# STATE OF MICHIGAN

# COURT OF APPEALS

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| STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,<br><br>Plaintiff-Appellee/Cross-Appellant, | UNPUBLISHED<br>August 13, 2013 |
| v | No. 306844<br>Shiawassee Circuit Court |
| MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, INC,<br><br>Defendant-Appellant/Cross-Appellee. | LC No. 07-05893-CK |

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

This insurance dispute arises out of a motorcycle accident that occurred during a police pursuit. Plaintiff seeks to hold defendant liable for a share of the personal injury benefits paid by plaintiff to the injured motorcycle operator.

In the main appeal, defendant, Michigan Municipal Risk Management Authority, Inc, appeals by right from the consent judgment entered by the trial court ordering defendant to pay plaintiff State Farm Mutual Automobile Insurance Company $229,687.29.[1] The judgment reserved the right of both parties to appeal "all issues previously raised for possible appeal." The judgment incorporated several previous orders granting partial summary disposition to the parties on various issues, including the trial court's grant of partial summary disposition to plaintiff on the issue of whether Shiawassee County Deputy Sheriff David Flores' ("Flores") vehicle was "involved" in the accident, the trial court's grant of partial summary disposition to defendant on the issue of whether it was liable for amounts paid to the injured party, Eugene Brothers ("Brothers") by plaintiff that were also paid by Brothers' health insurer (the "double dip" funds), and the trial court's denial as moot of defendant's second and third motions for partial summary disposition. Defendant requests reversal of the trial court's determination that Flores' vehicle was "involved" in the accident, or in the alternative that this Court find that

[1] The parties agreed to stay the enforcement of the consent judgment, without appeal bond, pending appeal by either party.

Brothers was not an "operator" of his motorcycle at the time of the accident, and/or that any benefits incurred prior to March 26, 2007 are barred by the "one year back" rule, and/or that the Michigan Catastrophic Claims Association ("MCCA"), as the real party in interest, is the only entity that can seek to recover amounts in excess of $375,000.

In the cross-appeal, plaintiff appeals by right from the same judgment, and requests reversal of the trial court's grant of summary disposition to defendant on the issue of defendant's liability for the "double dip" funds paid to Brothers.

For the reasons stated below, we (1) affirm the trial court's grant of partial summary disposition to plaintiff on the issue of whether Flores' vehicle was "involved" in the accident; (2) hold that the "one year back" rule does not apply to the instant action; and (3) hold that the MCCA is not the real party in interest in the instant action. In the cross-appeal, we reverse the trial court's grant of summary disposition to defendant with regard to its liability for "double dip" funds.

## I. BASIC FACTS AND PROCEDURE

Brothers has no memory of the accident underlying this case. Flores testified that he was on road patrol in a marked patrol vehicle on the day in question. Flores observed Brothers travelling eastbound on his motorcycle at seventy-seven miles per hour; the speed limit was fifty-five miles per hour in that area. Flores turned around at an intersection and began following Brothers; he also engaged his emergency lights and siren. Rather than stop, Brothers continued at an excessive speed and made several turns. Flores stated that the driver's "actions were to me that he was – he was trying to avoid me." Brothers continued to accelerate and began to outdistance Flores' patrol car; Flores testified that he reached speeds of nearly one hundred miles per hour. After several miles of pursuit, the motorcycle turned onto Shipman Road, a dirt road. Flores lost sight of the motorcycle on Shipman Road. Flores considered breaking off pursuit, and slowed down because of the sharp curves on the road—he did, however continue the pursuit at a slower speed. As Flores went around a curve, he "noticed a plume of smoke in the distance" and "could see in the distance a silver Ford Explorer kind of nose down in the edge line of the roadway" about one-quarter mile away. As he approached, Flores saw that the motorcycle was on the right shoulder and the motorcycle operator was on the ground several feet in front of the motorcycle.

Flores ran to the car, and determined that the driver was not injured. Flores stated that he believed "the motorcycle impacted the car or there had been some sort of collision" because the car had damage to its left front side and the motorcycle was on the ground. Flores could not say if Brothers was on the motorcycle at the time of the impact with the Explorer. The driver of the Ford Explorer was Denise Putnam ("Putnam").

The Explorer's left front wheel was broken off; the motorcycle was also damaged. Putnam stated to the investigating officer that she did not see any patrol vehicle in sight at the time of the collision and did not see the patrol vehicle until after the collision occurred and she pushed the airbag out of the way. Witnesses from the vicinity of Shipman Road variously estimated the motorcycle's speed at "70 to 80", "80", and "95 to 100" miles per hour. Two of

the three witnesses stated that they noticed a police car "following" the motorcycle, while the third said that Flores' car passed by "a couple seconds later."

Investigating Officer Thomas Terry stated his opinion, in the police report, as follows:

> Due to the evidence and statements of Deputy Flores and witnesses, it is my determination that the Ford Explorer that was driven by Denise Putnam was traveling northeast on Shipman Road in her lane of travel when the motorcycle driven by Eugene Brothers was evading police. Brothers failed to negotiate the curve and it was evidence [sic] that he lost control of the motorcycle. He went into the opposite lane of travel and collided with the Ford Explorer, which resulted in Brothers being seriously injured.

Officer Terry stated in an affidavit that Brother's motorcycle collided with the Ford Explorer; it continued, "[h]owever, based upon available evidence, it is unknown if Mr. Brothers was on his motorcycle at the time that it collided with the Ford Explorer."

