STATE OF MICHIGAN

IN THE COURT OF APPEALS

JOSEPH WIER,

Plaintiff-Appellee,

-vs-

ALLSTATE INSURANCE COMPANY,
a Foreign Corporation,

Defendant-Appellant.

Court of Appeals Docket No.: 334773
Consolidated with COA No.: 335167
Lower Court Case No.: 14-3584-NF

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DEFENDANT-APPELLANT, ALLSTATE INSURANCE COMPANY'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted,
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Dated: May 22, 2017

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STATEMENT OF THE BASIS OF JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Court is properly invoked under MCR 7.203(A)(1). A Judgment on August 26, 2016 was entered by Judge Edward A. Servitto of the Macomb County Circuit Court following a jury trial. (**Attachment 1 –** Order dated 8/26/16**.**) Plaintiff-Appellee (herein after "Plaintiff") filed his motion for attorney fees and costs with the trial court denying the motion for attorney fees and closing out the case on October 24, 2016. (**Attachment 2** – Order dated 10/24/16.) Defendant-Appellant Allstate Insurance Company (hereinafter "Defendant" or "Allstate") timely filed its Claim of Appeal on September 14, 2016.

This case proceeded to a jury trial on Plaintiff's claim that he continued to suffer from conditions arising out of a traumatic brain injury that he sustained in a September 9, 1996 motor vehicle accident. The dispute between the parties was quite adversarial. Yet, most of the rulings went in Plaintiff's favor. In fact, the trial court judge acknowledged that he had made many appealable decisions. The transcript:

> MS. MAGDICH: I think we're creating a major appealable issue.
>
> THE COURT: I think we've probably had many, so – (Trial Tran 7/26/16, 110:19-22.)

This implies a recognition by the trial court that at least some of its decisions against Defendant were wrong. Defendant has brought this Claim of Appeal to correct some of those improper, prejudicial and reversible decisions by the court.

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STATEMENT OF THE QUESTION PRESENTED

1. Whether the opinions expressed by Plaintiff's experts were unreliable under the principles articulated in MRE 702, where the experts admitted to having no knowledge regarding the accident from 1996, treatment rendered after 1996, no information regarding the Plaintiff's life prior to 1996 or after, no information regarding numerous intervening events including additional motor vehicle accidents, head injuries, physical altercations, drug abuse, alcohol abuse, and diagnosis of bipolar disorder and/or schizophrenia?

   Plaintiff-Appellee's answer: "No"
   The trial court's answer: "No"
   Defendant-Appellant's answer: "Yes"

2. Whether the subsequent intervening events terminate no fault PIP liability for Defendant when Plaintiff admits to having recovered from all 1996 accident related injuries by May 2000, thereafter Plaintiff is involved in numerous intervening events?

   Plaintiff-Appellee's answer: "No"
   The trial court's answer: "No"
   Defendant-Appellant's answer: "Yes"

3. Whether the trial court abused its discretion in precluding the use of Defendant's bodily injury claim file related to the 1996 motor vehicle accident in its' case in chief when Defendant sought to use the file after Plaintiff's counsel had used that file during its case in chief, established its relevancy and did not object to the admission of the file?

   Plaintiff-Appellee's answer: "No"
   The trial court's answer: "No"
   Defendant-Appellant's answer: "Yes"

4. Whether the trial court abused its discretion in precluding the use of Plaintiff's claims for PIP benefits arising out of accidents that occurred in 1999 and 2007 to show subsequent injuries and knowledge on behalf of Plaintiff that he knew how to make a claim for benefits when he denied such knowledge in the case at hand?

   Plaintiff-Appellee's answer: "No"
   The trial court's answer: "No"
   Defendant-Appellant's answer: "Yes"

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5. Whether Defendant was entitled to a directed verdict on Plaintiff's speculative attendant care claim because Plaintiff's mother, the alleged attendant care provider, testified that she did not know the total number of attendant care hours performed and she failed to produce any evidence to show the hours and services performed, as well as the fact that she testified her only expectation of payment was if Plaintiff won the case, which is not a reasonable expectation of payment?

   Plaintiff-Appellee's answer: "No"
   The trial court's answer: "No"
   Defendant-Appellant's answer: "Yes"

6. Whether the trial court committed reversible error when it refused to alter the standard verdict form to start with the actual question in dispute – whether Plaintiff's current condition in 2012 and beyond arose out of the 1996 accident for which benefits were due and owing – but instead submitted a verdict from that was confusing and prejudicial because it was prefilled out to indicate that Plaintiff suffered an accident related injury and then directed the jury to award benefits based on that pre-determined finding?

   Plaintiff-Appellee's answer: "No"
   The trial court's answer: "No"
   Defendant-Appellant's answer: "Yes"

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STATEMENT OF FACTS

A. Following the a 1996 motor vehicle accident, Allstate paid Plaintiff's PIP benefit through 1999 and did not hear from Plaintiff for more than 12 years later.

On September 9, 1996, Plaintiff, who was 14 years old at the time, fell off the tailgate of his father's truck. Plaintiff suffered a concussion. He was hospitalized at St. John Hospital. (Trial Tran 7/13/16, 14:7-13.) Plaintiff was discharged from the hospital and returned to his family's home.

Allstate sent a coverage letter in 1996 explaining the benefits allowed under the Michigan no-fault act. (Trial Tran 7/15/16, 195:12-25.) Benefits were paid throughout 1996, including attendant care benefits for family provided care. (*Id.* at 200:6-15.) Plaintiff returned to school in January of 1997. (Trial Tran 7/19/16, 139:9-13.) On April 11, 1997, Allstate sent a letter to Plaintiff's parents asking they contact Allstate because no one had heard from the family in some time. (Trial Tran 7/15/16, 198:11-25.) Additional medical bills were received in 2000 and paid.

Allstate did not hear from Plaintiff again for over twelve years. (Trial Tran 7/26/16, 15:17-20.) During the years immediately following the accident, Plaintiff's mother agreed that Plaintiff completed school with years of perfect attendance, he was engaged in work and had no behavioral problems at school until 10th or 12th grade when he switched school and began to abuse drugs and alcohol. It was noted that the alleged behavioral problems were not documented in his school records. (Trial Tran 7/21/16, 175:8- 177:2, 192:16-25.)

In late 2012, Plaintiff's sister, Julia Reinhard, contacted Allstate. (Trial Tran 7/15/16, 208:9-210:13.) Plaintiff's claim in 2012 and at the time of trial was that the 1996 head injury caused him to have behavioral problems that persisted from 1996 through the date of trial. It was agreed by his doctors that he was not suffering from cognitive issues as a result to the 1996 head injury.

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B. Plaintiff's family contacted Allstate in 2012 and began making claims for benefits.

Ms. Reinhard spoke with Toni Bradford, an Allstate adjuster. Plaintiff's sister informed Ms. Bradford that Plaintiff had been released from a psychiatric unit and the family wanted to determine if his claim could be reopened. (Trial Tran 7/15/16, 47:9-18; 150:9- 151:8.) At that time, Ms. Bradford offered to assign a case manager to assist with collecting medical records and coordinating treatment. (*Id*. at 49:24- 50:6.) Plaintiff and his family declined as they wanted to hire their own case manager. Their case manager did not assist Allstate with its efforts to obtain Plaintiff's medical records. (Trial Tran 7/15/16, 212:6.)

Ms. Bradford authorized payments accepting their account at face value. The claim was placed under investigation around August 5, 2014 due to questions on the claim. (*Id.* at 214:13-215:23.) During that time, Allstate started its investigation into the claims to determine if the treatment that was occurring over sixteen years after the accident and after twelve years of silence was reasonably necessary for the care of injuries arising out of the 1996 accident. (Trial Tran 7/26/16, 15:21- 16:10.)

As Allstate investigated the claim, it found inconsistencies in the alleged disability and what was going on in Plaintiff's life in the years following the accident. For example, Plaintiff was always his own guardian, but the picture his family was painting with their attendant care claim was that Plaintiff was a severely disabled person. The attendant care claims also were not supported by Plaintiff's treating providers in the manner that they described him in the records and was inconsistent with Plaintiff's public posts on his Facebook page. (Trial Tran 7/26/16, 19:7-15.), Thomas Remski of Allstate's Special Investigation Unit (SIU) assisted with the investigation into Plaintiff's claim. As part of his investigation, he was able to speak with Plaintiff's treating doctor, Dr. Kamoo. Mr. Remski wanted to speak with the doctor because the doctor's notes reported that Plaintiff had normal cognitive testing but yet was participating in a rehabilitation program. When Mr. Remski spoke with Dr. Kamoo,

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the doctor stated that he did not know if the condition and/or treatment were related to the accident. (*Id.* at 22:2-7.)

After suit was filed, Plaintiff's family members, through Plaintiff's counsel, began submitting claims for attendant care services by way of affidavits that were drafted by Plaintiff's initial attorney in this matter. (Trial Tran 7/21/16, 166:5-7; 199:7-19.) Allstate eventually received one large stack of affidavits that were all signed on the same day but spanned a year. The affidavits were executed by Plaintiff's family members: Mrs. Wier, Adam Wier and Joseph Wier, Sr. They indicated the same type of service every day for sixteen hours a day. Mr. Remski found that these claims were inconsistent with the fact that Plaintiff was allegedly in rehabilitation programs for most of the day. (Trial Tran 7/26/16, 29:1-9, 29:18-20.) Benefits were ultimately denied based on the opinions provided by Allstate's expert, Dr. Robin Hanks. (Trial Tran 7/15/16, 114:1-9; Trial Tran 7/26/16, 57:25- 58:1.)

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C. During the immediate years following the accident, there are no records to support ongoing behavioral issues. Issues begin to appear when Plaintiff developed a drug and alcohol habit. He would ultimately be diagnosed with bipolar disorder and schizophrenia.

In the early 2000, Plaintiff's medical records described a man who was cooperative without signs of a head injury. During that time, he was not using alcohol or drugs. (Trial Tran 7/22/16, 92-94.) In approximately 2005, Plaintiff began using drugs including crack cocaine. He also abused alcohol and exhibited violent behaviors during the abuse. (Trial Tran 7/21/16, 144:10-21.) During his drug using days, Plaintiff was arrested for choking his mother and it was not an isolated incident. (*Id.* at 203:23- 204:2.) He also assaulted her on several other occasions but his mother did not report the incidents to the authorities. (*Id.* at 202:24- 203:2.) After Plaintiff was released from prison for the violence against his mother, it was recommended that he go to an in-patient facility for drug rehabilitation. He declined stating he had to take care of his parents. Shortly thereafter he began using again. (Trial Tran 7/22/16, 96-97.) Plaintiff was arrested again for theft and admitted to committing at

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least two robberies and served a six-month sentence. (Trial Tran 7/21/16, 140:1- 141:13; Trial Tran 7/22/16, 95-96.) While in prison, he was involved in a physical altercation in which he was struck in the head. (Trial Tran 7/22/16, 17-19.) He suffered multisystem trauma, closed head injury and fractured ankle. (*Id.* at 98.)

During these years of drug use and following the physical altercation in prison, Plaintiff would treat for his substance abuse problems, which led to several relevant medical diagnoses. In 2005, he was diagnosed with bipolar disorder. (Trial Tran 7/22/16, 91.) In 2012, when Plaintiff continued to treat for his substance abuse issues, he was diagnosed with schizoaffective disorder. (*Id.* at 98-99.) In 2012, Plaintiff overdosed on Ambien. It was after the overdose that Plaintiff's family contacted Allison Fikany, a no fault case manager. (Trial Tran 7/21/16, 147:1-9.)

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D. Prior to Plaintiff's problems with drugs, alcohol and physical violence, he was injured in a 1999 motor vehicle accident and testified that his 1996 injuries had healed.

Plaintiff was involved in a motor vehicle accident in 1999 in which he was injured and treated for a closed head injury. For the July 1999 accident, Plaintiff was deposed on May 3, 2000. He testified, under oath, and in the presence of his father, that he had made progress in his treatment following the 1996 accident, so much so, that he was no longer suffering from any problems relating to the same. (**Attachment 3** – Plf's Dep Tran re 1999 motor vehicle accident, p 14.)

E. In 2010 Plaintiff provided sworn testimony in court without any claim of disability related to the 1996 accident.

On December 20, 2010, Plaintiff was sworn before Macomb County Circuit Court Judge David F. Viviano, regarding a Payment Motion for Confirmation Regarding Joseph Wier as the payee. (**Attachment 4, Ex R** - Transcripts from December 20, 2010 hearing.) At that time, Plaintiff sought to sell off a share of his structured settlement, which he had received from Defendant for his bodily injury claim arising out of the 1996 accident. (*Id.* at p 4-5 of Exhibit R) During that hearing, Plaintiff

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testified competently and with great understanding of the court proceedings, without any guardian or other assistance. Plaintiff advised the court that when he sold his shares to JG Wentworth in the past, in approximately 2004, he used it to pay for medical expenses for a previous ankle injury and to help his parents move into their current home. (*Id*. at 8.) Furthermore, Plaintiff indicated that the reason that he could not work was because of an ankle fracture that he had sustained while incarcerated in 2010. (*Id*. at 9.) Plaintiff made absolutely no mention to the court of any lingering disability from the 1996 motor vehicle accident. *Id*.

