STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PETER BRUSKI and CONSTANCE M. BRUSKI,

Plaintiffs,

v

File No. 01-21373-NI
HON. PHILIP E. RODGERS, JR.

DONALD RICHARD PAHL and CHERRYLAND ELECTRIC COOPERATIVE, a Michigan non-profit corporation,

Defendants.
_____/

George R. Thompson (P29289)
Attorney for Plaintiffs

Dennis K. Taylor (P32649)
Attorney for Defendants

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFFS' MOTION IN LIMINE AND FOR SUMMARY DISPOSITION

This is a third party automobile accident case. The undisputed facts are these. The Plaintiff Peter Bruski was driving a dark blue GEO east on South Airport Road after dark on March 8, 2000. He attempted to turn north onto Park Drive when he was struck by a white van that was being driven west on South Airport Road by Karen Miner (The "Miner/Bruski accident"). The headlights on Ms. Miner's vehicle were not on at the time. The Plaintiff's vehicle came to rest facing east in the inner westbound lane. At that time, it did not have operating headlights.

Several people observed the collision and stopped at the scene. After the Plaintiff stepped out of his vehicle, he was struck by a second vehicle that was westbound and being driven by this Defendant (The "Pahl/Bruski accident"). It is undisputed that the Plaintiff was severely injured in the second accident - his leg was ultimately amputated just below the knee. Prior to filing this action, the Plaintiff reached a settlement with the auto insurer of the Miner vehicle.

The Plaintiff filed a Motion in Limine and for Summary Disposition pursuant to MCR 2.116(C)(10). The Court heard the arguments of counsel on December 3, 2001 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, grants in part and denies in part the Plaintiff's motion.

STANDARD OF REVIEW

MCR 2.116(C)(10)

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* 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. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

I.

In order to sustain his cause of action against the Defendant in the instant case, the Plaintiff must show that his injuries were proximately caused by the Defendant's negligence. If reasonable minds could not differ regarding the proximate cause of a plaintiff's injury, the court should rule as a matter of law. *Dedes v South Lyon Community Schools*, 199 Mich App 385, 390; 502 NW2d 720 (1993).

The Defendant filed a notice of non-party fault asking that fault be allocated to Ms. Miner. The Plaintiffs, therefore, anticipate that the Defendant will offer evidence of the Miner/Bruski accident in an effort to "blame" Ms. Miner for the second collision. The Plaintiffs seek a ruling from this Court that the "alleged negligence which may have caused the first collision is not a proximate cause of the second collision, or any injuries resulting therefrom." The Plaintiffs further seek a ruling from this Court that "no allocation of fault may be attributed to [Miner] in the present action."

The Plaintiffs rely upon *Deaton v Baker*, 122 Mich App 252; 332 NW2d 457 (1982) and *Derbeck v Ward*, 178 Mich App 38; 443 NW2d 812 (1989). In *Deaton*, the plaintiff alleged that defendant Woods' vehicle struck the Baker vehicle as it was backing out of a private drive. Plaintiff Deaton was a passenger in the Baker's vehicle. Two to five minutes after the first collision, while plaintiff Deaton was walking around inspecting the damage caused in that accident, he was struck by a vehicle driven by defendant Simon. The plaintiff filed suit and alleged negligence on the part of Baker, i.e. driving without due caution; driving at a speed and under circumstances as to be unable to stop within the assured clear distance ahead; negligently failing to come to a stop before entering or crossing a through highway; failing to come to a full stop before entering or crossing a highway from a private road or driveway and yielding the right-of-way to all vehicles approaching on the

highway; and by driving upon the highway carelessly and heedlessly in willful disregard to the rights and safety to plaintiff.