Plaintiff, as Putnam's automobile insurer, paid Personal Injury Protection (PIP) benefits to Brothers, who was uninsured, in the amount of $675,114.16. Putnam's vehicle was either totaled or repaired before defendant was made aware of any potential liability. Defendant is a group self-insurance pool, of which Shiawassee County is a member. Defendant provides No-Fault coverage to Shiawassee County. On December 12, 2006, plaintiff sent a letter to Shiawassee County Sheriff's Department, stating that it had received a claim for PIP benefits on behalf of Brothers, and seeking pro-rata contribution from defendant.

Plaintiff filed suit, seeking a declaratory judgment that defendant[2] was liable for a pro-rata share of the PIP benefits paid by plaintiff to Brothers under the No-Fault Act, and additionally requesting that the trial court require defendant to reimburse plaintiff for 50% of all PIP benefits paid by plaintiff to Brothers to date, and to share in a pro rata basis any future PIP benefit payments made to Brothers. Plaintiff moved for partial summary disposition on the issue of whether Flores' vehicle was "involved" in the accident. The trial court determined that Flores' vehicle was "involved" in a "high speed chase."

Defendant then brought three motions for partial summary disposition. In the first motion, defendant argued that it was not liable for any "double dip" amounts paid by plaintiff; the trial court granted summary disposition in favor of defendant on that motion. In the second and third motions, defendant argued that plaintiff's claims were barred by the one-year back rule, and that attorney fees and penalty interest were not proper in an action where one insurer seeks reimbursement from another. The trial court denied those motions as moot. The parties then entered into the consent judgment with right of appeal reserved as described above.

[2] Shiawassee County was also named as a defendant, but was later voluntarily dismissed from the lawsuit by plaintiff.

## II. BROTHERS WAS AN "OPERATOR" OF HIS MOTORCYCLE AT THE TIME OF THE ACCIDENT

Defendant argues that the trial court erred in implicitly determining that Brothers was an "operator" of his motorcycle at the time of the accident. We disagree. This Court reviews a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales*, 458 Mich at 294.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Martin v Ledingham*, 282 Mich App 158, 160; 774 NW2d 328 (2009), rev'd on other grounds 488 Mich 987 (2010).

### A. THE TRIAL COURT DID NOT ERR IN RELYING ON CIRCUMSTANTIAL EVIDENCE IN GRANTING PLAINTIFF PARTIAL SUMMARY DISPOSITION

MCL 500.3114(5) provides in relevant part that an injured person may recover PIP benefits from a motor vehicle accident that occurred "while an operator or passenger of a motorcycle." Defendant is correct that "operator" is not defined in the No-Fault Act. However, the Michigan Vehicle Code defines an "operator" of a "motor vehicle"[3] as "every person . . . who is in actual physical control of a motor vehicle upon a highway." MCL 257.36. This Court has referred to the driver of a motorcycle at the time of an accident as the operator. See *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 108; 724 NW2d 485 (2006), lv den 478 Mich 880 (2007). Simply put, it is not necessary for this Court to map out all the contours of the "operator" definition, because the evidence supports the inference that Brothers was driving the motorcycle at the time of the accident, and there is no reasonable construction of the word "operator" that excludes the driver of the motorcycle.

Defendant essentially argues that the trial court impermissibly inferred that Brothers was driving his motorcycle at the time of the accident, although there were no eyewitnesses to the accident. Defendant argues that the trial court instead, in viewing the evidence in a light most favorable to defendant, should have inferred that Brothers was not an operator of his motorcycle

[3] A motorcycle is *not* a motor vehicle under the No-Fault act, MCL 500.3101(e), but *is* a motor vehicle under the Vehicle Code, see MCL 257.33.

at the time of the accident, presumably because he may have become separated from the motorcycle prior to the impact with Putnam's vehicle.

Defendant misapprehends the trial court's duty to view the evidence in the light most favorable to it. Plaintiff, as the initial moving party, had the burden of supporting its position with documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. Once plaintiff did so, defendant had the burden of establishing a disputed issue of fact with its own documentary evidence. *Id*. Here, plaintiff submitted eyewitness testimony that placed Brothers on his motorcycle moments before the accident, and that the motorcycle collided with Putnam's vehicle. Defendant offered no evidence to suggest that Brothers became separated from his motorcycle prior to the accident. Instead, defendant hypothetically raises the specter of that possibility, by citing to (a) the affidavit of Officer Terry (which merely indicates that "it is unknown if Mr. Brothers was on his motorcycle at the time that it collided with the Ford Explorer"; and (b) the findings of an accident reconstruction expert that he could not determine whether Brothers was on his motorcycle at the time of collision.

A trial court may grant a motion for summary disposition based on circumstantial evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). This Court has found that the question of whether a vehicle collided with another vehicle is a question of fact. *Auto Club Ins v State Auto Mut Ins Co*, 258 Mich App 328, 332; 671 NW2d 132 (2003). In *Auto Club Ins Ass'n*, a motorcyclist was involved in a multivehicle accident. *Id*. at 330. The motorcycle definitely hit the car belonging to the plaintiff's insured; what was disputed was whether it also struck the car belonging to the defendant's insured such that the defendant would be liable for a share of the PIP benefits. *Id*.