F. Allstate retained experts opined that Plaintiff was not suffering from an accident injury.

In order to assist Allstate in its investigation, it retained Dr. Robin Hanks to perform an independent medical examination of Plaintiff. Allstate selected Dr. Hanks to perform a neuropsychological examination because of her specialty in neuropsychology and treating people with traumatic brain injuries. (Trial Tran 7/26/16, 25:5-17.) Pursuant to Dr. Hank's report, many of the allegations and claims by Plaintiff were for conditions and/or issues not related to the motor vehicle accident. As explained in Allstate's January 13, 2015 correspondence to Plaintiff, it denied any further claims as being unrelated to the motor vehicle accident from 1996 as supported by Dr. Hank's report. (*Id.* at 25:18- 26 1-8.)

Allstate also retained Dr. Kezlarian to perform a psychiatric evaluation. Dr. Kezlarian's opined that the services Plaintiff was allegedly receiving did not arise out of the 1996 motor vehicle accident. (*Id.* 26:9-20.) Pursuant to Dr. Kezlarian's report, Allstate sent correspondence to Plaintiff's counsel advising that it was denying any claims for psychiatric care, attendant care, residential care, recreational therapy and vocational rehabilitation as being unrelated to the motor vehicle accident. (*Id.* 26:21- 27:2.) After this correspondence was sent, Allstate received an addendum report from Dr. Hanks following her review of additional records and she confirmed the fact that Plaintiff was not

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suffering from an accident related injury. Consistent with Dr. Hanks' addendum, Allstate sent a letter to Plaintiff's counsel dated October 22, 2015 advising that it was denying all claims as the care, services and treatment was not related to an injury arising out of the 1996 motor vehicle accident. (*Id.* at 27:3-8.) Allstate also advised that if Plaintiff and/or his treating physician had any additional information, they should provide it to Allstate for consideration. Allstate never heard from Plaintiff's treating physicians after its October 22, 2015 denial letter. (*Id.* at 9-18.)

G. Relevant pre-trial proceedings.

1. Motion for Summary Disposition and the physician's deposition testimony.

On November 12, 2015, Defendant filed its Motion for Summary Disposition. Defendant brought the motion on the grounds that (1) Plaintiff could not establish his alleged medical condition arose out of the 1996 accident; and, (2) Plaintiff suffered from intervening events that severed any liability Defendant may have had related to the 1996 accident. The trial court denied the motion.

In Defendant's motion, it outlined the significant events in Plaintiff's life that occurred during the 13 years between the accident and when his family reopened his claim with Allstate. At the time of the motion for summary disposition, Defendant presented evidence of the other motor vehicle accidents in 1999 in which he claimed a head injury and subsequent accidents in 2001 and 2004 in which Plaintiff sought treatment. (See **Attachment 4**, pp 14-15 and **Exs F and G of Attachment 4**.) Defendant also presented evidence of Plaintiff's drug abuse problems that started around 2005 and continued into 2012 including the treatment he sought for those addictions and the fact that the records did not note a 1996 injury. (*Id.* at pp 14-15 and see Exs H, I, M and N.) Defendant also presented evidence that Plaintiff suffered a head injury when he was attacked in prison on September 30, 2010. (*Id.* at pp 14-15 and see Ex L.) In addition, Defendant presented confirming evidence Plaintiff was diagnosed with bipolar disorder in 2005. (*Id.* at **Exhibit I to Attachment 4**, bate 000133, 000141.)

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To support its motion for summary disposition, Defendant presented the deposition testimony of Plaintiff's treating providers: Dr. Todd Best, Dr. Eugene Rubin and Dr. Ray Kamoo. These doctors began treating Plaintiff in 2012, or sixteen years after the 1996 accident. Plaintiff's counsel claimed he would rely on these doctor's to relate the condition to the accident. The deposition testimony revealed that they had no personal knowledge of Plaintiff's condition following the September 1996 motor vehicle accident, nor did they have any knowledge regarding what treatment he received between 1996 and when they began treating him over a decade later. (See **Attachment 4**, pp 11-13.)

It was revealed during the deposition that none of Plaintiff's treating physicians had any medical records between 1996 and 2012, with the exception of two partial records Dr. Best had obtained and provided to Dr. Rubin. Dr. Best and Dr. Rubin both testified that they never requested any of Plaintiff's prior records, including any prior medical records, prior educational records or prior employment records, with the exception of Dr. Best attempting to obtain an MRI from McLaren Macomb. (See **Attachment 21** – Dr. Best Dep Tran pp 8, 24, 25, 26, 27, 28, 39, 46, and 56 and **Attachment 22** – Dr. Rubin Dep Tra, pp 26-27, 32-33, 44, 45 and 46.) Dr. Best also testified that, while he had the discharge summary from Plaintiff's August 2012 admission for his drug overdose, which pre-dated his treatment of Plaintiff, he knew nothing more than that his treatment was for an Ambien overdose. He did not know who prescribed Ambien or why, and that he was admitted to the psychiatric ward for "behavioral health." (**Attachment 21**, p 26 & 29.) Dr. Best made no attempt to obtain any further records from the provider regarding Plaintiff's treatment mere months before he began treating Plaintiff. (*Id.*) Likewise, Dr. Rubin also testified he had little to know knowledge regarding Plaintiff's admission to St. John Hospital following the accident in 1996, including what Plaintiff's status was, if there were any neurological deficits seen during his admission, where he was discharged to and most importantly, what his diagnosis was immediately following the accident or

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what his prognosis was. (**Attachment 22**, pp. 41-42.) Dr. Rubin also could not testify to when any of Plaintiff's current alleged symptoms/deficiencies began. (*Id.* at 69.)

Dr. Best also testified that he was aware that Plaintiff had issues with marijuana, but did not know when he was using the same, how long he had been using, if he had been using any other drugs or if he had any substance abuse treatment between the date of the accident and when he began treating Plaintiff in 2012. (**Attachment 21**, pp. 29-30.) Dr. Best had no knowledge of any of the details of Plaintiff's incarceration, including the fight resulting in injury, only that, at some point in time, Plaintiff ended up in jail. (*Id.*)

Dr. Kamoo's deposition occurred on November 11, 2015. Dr. Kamoo did not have pre-accident records and only had a copy of the examination done by Dr. McMillan in 1999 and a single discharge note from StoneCrest in 2012. (See **Attachment 5** – Def's Supplemental Brief in Support of its MSD; and **Attachment 23** – Dr. Kamoo Dep Tran, pp 35-36.) Dr. Kamoo admitted that he had no idea if Plaintiff had any additional blows to the head, nor had he seen the police report or even the initial emergency room/hospital records. (**Attachment 23**, pp 31 & 76.) Dr. Kamoo stated that the only information he had regarding the 1996 accident was from Plaintiff, his mother and Ms. Fikany. (*Id.* at 31.) He never reviewed any of Plaintiff's pediatric records, nor had he reviewed any academic records, nor had he reviewed any employment records. (*Id.* at 34, 43-44, 59-60.) Dr. Kamoo had no knowledge regarding Plaintiff's criminal past. (*Id.* at 35.) Dr. Kamoo had no personal knowledge regarding whether Plaintiff had any behavioral problems, difficulties concentrating or basic problems following through with commands/compliance before or after 1996. (*Id.* at 39 & 78.)

In conclusion, Defendant's presented the deposition testimony of Plaintiff's providers at issue in the case that they had no knowledge about Plaintiff's life prior to 2012 and they could not provide reliable testimony on causation. Further, they did not know about Plaintiff's subsequent motor vehicle

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accidents causing injury, his non-motor vehicle injuries, his substance abuse and bipolar and schizophrenia diagnosis, Defendant argued that these were intervening events that severed any liability. (See Attachment 4.)

The trial court heard oral arguments on Defendant's motion on December 14, 2015. The court recognized that Defendant had a strong argument that there were intervening events. (Hearing Tran 12/14/15, 4:17-22.) That being said, the trial court found that the issue of whether the treating physicians from 2012 could nonetheless make a causal connection, despite Plaintiff's sworn admission that the 1996 injuries had resolved, was an issue for a *Daubert* hearing before summary disposition could be entertained. (*Id.* at 4:24- 6:2.)

2. Defendant's Motion to Strike Plaintiff's Treating Physicians from Providing Expert Testimony, or in the alternative, Request for a *Daubert* Hearing.

Thereafter, Defendant filed its Motion to Limit the Testimony of Treating Physicians and Medical Personnel, or in the alternative, Request for a *Daubert* Hearing. (**Attachment 6**.) In Defendant's Motion, it reviewed the testimony summarized in the foregoing account of Defendant's motion or summary disposition. In addition to the testimony about their lack of knowledge about Plaintiff's post-accident life, Defendant presented additional evidence that the treaters were fed false information about Plaintiff's pre-accident life and the treaters failed to obtain corroborating evidence as to what they were told was Plaintiff's pre-accident conditions. Instead, they admitted that such evidence was important to their opinions. They lacked the necessary foundation for expert testimony.

Again, Dr. Best testified that he had not reviewed any records that pre-dated the accident, nor did he attempt to obtain any additional records. He agreed he had no knowledge of Plaintiff's functioning prior to 2012. (**Attachment 21,** pp 8, 23-24, 25-26, 26-27, 27-29, 30, 39, 41-42, 72.) Dr. Best was not aware of Plaintiff's substance abuse problems but admitted that substance abuse can

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affect physical and mental abilities, and an individual's drive to achieve and be motivated, the same problems Plaintiff claims were caused by his alleged injuries. (*Id*. at 39)

Dr. Rubin also relied on Plaintiff's inaccurate reported history. Plaintiff and his family claimed that Plaintiff was doing exceptionally well at school prior to the accident and was in the gifted program. However, Plaintiff's school records revealed the opposite. Teachers commented on his inability to complete tasks, distractibility and disorganization before 1996. (See **Attachment 6, Ex F** – School records at 38, 39, 96, 98, 108 and 109.) In the semester, immediately prior to the motor vehicle accident, teachers reported that Plaintiff did not complete homework, needed more effort, did not use time wisely, and absences were affecting his work." (*Id.* at 38.) 1994-95 was more of the same, homework not done, needed more effort, test scores were failing, not using time wisely and absences were affecting performance. (*Id.* at 39.) Plaintiff was not demonstrating "honor roll" work, rather in the spring of 1996, he received one fail, two (2) D's and one (1) D-. (*Id.* at 42.) Interestingly, after the accident, in 1999 and 2000, his teachers report him to be a "pleasure to have in class, enthusiastic and motivated". (*Id.* at 2 & 17.) Dr. Rubin admitted knowing that these impulse control problems began prior to the accident would be "important to know". (**Attachment 22,** p 32.)

Likewise, the basis for Dr. Kamoo's opinion that Plaintiff never received any intervention or treatment after the 1996 accident until 2012 was based on Plaintiff's and Plaintiff's mother's report. The doctor's opinion that Plaintiff had attention problems and did poorly in school after the accident was based on the report from Plaintiff that he did not have these problems prior. Likewise, Dr. Kamoo, while claiming the 1996 accident caused Plaintiff to have a mood-disorder, was unaware that Plaintiff had been diagnosed with bipolar disorder before Kamoo's involvement. The alleged foundational support for his opinions was based on Plaintiff's report, not corroborating evidence to support his opinion. (**Attachment 23**, p 27-28, 30-31, 34-35, 38-40, 42, 43-44, 58, 59-60, 76-77, 79.) As will be

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more fully outlined in the Argument, the deposition testimony clearly showed that these witnesses lacked the requisite knowledge to provide expert testimony.

The trial court heard oral arguments on June 6, 2016. At oral argument, Plaintiff's counsel argued that the foundational basis for the treating personnel's opinions was a 1999 report authored by Dr. McMillan. Defense counsel explained that this was not an adequate basis given their total lack of knowledge as to what occurred prior to 1999 and the thirteen years after that 1999 report. (Hearing Tran 6/6/16, 4:17-5:25; 6:20-7:25.) The trial court initially held that Defendant was entitled to a pre-trial *Daubert* hearing. (*Id.* at 8:10-15; 9:12-13.) The court then reversed itself. The judge decided that because there was a brain injury in 1999 based on Dr. McMillan's report and found the other doctors could testify as experts. (*Id*. at 10:16- 12:7.)

H. Relevant trial testimony.

1. Brenda Wier – Plaintiff's mother.

On direct exam, Ms. Wier testified that she did not know what benefits Plaintiff was entitled to after the accident and did not know how to make a claim in the years of silence between Plaintiff and Allstate. However, she did recall a conversation from 1999 in which she was told that "his closed-head injury will be covered for the rest of his life." (Trial Tran 7/21/16, 155:19-23; 156:24- 157:6.) From 1999 until 2012, Mrs. Wier testified that she made one call to Allstate that was unreturned and sent a letter of which she retained a copy. The copy was never produced. (*Id.* 170:6.)

While Mrs. Wier testified at length regarding Plaintiff's post-accident aggression, memory issues and behavioral problems that she claimed were caused by the 1996 head injury. The testimony also revealed pre-accident educational and behavioral issues in contradiction to what she told Plaintiff's 2012 medical providers. While she testified he was in the gifted program at school before the accident, when asked about his pre-accident report cards, she claimed she did not recall the fact

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that his teachers were reporting that he had difficulty with organization before the accident. She also did not recall reports that he was failing to turn in assignments before the accident, which was inconsistent with the claim he was in the gifted problem (*Id*. at 197:7-9; 174:7-19.)

Mrs. Wier did agree on cross-examination that during the years following the accident, the years they had no contact with Allstate, Plaintiff had perfect attendance, liked going to school, was engaged in the work and had no behavioral problems at school. (*Id*. at 175:8- 176:7.)[1] In 9th and 12th grades, Plaintiff changed schools because his parent moved. Mrs. Wier testified that Plaintiff had behavioral problems during those times. (*Id*. at 176:20-177:2.) She also agreed that the behavioral problems were not documented or mentioned in his school or medical records. (*Id*. at 92:16-25.)

Later in his life, Plaintiff began to experience problems with drugs, alcohol and had physical violence. Plaintiff started using alcohol at eighteen years old. (*Id*. at 143:4-25.) She also found marijuana and crack cocaine in his car. (*Id*. at 144;10-21.) In 2006, he received treatment for his substance abuse problems. (*Id*. at 203:6-13.) Around the time of his drug use, he was arrested for choking his mother. (*Id.* at 203:23- 204:2.) She also testified that she knew of two robberies Plaintiff committed and that he served thirty days in jail. He was let out on bond but then went back to serve a six-month sentence. (*Id*. at 140:1- 141:13.) There was an altercation while Plaintiff was in prison and he was injured. (*Id.* at 17-19.) While Mrs. Wier claimed such acts of aggression and impulsivity had been going on since the accident, she did not have an answer as to why she did not report these alleged issues from 1997-2002 to anyone but by 2006 and 2007 she was reporting it to his therapists who were treating him for his drug problems. (*Id.* at 204:14-20.) In 2012, Plaintiff overdosed on Ambien. It was after the overdose that Plaintiff's family contacted Allison Fikany. (*Id*. at 147:1-9.)[2]

[1] See also **Attachment 20** – Plaintiff's schools records, Defendant's Trial Exhibit BB.

[2] Mrs. Wier was the only alleged attendant care provider that Plaintiff called at trial. The attendant care testimony will be addressed in the next section.

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2. Allison Fikany – case manager

Allison Fikany was Plaintiff's case manager. She met with Plaintiff, Plaintiff's mother and his sister on October 10, 2012 for the first time. (Trial Tran 7/19/16, 15:14-19.) Plaintiff's family informed her that he had been in a coma for ten days following the 1996 accident. She later learned that was not accurate. (*Id.* at 18:13- 19:2.) Ms. Fikany referred Plaintiff to Dr. Todd Best. (*Id.* at 23:21- 24:1.) Ms. Fikany was told by Plaintiff that his home environment was very "stressful" and "argumentative" and Plaintiff's mother would provoke him. (*Id.* at 32:3-24.) Ms. Fikany purposefully withheld this information from Allstate. (*Id.* at 86:25- 87:4.)

Ms. Fikany related Plaintiff's injuries to the motor vehicle accident of 1996 based on Dr. McMillan's 1999 record, the records from Dr. Best, the records from Dr. Rubin and the neuropsychological evaluation by Dr. Campbell. (*Id.* at 45:11-22.) That being said, she opined that the "issues" Plaintiff has are behavioral, not cognitive. (*Id.* at 46:22-47:2.) On cross-examination she admitted that it would be extremely important to know what treatment Plaintiff received after he was discharged from the hospital in 1996 in order to have any opinion whatsoever about the course of Plaintiff's brain injury. (*Id.* at 68:6 – 69:4.)

3. Plaintiff's trial testimony.

Plaintiff claimed that his behavioral issues started slowly after the accident. (Trial Tran 7/22/16, 27:7- 20.) However, the testimony also revealed that he had believed that such condition was resolved at least by 2000. Plaintiff acknowledged that he testified in 2000 that "I have no problems" related to an insuring arising out of the 1996 accident. Notably, he was claiming a head injury as a result of the 1999 accident. (*Id.* at 85-86.)

Regarding the years following the accident, Plaintiff obtained his driver's license, graduated from high school, worked at several jobs. (*Id.* at 21:6-8; 40:20-25.) Plaintiff started working when he

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was just shy of 15 years old. While Plaintiff testified at trial that he was fired from every job because he would get in fights and also due to problems with drinking on the job, he admitted on cross examination that he did not give these as the reasons for leaving the various jobs when asked at his deposition. (*Id.* at 78-80.) Also, while he and his mother described his job at a local deli as being a one where a family friend took sympathy on him letting him feel important, prior to the trial, he had reported to his providers and therapists that he had been employed at the deli for many years working 25 hours per week. (*Id.* at 99-100.) In addition, Plaintiff had at least two serious relationships, one being after he obtained treatment for his substance abuse problems (*Id.* at 28:18-25; 94.) These facts were not disclosed to his physicians.

Plaintiff explained to the jury that he had a significant history of drug abuse and criminal behavior. He began using alcohol and drugs when he was 18 years old. (*Id*. at 48:6-14.) Prior to his drug use, he agreed that the records showed he was cooperative without signs of a head injury. (*Id*. at 92-94.) During the time he was using drugs, he committed robberies. He did some time in prison. After Plaintiff was released from prison, it was recommended that he go to an in-patient facility for drug rehabilitation. He declined stating he had to take care of his parents. Shortly thereafter he began using again. (*Id*. at 96-97.) He did another stint in prison and was back in rehab against in 2010 where he met a girlfriend. (*Id*. at 97-98.) When he was in jail the second time, he was punched in the face by another inmate and the record reflected a diagnosis of multisystem trauma, closed head injury and fractured ankle. (*Id*. at 98.) Plaintiff also admitted to being diagnosed with two mental disorders. He was diagnosed with bipolar disorder in 2005. (*Id*. at 91.) In 2012, when Plaintiff continued to treat for his substance abuse issues at Macomb County Community Mental Health, he was diagnosed with schizoaffective disorder. (*Id*. at 98-99.) This testimony is important because it confirms Defendant's position in its motion for summary disposition and motion to limit the treating that the treating

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physicians did not have the proper foundational information to opine on the cause of Plaintiff's alleged condition. They were fed inaccurate information during their examinations and were not aware of the complete relevant history.

4. Dr. McMillan – Plaintiff's alleged expert physician.

Plaintiff retained Dr. Michael McMillan to provide allegedly expert testimony. (Trial Tran 7/13/16, 9.) Dr. McMillan, Ph.D. is a licensed psychologist. (**Attachment 7** - De Bene Esse Tran McMillan, 7:15-23.) In preparation for his testimony on behalf of Plaintiff, he reviewed documents provided to him by Plaintiff's counsel, including the rehabilitation notes from Dr. Best's team, Dr. Kamoo's report, Dr. Hank's report and other records selected by counsel. (*Id*. at 13:13- 14:6.)

Dr. McMillan was one of the physicians at St. John Hospital that examined Plaintiff following the 1996 motor vehicle accident. The doctor did not have a complete copy of the chart from 1996 but reviewed his report that was dated September 12, 1996 that Plaintiff's counsel provided him from Defendant's claim file. (*Id*. at 14:7-13; 23:15- 24:15.) At the time of the examination in 1996, Plaintiff's mother had relayed that Plaintiff was a clumsy, uncoordinated kid that had a lot of motor problems and had been diagnosed with a mild form of cerebral palsy as a child. It was noted that Plaintiff had been placed in a special education program as a kindergartner. (*Id*. at 14:2-17.) At the time of the doctor's first examination, he also took the time to discover any family issues that may be occurring because as other tragedy is relevant to his diagnosis. He noted that at the time of the accident, Plaintiff's family was having a bad year with the loss of a grandmother, an uncle and an aunt who was killed the day of his accident. (*Id*. at 16:4-20.)

At the time of Plaintiff's initial examination, Plaintiff had some problems with attention, concentration and mental flexibility. (*Id.* at 32:13-25.) Plaintiff did well on the cognitive tests. (*Id.* at 32:13-16.) Dr. McMillan did not see Plaintiff again until June 14, 1999 when he was approached to

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conduct a neuropsychological test, the report was addressed to Allstate. (*Id.* at 37:18- 39:9.) Dr. McMillan did not treat Plaintiff at that time but was asked to conduct an examination by Allstate. (*Id.* at 55:4-7; 67:1-18.) Dr. McMillan reported in 1999 that Plaintiff had significant psychological problems with moodiness. The doctor recommended he see a physician for possible use of psychotropic medications. (*Id*. at 52:12-23.) Dr. McMillan never saw Plaintiff again. (*Id.* at 52:5-13; 55:21-25; 73:17-20.)

On cross-examination, it was revealed that the reported behavioral problems from 1999 were not supported by the records. For example, while the doctor found that the head injury led to problems at school and Plaintiff being kicked out of school, he did not have any records to show Plaintiff was actually kicked out. (*Id.* at 69:22-24.) In fact, the testimony would reveal that Plaintiff was never kicked out of school. Importantly, the doctor agreed that he never received any school records and those would be important for him to review. (*Id*. at 70:3-7; and Trial Tran 7/21/16, 176:20-177:2.) While Plaintiff's mother reported in 1999 that he had been in the gifted program, the doctor did not have records to support that. Further, in the 1999 report Dr. McMillan recommended a thorough evaluation of Plaintiff's intellect needed to be performed. (*Id.* at 70:18- 71:8.) Dr. McMillan agreed that the reported history must be accurate in order to make a proper determination on the causation of an alleged condition. (*Id.* at 75:21-24.) Dr. McMillan agreed that if the history he was provided was not accurate, his thoughts and impressions could be wrong. (*Id*. at 74:25- 75:6; 80:23-2; 82:12- 84:12.) This is important because the trial court allowed Plaintiff to rely on this 1999 hearsay report that was not accurate. (Hearing Tran 6/6/16, 4:17-5:25; 6:20-7:25; 10:16- 12:7.)

5. Dr. Todd Best – Plaintiff's treating physician.

Plaintiff presented the trial deposition testimony of Dr. Todd Best. (Trial Tran 7/15/16, 238:15-16, continued on Trial Tran 7/19/16, 4:9-12.) Dr. Best specializes in physical medicine and

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rehabilitation. (**Attachment 8** - De Bene Esse Tran Dr. Best, 5:10-12.) Dr. Best first saw Plaintiff on December 3, 2012 and at that time he took a medical history from Plaintiff. Plaintiff reported that he had been in a coma for about five days in 1996 as a result of the motor vehicle accident. (*Id*. at 12:1-22.) Plaintiff told the doctor that almost immediately after the accident he was a completely different person; he went from being happy to antisocial and obsessed with death. (*Id.* at 12:3-11.) Plaintiff also told the doctor that he was unable to hold down a job due to his behavioral and drug issues. (*Id*. 12:12-13:8; 14:1-3.) Dr. Best's assessment was that Plaintiff had a brain injury, was suffering from migraines, and had an adjustment disorder with depressed and anxious mood, as well as chronic back pain following the accident. (*Id.* at 16:23- 17:7.)

Dr. Best called Plaintiff's diagnosis of bipolar disorder "absurd," Dr. Best believed the diagnosis of bipolar was from Defendant's expert, not several treating physicians. Regarding bipolar disorder, Dr. Best testified it is a genetic disorder characterized by behavioral swings and it is treated with mood stabilizing drugs. Dr. Best explained that Plaintiff is "emotionally liable" because he is paranoid and overreacts. (*Id.* at 45:15- 46:14.) While Dr. Best stated that bipolar disorder was genetic, he agreed he did not know anything about Plaintiff's family history and never asked. (*Id*. at 70:2-9.) Dr. Best confirmed that he was not aware of the schizophrenia diagnosis. (*Id.* at 48:16-22.)

In fact, it was not until Plaintiff's counsel provided the doctor with additional records that he was made aware of Plaintiff's documented medical history. (*Id.* at 50:1-51:23.) At the time of Dr. Best's discovery deposition testimony, he had only the 1999 IME report from Dr. McMillan and the 2012 discharge from his psych admission following his Ambien overdose. (*Id.* at 55:1-7.) Dr. Best agreed that in order to state, with medical certainty, that a condition is caused by a particular event one would need an accurate history. (*Id.* at 53:11-14.) Further, while Dr. Best gave a list of reasons he

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believed Plaintiff was having sequelae from the 1996 injury, he also admitted he could not point to one record that supported the allegations. (*Id.* at 73:3-75:15; 77:25- 79:2.)

6. Dr. Ray Kamoo – treating doctor.

Dr. Ray Kamoo holds his Ph.D. in clinical psychology. (Trial Tran 7/21/16, 5:3.) Plaintiff was referred to Dr. Kamoo by his case manager, Allison Fikany. (*Id.* at 7:10-24.) Dr. Kamoo met with Plaintiff on four different days to conduct the test; the first on February 4, 2013 and the last time on April 17, 2013. (*Id.* at 10:11-22.) Dr. Kamoo explained that the test results revealed that Plaintiff was not suffering from any cognitive deficits or intellectual deficits. Dr. Kamoo found that Plaintiff had "adapted relatively well" after his 1996 accident. (*Id*. at 13:1-12.) Dr. Kamoo had concerns about Plaintiff's personality testing, which demonstrated issues with depression, anxiety, impulsivity and suicidal thinking. (*Id*. at 13:13-17.) Dr. Kamoo recommended that Plaintiff be evaluated by a psychiatrist. (*Id.* at 14:21- 15:14.)

Dr. Kamoo admitted that at the time of his examination of Plaintiff, and when he was deposed, that he opined that the 1996 injury was a "mild brain injury." (*Id*. at 15:15-21.) He changed his mind after he reviewed "other things", which led him to change his opinion that the injury was moderate to severe. (*Id*. at 15:17-25.) Dr. Kamoo was provided with additional records after his deposition and immediately prior to trial. (*Id*.at 54:12-16l 55:16- 56:8.)

The doctor acknowledged that both Dr. McMillan and Dr. Hanks were critical of his report. He did not disagree with their criticism. He recognized that his report stated that Plaintiff had been in a coma for about ten days based on the family report, which was not true. (*Id*. at 20:21- 21:8.) Dr. Kamoo admitted that he would have liked to have Plaintiff's pre-accident school records. (*Id*. at 22:15-22.) Following Dr. Kamoo's deposition, the doctor learned that Plaintiff had additional motor vehicle accidents with reported injuries, a head injury, assaults by drug dealers and problems with drugs and

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alcohol. The doctor agreed that drugs and alcohol can cause aggression, anxiety and depression. Yet, learning that Plaintiff had problems with drugs, alcohol and other injuries did not change his opinion (*Id*. at 69:7- 72:25.)

7. Dr. Robins Hanks – Defendant's expert.

Dr. Robin Hanks is a licensed psychologist with a focus on traumatic brain injuries. Dr. Hanks was retained by Allstate to examine Plaintiff and review his records because she regularly evaluates and treats people with traumatic brain injuries, emotional disturbances, cognitive disorders, and mental health issues (Trial Tran 7/22/16, 113; 115; 120.)

Dr. Hanks explained that the proper post-accident diagnosis for Plaintiff's alleged head injury was a "mild complicated traumatic brain injury." (*Id.* at 127.) She disagreed with Dr. Best's and Dr. Rubin's assessment of a severe brain injury because Plaintiff did not meet the criteria for such a diagnosis, which includes loss of consciousness due to trauma, not medical intervention, for greater than 38 hours. (*Id.* at 126; 128.) The doctor also explained that people can recover from brain injuries without treatment. (*Id.* at 129.) Further, having a traumatic brain injury does not mean that one will be diagnosed with a mental illness later in life. (*Id.* at 130.) There is also no supported link between brain injuries and criminal behavior. (*Id.* at 134.) Here, the robberies he described had nothing to due to impulsive behavior as Plaintiff told her he did it because he was on drugs and needed money. His actions showed forethought on carrying out the robbery plan. (*Id.* at 134-135.)

At the time of her examination of Plaintiff, he related his history of being diagnosed with cerebral palsy when he was young, his memory of the accident, his academic history, his criminal history and his mental health history. (*Id.* at 130.) The pre-accident academic history that Plaintiff reported was being in the gifted program before the accident and then receiving D's and E's after the accident needing special education services. (*Id.* at 131.) Dr. Hanks had an opportunity to review

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Plaintiff's academic records, which did not reflect the stories or history he told. His records showed a struggling student academically and personally prior to the accident. (*Id.* at 132.) Dr. Hanks also reviewed Plaintiff's medical records. From the records, she discovered discrepancies in what Plaintiff reported and what the records actually supported. (*Id.* at 136.) The hospital records from the date of the accident documented Plaintiff being alert and oriented to person, place and time. He was not in a coma like they reported to his medical providers in 2012. (*Id.* at 137-138.)

During her time testing Plaintiff, he was pleasant, personal and friendly. He demonstrated a good work pace. (*Id.* at 142-143.) As for the results of the test, "[f]rom a cognitive standpoint he looked great." (*Id.* at 143.) There were no problems with memory, problem solving, reasoning or judgment. (*Id.* at 143.) Overall, Dr. Hanks found that there was no evidence of a brain injury at the time of her examination of Plaintiff. He was not suffering from any residual effects from the 1996 head injury and did not require attendant care as a result of an injury from the 1996 motor vehicle accident. Plaintiff did not require any additional treatment for an injury from the 1996 motor vehicle accident. (*Id.* at 146-147.) Instead, she found a person with a significant history of substance abuse with inappropriate behaviors in connection with the abuse. (*Id.* at 146) She opined that he would benefit from psychotherapy for his longstanding substance abuse, paranoid ideation, social isolation and social anxiety. (*Id.* at 147-148.)[3]

8. Dr. Jeffrey Kezlarian – Defendant's expert.

Dr. Jeffrey Kezlarian is a psychiatrist and was retained by Defendant because he regularly diagnosis and treats people with traumatic brain injuries, as well as bipolar disorder. (**Attachment 10** – De Bene Esse Tran Dr. Kezlarian 4:21-25l 7:6- 8:1.) On July 2, 2015, the doctor performed an examination of Plaintiff and also reviewed Plaintiff's medical records. (*Id.* at 9:5-15.) Dr. Kezlarian

[3] These opinions were consistent with her IME reports. (See **Attachment 9**.)

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opined that Plaintiff's current psychological symptoms did not arise out of the 1996 motor vehicle accident. (*Id.* at 10:2-8.)

Plaintiff reported to the doctor that he was in a coma as a result of the 1996 accident. (*Id.* at 14:5-15.) Unlike Plaintiff's treating doctors who accepted this story as true when they began treating him, Dr. Kezlarian had the documents to show that this was not accurate. (*Id.* at 15:1-10.) It was also noteworthy to the doctor that when Plaintiff was relating his alleged impulse control issue, Plaintiff did not provide any history related to this issue from 1996 until about 2004 or 2005 when he assaulted his mother and engaged in other criminal behavior. (*Id.* at 15:11-24.) This eight year gab, or eight years' worth of time without incidents, was significant to Dr. Kezlarian because the issues arose so long after the head injury that they were too attenuated. (*Id.* at 16:14- 17:1.)

Dr. Kezlarian also considered Plaintiff's psychological diagnoses and his substance abuse problems. Dr. Kezlarian explained that it is genetic and there were medical records noting that Plaintiff had a family history of bipolar disorder. (*Id.* at 28:13-26.) The doctor explained that substance abuse in the mentally ill population is so common that there is a name for it – dual diagnosis. People with disorders such as bipolar and schizophrenia commonly abuse drugs in a way to self-medicate. This also plays into impulsive behavior issues further exacerbating the situation. (*Id.* at 17:11- 18:14.) It was significant to the doctor that Plaintiff's behavioral problems emerged at the same time he was abusing drugs and alcohol on a daily basis. (*Id.* at 26:6-18.)

Dr. Kezlarian opined that Plaintiff's primary diagnosis is bipolar disorder and multiple drug addictions, which the doctor explained were in no way related to the 1996 accident or the 1996 head injury that had resolved within a year or two of the accident. (*Id.* at 34:10- 36:25.) As such, Dr. Kezlarian found that Plaintiff did not require any care for an injury arising out of the accident. (*Id.* at 37:3- 38:6; see also **Attachment 11** – Dr. Kezlarian's IME report.)

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I. Relevant trial proceedings.

1. The court struck Defendant's bodily injury claim file after it was used by Plaintiff in his case-in-chief and after it was admitted without objection.

Plaintiff's counsel, during his case-in-chief, elicited testimony about Defendant's claim file regarding Plaintiff's third-party, bodily injury (B.I.) claim. Yet, when Defendant sought to use the same evidence, it was stricken and prohibited by the trial court. Defense counsel explained that Plaintiff's counsel had used the file during his direct examination of Defendant's claim adjuster, Toni Bradford, and Defendant wanted to use it for the examination of Mrs. Wier. (Trial Tran 7/21/16, 207:12- 208:14.) The judge did not recall the testimony and ordered that it had "absolutely no relevance." (*Id*. at 211:11-21; 213:14-16.) Even though the B.I. claim file was accepted and admitted into evidence, with no objection by Plaintiff's counsel, the court prohibited Defense counsel from using it but allowed any testimony elicited by Plaintiff's counsel regarding the BI file to remain as evidence. (Trial Tran 7/21/16, 217:12-25.)

During Plaintiff's counsel's direct examination of Toni Bradford, counsel questioned her on claim notes generated by the B.I. adjuster had and had her read the notes into evidence. For example, Plaintiff's counsel directed Ms. Bradford to a July 9, 1997 claim note from Greg Bonnell, the bodily injury adjuster. Plaintiff's counsel knew this note was for Plaintiff's bodily injury. He argued that the B.I. notes were relevant in adjusting the first party claim "because they're a history of what's been going on…" (*Id.* at 125:1-126"9.) Counsel went on to elicit testimony form Ms. Bradford using Mr. Bonnell's B.I. note regarding the continued problems and treatment Plaintiff was experiencing in 1997 and Mr. Bonnell's opinion that the complaints of depression were related to the accident. (*Id*. at 128:18-25; 129:2-130:10; 133:1- 136; 145:21- 147:10.)

Conversely, when Defense counsel attempted to use the B.I. notes and claim file during the questioning of Mrs. Wier, the court ordered that all B.I. claim notes were to be stricken because the

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B.I. claim was in no way relevant. (Trial Tran 7/21/16, 205:6- 206:15; 207:12-19.) Even though Plaintiff's counsel elicited testimony that the B.I. claim file could be used to clarify the injury for the PIP claim and even though the parties were using medical records from the B.I. claim file, (Trial Tran 7/15/16, 125:1-126:9), the judge ordered that the B.I. claim file could no longer be used, it was to be precluded from that point on. (Trial Tran 7/21/16, 213:14-16; 214:15-24.)

2. The court struck evidence of Plaintiff's other claims for no-fault benefits.

Defendant sought to introduce evidence it obtained from Auto Club Insurance Association (AAA) and Progressive Insurance Company regarding Plaintiff's claims for first-party, no-fault benefits for injuries Plaintiff suffered in motor vehicle accidents that occurred after the 1996 accident. (Trial Tran 7/19/16, 89:23-90:23.) The court ruled that the claim files were not to be submitted as evidence. (*Id*. at 95:10-14.) Defense counsel explained that these files were relevant for two reasons. First, the AAA claim file included evidence that Plaintiff claimed he injured his head in a 1999 motor vehicle accident. Second, both claims files were relevant to impeach Plaintiff's and his mother's testimony that the reason no claims were made to Allstate from 1999 until 2012 was because they did not know Plaintiff may still be entitled to benefits and they did not know how to make a claim. (Trial Tran 7/19/16, 90:9-23.) Nonetheless, the court ruled the files were not admissible. It is Defendant's position that this was an abuse of discretion.

3. Defendant's motion for directed verdict on Plaintiff's attendant care claim.

i. Trial Testimony

At the conclusion of the trial, Plaintiff's counsel asked the jury to award Plaintiff $245,385.00 in attendant care benefits, which amounted to a rate of $15.00 an hour for 16 hours a day. (Trial Tran 7/27/16, 36: 3-8.) Counsel claimed that this number was supported by the affidavits contained in an

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exhibit that would be available for the jury to review. (*Id.*) The affidavits were not admitted and the testimony did not support the claim.

The only witness presented by Plaintiff at trial who claimed he performed attendant care was Plaintiff's mother, Mrs. Wier. On direct examination, Mrs. Wier testified that she reminds Plaintiff to take his medication and reminds him to shower. (Trial Tran 7/21/16, 161:17- 162:20.) She did not articulate any other attendant care services that were provided. Instead, she explained that a typical day for her and Plaintiff goes as follows:

> A. Well, Right now we'll get him up -- I'll get him up, if I'm lucky, by 11:00. I get him showered. I tell him to get his shower. And my grandson, we go pick up my grandson. I make sure he takes his pill. We pick up my grandson. We will typically go Pokemon hunting and spend a couple of hours with that. Then we go back to our house and my grandson and him will play video games and they'll go outside and they'll play games outside, like toss games and they ride their -- or they play their cars and stuff like that. And then we'll have dinner. And a lot of times he'll help me prepare dinner. He likes to cook. And then in the evening he usually goes to his room. Sometimes we won't have dinner till 9:00, 10:00, when his brother get home. We have family dinner every night. And then he'll go to his room and I make sure he's in bed before I go to bed. (*Id.* 164:25- 165:21.)

Mrs. Wier went on to testify that Plaintiff promised to pay her for these services if they were successful at trial. (*Id.* at 166:2-4.) Regarding the affidavits submitted to Allstate, Mrs. Wier admitted that they were given to her by the first attorney and that she signed each form. (*Id*. at 166:5-7.) She did not testify to the services noted in the form, nor did she confirm that she performed each service. She did not explain why each form was executed on the same day.

On cross examination, Mrs. Wier admitted that there are many days that Plaintiff does not take his medication, medication she allegedly was reminding him to take.(*Id*. at 198:9-20.) Further, prior to counsel providing her with the affidavits, she never documented her alleged attendant care services. Moreover, she agreed that there was no way one could tell from the affidavits who performed what service on any particular day. (*Id*. at 199:7-25.) While Mrs. Wier claimed at trial that she was not

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aware that she could be paid for attendant care, she was also confronted with evidence that she was in fact paid for attendant care service back in 1996. (*Id.* at 201:25- 202:14.)

ii. Motion for directed verdict on attendant care

Defense counsel moved for directed verdict on the attendant care claim on the grounds that it was based on pure speculation. (Trial Tran 7/26/15, 136:7-18.) First, Mrs. Wier's testimony suggested a range was between 16-24 hours. (Trial Tran 7/21/15, 200:2-15; Trial Tran 7/26/15, 136:7-15.) Secondly, Mrs. Wier testified that sometimes her son, Adam, would perform the care and sometimes her husband would. However, neither were called to testify at trial. (*Id.*) Notably, the affidavits that allegedly documented attendant care services were not admitted to evidence. (Trial Tran 7/26/15, 137:19-25.) While the trial judge theorized that Mrs. Wier testified that she performed an average of 16 hours a day, taking into account Plaintiff's appointment, that was not precisely the testimony, nor were there sufficient documents for the jury to consider in calculating a rate because even Plaintiff's daily medical treatment logs were not submitted. (*Id.* 138:1- 189:4.) Mrs. Wier had testified that she sleeps with one eye open. The trial court found that this was enough to support a 24-hour claim, less time he was at his appointments. (*Id.* 141:14-20.)

4. The trial court denied Defendant's request for a special verdict form.

Defendant requested a slightly altered verdict form from of M Civ JI 67.01. M Civ JI 67.01 begins with the following two questions: (1) did the plaintiff sustain an accidental bodily injury? And, if yes (2) did the plaintiff's accidental bodily injury arise out of the ownership, operation? In this case, these two questions did not accurately reflect the dispute between the parties. (Trial Tran 7/26/16, 106:1- 108:7.) Defendant's proposed the following as the first question for the jury: (1) did Plaintiff sustain an accidental bodily injury arising out of the September 9, 1996 motor vehicle accident for which benefits remain due and owing? (**Attachment 12** - proposed Verdict Form.)

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The trial court judge acknowledged that the question of whether Plaintiff incurred allowable expenses after the cutoff date for the care of an injury arising out of the accident was "exactly why we're here." (Trial Tran 7/26/16, 108:21-25.) However, the court decided that it would use the standard form and mark the first two questions as "yes", thereby informing the jury that Plaintiff sustained an accidental injury and it arose out of the accident. The third question would then be to direct it to award benefits if benefits were incurred related to the injury. Defendant argued this was confusing and prejudicial. Notably, it was here that the judge acknowledged that there were many appealable issues in this case. (*Id.* at 109:14- 110:22)

ARGUMENT

I. DEFENDANT WAS ENTITLED TO SUMMARY DISPOSITION AS PLAINTIFF COULD NOT ESTABLISH A PRIMA FACIE CASE, SPECIFICALLY THE CAUSAL CONNECTION BETWEEN THE 1996 ACCIDENT AND HIS PHYSICAL, MENTAL AND BEHAVIORAL PRESENTATION IN 2012 AND BEYOND.

A. Standard of review.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The Court has recently affirmed:

> Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Lowrey v LMPS & LMPJ, Inc*., 500 Mich 1, 7; 890 NW2d 344 (2016)(Internal citations omitted).]

In the case at hand, Defendant met its burden for summary disposition and Plaintiff failed to present anything but unsupported allegations by counsel in response.

B. Argument.

At the time of the hearing on Defendant's Motion for Summary Disposition, the Plaintiff failed to present evidence to create a genuine issue of material fact. Plaintiff failed to establish a causal

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connection between the 1996 accident and Plaintiff's condition in 2012, requiring judgment in favor of Allstate. Plaintiff's purported experts failed to have any knowledge or understanding of the Plaintiff from 1996-2012, failed to be aware of the numerous intervening events that cut liability to Allstate, and failed to consider the effects of these other incidents and behaviors to Plaintiff's current presentation. The court's explanation that a Daubert Hearing was necessary prior to summary disposition is and was a misstatement of the law. Once Defendant's established that Plaintiff could not meet his burden, and Plaintiff failed to refute with admissible evidence, Summary Disposition should have been granted in favor of Defendant.

At the time of the oral argument, the trial court stated that a Daubert hearing would be proper, in light of the Plaintiff's expert's not having the information regarding the intervening events. (Hearing Tran 12/14/15, 4:24- 6:2.) The court mistakenly believed that there was a factual question. The problem is that the court's finding is reversible error as the trial court failed to perform its gatekeeping function because it failed to recognize that the testimony of the treating physicians confirmed that they did not have the necessary foundation to support Plaintiff's theory of caution. Had the court performed its requisite gatekeeping role, the causation testimony would have been stricken and summary disposition entered in favor of Allstate. The experts' opinions were not reliable as they fail to be supported by the facts of the case and the court should have stricken them and granted summary disposition in favor of Allstate. *Daubert; Amerello v Monsanto Corp*, 186 Mich app 324 (1990), *Nelson v American Sterilizer*, 223 Mich App 485 (1997); *Elher v Misra et al* 499 Mich 11 (2016); *Nelson v. Tennessee Gas Pipeline Co*, 243 F. 3d 244 (2001).

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1. **At the time the Motion for Summary Disposition was before the court, Plaintiff failed to establish the necessary causal connection between the 1996 accident and Plaintiffs condition in 2012/2013 and beyond**.

Each of Plaintiff's purported experts admitted that they did not have any factual foundation to support any opinions regarding causation of the Plaintiff's current condition and the medical vehicle accident of 1996. Plaintiff's only response to the Motion was that the doctors had personal knowledge of the Plaintiff after 2012 and they had one report from 1999 by a neuropsychologist. (**Attachment 13** - Plaintiff's Answer to Motion for Summary Disposition, p 3.)[4] In fact, Plaintiff did not even deny the vast majority of the allegations presented in support of Defendant's Motion for Summary Disposition, rather "neither admitted nor denied" (*Id.* at ¶¶ 15, 16, 18, 19, 20, 21 and 34.) Plaintiff also admitted that he sustained injuries in the "unrelated events after the 1996 accident, but these injuries events do not relieve Defendant of its responsibility…" (*Id.* at ¶ 32.) This was a misstatement of the law as explained below. Plaintiff further admitted that he testified on May 3, 2000 that he recovered from the 1996 accident. (*Id.* at ¶ 33.)

The basis for the "experts" testimony was fully explored at the time of their discovery depositions and fully briefed by the parties in support of the Motion for Summary Disposition. Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible. *Elher,* 499 Mich at 13. This is what the court did in the case at hand. The trial court was required to ensure that the underlying data and methodology utilized by the expert was reliable. *Id.* In the matter at hand, the trial court failed.

The trial court simply took the testimony of the Plaintiff's doctors as true and it failed to consider the lack of foundation for the speculative opinions on causation. The court, admitted the

[4] As explained in Dr. McMillan's trial testimony, his 1999 report was based on statements from Plaintiff's family. Statements that Defendant has shown to be inaccurate. This hearsay report did not support Plaintiff's burden to overcome summary disposition.

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Defendant's motion was "strong", acknowledged the experts did not have necessary evidence, records or knowledge regarding the Plaintiff. (Hearing Tran 12/14/15, 4:17-22.)[5] Then, inexplicably, finds the baseless opinions to be a "factual question." As the opinions do not come close to meeting the requirement of MRE 702, the speculative, baseless opinions, were not admissible evidence to defeat the Defendant's Motion for Summary Disposition. Had the trial court performed its essential gate keeping function, it would have had no choice but to grant summary disposition in favor of Allstate, as Plaintiff could not establish the necessary causal connection between an accident in 1996, documented recovery, then new symptoms in 2012/13.

i. Intervening events terminate liability to Allstate from the 1996 accident.

By all accounts Plaintiff recovered from any injuries sustained in the 1996 accident by 2000. In fact, Plaintiff admitted the he had recovered and stopped treating at the time of his deposition in May 2000. Plaintiff ceased submitting claims for no fault benefits to Allstate. Thereafter, he is involved in a significant car accident in July 1999, followed by at least 3 more car crashes. (See Attachment 4, pp 14-15 and **Attachment 4, Exs F and G**.) In 2005 Plaintiff began his use and abuse of street drugs and alcohol, which led to trouble with the law and incarcerations. (See **Attachment 4, Ex H, I and J**.) In 2010, Plaintiff testified before the Honorable David Viviano. At that time, Plaintiff explained that the only reason Plaintiff was not working was an ankle injury (that occurred while in prison). There was no mention of any car accidents, much less an accident from 1996. (*See* **Attachment 4, Ex R** - Transcripts from December 20, 2010 hearing.)

[5] As outlined in the facts section, the trial testimony of Plaintiff and his family revealed that their account of Plaintiff's pre-accident life was not accurate and these inaccuracies were reported to and relied on by the treating physicians. Plaintiff's significant substance abuse history, as well as diagnoses of bipolar disorder and schizophrenia were confirmed at trial. Again, the treating providers had no knowledge of this history but admitted in their discovery depositions it would be relevant to their opinions. This matter never should have proceeded to the jury

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In the event that an insured suffers from a subsequent injury or disability, the insurer is no longer responsible for payment of PIP benefits beyond the date of the superseding event. *MacDonald v State Farm*, 419 Mich 146; 350 NW2d 233 (1984). In the matter at hand, each of the known intervening events cuts off liability for Allstate. *Id.* Moreover, when a plaintiff suffers an aggravation of injuries in a second accident, the liability of the insurer is terminated. (See *McQueen et al v Auto Club*, unpublished opinion of the Court of Appeals, released October 28, 2014 (Docket No 317753)[6][7], citing *Wilkinson v Lee* 463 Mich 388; 617 NW2d 305 (2000)(stating that aggravation of preexisting injuries is an injury under the no fault act).

In *MacDonald*, the plaintiff suffered a heart attack approximately two weeks after the motor vehicle accident. *MacDonald* at 150. The Supreme Court held that from the date of the heart attack, plaintiff would have been disabled, irrespective of any injuries sustained in the accident. The heart attack was a superseding event that terminated the insurer's liability. Similarly, the subsequent car accidents, head injuries sustained in physical altercations, drug abuse, and diagnosis of bipolar and/or schizophrenia would all terminate liability on the part of Allstate as a no fault insurer from 1996. Plaintiff stopped treating for the 1996 accident by 2000[8]. After not treating for the car accident for at

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[6] In *McQueen*, this Court affirmed the dismissal of a plaintiff's claim for benefits sustained in two separate vehicle accidents. This Court explained that the insurer for the first accident was not liable to provide no fault benefits for the second accident. *Id* at 2. Even if the injuries involved aggravations of preexisting injuries from the first accident, they still arise out of the subsequent accidents. *Id* at 8. In paragraph 32 in response to Defendant's Motion for Summary Disposition, plaintiff admits to the injuries in the subsequent, intervening events, however goes on to misstate the law.(**Attachment 13**.) The injuries/events do in fact relieve Allstate of any ongoing responsibility.

[7] Defendant cites to *McQueen* as the opinion is relevant to the matter at hand in that the Plaintiff in this matter had multiple other accidents where he was admittedly injured, or aggravated a prior injury. That precise issue was decided and articulated by the Court in McQueen. (**Attachment 14**.)

[8] Plaintiff had returned to school full time in early 1997. His mother stopped claiming Attendant Care in 1997. No medical bills were submitted between 1997-2000. One doctor visit and a couple prescriptions were submitted in 2000 and paid. (Payment Ledger, **Attachment 15.)**

least 5 years, Plaintiff began using drugs and alcohol. In 2005 he was diagnosed bipolar and, in 2012, he was diagnosed with schizophrenia. In 2012 he overdoses on Ambien.

Plaintiff's "experts" related their services to the 1996 accident simply because Plaintiff and his mother said so. None of these witnesses were informed of, knew about, or considered the intervening physical and mental health conditions as the cause of Plaintiffs current conditions. None of them knew that he had treated for and recovered from the 1996 accident[9]. Their failure to have any basis for their leap in causation from 1996 to 2012 was fatal to Plaintiff's case.

2. The trial court failed to perform its essential gatekeeping function to ensure that the witness opinions were based upon a sound factual foundation.

The trial judge failed to ensure that any and all scientific testimony or evidence admitted be not only relevant, but also reliable. The Supreme Court clarified in *Kumho* that the gatekeeping obligation applies to all expert testimony. *Kumho Tire Co v Carmichael*, 526 US 137, 141 (1999). The Court explained that the word "knowledge" connotes more than subjective belief or unsupported speculation. *Id.* Importantly, the court does not assess the credibility and accuracy of expert opinion, but must ensure that the opinion is made upon a reliable factual foundation and is not unsupported speculation. *Scrap Metal Antitrust Litig.*, 527 F3d 517, 529-30 (2008). The Supreme Court has also explained "while the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately." *Gilbert v DiamlerChrysler Corp* 470 Mich 749,780; 685 NW2d 391 (2004), quoting *Kumho supra* at 158-159 (Scalia, J. concurring.)[10]

[9] See Dr. Kamoo's testimony at **Attachment 23,** pp 27-28, 30-31, 34-35, 38-40, 42, 43-44, 58, 59-60, 76-77, 79.) See Dr. Rubin's testimony at **Attachment 22**, at pp 8, 23-24, 25-26, 26-27, 27-29, 30, 39, 41-42, 72. See Dr. Best's testimony at **Attachment 21**, pp 8, 23-24, 25-26, 26-27, 27-29, 30, 39, 41-42, 72.

[10] See also: *Greathouse v Rhodes*, 242 Mich App 221, 238 (2000), rev'd on other grounds, 465 Mich 885 (2001).

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In the matter at hand, Plaintiff's expert witnesses admitted to having no knowledge of the Plaintiff from 1999-2012. They failed to review any medical, school, or employment records or interview any prior treater. The experts failed to have any knowledge of the intervening injuries and diagnoses of the Plaintiff involving mental health and substance abuse problems. This failure to account for other factors that could have accounted for Plaintiff's current presentation is fatal to Plaintiffs case[11]. The opinions offered by the experts were not reliable as they had absolutely NO factual foundation upon which to base the purported opinions. The defect goes hand in hand with the failure to evaluate or have any knowledge regarding the temporal relationship between the 1996 accident and when the symptoms present in 2012/2013 began. The experts had no knowledge in this regard. They failed to account for the numerous intervening events. They utterly ignored all medical/scholastic/employment evidence. They flat out ignored the substance abuse, even though Dr. Best admitted that substance abuse could cause the same constellation of symptoms. (**Attachment 21,** pp 30, 39.)

The question the trial court was required to answer was whether the opinions by Plaintiff's experts were sufficiently reliable under the principles articulated under MRE 702 to allow the case to proceed. The trial court ignored the question, stating a Daubert hearing was first required. That is not the case when the expert opinions have been fully explored.

[11] See Dr. Kamoo's testimony at Attachment 23,pp at 27-28, 30-31, 34-35, 38-40, 42, 43-44, 58, 59-60, 76-77, 79.) See Dr. Rubin's testimony at Attachment 22, pp 8, 23-24, 25-26, 26-27, 27-29, 30, 39, 41-42, 72. See Dr. Best's testimony at Attachment 21, pp 8, 23-24, 25-26, 26-27, 27-29, 30, 39, 41-42, 72.

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3. Expert witnesses must not be allowed to testify without a proper factual foundation. At the time of the summary disposition hearing, Plaintiff's purported experts testimony was based solely upon speculation, summary disposition was proper.

MRE 702 requires that an expert's testimony (1) rest on sufficient facts, (2) qualify as the product of "reliable principles and methods," and (3) reflect that the expert reliably applied the principles and methods to the case facts. As a gatekeeper, the trial judge was required to scrutinize plaintiffs' basis for their opinions. The facts in evidence, must support the opinions. The experts cannot speculate as to causation. It is the methodology by which an expert reaches an opinion concerning causation that must be found reliable.

Plaintiff's experts admitted no knowledge concerning the actual motor vehicle accident, plaintiffs intervening events or the temporal relationship between the 1996 accident and Plaintiffs current medical presentation. A motor vehicle accident in 1996 does not ipso facto mean that symptoms of mental illness and lack of motivation will develop a decade later. The connection is too speculative without a reliable factual foundation. Plaintiffs experts failed to obtain any information regarding the Plaintiff or his life from 1999-2012.

i. The court must first determine if the opinion rests on a reliable foundation.

The court must determine whether the evidence "both rests on a reliable foundation and is relevant to the task at hand." Simply taking the Plaintiff and his mother's word as an accurate reflection of the last 16 years is neither scientific, nor reliable. That is exactly what the purported experts did in this case. The experts made zero attempt to secure any medical documentation of the Plaintiff's history. As the Supreme Court explained in *Daubert*:

> But, in order to qualify as "scientific knowledge", an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e. "good grounds" based on what is known. [*Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579,590 *1993.]

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The opinions cannot be created for purposes of litigation. The witnesses used by Plaintiff did not have "good grounds" based upon what is known. In fact, they knew nothing. There was not one fact to which the witnesses could point that took Plaintiff's current condition back to 1996.

Dr. Ruben testified that he had little to no knowledge regarding Plaintiff's initial admission to St. John Hospital in 1996 after the accident. He did not know what Plaintiff's status was, if there were any neurological deficits seen during his admission, where he was discharged to and most importantly what his diagnosis was immediately following the accident or what his prognosis was. (**Attachment 22**, pp 41-42.) Dr. Ruben could not testify to when any of Plaintiff's current symptoms/deficiencies began. (*Id.* at 69). Dr. Ruben and Dr. Best testified they never requested any of Plaintiff's prior records, including any prior medical records, educational or employment records. (**Attachment 21** pp 8,24,25,26,27,28,39,46; **Attachment 22**, pp 26-7, 32-3, 44-46).

Similarly, Dr. Kamoo was not aware of the other blows to the head. (**Attachment 23**, p 30.) The doctor never saw pediatrician records, academic records or employment records. (*Id.* at 34.) Dr. Kamoo was unaware of the academic and medical problems that Plaintiff suffered prior to the 1996 accident. (*Id.* at 39.) He was under the belief that Plaintiff began faltering in school after the 1996 accident[12]. (*Id.* at 39.) He was not aware that Plaintiff was diagnosed with Bipolar Disorder around 2005 (*Id.* at 58). Dr. Kamoo admitted to having no knowledge of Plaintiff's functional abilities prior to the 1996 accident. (*Id.* at 77.) He further admitted to having no knowledge of Plaintiff's functional

[12] The notion that academic problems began after the 1996 accident were completely refuted by the academic records. Plaintiff suffered from problems with memory and concentration from the beginning of his schooling. He was held back in Kindergarten due to academic and behavioral problems, not starting first grade until age 8. (See **Attachment 5, Ex F** – school records.) The "story" that Plaintiff was in the "gifted" program prior to the accident was a falsehood that the family told all of the experts. One they attempted to perpetuate at trial.

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abilities from 1996-2013 when he first met the Plaintiff. In other words, Dr. Kamoo's factual foundation begins in 2013, 17 years after the accident.

The experts, Drs. Best, Kamoo and Ruben, all admitted that they knew nothing of Plaintiff's history between 1996 and 2012. They did not know that Plaintiff was involved in a severe motor vehicle accident resulting in injuries on July 9, 1999, including a head injury. Thereafter, Plaintiff was involved in at least 3 more car accidents. In 2005, Plaintiffs abuse of drugs and alcohol began. Plaintiff's problems with drugs continued until at least August 16, 2012 when he overdosed on Ambien (which he stole), having snorted it to get high. The experts did not know any of these facts.

The opinions offered by the experts was nothing more than a regurgitation of misinformation provided by the Plaintiff and his mother. This testimony was not grounded in science or fact. The testimony would not in any way "serve to give the trier of fact a better understanding of the evidence or assist to determine a fact in issue". They lacked "knowledge", rather speculated and assumed. Knowledge applies to anybody of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds. *Nelson v American Sterilizer Co,* 223 Mich App 485; 566 NW2d 671 (1997). Continuing along these lines, the word "technical" signifies grounding in a specialized field of knowledge. *Craig v Oakwood Hosp* 471 Mich 67; 684 NW2d 296 (2004). Similarly "specialized" suggests a foundation in a specific field of study or expertise. *Id.* It takes no knowledge, technical training or specialized study to repeat words offered by lay people involved in a lawsuit for secondary gain. Despite their lack of effort or knowledge, the "experts" opined that Plaintiff's current medical condition was due to an automobile accident in 1996. The trial court simply failed to explore the lack of foundation for this leap in speculative regurgitation. Allowing these witnesses to proceed beyond Summary Disposition was reversible error, their opinions were nothing more than speculation and unqualified guestimation.

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II. THE TREATING PHYSICIANS TESTIMONY SHOULD HAVE BEEN LIMITED TO THE TIME AFTER 2012 WHEN THEY MET THE PLAINTIFF, AT A MINIMUM DEFENDANT WAS ENTITLED TO A DAUBERT HEARING.

After the Court failed to grant summary disposition, Defendant moved in to preclude the Plaintiff's experts from offering their baseless opinion testimony on causation. (**Attachment 6** - Def's Motion to Limit Treating Physician Testimony.) When the court heard Defendant's motion, the court waffled to say the least. The trial judge was confused with the difference between factual foundation and witness qualifications. The court was required to ensure that the opinions were made based upon a reliable factual foundation and not unsupported speculation. See *Scrap Metal Antitrust Litig*., 527 F3d 517, 529-30 (2008); and, MRE 702 and MRE 703, which govern expert testimony. MRE 703 requires that that the facts or data upon which an expert bases an opinion shall be in evidence. Under MRE 702 it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible. *Elher*, 499 Mich at 13. Further, MCL 600.2955 provides additional direction for the trial court, instructing that the court shall examine the facts that support an opinion when performing its gatekeeping role. The trial court was required to ensure that the underlying data and methodology utilized by the expert was reliable. *Id.* In the matter at hand, the trial court failed. The treating doctor's alleged expert testimony should have been excluded when it is based upon assumptions that are not supported by the established facts of the case. *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007). The proponent of the testimony bears the burden of proving general acceptance under MRE 702. Plaintiff failed and the trial court committed reversible error.

Plaintiff argued that the doctors: "they all testified that they had what they needed. They reviewed what they needed. They took a history. They read Doctor McMillan's report (from 1999). They treated him." (Hearing Tran 6/6/16, p 5.) Plaintiff's counsel went on to state: "Judge, my

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understanding of the law is, as we interpret it, the intent of a Daubert hearing is to determine if it is based on a novel scientific theory. These are physicians—this is a psychiatrist, physiatrist and neuropsychologist who are rely on the knowledge--- Judge what is being argued about is the weight of the evidence—Their opinions… experience in their realm and field of expertise". (*Id.* at 8-9) These articulations are complete misstatements of law. Though the trial judge acknowledged that there remains a requirement that there be a sufficient basis in fact, he somehow made a leap to "it doesn't have to be the only cause." (*Id*. at 10.) The trial court totally missed out on its gatekeeping function, and the requirement to look at the foundation, or lack thereof, for the testimony. When the facts do not exist, the testimony must be excluded. Indeed, when a court focuses its MRE 702 inquiry on the data underlying the expert opinion and neglects to evaluate the extent to which an expert extrapolates from those data in manner consistent with Daubert, it runs the risk of overlooking a yawning "analytical gap" between the data and the opinions expressed.