Baker filed a motion for summary disposition pursuant to the predecessor to MCR 2.116(C)(10). Plaintiff responded that he was injured as a result of the Baker/Woods accident because, had the Baker/Woods accident not occurred, the second accident, between Baker and Simon, would not have taken place. Further, there was a question of fact for the jury as to whether defendant Baker had an opportunity to remove his vehicle from the traveled portion of the highway. The trial court granted summary judgment in favor of the defendant.

The Court of Appeals reversed, saying:

> The negligence alleged in the complaint against defendant Baker is directed to the first accident. Defendant Baker's negligence in the first accident, if so determined, as a matter of law cannot be a proximate cause of the plaintiff's injuries resulting from the second accident, even though, as plaintiffs' counsel argued the second accident would not have occurred had it not been for the first accident having happened.
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> Defendant Baker is correct in his assertion that there existed a hiatus in essential proof connecting the negligence of defendant Baker in the first collision, accepted as pled, and plaintiff's eventual injury in the second collision. We do not agree with plaintiffs' counsel that the motion for summary judgment should have been denied based on the argument that the second accident would not have taken place had it not been for the first accident.
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> * * *
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> Whether defendant Baker was negligent in leaving his car blocking the highway after the accident with no lights on and, if negligent, whether the negligence was a proximate cause of plaintiff's injuries are questions of fact on which reasonable people could differ.

In *Derbeck*, a motorcyclist was allegedly injured when he was struck by a vehicle that had been abandoned in the roadway by an intoxicated driver. The plaintiff alleged that the defendant, while intoxicated, crossed the centerline of the roadway, lost control of her vehicle and thereafter collided with a telephone pole. The defendant's vehicle came to rest in the southbound lane blocking the plaintiff's lane of travel. The defendant left the vehicle in the roadway without activating her

emergency flashers or lights and failed to take any precautions to warn oncoming motorists of the existence of her disabled vehicle. Five to ten minutes later, the plaintiff struck the disabled vehicle, thereby causing the plaintiff personal injuries. The trial court granted summary disposition in favor of the intoxicated driver on six of the nine asserted theories of negligence because the alleged negligence that resulted in the first accident could not, as a matter of law, have been a proximate cause of the plaintiff's injuries.

The Court of Appeals affirmed the granting of summary disposition as to the acts that were not the proximate cause of the motorcyclist's injuries, i.e. failing to operate said vehicle on the highway with due regard to traffic and surface conditions; failing to see what was to be seen as a reasonable and prudent person would have; operating said motor vehicle in a careless and negligent manner; failing to obey the instructions of traffic control devices; driving on the wrong side of the road; and operating an automobile under the influence of intoxicating liquors. The Court said: "The defendant's prior negligent acts in operating her vehicle, alone, were not a substantial factor in causing the later collision between plaintiff's motorcycle and defendant's unoccupied and disabled vehicle. Without negligence in regard to leaving the scene or failing to warn, a cause of action cannot be sustained" because "the defendant's prior actions in operating her vehicle were not a cause in fact of plaintiff's injuries." The Court of Appeals held, however, that, because the defendant denied negligence and asserted comparative negligence, evidence regarding her alleged intoxication and means and manner of disabling her vehicle was relevant as to the issues of defendant's alleged negligence in leaving the scene of the accident, failing to activate flashers, and failing to take reasonable precaution to warn oncoming traffic. Thus, the Court refused to exclude the evidence.

In *Poe v City of Detroit*, 179 Mich App 564; 446 NW2d 523 (1989), the estate of a bus passenger, who was killed when he alighted from the bus and was struck by a vehicle while crossing the street, brought an action against the bus driver and city for wrongful death. The circuit court entered judgment for the plaintiff. The defendants appealed. The Court of Appeals found that the bus driver did not owe a duty to the passenger and that the City was immune from liability. The Court went on to say, however:

