(5)[.]" *Id*. at 519 n 26. In sum, "[i]f the motorcycle is an ORV, then the driver is not required to carry any insurance and the priority provisions of MCL 500.3114(5) control." *Id*. at 518.

Additionally, the *Nelson* Court stated that it was irrelevant whether the accident occurred on a public road:

> The Court of Appeals erroneously held that the instant the plaintiff entered the public road his vehicle became a motorcycle for which liability insurance was required under the no-fault act. In this case, it is undisputed that the road is an old logging trail, but the parties disagree whether it is a private or a public road. Nonetheless, being on a public road does not change the character of an ORV and does not automatically disqualify its operator from eligibility for no-fault benefits under MCL 500.3113. [*Nelson, supra* at 441 Mich 513 n 13.]

The *Nelson* Court specifically rejected defendant's argument that PIP benefits were intended to be forfeited for failure to insure or even register the motorcycle as an ORV by the later amendment to the no-fault law. It stated,

> If the motorcycle meets the definition of an ORV, it remains an ORV even if it is not registered as an ORV. . . . An ORV is an ORV regardless whether it is registered as such. In amending §3113 of the act in 1986, the Legislature did not state that ORV motorcycle owners would forfeit benefits for failing to register the vehicle as an ORV. [*Nelson, supra* at 441 Mich 517.]

Before holding that reading the no-fault law and the ORV exemption together results in two classifications of motorcycle, one designed for on-road use requiring insurance and one designed for off-road use exempt from the no-fault act insurance requirement, the Court stated,

> Although ORV motorcycles are exempt from the no-fault act, an injured motorcyclist is entitled to personal injury protection benefits if the injury occurred in a collision involving a motor vehicle. MCL 500.3105. Once it is established that the accident involved a motor vehicle, [as defined in MCL 500.3101(2)(c) now (e)] the motorcyclist will look to the no-fault act priority provision to determine the insurance company liable for paying benefits. MCL 500.3114(5).
>
> If the motorcycle is an ORV, then the driver is not required to carry any insurance and the priority provisions of MCL 500.3114(5) control. [*Nelson, supra* at 441 Mich 517-518.]

For all of these reasons, the trial court properly applied *Nelson, supra,* and denied Progressive's motion for summary disposition on the issue of disqualification.

C. Schultz and Nationwide

Schultz and Nationwide cross-appeal the denial of their respective motions for summary disposition against Progressive premised on collateral and judicial estoppel. In a separate action, Schultz brought a third-party residual bodily injury claim against Progressive's insured, Wilson. *Schultz v Wilson,* St. Clair County Circuit Court Case No. 07-001361. The tort action essentially sought non-economic damages, Schultz having sustained a serious impairment of body function arising out of Wilson's alleged negligence.

Neither Nationwide nor Progressive was a party to the tort action. Separate and independent counsel represented Wilson. In the course of litigating the tort claim, Wilson through counsel, made an offer of judgment pursuant to MCR 2.405 in the amount of Wilson's insurance policy limits of $100,000. Schultz accepted the offer of judgment. Thereafter, because Schultz was a minor, approval of the resolution by acceptance of the offer of judgment was sought from the trial court by notice for entry of a consent judgment and dismissal. MCR 2.420. The trial court entered an approved judgment and the settlement concluded with the execution of a release memorializing the resolution and payment. The release excluded any claims for PIP benefits by Schultz and denied any admission of liability by Wilson. The executed release further provided that the parties, "admit no liability of any sort by reason of said event, and that said payment and settlement in [sic] compromise is made to terminate further controversy respecting all claims for damages."

Schultz and Nationwide assert that the judgment rendered by virtue of the accepted offer of judgment operates to bar or estop Progressive's denial of liability for PIP benefits as a result of Wilson's involvement in the motor vehicle accident. The trial court denied the application of both collateral and judicial estoppel by operation of the settlement reached and entered by the approved judgment in the residual liability claim. Let there be no mistake, Schultz and Wilson reached a settlement of the residual bodily injury third-party claim.

For collateral estoppel to apply: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue and (3) there must be mutuality of estoppel. Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Monat v State Farm Insurance Co,* 469 Mich 679, 682-684; 677 NW2d 843 (2004). (internal citations and quotations omitted). The Court continued, "we believe that the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit." *Id*. at 691-692. The Court in *Monat* further acknowledged that to use collateral estoppel offensively, mutuality is required stating "this Court in *Howell* only refused to abandon mutuality of estoppel where collateral estoppel was asserted *offensively*." *Id*. at 687 n 5; citing *Howell v Vito's Trucking & Excavating Co,* 386 Mich 37, 48; 191 NW2d 313 (1971).

In this litigation, both Schultz and Nationwide proffer the judgment in *Schultz v Wilson* St. Clair County Circuit Court Case No. 07-001361, offensively to estop Progressive's defense of non-involvement. A review of the three-part *Monat* test reveals the flaws of the argument for offensive collateral estoppel. If the third party action had been tried, the finder of fact may have determined Wilson negligent and that such negligence caused a serious impairment of body function. However, the fact finder may have also concluded no negligence on the part of Wilson, or no causal relationship between the negligence and the injuries sustained, or no serious impairment caused by Wilson's negligence. Of these possibilities, which one has been determined by the judgment reflecting the settlement? Clearly, Nationwide had no opportunity to have a full and fair opportunity to litigate the issue of involvement. Remembering that the issue for Schultz in the third-party case was negligence, the issue for Nationwide was involvement in the motor vehicle accident. While a finding of causal negligence would necessitate involvement, a finding of involvement does not require negligence. Or, stated differently, a finding of no negligence does not negate involvement. Nationwide had no right to control the third-party action, and Schultz had no right to control the reimbursement action, and the thrust of each is decidedly different.

For offensive application of collateral estoppel, there must be mutuality. That means that Nationwide and Schultz, the parties seeking to offensively interpose the judgment in the reimbursement and declaratory actions, must be necessarily bound by an adverse judgment against Schultz. But, as shown above, the theories of recovery for each are different and the burden assigned to Schultz is distinctly greater than that assigned to Nationwide. An adverse Schultz judgment does not answer the question of involvement. Nationwide admits in its briefing the differences in proof between the two theories of recovery. The Schultz tort action requires proof of negligence that causally results in injuries constituting a serious impairment of body function. On the other hand, the entitlement to PIP benefits for a motorcyclist requires only a showing that the person suffering accidental bodily injury arises out of the involvement of a motor vehicle. As stated by Nationwide in its brief on appeal, "The relationship between use of the vehicle and the injury need not approach proximate cause." The phrase "arising out of" does not mean proximate cause in the strict legal sense, or require a finding that the injury was directly and proximately caused by the use of the vehicle, not that the insured vehicle was exerting any physical force upon the instrumentality which was the immediate cause of the injury. Almost any causal connection or relationship will do. *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 313-314; 282 NW2d 301 (1979).

We must conclude, as did the trial court, that an offer of judgment accepted does not determine a question of fact essential to the judgment. The same parties do not have the same interest in development of their separate claims, and therefore, each plaintiff with respect to the other, lacked a full and fair opportunity to develop its disparate interests. The proofs necessary to meet Nationwide's burden of proof for PIP benefits, are insufficient to meet the Schultz burden of proof in his tort action. A failure of proof in the tort action does not negate that the PIP burden of proof was not satisfied. For this offensive application of collateral estoppel, full mutuality is wanting. The *Monat* standard has not been met and the trial court correctly denied the motion for summary disposition on the basis of collateral estoppel.

Schultz and Nationwide asserted judicial estoppel as an alternative theory to preclude Progressive from denying liability for PIP benefits to Schultz. The parties offer the rule of

judicial estoppel as discussed by the Supreme Court in *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994).

> A party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent." [*Id*. (internal citations and quotations omitted.)]

The trial court determined that in entering judgment on the court's approval of the settlement of the claim of a minor, no position was taken concerning the factual issues. Schultz suffered extremely serious injuries and made a claim for non-economic damages that exceeded Wilson's insurance. The insurer, acting in good faith, resolved the matter pursuant to its duty to its insured and the insured was accordingly released. The duty to resolve the risk to its insured should not be utilized as a spear to pierce Progressive's defense for its own risks. Offering a judgment in settlement of the third-party claim in satisfaction of a duty owed to ones insured, is not wholly inconsistent with the subsequent position of the insurer in asserting its own defense. Offering a judgment is not a statement of position that will or should support a predicate inconsistency. The trial court did not err in denying the application of judicial estoppel to the plaintiffs.

VII. Conclusion

The trial court erred in granting the Farm Bureau motion for summary disposition predicated on the ORV exemption, MCL 324.81106. The alternative theories advanced by Farm Bureau for affirmation of the summary disposition granted are without merit. The trial court properly denied Progressive's motion for summary disposition claiming non-involvement of the Wilson vehicle for the reason that material questions of fact remain. The trial court also correctly denied Nationwide's motion for summary disposition claiming involvement of the Wilson vehicle on the basis that material questions of fact remain. The trial court properly denied Progressive's motion for summary disposition predicated on disqualification from no-fault benefits for failure to insure the motorbike. And finally, the trial court properly applied the doctrines of collateral estoppel and judicial estoppel in denying the Schultz and Nationwide motions for summary disposition against Progressive on the issue of Wilson's involvement in the accident.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. No costs to any party because no party prevailed completely. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray