STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY LUANNE DUFFY, Plaintiff-Appellee,	UNPUBLISHED October 29, 2013
v	No. 308789 Macomb Circuit Court
GRANGE INSURANCE COMPANY OF MICHIGAN, Defendant-Appellant.	LC No. 2007-004968-NF

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

In this automobile no-fault insurance case, defendant, Grange Insurance Company of Michigan, appeals as of right the trial court's order entering judgment in favor of plaintiff, Beverly Luanne Duffy, after a jury trial. We reverse the trial court's denial of defendant's motions for directed verdict and judgment notwithstanding the verdict (JNOV) regarding penalty interest and vacate the award of penalty interest. We affirm the trial court's judgment in all other respects.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case stems from an off-road vehicle (ORV) accident in September 2007. Plaintiff was operating an ORV along the Little Manistee Trail[1] when she got into an accident and sustained injuries that left her paralyzed. Although the ORV was not insured, plaintiff was

[1] The Little Manistee Trail contains portions that are designated as an "ORV trail" and an "ORV route." An "ORV route" is an area of the trail open for the operation of motor vehicles. An "ORV trail" is an area of the trail that is only capable of travel by a vehicle that is less than 50 inches in width. There is no dispute that plaintiff's accident occurred on an "ORV route" portion of the trail. We emphasize that this case only involves an "ORV route," i.e., an area of the Little Manistee Trail open for the operation of motor vehicles, that, based on the evidence in the lower court and as will be discussed further in this opinion, appears to be maintained by the government. We leave open for another day the issue of whether an "ORV trail" is a highway for purposes of MCL 257.20.

insured under an automobile no-fault policy issued by defendant. Defendant refused to pay plaintiff no-fault benefits under the policy.

On November 14, 2007, plaintiff filed a complaint against defendant for breach of contract and declaratory relief, alleging that that she was entitled to personal injury protection (PIP) benefits from defendant for the injuries that she received as a result of the ORV accident. Both parties moved the trial court for summary disposition, and the court granted summary disposition in favor of defendant on January 28, 2009. The court determined that plaintiff was not entitled to PIP benefits as a matter of law because MCL 500.3101(2)(e), as amended in July 2008, expressly excluded ORVs from the definition of "motor vehicle." Plaintiff appealed. We reversed and remanded to the trial court for further proceedings, holding that the July 2008 amendment of MCL 500.3101 that excludes ORVs from the definition of "motor vehicle" does not apply retroactively and, thus, that defendant was not entitled to summary disposition on the basis of the amendment. *Duffy v Grange Ins Co of Mich*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2010 (Docket No. 290198), pp 1, 4.

On remand, defendant moved the trial court for summary disposition under MCR 2.116(C)(10). Defendant argued that it was entitled to summary disposition because there was no genuine issue of material fact that the Little Manistee Trail was not a publicly maintained highway for purposes of the no-fault act. Plaintiff responded that the court should grant summary disposition in her favor under MCR 2.116(C)(10) and (I)(2) because the record evidence established that the Little Manistee Trail was a publicly maintained highway. On April 19, 2011, the trial court issued an opinion and order denying both defendant's motion for summary disposition and plaintiff's request for summary disposition; the court emphasized that "there is clearly a question of fact as to whether the Little Manistee Trail is 'publically maintained'" given the evidence presented by the parties.

The trial court conducted a seven-day jury trial beginning on August 9, 2011, and ending on August 18, 2011. At the conclusion of plaintiff's proofs, defendant moved the trial court for a directed verdict, arguing that plaintiff failed to meet her burden of proof that she was operating the ORV on a public highway under the no-fault act. Defendant also moved the court for a partial directed verdict on the issue of penalty interest, arguing that plaintiff "presented absolutely no evidence whatsoever . . . that establishes when the plaintiff submitted reasonable proof of the fact of the amount of her losses to Grange." The court took both motions under advisement. After the close of defendant's proofs, plaintiff moved the court for a directed verdict, arguing that reasonable minds could not disagree that the Little Manistee Trail was publicly maintained. The court denied both parties' motions for a directed verdict, opining that it was "a question for the jury to determine whether or not the Little Manistee Trail is publically maintained so that it's a highway and then there would be coverage afforded to the plaintiff." The court continued to hold under advisement defendant's motion for a partial directed verdict regarding penalty interest but ultimately instructed the jury on the issue. The jury rendered a special verdict, finding as follows: (1) the Little Manistee Route was publicly maintained, (2) plaintiff sustained accidental bodily injury, (3) plaintiff incurred allowable medical expenses ($242,641 in medical expenses, $362,766 in attendant care expenses, $3,176 in mileage expenses, and $1,709 in prescription expenses), (4) plaintiff did not sustain work loss, (5) plaintiff incurred $21,900 in replacement-service expenses, (6) payment of the expenses and losses was overdue, resulting in $100,463.04 in penalty interest, (7) it will be reasonably

necessary for plaintiff to incur $160,000 for future handicap-accessible modifications to her home, (8) it will be reasonably necessary for plaintiff to incur $55,000 for a handicap-accessible modified van, and (9) it will be reasonably necessary for plaintiff to incur future attendant care for 12 hours a day, seven days a week, at a rate of $20 per hour.