The defendant in *Auto Club Ins Ass'n* moved for summary disposition, and supported its motion with the testimony of two witnesses who stated that the motorcycle did not hit the defendant's car. *Id*. at 333. Plaintiff responded with the testimony of a witness who testified that the motorcycle definitely hit the second car and he was "almost positive" that the motorcyclist was on his bike at the time of the accident and became separated after hitting the second car. *Id*. at 333-334. Plaintiff also presented a state trooper's testimony that damage to defendant's vehicle and skid marks at the scene lead him to conclude that the vehicle was involved in the accident. *Id*. at 335. The trial court granted the defendant's motion for summary disposition. *Id*. at 331. This Court reversed, concluding that the testimony offered by plaintiff was "sufficient to raise an issue of fact regarding whether there was a collision" between the motorcyclist and defendant's car. *Id*. at 335, 341.

Here, in contrast to *Auto Club Ins Ass'n*, we conclude that since the non-moving party offered no evidence that fully supports its position, but only speculation based on an absence of certainty as reflected in the statement of Officer Terry and the findings of the accident reconstruction expert, the trial court did not err in granting partial summary disposition to plaintiff on this issue of whether Brothers was an "operator" of the motorcycle. Unlike *Auto Club Ins Ass'n*, there is no conflicting testimony that would require the trial court to weigh witness credibility. *Id*. Summary disposition is inappropriate when the truth of a material fact depends on witness credibility. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). Here, to grant summary disposition to defendant, or even deny it to plaintiff, the trial court would have to essentially speculate or engage in conjecture that Brothers had become

separated from his motorcycle prior to the accident, despite no evidence (circumstantial or otherwise) being offered in support of that conclusion. "Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Const Co (On Remand)*, 286 Mich App 460, 464; 708 NW2d 448 (2005). We therefore affirm the trial court's grant of summary disposition on this issue.

## B. SPOLIATION OF THE EVIDENCE

This Court's conclusion on this issue is not affected by defendant's argument that plaintiff spoliated evidence. Defendant argues that the trial court should have given it the benefit of an adverse presumption, or at a minimum an adverse inference, as a sanction for plaintiff's failure to allow defendant to inspect Putnam's vehicle before it was totaled or repaired. We review a trial court's decision to sanction a party for spoliation of evidence for an abuse of discretion. *Brenner v Kolk*, 226 Mich App 149, 160-161; 573 NW2d 65 (1997).

"Spoliation [of the evidence] refers to destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v Gen Motors Corp*, 271 F3d 583, 590 (4th Cir 2011). A party has "a duty to preserve evidence" "[e]ven when an action has not been commenced and there is only a potential for litigation." *Brenner*, 226 Mich App at 162. This duty to preserve evidence includes all evidence "that [a party] knows or reasonably should know is relevant to the [anticipated] action." *Id.*

Here, plaintiff had possession of the vehicle that was involved in a motor vehicle accident. Before plaintiff brought suit, the vehicle was either repaired or totaled. Thus, plaintiff failed to preserve relevant evidence before notifying defendant of its claim, and consequently, defendant had no opportunity to inspect the vehicle. We conclude that plaintiff should have preserved Putnam's vehicle in anticipation of its suit; therefore the trial court would have been within its discretion to grant a sanction. *Brenner*, 226 Mich App at 164. However, defendant would not have been entitled to an adverse *presumption*, only an adverse *inference*.

"[A] presumption is a 'procedural device' that entitles the person relying on it to a directed verdict if the opposing party fails to introduce evidence rebutting the presumption." *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005), quoting *Widmayer v Leonard*, 422 Mich 280, 289-90; 373 NW2d 538 (1985). However, "missing evidence gives rise to an adverse presumption only when the complaining party can establish 'intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth.'" *Ward*, 472 Mich at 84, quoting *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957). Therefore, a party can receive an adverse presumption only upon showing that the opposing party intentionally spoliated the evidence, and an adverse presumption requires a trial court to conclude that the spoliated evidence would be adverse to that party's position. *Id.* Defendant has presented no evidence indicating intentional and fraudulent conduct on the part of plaintiff, so as to warrant an adverse presumption.

On the other hand, an adverse inference permits the factfinder to conclude that the spoliated evidence would have been adverse to the opposing party. *Brenner*, 226 Mich App at 155-56.

> A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party. [*Ward*, 472 Mich at 85-86.]

Defendant has not provided this Court with an example of the application of an adverse inference or presumption in the context of a motion for summary disposition. This Court is not obligated to discover and rationalize the basis for a party's claims. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Because defendant was not entitled to an adverse presumption, the trial court did not abuse its discretion by failing to presumptively conclude that Putnam's vehicle would have provided evidence that Brothers was not an operator of his motorcycle at the time of the collision.

An adverse inference, however, *permits* a fact-finder to conclude that the evidence would have been adverse; the fact-finder is still "free to decide for itself." *Lagalo v Allied Corp*, 233 Mich App 514, 520; 592 NW2d 786 (1999), abrogated in part on other grounds by *Kelly v Builders Square*, 465 Mich 29; 632 NW2d 912 (2001). Defendant does not explain how the trial court's alleged failure to give an adverse inference altered the trial court's summary disposition analysis. As plaintiff was the moving party, the trial court was *already* required to consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to defendant. *Martin*, 282 Mich App at 160. Thus, even if defendant were entitled to an adverse inference, it is unclear how this would have altered the trial court's analysis. We therefore conclude that any spoliation on the part of plaintiff did not result in error on the part of the trial court, because even if defendant were entitled to an adverse inference, that would be mere duplication of the trial court's duty to draw inferences in its favor at summary disposition.