Defendant moved to limit the testimony of the treaters to that of treaters and not allow any testimony as to opinions on causation, as the opinions were not grounded in fact. The case was about to proceed to trial for the jury to decide if Plaintiff's need for PIP benefits in 2012 and beyond arose out of a motor vehicle accident in 1996. MCL 500.3105. The opinions and lack of foundation was completely exhausted at their discovery depositions. Again, Dr. Best was asked: "So, you have no knowledge regarding Mr. Wier's physical or mental condition prior to him coming to treat with you in December of 2012, correct". He answered "correct". (**Attachment 21**, p 25.) Dr. Ruben admitted he had no knowledge of what happened to Mr. Wier's life between 1996 and 2013 when he met him. (**Attachment 22**, pp 41-45.) He acknowledged that in order to make a determination of causation he

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would need data from other sources. (*Id.* at 20.) He admitted he did not have those[13]. Dr. Ruben admitted that persons with bipolar disorder commonly suffer from substance abuse and other problems exhibited by Plaintiff. (**Attachment 22**, p 36.) Yet, Dr. Ruben did not know about and failed to consider the diagnosis of bipolar disorder for the Plaintiff. Dr. Kamoo also admitted he had no other basis to reach his conclusions other than what the family told him. He had no knowledge regarding the Plaintiff prior to 2013. (*Id.*)

Plaintiff's treating medical practitioners did not derive their purported knowledge from any specialized training or scientific knowledge. Anyone without a medical degree, can repeat a phrase uttered by another lay person. Mere speculation that an injury might have occurred in the way alleged by Plaintiff does not offer adequate proof that it did occur in that manner. Plaintiff had the burden to prove that the opinions were reliable. Plaintiff failed. Rather, Plaintiff argued that the experts were qualified. Their medical training was not the issue, the foundation for their opinions was the issue. The fact that they did not know anything about the Plaintiff was the fatal problem. Testimony by way of opinion cannot be based upon regurgitation of a fantasy created by the Plaintiff in a lawsuit seeking money. The experts have a duty to independently verify the facts and know that there testimony is based upon an accurate history. Reliable scientific mandate that an expert witness testifying regarding causation, must thoroughly review the patient's history prior to making a leap to causation, particularly some 20 years prior. Defendant asks that this Court properly enforce the rules pertaining to expert testimony and find that a treating physician must be required to obtain the proper foundation to support their patient's lawsuit. Here, the physician's failed.

[13] Dr. Ruben explained that related the brain injury, and current emotional instability to 1996, was because he thought Plaintiff was in the gifted program before the accident and special ed after. The school records show that was not true. If Dr. Ruben had obtained the records he would have learned that the history provided by the family was totally false. (**Attachment 6, Ex F**.) It was readily apparent to any gatekeeper that Dr. Ruben was not relying upon a proper, real factual foundation.

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Expert testimony based upon nothing more than logical fallacy of *post hoc ergo propter hoc* do not pass must under *Daubert*. See *McClain v Metabolife Intern, Inc*, 401 F 3d 1233, 1242-43 (11th cir 2005). In other words, causation is not shown simply because a person is involved in an accident and then some 17 years later a medical condition is "discovered". Plaintiff's witnesses utterly failed to apply reliable principles, knowledge or science as required by the Rules of Evidence. Thus, their testimony on causation should have been stricken or at a minimum a Daubert hearing conducted. In conclusion, it was inescapable that Defendant was first entitled to summary disposition. Then, when the court erred in denying the motion, it erred again when it failed to strike the unreliable, unscientific testimony of the treating physician, or at the very least when it failed to hold the *Daubert* hearing at the time of the motion.

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III. THE COURT ABUSED ITS DISCRETION WHEN IT STUCK DEFENDANT'S B.I. CLAIM FILE AND SUBSEQUENT PIP CLAIM FILES.

A. Standard of review.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. Argument.

1. The trial court abused its discretion when it struck Defendant's BI file after Plaintiff's counsel used the file, established its relevancy and did not object to the admission.

It was an abuse of discretion for the trial court to exclude the evidence of Plaintiff's. B.I. claim arising out of the 1996 accident and an abuse to strike the claim files from AAA and Progressive related to subsequent accidents. All three files were relevant to issues in dispute between the parties and there was no basis to strike them from evidence at trial. Plaintiff relied on Defendant's B.I. claim

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file when it questioned Allstate's representative, Toni Bradford, and to obtain medical records regarding Plaintiff from the B.I. file. Ms. Bradford was asked to review claim notes from Defendant's B.I. adjuster, Greg Bonnell that were authored in 1997 and 1999. Plaintiff's counsel argued they were relevant to show an ongoing injury. (Trial Tran 7/15/16, 125:1-126:9. See also, pages 127:10- 128:17; 128:18-25; 129:2-130:10; 133:1- 136; 145:21- 147:10.) In addition, Plaintiff relied on records from the B.I. claim file including medical records and Dr. McMillan's IME report from 1999. (*Id*. at 146:1-21.)

When Defendant sought to use the B.I. claim file, to show that Mrs. Wier was not reporting an ongoing injury after 1997, the court ruled the file was not admissible because it was not relevant. However, the court allowed Plaintiff to use the notes to in an attempt establish an injury. (Trial Tran 7/15/16, 205:6-8; 211:22-1; 213:14-16.; 214:15-24.) Plaintiff's counsel agreed the file was relevant. As this Court is well aware, MRE 401 "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The file was relevant to Plaintiff's complaints of ongoing conditions, or the lack thereof. It was admissible pursuant to MRE 402. To allow one party to use the B.I. claim file and then prevent the other from using that same file was an abuse of discretion.

2. The trial court abused its discretion in precluding the use and introduction of Plaintiff's claims for PIP benefits arising out of accidents from 1999 and 2007.

Likewise, it was an abuse of discretion to preclude the use of Plaintiff's claims for PIP benefits with AAA and Progressive for accidents that occurred in 1999 and 2007. Defense counsel explained that these files were relevant for two reasons. First, the AAA claim file included evidence that Plaintiff claimed he injured his head in a 1999 motor vehicle accident. Second, both claims files were relevant to impeach Plaintiff's and Mrs. Wier's testimony that the reason no claims were made to Allstate from 1999 until 2012 was because they did not know Plaintiff may still be entitled to benefits and they did

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not know how to make a claim. (Trial Tran 7/19/16, 90:9-23.) Nonetheless, the court ruled the files were not admissible. This was an abuse of discretion.

The court found that Defendant's position that the claim file from AAA regarding the 1999 motor vehicle accident and the Progressive claim file from a 2007 accident were relevant to show that Plaintiff knew how to make a claim for PIP benefits, which was in contradiction to his testimony. (*Id.* at 92:15- 93:6; **Attachment 16** - Def's proposed Trial Ex Y, Progressive's claim file; and, **Attachment 17 -** Defendant's proposed Trial Ex Z, AAA claim file.) The court concluded that Defendant could only use the medical records from the AAA claim file showing Plaintiff suffered a head injury but that the other claims and PIP claims were not relevant. (*Id.* at 95:10-14.)

Throughout the case, Plaintiff and his mother claimed that they did not know how to make a claim for benefits in an effort to explain why there was about thirteen years of silence between claims. Plaintiff testified that his head injury caused behavior issues that started slowly after the accident. (Trial Tran 7/22/16, 27:7- 20.) Yet, he never made a claim for benefits. He claimed it was because he did not know how. (*Id.* at 90-91.) The AAA claim file would have shown that Plaintiff made claims for PIP benefits during the time he also claimed to suffer from the 1996 injury. In fact, Plaintiff argued that his 2007 arrests and issues with drugs were due to impulse control related to his 1996 brain injury. (*Id*. at 27:7- 20; 43:4-9; 45:6-7; 97.) Instead, of making a claim for benefits with Allstate, he filed a PIP claim with Progressive. (**Attachment 16**.)

The evidence that Plaintiff had made other claims for PIP benefits was relevant to a direct matter of impeaching Plaintiff and his mother on their claims that they did not know how to make a claim during those years they argued he was suffering. Defendant had a right to use these files to show the knowledge they claimed to lack pursuant to MRE 613(b). It was an abuse of discretion to preclude Defendant from using these files.

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IV. DEFENDANT WAS ENTITLED TO A DIRECTED VERDICT ON PLAINTIFF'S ATTENDANT CARE CLAIM.

A. Standard of review.

The Court of Appeals reviews de novo a trial court's decision to grant or deny a motion for directed verdict. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). The relevant inquiry examines "the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Id.* at 703. A directed verdict is appropriate when no factual question exists on which reasonable jurors could differ. *Id.*

B. Argument.

1. Defendant was entitled to a directed verdict on Plaintiff's speculative attendant care claim.

"In determining damages for allowable expenses, the jury must not be allowed to speculate concerning the cost of a particular procedure or service, and a trial court should grant a motion for judgment notwithstanding the verdict if the jury was permitted to engage in such speculation." *Kallabat v State Farm Mut Auto Ins* Co, 256 Mich App 146. 151; 662 NW2d 97 (2003) citing *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321-322; 602 NW2d 633 (1999). Here, the jury was allowed to speculate as it pertained to Plaintiff's attendant care claim.

The only alleged attendant care provider who took the stand at trial was Plaintiff's mother, Brenda Wier. She testified that she has to remind Plaintiff to shower and take his medication. But, agreed that Plaintiff does not always take his medication. She also testified to what constitutes a typical day and claimed that she has to watch him "constantly." (Trial Tran 7/21/16, 198:15-20.) While she claimed she watches him 24-hours a day, she admitted that she did not document her services until her

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attorney wrote the affidavit forms for her to sign. And, that these forms were also signed by her son Adam and her husband. (*Id.* at 199.) They did not continue to document services or submit forms after the one bulk submission. These affidavits were not admitted as evidence and neither Adam nor Mr. Wier testified. Instead, when Mrs. Wier was asked how many hours were at issue, she responded with "I've lost count." (Trial Tran 7/22/16, 5:9.)

Likewise, when Plaintiff took the stand in this case he did not testify to the precise attendant care services he received or how long it took to complete the alleged care each day for every day his counsel asked the jury to compensate him. Regarding attendant care, he testified that his mother helps remind him to take his medications. (*Id.* at 68.) He claimed he needs assistance with hygiene because he does not care about his appearance or cleanliness. (*Id.* at 69.) Plaintiff claimed he needed his mother with him "around the clock" because he is a danger to himself and others. Interestingly, he admitted that he sneaks out of the house at night. (*Id.* at 70-71.) It seems incredulous that Plaintiff would all of the sudden need to be watched and supervised by his mother when he was able to successfully complete school, work at numerous jobs and have relationships with women. (*Id.* at 21:6-8; 28:18-25; 40:20-25; 30:7-14; 31:19-22; 32:16-17; 33:19-20; 35:5-6; 36:8-9; 38:3-4; 78-80; 94.) While the evidence did not support Plaintiff's claim as far as the reasonably necessity, the fact remains that the attendant care claim was speculative and inappropriately submitted to the jury.

Under the terms of the no-fault act, a person injured in a motor vehicle accident is entitled to PIP benefits for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). The term "attendant care" is not defined or used in the Michigan no-fault act but is a term commonly used to define a type of "allowable expense" under MCL 500.3107(1)(a). Regarding payment for attendant care, or other allowable expenses, an insurer "not

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obliged to pay any amount except upon submission of evidence that services were *actually rendered* and of the *actual cost expended*." *Manley v DAIIE*, 425 Mich 140, 159; 388 NW2d 216 (1986) (emphasis added). Moreover, a person seeking reimbursement for attendant care services must prove by a preponderance of the evidence not only the amount and nature of the services rendered, but also the caregiver's expectation of compensation or reimbursement for providing the attendant care. *Douglas v Allstate Ins Co*, 492 Mich 241, 247-248; 821 NW2d 472 (2012.) Here, Plaintiff failed to present evidence to support a finding that services were actually rendered on a given day and did not provide the actual cost expended. Plaintiff did not meet his burden.

A vague and unsupported demand for reimbursement of attendant care does not provide reasonable proof, any more than if a hospital simply submitted an invoice to the insurance company without any information as to what was actually incurred. If a hospital did that, it would not constitute reasonable proof, and a claim for attendant care is no different. The Court in *Bronson v Methodist Hosp v Home-Owners Ins. Co.,* 295 Mich App 431 (2012) examined the proofs necessary to support a claim that an allowable expense was incurred and an insurance company's right to additional information before its duty to pay is triggered. In *Bronson*, the hospital argued the submission of its bill was reasonable proof to trigger payment. The Court of Appeals confirmed that an itemized bill standing alone does not trigger liability under the no-fault act. *Id.* at 453.

About five months after the *Bronson* decision, the Supreme Court issued its opinion in *Douglas v Allstate Ins Co*, 492 Mich 241 (2012). In *Douglas*, the plaintiff's wife submitted an attendant care claim. She testified about a series of forms, each labeled "Affidavit of Attendant Care Services." The forms totaled up the number of hours during which she claimed to have provided services and outlined the various tasks. However, she admitted that the forms were all completed in June 2007, that she did not contemporaneously itemize the amount of time she spent on any particular item. *Id.* at 252. The

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plaintiff failed to support the claim because description of the alleged services were "vague" and only "an effort to reconstruct her time." *Id.* at 254-255. The Supreme Court then considered the evidentiary support needed to support an attendant care claim. It held:

> **This evidentiary requirement is most easily satisfied when an insured or a caregiver submits itemized statements**… **statement that logs with specificity the nature and amount of services rendered**—and submit that documentation to the insurer within a reasonable amount of time after the services were rendered. … **Moreover, once a claimant seeks payment from the insurer for providing ongoing services, the insurer can request regular statements logging the nature and amount of those services to ensure that the claimed services are compensable**. [*Id.* at 269-270] (Emphasis added.)

In the case at hand, Plaintiff did not submit contemporaneous statements, nor did he submitted itemized statements. Again, Mrs. Wier failed to support her claim and, while she tried to claim entitlement to 24-hours a day, she also acknowledged she had lost count of the actual numbers incurred and admitted she was not the only one providing the care. (Trial Tran 7/22/16, 5:9.) The trial court allowed a speculative claim to proceed to the jury. As this Court has explained.

> Thus, a trial court should grant a party's motion for JNOV with respect to certain damages if the jury was permitted to speculate concerning the amount of those damages. . .. [A] **case should not be submitted to the jury where a verdict must rest upon conjecture or guess**. [*Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999) (citations and quotations omitted) (emphasis added)]

The Supreme Court has stated that to incur an expense for services, "the insured's family members and friends, just like any other provider, must perform the services with a reasonable expectation of payment." *Burris v Allstate Ins Co*, 480 Mich 1081; 745 NW2d 101 (2008). That is, even if a Plaintiff can show that services were for her care and were reasonably necessary, Defendant "is not obliged to pay any amount except upon submission of evidence that services were actually *rendered* and of the *actual cost expended*." See *Douglas v Allstate Ins Co*, 492 Mich 241, 266-267; 821 NW2d 472, 487 (2012) citing *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 159; 388

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NW2d 216 (1986.) Here, there was only speculation as to the number of hours, the services performed and the days services were incurred. Mrs. Wier's only expected to be paid if Plaintiff won. This did not create a reasonable expectation of payment. It created a speculative claim.

In *Schaible v Michigan Mutual Ins Co*, 116 Mich App 116; 321 NW2d 860 (1982), one issue before the court was the sufficiency of a replacement service claim by the plaintiff after his wife died in a motor vehicle accident. The Court of Appeals found that the trial court erred in denying the defendant insurer's motion for directed verdict because the plaintiff's testimony was insufficient to create a question of fact for the jury. While the plaintiff testified that family members performed household chores around the home that his wife had performed, the plaintiff "was unable to state with certainty how much time the relatives had spent on his behalf." *Id.* at 122. Further, while the plaintiff testified that he had agreed to compensate the family member if he prevailed in the lawsuit against the insurance company, "he was unable to state how much he had agreed to pay them." *Id.* The Court held the defendant was entitled to a directed verdict. *Id* at 122-123.

The testimony of Mrs. Wier and Plaintiff in the case at hand is just as deficient as the testimony in *Schaible*. Mrs. Wier did not testify with any certainty as to how many hours she performed. She specifically stated she did not have the total number of hours. Again, she testified that her husband and son performed services but no testimony was offered as to how many hours they performed. Like *Schaible*, while it was claimed that Plaintiff promised to pay his mother if he prevailed, that is insufficient to show that services were incurred. (Trial Tran 7/21/16 166:2-4.)

It is important for this court to continue to hold that family provided attendant care must be presented and supported to the same degree any other medical provider making a claim for benefits. Surely, this court would find that an insurance company is not liable to a medical provider based only on a guess as to the number of days the provider performed services. The same must be true for family

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provided care. There is no basis in the no-fault act to treat the burden of establishing these two claims differently. Defendant was entitled to a directed verdict on the attendant care claim.

V. THE VERDICT FORM AS SUBMITTED WAS SEVERELY PREJUDICIAL REQUIRING A REMAND FOR A NEW TRIAL.

A. Standard of review.

This Court reviews de novo claims of instructional error based on a legal issue. *Jackson v Nels*on, 252 Mich App 643, 647; 654 NW2d 604 (2002). The trial court's denial of a requested special jury instruction is reviewed de novo. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 679; 819 NW2d 28 (2011) The same application has been applied to the request for special, or altered verdict forms. (See *Carter v Liberty Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2014, (Docket No. 308359 & No 30884), p 2 & 16-17 (**Attachment 18**.)[14] Moreover, instructional errors, including the error to present a special verdict form warrants reversal if it "resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" *Carter, supra* at 15 citing *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005).

B. Argument.

1. **Defendant was entitled to a verdict form that accurately presented the questions in dispute between the parties. The verdict from as presented requires a new trial.**

The trial court refused to allow Defendant's special verdict form, even though it agreed that the first question proposed on Defendant's form was the heart of the dispute between the parties. (Trial Tran 7/26/16, 108:21-25.) Instead, the trial court stood steadfast to standard form at M Civ JI 67.01, even though it did not reflect the dispute between the parties and refused to delete the first two questions. As such, Defendant was entitled to an altered verdict from. The submitted form was slanted,

[14] This unpublished case is being presented to support the position that the court of appeals has applied the same standard of review to jury verdict forms as requests for special jury instructions.

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biased and caused confusion because on the submitted form was prefilled out indicating that the plaintiff's condition arose out of the accident and then directed the jury to award benefits if services were incurred for that condition it directed the jury that plaintiff suffered from.

The first two questions on the standard verdict form are: (1) did the plaintiff sustain an accidental injury; and, (2) did the plaintiff's accidental bodily injury arise out of a motor vehicle on September 9, 1995. The court ordered that both of these questions be pre-marked "yes" on the from and that the first question the jury would answer would be: "were allowable expenses incurred by or on behalf of the plaintiff arising out of the accidental bodily injury referred to in QUESTION NO. 2?" (**Attachment 19** – Verdict Form.) Everyone agreed that the issue was not whether Plaintiff suffered an injury arising out of the 1996 accident but whether he continued to suffer from that injury for which benefits were incurred and remained owing. (Trial Tran 7/26/16, 107:16- 109:16) Since the dispute between the parties was not whether Plaintiff sustained an injury in 1996 arising out of the 1996 accident, the first two questions on the verdict form should have been omitted entirely. The *Note On Use* section of M Civ JI 67.01 directs the trial court to omit any questions that are not at issue "such as whether the injuries arose out of…a motor vehicle." It goes on to state that a special verdict form may have to be used where there are "other issues arising under the no-fault statutes that are not specifically addressed by the format set forth. The court should have submitted Defendant's proposed verdict form with the first question being the question in dispute: Did Plaintiff Joseph Wier sustain an accidental bodily injury arising out of the September 9, 1996 motor vehicle accident for which benefits remain due and owing? (**Attachment 12** - proposed Verdict Form.)[15]

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[15] It was also a violation of MCR 2.515(A):"[t]he court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue."

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When the standard jury instructions, or in this case the standard verdict form, do not adequately address a topic, the trial court is obligated to give additional instructions when requested by a party, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001). Supplemental instructions must be concise, understandable, conversational, unslanted, and nonargumentative. *Id.* The same is true for a verdict form. Using the standard form and pre-filling it out in the affirmative that Plaintiff's condition arose out of the 1996 accident and then directing the jury to determine if benefits were incurred for the injury they were told he suffered was prejudicial. The failure of the court to give Defendant's proposed verdict from caused severe confusion for the jury and prejudiced Defendant affecting its rights to a fair deliberation by the jury on the disputed issues between the parties. When read as a whole, the verdict form did not represent the dispute, or overcome the prejudice against Defendant.

The prejudice against Defendant was continued because the first question the jury was asked to answer directed them back to the question two, which was already marked informing the jury the injury *in question* arose out of the accident. The third question on the form, but the first question the jury was allowed to decide stated:

> QUESTION NO. 3: Were allowable expenses incurred by or on behalf of the plaintiff arising out of the accidental bodily injury referred to in QUESTION NO. 2?

Given question number 2 was filled out informing the jury that the condition arouse out of the accident, a lay person would interpret this verdict form to mean that Plaintiff's current condition arose out of the accident. Defense counsel argued that doing this would create an appealable issue. The trial court did not disagree. (Trial Tran 7/26/16, 110:19-22.)

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To essentially inform the jury that Plaintiff's current condition arose out of the accident and then direct it to assign benefits for the injury "referred to in Question 2" was reversible error. No matter how compelling Defendant's evidence, it could not overcome a verdict form that informed the jury that Plaintiff's current condition arose out of the accident and then directing it to assign benefits pursuant to that finding. The form was so prejudicial, confusing and slanted that it was reversible error for the court to refuse to submit a verdict form that everyone agreed represented the dispute.

RELIEF REQUESTED

Based on the foregoing, Defendant was entitled to summary disposition and this matter never should have proceeded to a jury trial. As such, Defendant asks this court to reverse the trial court's ruling and find that Defendant was entitled to summary disposition thereby setting aside the jury's verdict in this case and dismissing it in its entirety with a finding of summary disposition in favor of Defendant. In the alternative, Defendant asks this Honorable Court to find: (1) Plaintiff's treating physicians were not qualified to present expert, causation testimony and remand the matter for a new trial; (2) Defendant was entitled to introduce its B.I. claim file, as well as the AAA and Progressive claim files into evidence; (3) Defendant was entitled to a directed verdict on Plaintiff's attendant care claim; and (4) Defendant is entitled to a special verdict form that accurately presented the disputed questions to the jury. And, any further relief the Court deems just and proper under the circumstances

Respectfully submitted,
MAGDICH LAW, P.C.
*/s/ Karen W. Magdich*____________________

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CERTIFICATE OF SERVICE

I, Chelsea Gartner, hereby certify that on Monday, May 22, 2017, I electronically served the following upon Richard E. Shaw, Esquire, Counsel for Plaintiff-Appellee, and James L. Spagnuolo, Jr., Esquire, and Thomas M. Lizza, Esquire, Co-Counsel for Plaintiff-Appellee:

- Defendant-Appellant, Allstate's Brief on Appeal with Attachment/Exhibits; and
- List of Attachments/Exhibits.

*/s/ Chelsea Gartner*_________________________
CHELSEA GARTNER

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LIST OF ATTACHMENTS/EXHIBITS

Attachment 1 Order dated 8/26/16

Attachment 2 Order dated 10/24/16

Attachment 3 Plaintiff's deposition transcript regarding 1999 motor vehicle accident

Attachment 4 Defendant's Motion for Summary Disposition, which includes:

Exhibit A – Wier Dep Tran 5/3/2000

Exhibit B – Dr. Best Dep Tran 8/21/2015

Exhibit C – Dr. Rubin Dep Tran 11/6/2015

Exhibit D – Weiss Dep Tran 10/20/2015

Exhibit E – Morelli Dep Tran 11/5/2015

Exhibit F – Plaintiff's medical records

Exhibit G – AAA claim notes

Exhibit H – Plaintiff's medical records

Exhibit I – Plaintiff's medical records

Exhibit J – Plaintiff's medical records

Exhibit K – Wier Dep Tran 6/24/2015

Exhibit L – Sheriff report and medical records

Exhibit M – Plaintiff's medical records from BCA Stonecrest

Exhibit N – Plaintiff's medical records from Macomb Community Mental Health

Exhibit O - *McQueen et al v Auto Club*, unpublished opinion of the Court of Appeals, released October 28, 2014 (Docket No 317753)

Exhibit P – Plaintiff's medical record from 5/27/1988

Exhibit Q – Order Authorizing Settlement 9/16/1999

Exhibit R – Transcript of Proceedings 12/20/2010

Attachment 5 Defendant's Supplemental Brief to its Motion for Summary Disposition

Exhibit S – Dr. Kamoo Dep Tran 11/11/2015

Attachment 6 Defendant's Motion to Limit the Testimony of Treating Physicians and Medical Personnel, or in the Alternative, Request for a *Daubert* Hearing, which includes:

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	Exhibit A – Plaintiff's Second Amended Witness List
	Exhibit B – Plaintiff's Answers to Defendant's Expert Witness Interrogatories
	Exhibit C – Dr. Best Dep Tran 8/21/2015
	Exhibit D – Dr. Kamoo Dep Tran 11/11/2015
	Exhibit E – Dr. Rubin Dep Tran 11/6/2015
	Exhibit F – Plaintiff's academic records
Attachment 7	Dr. McMillan *de bene esse* transcript
Attachment 8	Dr. Best *de bene esse* transcript
Attachment 9	Dr. Hanks' independent medical examination reports
Attachment 10	Dr. Kezlarian *de bene esse* transcript
Attachment 11	Dr. Kezlarian's independent medical examination reports
Attachment 12	Defendant's Proposed Verdict Form
Attachment 13	Plaintiff's Answer to Defendant's Motion for Summary Disposition
Attachment 14	*McQueen et al v Auto Club*, unpublished opinion of the Court of Appeals, released October 28, 2014 (Docket No 317753)
Attachment 15	Payment Ledger
Attachment 16	Defendant's proposed Trial Exhibit Y – Progressive's Claim File
Attachment 17	Defendant's proposed Trial Exhibit Z – AAA's Claim File
Attachment 18	*Carter v Liberty Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2014
Attachment 19	Verdict Form
Attachment 20	Plaintiff's school records from New Haven Schools
Attachment 21	Dr. Best's deposition transcript
Attachment 22	Dr. Rubin's deposition transcript
Attachment 23	Dr. Kamoo's deposition transcript

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