On September 27, 2011, defendant filed a renewed motion for partial directed verdict and a motion for JNOV regarding the issue of penalty interest. The trial court denied both motions. On February 10, 2012, the court entered judgment in plaintiff's favor totaling $1,067,624.51 (the $732,655.04 jury verdict, plus the $215,000 declaratory judgment, plus $3,090 in costs, plus $116,879.47 in prejudgment interest) and ordered that the jury "determined that a reasonable and necessary amount for expenses in the future related to attendant care is at 12 hours per day, 7 days per week, and $20.00 per hour."

II. ANALYSIS

A. SUMMARY DISPOSITION

Defendant first argues that the trial court erred by not granting its motion for summary disposition. According to defendant, the court should have concluded as a matter of law that the Little Manistee Trail is not a public highway for purposes of the no-fault act. We disagree.

We review de novo a trial court's summary disposition ruling. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

"Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). After the occurrence of plaintiff's ORV accident in this case, 2008 PA 241 amended MCL 500.3101(2)(e) to expressly provide that "[m]otor vehicle does not include an ORV." However, we concluded in *Duffy v Grange Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2010 (Docket No. 290198) that the amendment applies prospectively. Indeed, this holding is the law of the case. See, generally, *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000) ("[A]n appellate court's determination of an issue in a case binds . . . the appellate court in subsequent appeals.").

At the time of plaintiff's ORV accident, MCL 500.3101(2)(e) defined "motor vehicle" as "*a vehicle*, including a trailer, *operated* or designed for operation *upon a public highway* by power other than muscular power which has more than 2 wheels." 1988 PA 126 (emphasis added). Furthermore, this Court had held that "when an ORV is operated upon a public highway, regardless of whether it is there for the limited purpose of accessing recreational trails, it is a 'motor vehicle' under" MCL 500.3101(2)(e). *Allstate Ins Co v Dep't of Mgt & Budget*,

259 Mich App 705, 715; 675 NW2d 857 (2003), superseded by 2008 PA 241 amending MCL 500.3101(2)(e). We explained,

> the location where the vehicle is operated, is the sole factor to be addressed in deciding whether a vehicle was "operated ... upon a public highway...." In other words, when a vehicle is operated upon a public highway, regardless of the vehicle operator's intent, it is a "motor vehicle" under the no-fault act. [*Id.* at 714.]

At the time of plaintiff's accident, the no-fault act incorporated the definition of "highway" found in the Michigan Vehicle Code at MCL 257.20. *Id.* at 715; see also 1988 PA 126. MCL 257.20 provides: "'Highway or street' means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel."

In *Morris v Allstate Ins Co*, 230 Mich App 361, 366; 584 NW2d 340 (1998), this Court determined that the issue of whether a highway is publicly maintained and, thus, a public highway was a question of fact. The plaintiff in *Morris* was injured in a collision between two ORVs and filed suit for no-fault benefits. *Id.* at 363. The defendant insurance company moved the trial court for summary disposition, arguing that the ORVs were not motor vehicles and that the road on which the collision occurred was not a public highway. *Id.* at 364. The trial court denied the defendant's motion for summary disposition and granted partial summary disposition in favor of plaintiff, finding that the ORVs were operated on a public highway and, thus, motor vehicles under MCL 500.3101(2)(e). *Id.* at 365-366. Citing MCL 500.3101(2)(e), this Court explained that whether the ORVs are motor vehicles depends on "whether they are being operated on a 'public highway' at the time of the accident." *Id.* at 365. After discussing the trial court's reference to the pertinent definition of "highway" in MCL 257.20, this Court concluded that a genuine issue of material fact existed regarding whether the road at issue was a "public highway." *Id.* at 365-366. We explained that the documentary evidence showed that the local road commission did not consider the road to be a public highway but that the Oceana County Road Commission had "plowed snow off the roadway" and "repaired a portion of the roadway washed out by flooding." *Id.* at 366. Thus, we held that "a question of fact exists regarding whether this infrequent attention to the roadway constitutes 'public maintenance' of the road, pursuant to MCL 257.20 . . . as applied through MCL 500.3101(2)(b) . . . ." *Id.* at 366-367. After stating that there was nothing in the record regarding public access to and ownership of the road, we remanded the case to the trial court for further proceedings, holding that

> more information is needed regarding the status of the roadway, the local road commission's actions regarding the roadway, the entrances and exits used to access the roadway, and the ownership rights to the roadway before the trial court can resolve the genuine issue of material fact regarding whether this road constituted a public highway. [*Id.* at 367.]