> Even if it could be said that plaintiff proved that [the bus driver] breached a duty owed to Eric Poe, the case still should not have been presented to the jury for the reason that plaintiff failed to prove both requirements of causation. That the bus

was a cause in fact of the accident because it obstructed the view of pedestrian Eric Poe was clearly demonstrated. However, the requirement of legal or proximate causation is a separate matter that was not proved. Although legal or proximate causation is often stated in terms of foreseeability, *Richards v Pierce*, 162 Mich App 308, 316-317; 412 NW2d 725 (1987), the question of whether there is proximate causation, like the question of duty, is essentially a problem of law. *Moning v. Alfono*, 400 Mich 425, 440, 254 NW2d 759 (1977). When a number of factors contribute to producing injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in bringing about the injury. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547-548; 418 NW2d 650 (1988), citing 2 Restatement Torts, 2d, § 431, p 428. Factors to be considered in determining whether the negligence is a substantial factor are:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
>
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
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> (c) the lapse of time. [2 Restatement Torts, 2d, § 433, p 432.]

An intervening cause, meaning one which comes into active operation in producing harm to another after the negligence of the defendant, may relieve a defendant from liability. *Coy v Richard's Industries, Inc*, 170 Mich App 665, 670; 428 NW2d 734 (1988). The existence or nonexistence of an intervening or superseding cause is largely a matter of policy. *Heitsch v Hampton*, 167 Mich App 629, 632-633, 423 NW2d 297 (1988), lv den, 431 Mich 875 (1988).

Id at 576-577. See also, *Dedes v South Lyon Community Schools*, 199 Mich App 385; 502 NW2d 720 (1993).

Derbeck, Poe and their progeny tell us that proximate cause incorporates two concepts: (1) causation in fact, and (2) foreseeability. Causation in fact requires that the negligence be a "substantial factor" in producing the injury. The *Poe* opinion relies on 2 Restatement Torts 2d, § 431, p 428 to determine whether negligence is a "substantial factor." *Poe, supra,* at 576-577. One of the factors considered is "whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm . . . ." *Poe, supra*, at 577. See also, *Hagerman v Gencorp Automotive*, 218 Mich App 19; 553 NW2d 523 (1996).

Thus, the question presented here is whether Ms. Miner's negligence, driving without operating headlights, led to a foreseeable chain of events resulting in the Plaintiff's injury or whether the Defendant's negligence, if any, was an independent cause of Plaintiff's injuries which severed the causal relationship between Ms. Miner's negligence and the Plaintiff's injuries. Stated somewhat differently, the issue presented here is whether Ms. Miner's negligence "created a force or series of forces which are in continuous and active operation up to the time of the harm . . ." *Poe, supra,* at 577.

Metcalf v Waterbury, 60 Mich App 553; 231 NW2d 437 (1975) was a wrongful death action with a fact scenario closely resembling the fact scenario in the instant case. In *Metcalf,* the defendant's vehicle struck another vehicle, causing both automobiles to run off the road. The defendant admitted that he was negligent. Following this first accident, both vehicles were off to the side of the road, a tow truck arrived and police officers were present signaling oncoming drivers with a flashlight. Some 13 to 15 minutes after the first accident, the Metcalfs were driving on the same roadway. While they were traveling at a reduced speed in response to the police officers, another vehicle driven by Turner that was traveling at a high rate of speed violently collided with the rear of their vehicle, shoving it into yet another vehicle. The collision of the Turner vehicle with the Metcalf vehicle resulted in the death of the Metcalfs. Turner was charged with the crime of manslaughter in the second accident and subsequently pled guilty. Defendant Waterbury pled guilty to a charge of reckless driving in the first accident.

Plaintiffs' suit against defendant Waterbury was premised on the theory that the proximate cause of the second accident was a massive traffic tie-up which was a foreseeable consequence of the initial accident. In turn, the defendant alleged that Turner's act of speeding and violently colliding with the rear of the Metcalf vehicle was so extraordinary that it could not be considered foreseeable. The defendant relied upon the principles recited in 2 Restatement Torts 2d, §§ 447(c) and 448, pp 478-482.

2 Restatement Torts 2d, §§447(c), pp 478-480 is applicable here and states:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Under these principles, the Court, in *Metcalf*, said,

> It does not matter how the original actor was negligent. What matters is whether the negligent act, be it driving under the influence or a minor traffic violation, led to a foreseeable chain of events resulting in the injury complained of.

Similarly, *Davis v Thornton*, 384 Mich 138; 180 NW2d 11 (1970), was an action against the owner of a vehicle for injuries sustained in an automobile accident. The vehicle had been taken for a joyride by minors after the owner left his keys in the ignition. The trial court granted summary judgment in favor of the defendant on the ground that the complaint failed to state a cause of action. The Court of Appeals denied leave to appeal. The Supreme Court reversed, saying:

> The general rule--that an intervening, independent and efficient cause severs whatever connection there may be between the plaintiff's injuries and the defendant's negligence, *Fowles v Briggs*, 116 Mich 425; 74 NW 1046 (1898). 38 Am Jur Negligence, § 68, p 724, et seq)--is not controlling if the intervening act was reasonably foreseeable. 38 Am Jur, Negligence, § 70, p 726 et seq, *Skinn v Reutter*, 135 Mich 57; 97 NW 152 (1903) and also *Comstock v General Motors Corp*, 358 Mich 163; 99 NW2d 627 (1959) where we quoted with approval 2 Restatement Torts, § 447, p 1196:
>
> > The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
> >
> > > (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted.

Id at 148-149.

Thus, the Supreme Court concluded that whether the act of a motorist in leaving his keys in the ignition of his automobile so that it was taken for a joyride by minors, only to become involved in a collision with another vehicle was foreseeable, or, if leaving the keys in the ignition was not too remote a cause of the collision, and whether the theft was an independent cause which severed the causal relationship between the owner's negligence and the injury, were questions for jury. See also, *Winekoff v Neisner's Automotive Supply*, 12 Mich App 51;162 NW2d 341 (1968); *Frohman v City of Detroit*, 181 Mich App 400; 450 NW2d 59 (1988); *Rogers v City of Detroit,* 457 Mich 125; 579 NW2d 840 (1998); and, most recently, *Meek v Dep't of Transportation*, 240 Mich App 105; 610 NW2d 250 (2000).

In the Plaintiff's motion, brief and affidavits in support, Defendant's response, and at the oral arguments of counsel, no evidence was presented to the Court that would raise a genuine issue regarding whether Ms. Miner's negligence in driving without operating headlights was a proximate cause of the Plaintiff's injuries. The uncontroverted affidavits of Adam Crump and Steve Gore that were presented by the Plaintiff establish the requisite hiatus in essential proof connecting the negligence of Ms. Miner in the first accident and Plaintiff's eventual injury in the second accident.

According to the affidavits of Adam Crump and Steve Gore more than two minutes elapsed between the Miner/Bruski and Pahl/Bruski accidents. During that time, several other vehicles traveling in all directions stopped; some turned on their emergency flashers. One of the other drivers had enough time to drive through the intersection into the Western Concrete parking lot, leave her vehicle, and cross Park Street to the Miner van before the second collision. Some of these other drivers tried to assist Ms. Miner and the Plaintiff. Steve Gore, for example, opened a door and told the Plaintiff to get out of his vehicle because of smoke coming from the engine compartment. The Plaintiff emerged from his vehicle "woozy and unsteady," "in shock but not suffering any physical injuries." Almost immediately after the Plaintiff emerged from his vehicle, he was struck by the Defendant's vehicle.

Ms. Miner's negligence, if any, in causing the first accident cannot as a matter of law be a proximate cause of the Plaintiff's injuries. The evidence before the Court shows that several other drivers noticed the first accident and were able to stop their vehicles and offer assistance. Some of them parked their vehicles and turned on their emergency flashers. The affiants' assert that there was adequate post-accident activity to alert other drivers to the fact that an accident had occurred. Thus, the Defendant's conduct - driving his vehicle so as to strike the Plaintiff while the Plaintiff was responding to the first accident - was not reasonably foreseeable. It broke the causal connection between Ms. Miner's negligence and the Plaintiff's injuries and was a superseding cause of the Plaintiff's injuries.

That is not to say that evidence of the first accident, and how Ms. Miner and the Plaintiff responded to it is not relevant, however, to the issue of whether Ms. Miner or the Plaintiff was negligent in responding to the accident (e.g., turning on emergency flashers or otherwise warning other cars) and, if so, whether that negligence was a proximate cause of the Plaintiff's injuries. Their negligence, if any, in responding to the first accident may have been a proximate cause of the second accident and the Plaintiff's injuries. That is for the jury to decide.

Thus, the Plaintiff is entitled to a ruling that Ms. Miner's negligence in causing the first accident was not, as a matter of law, a proximate cause of the Plaintiff's injuries. Evidence regarding the first accident, how it occurred and how Ms. Miner and the Plaintiff responded to it, however, will not be excluded. Indeed, it is inconceivable that Plaintiff can describe his case to a jury without putting himself and Defendant into a factual context that describes the entire series of events.

II.

The Plaintiff also seeks a ruling that, because "the persons who were at fault in causing the first collision were not a proximate cause of the Plaintiff's traumatic amputation, then no allocation of fault may be attributed to them in the present action," citing MCL 600.6304. MCL 600.6304 provides, in pertinent part, as follows:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise

agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

> (a) The total amount of each plaintiff's damages.
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> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.
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> > (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

The Plaintiff claims that because Ms. Miner's negligence in causing the first accident could not, as a matter of law, be a proximate cause of the Plaintiff's injuries resulting from the second accident, she did not "contribute to the death or injury" of the Plaintiff and, therefore, no fault should be allocated to her.

While *Deaton*, *Derbeck* and *Poe* stand for the proposition that a party's negligence in causing a first accident cannot, as a matter of law, be a proximate cause of injuries arising out of a second collision where there is a break in the causal connection between the first accident and the injuries, they do not preclude a finding of liability based on the party's independent negligence in responding to the first accident. See, *Derbeck, supra.* In other words, regardless of her negligence in causing the first accident, Ms. Miner may have been negligent in how she responded to the first accident, e.g., how she warned other drivers of the hazard now on the roadway, and her purported negligence in responding to the first accident may have been a proximate cause of the Plaintiff's injuries. Similarly, regardless of any inadmissable negligence on the part of the Plaintiff in causing the first accident, the Plaintiff may have been negligent in how he responded to the first accident and what care he reasonable demonstrated in exiting his vehicle and that negligence may have been a proximate cause of his injuries. Thus, fault cannot be allocated to those whose negligence caused the first accident because there is a fatal break in the causal connection between the first accident and the Plaintiff's injuries. But, fault can and will be allocated to those (including those involved in the

first accident) whose post collision negligence was a proximate cause of the second accident and the Plaintiff's injuries.

Thus, the Plaintiff is not entitled to a ruling that fault cannot be allocated to Ms. Miner. Ms. Miner's negligence, if any, in responding to the first accident may have been a proximate cause of the Plaintiff's injuries.

III.

The Plaintiffs also seek a ruling from this Court that would prohibit defense counsel from "allud[ing] to the Plaintiff's settlement with or allegations against Ms. Miner or her insurer." With respect to the settlement, defense counsel is precluded from using the fact of the settlement or the amount of the settlement for any purpose. *Brewer v Payless Stations, Inc*, 412 Mich 673 (1982); *Price v Long Realty*, 199 Mich App 461 (1993), and *Clery v Sherwood*, 151 Mich App 55 (1986).

