

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Court of Appeals  
(Murphy, P.J., and Sawyer and Bandstra, JJ.)

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CATHERINE WILCOX, individually and  
as Next Friend of ISAAC WILCOX, a  
minor,

Plaintiffs/Appellants,

Supreme Court Case No. 138602

v

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE CO,

Defendant/Appellee.

Court of Appeals No. 290515

Kent Circuit No. 08-010120-NF

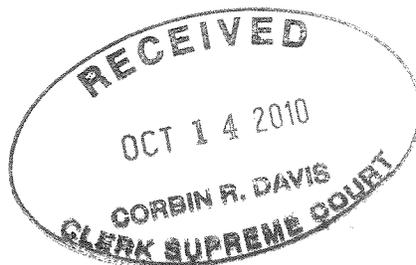
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**AMICUS CURIAE BRIEF OF COALITION PROTECTING AUTO NO-FAULT  
IN SUPPORT OF PLAINTIFFS/APPELLANTS**

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Liisa R. Speaker (P65728)  
SPEAKER LAW FIRM, PLLC  
Appellate Counsel for Amicus Curiae  
Coalition Protecting Auto No-Fault  
230 N. Sycamore St., Suite D  
Lansing, MI 48933  
(517) 482-8933

George T. Sinas (P25643)  
SINAS DRAMIS BRAKE BOUGHTON &  
MCINTYRE, PC  
General Counsel for Coalition Protecting  
Auto No-Fault  
3380 Pinetree Rd.  
Lansing, MI 48911  
(517) 394-7500



# TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES .....	iv
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i> CPAN .....	1
STATEMENT OF BASIS FOR JURISDICTION .....	4
INTRODUCTION .....	5
STATEMENT OF RELEVANT FACTS AND PROCEEDINGS .....	6
ARGUMENT .....	9
I.    There is one singular causation standard which applies to the PIP benefit entitlement provisions of MCL 500.3105(1) and the allowable expense provision of MCL 500.3107(1)(a), which standard is reflected in the decisions of <i>Shinabarger v Citizens</i> and <i>Scott v State Farm</i> , and this standard is consistent with a proper reading of <i>Griffith v State Farm</i> .....	9
A.    Distinguishing between entitlement to PIP benefits under Section 3105(1) and liability for allowable expense benefits under Section 3107(1)(a) .....	10
B.    Evolution of causation law under Section 3105(1) – <i>Shinabarger v Citizens</i> .....	13
C.    Evolution of causation law under Section 3107(1)(a) – <i>Scott v State Farm</i> .....	16
D.    Emergence of Singular Causation Standard – the <i>Shinabarger-Scott</i> test .....	22
II.   The decision in <i>Griffith v State Farm</i> , if properly read, is consistent with the <i>Shinabarger-Scott</i> singular causation test, and obligates no-fault insurers to pay the full amount of an allowable expense claim whenever a motor vehicle accident materially affects the pre-accident needs of a catastrophically injured person with respect to such expenses, rather than permitting an insurer to pay only for the incremental increase in the costs of those affected pre-accident needs .....	23
A.    The pre- <i>Griffith</i> appellate case law rejects incrementalism .....	25
B.    The specific issue involved in <i>Griffith</i> and its “rhetorical question” are the keys to properly interpreting the decision .....	31

C.	<i>Griffith</i> does not adopt incrementalism, but rather embraces the <i>Shinabarger-Scott</i> singular causation standard . . . . .	34
D.	The causation requirements for payment of PIP benefits are significantly less restrictive than the causation requirements of tort law. . . . .	35
	CONCLUSION . . . . .	38
	RELIEF REQUESTED . . . . .	40
	PROOF OF SERVICE . . . . .	41
	APPENDIX	<b><u>Tab</u></b>
•	George T. Sinas and Stephen H. Sinas, <i>Deciphering Two Related Concepts: No-Fault PIP Causation and the Decision in Griffith v State Farm</i> , Thomas M. Cooley L. Rev., 27:1 (Trinity Term 2010) . . . . .	A
•	<i>Henderson v Auto Club Ins Ass'n</i> , unpublished per curiam opinion of Court of Appeals, issued June 19, 1987 (Docket No 96310) . . . . .	B

## INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bailey v DAIIIE</i> , 143 Mich App 223; 371 NW2d 917 (1985) .....	12
<i>Begin v Mich Bell Tel Co</i> , 284 Mich App 581; 773 NW2d 271 (2009) .....	24
<i>Bonkowski v Allstate Insurance Company</i> , 281 Mich App 154; 761 NW2d 784 (2008) .	12
<i>Bradley v Detroit Automobile Inter-Ins Exch</i> , 130 Mich App 34; 343 NW2d 506 (1983) .....	15, 21
<i>Bromley v Citizens Insurance Co of Am</i> , 113 Mich App 131; 317 NW2d 318 (1982) ..	15
<i>Davis v Citizens Ins Co of America</i> , 195 Mich App 323; 489 NW2d 214 (1992) .....	12, 25, 29, 30
<i>Griffith v State Farm Mut Auto Ins Co</i> , 472 Mich 521; 697 NW2d 895 (2005) .....	<i>passim</i>
<i>Heinz v Auto Club Ins Ass'n</i> , 214 Mich App 195; 543 NW2d 4 (1995) .....	12
<i>Henderson v Auto Club Ins Ass'n</i> , unpublished per curiam opinion of Court of Appeals, issued June 19, 1987 (Docket No 96310) .....	18
<i>Hoover v Mich Mut Ins Co</i> , 281 Mich App 617; 761 NW2d 801 (2008) .....	7, 8, 24, 25, 35, 38
<i>Kitchen v State Farm Ins Co</i> , 202 Mich App 55; 507 NW2d 781 (1993) .....	12
<i>Kondratek v ACIA</i> , 163 Mich App 634; 414 NW2d 903 (1987) .....	12
<i>Manley v DAIIIE</i> , 425 Mich 140; 388 NW2d 216 (1986) .....	12
<i>McKenzie v Auto Club Ins Ass'n</i> , 458 Mich 214; 580 NW2d 424 (1998) .....	11, 16
<i>McKim v Home Ins Co</i> , 133 Mich App 694; 349 NW2d 533, 535 (1984) .....	16, 18
<i>Miller v State Farm Mut Auto Ins Co</i> , 410 Mich 538; 302 NW2d 537 (1991) .....	25, 27, 28, 30

<i>Mollitor v Associated Truck Lines</i> , 140 Mich App 431; 364 NW2d 344 (1985) . . . .	16, 18
<i>Morosini v Citizens Ins Co of Am</i> , 461 Mich 303; 602 NW2d 828 (1999) . . . . .	11
<i>Payne v Farm Bureau</i> , 263 Mich App 521; 688 NW2d 327 (2004) . . . . .	12
<i>Scott v State Farm</i> , 278 Mich App 578; 751 NW2d 51 (2008), <i>vacated in part and appeal denied</i> , 482 Mich 1074; 758 NW2d 249 (2008), and <i>vacated prior order and appeal denied</i> , 483 Mich 1032; 766 NW2d 273 (2009) . . . . .	5, 9, 16, 18, 19-23, 34-39
<i>Sharp v Preferred Risk Mutual Ins Co</i> , 142 Mich App 499; 370 NW2d 619 (1981) . . . . .	25, 28, 29, 30, 34, 35
<i>Shavers v Attorney General</i> . 402 Mich 554; 267 NW2d 72 (1978) . . . . .	26
<i>Shinabarger v Citizens Mutual Insurance Co</i> , 90 Mich App 307; 282 NW2d 301 (1979) . . . . .	5, 9, 13-15, 19-23, 34
<i>Swantek v ACIA</i> , 118 Mich App 807; 325 NW2d 588 (1982) . . . . .	12
<i>Tennant v State Farm Mut Auto Ins Co</i> , 143 Mich App 419; 372 NW2d 582 (1985) . . .	12
<i>Thornton v Allstate Ins Co</i> , 425 Mich 643; 391 NW2d 320 (1986) . . . . .	15
<i>University Rehab Alliance Inc v Farm Bureau Gen Ins Co</i> , 279 Mich App 691; 760 NW2d 574 (2008), <i>appeal denied</i> 483 Mich 955 (2009) . . . . .	16
<i>Visconti v DAIE</i> , 90 Mich App 477; 282 NW2d 360 (1979) . . . . .	12
<i>Wilcox v State Farm Mut Auto Ins Co</i> , Court of Appeals Docket Number 290515 (pending appeal) . . . . .	7
<i>Williams v AAA Michigan</i> , 250 Mich App 249; 646 NW2d 746 (2002) . . . . .	12

**Statutes and Court Rules**

MCL 500.3101 . . . . .	4, 11
MCL 500.3105 . . . . .	<i>passim</i>
MCL 500.3107 . . . . .	<i>passim</i>

MCL 500.3108 ..... 25  
MCR 7.302 ..... 4

**Secondary Sources**

George T. Sinas and Stephen H. Sinas, *Deciphering Two Related Concepts: No-Fault PIP Causation and the Decision in Griffith v State Farm*, Thomas M. Cooley L. Rev., 27:1 (Trinity Term 2010) ..... 9, 38

## STATEMENT OF INTEREST OF *AMICUS CURIAE* CPAN

CPAN is a broad-based coalition formed to preserve the integrity of Michigan’s model no-fault automobile insurance system. The “centerpiece” of the Michigan No-Fault Act is that it guarantees the payment of a broad scope of medical and rehabilitation expenses that enable accident victims, particularly those who have sustained catastrophic injury, to obtain the best recovery and the highest quality of life possible. These benefits are referred to as “allowable expense” benefits and are defined in Section 3107(1)(a) of the Act. It is this feature of the Michigan No-Fault Act which distinguishes it from any other no-fault system in the United States. The central mission of CPAN is to protect and preserve the vitality of the Michigan auto no-fault insurance system so that it continues to provide comprehensive coverage and meaningful protections for Michigan citizens injured in motor vehicle collisions.

CPAN consists of sixteen major medical groups and eight consumer organizations. CPAN’s member organizations are identified below:

<b>CPAN: Coalition Protecting Auto No-Fault</b>	
<b>Medical Provider Groups</b>	<b>Consumer Organizations</b>
1. <i>Michigan State Medical Society</i>	1. <i>Brain Injury Association of Michigan</i>
2. <i>Michigan Osteopathic Association</i>	2. <i>Michigan Association for Justice</i>
3. <i>Michigan Health &amp; Hospital Association</i>	3. <i>Michigan Citizens Action</i>
4. <i>Michigan Orthopaedic Society</i>	4. <i>UAW MI CAP</i>
5. <i>Michigan Association of Chiropractors</i>	5. <i>Michigan Protection and Advocacy Services</i>
6. <i>Americare Medical</i>	6. <i>Michigan Paralyzed Veterans of America</i>
7. <i>Michigan Association of Centers for Independent Living</i>	7. <i>Michigan State AFL-CIO</i>
8. <i>Eisenhower Center</i>	8. <i>Michigan Tribal Advocates</i>

9. <i>Michigan Academy of Physician Assistants</i>	
10. <i>Michigan Brain Injury Providers Council</i>	
11. <i>Michigan Dental Association</i>	
12. <i>Michigan Nurses Association</i>	
13. <i>Michigan Orthotics &amp; Prosthetics Association</i>	
14. <i>Michigan Rehabilitation Association</i>	
15. <i>Michigan Rehabilitation Services</i>	
16. <i>Spectrum Health</i>	

It is CPAN’s fervent belief that Michigan’s auto no-fault insurance system cannot survive unless the Michigan Legislature and the Michigan appellate courts preserve and protect the lifetime medical and rehabilitation benefits that have always been available to motor vehicle accident victims since the No-Fault Act went into effect in 1973.

CPAN is gravely concerned that the ability of catastrophically injured accident victims to obtain prompt reparations for many necessary products, services, and accommodations has been seriously jeopardized as a result of the insurance industry’s misinterpretation of *Griffith v State Farm Mutual Insurance Co*, 472 Mich 521; 697 NW2d 895 (2005). The Michigan Supreme Court in *Griffith* held that a catastrophically injured person cared for at home could not be reimbursed for his ordinary non-special dietary food expenses if his post-injury food needs were no different than his food needs before his injury. *Id* at 536. In the wake of the *Griffith* decision, many insurance companies – including the Defendant in the *Wilcox* case – have argued that *Griffith* adopts a theory of “incrementalism,” which only requires insurers to pay the difference between the plaintiff’s cost for barrier-free home accommodations and handicap-accessible transportation and plaintiff’s cost for housing and transportation prior to being injured. This incrementalist

concept was not adopted by this Court in *Griffith*, is contrary to prior no-fault appellate case law, and has no support in the No-Fault Act. Moreover, it is wreaking havoc in the trial courts and for providers who service these catastrophically injured accident victims. The insurance industry's interpretation of *Griffith* invites the trial courts to speculate about what fraction of each and every cost element for handicapper transportation and accommodations (electricity, property taxes, home insurance, construction costs, security system, trash disposal, cleaning costs, snow removal, and so on) represents expenses the injured person would have incurred before sustaining a catastrophic motor vehicle injury. Such a concept would significantly and unnecessarily complicate the processing of catastrophic injury claims, increase the provider's administrative expenses, and substantially delay payment of claims. As such, the concept of incrementalism advocated by State Farm in the instant case contravenes the fundamental purpose of the No-Fault Act, which is to provide prompt payment of benefits and reduce administrative delays.

## STATEMENT OF BASIS FOR JURISDICTION

This Court has jurisdiction to decide this case because it presents jurisprudentially significant issues. MCR 7.302(B)(3). In its order granting leave to appeal on April 16, 2010, this Court ordered the parties to address “whether, or to what extent, the defendant is obligated to pay the plaintiffs personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq.*, for housing expenses, modifications, and accommodations associated with the care of the plaintiffs’ son, Isaac Wilcox, and whether *Griffith v State Farm Mutual Automobile Ins Co*, 472 Mich 521 (2005), was correctly decided.”

## INTRODUCTION

This case arises from the housing needs of a young boy who was catastrophically injured in an automobile accident. The young boy is now quadriplegic and ventilator-dependent and requires larger and better-equipped housing. This case presents this Court the opportunity to clarify that the causation standard for no-fault PIP benefits under MCL 500.3105(1) is the same as the causation standard for allowable expenses under MCL 500.3107(1)(a), as enunciated in *Shinabarger v Citizens Mutual Insurance Co*, 90 Mich App 307; 282 NW2d 301 (1979) and *Scott v State Farm*, 278 Mich App 578; 751 NW2d 51 (2008). The singular causation standard of *Shinabarger* and *Scott* is consistent with this Court's holding in *Griffith*. Applying this singular causation standard means that if the accident is one of the causes of the need for products, services, or accommodations, then there is a sufficient causal nexus and the insurance company is obligated to pay 100% of that allowable expense. Because Isaac Wilcox's need for a handicap-accessible home was caused by the catastrophic injury he sustained in an automobile accident, State Farm is obligated to pay for 100% of that home.

## STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

Isaac Wilcox was four years old when he sustained catastrophic injuries in an automobile accident. For the month following the accident, Isaac was hospitalized, at a cost of \$5,000 per day to State Farm, the PIP carrier. (Appellant's Appendix 35a). At the time of the accident, Isaac, his parents, and brothers rented a home for \$925 per month. But the rental home could not accommodate Isaac after the accident because he is now quadriplegic and ventilator-dependent.

Isaac's parents researched their housing needs and settled on buying a house that boasted handicap-accessible features to accommodate their quadriplegic, ventilator-dependent son. The monthly mortgage payment on Isaac's large and better equipped home is \$1958, not including escrow, taxes, and insurance. Appellant's Appendix 31a, 39a. As part of their housing search, it was important to Isaac's family that they select a house close to Isaac's schools. Indeed, they now live within one mile of Isaac's elementary school, and within ten minutes of Isaac's middle school, high school, and a hospital with a pediatric ventilation care unit. But just as important as the proximity to schools and the hospital, Isaac's parents chose to live in a school district that could accommodate Isaac's care requirements during school hours. Because they chose a school system that had the resources to offer care and education to their quadriplegic, ventilator-dependent son, the school system is responsible for Isaac's care for seven to eight hours per day during the school year (nine months out of the year).

As it has turned out, Isaac's parents school choice has saved Isaac's life. On one occasion, Isaac began choking while he was at school when his tracheotomy was plugged with mucous. The school's nursing attendant was unable to remedy the situation, so the

school called Isaac's father. Because Isaac lived only one mile away, his father was able to rush to school and save Isaac's life.

Isaac's home is also very important to his rehabilitation. As a young boy now age 9, Isaac's house is the center of all his non-school social activities. It is, therefore, very important for Isaac to be able to access the entire home so he can spend time with his brothers and parents, and not be restricted to a single room or wing of the house.

In spite of all the advantages afforded by this handicap-accessible home near Isaac's school, and despite the fact that this home has actually saved State Farm money compared to institutional living or a home in a school district that could not accommodate Isaac, State Farm has refused to reimburse the Wilcox family for 100% of that expense. Instead, claiming reliance on this Court's decision in *Griffith*, State Farm asserted that it was only obligated to reimburse Isaac for the amount solely attributable to "Isaac's increased needs" after the accident. Appellant's Appendix 18a. Accordingly, State Farm calculated that it was only obligated to reimburse Isaac for 2/5ths of the house, representing Isaac and one caregiver, who are two of the five people who live in the family home.

The trial court agreed with State Farm, adopted the incrementalization announced in *Hoover v Michigan Mutual Insurance Co*, 281 Mich App 617; 761 NW2d 801 (2008), and held that the State Farm was not obligated to reimburse the Wilcox family for the full purchase price of the home, but only for the "increased housing costs" incurred as a result of Isaac's injuries. Appellant's Appendix 103a-106a. Plaintiffs sought leave to appeal in the Court of Appeals. The Court of Appeals remanded the case to the trial court with

instructions to “employ the analysis described and used” in the *Hoover* decision. Appellant’s Appendix 117a. This Court granted leave to appeal.

## ARGUMENT

- I. **There is one singular causation standard which applies to the PIP benefit entitlement provisions of MCL 500.3105(1) and the allowable expense provision of MCL 500.3107(1)(a), which standard is reflected in the decisions of *Shinabarger v Citizens* and *Scott v State Farm*, and this standard is consistent with a proper reading of *Griffith v State Farm*.**

The Michigan law of causation for no-fault PIP cases is that, if a motor vehicle accident is one of the causes of the plaintiff's need for products or services (such as barrier-free housing or a handicapper van), then a sufficient causal nexus has been demonstrated to obligate the insurer to pay 100% of that claimed expense. This legal principle was made abundantly clear in the recent published Court of Appeals opinion of *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578; 751 NW2d 51 (2008), which after careful review, the Supreme Court refused to modify in any way. See *Scott*, 482 Mich 1074; 758 NW2d 249 (2008), and 483 Mich 1032; 766 NW2d 273 (2009). Thus, as in the case at bar, where an automobile accident injury has materially affected a person's pre-accident needs for items such as housing and transportation, the no-fault insurer must pay, under Section 3107(1)(a) of the No-Fault Act, the entire reasonable charges for all such reasonably necessary accommodations, products, and services. The Supreme Court's decisions in *Scott, supra* and *Griffith, supra* clearly embrace these fundamental tenets of no-fault PIP causation law.

This law has been cogently and thoroughly analyzed in a newly-released law review article entitled *Deciphering Two Related Concepts: No-Fault PIP Causation and the Decision in Griffith v State Farm*, by George T. Sinas and Stephen H. Sinas, Thomas M. Cooley Law Review, volume 27, number 1, Trinity Term 2010. Although a pre-publication

copy of this Article was included in Appellant's Appendix at 120a-184a, the Article has since been released, and a published copy is attached as **Exhibit A** to this Amicus Brief. This Article contains the most comprehensive analysis and research on the topic of PIP causation law to date and should be considered a seminal legal authority on those issues. The Article clearly explains why Michigan law does not support the insurance industry's incrementalist approach to allowable expenses under Section 3107(1)(a).

**A. Distinguishing between entitlement to PIP benefits under Section 3105(1) and liability for allowable expense benefits under Section 3107(1)(a).**

In order for an automobile accident victim to receive PIP benefits under the No-Fault Act, he must satisfy two statutory provisions: MCL 500.3105 and MCL 500.3107. While interrelated, these two sections address distinct concepts: Section 3105(1) establishes the accident victim's "entitlement to benefits" while Section 3107(1)(a) sets the insurer's "liability to pay allowable expense benefits."

The concept of entitlement to benefits generally involves the question of whether there was an injury-producing event that satisfies the requirements of Section 3105(1). Section 3105(1) provides the following:

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, subject to the provisions of this chapter.

In recognizing the broad scope of PIP benefit entitlement, the appellate case law under Section 3105(1) has produced a five-part test to determine when an injury victim is entitled to recover no-fault PIP benefits under the Act. The five elements of this test are as follows:

(1) there must be a motor vehicle involve in the accident, as that term is defined in the statute (see Section 3101(2)(e));

(2) the claim must involve a bodily injury, rather than some disease or latent medical condition;

(3) the injury giving rise to the claim must be accidental in the sense that it was not caused intentionally by the claimaint (see Section 3105(4));

(4) the injury must be closely related to the transportational function of a motor vehicle; and

(5) there must be a sufficient causal nexus between the injury and the use of the vehicle that is more than incidental or fortuitous.

*Morosini v Citizens Ins Co of Am*, 461 Mich 303, 309-310; 602 NW2d 828 (1999). The focus under Section 3105(1) is primarily on how the injury-producing event happened and its relationship to a motor vehicle. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 226; 580 NW2d 424 (1998).

In contrast to Section 3105(1), the concept of liability to pay allowable expense benefits under Section 3107(1)(a) generally focuses on whether the claimant's medical condition and the claimant's need for specific medical services are sufficiently related to the injury that gives rise to the no-fault benefit entitlement. The allowable expense benefit set forth in Section 3107(1)(a) of the No-Fault Act is defined in such a way as to create an unlimited, lifetime benefit that covers an extraordinarily broad category of expenses incurred by those individuals who sustain catastrophic injury. This section obligates a no-fault insurer to pay "allowable expenses" for the following:

. . . all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation.

In interpreting the allowable expense benefits payable under Section 3107(1)(a), the Michigan appellate courts have consistently ruled that this benefit extends far beyond expenses for traditional medical care. Allowable expense benefits cover a wide variety of expenses incurred by catastrophically injured people including, but not limited to, the following:

- The cost of handicap accessible single family homes and other residential accommodations. [See *Kitchen v State Farm Ins Co*, 202 Mich App 55; 507 NW2d 781 (1993); *Williams v AAA Michigan*, 250 Mich App 249; 646 NW2d 746 (2002); and *Payne v Farm Bureau*, 263 Mich App 521; 688 NW2d 327 (2004)];
- The cost of handicap accessible motor vehicle vans for paraplegics and quadriplegics and others who cannot drive or be transported in conventional motor vehicles. [See *Davis v Citizens Ins Co of America*, 195 Mich App 323; 489 NW2d 214 (1992)];
- The cost of vocational rehabilitation and job retraining where catastrophic injury has disabled the injured person from returning to a prior occupation. [See *Bailey v DAIE*, 143 Mich App 223; 371 NW2d 917 (1985); *Tennant v State Farm Mut Auto Ins Co*, 143 Mich App 419; 372 NW2d 582 (1985); and *Kondratek v ACIA*, 163 Mich App 634; 414 NW2d 903 (1987)];
- The cost to establish and maintain guardianships and conservatorships where motor vehicular injury renders the person unable to manage his or her own affairs. [See *Heinz v Auto Club Ins Ass'n*, 214 Mich App 195; 543 NW2d 4 (1995)];
- The cost of mileage and related transportation expenses to deliver an injured person to and from medical care and treatment. [See *Swantek v ACIA*, 118 Mich App 807; 325 NW2d 588 (1982)]; and
- The cost of in-home attendant care and nursing services rendered by either commercial agencies or family members. [See *Visconti v DAIE*, 90 Mich App 477; 282 NW2d 360 (1979); *VanMarter v American Fidelity*, 114 Mich App 171; 318 NW2d 679 (1982); *Manley v DAIE*, 425 Mich 140; 388 NW2d 216 (1986); and *Bonkowski v Allstate Ins Co*, 281 Mich App 154; 761 NW2d 784 (2008)].

In order to properly adjudicate the issues in this case, it is important to understand the evolution PIP causation law under both Sections 3105(1) and 3107(1)(a). Those issues will be discussed below.

**B. Evolution of causation law under Section 3105(1) – *Shinabarger v Citizens*.**

As outlined above, the fifth element of Section 3105's entitlement to benefits test requires a sufficient causal nexus between the injury and the use of the vehicle. The causal nexus component of the five-part test is based on the phrase "arising out of" in Section 3105(1) – "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) (emphasis added). One of the earliest and most significant cases in the evolution of the causal-nexus test is *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307; 282 NW2d 301 (1979). In *Shinabarger*, the plaintiff's decedent sustained an injury while he was using his automobile to shine deer. *Shinabarger, supra* at 309. After the plaintiff's decedent had illuminated a deer in his headlights he stopped his vehicle momentarily to get out and shoot the animal. *Id.* As he was attempting to re-enter the vehicle, he handed his shotgun to a friend who was seated in the front seat. *Id.* At some point during the exchange, the shotgun accidentally discharged, fatally wounding the plaintiff's decedent. *Id.* The question presented to the court of appeals in *Shinabarger* was whether there was a sufficient causal nexus between the use of the plaintiff's automobile and his accidental shooting, which would entitle the plaintiff to claim benefits under Section 3105(1). The court of appeals held that there was a question of fact requiring a jury

determination as to whether there was a sufficient causal nexus for the plaintiff's decedent to be entitled to PIP benefits.