On remand, the parties conducted additional discovery, and the trial court granted the defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that "although the road was open to the public, the infrequent maintenance provided by the county did not meet the requirements of a public highway." *Morris v Allstate Ins Co*, unpublished

memorandum opinion of the Court of Appeals, issued October 31, 2000 (Docket No. 221425). On appeal, this Court held as follows:

> The evidence supports the trial court's finding that the road was not publicly maintained. The last incidental maintenance performed on the road occurred three years prior to the accident, and the maintenance employee was instructed afterwards not to maintain the road because it was not a county road. Infrequent maintenance and repairs by the county do not make a road a public highway. See *Keller v Locke*, 62 Mich App 591; 233 NW2d 666 (1975). [*Id.*]

Viewing the documentary evidence in a light most favorable to plaintiff, we conclude that whether the Little Manistee Trail is a public highway was a genuine issue of material fact. There was a substantial amount of deposition testimony that would allow a reasonable person to conclude that the Little Manistee Trail was publicly maintained. Steve Kubisiak[2] testified that the trail is owned by the state of Michigan and under the jurisdiction of the DNR. The deposition testimony in this case illustrated that the DNR administers a grant-sponsor program in which the DNR contracts with the Irons Area Tourist Association to repair and maintain the trail. Loretta Wierenga[3] testified that Irons is responsible under contract for grading, signage, winter grooming, and brushing. Katie Keen[4] testified that the DNR provides the grant sponsor with all of the signage. Wierenga testified that Irons uses John Deere tractors for grading that are owned by the state either in full or by majority share. Kubisiak testified that the DNR uses public funds to fund the grant-sponsor program. The deposition testimony also illustrated that the DNR maintains a significant degree of oversight and control over Irons's work on the trail. Specifically, Kubisiak, Wierenga, and Keen all testified that the DNR inspects the work performed by the grant sponsor to ensure compliance with the grant contract. Keen testified that she physically inspects the trail. Furthermore, the DNR provides Irons with a maintenance handbook with which it must comply. Wierenga testified that Irons can only act pursuant to the grant contract; if something to the trail needs to be done that is outside the terms of the contract, Irons must receive authorization from the DNR through another grant contract.

Furthermore, there was abundant testimony from Wierenga, Keen, Bryce Avery[5], and Gary Meese[6] that state employees performed physical maintenance and repairs on the Little Manistee Trail. Specifically, the deposition testimony illustrated that state employees were

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[2] Steve Kubisiak testified that he works for the DNR as the recreation and trails program coordinator. In lieu of their live testimony at trial, the deposition of Kubisiak and several other witnesses was read into evidence at trial.

[3] Loretta Wierenga testified that she is a sales agent with Irons Real Estate and the treasurer and snowmobile coordinator for the Irons Area Tourist Association.

[4] Katie Keen testified that she works for the DNR and administers the ORV program.

[5] Bryce Avery testified that he is employed by the state of Michigan as an area fire supervisor for the Cadillac Unit, which is within the DNR.

[6] Gary Meese testified that he is a forest fire officer at the DNR.

involved in grading the trail from 1995 until the time of the depositions in 2008, with the exception of approximately 2003 through 2005. Wierenga, Keen, Avery, and Meese all testified that state employees graded the trail in the fall of 2007 and June 2008. When asked who would be responsible for grading the trail in the future, Avery testified that it would be a combined effort of the DNR and Irons. In addition to grading, state workers also installed and replaced signs, removed trees, and performed bridge repair and maintenance. Indeed, Meese testified that bridge work was the DNR's responsibility.

Defendant contends that the physical maintenance performed by state employees was too infrequent to create a question of fact as to whether the route is publicly maintained and cites this Court's unpublished opinion in *Morris* in support. Defendant's reliance on *Morris* is misplaced for two reasons. First, the *Morris* decision is unpublished and, thus, not binding on this Court. See *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). Second, the *Morris* Court referenced a considerably less degree of evidence of public maintenance when compared to the large amount of documentary evidence in the present case. Given the distinct facts of the present case, we agree with the trial court that whether the route is publicly maintained was a question of fact.

Defendant likewise misplaces its reliance on our unpublished, nonbinding decision in *Flowers v Progressive Mich Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2010 (Docket No. 291958). See, generally, *Paris Meadows, LLC*, 287 Mich App at 145 n 3. *Flowers* is obviously distinguishable from the present case because, unlike *Flowers*, unpub op at 2, the DNR in this case has jurisdiction over the Little Manistee Trail, the trail is owned by the state, it is not up to private individuals to choose to maintain the trail, the DNR maintains the trail through its grant-sponsor program irrespective of the will of private individuals, public funds are used to maintain the trail through the grant-sponsor program, Irons uses state equipment to repair and maintain the trail, and state employees physically maintain the trail by doing grading, tree removal, bridge repair, and installing and removing signage.