Again, however, the Plaintiffs' request goes too far. The Plaintiffs want the Court to preclude defense counsel from alluding to the Miner/Bruski settlement and from alluding to "allegations against Ms. Miner or her insurer." The Plaintiffs' motion and brief are somewhat vague, but the defense asserts that, "With respect to the first accident, Mr. Bruski stated in deposition that he could not see the white van (Miner) because it did not have headlights on and because it 'came out of no where.' He also cited the fact that it was raining and dark which made the white van difficult to see."

Mr. Bruski was driving a dark blue GEO. After the first accident, his vehicle came to rest facing east in the westbound lane without operating headlights. The Defendant was driving west in the westbound lane. It was raining and he had his wipers on high. He claims that, when he saw a dark object in the road ahead of him, he attempted to avoid it by turning sharply to the right and that is when he struck the Plaintiff. The Defendant anticipates that the Plaintiff will claim that the Defendant should have seen his dark blue GEO without lights standing in the oncoming lane. With respect to the first accident, however, he claimed that he could not see Ms. Miner's white van before he turned because she was driving without headlights.

If the Plaintiff makes statements during the trial of this matter that are inconsistent with his prior statements, his prior inconsistent statements can properly be used for impeachment purposes. *Selph v Evanoff*, 28 Mich App 201; 184 NW2d 282 (1971).[1]

Thus, the Plaintiff shall not use the fact of the settlement or the amount of the settlement for any purpose. However, defense counsel may use Plaintiff's prior inconsistent statements for impeachment purposes or possibly as admissions.

IV.

COLLATERAL SOURCE ISSUE

The Plaintiffs seek a ruling from the Court that precludes defense counsel from "allud[ing] to the receipt of PIP benefits or any other collateral source." Defense counsel agrees that the Defendants will follow the statutory application of MCL 600.6303 in determination of collateral source benefits for economic losses at the proper time given the progress of the case.

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[1]In *Selph*, the Court said:

Generally, pleadings from another action are admissible insofar as they are relevant and not within the realm of hearsay. 5 Callaghan's Michigan Pleading and Practice (2 ed), 36.595, p 255 Anno: 90 ALR 1393, 1398. In *Cady v Doxtator*, 193 Mich 170;159 NW 151 (1916) the Supreme Court permitted the introduction of a pleading from a prior lawsuit between the same parties for purposes of impeaching the testimony of one of the parties in the subsequent case.

More recently, in *Schwartz v Triff*, 2 Mich App 379; 139 NW2d 907 (1966), this doctrine was again set forth and clarified by this Court. In *Schwartz*, which also dealt with two automobile accidents and two separate actions, the Court held that it was not error for the trial court to admit into evidence an unverified but duly authenticated copy of a pleading in a separate action brought by plaintiff but settled before trial. Its admission into evidence was qualified in that it was limited to the impeachment of the testimony of the plaintiff in the case then before the Court.

CONCLUSION

Ms. Miner's and the Plaintiff's negligence, if any, in causing the first accident could not, as a matter of law, be a proximate cause of the Plaintiff's injuries resulting from the second accident. Fault may, however, be allocated to Ms. Miner for any negligence in responding to the first accident that may have contributed to the second accident. The Plaintiff's post collision comparative fault, if any, in causing the second accident may also be assessed. Evidence regarding the first accident and Ms. Miner's and the Plaintiff's response to it is admissible insofar as that evidence goes to their negligence, if any, in responding to the first accident and, thus, causing the second accident.

Defense counsel may not allude to or present any testimony or other evidence regarding the fact of the settlement or the amount of the settlement between this Plaintiff and Ms. Miner's auto insurer. Defense counsel may use any prior admissions of Plaintiff or inconsistent statements made by the Plaintiff for impeachment purposes.

Defense counsel may not allude to or present any testimony or other evidence regarding collateral source benefits for economic losses to the jury. Collateral source benefits will be determined and deducted from the verdict when and if appropriate, pursuant to MCL 600.6303.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/25/02