In reaching this conclusion, the court analyzed the "arising out of" language in Section 3105(1), and stated:

[C]ases construing the phrase "arising out of the . . . use of a motor vehicle as a motor vehicle" uniformly require that the injured person establish a causal connection between the use of the motor vehicle and the injury. **Where use of the vehicle is one of the causes of the injury, a sufficient causal connection is established even though there exists an independent cause.**

**The relationship between use of the vehicle and the injury need not approach proximate cause:**

[T]he term "arising out of" does not mean proximate cause in the strict legal sense, nor require a finding that the injury was directly and proximately caused by the use of the vehicle, nor that the insured vehicle was exerting any physical force upon the instrumentality which was the immediate cause of the injury. **That almost any causal connection or relationship will do.** "Case law indicates that the injury need not be the proximate result of 'use' in the strict sense, but it cannot be extended to something distinctly remote. . . . Each case turns on its precise individual facts. The question to be answered is whether the injury 'originated from', 'had its origin in', 'grew out of', or 'flowed from' the use of the vehicle."

Where the injury is entirely the result of an independent cause in no way related to the use of the vehicle, however, the fact that the vehicle is the site of the injury will not suffice to bring it within the policy coverage.

*Shinabarger, supra* at 313 (internal citations omitted) (emphasis added). Thus, the court of appeals made several important rulings regarding the causation required by the

entitlement provisions of Section 3105(1). First, the court held that the causal link between the injury and the ownership, operation, maintenance, or use of a motor vehicle “need not approach proximate cause,” and in fact “almost any causal connection or relationship will do.” Second, an accident victim can establish a sufficient causal nexus between the injury and motor vehicle even though there exists an independent cause for the injury. And, third, there is no causal connection when the motor vehicle is merely the site of the injury that results from an independent cause unrelated to the use of the motor vehicle.

The line of cases after *Shinabarger* continued to develop and hone the causal-nexus requirement. For instance, appellate decisions allowed PIP benefits even when there was no physical contact with a motor vehicle when the operation of a motor vehicle caused an accident nonetheless. See *Bromley v Citizens Insurance Co of Am*, 113 Mich App 131, 135; 317 NW2d 318 (1982) (holding that motorcyclist was entitled to PIP benefits when he was allegedly run off the road by an automobile that crossed the center line, even though there was no physical contact between the motorcycle and the automobile); *Bradley v Detroit Automobile Inter-Ins Exch*, 130 Mich App 34, 40; 343 NW2d 506 (1983) (allowing PIP benefits when motorcycle collided with the back of a legally parked pick up truck when the motorcyclist was unable to change lanes to avoid striking the parked truck because there was a moving automobile immediately adjacent to the plaintiff’s motorcycle). On the other hand, an accident victim is not entitled to PIP benefits when the injury is caused by a criminal assault that fortuitously happens to occur at the site of a motor vehicle. See *Thornton v Allstate Ins Co*, 425 Mich 643, 660-661; 391 NW2d 320 (1986) (denying PIP benefits to plaintiff taxicab driver who sustained serious injuries when passenger shot him in the neck, robbed him, and dragged him from the vehicle because

there was an insufficient causal nexus between the injury and the vehicular use of the taxicab). However, PIP benefits are allowed when the criminal assault is closely related to the transportational function of a vehicle, such as when the victim is thrown from a moving vehicle or a person is intentionally run over by a moving vehicle. *See University Rehab Alliance Inc v Farm Bureau Gen Ins Co*, 279 Mich App 691, 697; 760 NW2d 574 (2008), *appeal denied* 483 Mich 955 (2009). This is consistent with this Court's holding *McKenzie v Auto Club Insurance Association*, 458 Mich 214, 219-220; 580 NW2d 424 (1998), that Section 3105's entitlement to benefits provision requires that injuries resulting from the use of motor vehicles are closely related to their transportational function of the vehicle.

Michigan appellate courts have also made it clear that if an auto accident results in the aggravation of a prior existing condition, entitlement to benefits is established under Section 3105(1), and the insurer may be obligated to pay appropriate allowable expenses under section 3107(1)(a). *See Mollitor v Associated Truck Lines*, 140 Mich App 431, 438; 364 NW2d 344 (1985); *McKim v Home Ins Co*, 133 Mich App 694, 697-698; 349 NW2d 533, 535 (1984). Causation under Section 3107(1)(a) is discussed below.

**C. Evolution of causation law under Section 3107(1)(a) – *Scott v State Farm*.**

Proving entitlement to no-fault benefits under Section 3105(1) is not the same as proving liability for payment of specific allowable expense benefits under section 3107(1)(a). A person becomes eligible to claim PIP benefits by satisfying the requirements

of section 3105(1). Once entitlement has been established, the injured person must satisfy the requirements of Section 3107(1)(a) in order to obtain payment for a particular expense as an allowable expense benefit. MCL 500.3107(1)(a). That section renders an insurer liable to pay allowable expense benefits for “all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” *Id.* Under this language, an insurer is only obligated to pay “reasonable charges” and only where those charges are “reasonably necessary” for the injured person’s care, recovery, or rehabilitation. Neither of those terms, as used in Section 3107(1)(a), are defined anywhere in the no-fault statute. Indeed, Section 3107(1)(a) does not contain any specific causation language. In other words, the legislature did not insert phrases such as “causally connected,” “proximately caused,” or “causally related” in the text of Section 3107(1)(a). The legislature could have done so, but it chose not to.

Nevertheless, the text of Section 3107(1)(a) suggests that some type of causal connection must be established between the injury that satisfied the entitlement provisions of Section 3105(1) and the product, service, or accommodation that the injured person is now claiming the insurer is obligated to pay under Section 3107(1)(a). The statutory language that suggests the necessity to prove some type of causal connection is the word “for,” as used in section 3107(1)(a). *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531 & n 6; 697 NW2d 895 (2005). In other words, the product, service, or accommodation in question must be for accident-related care, recovery, or rehabilitation. *Griffith, supra* at 530-531. However, because the statutory language of Section 3107(1)(a) does not provide a more precise description of the requisite causal connection contemplated by that

subsection, it is necessary to resort to the case law that has developed to resolve this question.

There is clearly interplay between PIP benefit entitlement and allowable expense benefit liability. This has been demonstrated through the years in a number of unpublished court of appeals opinions. For example, in *Henderson v Auto Club Insurance Association*, the plaintiff was an 87-year-old man who was hit by a car and suffered a traumatic brain injury. *Henderson v Auto Club Ins Ass'n*, unpublished per curiam opinion of Court of Appeals, issued June 19, 1987 (Docket No 96310). Before the accident, he lived independently. After the accident, he was totally dependent on others for care. The defendant hired an independent medical examiner who opined that the plaintiff had preexisting Alzheimer's disease that would have disabled him within a year or so regardless of the plaintiff's auto-accident injury. The court of appeals reaffirmed its earlier holdings in *Mollitor, supra* and *McKim, supra* — that no-fault benefits were available in cases involving aggravation of preexisting conditions — and held that the plaintiff in *Henderson* was entitled to benefits. The court emphasized that when the condition in question is the product of both preexisting conditions and the accident, the insurer has the responsibility to pay no-fault benefits.

As the case law under Sections 3105(1) and 3107(1)(a) evolved, it became apparent that the courts had not specifically decided whether the causal-nexus requirement utilized to determine entitlement to PIP benefits under section 3105(1) is the same as the causation requirement under Section 3107(1)(a) regarding an insurer's liability to pay specific allowable expense benefits. This issue was finally determined by the Court of Appeals in *Scott v State Farm Mutual Automobile Insurance Co*, 278 Mich App 578; 751

NW2d 51 (2008), a decision which this Court – after careful review on two occasions – refused to disturb. *Scott v State Farm*, 483 Mich 273 (2009), *vacating* 482 Mich 1074 (2008).

In *Scott*, the court of appeals addressed a claim for allowable expenses made by the plaintiff under Section 3107(1)(a). In doing so, the court of appeals applied the *Shinabarger* causal-nexus test that Michigan appellate courts had been applying for years to determine entitlement issues under section 3105(1). *Scott*, 278 Mich App 578, 585-586; 751 NW2d 51 (2008), citing *Shinabarger, supra*; *see also Scott, supra* 483 Mich at 1033-1036 (Kelly, C.J., concurring). The plaintiff in *Scott* sustained a catastrophic brain injury in a 1981 motor-vehicle collision. As a result of the brain injury, the plaintiff suffered severely impaired judgment as well as considerable physical disability that made it virtually impossible for her to exercise. *Scott*, 278 Mich App at 580. Over the years, the plaintiff developed hyperlipidemia (high cholesterol). Her condition was quite serious and required medical treatment and medication. The plaintiff contended that her hyperlipidemia was related, in whole or in part, to her auto accident for two reasons, both of which were allegedly a result of her brain injury: (1) she had severely impaired judgment, causing her to consistently eat inappropriate foods; and (2) she was physically unable to exercise due to her brain injury. The plaintiff's physicians supported this claim and testified that both of these brain-injury-related problems were contributing factors to the plaintiff's high-cholesterol disorder. *Id* at 581.

The trial court denied the defendant's motion for summary disposition and found that the plaintiff's claim created a question of fact for jury determination. *Id*. In a unanimous opinion, the court of appeals affirmed the trial court's decision and applied the causal-

nexus test articulated many years ago by the court of appeals in *Shinabarger*. *Id* at 585-586. Pursuant to that test, the court of appeals held that the applicable causation standard requires only that the auto accident is one of the causes of an injury and need for service, and that this causal link is more than “incidental, fortuitous, or but for.” *Scott*, 278 Mich App at 584. In fact, the court of appeals stated that the *Shinabarger* decision made it clear that “[a]lmost any causal connection will do.” *Id* at 586. In applying this causal-nexus test, the court of appeals in *Scott* held that the plaintiff had put forth sufficient evidence to create a genuine issue of material fact as to whether the plaintiff’s need for hyperlipidemia treatment was sufficiently related to her motor-vehicle accident to satisfy the *Shinabarger* test. The court of appeals in *Scott* explained:

In *Shinabarger v Citizens Mut Ins Co*, this Court used other words to describe the “arising out of” test:

The relationship between use of the vehicle and the injury need not approach proximate cause. “[T]he term ‘arising out of’ does not mean proximate cause in the strict legal sense, nor require a finding that the injury was directly and proximately caused by the use of the vehicle, nor that the insured vehicle was exerting any physical force upon the instrumentality which was the immediate cause of the injury. That almost any causal connection or relationship will do. . . .Case law indicates that the injury need not be the proximate result of ‘use’ in the strict sense, but it cannot be extended to something distinctly remote. Each case turns on its precise individual facts. The question to be answered is whether the injury ‘originated from’, ‘had its origin in’, ‘grew out of’, or ‘flowed from’ the use of the vehicle.” [Some internal quotation marks omitted; citations omitted.]

Similarly, in *Bradley v Detroit Auto Inter-Ins Exch*, this Court stated that the use of the motor vehicle need only be one of the causes of the injury; there may be other independent causes. “[A]lmost any causal connection or relationship will do.” Thus, it is well settled that “arising out of” requires more than an incidental, fortuitous, or but-for causal connection, but does not require direct or proximate causation.

. . . Plaintiffs presented testimony indicating that the accident caused brain and skeletal injuries, which make it difficult for plaintiff to exercise, and which contribute to poor judgment regarding diet. Plaintiffs also presented evidence that this difficulty in exercising and the poor diet contribute to hyperlipidemia. Plaintiffs are not required to establish direct or proximate causation. Almost any causal connection will do. Although a genetic predisposition to hyperlipidemia is apparently present, there is no authority that, for purposes of personal protection insurance, a plaintiff must exclude other possible causes . . . . Plaintiffs have presented evidence sufficient to raise a genuine issue of material fact. The chain of causation, under plaintiffs’ theory, though somewhat attenuated, is not so long that its links are completely unable to support the burden of proof. There is testimony indicating that there is no objective test that can distinguish between a case of hyperlipidemia caused genetically and one caused by independent factors. Thus, the trier of fact must decide whether the high-cholesterol problem is one “arising out of” the accident.

*Scott*, 278 Mich App at 585-586.

State Farm appealed the holding of the court of appeals to the Michigan Supreme Court. In an order issued on December 3, 2008, the Michigan Supreme Court, in lieu of granting leave to appeal, vacated the portion of the court of appeals opinion taken from the *Shinabarger* decision, which stated, “[A]lmost any causal connection or relationship will do.” *Scott*, 482 Mich 1074 (2008). In its order, this Court reasoned that this language from *Shinabarger* was inconsistent with other cases from the Court of Appeals. *Scott*, 482 Mich at 1074. In all other respects, the court of appeals decision applying the *Shinabarger*

analysis to this section 3107(1)(a) claim was left undisturbed. *Id.* Following a motion for reconsideration, on June 5, 2009, this Court granted the motion, vacated its order dated December 3, 2008, and denied leave to appeal. *Scott*, 483 Mich at 1032. The effect of this Michigan Supreme Court decision was to affirm the court of appeals decision in its entirety — including its reliance on the phrase, “almost any causal connection . . . will do.”

**D. Emergence of Singular Causation Standard – the *Shinabarger-Scott* test.**

The decision of this Court to leave the court of appeals decision in *Scott* fully intact is a significant event in the jurisprudence of Michigan no-fault law. The result in this case, succinctly stated, is simply this: the causal-nexus test used to determine entitlement to PIP benefits under Section 3105(1) is the same causation test that should be used to determine an insurer’s liability to pay allowable-expense PIP benefits under Section 3107(1)(a).

Under this singular causation standard, an insurance company would not be able to diminish its liability for payment of allowable expenses under section 3107(1)(a) by seeking to allocate a portion of those expenses to nonaccident causes. *Scott*, 483 Mich at 1033-1034. On the contrary, if the auto-accident injury is one of the causes for the injured person incurring the expense in question, the no-fault insurer is responsible for 100% of the allowable expense, even though there were other nonaccident causes that contribute to the patient’s need to incur the expense. *Scott*, 278 Mich App at 585-586. That being the case, there can be no allocation of allowable-expense claims between accident

and nonaccident causes — the entire expense claim is recoverable if the accident was one of the causes of the claimed expense.

Taken together, the causation standard for entitlement to benefits under Section 3105(1), as interpreted in *Shinabarger*, and the causation standard for liability to pay allowable expense benefits under Section 3107(1)(a), as applied in *Scott*, are identical causation standards.

- II. **The decision in *Griffith v State Farm*, if properly read, is consistent with the *Shinabarger-Scott* singular causation test, and obligates no-fault insurers to pay the full amount of an allowable expense claim whenever a motor vehicle accident materially affects the pre-accident needs of a catastrophically injured person with respect to such expenses, rather than permitting an insurer to pay only for the incremental increase in the costs of those affected pre-accident needs.**

On June 14, 2005, this Court decided *Griffith v State Farm Automobile Insurance Co*, 472 Mich 521; 697 NW2d 895 (2005), holding that a no-fault insurance company was not obligated to pay for the cost of food consumed by a catastrophically injured person cared for at home where those food needs had not been affected by the accident. *Griffith, supra* at 534-535. This Court reasoned that because the injured person did not require a special diet as a result of his injuries, there was an insufficient causal connection between his auto accident and his food expenses to trigger the insurer's liability to pay allowable expense benefits under Section 3107(1)(a).

A number of insurance companies contend that *Griffith* substantially changes the extent to which some types of products, services, and accommodations are compensable under the allowable expense benefit provision of Section 3107(1)(a) of the No-Fault Act.

*See Begin v Mich Bell Tel Co*, 284 Mich App 581; 773 NW2d 271 (2009); *Hoover v Mich Mut Ins Co*, 281 Mich App 617; 761 NW2d 801 (2008). Since this Court issued the *Griffith* decision, many insurance companies contend that they are now only obligated to pay the difference between a plaintiff's cost for home accommodations and handicap-accessible transportation and the plaintiff's costs for housing and transportation prior to being injured. As such, these insurers argue that, in *Griffith*, this Court incorporated the concept of "incrementalism" into the jurisprudence of Michigan no-fault law.

"Incrementalism" is the notion that a no-fault insurer can reduce its liability to pay allowable expense benefits under Section 3107(1)(a) by some amount that approximates what the injured person would have consumed or would have needed if the injury in question had not occurred. *Hoover, supra* at 629. Under this doctrine, a no-fault insurer is permitted to engage in a hypothetical analysis that looks at what kind of housing, transportation, medical care, etc., an injured patient would have needed, would have consumed, or would otherwise have required had he or she not suffered injury. Therefore, because virtually everyone requires residential accommodations and motor vehicle transportation regardless of injury, a no-fault insurer would only be required to pay for the so-called "incremental increase" in these types of expenses even though the injured person's residential and motor vehicle transportation needs have been drastically altered by catastrophic injury. As the court of appeals recognized in *Hoover*, using an incrementalist approach "necessarily entails a comparison between costs associated with circumstances as they actually exist, which includes reflection on a life scarred and affected by injuries sustained in an automobile accident, and costs associated with a life unscarred by injuries, which would include examination of circumstances that existed pre-

injury or that would in all likelihood have transpired absent the injury.” *Hoover, supra* at 629. Obviously, incorporating such a doctrine into Michigan no-fault jurisprudence would inject nightmarish and unimaginable complexity, confusion, and delay, as well as adding an adversarial dimension into the processing of no-fault benefit claims.

Contrary to the insurance industry’s incrementalism argument, Michigan appellate courts have rejected the concept of incrementalism in several contexts prior to *Griffith*. See *Davis v Citizens Ins Co of Am*, 195 Mich App 323; 489 NW2d 214 (1992); *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499; 370 NW2d 619 (1985). Moreover, there is nothing in the *Griffith* decision that adopts incrementalism.

**A. The pre-*Griffith* appellate case law rejects incrementalism.**

Although the doctrine of “incrementalism” has not been specifically referred to by that name in case law, its core concepts have most assuredly been presented to and flatly rejected by the Michigan appellate courts over the long and storied history of the Michigan No-Fault Act. See *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538; 302 NW2d 537 (1991); *Sharp v Preferred Risk Mutual Ins Co*, 142 Mich App 499; 370 NW2d 619 (1981); *Davis v Citizens Ins Co of Am*, 195 Mich App 323; 489 NW2d 214 (1992).

In *Miller v State Farm, supra*, the Michigan Supreme Court analyzed whether no-fault survivor’s loss benefits payable under the provisions of MCL 500.3108 of the Act could be reduced by the amount of “personal consumption expenses” that would have been attributable to the decedent had he or she not suffered death in the motor vehicle accident. In *Miller*, the no-fault insurer argued that under the specific language of Section 3108, a no-fault insurer should be permitted to offset its liability to pay survivor’s loss

benefits by whatever amounts the decedent would have personally used, spent or otherwise consumed had he or she not died. In rejecting this theory, Justice James Ryan, perhaps the most conservative member of the Michigan Supreme Court at the time, wrote the majority opinion and held that such a benefit reduction concept would be inconsistent with the overall purpose of the No-Fault Act. In this regard, Justice Ryan, writing for the Court held:

The second reason we think the Legislature did not intend that a 'consumption factor' for the decedent's personal expenses be calculated and deducted from the fund of 'things of tangible value' that the decedent's dependents would otherwise have received is found in our understanding of the purpose of the no-fault act itself and the manner in which it is intended to be applied.

In *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978), we said:

'The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses.'

The act is designed to minimize administrative delays and factual disputes that would interfere with achievement of the goal of expeditious compensation of damages suffered in motor vehicle accidents. . . .

Calculation, in every case, of a 'consumption factor' attributable to the decedent's personal expenses would be inconsistent with the declared legislative purposes of expeditious settlement of survivors' claims without complex factual controversy.

A family is not run like a commercial enterprise. Family finances are not allocated or their expenditure accounted for as in a business. Accounting procedures are rarely, if ever, followed to account for the precise dollars-and-cents expenses in cash and in kind attributable to each member of the family. How, for example, would the deceased breadwinner's

'consumption factor' for family meals, use of the family automobile, household maintenance, and hundreds of personal expenses be calculated? And if calculable at all, one can envision the interminable controversy and disproportionate expense such a factual determination would involve. As the plaintiff so aptly put it:

'A legislative purpose of rapid, efficient and uniform claims adjustment is not advanced by a ponderous examination of every family expenditure.' Plaintiff's Brief, p 18.

In view of the no-fault act's goal of expeditious reparation of motor vehicle accident injuries, and minimization of potential factual disputes, we conclude that . . . the administrative delays and factual controversies that might be engendered by such a calculation would unjustifiably interfere with the above-discussed goals of the act.

*Miller, supra* at 567-569.

There is no real conceptual difference between the personal consumption set off argument that this Court rejected in *Miller v State Farm, supra*, and the incrementalist argument advanced by Defendant-Appellee State Farm in the case at bar. Under both scenarios, the no-fault insurer is contending it should not be responsible for something that the auto accident victim would have needed (such as housing) had the auto accident not occurred.

This Court's decision in *Miller v State Farm* also emphasizes the importance of prompt reparations, as an essential component of the no-fault system, which would have been defeated if the Michigan Supreme Court had adopted the "consumption factor" proposed by the insurance industry. The Supreme Court, through Justice Ryan, reiterated at least four times that the No-Fault Act's purpose is to "minimize administrative delays and factual disputes" with the ultimate goal of "expeditious compensation" of no-fault benefits.

*Id* at 567-569. There can be no doubt that these same concerns raised in *Miller v State Farm* apply equally to the case at bar. An affirmance of the Court of Appeals' adoption of incrementalism regarding the payment of benefits under Section 3107(1)(a) would contravene one of the most important legislative purposes of the No-Fault Act by causing substantial administrative complexity in claims processing, increasing factual disputes, and dramatically slowing or halting reparations to catastrophically injured accident victims.

The second specific rejection of the concept of incrementalism came in the Court of Appeals decision in *Sharp v Preferred Risk, supra*. The decision in *Sharp* is perhaps one of the most important and frequently cited decisions in the history of the Michigan no-fault law. It is a flat out rejection of the principal of incrementalism and confirms that no-fault insurers are not entitled to reduce their liability under Section 3107(1)(a) by the injured person's pre-accident needs. In *Sharp*, the injured person sustained catastrophic brain injury in a motor vehicle accident when he was 20 years old. Prior to the accident, he lived as a single man in an apartment that he rented for \$245 per month. After he was discharged from the hospital following his disabling injuries, it was necessary that he move into a larger apartment that was able to accommodate his wheelchair and other items of elaborate medical equipment. The rent for this larger apartment was \$445 per month. The no-fault insurer argued that it was only responsible to pay the difference between Mr. Sharp's pre-accident rent of \$245 per month and his post-accident rent of \$445 per month. The Court of Appeals rejected this "incrementalism" theory and held that the no-fault insurer was obligated to pay **the full cost** of Mr. Sharp's residential accommodations under the provisions of Section 3107(1)(a) of the No-Fault Act. In this regard, the decision

in *Sharp* contains one of the most widely quoted statements in no-fault appellate law which appears at page 511 of the opinion, in which the Court held:

As long as housing larger and better equipped is required for the injured person than would be required if he were not injured, the full cost is an allowable expense.

The decision in *Sharp* is obviously a specific rejection of the concept of incrementalism in its purest sense. If this doctrine had any viability whatsoever in Michigan no-fault law, the Court of Appeals would have simply ruled in *Sharp* that the defendant insurance company was only liable for the difference between Mr. Sharp's pre-accident rent and his post-accident rent. It did not. On the contrary, it held the no-fault insurer was responsible for the full cost of the injured person's apartment rent after the accident because he needed "larger and better equipped" accommodations specifically because of his auto accident injury.

Incrementalism was rejected a third time when the court of appeals was presented with the concept in the context of handicapper vans in *Davis v Citizens Insurance Co of America*, 195 Mich App 323; 489 NW2d 214 (1992). In *Davis*, the plaintiff demanded that her insurance company pay for the full cost of a handicap-accessible van plus all necessary modifications. *Davis, supra* at 325. The no-fault insurer in *Davis* refused to pay the full cost of the plaintiff's van, arguing that it was only responsible to pay the cost of handicap equipment and modifications. *Id.* Following a bench trial, the trial court rejected the insurer's incrementalism argument and determined that the full purchase price of the van was a reasonably necessary expense under section 3107(1)(a), reasoning that the van was necessary for the plaintiff to lead as full and complete a life as possible, given her profound physical disability. *Id.* In affirming the trial court, the court of appeals in *Davis*

held that the full cost of the van was reasonable and that the van was reasonably necessary. *Id* at 327. In affirming the trial court's rejection of the insurer's incrementalism argument, the court of appeals reasoned that even though transportation is as necessary for an injured person as it is for an uninjured person, a handicap-accessible van is different from ordinary motor-vehicle transportation and was fundamentally necessary for the wheelchair-bound plaintiff who had limited access to alternative means of public transportation. *Id* at 327-328. The *Davis* court explained:

In this case, the cost of the van was reasonable, and obviously the expense was incurred. We also find that the van was reasonably necessary. Transportation is as necessary for an uninjured person as for an injured person. However, the modified van is necessary in this case given the limited availability of alternative means of transportation. The ambulance service is limited to Branch County, traveling outside the county two or three times a week. Although this service is available twenty-four hours a day, seven days a week, advance notice is preferred for clients who, like plaintiff, reside more than five miles from town. Moreover, because the ambulance service is the only one in the county, transportation could be delayed or unavailable because of medical emergencies. The local transit authority provides door-to-door service to clients who make advance reservations, but it is unavailable during evenings. The van allows plaintiff to travel outside the county for medical purposes and vacations. In addition, the van was reasonably necessary according to plaintiff's treating physician. He testified that when he discharged plaintiff, one of the requirements was that plaintiff use a van for her transportation, allowing her the independence to go to work. Under these circumstances, we find that the modified van is an allowable expense.

*Davis, supra* at 327-328.

The holdings in *Miller v State Farm*, *Sharp v Preferred Risk*, and *Davis v Citizens*, articulate simple rules that are indispensable to the smooth and efficient processing of claims under the Michigan no-fault law. These rules are essential to achieving the central

objective of the no-fault statute which is to promote the prompt and efficient payment of medical expense claims. Any deviation from those rules jeopardizes the administration of the no-fault system by delaying the payment of benefits and increasing litigation over factual disputes as to what increment of a particular cost can be attributed solely to the automobile accident.

If a motor vehicle accident materially changes a person's pre-accident needs for residential accommodations, motor-vehicle transportation, or other goods and services, then the full cost of the affected expense has always been compensable under section 3107(1)(a). This has been the law in Michigan for many years and, as will be explained below, the Michigan Supreme Court's decision in *Griffith* did nothing to change it.

**B. The specific issue involved in *Griffith* and its “rhetorical question” are the keys to properly interpreting the decision.**

Reduced to its essence, the error committed by the Court of Appeals in the case at bar occurred because of the court's misinterpretation and misapplication of the Supreme Court's decision in *Griffith v State Farm, supra*. The specific holding in *Griffith* was narrow and limited. It was essentially this: ***The cost of non-medical, non-special dietary food unrelated to a motor vehicular injury and consumed by an injured person who is cared for at home, is not a recoverable benefit under Section 3107(1)(a) of the Michigan No-Fault Act.*** In ruling that the no-fault insurer was not responsible for paying the cost of Mr. Griffith's food expense while he was cared for at home, the Court emphasized that Mr. Griffith had dietary needs that differed in no way from his dietary needs prior to his injury. In other words, there was absolutely no relationship between

Griffith's food needs and his motor vehicle injury — his food needs had not been affected in any way by his catastrophic brain injury. In analyzing causation, the *Griffith* Court noted the difficulties of plaintiff's claims that the benefits are "for accidental bodily injury" and stated:

Plaintiff does not claim that her husband's diet is different from that of an uninjured person, that his food expenses are part of his treatment plan, or that these costs are related in any way to his injuries. She claims instead that Griffith's insurer is liable for ordinary, everyday food expenses. As such, plaintiff has not established that these expenses are "for accidental bodily injury. . ."

*Griffith, supra* at 532. In analyzing causation, this Court further examined whether the claimed expense was related to Griffith's "care, recovery, or rehabilitation."

Griffith's food costs here are not related to his 'care, recovery, or rehabilitation.' There has been no evidence introduced that he now requires different food than he did before sustaining his injuries as part of his treatment plan. While such expenses are no doubt necessary for his *survival*, they are not necessary for his recovery or rehabilitation from the injuries suffered in the accident, nor are they necessary for his care because of the injuries he sustained in the accident. Unlike prescription medications or nursing care, the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his 'care, recovery, or rehabilitation.' In fact, if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his 'care, recovery, or rehabilitation' and are not 'allowable expenses' under MCL 500.3107(1)(a).

*Griffith, supra* at 532-533, 535-536 (emphasis in original).

In reaching its conclusion that non-medical, non-special dietary food served to an injured person who is cared for at home is not compensable under the No-Fault Act, the Court drew an important distinction between food consumed at home and food consumed

by an injured person who is being cared for in an institutional setting. In drawing this distinction, the Court held that food provided to an institutionalized person is indeed compensable even though the person's food needs were not affected by the injury. In so holding, the Court noted that an institutionalized patient has "limited dining options" that make it impossible for the patient to consume food that he or she would otherwise choose to eat. In this regard, the Court stated, "Because an insured in an institutional setting is required to eat 'hospital food,' such food costs are necessary for an insured's care, recovery, or rehabilitation while in such a setting." *Griffith, supra* at 537. The Court's treatment of non-accident affected food needs in the institutional setting is, itself, a rejection of incrementalism. However, what is most important about the *Griffith* decision is that issue is the now famous "rhetorical question" which appears at the end of the Court's discussion regarding the compensability of food costs in an institutional setting. The passage appears at pages 538-539 of the *Griffith* opinion where the Court stated:

This reasoning can be taken a step further when considering the costs of items such as an injured person's clothing, toiletries, and even housing costs. Under plaintiff's reasoning, because a hospital provided Griffith with clothing while he was institutionalized, defendant should continue to pay for Griffith's clothing after he is released. The same can be said of Griffith's toiletry necessities and housing costs. While Griffith was institutionalized, defendant paid his housing costs. **Should defendant therefore be obligated to pay Griffith's housing payment now that he has been released when Griffith's housing needs have not been affected by his injuries?**

*Griffith, supra* at 538-539 (emphasis added). As reflected in the emphasized language quoted above, the rhetorical question posed by the *Griffith* Court frames the pertinent

analytical issue this way: “Should defendant therefore be obligated to pay Griffith’s housing payment now that he has been released **when Griffith’s housing needs have not been affected by his injuries?**” The essence of this rhetorical question looks to whether a patient’s accident related injuries “affected” the patient’s pre-accident needs. In other words, if a catastrophic injury “affected,” a patient’s housing needs such that the patient’s housing needs are now different than they were before the accident, then a sufficient causal relationship has been established obligating the no-fault insurer to pay benefits for all those preexisting but now changed housing needs. Such an analysis is perfectly consistent with the Court of Appeals decision in *Sharp v Preferred Risk, supra*. **In fact, nowhere in the *Griffith* decision does the Supreme Court in any way refer to or criticize the decision in *Sharp*!**

**C. *Griffith* does not adopt incrementalism, but rather embraces the *Shinabarger-Scott* singular causation standard.**

The holding in *Griffith* goes no further than addressing the specific issue of non-affected food needs in the home care environment. It does **not** adopt incrementalism; it does **not** criticize *Sharp v Preferred Risk*; it does **not** hold that no-fault insurers can reduce their liability under Section 3107(1)(a) by amounts that approximate what an injured person would have needed, consumed or spent had the injury not occurred. Although the *Griffith* decision did not formally articulate a specific causation test that further defines the causation requirements of section 3107(1)(a), the rhetorical question posed in *Griffith* implicitly provides the basic causation standard that should be utilized, which simply stated, is this: if the auto-accident injury has affected any specific pre-accident needs of the

injured person so that those needs are now different than they were before the accident, the no-fault insurer is obligated to pay the full amount of all charges associated with those needs, provided those charges are reasonable in amount and are reasonably necessary for the injured person's care, recovery, or rehabilitation. Under *Griffith*, that is the causal link that must be established to trigger a no-fault insurer's liability to pay *allowable expense benefits*.

The *Griffith* decision is completely consistent with the causation principles embraced in *Scott*. Under *Griffith*, and its progeny, a sufficient causal connection has been demonstrated under Section 3107(1)(a) if an auto accident has materially affected an injured person's pre-accident needs. Moreover, the insurer may not reduce its liability to pay those benefits by utilizing the doctrine of incrementalism or any other damage-allocation principles. As the court of appeals succinctly stated in *Sharp*, "As long as housing larger and better equipped is required for the injured person than would be required if he were not injured, the full cost is an 'allowable expense.'" *Sharp, supra* at 511. The same principle applies with equal force to all types of claims for allowable expense benefits under Section 3107(1)(a) of No-Fault Act. Because the court of appeals deviated from these principles in *Hoover*, its decision in *Hoover* is fundamentally flawed.

**D. The causation requirements for payment of PIP benefits are significantly less restrictive than the causation requirements of tort law.**

In order to properly adjudicate the causation issues involved in the case at bar, it is essential to understand that causation law applicable to the payment of PIP benefits is far different than causation law applicable to tort claims. Clearly PIP causation law is much

broader than tort causation law with far less restrictive proof requirements. This critical point was succinctly stated in the previously referenced law review article, “Deciphering Two Related Concepts: No-Fault PIP Causation Law and the Decision in *Griffith v State Farm*,” where the authors state as follows:

As evident from the foregoing discussion, the principles of no fault PIP causation law are fundamentally different from traditional tort principles of causation, such as proximate cause. In this regard, the doctrine of proximate causation in tort cases is a limitation-of liability principle that prevents a tortfeasor from being held liable for damages that were not reasonably foreseeable to result from the tortfeasor’s negligence. This is not the proper analytical construct regarding the payment of no-fault PIP benefits, which are payable without regard to fault. In fact, section 3105(2) of the no-fault statute succinctly states, “Personal protection insurance benefits are due under this chapter without regard to fault.” Moreover, a long line of appellate decisions dealing with no-fault PIP causation law, including the recent decision in *Scott*, explicitly hold that proximate cause is not required.

The inapplicability of tort-law, proximate-causation principles to no-fault PIP law means that related tort principles, such as allocation of damages, are also not applicable to claims for no-fault PIP benefits. In a tort case where the plaintiff’s injury is the result of both a preexisting condition and the tortfeasor’s conduct, Michigan Model Civil Jury Instruction 50.11 directs a jury to “separate the damages caused by defendant’s conduct from the condition which was preexisting if it is possible to do so.” If the jury is capable of making this allocation, the tortfeasor is only responsible for that portion of the damage that is specifically attributable to the tortfeasor’s negligence. However, if it is impossible to allocate the damages between those attributable to the preexisting condition and those attributable to the defendant’s negligence, then an indivisible injury is deemed to exist for which the tortfeasor is entirely responsible.

These rules of allocation of damages grow out of the commonlaw principle that tortfeasors should only be held liable for those damages proximately caused by their negligence. Therefore, if proximate causation is not a requirement in PIP

cases, then the allocation-of-damages principles associated with it are also inapplicable. These conclusions are further compelled by the previously stated proposition that no-fault benefits are payable “without regard to fault.” In fact, the no-fault law was designed to be a substitute for, and an improvement over, the tort-liability system—a system that is capable of only compensating those victims who are not at fault and, even then, only after lengthy, protracted, expensive, and adversarial claims processing and litigation. Therefore, it would be fundamentally inconsistent to incorporate major doctrinal concepts of tort law, such as proximate causation and allocation of damages, into the jurisprudence of a no-fault system.

Causation in no-fault law is indeed fundamentally different from causation in tort law. Under the Michigan No-Fault Act, a person is entitled to no-fault PIP benefits if that person can satisfy the provisions of section 3105(1) by showing that they sustained accidental bodily injury “arising out of the ownership, operation, maintenance or use of a motor vehicle.” The appellate case law regarding this causation standard requires only that the connection between the injury and the automobile accident be something that is “more than incidental, fortuitous[,] or but for.” If the automobile accident is one of the causes of the injury, a sufficient causal nexus has been demonstrated, thereby entitling the injured person to no-fault benefits. Once the entitlement provisions of section 3105(1) have been satisfied in this manner, the same causal-nexus standard obligates a no-fault insurer, under section 3107(1)(a), to pay for “all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” As the recent decision in *Scott* demonstrates, the causation principles applicable to determine entitlement to benefits under section 3105(1) are identical to the causation principles applicable under the allowable-expense provisions of section 3107(1)(a). Therefore, if the trier of fact determines that the auto-accident injury is one of the causes for a patient’s need for products and services, a sufficient causal connection has been demonstrated to obligate the insurer to pay the benefits, assuming that the other requirements of section 3107(1)(a) have been satisfied.

Sinas, "Deciphering Two Related Concepts," 27 Thomas Cooley L Rev at 160-162 (footnotes omitted).

It is respectfully submitted that the principles articulated above clearly demonstrate the fundamental flaw in the analytical approach used by the Court of Appeals in the case at bar, where the court applied incrementalist causation principles drawn from the *Hoover* decision to determine State Farm's liability to pay PIP benefits to Isaac Wilcox.

### CONCLUSION

In the last several years, insurance companies and some lower courts have impermissibly extended the *Griffith* decision so as to prevent catastrophically injured victims from recovering full payment for reasonably necessary accommodations and transportation expenses based on the concept that the victim had some accommodation and transportation needs before the accident, and therefore full payment is not required by the Michigan No-Fault Act. If that were the proper legal standard, no-fault insurance companies would never be required to pay 100% of an accident victim's reasonably necessary housing and transportation expenses because every victim had some pre-accident need for housing and transportation. This is not what *Griffith* said or meant. If it did, then *Griffith* itself should be overruled. Accordingly, CPAN urges this Court to revisit and clarify the *Griffith* decision so as to prevent further misapplication of that decision, which is causing significant delay and unnecessary complexity regarding the payment of no-fault PIP benefit claims.

In the case at bar, the Court of Appeals erred and should be reversed because it ordered the trial court to apply an incrementalist standard based on *Hoover v Michigan*

*Mutual Insurance Co*, 281 Mich App 617, 631-636; 71 NW2d 801 (2008). The court should not have done so. Rather, the court should have adjudicated the issues in this case by applying a simple three-part test derived from *Scott v State Farm* and a proper reading of *Griffith v State Farm*. Under this three-part test, an insurer is reasonable to pay 100% of an allowable expense claim under Section 3107(1)(a) if the plaintiff establishes the following elements: (1) plaintiff's injuries either materially affected his pre-accident need for the services at issue or the injuries were one of the reasons why plaintiff needs these services; (2) the services at issue are reasonably necessary for plaintiff's care, recovery, and rehabilitation; and (3) the charge for the services is reasonable.

In this case, Isaac Wilcox satisfied this three-part test and, thus, State Farm should be liable for payment of 100% of the claimed expenses for Isaac's barrier free home — a home that would never have been required had it not been for Isaac's devastating spinal cord injury. CPAN sincerely believes that unless this Court recognizes these basic legal principles, the processing of allowable expense benefits claims under Section 3107(1)(a) will become a nightmare that will result in: victims not receiving the medical care and rehabilitation they require; medical caregivers not being properly compensated for the care and services they provide; and, a dramatic increase in unnecessary, time-consuming, and expensive litigation that will turn Michigan judges into "super claims adjusters." This is clearly not the intent of the Michigan no-fault law.

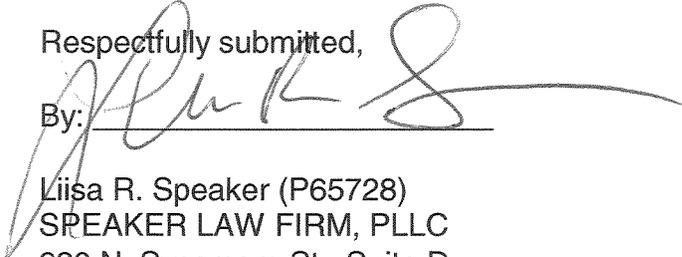
### **RELIEF REQUESTED**

*Amicus Curiae* CPAN respectfully requests that this Honorable Court hold that, consistent with the causation principles discussed above, the Court of Appeals decision

be reversed, and that State Farm be ordered to pay 100% of the plaintiff's claimed expense.

Date: October 14, 2010

Respectfully submitted,

By: 

Liisa R. Speaker (P65728)  
SPEAKER LAW FIRM, PLLC  
230 N. Sycamore St., Suite D  
Lansing, MI 48933  
(517) 482-8933

George T. Sinas (P25643)  
General Counsel for Coalition Protecting  
Auto No-Fault  
SINAS DRAMIS BRAKE BOUGHTON &  
MCINTYRE PC  
3380 Pinetree Rd.  
Lansing, MI 48911  
(517) 394-7500

## PROOF OF SERVICE

I certify that I served this document on October 14, 2010 this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record as listed below, and by depositing them in the United States mail.

William W. Decker (P38052)  
William W. Decker, Jr. LLC  
220 Lyon St., N.W., #560  
Grand Rapids, MI 49503  
Attorney for Plaintiffs-Appellants  
Catherine Wilcox as Next Friend for Isaac  
Wilcox

April H. Sawhill (P67894)  
Varnum LLP  
P.O. Box 352  
Grand Rapids, MI 49501  
Co-Counsel for Plaintiffs-Appellants

Daniel S. Saylor (P37942)  
Garan Lucow  
1000 Woodbridge Street  
Detroit, MI 48207-3192  
Attorneys for Defendant-Appellee  
State Farm

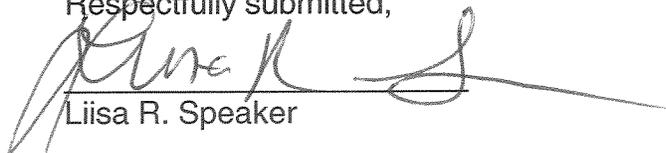
John A. Braden (P29645)  
5519 Taylor Drive  
Fremont, MI 49412  
Amicus Curiae

Eric S. Steinberg (P35313)  
Lee B. Steinberg, PC  
30500 Northwestern Hwy, Ste 400  
Farmington Hills, MI 48834  
Attorney for Amicus Curiae Michigan  
Association of Justice

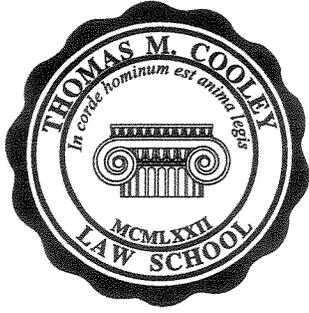
George T. Sinas (P25643)  
Sinus Dramis Brake Boughton &  
McIntyre, PC  
3380 Pinetree Rd.  
Lansing, MI 48911  
Co-Counsel for Amicus Curiae Coalition  
Protecting Auto No-Fault

I declare that the statements above are true to the best of my information, knowledge, and belief.

Respectfully submitted,

  
Liisa R. Speaker

A



Volume 27  
Number 1  
Hilary Term 2010

# Thomas M. Cooley Law Review

SYMPOSIUM ISSUE

**“CSI EFFECT”  
JUROR EXPECTATIONS FOR FORENSIC SCIENCE:  
DOES REALITY MEET THE STANDARD?**

ARTICLES

***JUROR EXPECTATIONS FOR SCIENTIFIC EVIDENCE IN CRIMINAL CASES:  
PERCEPTIONS AND REALITY ABOUT THE “CSI EFFECT” MYTH***

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***DEALING WITH SUPPOSED JURY PRECONCEPTIONS ABOUT THE  
SIGNIFICANCE OF THE LACK OF EVIDENCE: THE DIFFERENCE BETWEEN  
THE PERSPECTIVE OF THE POLICYMAKER AND THAT OF THE ADVOCATE***

***EDWARD J. IMWINKELRIED***

***LAWYERED UP: A BOOK REVIEW ESSAY***

***CHARLES N. W. KECKLER***

***DECIPHERING TWO RELATED CONCEPTS: NO-FAULT PIP CAUSATION LAW  
AND THE DECISION IN GRIFFITH V. STATE FARM***

***GEORGE T. SINAS and STEPHEN H. SINAS***

COMMENT

***THE AFTERMATH OF MELENDEZ: HIGHLIGHTING THE NEED FOR  
ACCREDITATION-BASED RULES OF ADMISSIBILITY FOR FORENSIC  
EVIDENCE***

***BETH A. RIFFE***

DISTINGUISHED BRIEF

***UNITED STATES FIDELITY INSURANCE &  
GUARANTY COMPANY, a foreign corporation,***

***Plaintiff/Appellee,***

***v.***

***MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION,  
a non-profit Catastrophic Claims Association***

***Defendant/Appellant,***

***GEORGE T. SINAS, LIISA R. SPEAKER and STEVEN A. HICKS***

A PUBLICATION OF THE THOMAS M. COOLEY LAW SCHOOL

# DECIPHERING TWO RELATED CONCEPTS: NO-FAULT PIP CAUSATION LAW AND THE DECISION IN *GRIFFITH V. STATE FARM*

GEORGE T. SINAS<sup>\*</sup> AND STEPHEN H. SINAS<sup>\*\*</sup>

## TABLE OF CONTENTS

I.	INTRODUCTION .....	106
	A. <i>Purpose of This Article</i> .....	106
	B. <i>Basic Statutory Overview</i> .....	108
	C. <i>Framing the Causation Issue</i> .....	111
	D. <i>Framing the Griffith Issue</i> .....	112

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\* George T. Sinas, senior shareholder in the law firm of Sinas, Dramis, Brake, Boughton & McIntyre, P.C., Lansing, Michigan, received his Bachelor's degree from the University of Michigan and his law degree from Wayne State University. He is the author of a widely read case-law annotation book entitled *Michigan No-Fault Auto Insurance Decisions*, commonly referred to as the "No-Fault Red Book." He is also a co-author of a textbook entitled *Motor Vehicle No-Fault Law in Michigan* now used in several law schools. Mr. Sinas is an adjunct professor of law at the Michigan State University College of Law where he teaches a course on the Michigan auto no-fault law. Mr. Sinas has been recognized in every edition of *The Best Lawyers in America* since 1989 in the field of personal-injury litigation. In 2005, Mr. Sinas received the Michigan Brain Injury Association Legacy Society Professional Service Award for his work representing the victims of serious brain injury. He also serves as General Counsel to the *Coalition Protecting Auto No-Fault (CPAN)*, a broad-based coalition of consumer groups, medical providers, and others working together to preserve and protect the Michigan auto no-fault system. Mr. Sinas is a past president of the Michigan Trial Lawyers Association (now the Michigan Association for Justice) and a former chair of the Negligence Law Section of the State Bar of Michigan.

\*\* Stephen H. Sinas received his Bachelor's degree from the University of Michigan in 2004 and his Juris Doctorate from Wayne State University Law School in 2007. While in law school, Mr. Sinas was a member of the Wayne State University Law School National Mock Trial Competition Team, served as President of the Wayne State University Law School Student Chapter of the American Association for Justice, and was awarded first place honors in the statewide American Constitution Society/State Bar of Michigan Negligence Law Section Law School Writing Competition. Mr. Sinas joined the law firm of Sinas, Dramis, Brake, Boughton & McIntyre, P.C., in the fall of 2007 and shortly thereafter was sworn into the State Bar of Michigan. Mr. Sinas primarily concentrates his law practice on the field of Michigan no-fault insurance litigation.

II.	NO-FAULT PIP CAUSATION LAW .....	114
A.	<i>Entitlement to No-Fault PIP Benefits—Section 3105</i> .....	114
1.	The Bodily Injury Requirement .....	115
2.	The Causal-Nexus Requirement .....	119
B.	<i>Liability to Pay No-Fault Allowable Expenses—Section 3107(1)(a)</i> .....	125
C.	<i>The Emergence of a Singular Causation Test—Scott v. State Farm</i> .....	128
D.	<i>Jury Instructions Regarding Allowable-Expense Causation Issues</i> .....	132
III.	THE <i>GRIFFITH</i> ISSUE .....	137
A.	<i>Pre-Griffith Rejection of Incrementalism</i> .....	138
1.	Incrementalism Rejected in Survivor’s Loss Claims— <i>Miller v. State Farm</i> .....	141
2.	Incrementalism Rejected in Housing Claims— <i>Sharp v. Preferred Risk</i> .....	143
3.	Incrementalism Rejected in Handicap-Van Claims— <i>Davis v. Citizens</i> .....	144
4.	The Implications of Incrementalism.....	145
B.	<i>The Griffith Decision</i> .....	146
1.	The Specific Holding .....	146
2.	The <i>Griffith</i> Rhetorical Question .....	150
C.	<i>Post-Griffith Decisions</i> .....	153
IV.	CONCLUSION: THE BIG PICTURE OF NO-FAULT PIP CAUSATION LAW AND THE <i>GRIFFITH</i> DECISION .....	160

## I. INTRODUCTION

### A. Purpose of This Article

The Michigan No-Fault Automobile Insurance Act<sup>1</sup> was adopted by the Michigan Legislature in 1972 and went into effect in October of 1973.<sup>2</sup> Michigan is only one of a handful of states to adopt a no-fault system, and many consider the Michigan statute to be the *model act* for this type of auto-reparation system.<sup>3</sup> Even though the legislature hoped that passage of the no-fault statute would simplify motor-vehicle-accident claims, in some

1. MICH. COMP. LAWS ANN. §§ 500.3101–.3179 (West 2002 & Supp. 2009).

2. GEORGE T. SINAS & WAYNE J. MILLER, MOTOR VEHICLE NO-FAULT LAW IN MICHIGAN 4 (2007).

3. See *id.* at 3-4; see also David Perlow, *It’s Time for a Tune Up: Torquing Michigan’s “Faulty” Automobile-Insurance System*, 24 T.M. COOLEY L. REV. 281, 285-86 (2007) (“Michigan’s no-fault automobile-insurance system is regarded as successful where others have failed.”).

respects the opposite has occurred.<sup>4</sup> There have been over 2,000 appellate-court decisions written during the last thirty years that interpret various aspects of the Michigan No-Fault Act.<sup>5</sup> In spite of that extensive jurisprudential history, there are a number of issues that remain confusing or unresolved. Specifically, there are two issues that have considerable present-day importance: (1) the law of causation applicable to the payment of no-fault PIP benefits, particularly in light of the Michigan Supreme Court's recent decision in *Scott v. State Farm Mutual Automobile Insurance Co.*;<sup>6</sup> and (2) the implications of the Michigan Supreme Court's decision in *Griffith ex rel. Griffith v. State Farm Mutual Automobile Insurance Co.*<sup>7</sup> regarding the payment of no-fault PIP benefits in catastrophic-injury claims. These issues are truly interrelated as both *Scott* and *Griffith* deal with fundamental principles relating to causation.<sup>8</sup> This Article is made even more timely because, on September 25, 2009, the Michigan Supreme Court granted leave to appeal in *Hoover v. Michigan Mutual Insurance Co.*<sup>9</sup> and specifically directed the parties to address the issue of "whether *Griffith* . . . was correctly decided."<sup>10</sup> However, on January 15, 2010, an order was entered by the Michigan Supreme Court dismissing the *Hoover* case because the parties had settled their differences.<sup>11</sup> Therefore, the *Griffith* decision will not be reviewed by the Michigan Supreme Court in *Hoover*. Nevertheless, *Griffith* may very well be reviewed in another case that is coming up the appellate ladder, *Wilcox v. State Farm Mutual Automobile Insurance Co.*, which deals with issues very similar to those presented in *Hoover*.<sup>12</sup> Clearly, the supreme-court order granting leave in *Hoover* last year suggests that *Griffith* is controversial and deserving of further appellate review.

This Article examines no-fault PIP causation law and the decisions in *Griffith* and *Scott* to simplify what has become an unnecessarily complex area of Michigan law. In addition, this Article suggests a new approach to jury instructions for no-fault PIP cases that correctly encompasses the

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4. SINAS & MILLER, *supra* note 2, at 4.

5. See GEORGE T. SINAS, THE RED BOOK: MICHIGAN NO-FAULT AUTO INSURANCE DECISIONS TC-1 to TC-23 (1/1/09 - 7/31/09 ed. 2009).

6. 766 N.W.2d 273 (Mich. 2009).

7. 697 N.W.2d 895 (Mich. 2005).

8. See *Scott*, 766 N.W.2d at 273-74; *Griffith*, 697 N.W.2d at 901-03.

9. 761 N.W.2d 801 (Mich. Ct. App. 2008).

10. *Hoover v. Mich. Mut. Ins. Co.*, 772 N.W.2d 338, 338 (Mich. 2009).

11. *Hoover v. Mich. Mut. Ins. Co.*, 776 N.W.2d 895, 896 (Mich. 2010) (order dismissing application for leave to appeal).

12. *Wilcox ex rel. Wilcox v. State Farm Mut. Auto. Ins. Co.*, 773 N.W.2d 691, 691 (Mich. 2009) (order holding application for leave to appeal in abeyance pending the decision in *Hoover*).

causation principles established under the No-Fault Act and emerging case law. To achieve that objective, however, it would be helpful to first conduct a basic overview of the no-fault statute so that important principles and concepts necessary to understanding the causation question are introduced and explored.

### B. Basic Statutory Overview

The basic concept of the Michigan No-Fault Act<sup>13</sup> is to impose a compulsory insurance system that guarantees payment of certain insurance benefits to all victims of motor-vehicle accidents regardless of who was at fault.<sup>14</sup> The legally correct name for PIP benefits is *personal protection insurance benefits* (PIP benefits).<sup>15</sup> To fund such a system, the No-Fault Act imposes certain limitations on the right of accident victims to bring tort-liability claims for noneconomic damages against the tortfeasors who inflicted the injury.<sup>16</sup> In addition, tortfeasors can be held liable for economic loss not covered by PIP benefits.<sup>17</sup> Therefore, given these basic statutory schemata, every motor-vehicle accident that occurs in Michigan has the potential for creating two separate and distinct claims: the claim for no-fault PIP benefits and the tort-liability claim for noneconomic and excess economic damages.

Basically, there are four types of PIP benefits payable under the Michigan Act: (1) the *allowable expense benefit* payable under section 3107(1)(a);<sup>18</sup> (2) the wage-loss benefit payable under section 3107(1)(b);<sup>19</sup> (3) the replacement-service-expense benefit payable under section 3107(1)(c);<sup>20</sup> and (4) the survivor's loss benefit payable under section 3108.<sup>21</sup>

The most important of these four PIP benefits is the *allowable expense benefit* payable under section 3107(1)(a) of the statute. This particular benefit is the one that distinguishes the Michigan No-Fault Act from any other no-fault system currently in effect in this country.<sup>22</sup> Section 3107(1)(a) creates a system that pays lifetime medical, rehabilitation, and

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13. MICH. COMP. LAWS ANN. §§ 500.3101–.3179 (West 2002 & Supp. 2009).

14. See §§ 500.3101, .3103, .3105.

15. § 500.3105.

16. See § 500.3135.

17. *Id.*

18. § 500.3107(1)(a).

19. § 500.3107(1)(b).

20. § 500.3107(1)(c).

21. § 500.3108.

22. See SINAS & MILLER, *supra* note 2, at 5.

related benefits to accident victims without any monetary cap.<sup>23</sup> These unlimited, lifetime medical and rehabilitation benefits are set forth in one simple sentence contained in section 3107(1)(a), which states:

Sec. 3107(1) . . . personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.<sup>24</sup>

The no-fault statute does not set forth any definitions regarding the scope and extent of the *allowable expense benefit*. However, it is clear from the broad language of the statute that *allowable expense benefits* extend far beyond basic medical expenses for hospitalization, physician's charges, prescriptions, and other traditional treatment costs. In fact, the Michigan Supreme Court and numerous Michigan appellate-court decisions have established that the *allowable expense benefits* extend to a vast array of products and services, including the following: (1) in-home nursing services and family-provided attendant care;<sup>25</sup> (2) barrier-free residential accommodations;<sup>26</sup> (3) vocational rehabilitation;<sup>27</sup> (4) special handicap-accessible motor-vehicle transportation;<sup>28</sup> (5) mileage to and from medical

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23. See § 500.3107(1)(a); SINAS & MILLER, *supra* note 2, at 6.

24. § 500.3107(1)(a).

25. See *Burris v. Allstate Ins. Co.*, 745 N.W.2d 101, 101, 104 (Mich. 2008); *Manley v. Detroit Auto. Inter-Ins. Exch.*, 388 N.W.2d 216, 222, 225 (Mich. 1986); *Van Marter v. Am. Fid. Fire Ins. Co.*, 318 N.W.2d 679, 683 (Mich. Ct. App. 1982); *Visconti v. Detroit Auto. Inter-Ins. Exch.*, 282 N.W.2d 360, 361, 362-63 (Mich. Ct. App. 1979).

26. See *Payne v. Farm Bureau Ins.*, 688 N.W.2d 327, 327-28, 331 (Mich. Ct. App. 2004); *Williams v. AAA Mich.* 646 N.W.2d 476, 480-81 (Mich. Ct. App. 2002); *Kitchen v. State Farm Ins. Co.*, 507 N.W.2d 781, 782-83 (Mich. Ct. App. 1993); *Sharp v. Preferred Risk Mut. Ins. Co.*, 370 N.W.2d 619, 625-26 (Mich. Ct. App. 1985).

27. See *Kondratek v. Auto Club Ins. Ass'n*, 414 N.W.2d 903, 905 (Mich. Ct. App. 1987); *Tennant v. State Farm Mut. Auto. Ins. Co.*, 372 N.W.2d 582, 587 (Mich. Ct. App. 1985); *Bailey v. Detroit Auto. Inter-Ins. Exch.*, 371 N.W.2d 917, 919 (Mich. Ct. App. 1985).

28. See *Davis v. Citizens Ins. Co. of Am.*, 489 N.W.2d 214, 216 (Mich. Ct. App. 1992).

treatment;<sup>29</sup> and (6) guardianship and conservatorship expenses for seriously injured patients requiring probate-court intervention.<sup>30</sup>

For an accident victim to recover any of the four PIP benefits under the Michigan Act (including *allowable expense benefits*), the injured person must first satisfy the *entitlement* provisions of section 3105 of the Michigan statute.<sup>31</sup> This pivotal statutory section is considered to be the gateway to the no-fault PIP benefits system.<sup>32</sup> Within that section, subsection (1) is the key provision. In one sentence, that subsection defines when a person is entitled to receive PIP benefits. In this regard, section 3105(1) states, "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, subject to the provisions of this chapter."<sup>33</sup>

As a result of the interplay between the entitlement provisions of section 3105(1) and the allowable-expense provisions of section 3107(1)(a), there are basically two statutory requirements that an injured accident victim must establish before being able to collect *allowable expense benefits*: (1) it must be established that the injured person is legally entitled to receive PIP benefits by satisfying the entitlement provisions of section 3105(1) of the Act;<sup>34</sup> and (2) the injured person must satisfy the specific elements set forth in section 3107(1)(a)<sup>35</sup> to impose liability on the no-fault insurer for the payment of specific allowable-expense claims under that statute.

As previously alluded to, under the basic scheme established by the No-Fault Act, an accident victim also has a right to pursue a tort-liability claim against the at-fault driver to recover two types of damages.<sup>36</sup> Those damages consist of noneconomic loss and excess economic loss. Claims for noneconomic loss require that the victim sustain one of three threshold injuries identified in section 3135 of the No-Fault Act: (1) serious impairment of body function; (2) permanent serious disfigurement; or (3)

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29. See *Swantek v. Auto. Club of Mich. Ins. Group*, 325 N.W.2d 588, 590 (Mich. Ct. App. 1982).

30. See *Heinz v. Auto Club Ins. Ass'n*, 543 N.W.2d 4, 5 (Mich. Ct. App. 1995).

31. MICH. COMP. LAWS ANN. § 500.3105(1)-(4) (West 2002) (discussing generally what is required for an insurer to be liable under personal-protection insurance).

32. See *Drake v. Citizens Ins. Co. of Am.*, 715 N.W.2d 387, 389 (Mich. Ct. App. 2006); *Rice v. Auto Club Ins. Ass'n*, 651 N.W.2d 188, 192 (Mich. Ct. App. 2002).

33. § 500.3105(1).

34. *Id.*

35. § 500.3107(1)(a).

36. §§ 500.3135(1), (3)(c).

death.<sup>37</sup> Claims for excess economic loss deal with certain economic damages suffered by the injured person that exceed what is compensable by way of PIP benefits, such as wage loss beyond three years.<sup>38</sup> These excess-economic-loss claims do not require proof of a threshold injury.<sup>39</sup> The legal causation standards applicable to tort-liability claims under the Michigan No-Fault Act are the same proximate-cause principles that are applicable to all tort claims governed by Michigan common law.<sup>40</sup>

### C. Framing the Causation Issue

The causation issue addressed in this Article arises because neither the entitlement provisions of section 3105(1) nor the *allowable expense benefit* provisions of section 3107(1)(a) contain any specific definitional language that establishes the legal causation standard that must be met to satisfy each of these two statutory sections.<sup>41</sup> Clearly, the statutory language contained in both of these subsections—and the case law that has discussed these subsections—imposes causation requirements. The question then becomes, what are those legal causation requirements? More specifically, are the causation requirements under the entitlement provisions of section 3105(1) any different from the causation requirements applicable to the *allowable expense benefit* provisions of section 3107(1)(a)?

The search for the answer to this question begins with recognizing that there is a difference between “entitlement to benefits” under section 3105(1) and “liability to pay allowable expense benefits” under section 3107(1)(a). The concept of *entitlement to benefits* generally involves the question of whether there was an injury-producing event that satisfies the requirements of section 3105(1).<sup>42</sup> Under such an analysis, the focus is primarily on how the injury-producing event happened and its relationship to a motor vehicle.<sup>43</sup> The concept of *liability to pay allowable expense benefits* under section 3107(1)(a), however, generally focuses on whether the claimant’s medical condition and the claimant’s need for specific medical services are sufficiently related to the injury that gives rise to no-

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37. § 500.3135(1).

38. § 500.3135(3)(c).

39. *See id.* (distinguishing when a threshold injury is required pursuant to section 3105(1) and section 3105(3)(c)).

40. *See* 1 MICHIGAN MODEL CIVIL JURY INSTRUCTIONS ch. 36 (Supp. 2009), available at <http://courts.mi.gov/mcji/MCJI.htm>.

41. §§ 500.3105(1), 3107(1)(a).

42. § 500.3105(1).

43. *See* GEORGE T. SINAS & WAYNE MILLER, MOTOR VEHICLE NO-FAULT LAW IN MICHIGAN 49-135 (2008).

fault benefit entitlement—thus rendering the no-fault insurer liable to pay for those specific *allowable expense benefits* under section 3107(1)(a).<sup>44</sup>

Clearly, the concepts of *entitlement to benefits* and *liability for payment of allowable expense benefits* both imply causal-connection requirements. As previously indicated, the question is whether those causation requirements are different. It is the thesis of this Article that Michigan appellate decisions,<sup>45</sup> and in particular the Michigan Supreme Court's recent decision in *Scott*,<sup>46</sup> have established that the legal causation requirements under both sections 3105(1) and 3107(1)(a) are identical. The recognition of this principle by bench and bar should greatly clarify and simplify the law of causation as it applies to claims for no-fault PIP benefits.

#### D. Framing the Griffith Issue

On June 14, 2005, the Michigan Supreme Court decided *Griffith ex rel. Griffith v. State Farm Mutual Automobile Insurance Co.*<sup>47</sup> A number of insurance companies contend that *Griffith* substantially changes the extent to which some types of products, services, and accommodations are compensable under the *allowable expense benefit* provision of section 3107(1)(a) of the No-Fault Act.<sup>48</sup> In *Griffith*, the Michigan Supreme Court held that a no-fault insurance company was not obligated to pay for the cost of food consumed by a catastrophically injured person who was cared for at home and whose food needs had been unaffected by the accident.<sup>49</sup> The court reasoned that because the injured person did not require a special diet as a result of his injuries, there was an insufficient causal connection between his auto accident and his food expenses to trigger the insurer's liability to pay *allowable expense benefits* under the provisions of section 3107(1)(a).<sup>50</sup> Since the *Griffith* decision was released, many insurance

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44. See, e.g., *Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co.*, 697 N.W.2d 895, 903 (Mich. 2005) (“[Section 3107(1)(a)] specifically limits compensation to charges for products or services that are reasonably necessary ‘for an *injured person’s* care, recovery, or rehabilitation.’ This context suggests that ‘care’ must be related to the insured’s injuries.”); *Begin v. Mich. Bell Tel. Co.*, 773 N.W.2d 271, 281 (Mich. Ct. App. 2009) (stating that an allowable expense under section 3107(1)(a) must be sufficiently related to injuries sustained in a motor-vehicle accident).

45. See ROBERT E. LOGEMAN, MICHIGAN NO-FAULT AUTOMOBILE CASES T-13 to T-39 (3d ed. Supp. 2009) (tabulating significant cases).

46. *Scott v. State Farm Mut. Auto. Ins. Co.*, 766 N.W.2d 273 (Mich. 2009).

47. 697 N.W.2d 895.

48. See *Begin*, 773 N.W.2d 271; *Hoover v. Mich. Mut. Ins. Co.*, 761 N.W.2d 801 (Mich. Ct. App. 2008).

49. *Griffith*, 697 N.W.2d at 906.

50. *Id.* at 903.

companies contend that they are now only obligated to pay the difference between a plaintiff's costs for home accommodations and handicap-accessible transportation and the plaintiff's costs for housing and transportation prior to being injured.<sup>51</sup> As such, these insurers argue that, in *Griffith*, the Michigan Supreme Court incorporated the concept of *incrementalism* into the jurisprudence of the Michigan no-fault law.<sup>52</sup>

In a nutshell, incrementalism is the notion that a no-fault insurer can reduce its liability to pay *allowable expense benefits* under section 3107(1)(a) by some amount that approximates what the injured person would have consumed or would have needed if the injury in question had not occurred.<sup>53</sup> Under incrementalism, a no-fault insurer is permitted to engage in an analysis that looks at what the injured person would have needed, consumed, or otherwise utilized had the injury not occurred.<sup>54</sup>

As this Article will explain, Michigan appellate courts have rejected the concept of incrementalism in several contexts prior to *Griffith*.<sup>55</sup> Moreover, there is nothing in the *Griffith* decision that adopts incrementalism.<sup>56</sup> In addition, case law subsequent to *Griffith* confirms that incrementalism is not the proper analytical standard to be utilized in determining the extent to which a no-fault insurer is liable to pay for the cost of handicap-accessible

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51. See, e.g., *Hoover*, 761 N.W.2d at 810 (challenging an award of insurance benefits covering "property taxes, standard utility bills, homeowner's insurance, home maintenance costs, telephone bills, dumpster expenses, elevator inspection costs, home security system expenses, cleaning stipends . . . , and snow removal").

52. But see *Begin*, 773 N.W.2d at 280. In rejecting the notion that *Griffith* had adopted incrementalism, the court stated, "[W]e reject defendants' bright-line rule that if an injured person uses a product, service, or accommodation both before and after the person's motor vehicle accident, it cannot for that reason meet the statutory causal relationship tests clarified in *Griffith* for an 'allowable expense' no-fault benefit. Rather, the *Griffith* Court held that a product, service, or accommodation an injured person uses both before and after a motor vehicle accident might be an 'allowable expense' no-fault benefit depending on the particular facts and circumstances involved." *Id.*

53. See *Hoover*, 761 N.W.2d at 808 ("The analysis necessarily entails a comparison between costs associated with circumstances as they actually exist, which includes reflection on a life scarred and affected by injuries sustained in an automobile accident, and costs associated with a life unscarred by injuries, which would include examination of circumstances that existed preinjury or that would in all likelihood have transpired absent the injury.").

54. See *id.*

55. See *Davis v. Citizens Ins. Co. of Am.*, 489 N.W.2d 214 (Mich. Ct. App. 1992); *Sharp v. Preferred Risk Mut. Ins. Co.*, 370 N.W.2d 619 (Mich. Ct. App. 1985).

56. *Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co.*, 697 N.W.2d 895, 903 (Mich. 2005).

transportation and housing accommodations for catastrophically injured accident victims.<sup>57</sup>

## II. NO-FAULT PIP CAUSATION LAW

### A. *Entitlement to No-Fault PIP Benefits—Section 3105*

The appellate case law decided under the entitlement provisions of section 3105(1) has evolved over many years and has demonstrated that entitlement to benefits goes far beyond bodily injury sustained in traditional motor-vehicle collisions.<sup>58</sup> On the contrary, section 3105(1) creates entitlement to PIP benefits in a number of noncollision situations, such as injuries involving vehicular maintenance, vehicular loading and unloading, and occupancy of parked cars.<sup>59</sup> In recognizing the broad scope of PIP benefit entitlement, the appellate case law under section 3105(1) has produced a five-part test to determine when an injury victim is entitled to recover no-fault PIP benefits under the Act. The five elements of this test are as follows:

- (1) there must be a *motor vehicle* involved in the accident, as that term is defined in the statute (section 3101(2)(e));
- (2) the claim must involve a *bodily injury*, rather than some disease or latent medical condition;
- (3) the injury giving rise to the claim must be *accidental* in the sense that it was not caused intentionally by the claimant (see section 3105(4));

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57. See *Begin*, 773 N.W.2d at 280; *Chappel v. Auto-Owners Ins. Co.*, No. 260561, 2006 WL 3230765 (Mich. Ct. App. Oct. 3, 2006); *Chartier v. Auto. Club Ins. Ass'n*, No. 257301, 2006 WL 73624 (Mich. Ct. App. Jan. 12, 2006).

58. See, e.g., *Rice v. Auto. Club Ins. Ass'n*, 651 N.W.2d 188 (Mich. Ct. App. 2002) (allowing recovery for a driver who was injured while fueling equipment with a fueling truck); *Kreighbaum v. Auto Club Ins. Ass'n*, 428 N.W.2d 718 (Mich. Ct. App. 1988) (allowing recovery for a driver who slowed to avoid hitting a deer and was struck by bullets from a hunter's rifle); *Davis v. Auto Owners Ins. Co.*, 323 N.W.2d 418 (Mich. Ct. App. 1982) (allowing recovery where a tow-truck driver was struck while standing next to his parked vehicle).

59. See *Miller v. Auto-Owners Ins. Co.*, 309 N.W.2d 544, 545-47 (Mich. 1981) (discussing entitlement to PIP benefits for injuries involving vehicular maintenance and occupancy of parked cars); *Arnold v. Auto-Owners Ins. Co.*, 269 N.W.2d 311, 313 (Mich. Ct. App. 1978) (“[W]e conclude that § 3106(b) makes compensable injuries which are a direct result of physical contact with property being lifted onto or lowered from the parked vehicle in the loading or unloading process.”).

- (4) the injury must be closely related to the *transportational function* of a motor vehicle; and
- (5) there must be a sufficient *causal nexus* between the injury and the use of the vehicle that is more than incidental or fortuitous.<sup>60</sup>

Only the fifth element of this five-part test specifically deals with the issue of causation. That element is the requirement that there be a sufficient causal nexus between the injury and the use of the vehicle.<sup>61</sup> However, the second element of the entitlement test, which deals with the requirement that there be some *bodily injury* as opposed to a latent disease or condition, sets the stage for a full understanding of the causal-nexus element of the five-part entitlement test.<sup>62</sup> This is especially true with regard to how that particular element has been applied to situations involving *aggravation of prior existing conditions*.<sup>63</sup> Therefore, the *bodily injury* element of the five-part entitlement test will first be explored.

### 1. The Bodily Injury Requirement

The second prong of the five-part entitlement test requires that there be a *bodily injury* that gives rise to a claim.<sup>64</sup> Early case law dealt with situations where entitlement to benefits was disputed because the claim was based upon a medical condition that was not the result of a single accident that occurred at a specific moment at a specific location.<sup>65</sup> Rather, claims were made where a medical condition resulted over a period of time as a

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60. See *Morosini v. Citizens Ins. Co. of Am.*, 602 N.W.2d 828, 829-32 (Mich. 1999) (per curiam); *McKenzie v. Auto Club Ins. Ass'n*, 580 N.W.2d 424, 426, 429 (Mich. 1998); *Wheeler v. Tucker Freight Lines Co.*, 336 N.W.2d 14, 15-17 (Mich. Ct. App. 1983) (per curiam).

61. See *McKenzie*, 580 N.W.2d at 429 (stating that PIP benefits cannot be obtained where the requisite nexus between an injury and the transportational function of a vehicle is lacking).

62. See *Mollitor v. Associated Truck Lines*, 364 N.W.2d 344, 346 (Mich. Ct. App. 1985); *McKim v. Home Ins. Co.*, 349 N.W.2d 533 (Mich. Ct. App. 1984); *Randles v. Carriers Ins. Co.*, 361 N.W.2d 6 (Mich. Ct. App. 1984); *Wheeler*, 336 N.W.2d 14.

63. See *Mollitor*, 364 N.W.2d at 346; *McKim*, 349 N.W.2d 533; *Randles*, 361 N.W.2d 6; *Wheeler*, 336 N.W.2d 14.

64. See MICH. COMP. LAWS ANN. § 500.3105(1) (West 2002) (requiring bodily injury for PIP benefit recovery).

65. See, e.g., *Randles*, 361 N.W.2d at 7, 9 (deciding that the back injury was caused by prolonged use of body while at work); *Wheeler*, 336 N.W.2d at 15-17 (holding that bodily injury did not exist when caused by a series of events over a prolonged period of time).

result of cumulative activities connected with the use of motor vehicles.<sup>66</sup> In these situations, the appellate courts have held that benefits are generally not available.<sup>67</sup> On the contrary, to constitute a *bodily injury*, as contemplated in section 3105(1), the courts have held that there must be a single injury-producing event.<sup>68</sup> This was made clear in *Wheeler v. Tucker Freight Lines Co.* where the plaintiff complained that he had sustained a back disability that was the result of many years of driving a truck.<sup>69</sup> The court of appeals held that this was not a *bodily injury* as required by section 3105(1) and stated:

Reading the no-fault act as a whole, we conclude that the Legislature intended to authorize the payment of personal protection insurance benefits only for an injury sustained in a single accident, having a temporal and spatial location. Accordingly, we hold that “accidental bodily injury” as that phrase is used in the no-fault act is an injury resulting from only such an accident.

Mr. Wheeler’s injury arose from a series of events spanning many years of driving and many miles of roadway. It is not attributable to a single accident. We hold, therefore, that, as a matter of law, Mr. Wheeler’s injury is not “accidental bodily injury” under the no-fault act.<sup>70</sup>

One year later, in *McKim v. Home Insurance Co.*,<sup>71</sup> the court of appeals somewhat softened its holding in *Wheeler*. In *McKim*, the court reversed the trial court’s ruling that a plaintiff who sustained a heart attack while unloading a semitrailer during the course of his employment could not, as a matter of law, recover PIP benefits under section 3105(1).<sup>72</sup> The trial court had held that the plaintiff’s heart attack did not entitle him to PIP benefits because it was not a *bodily injury* as defined in section 3105(1).<sup>73</sup> In reversing the trial court, the court of appeals held that the claim presented a question of fact for the jury and stated in pertinent part:

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66. See, e.g., *Randles*, 361 N.W.2d at 7, 9; *Wheeler*, 336 N.W.2d at 15-17.

67. See, e.g., *Wheeler*, 336 N.W.2d at 14, 16 (holding that the plaintiff could not recover because his “injury arose from a series of events spanning many years of driving and many miles of roadway”).

68. See, e.g., *id.* (noting that the “no-fault act assume[s] that the accident occurred at a particular point in time”).

69. *Id.* at 15.

70. *Id.* at 16-17.

71. 349 N.W.2d 533 (Mich. Ct. App. 1984).

72. *Id.* at 535-36.

73. *Id.* at 535.

While defendant Home argues strenuously that the accident or heart problem was caused by 44 years of accumulated blockage of plaintiff's arteries, this Court and its interpretation of the act must deal with the nationwide acceptance of the proposition that physical strain can cause cardiac disability or death. . . .

. . . .

. . . [G]iven the widely accepted premise that cardiovascular disabilities can be caused by physical strain, we conclude that the instant case is not one properly resolved by summary judgment . . . . Whether plaintiff's myocardial infarction and the resulting disability are directly traceable to his unloading of the trailer in Milwaukee, Wisconsin, involves a factual question, presumably one to be resolved by the jury.<sup>74</sup>

Similar principles were recognized by the court of appeals in *Randles v. Carriers Insurance Co.*, where the court held that PIP benefits were not available to a plaintiff who sustained back injuries as a result of "wear and tear" on his back from his employment as a yardman for a trucking company.<sup>75</sup>

The principles of *Wheeler* and *McKim* were reaffirmed by the court of appeals in *Mollitor v. Associated Truck Lines Co.*<sup>76</sup> *Mollitor* involved a truck driver who developed carpal tunnel syndrome in his wrist.<sup>77</sup> The court held that for the truck driver to collect no-fault PIP benefits, it would be necessary for him to show that he sustained an accidental bodily injury attributable to a single, specific incident.<sup>78</sup> Benefits would not be recoverable if the condition resulted from a series of events, such as a gradually deteriorating physical condition attributable to many years of employment as a truck driver.<sup>79</sup> However, in reaching this holding, the *Mollitor* court made it very clear that a specific event that "aggravates a pre-existing condition" may qualify for PIP benefit entitlement.<sup>80</sup> In this regard, the court stated:

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74. *Id.* at 535-36 (internal quotations and citations omitted).

75. 361 N.W.2d 6, 9 (Mich. Ct. App. 1984).

76. *See Mollitor v. Associated Truck Lines Co.*, 364 N.W.2d 344 (Mich. Ct. App. 1985).

77. *Id.* at 345.

78. *Id.* at 346.

79. *Id.*

80. *Id.* at 347.

[S]ummary judgment for either defendant or plaintiff would have been improper in the instant case since a question of fact was presented as to whether plaintiff's disability was the result of what occurred on October 17 when plaintiff attempted to open the door of his semitrailer or was due to years of repetitive use of plaintiff's hands and wrists while loading, unloading and driving his truck. That question was properly presented to the jury which, based on the testimony presented, decided in favor of defendant.

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. . . *Wheeler* does not hold that a condition precipitated by an accidental injury is automatically outside the scope of the no-fault statute because it results in part from a pre-existing condition. Even under *Wheeler*, an injured party may recover if he can demonstrate that the accident aggravated a pre-existing condition. This Court so held in *McKim v. Home Ins. Co.*<sup>81</sup>

The Michigan Supreme Court has endorsed the definition of *accidental bodily injury* adopted by the court of appeals in *Wheeler* and *McKim*. This occurred in *Nehra v. Provident Life & Accident Insurance Co.*, a case that dealt with disability insurance.<sup>82</sup> In *Nehra*, the Michigan Supreme Court held that a plaintiff who had developed disabling bilateral carpal tunnel syndrome due to prolonged repetition of hand movements had not sustained an *accidental bodily injury* for purposes of disability coverage under an insurance policy.<sup>83</sup> In so holding, the court specifically relied on *Wheeler* and *McKim*, reasoning that the plaintiff had not suffered a discrete injury and that "[n]o single event caused the disability."<sup>84</sup> Likewise, the court noted that the word *accidental* "is not ambiguous insofar as its ordinary meaning includes the temporal and spatial elements discussed in the no-fault cases. . . . Without the temporal/spatial component, the word 'accidental' adds almost nothing to the phrase 'accidental bodily injuries.'"<sup>85</sup> More recently, in the unpublished no-fault case of *Davidson v. Auto-Owners Insurance Co.*, the court of appeals followed *Wheeler*, *McKim*, and *Nehra* in holding that the plaintiff had not sustained an

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81. *Id.* at 346-67 (citing *McKim v. Home Ins. Co.*, 349 N.W.2d 533 (Mich. Ct. App. 1984)).

82. *See* 559 N.W.2d 48, 50 (Mich. 1997).

83. *See id.*

84. *Id.* at 51.

85. *Id.*

accidental bodily injury when he gradually developed back and lower-leg pain over the course of a thirteen-hour work day as a delivery truck driver.<sup>86</sup>

The early cases of *Wheeler, McKim*, and *Mollitor* clearly establish that the accidental-bodily-injury requirement of section 3105(1) can be satisfied by proving that a single event occurring on a specific date and time either (1) produced the medical condition that is the subject of the PIP claim, or (2) aggravated a previously existing condition or vulnerability that now serves as the basis of the PIP claim.<sup>87</sup> However, the case law dealing with the accidental-bodily-injury test of entitlement to PIP benefits does not address the nature and extent of the causal connection that must be demonstrated between the specific event in question and the nature of the injury that resulted from that event.<sup>88</sup> That issue was addressed when the appellate courts articulated the *arising out of*, or *causal nexus*, prong of the five-part test that established what must be demonstrated to satisfy the entitlement provisions of section 3105(1).<sup>89</sup> This causal-nexus requirement is addressed below.

## 2. The Causal-Nexus Requirement

The causal-nexus test under section 3105(1) is perhaps the most complex and heavily litigated component of the five-part entitlement test. This test is based on the phrase “arising out of” in section 3105(1).<sup>90</sup> The causal-nexus test requires the existence of a sufficient causal link between the injury that occurred and the ownership, operation, maintenance, or use of a motor vehicle that “need not approach proximate cause.”<sup>91</sup> Furthermore, courts have held that “where [the] use of the vehicle is one of the causes of the injury, a sufficient causal connection is established even though there exists an independent cause.”<sup>92</sup>

The causal-nexus test has evolved over a period of many years and through many cases. One of the earliest and most significant cases in the evolution of the causal-nexus test is *Shinabarger v. Citizens Mutual*

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86. *Davidson v. Auto-Owners Ins. Co.*, No. 275074, 2008 WL 782640, at \*4 (Mich. Ct. App. Mar. 25, 2008).

87. *Mollitor v. Associated Truck Lines*, 364 N.W.2d 344, 347 (Mich. Ct. App. 1985); *McKim v. Home Ins. Co.*, 349 N.W.2d 533, 535-36 (Mich. Ct. App. 1984); *Wheeler v. Tucker Freight Lines Co., Inc.*, 336 N.W.2d 14, 16-17 (Mich. Ct. App. 1983).

88. *See supra* text accompanying notes 64-87.

89. *See infra* text accompanying notes 90-129.

90. MICH. COMP. LAWS ANN. § 500.3105(1) (West 2002).

91. *Shinabarger v. Citizens Mut. Ins. Co.*, 282 N.W.2d 301, 305 (Mich. Ct. App. 1979).

92. *Id.*

*Insurance Co.*<sup>93</sup> This case has been cited frequently in subsequent appellate decisions. In *Shinabarger*, the court of appeals dealt with a situation where the plaintiff's decedent sustained an injury while he was using his automobile to shine deer.<sup>94</sup> After the plaintiff's decedent had illuminated a deer in his headlights, he stopped his vehicle momentarily to get out and shoot the animal.<sup>95</sup> As he was attempting to re-enter the vehicle, he handed his shotgun to a friend who was seated in the front seat.<sup>96</sup> At some point during this exchange, the shotgun accidentally discharged, fatally wounding the plaintiff's decedent.<sup>97</sup> The question was whether there was a sufficient causal nexus between the use of the plaintiff's automobile and his accidental shooting, which would entitle the plaintiff to claim benefits under section 3105(1) of the Act.<sup>98</sup> The court found that the case presented a question of fact requiring jury determination and remanded the matter back to the trial court for further proceedings.<sup>99</sup> In reaching this conclusion, the court explained important principles regarding the *arising out of* concept embodied by section 3105(1). In this regard, the court held:

[C]ases construing the phrase "arising out of the . . . use of a motor vehicle as a motor vehicle" uniformly require that the injured person establish a causal connection between the use of the motor vehicle and the injury. Where use of the vehicle is one of the causes of the injury, a sufficient causal connection is established even though there exists an independent cause.

The relationship between use of the vehicle and the injury need not approach proximate cause:

[T]he term "arising out of" does not mean proximate cause in the strict legal sense, nor require a finding that the injury was directly and proximately caused by the use of the vehicle, nor that the insured vehicle was exerting any physical force upon the instrumentality which was the immediate cause of the injury. That almost any causal connection or relationship will do. "Case law indicates that the injury need not be the proximate result of 'use' in the

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93. 282 N.W.2d 301.

94. *Id.* at 303.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 304.

99. *Id.* at 305.

strict sense, but it cannot be extended to something distinctly remote. . . . Each case turns on its precise individual facts. The question to be answered is whether the injury ‘originated from’, ‘had its origin in’, ‘grew out of’, or ‘flowed from’ the use of the vehicle.”

Where the injury is entirely the result of an independent cause in no way related to the use of the vehicle, however, the fact that the vehicle is the site of the injury will not suffice to bring it within the policy coverage.<sup>100</sup>

Based on the analysis utilized in *Shinabarger*, several appellate-court decisions over the next few years held that victims were entitled to recover no-fault benefits under section 3105(1), even though there was no physical contact between two motor vehicles. One of the earliest cases addressing that scenario was *Bromley v. Citizens Insurance Co. of America*, where a motorcyclist was held to be entitled to no-fault benefits when he was allegedly run off the road by an automobile that crossed the center line, even though there was no physical contact between the motorcycle and the automobile.<sup>101</sup> The court of appeals held that physical contact is not required as long as the requisite causal nexus between the ownership, operation, maintenance, and use of a motor vehicle has been factually established.<sup>102</sup>

A similar holding occurred in *Bradley v. Detroit Automobile Inter-Insurance Exchange*,<sup>103</sup> a case that also dealt with injuries to a motorcyclist whose motorcycle collided with the back of a legally parked pickup truck that was situated on a dark, unlit one-way street.<sup>104</sup> The accident occurred because the motorcyclist was unable to change lanes to avoid striking the parked pickup truck because there was a moving automobile immediately adjacent to the plaintiff’s motorcycle at the time of the incident.<sup>105</sup> The presence of this moving automobile prevented the plaintiff from changing lanes to avoid the collision.<sup>106</sup>

The causal-nexus test under section 3105(1) was more fully developed in a line of five cases decided by the Michigan Supreme Court dealing with injuries caused by criminal assaults: *Thornton v. Allstate Insurance Co.*,<sup>107</sup>

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100. *Id.* (citations omitted).

101. 317 N.W.2d 318 (Mich. Ct. App. 1982).

102. *Id.* at 319.

103. 343 N.W.2d 506 (Mich. Ct. App. 1983).

104. *Id.* at 508.

105. *Id.* at 507-08.

106. *Id.* at 508.

107. 391 N.W.2d 320 (Mich. 1986).

*Marzonia v. Auto Club Insurance Ass'n*,<sup>108</sup> *Bourne v. Farmers Insurance Exchange*,<sup>109</sup> *Moreno v. Farmers Insurance Exchange*,<sup>110</sup> and *Morosini v. Citizens Insurance Co. of America*.<sup>111</sup> In *Thornton*, the court denied PIP benefits to a plaintiff taxicab driver who sustained severe injuries when a passenger shot him in the neck with a pistol, robbed him, and dragged him from the vehicle.<sup>112</sup> The court denied benefits on the basis of the causal-nexus test, finding that there was not a sufficient relationship between the shooting of the plaintiff and the vehicular use of the taxicab.<sup>113</sup> On the contrary, the court found that the connection was no more than incidental and fortuitous.<sup>114</sup> In so ruling, the court held:

In drafting MCL 500.3105(1), the Legislature limited no-fault PIP benefits to injuries arising out of the “use of a vehicle *as a motor vehicle*.” In our view, this language shows that the Legislature was aware of the causation dispute and chose to provide coverage only where the causal connection between the injury and the use of a motor vehicle is more than incidental, fortuitous, or “but for.” The involvement of the car in the injury should be “directly related to its character as a motor vehicle.” . . .

The connection in this case between the debilitating injuries suffered by Mr. Thornton and the use of the taxicab as a motor vehicle is no more than incidental, fortuitous, or “but for.” The motor vehicle was not the instrumentality of the injuries. The motor vehicle here was merely the situs of the armed robbery—the injury could have occurred whether or not Mr. Thornton used a motor vehicle as a motor vehicle. The relation between the functional character of the motor vehicle and Mr. Thornton’s injuries was not direct—indeed, the relation is at most incidental.

. . . .

In this case, the injuries suffered by Mr. Thornton are not covered by PIP benefits under the no-fault policy because

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108. 495 N.W.2d 788 (Mich. 1992) (per curium).

109. 534 N.W.2d 491 (Mich. 1995).

110. 562 N.W.2d 199 (Mich. 1997).

111. 602 N.W.2d 828 (Mich. 1999).

112. *Thornton*, 391 N.W.2d at 321, 328.

113. *Id.* at 328.

114. *Id.*

there was, at most, no more than an incidental and fortuitous causal relation between his injuries and the use of a motor vehicle as a motor vehicle.<sup>115</sup>

The court reached a similar result in *Marzonie*, where it once again denied no-fault benefits to a plaintiff who, while occupying a motor vehicle, was shot by a person outside of the vehicle.<sup>116</sup>

Similarly, in *Bourne*, the court applied the causal-nexus test and held that the plaintiff was not entitled to benefits under section 3105(1) where the plaintiff sustained injuries after being beaten during a car-jacking.<sup>117</sup> In denying benefits, the court cited *Thornton* and held that the “plaintiff’s vehicle was at best the situs of the injury, which is not a sufficient condition to establish the requisite causal connection between the injury and the vehicle.”<sup>118</sup>

In *Moreno*, the court peremptorily reversed the court of appeals and found that the plaintiff was not entitled to no-fault benefits where he sustained a fractured skull as a result of being hit in the head by a piece of concrete that was thrown at the vehicle while he was a passenger.<sup>119</sup> Citing *Bourne*, the court held, “Plaintiff was the victim of an assault, injured when he was struck by a piece of concrete thrown at the vehicle in which he was riding. His injuries did not arise out of the use of the vehicle as a motor vehicle.”<sup>120</sup>

In *Morosini*, the court applied the causal-nexus test and held that the plaintiff was not entitled to benefits under section 3105(1) where the plaintiff sustained an assault injury that occurred after his vehicle and another vehicle were involved in a rear-end collision and the two drivers exited their vehicles at the scene to exchange information.<sup>121</sup> As they were doing so, a fight ensued resulting in an injury to the plaintiff.<sup>122</sup> In peremptorily reversing the court of appeals, the court cited its decisions in *Thornton*, *Marzonie*, and *Bourne*, and held that the assault that occurred in this case was not sufficiently causally related to the use of a motor vehicle—even though the injury occurred while the two drivers were discharging their statutory obligation under the Motor Vehicle Code, to stop

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115. *Id.* at 327-28 (citations omitted).

116. *Marzonie v. Auto Club Ins. Ass’n*, 495 N.W.2d 788, 788-89 (Mich. 1992) (per curiam).

117. *Bourne v. Farmers Ins. Exch.*, 534 N.W.2d 491, 492, 495 (Mich. 1995).

118. *Id.* at 494.

119. *Moreno v. Farmers Ins. Exch.*, 562 N.W.2d 199 (Mich. 1997).

120. *Id.* at 199 (citing *Bourne*, 534 N.W.2d 491).

121. *Morosini v. Citizens Ins. Co. of Am.*, 602 N.W.2d 828, 830-31 (Mich. 1999).

122. *Id.* at 829.

at the scene of a property-damage accident and exchange information.<sup>123</sup> In denying benefits, the court cited its recent decision in *McKenzie v. Auto Club Insurance Ass'n*, in which it held that for a claimant to be entitled to no-fault benefits under section 3105(1), the injury that is the subject of the claim must be closely related to the transportation function of the motor vehicle.<sup>124</sup> Although *Morosini* reaffirmed the basic notion that criminal assaults on drivers and passengers generally do not result in entitlement to PIP benefits, because of the failure to establish the requisite causal nexus between the injury and the use of a vehicle, *Morosini* made it clear that not every assault-based injury results in nonpayment of benefits.<sup>125</sup> On the contrary, assault injuries occurring in connection with the transportation function of the vehicle are not, *ipso facto*, disqualified.<sup>126</sup>

Thus, it would appear that persons who sustain bodily injury as a result of assaults that are closely related to the transportation function of a vehicle would be entitled to no-fault PIP benefits. Such would be the case where a person is intentionally run over by a moving vehicle or is pushed out of a moving vehicle. Although these are assaultive situations, the injuries are directly related to a force closely related to the transportation function of the vehicle.

This conclusion is further supported by the recent appellate decision in *University Rehabilitation Alliance Inc. v. Farm Bureau Insurance Co.*, where the court of appeals upheld the trial court's holding that the defendant insurer unreasonably denied benefits where the plaintiff sustained a severe brain injury when she was pushed out of a moving motor vehicle.<sup>127</sup> The court of appeals held that this was not a legitimate basis to deny benefits as there is "no [per se] rule precluding PIP benefits for injuries resulting from an assault."<sup>128</sup> Instead, the court of appeals emphasized, "[The plaintiff's] injuries directly resulted from her falling out of the motor vehicle while it was in motion and being used for transportation."<sup>129</sup>

There have literally been scores of decisions dealing with the causal-nexus prong of the five-part test regarding entitlement to benefits under

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123. *Id.* at 831-32 (citing *Bourne*, 534 N.W.2d 491; *Marzonie v. Auto Club Ins. Ass'n*, 495 N.W.2d 788 (Mich. 1992); *Thornton v. Allstate Ins. Co.*, 391 N.W.2d 320 (Mich. 1986)).

124. *Morosini*, 602 N.W.2d at 830-31 (citing *McKenzie v. Auto Club Ins. Ass'n*, 580 N.W.2d 424 (Mich. 1998)).

125. *Id.* at 831-32.

126. *See id.* at 830-31.

127. 760 N.W.2d 574, 579 (Mich. Ct. App. 2008), *appeal denied*, 763 N.W.2d 908 (Mich. 2009).

128. *Id.* at 578.

129. *Id.*

section 3105(1). A review of all of those cases is impossible in the context of this Article. However, the decisions cited and analyzed above fairly characterize the current status of the causal-nexus test used to determine entitlement to benefits under section 3105(1). The question that then emerges from the evolution of the causal-nexus test is whether that same causal-nexus test also applies to determine an insurer's liability to pay specific *allowable expense benefits* under section 3107(1)(a). That issue will be explored below.

*B. Liability to Pay No-Fault Allowable Expenses—Section  
3107(1)(a)*

Proving entitlement to no-fault benefits under section 3105(1) is not the same thing as proving liability for payment of specific *allowable expense benefits* under section 3107(1)(a).<sup>130</sup> A person becomes eligible to claim PIP benefits by satisfying the requirements of section 3105(1).<sup>131</sup> On the other hand, once entitlement has been established, the injured person must satisfy the requirements of 3107(1)(a) in order to claim a particular expense as an *allowable expense benefit*.<sup>132</sup>

That section renders an insurer liable to pay *allowable expense benefits* for "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."<sup>133</sup> Under this language, an insurer is only obligated to pay "reasonable charges" and only where those charges are "reasonably necessary" for the injured person's care, recovery, or rehabilitation.<sup>134</sup> Neither of those terms, as used in section 3107(1)(a), are defined anywhere in the no-fault statute.<sup>135</sup>

It is clear that section 3107(1)(a) does not contain any specific causation language.<sup>136</sup> In other words, the legislature did not insert phrases such as *causally connected*, *proximately caused*, or *causally related* in the text of section 3107(1)(a).<sup>137</sup> The legislature could have done so, but it chose not to. Nevertheless, the text of section 3107(1)(a) suggests that *some type of causal connection* must be established between the injury that satisfied the entitlement provisions of section 3105(1) and the product,

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130. Compare MICH. COMP. LAWS ANN. § 500.3107(1)(a) (West 2002) with § 500.3105(1).

131. See § 500.3105(1).

132. § 500.3107(1)(a).

133. *Id.*

134. *Id.*

135. §§ 500.3101–.3179.

136. § 500.3107(1)(a).

137. *Id.*

service, or accommodation that the injured person is now claiming the insurer is obligated to pay under section 3107(1)(a).<sup>138</sup> The statutory language that suggests the necessity to prove some type of causal connection is the word “for,” as used in section 3107(1)(a).<sup>139</sup> In other words, the product, service, or accommodation in question must be for accident-related care, recovery, or rehabilitation. The Michigan Supreme Court acknowledged this basic point in *Griffith*,<sup>140</sup> a decision that will be discussed subsequently in greater detail. However, because the statutory language of section 3107(1)(a) does not provide a more precise description of the requisite causal connection contemplated by that subsection, it is necessary to resort to the case law that has developed to resolve this question.

A good place to begin the analysis of the causation requirements of section 3107(1)(a) is to look at the Michigan Model Civil Jury Instructions that are applicable to no-fault PIP claims.<sup>141</sup> Instruction 35.02 makes general reference to the issue of causation.<sup>142</sup> This instruction is entitled “No-Fault First-Party Benefits Action: Burden of Proof.”<sup>143</sup> It does not specifically indicate if it is intended for use in entitlement cases under section 3105(1) or to determine liability for payment of allowable expenses under section 3107(1)(a) or both.<sup>144</sup> It simply states the plaintiff’s general burden with regard to causation, thereby implying that the instruction is applicable to entitlement as well as allowable-expense-liability scenarios.<sup>145</sup> Section 35.02 of the jury instructions states in pertinent part:

In order for the plaintiff to recover no-fault benefits from the defendant, the plaintiff has the burden of proof on each of the following:

.....

b. (that plaintiff’s injuries arose out of the [ownership / or / operation / or / maintenance / or / use] of a motor vehicle as a motor vehicle)

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138. *Id.*

139. *Id.*

140. *Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co.*, 697 N.W.2d 895 (Mich. 2005).

141. 1 MICHIGAN MODEL CIVIL JURY INSTRUCTIONS ch. 35 (Supp. 2009), available at <http://courts.mi.gov/mcji/MCJI.htm>.

142. *Id.* ch. 35, § 35.02, at 35-15 to -16.

143. *Id.* ch. 35, § 35.02, at 35-15.

144. *See id.* ch. 35, § 35.02, at 35-15 to -16.

145. *Id.*

c. (that plaintiff incurred allowable expenses which consist of reasonable charges for reasonably necessary products, services and accommodations for the plaintiff's care, recovery or rehabilitation)<sup>146</sup>

As previously noted, Michigan appellate courts have made it clear, for many years, that if an auto accident results in the aggravation of a prior existing condition, entitlement to benefits is established under section 3105(1), and the insurer may be obligated to pay appropriate allowable expenses under section 3107(1)(a).<sup>147</sup> Therefore, persons who have prior existing conditions that are aggravated by motor-vehicle accidents are entitled to *allowable expense benefits* under section 3107(1)(a) if the elements of that subsection are satisfied.<sup>148</sup>

There is clearly interplay between *PIP benefit entitlement* and *allowable expense benefit liability*. This has been demonstrated through the years in a number of unpublished court of appeals opinions. For example, in *Henderson v. Auto Club Insurance Ass'n*, the plaintiff was an 87-year-old man who was hit by a car and suffered a traumatic brain injury.<sup>149</sup> Before the accident, he lived independently.<sup>150</sup> After the accident, he was totally dependent on himself for care.<sup>151</sup> The defendant hired an independent medical examiner who opined that the plaintiff had preexisting Alzheimer's disease that would have disabled him within a year or so regardless of the plaintiff's auto-accident injury.<sup>152</sup> The court of appeals reaffirmed its earlier holdings in *Mollitor* and *McKim*—that no-fault benefits were available in cases involving aggravation of preexisting conditions—and held that the plaintiff in *Henderson* was entitled to benefits.<sup>153</sup> The court emphasized that when the condition in question is the product of both preexisting conditions and the accident, the insurer has the responsibility to pay no-fault benefits.<sup>154</sup> The issue of whether the causal-nexus requirement utilized to determine entitlement to PIP benefits under section 3105(1) is the

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146. *Id.* ch. 35, § 35.02, at 35-15.

147. See *Mollitor v. Associated Truck Lines*, 364 N.W.2d 344, 347 (Mich. Ct. App. 1985); *Randles v. Carriers Ins. Co.*, 361 N.W.2d 6, 7 (Mich. Ct. App. 1984); *McKim v. Home Ins. Co.*, 349 N.W.2d 533, 535 (Mich. Ct. App. 1984).

148. *Mollitor*, 364 N.W.2d at 347.

149. *Henderson v. Auto Club Ins. Ass'n*, No. 96310, slip op. at 1 (Mich. Ct. App. filed June 19, 1987).

150. *Id.* at 2.

151. *Id.*

152. *Id.*

153. *Id.* at 3 (citing *Mollitor*, 364 N.W.2d 344; *McKim v. Home Ins. Co.*, 349 N.W.2d 533 (Mich. Ct. App. 1984)).

154. *Id.* at 3, 5.

same as the causation requirement under section 3107(1)(a) regarding an insurer's liability to pay specific *allowable expense benefits* was finally determined when the Michigan Supreme Court decided *Scott v. State Farm Mutual Automobile Insurance Co.*<sup>155</sup> This important, new decision is discussed below.

*C. The Emergence of a Singular Causation Test—Scott v. State Farm*

In *Scott*, the court of appeals addressed a claim for allowable expenses made by the plaintiff under section 3107(1)(a). In doing so, the court applied the *Shinabarger* causal-nexus test that Michigan appellate courts had been applying for years to determine entitlement issues under section 3105(1).<sup>156</sup> The plaintiff in *Scott* sustained a catastrophic brain injury in a 1981 motor-vehicle collision.<sup>157</sup> As a result of the brain injury, the plaintiff suffered severely impaired judgment as well as considerable physical disability that made it virtually impossible for her to exercise.<sup>158</sup> Over the years, the plaintiff developed hyperlipidemia (high cholesterol).<sup>159</sup> Her condition was quite serious and required medical treatment and medication.<sup>160</sup> The plaintiff contended that her hyperlipidemia was related, in whole or in part, to her auto accident for two reasons, both of which were allegedly a result of her brain injury: (1) she had severely impaired judgment, causing her to consistently eat inappropriate foods; and (2) she was unable to exercise.<sup>161</sup> The plaintiff's physicians supported this claim and testified that both of these brain-injury-related problems were contributing factors to the plaintiff's high-cholesterol disorder.<sup>162</sup>

The trial court denied the defendant's motion for summary disposition and found that the plaintiff's claim created a question of fact for jury

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155. 751 N.W.2d 51 (Mich. Ct. App. 2008), *cert. denied*, 758 N.W.2d 249 (Mich. 2008) (“[I]n lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that stated that, with respect to the causation test under MCL 500.3105(1), ‘almost any causal connection or relationship will do.’”), *vacated*, 766 N.W.2d 273 (Mich. 2009) (“We vacate our order dated December 3, 2008. On reconsideration, the application for leave to appeal the judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this court.”).

156. *Scott*, 766 N.W.2d at 273-75 (Kelly, C.J., concurring) (citing *Shinabarger v. Citizens Mut. Ins. Co.*, 282 N.W.2d 301 (Mich. Ct. App. 1979)).

157. *Id.* at 273.

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.* at 276 (Corrigan, J., dissenting).

162. *Id.*

determination.<sup>163</sup> In a unanimous opinion, the court of appeals affirmed the trial court's decision and applied the causal-nexus test articulated many years ago by the court of appeals in *Shinabarger v. Citizens Mutual Insurance Co.*<sup>164</sup> Pursuant to that test, the court of appeals held that the applicable causation standard only requires a connection between the auto-accident injury and a claimed medical expense that is more than "incidental, fortuitous, or but for."<sup>165</sup> In fact, the court of appeals stated that the *Shinabarger* decision made it clear that "[a]lmost any causal connection will do."<sup>166</sup> In applying this causal-nexus test, the court of appeals in *Scott* held that the plaintiff had put forth sufficient evidence to create a genuine issue of material fact as to whether the plaintiff's need for hyperlipidemia treatment was sufficiently related to her motor-vehicle accident to satisfy the *Shinabarger* test.<sup>167</sup> The court of appeals in *Scott* explained:

In *Shinabarger v. Citizens Mut. Ins. Co.*, this Court used other words to describe the "arising out of" test:

The relationship between use of the vehicle and the injury need not approach proximate cause.

"[T]he term 'arising out of' does not mean proximate cause in the strict legal sense, nor require a finding that the injury was directly and proximately caused by the use of the vehicle, nor that the insured vehicle was exerting any physical force upon the instrumentality which was the immediate cause of the injury. That almost any causal connection or relationship will do. . . . Case law indicates that the injury need not be the proximate result of 'use' in the strict sense, but it cannot be extended to something distinctly remote. Each case turns on its precise individual facts. The question to be answered is whether the injury 'originated from', 'had its origin in', 'grew out of', or 'flowed from' the use of the vehicle." [Some internal quotation marks omitted; citations omitted.]

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163. *Id.*

164. *Scott v. State Farm Mut. Auto. Ins. Co.*, 751 N.W.2d 51, 55, 56 (Mich. Ct. App. 2008) (citing *Shinabarger v. Citizens Mut. Ins. Co.*, 282 N.W.2d 301 (Mich. Ct. App. 1979)).

165. *See id.* at 56.

166. *See id.*

167. *Id.*

Similarly, in *Bradley v Detroit Auto Inter-Ins. Exch.*, this Court stated that the use of the motor vehicle need only be one of the causes of the injury; there may be other independent causes. “[A]lmost any causal connection or relationship will do.” Thus, it is well settled that “arising out of” requires more than an incidental, fortuitous, or but-for causal connection, but does not require direct or proximate causation.

. . . Plaintiffs presented testimony indicating that the accident caused brain and skeletal injuries, which make it difficult for plaintiff to exercise, and which contribute to poor judgment regarding diet. Plaintiffs also presented evidence that this difficulty in exercising and the poor diet contribute to hyperlipidemia. Plaintiffs are not required to establish direct or proximate causation. Almost any causal connection will do. Although a genetic predisposition to hyperlipidemia is apparently present, there is no authority that, for purposes of personal protection insurance, a plaintiff must exclude other possible causes . . . Plaintiffs have presented evidence sufficient to raise a genuine issue of material fact. The chain of causation, under plaintiffs’ theory, though somewhat attenuated, is not so long that its links are completely unable to support the burden of proof. There is testimony indicating that there is no objective test that can distinguish between a case of hyperlipidemia caused genetically and one caused by independent factors. Thus, the trier of fact must decide whether the high-cholesterol problem is one “arising out of” the accident.<sup>168</sup>

State Farm appealed the holding of the court of appeals to the Michigan Supreme Court.<sup>169</sup> In an order issued on December 3, 2008, the Michigan Supreme Court, in lieu of granting leave to appeal, vacated the portion of the court of appeals opinion taken from the *Shinabarger* decision, which stated, “[A]lmost any causal connection or relationship will do.”<sup>170</sup> The Michigan Supreme Court felt that this sentence did not accurately state Michigan causation law.<sup>171</sup> In all other respects, the court of appeals

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168. *Id.* at 56 (citations omitted).

169. *Scott v. State Farm Mut. Auto. Ins. Co.*, 758 N.W.2d 249 (Mich. 2008).

170. *Id.* at 249 (quoting *Shinabarger v. Citizens Mut. Ins. Co.*, 282 N.W.2d 301, 305 (Mich. Ct. App. 1983)) (emphasis added).

171. *Id.*

decision applying the *Shinabarger* analysis to this section 3107(1)(a) claim was left undisturbed.<sup>172</sup>

The plaintiff then filed a motion for reconsideration of the Michigan Supreme Court's December 3, 2008 order.<sup>173</sup> On June 5, 2009, the court granted the motion.<sup>174</sup> In so doing, the court stated, "We vacate our order dated December 3, 2008. On reconsideration, the application for leave to appeal the judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court."<sup>175</sup> The effect of this Michigan Supreme Court decision was to affirm the court of appeals decision in its entirety—including its reliance on the phrase, "*almost any causal connection . . . will do.*"<sup>176</sup>

The decision of the Michigan Supreme Court to leave the court of appeals decision in *Scott* fully intact is a significant event in the jurisprudence of Michigan no-fault law. The result in this case, succinctly stated, is simply this: the causal-nexus test used to determine entitlement to PIP benefits under section 3105(1) is the same causation test that should be used to determine an insurer's liability to pay allowable-expense PIP benefits under section 3107(1)(a).<sup>177</sup> Under this singular causation standard, an insurance company would not be able to diminish its liability for payment of allowable expenses under section 3107(1)(a) by seeking to allocate a portion of those expenses to nonaccident causes.<sup>178</sup> On the contrary, if the auto-accident injury was one of the causes for the injured person incurring the expense in question, the no-fault insurer is responsible for 100% of the allowable expense, even though there were other nonaccident causes that contributed to the patient's need to incur the expense.<sup>179</sup> That being the case, there would be no allocation of allowable-expense claims between accident and nonaccident causes—the entire expense claim is recoverable if the accident was one of the causes of the claimed expense. To correctly apply these legal principles, it is critically important for the courts to utilize proper jury instructions that accurately state principles of causation applicable to allowable-expense claims under

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172. *Id.*

173. *Scott v. State Farm Mut. Auto. Ins. Co.*, 766 N.W.2d 273, 273 (Mich. 2009).

174. *Id.*

175. *Id.*

176. *Scott*, 758 N.W.2d at 249 (quoting *Shinabarger v. Citizens Mut. Ins. Co.*, 282 N.W.2d 301, 305 (Mich. Ct. App. 1983)) (emphasis added).

177. *See Scott*, 766 N.W.2d 273.

178. *See id.* at 274 (Kelly, C.J., concurring).

179. *Scott v. State Farm Mut. Auto. Ins. Co.*, 751 N.W.2d 51, 56 (Mich. Ct. App. 2008).

section 3107(1)(a). The issue of jury instructions is discussed in the next section.

*D. Jury Instructions Regarding Allowable-Expense Causation Issues*

Other than the previously quoted standard jury instruction, Michigan Model Civil Jury Instruction 35.02, there are no standard jury instructions that deal directly with PIP causation issues. As previously stated, instruction 35.02 is not specific to entitlement issues under section 3105(1) or allowable-expense-payment issues under section 3107(1)(a).<sup>180</sup> Therefore, in PIP cases where causation is the central issue in the trial, instruction 35.02 is not very helpful.

To fill the jury-instruction void regarding PIP causation issues, Michigan appellate courts have, over the years, wrestled with whether two commonly used, standard tort-law causation instructions should be given in PIP cases. These standard jury instructions are Michigan Model Civil Jury Instructions 50.10 and 50.11.<sup>181</sup> The former is referred to as the “eggshell plaintiff” instruction, and the latter is referred to as the “allocation-indivisible injury” instruction. Instruction 50.10 is entitled *Defendant Takes the Plaintiff as He/She Finds Him/Her* and states the following:

You are instructed that the defendant takes the plaintiff as [he / she] finds [him / her]. If you find that the plaintiff was unusually susceptible to injury, that fact will not relieve the defendant from liability for any and all damages resulting to plaintiff as a proximate result of defendant’s negligence.<sup>182</sup>

Instruction 50.11 is entitled *Inability to Determine Extent of Aggravation of Injuries* and states the following:

If an injury suffered by plaintiff is a combined product of both a preexisting [disease / injury / state of health] and the effects of defendant’s negligent conduct, it is your duty to determine and award damages caused by defendant’s conduct alone. You must separate the damages caused by defendant’s conduct from the condition which was preexisting if it is possible to do so.

However, if after careful consideration, you are unable to separate the damages caused by defendant’s conduct from those which were preexisting, then the entire amount of

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180. See 1 MICHIGAN MODEL CIVIL JURY INSTRUCTIONS ch. 35, § 35.02 (Supp. 2009), available at <http://courts.mi.gov/mcji/MCJI.htm>.

181. *Id.* at ch. 50, §§ 50.10, .11.

182. *Id.* at ch. 50, § 50.10.

plaintiff's damages must be assessed against the defendant.<sup>183</sup>

Instruction 50.10 sets forth principles of causation law that are applicable to no-fault PIP causation issues and, therefore, this instruction would be appropriate for use in PIP cases. However, instruction 50.11 is unique to tort law and would not be proper for use in PIP cases where causation is the disputed issue. This is so because instruction 50.11 requires allocation between causes, with liability attaching only to that portion of the damage that is specifically allocated to the subject accident.<sup>184</sup> Liability for 100% of the damages can only attach under instruction 50.11 if the injury is deemed to be indivisible among multiple causes.<sup>185</sup> This indivisibility concept is not consistent with causation law applicable to allowable-expense claims under section 3107(1)(a), where 100% liability for a claimed expense attaches whenever an accident is one of the causes of the subject expense.<sup>186</sup> This principle has been clearly embraced in *Scott*.<sup>187</sup>

There is very little appellate law on the specific issue of causation jury instructions in PIP cases. What little case law exists is almost entirely unpublished. Furthermore, it is inconsistent and unhelpful. A quick review of this case law illustrates this point.

In *Yax v. Aetna Casualty and Surety Co.*, the court of appeals considered a claim for attendant care involving an elderly plaintiff who sustained orthopedic injuries in an auto accident.<sup>188</sup> The insurance company claimed that the attendant care was due to the preexisting condition of advanced age and not to the accident-related orthopedic injuries.<sup>189</sup> The court, relying on instruction 50.10, held that the eggshell plaintiff instruction was conceptually applicable.<sup>190</sup>

In *Guenther v. Detroit Automobile Inter-Insurance Exchange*, the court of appeals approved the use of instructions 50.10 and 50.11 as modified for no-fault cases.<sup>191</sup>

In *Nowyorkas v. Farm Bureau Mutual Insurance Co.*, the court of appeals reversed a trial-court judgment that applied instruction 50.11.<sup>192</sup>

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183. *Id.* at ch. 50, § 50.11.

184. *See id.*

185. *See id.*

186. *See* MICH. COMP. LAWS ANN. § 500.3107(1)(a) (West 2002).

187. *Scott v. State Farm Mut. Auto. Ins. Co.*, 751 N.W.2d 51, 56 (Mich. Ct. App. 2008).

188. *Yax v. Aetna Cas. and Sur. Co.*, No. 124153 (Mich. Ct. App. June 5, 1991).

189. *Id.*

190. *See id.*

191. *Guenther v. Detroit Auto. Inter-Ins. Exch.*, No. 105181 (Mich. Ct. App. Nov. 20, 1991).

The court in *Nowyorkas* distinguished *Yax* because it approved a modified version of instruction 50.10 rather than instruction 50.11.<sup>193</sup>

In *Caldwell v. Auto Club Insurance Ass'n*, the court of appeals reversed the trial court's application of instructions 50.10 and 50.11.<sup>194</sup> However, *Caldwell* was purely a work-loss case under section 3107(1)(b) and, as such, is governed by a separate causation standard stated within that section.

In *Beach v. State Farm Mutual Automobile Insurance Co.*, the court of appeals affirmed a jury verdict in the plaintiff's favor regarding the need for rehabilitation services.<sup>195</sup> The court approved the jury-verdict form that asked whether the plaintiff had incurred "allowable expenses arising out of" the motor-vehicle accident and further approved the use of an instruction that appeared similar to instruction 50.11, although it is not precisely clear from the text of the decision.<sup>196</sup>

In *Kelmendi v. Citizens Insurance Co. of America*, the plaintiff argued that his motor-vehicle accident aggravated his preexisting injuries.<sup>197</sup> The plaintiff did not request instruction 50.11 and, therefore, waived it.<sup>198</sup> However, the court implied that such an instruction would be helpful.<sup>199</sup>

In a recent, unpublished case, *Chalko v. State Farm Mutual Automobile Insurance Co.*, the court of appeals held, in a two-to-one decision, that instruction 50.11 is not proper for use in no-fault PIP litigation.<sup>200</sup> The court's conclusion regarding that issue is based on what it felt was the confusing nature of this instruction rather than its conceptual inapplicability to PIP causation questions. In this regard, the majority opinion in *Chalko* stated:

The above-cited instruction [Michigan Civil Jury Instruction 50.11] is a negligence instruction that simply does not apply in first party, no-fault insurance litigation. This instruction directs the jury to determine whether the "injury suffered by plaintiff was a combined product of both a preexisting [state of health] and the effects of

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192. *Nowyorkas v. Farm Bureau Mut. Ins. Co.*, No. 168726, 1996 WL 33681826 (Mich. Ct. App. May 24, 1996).

193. *Id.* at \*2.

194. *Caldwell v. Auto Club Ins. Ass'n*, No. 164138 (Mich. Ct. App. Feb. 23, 1996).

195. 550 N.W.2d 580, 583 (Mich. Ct. App. 1996).

196. *See id.*

197. *Kelmendi v. Citizens Ins. Co. of Am.*, No. 264019, 2007 WL 419786, at \*1 (Mich. Ct. App. Feb. 8, 2007).

198. *Id.*

199. *Id.*

200. *Chalko v. State Farm Mut. Auto. Ins. Co.*, No. 278215, 2009 WL 2003320, at \*3 (Mich. Ct. App. July 9, 2009).

defendant's negligent conduct." Stated differently, the jury is instructed to consider whether State Farm was the cause of the automobile accident that resulted in plaintiff's broken ankle. This instruction is inapplicable to the present case and including it in the jury charge would serve no purpose but to confuse the jury.<sup>201</sup>

Judge Douglas B. Shapiro dissented in part and concurred in part in *Chalko* regarding the jury-instruction issue.<sup>202</sup> He specifically noted that there was a "need for an accurate instruction regarding multiple causative factors."<sup>203</sup> He went on to cite an earlier decision of the court of appeals—*Morales*<sup>204</sup>—which he characterized as follows:

[T]his Court affirmed a verdict for the plaintiff where the plaintiff argued that the auto accident injury was not the sole factor causing his disability, but that his preexisting ailments would not have prevented him from working had he not also suffered the injuries [in] the accident. In that case, we held benefits were due where "it was plaintiff's closed head injury from his motor vehicle accident *interacting with* plaintiff's susceptible diabetes condition that kept him from working."<sup>205</sup>

Regarding the issue of causation, Judge Shapiro made specific reference to the decision in *Scott*, where he noted that the court of appeals had "reaffirmed the view that the 'arising out of' test is satisfied by 'almost any causal relationship.' The Supreme Court declined leave to appeal that decision and Chief Justice Kelly's concurrence specifically approved the 'almost any causal relationship' language."<sup>206</sup>

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201. *Id.*

202. *Id.* at \*3-4 (Shapiro, J., dissenting in part and concurring in part).

203. *Id.* at \*6.

204. *Morales v. State Farm Mut. Auto. Ins. Co.*, 761 N.W.2d 454 (Mich. Ct. App. 2008).

205. *Chalko*, 2009 WL 2003320, at \*7 (quoting *Morales*, 761 N.W.2d at 739). Citing *Morales* as authority for causation issues under section 3107(1)(a) is problematic, given the fact that *Morales* is a work-loss claim governed by section 3107(1)(b)). The causation standard under that section is not the same standard as the *arising out of* causation standard of section 3107(1)(a). In this regard, section 3107(1)(b) requires payment of work-loss benefits for "loss of income from work an injured person would have performed during the first three years after the accident if he or she had not been injured." Therefore, *Morales* does not specifically address causation questions under section 3107(1)(a). *Id.*

206. *Id.* at \*8 (quoting *Scott v. State Farm Mut. Auto. Ins. Co.*, 751 N.W.2d 51, 56 (Mich. Ct. App. 2008)) (citations omitted).

Judge Shapiro went on to note the inadequacy of instruction 35.02 in those cases where the central issue is whether *allowable expense benefits* are payable for medical conditions resulting from a combination of accident and nonaccident causes.<sup>207</sup> This is precisely why the authors of this Article believe that a special jury instruction is required for that specific situation. In explaining this need, Judge Shapiro stated:

Defendant suggests that since the standard “arising out of” instruction in M Civ JI 35.02 was given, none of plaintiff’s requested instructions were necessary to fairly and adequately explain plaintiff’s claim and the relevant law to the jury. However, the “arising out of” instruction speaks only to whether “plaintiff’s injuries arose out of the use of a motor vehicle as a motor vehicle.” Here, there was no question that plaintiff suffered an injury arising out of the use of a motor vehicle, i.e., her catastrophic ankle fracture. The issue for the jury, which M Civ JI 35.02 does not adequately address, is whether a claimant is entitled to PIP coverage for care required due to a combination of the auto-related injury and some other medical condition.<sup>208</sup>

With regard to the jury-instruction issue involved in *Chalko*, Judge Shapiro expressed the view that, taking everything into consideration, the jury had not been properly instructed on the causation question because the jurors needed more legal direction than the trial court provided.<sup>209</sup> To correct that problem, Judge Shapiro stated that “M Civ JI 50.11 . . . can be readily adapted to non-negligence cases.”<sup>210</sup> What he meant by that statement is not clear. To the extent that he means juries must allocate between multiple causes, the authors disagree. To the extent that he means indivisible injuries require full payment of benefits, the authors agree.

Based on the foregoing, the authors believe that it is imperative for the bench and bar to give juries a clear and concise instruction on the law of causation applicable to allowable-expense claims under section 3107(1)(a). In light of the decision in *Scott*, the following would be an appropriate jury instruction for use in a case where an insurer is denying liability for allowable expenses under section 3107(1)(a) because of a dispute as to whether the claimed expense is sufficiently causally related to the injury that triggered entitlement to benefits:

*Special Jury Instruction Regarding*

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207. *Id.* at \*7.

208. *Id.*

209. *Id.*

210. *See id.*

*Causation Under Section 3107(1)(a):*

*In order for Defendant to be liable under the Michigan No-Fault Law for the [products / services / accommodations] provided to Plaintiff, there must be a sufficient causal connection between the injuries Plaintiff sustained in the motor-vehicle accident and the [products / services / accommodations] provided to Plaintiff. The injuries Plaintiff sustained in the motor-vehicle accident need not be the sole cause of Plaintiff's need for the [products / services / accommodations]. Rather, the law in Michigan provides that a sufficient causal connection exists if the injuries sustained by Plaintiff in the motor-vehicle accident were one of the causes necessitating the [products / services / accommodations] provided to Plaintiff, even though there may have been other independent causes that contributed to Plaintiff's need for the [products / services / accommodations]. Under the law, almost any causal connection or relationship will suffice as long as the connection is more than incidental, fortuitous, or but for. Therefore, if you determine that the injuries sustained by Plaintiff in the motor-vehicle accident were one of the reasons Plaintiff needed the [products / services / accommodations] provided to Plaintiff, then a sufficient causal connection has been established under the law to render Defendant liable for those [products / services / accommodations].*

With this basic understanding of no-fault PIP causation principles in mind, attention now shifts to the Michigan Supreme Court's decision in *Griffith ex rel. Griffith v. State Farm Mutual Automobile Insurance Co.*<sup>211</sup> to determine whether that decision is consistent or inconsistent with those principles.

### III. THE *GRIFFITH* ISSUE

Reduced to its essence, the decision in *Griffith* fundamentally deals with issues of causation.<sup>212</sup> In this regard, the *Griffith* court held that the requisite causal relationship required by section 3107(1)(a) had not been established so as to require an insurance company to pay for an injured person's food expenses where the injured person's need for food had not

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211. 697 N.W.2d 895 (Mich. 2005).

212. *Id.*

been affected in any way by the person's motor-vehicle injuries.<sup>213</sup> However, as will be demonstrated herein, and contrary to arguments made by some insurance companies, *Griffith* did not adopt a causation standard that utilizes the concept of *incrementalism* to determine a no-fault insurer's liability to pay *allowable expense benefits*.<sup>214</sup> As noted earlier, the concept of incrementalism would allow no-fault insurers to deny payment of a portion of certain expenses if those particular expenses represented needs that the injured person had prior to the injury, even though those needs had materially changed due to the motor-vehicle injury.<sup>215</sup> For example, if the injured person would have required residential accommodations prior to an injury, then under incrementalism, a no-fault insurer would be responsible to only pay for the incremental increase in the costs of residential accommodations related solely to the nature of the person's injury—for example, the cost of wheelchair ramps, widened doorways, or special bathroom equipment. Similarly, if the injured person would have required motor-vehicle transportation prior to the injury but now needs a handicap-accessible van, incrementalism would allow a no-fault insurer to pay only the incremental increase in the cost of motor-vehicle transportation specifically necessitated by the nature of the person's injury—for example, the cost of a wheelchair lift and special hand controls but not the cost of the van itself.

The discussion that follows will demonstrate that *Griffith* does not support the notion that the Michigan Supreme Court has adopted incrementalism. As shown in section II.C of this Article, the *Scott* decision affirmed the rule that a no-fault insurer is obligated to pay the entire cost of an allowable expense if the injury is one of the causes for incurring that expense. Therefore, interpreting the *Griffith* decision as an adoption of incrementalism would be fundamentally inconsistent with the Michigan Supreme Court's recent decision in *Scott*. Moreover, as will be demonstrated below, appellate case law prior to *Griffith* had rejected the concept of incrementalism in several scenarios.

#### A. Pre-*Griffith* Rejection of Incrementalism

As previously noted, Michigan appellate courts have consistently held that *allowable expense benefits* payable under section 3107(1)(a) extend far beyond expenses incurred for traditional medical care.<sup>216</sup> These benefits include a wide variety of expenses incurred by catastrophically injured people, including in-home attendant care, vocational rehabilitation,

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213. *Id.* at 902-06.

214. *See id.*

215. *Id.* at 903.

216. *See supra* notes 25-30 and accompanying text.

guardianships and conservatorships, medical transportation, handicap-accessible homes, and handicap-accessible motor vehicles.<sup>217</sup>

In addition, Michigan appellate courts have consistently held that the fundamental purpose of the Michigan No-Fault Act is to provide comprehensive coverage to victims of motor-vehicle accidents without the delays and inequities that characterize the tort-liability system.<sup>218</sup> In this regard, the Michigan Supreme Court, in its landmark decision in *Shavers v. Kelley*,<sup>219</sup> specifically recognized the importance of this essential purpose of the Act when it stated:

The Michigan No-Fault Insurance Act, which became law on October 1, 1973, was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of *compulsory* insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort.

*The No-Fault Act, insofar as it provides benefits to victims of motor vehicle accidents without regard to "fault" (as a substitution for tort remedies which are, in part, abolished), constitutionally accomplishes its goal. After intense scrutiny of this litigation's extensive record, this Court holds that the No-Fault Act does not exceed the traditional scope of the Legislature's police power. The partial abolition of tort remedies under the act is consistent with constitutional principles articulated by this Court. The act's personal injury protection insurance scheme, with its comprehensive and expeditious benefit system, reasonably relates to the evidence advanced at trial that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle*

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217. See *supra* notes 25-30 and accompanying text.

218. See *Shavers v. Kelley*, 267 N.W.2d 72, 77 (Mich. 1978).

219. *Id.*

accident victims, minor injuries were overcompensated, serious injuries were undercompensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination.<sup>220</sup>

The Michigan Supreme Court reiterated this principle in *Miller v. State Farm Mutual Automobile Insurance Co.*, wherein the court stated, "The [No-Fault A]ct is designed to minimize administrative delays and actual disputes that would interfere with achievement of the goal of expeditious compensation of injuries suffered in motor vehicle accidents."<sup>221</sup>

Furthermore, throughout the history of Michigan no-fault jurisprudence, Michigan appellate courts have consistently recognized that the Michigan No-Fault Act must be liberally construed and interpreted in favor of those seriously injured individuals who were intended to benefit by such a unique and comprehensive reparations system. In this regard, in 1978, the court of appeals stated in *Bierbusse v. Farmers Insurance Group*, "The no-fault automobile statute is remedial in nature, attempting to correct the deficiencies found in the old tort system. Remedial statutes are to be construed liberally in favor of the persons intended to be benefited by the statute."<sup>222</sup>

Likewise, in 1995, the Michigan Supreme Court confirmed, in *Turner v. Auto Club Insurance Ass'n*, that the No-Fault Act must be liberally construed in favor of accident victims when it stated, "[W]hen courts interpret the no-fault act in particular, they are to remember that the act is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it."<sup>223</sup> The point was made again by the Michigan Supreme Court in *Putkamer v. Transamerica Insurance Corp. of America*, wherein the court stated, "The no-fault act is remedial in nature and is to be liberally construed in favor of the persons who are intended to benefit from it."<sup>224</sup>

The broad scope of *allowable expense benefits* payable under section 3107(1)(a) and the recognized public policy applicable to the payment of those benefits has resulted in Michigan appellate courts rejecting the

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220. *Id.*

221. 302 N.W.2d 537, 546 (Mich. 1981).

222. 269 N.W.2d 297, 298-99 (Mich. Ct. App. 1978) (citations omitted).

223. 528 N.W.2d 681, 684 (Mich. 1995) (citing *Gobler v. Auto-Owners Ins. Co.*, 404 N.W.2d 199 (Mich. 1987)).

224. 563 N.W.2d 683, 686 (Mich. 1997) (citing *Turner v. Auto Club Ins. Ass'n*, 582 N.W.2d 681 (Mich. 1995)).

concept of incrementalism in at least three different scenarios.<sup>225</sup> Those decisions will be discussed below.

1. Incrementalism Rejected in Survivor's Loss Claims—*Miller v. State Farm*

The application of incrementalism principles to no-fault benefits was first rejected by the Michigan Supreme Court in *Miller*.<sup>226</sup> In *Miller*, the court analyzed whether survivor's loss benefits payable under the provisions of section 3108 of the No-Fault Act could be reduced by the amount of *personal consumption expenses* that would have been attributable to the decedent had death not occurred in the motor-vehicle accident.<sup>227</sup> The no-fault insurer argued that under the specific language of section 3108, it should be permitted to offset its liability to pay survivor's loss benefits by whatever amount the decedent would have personally consumed had the decedent lived.<sup>228</sup>

Justice James Ryan, perhaps the most conservative member of the Michigan Supreme Court at the time, wrote the majority opinion and held that such a reduction in no-fault benefits, approximating what a decedent's personal consumption would have been had he lived, is not only inconsistent with the legislative history of section 3108 but, more importantly, is inconsistent with the overall purpose of the No-Fault Act.<sup>229</sup> Justice Ryan, writing for the court, explained:

In *Shavers v. Attorney General*, we said:

“The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses”.

The act is designed to minimize administrative delays and factual disputes that would interfere with achievement of the goal of expeditious compensation of damages suffered in motor vehicle accidents. . . .

Calculation, in every case, of a “consumption factor” attributable to the decedent's personal expenses would be

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225. *Miller* 302 N.W.2d at 547; *Davis v. Citizens Ins. Co. of Am.*, 489 N.W.2d 214, 216 (Mich. Ct. App. 1992); *Sharp v. Preferred Risk Mut. Ins. Co.*, 370 N.W.2d 619, 623-24 (Mich. Ct. App. 1985).

226. 302 N.W.2d at 547.

227. *Id.* at 545-47.

228. *Id.* at 540.

229. *Id.* at 545-46.

inconsistent with the declared legislative purposes of expeditious settlement of survivors' claims without complex factual controversy.

A family is not run like a commercial enterprise. Family finances are not allocated or their expenditure accounted for as in a business. Accounting procedures are rarely, if ever, followed to account for the precise dollars-and-cents expenses in cash and in kind attributable to each member of the family. How, for example, would the deceased breadwinner's "consumption factor" for family meals, use of the family automobile, household maintenance, and hundreds of personal expenses be calculated? And if calculable at all, one can envision the interminable controversy and disproportionate expense such a factual determination would involve. As the plaintiff so aptly put it:

"A legislative purpose of rapid, efficient and uniform claims adjustment is not advanced by a ponderous examination of every family expenditure."

In view of the No-Fault Act's goal of expeditious reparation of motor vehicle accident injuries, and minimization of potential factual disputes, we conclude that . . . the administrative delays and factual controversies that might be engendered by such a calculation would unjustifiably interfere with the above-discussed goals of the act.<sup>230</sup>

There is no real conceptual difference between the personal-consumption setoff argument that was rejected in *Miller* and the incrementalism argument advanced by many insurers in the wake of *Griffith*. Under both, no-fault insurers contend that they should not be responsible for something that the auto-accident victim would have either consumed or needed had the auto accident not occurred.<sup>231</sup> The court's rejection of a survivor's loss personal-consumption setoff in *Miller* underscores why a no-fault insurer's liability for payment of no-fault benefits should not be determined by the utilization of hypothetical analytical calculations that interfere with the fundamental goal of the No-

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230. *Id.* at 546-47 (citations omitted).

231. *Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co.*, 697 N.W.2d 895, 901 (Mich. 2005); *Miller*, 302 N.W.2d at 540.

Fault Act—to provide prompt and adequate reparation for economic losses incurred by motor-vehicle-accident victims.<sup>232</sup>

## 2. Incrementalism Rejected in Housing Claims—*Sharp v. Preferred Risk*

The second specific rejection of incrementalism came from the landmark decision of the court of appeals in *Sharp v. Preferred Risk Mutual Insurance Co.*<sup>233</sup> In this case, Scott Sharp sustained a catastrophic brain injury in a motor-vehicle accident when he was twenty years old.<sup>234</sup> Prior to the accident, he lived as a single man in an apartment that he rented for \$245 per month.<sup>235</sup> After he was discharged from the hospital, following his disabling injuries, it was necessary for him to move into a larger apartment that was big enough to accommodate his wheelchair and other items of durable medical equipment—such as a therapeutic whirlpool tub, a Hoyer lift, and other devices.<sup>236</sup> The rent for this larger apartment was \$445 per month.<sup>237</sup> The trial court held that the no-fault insurer was only responsible to pay the difference between Mr. Sharp's pre-accident rent of \$245 and his post-accident rent of \$445.<sup>238</sup> The court of appeals rejected this *incrementalism* theory and held that the no-fault insurer was obligated to pay the full cost of Mr. Sharp's residential accommodations under section 3107(1)(a).<sup>239</sup> In this regard, the decision in *Sharp* contains one of the most significant statements in no-fault appellate law, wherein the court held:

The issue raised is of first impression. We find no case law considering whether apartment rental is an allowable expense under Michigan's no-fault act. . . .

. . . .

. . . As long as housing larger and better equipped is required for the injured person than would be required if he were not injured, the full cost is an "allowable expense".<sup>240</sup>

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232. *Miller*, 302 N.W.2d at 546-47.

233. 370 N.W.2d 619, 625 (Mich. Ct. App. 1985).

234. *Id.* at 621.

235. *Id.* at 625.

236. *See id.* at 621.

237. *Id.* at 625.

238. *Id.*

239. *See id.*

240. *Id.* (citations omitted).

The decision in *Sharp* is a specific rejection of the doctrine of incrementalism in its purest sense. If the doctrine had any viability whatsoever in Michigan no-fault law, the court of appeals would have held that the defendant insurance company was only liable for the difference between Mr. Sharp's pre-accident rent and his post-accident rent. It did not. On the contrary, the court of appeals in *Sharp* held that the no-fault insurer was responsible to pay the full cost of Mr. Sharp's apartment rent after the accident because his injuries very significantly affected his pre-accident housing needs.<sup>241</sup> As will be demonstrated, this very important principle was not disturbed or diminished in the *Griffith* decision.

### 3. Incrementalism Rejected in Handicap-Van Claims—*Davis v. Citizens*

The third major rejection of incrementalism came in the holding of the court of appeals in *Davis v. Citizens Insurance Co. of America*.<sup>242</sup> In *Davis*, the plaintiff demanded that her insurance company pay for the full cost of a handicap-accessible van plus all necessary modifications.<sup>243</sup> The no-fault insurer in *Davis* refused to pay the full cost of the plaintiff's van, arguing that it was only responsible to pay the cost of handicap equipment and modifications.<sup>244</sup> Following a bench trial, the trial court rejected the insurer's incrementalism argument and determined that the full purchase price of the van was a reasonably necessary expense under section 3107(1)(a), reasoning that the van was necessary for the plaintiff to lead as full and complete a life as possible—given her physical limitations.<sup>245</sup>

In affirming the trial court, the court of appeals in *Davis* held that the full cost of the van was reasonable and that the van was reasonably necessary.<sup>246</sup> In affirming the trial court's rejection of the insurer's incrementalism argument, the court of appeals reasoned that even though transportation is as necessary for an injured person as it is for an uninjured person, a handicap-accessible van is different from ordinary motor-vehicle transportation and was fundamentally necessary for the wheelchair-bound plaintiff who had limited access to alternative means of public transportation.<sup>247</sup> The court explained:

In this case, the cost of the van was reasonable, and obviously the expense was incurred. We also find that the

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241. *See id.*

242. 489 N.W.2d 214, 216 (Mich. Ct. App. 1992).

243. *Id.* at 215.

244. *See id.*

245. *Id.*

246. *Id.* at 216.

247. *Id.*

van was reasonably necessary. Transportation is as necessary for an uninjured person as for an injured person. However, the modified van is necessary in this case given the limited availability of alternative means of transportation. The ambulance service is limited to Branch County, traveling outside the county two or three times a week. Although this service is available twenty-four hours a day, seven days a week, advance notice is preferred for clients who, like plaintiff, reside more than five miles from town. Moreover, because the ambulance service is the only one in the county, transportation could be delayed or unavailable because of medical emergencies. The local transit authority provides door-to-door service to clients who make advance reservations, but it is unavailable during evenings. The van allows plaintiff to travel outside the county for medical purposes and vacations. In addition, the van was reasonably necessary according to plaintiff's treating physician. He testified that when he discharged plaintiff, one of the requirements was that plaintiff use a van for her transportation, allowing her the independence to go to work. Under these circumstances, we find that the modified van is an allowable expense.<sup>248</sup>

Like *Sharp*, the result in *Davis* is a clear rejection of incrementalism principles; otherwise, the insurer would not have been ordered to pay the full cost of the van with no offset for the plaintiff's pre-accident vehicular needs.

#### 4. The Implications of Incrementalism

Together, *Miller*, *Sharp*, and *Davis* represent the Michigan appellate courts' strong rejection of incrementalism principles to determine a no-fault insurer's liability to pay no-fault benefits. These cases recognize not only that there is no support for incrementalism in the statutory language of the No-Fault Act but also that incrementalism would run counter to the central objective of the no-fault statute, which is to promote the prompt and efficient payment of benefits to those injured in motor-vehicle accidents.<sup>249</sup> For example, in claims for handicap-accessible housing, how could anyone intelligently determine the type of residence that an injured person would have lived in, and the cost of such accommodations, had an injury not occurred? Would that issue be determined based on the type of housing the

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248. *Id.*

249. See *Miller v. State Farm Mut. Auto. Ins. Co.*, 302 N.W.2d 537, 546-47 (Mich. 1981); *Shavers v. Kelley*, 267 N.W.2d 72, 77 (Mich. 1978).

person was living in at the time of the accident? Would it matter if the person was living in a college dormitory or living in their parents' palatial estate at the time of the accident? The same issues arise with regard to motor-vehicle-transportation claims. Would it make any difference if the injured person never owned a motor vehicle prior to the time that a catastrophic injury occurred in a motor-vehicle accident? What if the injured person only drove a motorcycle and then sustained paraplegia as a result of a motor-vehicle accident? What if the injured person consistently drove luxurious and very expensive two-seater sports cars prior to the accident and now requires a handicap-accessible van? How would the utilization of incrementalism affect the processing of these claims?

The doctrine of incrementalism could also have major implications in a wide variety of other scenarios. For example, a person who sustains an aggravation of a preexisting medical condition as a result of a motor-vehicle accident presumably would only be entitled to recover that specific portion of their medical expenses that corresponds to the degree that the preexisting medical condition was worsened or exacerbated by the motor-vehicle accident—regardless of how difficult it may be to ascertain the exact amount of the incremental increase in the cost of the person's care. Obviously, incorporating such a doctrine into Michigan no-fault jurisprudence would likely inject almost unmanageable complexity and prolonged delay in the processing of no-fault allowable-expense claims, thus contravening one of the fundamental purposes of the no-fault law.

Stated succinctly—incrementalism does not work. If a motor-vehicle accident materially changes a person's pre-accident needs for residential accommodations, motor-vehicle transportation, or other goods and services, then the full cost of the affected expense has always been compensable under section 3107(1)(a).<sup>250</sup> This has been the law in Michigan for many years and, as will be explained below, the Michigan Supreme Court's decision in *Griffith*, and its progeny, did nothing to change it.<sup>251</sup>

## B. *The Griffith Decision*

### 1. The Specific Holding

In light of the great controversy that has developed regarding the meaning of the *Griffith* decision and its ramifications, it is imperative that one interested in this area of law gain a clear understanding of the specific facts and holding in *Griffith*. The plaintiff, Doug Griffith, sustained severe, traumatic brain injuries in a motor-vehicle accident that left him profoundly

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250. MICH. COMP. LAWS ANN. § 500.3107(1)(a) (West 2002).

251. See *Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co.*, 697 N.W.2d 895 (Mich. 2005).

disabled, confined to a wheelchair, and needing round-the-clock attendant care.<sup>252</sup> Although Mr. Griffith's injuries affected almost every aspect of his daily life, they did not affect his dietary needs.<sup>253</sup> In other words, Mr. Griffith's food needs after his accident differed in no way from his food needs before his injury. The sole issue in *Griffith* was whether the no-fault insurer was liable to pay \$10.00 per day for Mr. Griffith's food consumption, as the lower courts had held was required under the *room and board* rule set forth in *Reed v. Citizens Insurance Co. of America*.<sup>254</sup> That was the only claim before the court in *Griffith*.<sup>255</sup>

In reversing the lower courts, the Michigan Supreme Court rendered a holding in *Griffith* that was very narrow and limited. Simply stated, it was this: *the cost of non-medical, non-special dietary food unrelated to a motor-vehicle injury and consumed by persons who are cared for at home is not a recoverable benefit under section 3107(1)(a) of the Michigan No-Fault Act*.<sup>256</sup> In holding that the no-fault insurer was not responsible for paying the cost of Mr. Griffith's food expenses while he was cared for at home, the court emphasized the fact that Mr. Griffith had dietary needs after the injury that differed in no way from his dietary needs before his injury.<sup>257</sup> In other words, there was absolutely no causal relationship between Mr. Griffith's food needs and his motor-vehicle injury—his food needs had not been affected in any way by his catastrophic brain injury. The court emphasized this point when it stated:

Plaintiff does not claim that her husband's diet is different from that of an uninjured person, that his food expenses are part of his treatment plan, or that these costs are related in any way to his injuries. She claims instead that Griffith's insurer is liable for ordinary, everyday food expenses. As such, plaintiff has not established that these expenses are "for accidental bodily injury . . . ."

. . . .

. . . It is not contended here that the food expenses at issue are a part of the insured's "recovery" or "rehabilitation." Indeed, plaintiff does not allege that the food has special

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252. *Id.* at 897.

253. *Id.* at 903.

254. *See* 499 N.W.2d 22, 24 (Mich. Ct. App. 1993), *overruled by Griffith*, 697 N.W.2d 895 (Mich. 2005).

255. *Griffith*, 697 N.W.2d at 897.

256. *Id.* at 903.

257. *Id.* at 904.

curative properties that might advance Griffith's recovery or rehabilitation. . . .

. . . .

Griffith's food costs here are not related to his "care, recovery, or rehabilitation." There has been no evidence introduced that he now requires different food than he did before sustaining his injuries as part of his treatment plan. While such expenses are no doubt necessary for his *survival*, they are not necessary for his recovery or rehabilitation from the injuries suffered in the accident, nor are they necessary for his care because of the injuries he sustained in the accident. Unlike prescription medications or nursing care, the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his "care, recovery, or rehabilitation." In fact, if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his "care, recovery, or rehabilitation" and are not "allowable expenses" under M.C.L. § 500.3107(1)(a).<sup>258</sup>

In reaching its conclusion that nonspecial dietary food served to an injured person who is cared for at home is not compensable under the No-Fault Act, the court drew an important distinction between that scenario and the case where nonspecial dietary food is served to an injured person in an institutional setting.<sup>259</sup> In so doing, the court held that food provided to an injured person in an institutional setting is indeed compensable even though the injured person's food needs were not affected by the injury.<sup>260</sup> This aspect of the *Griffith* holding is, in and of itself, a flat-out rejection of incrementalism. Otherwise, the court would have found that a no-fault insurer would not be liable for the cost of nonspecial dietary food served in an institution. In holding that a no-fault insurer would be liable for the full cost of an institutionalized patient's nonaccident-related food consumption, the court stated:

The parties focus on the distinction between food costs for hospital food and food costs for an insured receiving at-

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258. *Id.* at 901-03 (footnotes omitted).

259. *Id.* at 904.

260. *Id.*

home care. Plaintiff contends that there is no distinction between such costs. We disagree.

Food costs in an institutional setting are “benefits for accidental bodily injury” and are “reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” That is, it is “reasonably necessary” for an insured to consume hospital food during in-patient treatment given the limited dining options available. Although an injured person would need to consume food regardless of his injuries, he would not need to eat *that particular food* or bear the cost associated with it. Thus, hospital food is analogous to a type of special diet or select diet necessary for an injured person’s recovery. Because an insured in an institutional setting is required to eat “hospital food,” such food costs are necessary for an insured’s “care, recovery, or rehabilitation” while in such a setting. Once an injured person leaves the institutional setting, however, he may resume eating a normal diet just as he would have had he not suffered any injury and is no longer required to bear the costs of hospital food, which are part of the unqualified unit cost of hospital treatment.<sup>261</sup>

This reasoning can be taken a step further when considering the costs of items such as an injured person’s clothing, toiletries, and even housing costs. Under plaintiff’s reasoning, because a hospital provided Griffith with clothing while he was institutionalized, defendant should continue to pay for Griffith’s clothing after he is released. The same can be said of Griffith’s toiletry necessities and housing costs. While Griffith was institutionalized, defendant paid his housing costs. *Should defendant therefore be obligated to pay Griffith’s housing payment now that he has been released when Griffith’s housing needs have not been affected by his injuries?*<sup>262</sup>

This above quoted discussion regarding institutionalized and noninstitutionalized patients contains what may be the most significant passage in the *Griffith* decision—the so-called “rhetorical question,” which is discussed below.

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261. *Id.* at 904 (footnote omitted).

262. *Id.* at 905 (emphasis added).

## 2. The *Griffith* Rhetorical Question

The rhetorical question posed by the *Griffith* court asks this: “*Should defendant therefore be obligated to pay Griffith’s housing payment now that he has been released when Griffith’s housing needs have not been affected by his injuries?*”<sup>263</sup> The essence of this rhetorical question suggests a threshold-type analysis that would look to whether the plaintiff’s accident-related injuries affected the plaintiff’s pre-accident needs.<sup>264</sup> In other words, if a catastrophic injury affected a plaintiff’s housing needs, such that the plaintiff’s housing needs are now different than they were before the accident, then a sufficient causal relationship has been established obligating the no-fault insurer to pay benefits for all of those preexisting but now-changed needs. Such an analysis is perfectly consistent with the court of appeals in *Sharp* and *Davis*.<sup>265</sup> In fact, nowhere in *Griffith* does the Michigan Supreme Court in any way refer to, or criticize, the decisions in *Sharp* or *Davis*.<sup>266</sup>

That is the extent of the decision in *Griffith*. It goes no further than addressing the specific issue of nonaffected food needs in the home-care environment.<sup>267</sup> It does not adopt incrementalism.<sup>268</sup> It does not overrule *Sharp* or *Davis*.<sup>269</sup> It does not hold that no-fault insurers can reduce their liability under section 3107(1)(a) by an amount that approximates what an injured person would have needed or consumed had the injury not occurred.<sup>270</sup> On the contrary, the *Griffith* decision, in its rhetorical question, clearly implies that where a motor-vehicle injury has in fact affected specific pre-accident needs of an individual, a no-fault insurer has no basis for refusing to pay the full amount of all expenses that are reasonably necessary to accommodate those changed needs.<sup>271</sup>

This logical reading of the *Griffith* rhetorical question is perfectly consistent with the discussion appearing in *Griffith* about the legal causation requirements that emanate from the statutory language contained in sections 3105(1) and 3107(1)(a) of the Act.<sup>272</sup> In discussing the issue of causation,

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263. *Id.*

264. *Id.*

265. *See Davis v. Citizens Ins. Co. of Am.*, 489 N.W.2d 214 (Mich. Ct. App. 1992); *Sharp v. Preferred Risk Mut. Ins. Co.*, 370 N.W.2d 619 (Mich. App. Ct. 1985).

266. *See Griffith*, 697 N.W.2d 895.

267. *See id.*

268. *See id.*

269. *See id.*

270. *See id.* at 906.

271. *See* 697 N.W.2d 895.

272. *See id.* at 901.

the court in *Griffith* made the point that the statutory language clearly indicates that there must be some causal link between accident injuries and the specific expense submitted for payment under section 3107(1)(a).<sup>273</sup> The court reasoned that this causal-connection requirement emanates from the use of the word *for* in section 3105(1) and section 3107(1)(a).<sup>274</sup> The first of those sections is the so-called “entitlement” provision of the Act, which states, “[A]n 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, subject to the provisions of this chapter.”<sup>275</sup>

The second of those sections defines the allowable-expense PIP benefit payable under the Act and states that these benefits are payable 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.”<sup>276</sup> In elaborating on the implicit causation requirements of these sections, the court in *Griffith* stated:

Defendant contends that M.C.L. § 500.3105(1) requires that allowable expenses be causally connected to a person’s injury. We agree. In fact, M.C.L. § 500.3105(1) imposes two causation requirements for no-fault benefits.

First, an insurer is liable only if benefits are “*for* accidental bodily injury . . . .” “[F]or” implies a causal connection. “[A]ccidental bodily injury” therefore triggers an insurer’s liability and defines the scope of that liability. Accordingly, a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident.

Second, an insurer is liable to pay benefits for accidental bodily injury only if those injuries “aris[e] out of” or are caused by “the ownership, operation, maintenance or use of a motor vehicle . . . .” It is not any bodily injury that triggers an insurer’s liability under the no-fault act. Rather, it is only those injuries that are caused by the insured’s use of a motor vehicle.

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273. *See id.*

274. *See id.*

275. MICH. COMP. LAWS ANN. § 500.3105(1) (West 2002).

276. § 500.3107(1)(a) (emphasis added).

....

Even if ordinary food expenses were compensable under § 3105, an insurer would be liable for those expenses only if they were also “allowable expenses” under M.C.L. § 500.3107(1)(a). This section provides that benefits are payable for “reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” In other words, an insurer is liable only for the cost of “products, services and accommodations” “reasonably necessary” “for an injured person’s care, recovery, or rehabilitation.”<sup>277</sup>

The court went on to conclude:

Under M.C.L. § 500.3105 and M.C.L. § 500.3107(1)(a), defendant is not required to reimburse plaintiff for the food expenses at issue in this case. Such expenses are not necessary “for accidental bodily injury” under M.C.L. § 500.3105. In addition, they are not “allowable expenses” under M.C.L. § 500.3107(1)(a) because food is not necessary for Griffith’s “care, recovery, or rehabilitation” under that subsection. Because the rule announced in *Reed* . . . is contrary to the language of the above provisions, we overrule the Court of Appeals decision in *Reed*.<sup>278</sup>

Despite this general causation discussion, the *Griffith* decision did not formally articulate a specific causation test that further defines the causation requirements of section 3107(1)(a).<sup>279</sup> Clearly, however, the rhetorical question posed in *Griffith* implicitly provides the basic causation standard that should be utilized, which simply stated, is this: if the auto-accident injury has affected any specific pre-accident needs of the injured person so that those needs are now different than they were before the accident, the no-fault insurer is obligated to pay the full amount of all charges associated with those needs, provided those charges are reasonable in amount and are reasonably necessary for the injured person’s care, recovery, or rehabilitation. Under *Griffith*, that is the causal link that must be established to trigger a no-fault insurer’s liability to pay *allowable expense benefits*.<sup>280</sup> That conclusion has been clearly validated by several appellate

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277. *Griffith*, 697 N.W.2d at 901 (emphasis added) (footnotes omitted).

278. *Id.* at 906.

279. See *supra* notes 252-62 and accompanying text.

280. See *Griffith*, 697 N.W.2d at 902-03.

decisions rendered after *Griffith*.<sup>281</sup> Those decisions will be briefly discussed below.

### C. Post-Griffith Decisions

The court of appeals has issued several decisions in the wake of the *Griffith* case that interpret and apply *Griffith* in exactly the way previously explained in this Article. The first of these cases is the unpublished decision in *Chartier v. Automobile Club Insurance Ass'n*, which specifically deals with handicap-accessible vans.<sup>282</sup> In this unanimous ruling, which does not specifically mention *Griffith*, the court of appeals held that an insurer must pay the full cost of a specially adapted van for a paraplegic plaintiff.<sup>283</sup>

The plaintiff in *Chartier* worked in a job that required regular travel by motor vehicle in addition to traveling from home to work.<sup>284</sup> In the past, the plaintiff had purchased handicap-accessible vans, which were then modified for his disability by his no-fault insurer.<sup>285</sup> Thereafter, the plaintiff experienced a painful, degenerative condition in his neck and shoulders that was brought on in part by the strain of getting in and out of the stock vans that had been adaptively modified over the years following his injury.<sup>286</sup> Because of this change in his medical condition, the plaintiff's physician and his occupational therapist recommended that a van be purchased and structurally modified with either a raised roof or a lowered floor so that the plaintiff could access it without experiencing neck, back, and shoulder strain.<sup>287</sup> The insurance company refused to buy such a van and modify it in this manner.<sup>288</sup>

The court of appeals affirmed the trial court's declaratory ruling that the defendant was legally obligated to pay the entire cost of the van as well as all structural modifications once the plaintiff incurred the expense.<sup>289</sup> In reaching this conclusion, the court of appeals relied on its previous decision in *Davis*.<sup>290</sup> In this regard, the court held in *Chartier*:

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281. See cases discussed *infra* Part III.C.

282. *Chartier v. Auto. Club Ins. Ass'n*, No. 257301, 2006 WL 73624 (Mich. Ct. App. Jan. 12, 2006).

283. *Id.* at \*4.

284. *Id.* at \*1.

285. *Id.*

286. *Id.*

287. *Id.* at \*1-2.

288. *Id.* at \*1.

289. *Id.* at \*4.

290. *Id.* at \*2 (citing *Davis v. Citizens Ins. Co. of Am.*, 489 N.W.2d 214, 216 (Mich. Ct. App. 1992)).

Whether the expense is reasonably necessary can be resolved by reference to *Davis*. The facts in the present case are almost identical to the facts present in *Davis*. Both plaintiffs were rendered paraplegics following an automobile accident, and both requested that the respective defendants pay for a van modified for use by a person in a wheelchair. In finding that a modified van was reasonably necessary, the *Davis* Court stated:

Transportation is as necessary for an uninjured person as for an injured person. However, the modified van is necessary in this case given the limited availability of alternative means of transportation. . . . The van allows plaintiff to travel outside the county for medical purposes and vacations. In addition, the van was reasonably necessary according to plaintiff's treating physician. . . . Under these circumstances, we find that the modified van is an allowable expense.

Therefore, this Court must focus on the unique circumstances of the current facts to determine whether a modified van is necessary. For almost a decade, plaintiff's treating physician has prescribed a modified van for plaintiff. Even the occupational therapist recommended by *defendant's* case manager stated that plaintiff requires an accessible van. Therefore, it is clear that, based on the needs of his particular disability, plaintiff's circumstances require a modified van. Additionally, plaintiff's treating physician believes plaintiff's disability is "partial, permanent and ongoing." Thus, it does not appear that plaintiff's need for a modified van is likely to diminish anytime in the near future. Accordingly, plaintiff has unquestionably demonstrated his need for a modified van due to his disability and we affirm the court's finding underlying its declaratory judgment that the expense was reasonably necessary.<sup>291</sup>

The second post-*Griffith* decision came in the unpublished case of *Chappel v. Auto-Owners Insurance Co.*<sup>292</sup> In this unanimous decision, the court of appeals affirmed a declaratory judgment in favor of the plaintiff

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291. *Id.* (quoting *Davis*, 489 N.W.2d at 216) (citations omitted).

292. *Chappel v. Auto-Owners Ins. Co.*, No. 260561, 2006 WL 3230765 (Mich. Ct. App. Oct. 3, 2006).

and required the insurance company to pay approximately \$250,000 as the reasonable cost for barrier-free home accommodations.<sup>293</sup> In affirming the award, the court of appeals specifically cited *Griffith* and held that the home modifications in question were “reasonably necessary for [the] plaintiff’s care.”<sup>294</sup> The court stated the following:

After the accident, plaintiff was confined to a wheelchair. He was unable to access two levels in his quad-level home. During power outages, the overhead lift system used to move plaintiff was inoperable. When traveling from his lower level bedroom, bathroom, and office to the main level kitchen or living area, he was forced to use an interior elevator or traverse an outdoor ramp. However, the outdoor ramp was impassable in the winter months and the elevator was unreliable and extremely unsafe. Although plaintiff could access the kitchen area, he could not reach the kitchen sink, stove, or countertop. The ramp that provided ingress into the home from the garage was difficult to maneuver because it was too steep. According to David Esau, an architect with experience in designing barrier-free homes, plaintiff’s home was not suitable for his needs. Viewing this evidence in a light most favorable to plaintiff, we conclude that reasonable minds could differ on the issue of whether the modifications were reasonably necessary for plaintiff’s care. Indeed, the evidence supports the conclusion that the modifications were necessitated by the injuries sustained by plaintiff in the motor vehicle accident. Therefore, defendant was not entitled to judgment as a matter of law and the trial court properly denied its motion for summary disposition.<sup>295</sup>

The *Chappel* decision is also significant because it specifically refers, on two occasions, to the earlier decision of the court of appeals in *Sharp*:

The “resolution of the issue of reasonable accommodations is factually driven.” Therefore, the reasonableness of accommodations is generally a question for the fact-finder. Moreover, “as long as housing larger and better equipped is required for the injured person than would be required if he were not injured, the full cost is an ‘allowable expense.’”

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293. *Id.* at \*5.

294. *Id.* at \*2 (citing *Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co.*, 697 N.W.2d 895, 902-03 (Mich. 2005)).

295. *Id.* (citations omitted).

....

. . . Further, the evidence in this case supports the conclusion that a larger and better-equipped house was required for plaintiff than would be required if he were not injured. Therefore, the full cost of the home modifications was an allowable expense under MCL 500.3107(1)(a).<sup>296</sup>

The third post-*Griffith* decision came in the unpublished case of *Mahle v. Titan Insurance Co.*, where the court of appeals applied the reasoning in *Griffith* and denied the plaintiff's housing claim for the specific reason that the plaintiff had not put forth any evidence demonstrating that he required bigger or better-equipped housing as a result of his motor-vehicle-accident injuries.<sup>297</sup> In other words, the plaintiff was unable to affirmatively satisfy the *Griffith* rhetorical question, and thus, his claim was denied. Clearly, however, *Mahle* does not, in any way, conflict with the holding in *Sharp* and, in fact, is perfectly consistent with that decision.

The fourth post-*Griffith* decision came in *Hoover v. Michigan Mutual Insurance Co.*, where the court of appeals was critical of the *Griffith* decision but then, in a rather confusing analysis, extended *Griffith* beyond its facts and applied it in a way that is inconsistent with the *Griffith* rhetorical question, which *Hoover* specifically referenced but misapplied.<sup>298</sup> The plaintiff in *Hoover* was a quadriplegic who required special barrier-free residential accommodations that clearly would not have been needed had he not suffered his catastrophic motor-vehicle injury.<sup>299</sup> The plaintiff's injury also necessitated other enhanced products and services that would not have been necessary had he not suffered the injury.<sup>300</sup>

It is important to know that the dispute in *Hoover* did not relate to the structural costs of the handicap-accessible accommodations but only to the costs of certain expenses related to living in that structure.<sup>301</sup> This was so because the parties in *Hoover* had reached an agreement regarding the cost of constructing the handicap-accessible house with the only remaining dispute related to living expenses and maintenance costs (that is utilities,

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296. *Id.* at \*3 (citing *Sharp v. Preferred Risk Mut. Ins. Co.*, 370 N.W.2d 619, 625 (Mich. Ct. App. 1985)).

297. *Mahle v. Titan Ins. Co.*, No. 277326, 2008 WL 2038814, at \*3 (Mich. Ct. App. May 13, 2008).

298. 761 N.W.2d 801, 804, 806-13 (Mich. Ct. App. 2008).

299. *See id.* at 804.

300. *See id.*

301. *See id.*

property taxes, homeowners insurance, maintenance, etc.).<sup>302</sup> Even though the court of appeals in *Hoover* specifically noted the significance of the rhetorical question posed in *Griffith*, the court held in an inconsistent manner by remanding the case to the trial court and ordering it to “allocate . . . that portion of the [expenses] attributable to the injured person’s usage that is only occurring because of the injuries . . . . Making these calculations and ascertaining the proper allocations might prove difficult; however, *Griffith* requires such an undertaking.”<sup>303</sup>

Clearly, the *Hoover* decision is not only inconsistent with the *Griffith* decision, but it is also inconsistent with the recent decision in *Scott*, wherein the use of the *Shinabarger* causal-nexus standard to resolve claims under section 3107(1)(a) was endorsed.<sup>304</sup> Under such a standard, an insurer is obligated to pay the entire cost of a claimed expense as long as there is some causal connection between the accident and the claimed expense that is “more than incidental, fortuitous, or ‘but for.’”<sup>305</sup> As the court established in *Scott*, “[a]lmost any causal connection will do.”<sup>306</sup> However, *Hoover* holds that even when there is a causal connection between the cost of handicap accommodations and the accident-related injuries, no-fault insurers are not necessarily responsible for the full cost of those accommodations and related living expenses.<sup>307</sup> Thus, the *Hoover* decision has clearly been superseded by the decision in *Scott*.<sup>308</sup> In any event, the correctness and analytical soundness of the *Hoover* decision will hopefully be determined by the Michigan Supreme Court in some other case coming up the appellate ladder, such as *Wilcox ex rel. Wilcox v. State Farm Mutual Automobile Insurance Co.*<sup>309</sup>

It is also significant to note that despite its holding in *Hoover*, as recently as June 25, 2009, the court of appeals, in the fifth post-*Griffith*

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302. *See id.*

303. *Id.* at 809.

304. *See Shinabarger v. Citizens Mut. Ins. Co.*, 282 N.W.2d 301, 305 (Mich. Ct. App. 1979) (holding that “cases construing the phrase ‘arising out of the . . . use of a motor vehicle as a motor vehicle’ uniformly require that the injured person establish a casual connection between the use of the motor vehicle and the injury”).

305. *Scott v. State Farm Mut. Auto. Ins. Co.*, 766 N.W.2d 273, 274 (Mich. 2009).

306. *Id.* at 276.

307. *Hoover*, 761 N.W.2d at 808 (holding that “[n]o-fault benefits would not be payable absent a link between the expenses and the injury”).

308. *See Scott*, 766 N.W.2d at 276.

309. *Wilcox ex rel. Wilcox v. State Farm Mut. Auto. Ins. Co.*, No. 138602, 2010 WL 1526144 (Mich. 2010) (granting leave to appeal).

decision, held consistently with *Sharp* and *Davis*.<sup>310</sup> This occurred in *Begin v. Michigan Bell Telephone Co.*, where the court affirmed a decision denying the defendant's motion for summary disposition regarding a claim for the entire cost of a handicap-accessible van and held that liability for payment of allowable-expense "benefits is dependent on the facts and circumstances of each case."<sup>311</sup> This was true even though the plaintiff in *Begin* drove a van before his accident.<sup>312</sup> Moreover, the court of appeals squarely rejected the notion that *Griffith* had adopted incrementalism<sup>313</sup>:

Next, we consider defendants' claimed entitlement to judgment as a matter of law under *Griffith* and their reasoning that because plaintiff used a van for transportation before his injuries, plaintiff's motor vehicle accident injuries did not create his need for a van. We disagree. We do not read *Griffith* as establishing the bright-line rule defendants espouse; rather, entitlement to no-fault benefits is dependent on the facts and circumstances of each case.

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Although the *Griffith* Court clarified judicial construction of both MCL 500.3105(1) and MCL 500.3107(1)(a) to determine whether claimed no-fault benefits are "allowable expenses," the Court did not specifically overrule this Court's decision in *Davis*. Indeed, *Griffith* only specifically overruled *Reed v. Citizens Ins. Co. of America*, which had held that room and board may be "allowable expenses" because there was no principled distinction between such necessities furnished in an institutional setting and the same items furnished to severely injured persons in their home. Because the *Griffith* Court did not overrule *Davis*, and because *Davis* was issued on or after November 1, 1990, the *Davis* decision is binding precedential authority until it is "reversed or modified by the Supreme Court, or by a special panel" of this Court.

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310. See *Begin v. Mich. Bell Tel. Co.*, 773 N.W.2d 271, 276 (Mich. Ct. App. 2009) ("The principle enunciated in *Davis* . . . is still viable and controlling. And for that reason . . . *Griffith* [is] distinguishable and inapplicable to this case . . .").

311. *Id.* at 278.

312. *Id.*

313. See *id.*

Moreover, we reject defendants' bright-line rule that if an injured person uses a product, service, or accommodation both before and after their motor vehicle accident, the person cannot for that reason meet the statutory causal relationship tests clarified in *Griffith* for an "allowable expense" no-fault benefit. Rather, the *Griffith* Court held that a product, service, or accommodation an injured person uses both before and after a motor vehicle accident might be an "allowable expense" no-fault benefit depending on the particular facts and circumstances involved. . . .

....

A further example cited by the *Griffith* Court illustrates the fact that our Supreme Court did not adopt the bright-line rule defendants urge. In explaining what "allowable expenses" might come within the term "care" as used in MCL 500.3107(1)(a), the Court used the hypothetical example of a person whose leg was injured or amputated in a motor vehicle accident. The Court opined that "the cost of such items as a prosthetic leg or *special shoes* would be recoverable under the term 'care,' even though the person will never recover or be rehabilitated from the injuries, because the cost associated with such products or accommodations stems from the injury." Thus, in the Court's hypothetical example, the mere fact that the injured person almost certainly used shoes before the accident would not preclude a finding that "special shoes" would be necessary for the injured person's care and thus an "allowable expense" under MCL 500.3107(1)(a).

We also note that the *Griffith* Court, when discussing the cost of food provided to an injured person in an institutional setting, did not suggest that only the marginal increase in the cost of such food served in an institutional setting would be an allowable expense. Nor did the Court suggest that only the marginal cost of modifying regular shoes would be a recoverable "allowable expense" under MCL 500.3107(1)(a). Rather, in each example, the product, service, or accommodation used by the injured person before the accident is so blended with another product, service, or accommodation that the whole cost is an allowable expense if it satisfies the statutory criteria of being sufficiently related to injuries sustained in a motor vehicle accident and if it is a reasonable charge and

reasonably necessary for the injured person's care, recovery, or rehabilitation under MCL 500.3107(1)(a). The latter inquiry, of course, is factual and dependent on the circumstances of each case.<sup>314</sup>

Clearly, the holding of the court of appeals in *Begin* is totally consistent with *Sharp*, *Davis*, and *Scott*. More importantly, it expressed a clear repudiation of the view that *Griffith* had injected the doctrine of incrementalism into the jurisprudence of Michigan no-fault law.<sup>315</sup>

#### IV. CONCLUSION: THE BIG PICTURE OF NO-FAULT PIP CAUSATION LAW AND THE *GRIFFITH* DECISION

As evident from the foregoing discussion, the principles of no-fault PIP causation law are fundamentally different from traditional tort principles of causation, such as proximate cause. In this regard, the doctrine of proximate causation in tort cases is a limitation-of-liability principle that prevents a tortfeasor from being held liable for damages that were not reasonably foreseeable to result from the tortfeasor's negligence.<sup>316</sup> This is not the proper analytical construct regarding the payment of no-fault PIP benefits, which are payable without regard to fault. In fact, section 3105(2) of the no-fault statute succinctly states, "Personal protection insurance benefits are due under this chapter without regard to fault."<sup>317</sup> Moreover, a long line of appellate decisions dealing with no-fault PIP causation law, including the recent decision in *Scott*, explicitly hold that proximate cause is not required.<sup>318</sup>

The inapplicability of tort-law, proximate-causation principles to no-fault PIP law means that related tort principles, such as allocation of damages, are also not applicable to claims for no-fault PIP benefits. In a tort case where the plaintiff's injury is the result of both a preexisting condition and the tortfeasor's conduct, Michigan Model Civil Jury Instruction 50.11 directs a jury to "separate the damages caused by

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314. *Id.* at 278-81 (citations omitted).

315. *See id.* at 278 ("We do not read *Griffith* as establishing the bright-line rule defendants espouse; rather, entitlement to no-fault benefits is dependent on the facts and circumstances of each case.").

316. MICH. COMP. LAWS ANN. § 600.6304(8) (West 2000) (defining fault as "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause sustained by a party").

317. MICH. COMP. LAWS ANN. § 500.3105(2) (West 2002 & Supp. 2009).

318. *Scott v. State Farm Mut. Auto. Ins. Co.*, 766 N.W.2d 273, 274 (Mich. 2009) ("Precedent makes clear that an injury requires more than a fortuitous, incidental, or 'but for' casual connection, but does not require proximate causation.").

defendant's conduct from the condition which was preexisting if it is possible to do so."<sup>319</sup> If the jury is capable of making this allocation, the tortfeasor is only responsible for that portion of the damage that is specifically attributable to the tortfeasor's negligence.<sup>320</sup> However, if it is impossible to allocate the damages between those attributable to the preexisting condition and those attributable to the defendant's negligence, then an indivisible injury is deemed to exist for which the tortfeasor is entirely responsible.<sup>321</sup>

These rules of allocation of damages grow out of the common-law principle that tortfeasors should only be held liable for those damages proximately caused by their negligence.<sup>322</sup> Therefore, if proximate causation is not a requirement in PIP cases, then the allocation-of-damages principles associated with it are also inapplicable. These conclusions are further compelled by the previously stated proposition that no-fault benefits are payable "without regard to fault."<sup>323</sup> In fact, the no-fault law was designed to be a substitute for, and an improvement over, the tort-liability system—a system that is capable of only compensating those victims who are not at fault and, even then, only after lengthy, protracted, expensive, and adversarial claims processing and litigation.<sup>324</sup> Therefore, it would be fundamentally inconsistent to incorporate major doctrinal concepts of tort law, such as proximate causation and allocation of damages, into the jurisprudence of a no-fault system.

Causation in no-fault law is indeed fundamentally different from causation in tort law. Under the Michigan No-Fault Act, a person is entitled to no-fault PIP benefits if that person can satisfy the provisions of section 3105(1) by showing that they sustained accidental bodily injury "arising out of the ownership, operation, maintenance or use of a motor vehicle."<sup>325</sup> The appellate case law regarding this causation standard requires only that the connection between the injury and the automobile accident be something that is "more than incidental, fortuitous[,] or but for."<sup>326</sup> If the automobile accident is one of the causes of the injury, a sufficient causal nexus has been demonstrated, thereby entitling the injured person to no-fault

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319. 1 MICHIGAN MODEL CIVIL JURY INSTRUCTIONS ch. 50, § 50.11 (Supp. 2009), available at <http://courts.mi.gov/mcjl/MCJI.htm>.

320. *Id.*

321. *Id.*

322. See DAN B. DOBBS, *THE LAW OF TORTS* 443 (2000).

323. MICH. COMP. LAWS ANN. § 500.3105(2) (West 2002 & Supp. 2009).

324. See *Shavers v. Kelley*, 267 N.W.2d 72, 77 (Mich. 1978) (explaining the purpose of the Michigan No-Fault Insurance Act).

325. § 500.3105(1).

326. *Kangas v. Aetna Cas. & Sur. Co.*, 235 N.W.2d 42, 50 (Mich. Ct. App. 1975).

benefits.<sup>327</sup> Once the entitlement provisions of section 3105(1) have been satisfied in this manner, the same causal-nexus standard obligates a no-fault insurer, under section 3107(1)(a), to pay for “all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.”<sup>328</sup> As the recent decision in *Scott* demonstrates, the causation principles applicable to determine entitlement to benefits under section 3105(1) are identical to the causation principles applicable under the allowable-expense provisions of section 3107(1)(a).<sup>329</sup> Therefore, if the trier of fact determines that the auto-accident injury is one of the causes for a patient’s need for products and services, a sufficient causal connection has been demonstrated to obligate the insurer to pay the benefits, assuming that the other requirements of section 3107(1)(a) have been satisfied. The proposed jury instruction contained in this Article accurately embraces these principles.<sup>330</sup>

The *Griffith* decision is completely consistent with the causation principles embraced in *Scott*. Under *Griffith*, and its progeny, a sufficient causal connection has been demonstrated under section 3107(1)(a) if an auto accident has materially affected an injured person’s pre-accident needs. Moreover, the insurer may not reduce its liability to pay those benefits by utilizing the doctrine of incrementalism or any other damage-allocation principles. As the court of appeals succinctly stated in *Sharp*, “As long as housing larger and better equipped is required for the injured person than would be required if he were not injured, *the full cost* is an ‘allowable expense.’”<sup>331</sup> The same principle applies with equal force to all types of claims for *allowable expense benefits* under section 3107(1)(a) of the Michigan No-Fault Act. Because the court of appeals deviated from these principles in *Hoover*, its decision is fundamentally flawed.

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327. *Shinabarger v. Citizens Mut. Ins. Co.*, 282 N.W.2d 301, 305 (Mich. Ct. App. 1979).

328. § 500.3107(1)(a).

329. *See* 766 N.W.2d at 273-74 (affirming the lower court’s use of the *Kangas* causation standard, as applied to allowable expenses incurred by an insured).

330. *See supra* part II.D.

331. *Sharp v. Preferred Risk Mut. Ins. Co.*, 370 N.W.2d 619, 625 (Mich. Ct. App. 1985) (emphasis added).



B

STATE OF MICHIGAN  
COURT OF APPEALS

JUN 19 1987

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ALEXANDER HENDERSON,

Plaintiff-Appellant,

No. 96310

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

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BEFORE: M.H. Wahls, P.J., and R.M. Maher and J.T. Kallman\*, JJ.

PER CURIAM

Plaintiff appeals by leave granted from the November 4, 1986 order of the Wayne Circuit Court denying his motion for partial summary disposition, pursuant to MCR 2.116(C)(9), on the issue of defendant's liability for no-fault personal injury protection benefits under MCL 500.3105; MSA 24.13105.

Plaintiff's claim for PIP benefits arises out of a pedestrian-car accident on Nine Mile Road in the City of Ferndale on February 19, 1985. Plaintiff, who was 87 years old at the time, was walking across Nine Mile Road on his way to his daughter's home. The automobile was driven by Stuart Fine who was insured by defendant.

Immediately after the accident, plaintiff was taken to Providence Hospital in Southfield. There he was diagnosed as having suffered a number of traumatic injuries, including a contusion of the left eye and a cerebral concussion. Plaintiff was treated at Providence Hospital until February 27, 1985. At that time, he was discharged to a nursing home.

Plaintiff continued to receive nursing home treatment through December 17, 1985. At that time, Dr. Leonard Sahn conducted a neurological examination for the defendant-insurer. Dr. Sahn's examination consisted of a clinical examination and a

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\*Circuit Judge, sitting on the Court of Appeals by assignment.

history provided by plaintiff's daughter. Dr. Sahn's clinical examination revealed severe memory deficits, including an inability to remember his age, the day, date and year. Plaintiff was able to perform no more than one-digit addition and exhibited some spatial disorientation as well. Plaintiff was hard of hearing in both ears. His pupils reacted slowly to light. Plaintiff's motor skills were slowed, though he was able to walk both in and out of Dr. Sahn's office.

The history provided by plaintiff's daughter was that plaintiff was experiencing considerable forgetfulness before the February 19 accident, but was able to live by himself with occasional assistance. However, after the accident, plaintiff required constant supervision and assistance with such basic functions as dressing. Before the accident, plaintiff was able to carry on a conversation. After the accident, plaintiff began thoughts, then lost them and was not able to sustain conversation.

Dr. Sahn concluded that plaintiff was suffering from significant senile dementia which was accelerated by the February 19, 1985 accident. Dr. Sahn believed that the accident had contributed to plaintiff's disability. However, Dr. Sahn was of the opinion that plaintiff could not have been expected to live unsupervised for more than another six to twelve months even without the accident. Dr. Sahn was, nevertheless, of the opinion that the accident continued to contribute to plaintiff's disability. Dr. Sahn was unable to separate or quantify the continuing effects of the accident as opposed to plaintiff's preexisting dementia.

In February of 1986, defendant ceased paying PIF benefits to plaintiff based upon Dr. Sahn's examination. On February 11, 1986, plaintiff filed suit under § 3105 of Michigan's No-Fault Automobile Insurance Act, MCL 500.3105; MSi 24.13105. After a period of discovery including the deposition

of Dr. Sahn, plaintiff moved for partial summary judgment on the question of liability for PIP benefits. As noted supra, the trial court denied plaintiff's motion, prompting this appeal.

We first observe that plaintiff's motion before the trial judge was ostensibly based upon MCR 2.116(C)(9), failure to state a valid defense to the claim asserted. However, as defendant concedes, both parties and the trial court treated the motion as one based upon MCR 2.116(C)(10). We will therefore proceed with review of the trial court's ruling on this basis. Bousson v Mitchell, 84 Mich App 98, 99, n 1; 269 NW2d 317 (1978).

Under MCR 2.116(C)(10), summary disposition may be granted if:

"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."

As we have recently held:

"Summary judgment pursuant to GCR 1963, 117.2(3), now MCR 2.116(C)(10), is proper only if there is no genuine issue as to any material fact and the party in whose favor judgment is granted is entitled to judgment as a matter of law. A motion based on GCR 1963, 117.2(3) is designed to test the factual support for a claim. Maccabees Mutual Life Ins Co v Dep't of Treasury, 122 Mich App 660, 663; 332 NW2d 561 (1983), lv den 417 Mich 1100.15 (1983). The court must consider the pleadings, affidavits, and other available evidence and be satisfied that the claim or position asserted cannot be supported by evidence at trial because of some deficiency which cannot be overcome. Id. The court must give the benefit of any reasonable doubt to the party opposing the motion and inferences are to be drawn in favor of that party. Id." Hogerl v Auto Club Group Ins Co, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (No 87245, rel'd 2-17-87).

Here there is no dispute as to defendant's liability for PIP benefits at the time of the accident. This Court has previously held that an aggravation of a preexisting condition is compensable under § 3105 of Michigan's no-fault statute. See, Mollitor v Associated Truck Lines, 140 Mich App 431; 364 NW2d 344 (1985); McKim v Home Ins Co, 133 Mich App 694; 349 NW2d 533 (1984), lv den 422 Mich 893 (1985). However, defendant does dispute whether plaintiff's continuing disability is related to the accident. According to defendant, plaintiff's injuries resulting from the accident have entirely healed and plaintiff's continuing disability is solely due to his preexisting dementia.

There is no factual support for defendant's claim in the record. The only medical evidence submitted at the time of the motion for summary disposition was the deposition of defendant's own consultative examiner, Dr. Sahn. Dr. Sahn never testified that plaintiff's continuing disability is solely due to preexisting dementia.<sup>1</sup> In fact, under cross examination, Dr. Sahn testified the relative extent of plaintiff's preexisting dementia and the accident on plaintiff's continuing disability:

"Q. (plaintiff's counsel) You've admitted that this brain injury sustained in the accident by Mr. Henderson contributed to his current predicament in life. That is, where he's in a nursing home full-time rather than living on his own. You said that that contributed, despite your diagnosis of senile dementia?"

"MS. KULIK (defense counsel): Is that a question or a statement? BY MS. CONNOLLY-LEMBERG (plaintiff's counsel):

"Q. In fact, Doctor, you cannot separate the extent to which the head injury brought about the current condition and the extent to which what you've called "pre-senile dementia" contributed to this condition. Isn't that true?"

"A. (Dr. Sahn) You can't separate them precisely, obviously. You can make -- I think I've answered that. I've attempted in the best way that I know how to give some indication as to what the relative contribution is of each, but other than that you can't give a percentage based on something. I mean, it's just not possible.

"Q. You personally would not want to quantify the contribution of the brain injury over the alleged dementia?"

"A. I think that you could put a range on it, but I don't think that you could say it's twenty-two point four percent.

"Q. Why are you unable to do that?"

"A. Because it's just not amenable to that kind of thing. I mean it's not like three people were chipping in and buying a car and you know how much each person puts in. This is a more nebulous thing.

"Q. In layman's terms, it's just unclear how much each injury or disease contributed to the condition. Isn't that right?"

"A. I think it's clear to the extent that I stated in my letter. There are obviously some parts of it that are not quantifiable."

Our review of Dr. Sahn's letter to defendant's adjuster indicates that, in fact, no attempt was made therein to differentiate between the effects of plaintiff's preexisting dementia and the accident on his continuing disability.

We are dismayed that the defendant insurer would cease plaintiff's PIP benefits based upon the medical evidence of Dr. Sahn. The basic goal of the personal injury provisions of the no-fault insurance system is to provide assured, adequate and

prompt benefits to individuals injured in automobile accidents. Babbitt v Employer's Ins of Waussau, 136 Mich App 198, 201; 355 NW2d 635 (1984). To that end, the Act was passed in anticipation that it would reduce excessive and frivolous litigation. Williams v Payne, 131 Mich App 403, 406; 346 NW2d 564 (1984). The order of circuit court denying summary judgment to plaintiff on the issue of liability is reversed.

Upon remand, the circuit court shall promptly enter an order of partial summary judgment on the issue of liability in favor of plaintiff. We strongly encourage the parties to resolve any remaining issues without further protracting this litigation.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Costs to plaintiff.

/s/ Myron H. Wahls  
/s/ Richard M. Maher  
/s/ James T. Kallman

<sup>1</sup> Indeed, the only reliable expertise demonstrated by Dr. Sahn at the deposition was his ability to evade the essential issues of this litigation. Nevertheless, for the purpose of review of a motion under MCR 2.116(C)(10), we are required to credit the doctor's testimony with some reliability. Hagerl, supra.