## III. FLORES' VEHICLE WAS "INVOLVED" IN THE ACCIDENT

MCL 500.3114(5) provides as follows:

> 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.

Plaintiff is the insurer of the "owner or registrant" of Putnam's vehicle, and thus falls under subsection (a) in order of priority. Defendant insures Shiawassee County, the owner or registrant of Flores' vehicle. Thus, if both Putnam's and Flores' vehicles were "involved" in the accident, plaintiff and defendant would be insurers in the same order of priority, and plaintiff would be entitled to partial recoupment from defendant pursuant to MCL 500.3114(6) ("[i]f 2 or more insurers are in the same order of priority to provide personal protection insurance benefits under subsection (5), and insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority").

Here, Brothers' injuries arose from a "motor vehicle accident which shows evidence of the involvement of a motor vehicle." The general test for whether injuries arise out of an accident involving a motor vehicle has been stated as follows:

> "[W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." [*Thornton v Allstate Ins Co*, 425 Mich 643, 650; 391 NW2d 320 (1986), quoting *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975).]

The motor vehicle's connection with the injury must be "directly related to its character as a motor vehicle." *Id*. at 659; see also MCL 500.3105(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."). The record contains sufficient evidence for this Court to conclude that Brothers' injuries arose from a motor vehicle accident involving Putnam's vehicle, which was being used as a motor vehicle at the time of the accident. Having met this threshold, plaintiff must then establish that Flores' vehicle was "involved" in the accident.

Physical contact between the injured party and a motor vehicle being used as a motor vehicle "involves" that vehicle in the accident. See *Auto Club Ins*, 258 Mich App at 339 ("[T]here is no case where there was physical contact between the injured party and a vehicle where the vehicle was found not to be involved."). However, when there is no physical contact between a vehicle and the injured party, the analysis of that vehicle's involvement is governed by *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995). See *Auto Club Ins*, 258 Mich App at 340.

In *Turner*, the Court articulated the test for "involvement" of a motor vehicle in a multi-vehicle accident as follows:

> Combining what we said in *Heard* with the guidance provided by the Court of Appeals, we hold that for a vehicle to be considered "involved in the accident" under § 3125, the motor vehicle, being operated or used as a motor vehicle, must actively, as opposed to passively, contribute to the accident. Showing a mere "but for" connection between the operation or use of the motor vehicle is not enough to establish that the vehicle is "involved in the accident." Moreover, physical

> contact is not required to establish that the vehicle is "involved in an accident." Finally, as already indicated by our discussion in part A, the concept of being "involved in the accident" under § 3125 encompasses a broader causal nexus between the use of the vehicle and the damage than what is required under § 3121 to show that the damage arose out of the ownership, operation, maintenance, or use of the motor vehicle as a motor vehicle. [*Id*. at 39.]

Here, as in *Turner*, this case involves an officer who decided to pursue a vehicle with activated lights. Like *Turner*, Brothers did not pull over, but rather accelerated—Flores testified that he reached speeds of around 100 miles per hour and still could not close the distance to Brothers. Like *Turner*, Flores attempted to "back off" immediately before the crash out of concern for safety. Our Supreme Court concluded that the police vehicle in *Turner* was involved in the accident because:

> the police officer was using his vehicle as a motor vehicle while he pursued the stolen vehicle. This active use perpetuated the stolen vehicle's flight, which, in turn, resulted in the collision with the other cars and the damage to the nearby property. We consider it to be unimportant that seconds before the multivehicle collision, the police vehicle "backed off and allowed more room between the patrol car and the susp[ect] veh[icle]" in an effort to deter the stolen vehicle from running the red light. Before slowing down, the police vehicle had actively pursued the stolen vehicle, and this pursuit, in part, obviously prompted the stolen vehicle to ignore the red light and collide with the other vehicles. [*Id*. at 42-43.]

We reach the same conclusion here. Defendant's attempt to rely on pre-*Turner* cases, *Sanford v Ins Co of North America*, 151 Mich App 747; 391 NW2d 473 (1986) and *Peck v Auto Owners Ins Co*, 112 Mich App 329; 315 NW2d 586 (1982), is unpersuasive. Notwithstanding the non-binding nature of these cases, MCR 7.215(J)(1), these cases were both specifically distinguished by *Turner*:

> Both Ferndale and the Court of Appeals rely on the holdings in *Sanford v Ins Co of North America*, 151 Mich App 747; 391 NW2d 473 (1986), and *Peck v Auto Owners Ins Co*, 112 Mich App 329; 315 NW2d 586 (1982), to support the proposition that Ferndale is not liable for property protection benefits. Reliance on these cases is misplaced because both dealt with single motor vehicle accidents in which the claimants' only chance of collecting benefits hinged on showing that the use of the single motor vehicle (the police car) as a motor vehicle gave rise to the claimant's injures under § 3105(1). Because this is a multivehicle accident situation, and the facts establish that the damage arose out of the functional use of a motor vehicle (the motor vehicle not being the police car), the primary liability of the insurer of the police car turns on whether the police car was "involved in the accident" under § 3125. [*Turner*, 448 Mich at 35 n 10.]

Thus, in a single vehicle accident, liability for a motor vehicle would hinge on *that vehicle* having given rise to the claimant's injuries through its use as a motor vehicle. In contrast, in a multiple vehicle accident, once *a* motor vehicle is established as giving rise to claimant's injuries through its use as a motor vehicle, the question becomes whether a vehicle was "involved" in the

accident, which "encompasses a broader causal nexus" under *Turner*. *Id*. at 39. *Turner* specifically disavowed the use of *Peck* and *Sanford* in deciding a case such as the instant case.

Additionally, we are not persuaded by defendant's attempts to distinguish *Turner*. Defendant argues that it is unknown whether Brothers knew he was being pursued by Flores (and therefore not in flight "perpetuated" by Flores' pursuit) because he was already speeding when he was observed by Flores. However, Flores testified that he pursued Brothers at speeds of up 100 miles per hour with lights and sirens activated, that Brothers made several sharp turns, and that Flores believed Brothers knew he was being pursued. This evidence supports the inference that Brother's actions were in response to Flores' pursuit. Although defendant is entitled to have the evidence viewed in the light most favorable to it, *Martin*, 282 Mich App at 160, the trial court was not required to ignore evidence that Brothers was aware of the pursuit.

Finally, defendant urges this Court, if it does not find *Turner* distinguishable, to find that it was wrongly decided. But a decision of the Supreme Court is binding precedent if it contains "a concise statement of the facts and reasons for each decision." Const 1963, art 6, § 6; see also *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). Thus, this Court is not at liberty to decline to follow *Turner*. Nor would finding for defendant be as simple as ignoring *Turner* (which in any event we cannot do), as the test for vehicular involvement in *Turner* is based upon and comports with numerous other decisions of this Court that considered the meaning of the phrase "involved in the accident." *Turner*, 448 Mich at 38-39.

We therefore affirm the trial court's grant of partial summary disposition on the issue of whether Flores' vehicle was "involved in the accident."

## IV. THE "ONE YEAR BACK" RULE DOES NOT APPLY TO PLAINTIFF'S CLAIM

Defendant also argues that the "one year back" rule applies to bar at least a portion of plaintiff's claim. MCL 500.3145(1) provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, *the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced*. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

At issue here is the so-called "one year back rule," i.e., the language that reads "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

As a threshold issue, defendant attempts to cast plaintiff's action as one for subrogation. An action for subrogation arises when an insurer has paid benefits to an insured that it believes another insurer should have paid. *Titan Ins Co v North Pointe Ins*, 270 Mich App 339, 343; 715 NW2d 324 (2006), citing *Fed Kemper Ins Co v Western Ins Cos*, 97 Mich App 204, 209; 293 NW2d 765 (1980). An insurer subrogee in that instance is "substituted for his insured" and acquires no greater rights than those possessed by the injured party. *Id*. at 333-334, quoting *Fed Kemper Ins Co*, 97 Mich App at 209. Thus, in a subrogation action, if MCL 500.3145(1) would bar an injured party's claim, it would bar the subrogee's claim as well. *Id*. at 344.

However, plaintiff's claim arises under MCL 500.3114(6), which provides:

> If 2 or more insurers are in the same order of priority to provide personal protection insurance benefits under subsection (5), an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among all of the insurers.

In considering the almost entirely identical provision found in MCL 500.3115(2),[4] this Court in *Titan Ins Co v Farmers Ins Exch*, 241 Mich App 258, 262; 615 NW2d 774 (2000), noted that the provision:

> provides a specific right of partial recoupment by one no-fault insurer of PIP benefits paid by another no-fault insurer of the same order of priority, *independent of an accident victim's right to payment of PIP benefits*. Thus, this case is distinguishable from those in which an insurer's right to recovery or reimbursement from another insurer was found to be subrogated to the insured's right to recovery and therefore subject to the period of limitation in § 3145. [Emphasis added.]

Thus, this Court in *Titan Ins Co* specifically rejected the notion that a claim for partial recoupment was a subrogation claim. *Id*.; see also *Stonewall Ins Group v Farmers Ins Group*, 128 Mich App 307, 308; 340 NW2d 71 (1983) (referring to an action for recoupment of PIP benefits as a "contribution" action).

[4] "When 2 or more insurers are in the same order of priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers."

At issue in *Titan Ins Co* was the limitations period in MCL 500.3145[5], not the "one year back rule." *Id*. at 260-261. Defendant thus argues that *Titan Ins Co* is not relevant to the instant case. However, *Titan Ins Co*'s recognition that actions for recoupment are not subrogation actions supports the broader conclusion that MCL 500.3145 does not apply to recoupment actions: "While we recognize that plaintiff's claim falls within the no-fault act, we disagree with defendant that because plaintiff seeks reimbursement under the act, its claim automatically falls within the period of limitation provided for in subsection 3145(1)." *Id*. at 262. Additionally, this Court noted that

> [T]he purpose of the no-fault insurance system is "to provide *victims of motor vehicle accidents* assured, adequate and prompt reparation for certain economic losses." Where, as here, a no-fault insurer promptly pays benefits, the purpose of the statute is served. Refusing to apply the limitation period of subsection 3145(1) to a subsequent claim by that no-fault insurer for partial recoupment of benefits paid from another no-fault insurer of equal priority . . . does not thwart that purpose.
>
> Accordingly, we conclude that the circuit court properly held subsection 3145(1) inapplicable to plaintiff's action. [*Id*. at 262-263 (internal citations omitted).]