Finally, defendant relies on the Supreme Court's opinion in *Duffy v Mich Dep't of Natural Resources*, 490 Mich 198; 805 NW2d 399 (2011), to argue that the DNR has no duty to maintain or repair the Little Manistee Trail. Defendant's reliance on *Duffy* is misplaced for two significant reasons. First, defendant's argument directly contradicts the Supreme Court's finding in *Duffy* that MCL 324.81123[7] obligates the DNR to maintain and manage the Little Manistee Trail: "The [Little Manistee] Trail is part of a comprehensive system of recreational trailways, which by statute the DNR is obligated to maintain and manage for off-road vehicles. See MCL 324.81123." *Duffy*, 490 Mich at 203. Second, *Duffy* is distinguishable from the present case. The legal issues addressed by the Court in *Duffy* are inapposite to this case. *Duffy* involved whether the Little Manistee Trail constituted a "highway" under MCL 691.1401 for purposes of the highway exception to governmental immunity, MCL 691.1402(1), of the Governmental Tort

[7] MCL 324.81123(1) provides, "The department shall, by October 1, 1991, develop a comprehensive plan for the management of ORV use of areas, routes, and trails maintained by or under the jurisdiction of the department or a local unit of government pursuant to section 81131."

Liability Act (GTLA), MCL 691.1401 *et seq*. *Duffy*, 490 Mich at 204-205, 224-225. The *Duffy* Court held that the Little Manistee Trail is "not a 'highway' *for purposes of the highway exception to governmental immunity*." *Id.* at 220 (emphasis added). But the present case does not involve the GTLA, the highway exception to governmental immunity, and, thus, the definition of "highway" found in MCL 691.1401. Rather, this case concerns whether the Little Manistee Route is a "highway" *for purposes of the no-fault act*. *Duffy* did not address this issue. The *Duffy* Court's holding that the Little Manistee Trail is not a "highway" is limited to purposes of the highway exception to governmental immunity. See *id.* Significantly, the definition of "highway" found in MCL 691.1401 for purposes of the highway exception is different than the definition of "highway" found in MCL 257.20 that the no-fault act expressly incorporated at the time of plaintiff's accident, 1988 PA 126, and still incorporates today, MCL 500.3101(2)(b). Whether the Little Manistee Trail is a public highway for purposes of the no-fault act focuses on whether the route is "publicly maintained." See MCL 257.20. The *Duffy* Court did not address this issue; the definition of highway in MCL 691.1401 does not use the words "publicly maintained." We cannot import into the no-fault act the definition of "highway" found in MCL 691.1401.[8] The language of MCL 257.20 is clear and unambiguous and must be applied as written. See, generally, *Petersen v Magna Corp*, 484 Mich 300, 307; 773 NW2d 654 (2009) ("If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.").

Accordingly, the trial court properly denied defendant's motion for summary disposition.

B. LIMITATION ON EVIDENCE AT TRIAL

Next, defendant "seeks review of the Circuit Court's decision to limit the admission of evidence regarding the full definition of a 'public highway' . . . to only whether the [Little Manistee Route] was 'publicly maintained.'" Defendant argues that the trial court abused its discretion by excluding evidence relevant to all of the elements necessary to prove whether the route was a highway for purposes of the no-fault act. We do not agree.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *Dep't of Transp v Gilling*, 289 Mich App 219, 243; 796 NW2d 476 (2010). "An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of

[8] We note that the GTLA and the no-fault act are not in pari materia. "The stated purpose of the GTLA was to 'define and limit' liability of governmental units." *Pavlov v Community Emergency Med Serv, Inc*, 195 Mich App 711, 722; 491 NW2d 874 (1992). "The purpose of the Michigan no-fault act is to broadly provide coverage for those injured in motor vehicle accidents without regard to fault." *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 37; 748 NW2d 574 (2008). "An act is not in pari materia with another act, even if it incidentally refers to the same subject, if the scope and aim of the two acts are distinct and unconnected." *Pavlov*, 195 Mich App at 721.

principled outcomes." *Id.*; see also *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Generally, all relevant evidence is admissible and irrelevant evidence is not." *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008); see also MRE 402. "Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence." *Morales*, 279 Mich App at 729-730; see also MRE 401.

As previously discussed, plaintiff had the burden of proving at trial that she suffered "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" to be entitled to PIP benefits. MCL 500.3105(1). Furthermore, an ORV is a "motor vehicle" under MCL 500.3101(2)(e) if it is operated on a public highway. *Allstate Ins Co*, 259 Mich App at 715. And MCL 257.20 defines "highway" as "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." Thus, for plaintiff to be operating a motor vehicle in this case, she had the burden to prove at trial that she was operating the ORV (1) between the boundary lines of a way, (2) that the way was publicly maintained, and (3) that any part thereof was open to the use of the public for purposes of vehicular travel. See *Allstate Ins Co*, 259 Mich App at 713-715; MCL 257.20.

Before trial, plaintiff argued that the parties agreed that the Little Manistee Trail was a way open to use of the public and that the dispositive question was limited to whether the trail was publicly maintained. Plaintiff expressed concern that defendant would seek to introduce opinion evidence that the trail was not a highway. Thus, plaintiff filed a motion in limine requesting that the trial court issue an order that witnesses, lay or expert, not be allowed to testify regarding opinions as to whether the trail was a highway and that any testimony should be limited to facts of whether the trail was publicly maintained. Defendant insists that the trial court limited the evidence that defendant could submit to evidence solely related to whether the trail was publicly maintained—no mention of the other elements was permitted.

Review of the trial court's decision regarding plaintiff's motion in limine reveals that the court ordered neither what defendant contends nor what plaintiff requested in her motion. The court opined in pertinent part:

> My understanding is that *[public maintenance is] not going to be the only thing that [plaintiff is] going to be attempting to prove in this case. They understand their other obligations in terms of the breach of contract and reasonably necessary and motor vehicle so on and so forth.*
>
> [T]he logical conclusion from all these court rulings, mine included, is whether Little Manistee Trail is a highway hinges upon whether it's publically maintained. This is based on the statutory definition of highway that's contained [in] MCL 257.20. Therefore, the plaintiff's motion is granted. An additional expert or lay testimony concerning the meaning of highway is excluded, but *the defendant is not prevented from presenting evidence and testimony pertaining to the other issues before the court.* But we're not going to have a whole lot of testimony

> regarding what is a highway. *The issue is here is [sic] whether or not it's publically maintained. So, the plaintiff's motion is granted in that regard but I'm completely cognizance [sic] of the fact, counsel, that that is not all they have to prove in order to get a verdict in this case*. But, that's the issue. That's the issue. [Emphasis added.]

It is clear from the trial court's ruling that the court recognized that public maintenance of the Little Manistee Trail was not the only thing within plaintiff's burden of proof at trial. Therefore, it did not limit the evidence at trial to only evidence relevant to the issue of whether the trail was publicly maintained. Indeed, it expressly ruled that defendant was not prevented from presenting evidence and testimony pertaining to issues other than public maintenance. The trial court simply acknowledged that the central issue of dispute in the case was whether the trail was publicly maintained. The court ordered that "expert or lay testimony concerning the meaning of highway is excluded. . . . [W]e're not going to have a whole lot of testimony regarding what is a highway." Thus, the court granted plaintiff's motion in limine "in . . . regard" to the request to exclude expert or lay witness opinion as to what constitutes a public highway, but it did not grant plaintiff's request to limit the testimony at trial to whether the trail was publicly maintained.

Furthermore, the trial court's decision to exclude testimony "concerning the meaning of highway" fell within the range of principled outcomes. See *Maldonado*, 476 Mich at 388. Neither testimony concerning the meaning of highway nor an opinion that the Little Manistee Trail is or is not a highway has a tendency to make the existence of the following facts of consequence more probable or less probable than it would be without the testimony: (1) plaintiff was operating the ORV between the boundary lines of a way, (2) the way was publicly maintained, (3) any part of thereof was open to the use of the public for purposes of vehicular travel. See *Allstate Ins Co*, 259 Mich App at 713-715; MCL 257.20. Therefore, the testimony that the court excluded was irrelevant and, thus, properly excluded. See *Morales*, 279 Mich App at 729-730.

Finally, we note that "[e]ven if a trial court's decision regarding the admission or exclusion of evidence is an abuse of discretion . . ., reversal is not warranted unless a substantial right of a party is affected, MRE 103(a), or it affirmatively appears that failure to grant relief is inconsistent with substantial justice, MCR 2.613(A)." *Howard v Kowalski*, 296 Mich App 664, 675-676; 823 NW2d 302 (2012). Defendant has not provided this Court with any argument that the court's ruling affected a substantial right or that failure to grant relief is inconsistent with substantial justice. Therefore, even assuming that the trial court abused its discretion, defendant has failed to demonstrate that reversal is warranted.

C. JURY INSTRUCTION AND VERDICT FORM

Defendant's next argument is that the trial court did not properly instruct the jury regarding plaintiff's burden of proof. Defendant challenges both the jury instructions and the special verdict form.

With regard to the jury instructions, we conclude that that defendant is not entitled to relief. "[A] party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an

appellate parachute." *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). Here, defendant's only objection to the jury instructions before the jury was instructed concerned a "claims handling" instruction that defendant does not contest on appeal. After the trial court instructed the jury, defendant approved of the court's instructions. Thus, with the exception of the "claims handling" instruction, defendant expressly approved the jury instructions. Therefore, defendant is not entitled to any relief on this issue. See *id.*; see also *Chastain v Gen Motors Corp*, 254 Mich App 576, 591; 657 NW2d 804 (2002) ("Thus, because plaintiff acquiesced in the trial court's decision to provide only the first paragraph of SJI2d 15.05 in lieu of the special jury instruction, plaintiff is not entitled to any relief with regard to this issue."). Nevertheless, we have reviewed the oral jury instructions as a whole and conclude that there is no basis for reversal as "the theories and applicable law were adequately and fairly presented to the jury." *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

Regarding defendant's challenge to the special verdict form, MCR 2.515(A) provides that a trial court "may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." "[T]he court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict." MCR 2.515(A). The court may submit to the jury "written questions that may be answered categorically and briefly." MCR 2.515(A)(1). "The 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." MCR 2.515(A). "After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings." MCR 2.515(B). MCR 2.515(C) provides:

> If the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless the party demands its submission to the jury before it retires for deliberations. The court may make a finding with respect to an issue omitted without a demand. If the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.

The Michigan Court Rules Practice text explains the application of MCR 2.515(C) as follows:

> When a case is submitted to the jury for a special verdict, the parties are entitled to have all of the controlling factual issues submitted to the jury. However, they cannot complain if issues are omitted, unless a demand for the inclusion of those issues is made prior to the jury's deliberations. Any facts that were not submitted for decision by the jury in connection with its special verdict are then left for decision by the court, as the party is deemed to have waived the right to a trial by jury.
>
> MCR 2.515(C) anticipates that there may be some variance between the instructions requested by the parties and the instructions as they are actually given to the jury. For that reason, the subrule requires that the parties be afforded an opportunity after the instructions have been given, but before the jury retires, to raise objections to the instructions actually given. If a party's objection to the actual instructions already appears on the record, no further objection is

> necessary. If, however, a requested instruction has been omitted, but not previously denied, the party must raise an objection to the instructions at that time and "demand" that the issue be submitted. The party must point out the omission to the court and give the judge an opportunity to correct an inadvertent failure to submit the issue. If the party does not, the right to jury trial as to that issue is waived. If a party demands the submission of an issue to the jury and the court refuses, there is, of course, no waiver of the right to trial by jury as to that issue, and if it is determined on appeal that the issue should have been submitted to the jury, a new trial may be necessary. [3 Mich. Ct. Rules Prac., Text § 2515.6 (5th ed.).]

In this case, the trial court described the dispute over the special verdict form as follows:

> THE COURT: I do have -- you have a dispute about the verdict form I imagine that. The parties tried to work out language on the verdict form. The first question was fine, was the Little Manistee Route was [sic] publically maintained. Question number two defendant wanted the question, did the plaintiff's accident body injury [sic] arise out of the ownership, operation or maintenance of use [sic] of a motor vehicle as a motor vehicle . . . .
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: And the plaintiff objected to that.

The court then gave defense counsel the opportunity to make a record of her objection. Counsel argued that the verdict form was inconsistent with the burden of proof, which required plaintiff to prove that A, "at the time of the accident there existed a valid contract of no-fault insurance. B, that plaintiff's injuries arose out of the operation or use of a motor vehicle as a motor vehicle. And . . . C, that plaintiff incurred allowable expenses." The special verdict form submitted to the jury ultimately asked two questions before asking the jury whether plaintiff incurred various allowable expenses: (1) whether the Little Manistee Trail was publicly maintained and (2) whether plaintiff sustained accidental bodily injury.

On appeal, defendant argues that the verdict form should have included (1) unspecified questions concerning "the definitions of highway and motor vehicle, set forth in MCL 500.3101(2)(e) and MCL 257.20," respectively, and (2) the question whether "plaintiff's accidental bodily injury arose out of the ownership, operation, or maintenance of use [sic] of a motor vehicle as a motor vehicle."

To the extent defendant argues on appeal that the verdict form should have included questions related to the definitions of highway and motor vehicle as set forth in MCL 500.3101(2)(e) and MCL 257.20—in addition to the already existing question of whether the Little Manistee Trail was publicly maintained—defendant did not demand such questions before deliberations. Therefore, defendant waived its right to a jury trial on any such issues. See MCR 2.515(C); see also 3 Mich. Ct. Rules Prac., Text § 2515.6 (5th ed.). Because the trial court did not expressly make a finding on any such issues, it is deemed to have made a finding in accord with the judgment on the special verdict, i.e., a finding in plaintiff's favor. See MCR 2.515(C).

As previously discussed, MCL 500.3101(2)(e) and MCL 257.20 contain the definitions of motor vehicle and highway. As a matter of law at the time of plaintiff's ORV accident, an ORV constituted a "motor vehicle" under MCL 500.3101(2)(e) if it was operated on a public highway. *Allstate Ins Co*, 259 Mich App at 715, since superseded by 2008 PA 241 amending MCL 500.3101(2)(e). MCL 257.20 defines "highway" as "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." The factual issues relative to MCL 500.3101(2)(e) and MCL 257.20 that were not included on the verdict form are, thus, (1) whether the ORV was being operated between the boundary lines of a way and (2) whether the way was open to the use of the public for purposes of vehicular travel. Under MCR 2.515(C), the trial court is deemed to have found that the ORV was being operated between the boundary lines of a way and that the way was open to the public for purposes of vehicular travel. As a result, the court necessarily found that the ORV was being operated on a public highway when its findings under MCR 2.515(C) are considered in conjunction with the jury's finding that the Little Manistee Trail was publicly maintained. See MCL 500.3101(2)(e); MCL 257.20. Moreover, because the ORV was being operated on a public highway, it constitutes a motor vehicle as a matter of law for purposes of MCL 500.3105(1). See *Allstate Ins Co*, 259 Mich App at 713-715.

Regarding defendant's argument that the trial court should have asked the jury whether plaintiff's accidental bodily injury arose out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle, this was the only question that defendant demanded be included in the verdict form before deliberations that the court did not include. Therefore, defendant did not waive the right to have a jury answer this question. See MCR 2.515(C); see also 3 Mich. Ct. Rules Prac., Text § 2515.6 (5th ed.). Thus, we must determine whether the question should have been submitted to the jury and if a new trial is necessary. See 3 Mich. Ct. Rules Prac., Text § 2515.6 (5th ed.).

The jury determined in question two of the verdict form that plaintiff sustained an accidental bodily injury. And, as previously discussed, both the jury's determination in question one of the verdict form that the Little Manistee Trail was publicly maintained and the trial court's findings under MCR 2.515(C) necessitated the conclusion as a matter of law that plaintiff was operating a motor vehicle on the Little Manistee Trail, a public highway. Thus, the only issue that defendant requested that was not decided by either the jury or the court under MCR 2.515(C) is the issue of "arising out of" causation. See, generally, MCL 500.3105(1).

We conclude that defendant is not entitled to relief on the basis of the omission from the verdict form of a question concerning causation. At trial, plaintiff's counsel sought to elicit opinion testimony from Paul Cole concerning whether logs on the route had anything to do with plaintiff's accident. Defense counsel objected on the basis of relevance. After plaintiff's counsel argued that the testimony would be relevant to the issue of causation, defense counsel responded, "Causation is not an issue in this case," and the trial court sustained the objection. Again, "a party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf*, 245 Mich App at 683. Because defendant represented at trial that causation was not an issue in this case, defendant should not now be permitted to assert that causation was an issue during trial and that the court should have included a special question regarding causation in the verdict form. See *id.*

Moreover, even assuming that the trial court abused its discretion with the verdict form, the error was harmless. See, generally, MCR 2.613(A). There was essentially no dispute in this case that plaintiff's bodily injury arose out of her use of an ORV—hence defense counsel's representation at trial. There was also no evidence at trial contradicting Dan Duffy's testimony that he and plaintiff were riding ORVs on the Little Manistee Trail in an area of a turn where the trail was unstable and rough, that he heard a "loud crack," and that when he turned around to go back to plaintiff, he saw her laying in a ditch across a fallen tree. There was also no evidence contradicting Cole's testimony that there were logs under the ground in the area of the trail where plaintiff's accident occurred. The procedural history of this case illustrates that the parties' only focus of dispute concerned whether the ORV constituted a motor vehicle, which depended on whether the Little Manistee Trail was publicly maintained. On appeal, defendant does not contest causation.

Accordingly, defendant has not demonstrated entitlement to relief on the basis of an erroneous jury instruction or special verdict form.

D. PENALTY INTEREST

Defendant's final contention on appeal is that the trial court erred by denying its motions for directed verdict and JNOV on the issue of penalty interest. We agree.

We review de novo a trial court's denial of a motion for a directed verdict or a motion for JNOV. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). We must consider the evidence presented up to the point of the motion and all legitimate inferences from the evidence in the light most favorable to the nonmoving party to determine whether a factual question existed. *Id.*; *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009). A trial court properly grants a directed verdict or a motion for JNOV only when no factual question exists upon which reasonable minds could differ. *Abke*, 239 Mich App at 361.

"No-fault penalty interest is intended to penalize an insurer that is dilatory in paying a claim." *Williams v AAA Michigan*, 250 Mich App 249, 265; 646 NW2d 476 (2002). MCL 500.3142(2) provides as follows regarding penalty interest on overdue PIP benefits:

> Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer.

Thus, MCL 500.3142(2) "provides that personal protection insurance benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of the fact of injury and of the amount of loss sustained. Payments are not overdue if they are not supported by reasonable proof." *Nash v Detroit Auto Inter-Ins Exch*, 120 Mich App 568, 572; 327 NW2d 521 (1982) (emphasis omitted). In terms of what constitutes reasonable proof of the amount of loss sustained, exact proof is not required. *Williams*, 250 Mich App at 267.

In this case, reasonable minds could not conclude on the basis of the evidence at trial that plaintiff provided defendant before trial with reasonable proof of the amount of loss sustained. There was no evidence at trial of any pretrial communication between the Duffys and defendant regarding a monetary amount of loss sustained by plaintiff. When plaintiff submitted her application for benefits, she did not provide any information regarding her amount of loss to date; instead, she stated that it was "unknown." There was no evidence at trial that the Duffys provided defendant with bills of plaintiff's medical expenses before trial.[9] Although plaintiff argues that Christina Criscenti, defendant's PIP adjuster who handled plaintiff's claim, was familiar with the amount of loss generally sustained by a quadriplegic, her familiarity with the costs incurred by quadriplegics is not proof received by defendant specific to the amount of loss sustained by plaintiff. Moreover, plaintiff's authorization of defendant to obtain medical and wage information does not constitute proof of the amount of plaintiff's loss. See, generally, *English v Home Ins Co*, 112 Mich App 468, 470, 476; 316 NW2d 463 (1982) (holding that the plaintiff failed to present reasonable proof of the amount of loss, even where the defendant insurer requested various records and medical authorizations from the plaintiff).

Plaintiff argues that she provided reasonable proof of the fact and amount of her loss at the time Criscenti denied her claim on the telephone in late October 2007. According to plaintiff, "[r]easonable proof of loss does not require documentation where the claim is denied for lack of coverage." Not only does plaintiff provide no legal authority for this argument, but our caselaw illustrates that plaintiff's argument must fail. If proof of loss were unnecessary simply because an insurer denies coverage, a claimant who is denied coverage will always be entitled to penalty interest—this is clearly not the case.[10] See, e.g., *id.* at 470 (plaintiff fails to present reasonable proof of the fact and amount of loss after claim for additional benefits is denied); *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 516-17; 370 NW2d 619 (1985) (same).

Plaintiff also argues that it would be unreasonable for her to provide defendant with medical-expense information after defendant told her through Criscenti's interrogatory answer not to provide defendant with such information. While this argument has some equitable appeal, MCL 500.3142(2) speaks of an entitlement to interest after a certain number of days: "30 days after" the insurer receives reasonable proof of the fact and of the amount of loss sustained. Establishing the day on which an insurer received reasonable proof of the fact and of the amount

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[9] Contrary to plaintiff's closing argument that defendant received the medical bills in November 2008, there was no evidence at trial supporting this assertion.

[10] Moreover, we have held that claimants have submitted reasonable proof of the fact and of the amount of loss for the first time at various points after a no-fault insurer denies a claim. See, e.g., *Williams*, 250 Mich App at 253, 264-267 (reasonable proof of the fact and amount of loss first submitted to insurer in a letter after claim was denied); *Manley v Detroit Auto Inter-Ins Exch*, 127 Mich App 444, 461; 339 NW2d 205 (1983) (reasonable proof of fact and amount of loss first provided to insurer through the evidence at trial); *Hartman v Ins Co of North America*, 106 Mich App 731, 747; 308 NW2d 625 (1981) (reasonable proof of fact and amount of loss first provided to insurer through the contents of a complaint filed after insurer denied claim).

of loss is, thus, necessary to begin the calculation of the 30-day payment period and the day when interest begins to accrue. Excusing a claimant from the requirement of providing an insurer with proof of the amount of loss sustained eliminates the statutory parameters for determining the day when interest begins to accrue under MCL 500.3142(2). Here, the jury awarded $100,463.04 in penalty interest, yet we are unable to determine—either from the jury's verdict or the evidence at trial—from what date(s) penalty interest started to accrue. Neither the reading of the jury's verdict on the record nor the verdict form shed any light on what the jury determined was the date(s) penalty interest started to accrue; the jury's verdict and verdict form simply provide that benefits were overdue and announce the $100,463.04 figure. Although plaintiff argued to the jury during closing arguments that she should start receiving penalty interest as of January 2008, the time when Criscenti informed plaintiff through her answer to the interrogatory that defendant did not want plaintiff to submit proof of her loss, the interrogatory was never admitted into evidence at trial. And although plaintiff also argued to the jury that defendant received her medical bills in November 2008, there was no evidence at trial supporting this assertion. Even assuming the jury had evidence of when defendant instructed plaintiff not to submit proof of her loss, the amount of loss that plaintiff had incurred at that time, upon which to calculate interest, is impossible to discern.

Accordingly, we must reverse the trial court's denial of defendant's motions for directed verdict and JNOV on the issue of penalty interest and vacate the award of penalty interest. We note, however, that there was significant testimony at trial regarding the amount of loss incurred by plaintiff. Further, the trial court admitted plaintiff's medical bills into evidence. Therefore, defendant received at trial reasonable proof of the fact and of the amount of loss. See, generally, *Manley v Detroit Auto Inter-Ins Exch*, 127 Mich App 444, 461; 339 NW2d 205 (1983).

We reverse the trial court's denial of defendant's motions for directed verdict and JNOV regarding penalty interest and vacate the award of penalty interest. We affirm the trial court's judgment in all other respects.

/s/ Jane M. Beckering
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro