STATE OF MICHIGAN

IN THE 42ND CIRCUIT FOR THE COUNTY OF MIDLAND

MARY COLEMAN, Individually and
as Next Friend of ADRIENNE COLEMAN,

Plaintiffs,

FILE NO: 98-7570-CK-L

vs.

AUTO CLUB GROUP INSURANCE CO.,

OPINION

Defendant.

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INTRODUCTION

Plaintiffs, Mary and Adrienne Coleman (hereinafter "Plaintiffs"), filed a Motion for Summary Disposition on October 1, 1998. Plaintiffs' Motion was based on MCR 2.116(C)(10). Plaintiffs contend that Auto Club Group Insurance Co. (hereinafter "Defendant") should honor her application for first party personal protection benefits for injuries received in an accident. Oral arguments were heard before the court on November 6, 1998. This opinion follows.

FACTS

The factual basis for this Opinion was summarized at the hearing on Plaintiffs' summary disposition motion. Defendant agreed that the police report was an accurate

expression of the relevant events. A copy of the report is attached as Exhibit A. Also, it was agreed that the deposition transcript of Plaintiff Mary Coleman taken on August 4, 1998 was both accurate and uncontradicted.

On February 22, 1997, Mary Coleman and her daughter, Adrienne, were traveling by snowmobile, a 1992 Arctic Cat, East on Pierce Road in Oscoda County. Mary's husband, Rick, was traveling next to them on another snowmobile, a 1993 Arctic Cat, with the Colemans' other minor child.

Unknown to the Colemans, Linda Liss had maneuvered her van in the eastbound lane of Pierce Road, facing west. Ms. Liss located her van there to allow her husband to attach a chain to the van's front-mounted winch. Mr. Liss' snowplow-equipped pickup truck was stuck in the snow near a driveway adjacent to Pierce Road. The van's headlights were on. The engine was running. Ms. Liss was seated in the driver seat of the van.

The Colemans could not see the Liss van until they crested a hill on Pierce Road. Upon cresting this hill, the Colemans encountered the Liss van in the eastbound lane. Mr. Coleman was on the inside. He was able to steer his sled around the van. Mrs. Coleman was on the outside. Upon cresting the hill and seeing the van, she applied her brakes. As a result, she and her daughter, Adrienne, were both thrown from the snowmobile. Mrs. Coleman, a resident of Midland, broke both bones in her right arm as well as tearing the ligaments in her right knee and rupturing a disc in her back. In response to an interrogatory posed by Defendant, Mrs. Coleman indicated receiving medical treatment from the following sources:

Mercy Health Services (2/22/97)	$1,783.00
MMRMC (2/23/97 through 2/25/97)	$11,969.33
Dr. Goethe (surgery on arm)	$5,486.00
MMRMC (5/12/97 through 5/13/97)	$5,903.43
Dr. Goethe (surgery on knee)	$2,118.00
MMRMC (9/15/97 through 9/17/98)	$5,433.25
Dr. Sonnino (surgery on back)	$6,720.00
MMRMC (physical therapy and testing)	$2,895.50
MRI	$250.00
Braces for knee	$525.00
Myelogram (8/5/97)	$1,603.75
MMRMC (3/23/98)	$3,087.96
TOTAL	$47,775.22[1]

In addition to these medical expenses, Mrs. Coleman incurred out-of-pocket expenses of $621.83[2]. During Mrs. Coleman's recovery period, she missed time from work amounting to $6,353.89 in lost wages[3]. The total for injuries, out-of-pocket expenses and lost wages is $54,750.94.

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[1]Plaintiffs' answer to defendant's interrogatory 2. Attached as Exhibit B.

[2]Plaintiffs' answer to defendant's interrogatory 3. Attached as Exhibit C.

[3]Plaintiffs' answer to defendant's interrogatory 5. Attached as Exhibit D.

PROCEDURE

Defendant filed its own Motion for Summary Disposition on June 17, 1998 pursuant to both MCR 2.116(C)(8) and (C)(10). Oral arguments for this Motion for Summary Disposition were heard before the court on September 11, 1998. Defendant contented that the Liss van was "parked" for purposes of the no-fault law. MCL 500.3106. Section 3106 provides in pertinent part:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> (a) The vehicle was parked in such a way as to cause unreasonable risk of injury.
>
> (b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.
>
> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.
>
> (2) . . . .
> [MCL 500.3106; MSA 24.13106 (emphasis added)]

Defendant primarily relied on *Willis v State Farm Insurance Company*, 437 Mich 205; 468 NW2d 511 (1991), to support their motion. In *Willis*, plaintiff's decedent, a passenger on a snowmobile, was killed when he struck an unoccupied vehicle located on the shoulder of M-19. The unoccupied vehicle was facing oncoming traffic with its lights off. The snowmobile was illegally traveling on the shoulder. The Supreme Court reviewed the case to determine, as a matter of law, whether an automobile parked on the shoulder

of a highway was unreasonably parked under MCL 500.3106(1)(a). *Willis*, at 209. The trial court found that the vehicle was not unreasonably parked because it was completely off the roadway, not impeding traffic flow, and was plainly visible. *Willis*, at 215. The Supreme Court did not quarrel with these findings. That court found that the vehicle was not in use as a motor vehicle for purposes of MCL 500.3105 because it was parked. *Willis*, at 215. It also found that none of the exceptions to § 3106 applied to the facts of the case; i.e., the unoccupied vehicle parked on the shoulder was not unreasonably parked. *Willis*, at 215.

This Court denied Defendant's Motion, concluding that there were sufficient facts identified by the Plaintiffs to establish a genuine issue as to whether the Liss van was "parked," as that term is used in MCL 600.3106 and, if so, whether it was "parked in such a way as to cause an unreasonable risk of injury" within the meaning of subsection (1)(a) of MCL 500.3106. *Willis* (supra), in this Court's opinion, was distinguishable, indeed inapplicable, to the instant case on its facts. In *Willis*, the vehicle was unoccupied and parked on the shoulder of the highway. In the instant case, the vehicle was occupied (Ms. Liss was in the driver's seat), located in the eastbound lane facing west with the engine running. Indeed, the vehicle in the immediate case was in the process of being used to extract Mr. Liss' pickup from a snowbank.

STANDARD OF REVIEW

Plaintiffs' Motion for Summary Disposition was also made under MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). The court

must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Marx v Department of Commerce*, 220 Mich App 66, 70; 558 NW2d 460, 463 (1996).

ANALYSIS

In *Willis v State Farm Insurance Company* (supra), the Michigan Supreme Court established that ". . . [s]ince snowmobiles are not motor vehicles for purposes of the no-fault statute, it must be determined whether the parked vehicle was in use as a motor vehicle." *Willis* at 215. This statement by our Supreme Court provides us with a two-part inquiry: First, whether the vehicle was parked; and, second, if it was parked, whether it was in use as a motor vehicle.

To date, Defendant has not offered any factual rational for contending that the Liss vehicle was "parked" other than the fact that the vehicle was not in motion. Indeed, that is the only fact in common with *Willis*.

The one case located by this Court on point is the matter of *Tollers v Amerisure Companies/Michigan Mutual Insurance Company*, an unpublished per curiam opinion of the Court of Appeals, decided June 16, 1993 (Docket No. 144505). In *Tollers*, the plaintiff was sitting in his truck–the engine was running, the truck was in neutral, and the parking break was activated–waiting for hot asphalt to be deposited in the bed. Plaintiff remained in the truck because he was required to reposition the truck to evenly distribute the weight of the asphalt. Plaintiff was injured when another silo opened and dumped hot asphalt on

the roof of his truck. The trial court and the Court of Appeals rejected the argument that the truck was parked and subject to the provisions of §3106. The Court of Appeals noted that "Tollers was sitting in the cab of the truck with the engine running waiting to move the truck to more easily facilitate the loading process. The truck was in neutral with the parking brake on. We cannot conclude, under these facts, that the truck was a parked vehicle." *Tollers*, at 3.

The factual scenario in *Tollers* is similar to that of the instant case. Linda Liss was sitting in the van. The engine was running and the lights were on. At any time, Ms. Liss might have moved the vehicle. The vehicle was simply waiting for Mr. Liss to finish attaching the van's winch chain to his stuck pickup truck. This Court cannot conclude, on the basis of these undisputed facts, that Defendant can identify a genuine issue of fact that the Liss van was parked, as that term is used in §3106. Even assuming *arguendo* that the Liss' van was parked, the Defendant has not identified any factual basis for contending that the van was parked in a reasonable manner. MCL 500.3106(1)(a). The vehicle was located by the Lisses in the lane of oncoming traffic on the blind side of the crest of a hill.

Plaintiffs' Motion for Summary Disposition is GRANTED. Plaintiff should schedule a hearing solely for the purpose of receiving evidence as to damages.

Dated: November 18, 1998

Thomas L. Ludington (P31391)
Circuit Court Judge