The reasoning of *Titan Ins Co* applies equally to the "one year back rule" portion of MCL 500.3114(6). When an insurer "promptly pays" benefits, it makes little sense to preclude it from recovering those benefits from another equal-priority insurer if it files suit more than one year after the insured's injury was incurred; this would defeat the purpose of the recoupment subsections: "to accomplish equitable distribution of the loss among such insurers." MCL 500.3114(6); MCL 500.3115(2). To do so also would also encourage piecemeal litigation, as an insurer would have to seek recoupment for each payment of PIP benefits as the one-year mark approached, rather than seeking partial recoupment in one lawsuit. This would frustrate the "no-fault act's purpose of reducing litigation." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 565; 702 NW2d 539 (2005).

Further, defendant has not provided this Court with an example of the application of the "one year back" rule in the context of a partial recoupment action. Defendant's references to *Devillers* and *Cooper v Auto Club Ins Ass'n*, 481 Mich 399; 751 NW2d 443 (2008), are not persuasive. Both *Devillers* and *Cooper* involved insureds who brought an action against an insurer to recover benefits, either after an insurer had discontinued benefits, *Devillers*, 473 Mich at 565, or because the insured alleged that the benefits paid were insufficient, *Cooper*, 481 Mich at 406. Our Supreme Court's discussion of the application of the "one year back rule" to these actions is thus not applicable to the instant case.

We conclude that the "one year back" rule does not bar any portion of plaintiff's claim.

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[5] "An action for recovery of personal protection benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury" absent certain notice requirements or payment by the insurer.

## V. THE MCCA WAS NOT THE "REAL PARTY IN INTEREST"

Next, defendant cursorily argues that plaintiff is entitled to seek reimbursement from the MCCA of 100% of benefits paid in excess of $375,000 because, it argues, the MCCA is the real party in interest. As a result, defendant maintains that plaintiff cannot recoup any portion of those amounts from defendant. We disagree.

As a threshold issue, defendant does not explain how the real party in interest statute, MCL 600.2041, applies to the instant case. MCL 600.2041 provides in relevant part that "every action *shall be prosecuted* in the name of the real party in interest . . . ." Emphasis added. Defendant essentially argues that it is not obligated for any amounts paid by plaintiff over $375,000; however, defendant provides no authority for its contention that the real party in interest statute or accompanying caselaw has some bearing on its *defense* of plaintiff's claim. Plaintiff undisputedly has the right to pursue an action for some amount against defendant. See MCL 500.3114(6). Thus, we conclude that the law concerning real parties at interest is inapplicable here. To the extent that defendant, misuse of the term "real party in interest" aside, argues that it is not liable for any amounts paid by plaintiff over $375,000, we disagree for the reasons stated below.

The MCCA is a statutorily created body. See MCL 500.3104. MCL 500.3104 provides in relevant part:

> (1) An unincorporated, nonprofit association to be known as the catastrophic claims association, hereinafter referred to as the association, is created. Each insurer [under the no-fault act] . . . shall be a member of the association . . . .
>
> (2) The association shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence:
>
> * * *
>
> (e) For a motor vehicle accident policy issued or renewed during the period July 1, 2005 to June 30, 2006, $375,000.

Defendant argues that because plaintiff has paid over $375,000 in PIP benefits, it is entitled to 100% reimbursement of amounts in excess of $375,000 and thus is not entitled to recoup any of that portion of its payments from defendant. A similar issue was addressed by this Court in *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454; 651 NW2d 428, lv den 467 Mich 917 (2002). In *Farmers Ins Exch*, like the instant case, an insurer sought partial recoupment of PIP benefits from another insurer of equal priority. *Id*. at 455. The defendant appealed the trial court's ruling that the plaintiff was entitled to recoup half of the total PIP benefits paid and owing to the injured party, arguing that it should not have to recoup amounts already paid to the plaintiff by the MCCA. *Id*. This Court cited the provision creating the MCCA, and noted that this statute must be read in relation to MCL 500.3115(2) (the priority statute at issue, and as noted above, functionally identical to MCL 500.3114(6)). *Id*. at 458. This Court noted that the MCCA had, pursuant to statutory direction, developed a plan for this situation, which required a member to turn over monies recovered from the MCCA if it recovers those sums from a third

party. *Id*. at 459, citing Michigan Catastrophic Claims Association Plan of Operation, Article X, § 10.06. This Court therefore concluded that "when an insurer pays out benefits, it can recoup part of the money paid from another insurer in equal priority, even if the MCCA already has reimbursed the initial insurer." *Id*. at 459.

We conclude that the rationale of *Farmers Ins Exch* supports our conclusion that the MCCA is not the real party in interest in a suit for contribution between insurers of equal priority. Our conclusion is supported by *Transamerica Ins Group v MCCA*, 202 Mich App 514, 517-518; 509 NW2d 540 (1993), where this Court held that the statute governing reimbursement by the MCCA unambiguously provides that insurers may not aggregate their claims; rather "the statute provides for indemnification of member insurers only after an individual insurer has sustained a loss in excess of $250,000 for a single loss occurrence." *Id*.[6] This Court found support for its conclusion in the language of MCL 500.3104(2), which provides that members will receive indemnification only for the amount of "ultimate loss" sustained in excess of the relevant amount. *Id*. at 541-542. An ultimate loss is defined in the statute as "the actual loss amounts which a member is obligated to pay and which are paid or payable by the member." *Id*. at 541.

Therefore, in conformity with *Farmers Ins Exch* and *Transamerica Ins Group*, we hold that an insurer may seek partial recoupment from an insurer of equal priority; if, after recoupment, either insurer (or both) has paid claims in excess of the relevant reimbursement amount, either insurer (or both) may then seek reimbursement from the MCCA for the excess benefits paid. This would comport with MCL 500.3114(6)'s goal of accomplishing "equitable distribution of the loss among all of the insurers" and MCL 500.3104(2)'s restriction of reimbursement by the MCCA to "ultimate loss." A loss would thus not be "ultimate" until it had been "equitably distributed." Defendant has offered no support for its contention that insurers seeking partial recoupment must, in lieu of such recoupment, first proceed against the MCCA for reimbursement of amounts in excess of the statutory threshold, and we do not so find.

We conclude that plaintiff is entitled to seek contribution from defendant, notwithstanding its separate right to seek reimbursement for excess payments from the MCCA.

## V. THE TRIAL COURT ERRED IN GRANTING DEFENDANT PARTIAL SUMMARY DISPOSITION AS TO THE "DOUBLE DIP" AMOUNTS PAID BY PLAINTIFF (CROSS-APPEAL)

Brothers' health insurer, Blue Cross Blue Shield of Michigan (BCBSM), paid over $200,000 of PIP benefit claims that were also paid by plaintiff. Defendant argued before the trial court that by virtue of Putnam's coordinated policy (i.e., an automotive insurance policy that makes the insured's health insurer primarily responsible for personal injury protection benefits in return for lower premiums), these funds should not have been dispersed to Brothers by plaintiff,

[6] At the time *Transamerica Ins Group* was decided, MCL 500.3104(2) provided for a threshold amount of $250,000. See MCL 500.3104(2)(a). As noted, the threshold amount that is applicable in this case is $375,000. MCL 500.3104(2)(e).

because it was BCBSM's responsibility to pay these benefits. Defendant further argued that plaintiff mistakenly paid benefits to Brothers as if Brothers had an uncoordinated insurance policy (i.e., an automotive insurance policy that makes the automotive insurer primarily liable for personal injury protection benefits). Thus, defendant argued, it should not be liable for a share of these funds.

The trial court, in granting defendant's first motion for partial summary disposition, stated:

> In the present case, Mr. Brothers [sic] coordinated health plan primarily paid for his medical expenses incurred as a result of the March 21, 2006, accident. Plaintiff's coordinated no-fault automobile insurance plan for third-party Putnam also paid Mr. Brothers [sic] expenses as if Mr. Brothers had purchased an uncoordinated no-fault automobile insurance plan. However, this Court finds no case law or statute that supports § 3109a allowing a coordinated no-fault automobile insurance plan to transform into an uncoordinated no-fault automobile insurance plan.

In support of its ruling, the trial court made reference to MCL 500.3109a, which governs coordinated policies, and provides:

> An insurer providing personal protection insurance benefits under this chapter may offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. Any deductibles and exclusions offered under this section are subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured, and any relative of either domiciled in the same household.

We conclude, however, that MCL 500.3109a is inapplicable to this case. MCL 500.3109a provides that deductibles and exclusion may be offered related to "other health and accident coverage *on the insured*." (Emphasis added). Further, the deductions and exclusions under this section "shall apply only to benefits payable to the person named in the policy, the spouse of the insured, and any relative of either domiciled in the same household." Our Supreme Court has held that MCL 500.3109a is inapplicable with regard to payments made to an injured party not named in the relevant policy nor related to any named insured. See *DeMeglio v Auto Club Ins Ass'n*, 449 Mich 33, 47; 534 NW2d 665 (1995) (BRICKLEY, C.J., lead opinion); see also *Crowley v DAIIE*, 428 Mich 270, 279-280; 407 NW2d 372 (1987). Since Brothers was not the named insured on plaintiff's policy, MCL 500.3109a is inapplicable.

The trial court also made reference, as plaintiff does on cross-appeal, to *Shanafelt v Allstate Insurance Co*, 217 Mich App 625; 552 NW2d 671 (1996). In *Shanafelt*, the plaintiff, an insured, sued her insurer for benefits that were previously paid by her health insurance provider. *Id*. at 639. Because the plaintiff had purchased an uncoordinated policy (and therefore paid a higher premium), this Court held that the language of the policy mandated payment of benefits without a setoff for health insurance. *Id*. at 643.

The trial court further made reference to *Smith v Physicians Health Plan, Inc*, 444 Mich 743; 514 NW2d 150 (1994). In *Smith*, the plaintiff's medical expenses were paid by an uncoordinated auto insurance policy; plaintiff then sought duplicate payments from his coordinated health insurance policy. *Id*. at 748. The plaintiff essentially brought suit to argue that the health insurance policy was primarily liable for medical expenses and that the uncoordinated auto policy entitled him to duplicate benefits. *Id*. The Court disagreed, holding that the auto insurance policy was primarily responsible for benefits due to the coordination clause in the health insurance policy. *Id*. at 759.

Both *Smith* and *Shanafelt* are inapposite to the instant case. *Shanafelt* involved a situation where an *insured* received duplicate benefits because she had, in effect, paid for the privilege by purchasing an uncoordinated auto policy. *Smith* similarly involved an *insured* who was denied duplicate benefits because of a coordinated policy. Neither addressed the situation of benefits paid to an injured party who was not a party to a coordinated insurance policy, which is where Brothers stands in the instant case.

"[W]here no-fault coverage and health coverage are coordinated, the health insurer is primarily liable for [the insured's] medical expenses." *Am Med Sec, Inc v Allstate Ins Co*, 235 Mich App 301, 304; 597 NW2d 244 (1999), lv den 461 Mich 1003 (2000). However, in the absence of coordination, a no-fault insurer is primarily liable for benefits paid to an insured. See *Shanafelt*, 217 Mich App at 642. Here, Brothers' entitlement to benefits arose not from any insurance policy, but from statute, MCL 500.3114(5). See *Harris v Auto Club Ins*, ___ Mich ___; ___ NW2d ___ (2013), slip op at 10. That statute provides simply that an injured party "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." *Id*. Thus, no-fault insurance, not health insurance, was primary in the instant case. See *DeMeglio*, 449 Mich 33 at 47; ). See *Harris*, slip op at 10.

It appears that any "windfall" granted to Brothers was in fact granted by his health insurer, not plaintiff. We express no opinion on whether Brothers ultimately should keep his windfall; such a determination would depend on the policy between Brothers and his health insurer.[7] What is clear is that *Smith* does not provide support for the trial court's conclusion that plaintiff was not obligated to pay benefits to Brothers paid by his health insurer, and thus, that defendant was not obligated for any share of those benefits.[8]

[7] See, e.g., *Harris*, slip op at 10-11. In *Harris*, the Court found that a health insurance policy that provided that the insurer would not pay sums "for which you [the insured] legally do not have to pay" shielded the health insurer from liability for PIP benefits paid to an injured motorcyclist pursuant to MCL 500.3114(5)(a), because the injured party was not obligated to pay his medical expenses; rather the insurer with priority under the statute was obligated to pay them as a matter of law. *Id.*

[8] Defendant advances numerous policy arguments regarding the deleterious effect of allowing "double-dipping" on the overburdened Michigan No-Fault system. This Court's decision is

We also reject defendant's contention that the benefits that were paid by Brothers' health insurer were not "reasonable charges *incurred*" by Brothers, and thus plaintiff was not required to pay them under MCL 500.3107 (defining "payable personal protection benefits" as, among others, "all reasonable charges incurred" for the injured person's care, recovery, or rehabilitation). This exact argument was addressed and rejected in *Shanafelt*:

> Defendant's position is untenable. The word "incurred" is not defined in the no-fault act, so we accord the word its plain and ordinary meaning within the context of the statute. A dictionary may be used when determining the meaning of a word. The primary definition of the word "incur" is "to become liable for." *Random House Webster's College Dictionary* (1995). Obviously, plaintiff became liable for her medical expenses when she accepted medical treatment. The fact that plaintiff had contracted with a health insurance company to compensate her for her medical expenses, or to pay directly the health care provider on her behalf, does not alter the fact that she was obligated to pay those expenses. Therefore, one may not reasonable maintain that plaintiff did not incur expenses. Thus, defendant has presented no argument suggesting that plaintiff's expenses were not allowable expenses as that term is used in MCL 500.3107(1)(a). [*Shanafelt*, 271 Mich App at 616-617 (citations omitted).]

Further, when an insurer is designated as the responsible insurer by MCL 500.3114(5)(a), it is legally responsible for PIP coverage as a matter of law. *Harris*, slip op at 10.

We therefore reverse the trial court's grant of partial summary disposition to defendant on the issue of defendant's liability for the so-called "double dip" amounts.

## VI. CONCLUSION

In the main appeal, we conclude that the trial court did not err in determining that Flores' vehicle was "involved" in Brothers' accident. Further, there is no support for defendant's contention that Brothers was not an "operator" of his motorcycle at the time of the accident. Our conclusion on the issue of Brothers' status as an "operator" of his motorcycle is not affected by plaintiff's failure to preserve Putnam's vehicle for defendant's examination. Additionally, the "one year back" rule does not apply to the instant action. Finally, the MCCA was not the "real party at interest" in the instant case. We therefore affirm the trial court's grant of partial summary disposition to plaintiff.

In the cross-appeal, we conclude that the trial court erred in granting defendant partial summary disposition with regard to the so-called "double-dip" funds. We therefore reverse the trial court's grant of partial summary disposition to defendant, and remand for further proceedings consistent with this opinion. On remand, the trial court should determine the additional amount owed to plaintiff by defendant relative to any "double dip" funds excluded

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based upon the existing state of the law. Defendant's arguments are better addressed to the Legislature. See *People v Carruthers*, ___ Mich App ___; ___ NW2d ___ (2013), slip op at 9.

from the consent judgment by virtue of the trial court's grant of partial summary disposition to plaintiff.

Affirmed as to the main appeal, reversed as to the cross-appeal, and remanded further proceedings, consistent with this opinion. We do not retain jurisdiction. Having prevailed in full, plaintiff may tax costs. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray