

STATE OF MICHIGAN
IN THE SUPREME COURT

IAN McPHERSON

IAN McPHERSON,
Plaintiff-Appellee,

v

CHRISTOPHER McPHERSON and
AAA AUTO CLUB GROUP INSURANCE
COMPANY,

Defendants,

PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

Defendant/Cross-Plaintiff-
Appellant,

and

AUTO CLUB INSURANCE ASSOCIATION
MEMBER SELECT INSURANCE COMPANY
and AUTO CLUB INSURANCE COMPANY,

Defendants/Cross-Defendants

UNPUBLISHED
January 10, 2012

Upn -

No. 299618
Oakland Circuit Court
LC No. 2008-095926-NI

R. Chabot

OK

NOTICE OF HEARING

DEFENDANT-APPELLANT PROGRESSIVE MICHIGAN
INSURANCE COMPANY'S APPLICATION FOR LEAVE TO APPEAL

MARCH 17, 2010 TRANSCRIPT OF HEARING ON APPELLANT'S
MOTION FOR PARTIAL SUMMARY DISPOSITION

MARCH 17, 2010 ORDER DENYING MOTION FOR PARTIAL SUMMARY DISPOSITION

AUGUST 19, 2010 ORDER DENYING MOTION FOR RECONSIDERATION

JANUARY 10, 2012 PER CURIAM OPINION OF THE MICHIGAN COURT OF APPEALS

PROOF OF SERVICE

FILED

FEB 21 2012

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CLERK
MICHIGAN SUPREME COURT

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Plaintiff-Appellee,

-vs-

PROGRESSIVE MICHIGAN INSURANCE
COMPANY

Defendant-Appellant,

and,

AAA AUTO CLUB GROUP INSURANCE
COMPANY, AUTO CLUB INSURANCE
ASSOCIATION MEMBER SELECT
INSURANCE COMPANY,

Defendants.

and

PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

Defendant/Cross-Plaintiff,

vs.

AUTO CLUB INSURANCE COMPANY,
AUTO CLUB INSURANCE ASSOCIATION
MEMBER SELECT INSURANCE COMPANY

Defendants/Cross-Defendants.

Supreme Court No:
Court of Appeals No: 299618
Lower Court No: 08-095926-NI

**DEFENDANT-APPELLANT PROGRESSIVE MICHIGAN
INSURANCE COMPANY'S APPLICATION FOR LEAVE TO APPEAL**

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Argument

PLAINTIFF WAS IN AN AUTOMOBILE ACCIDENT IN 2007. IN 2008, WHILE RIDING HIS MOTORCYCLE, HE SWERVED OVER FOUR LANES STRIKING A PARKED CAR RESULTING IN HIS INJURIES. PLAINTIFF CLAIMED THAT A CONDITION CAUSED BY THE 2007 ACCIDENT RESULTED IN THE 2008 MOTORCYCLE ACCIDENT. THE COURT OF APPEALS HELD THAT THE PHYSICAL CONDITION FROM THE 2007 MOTOR VEHICLE ACCIDENT SATISFIED THE "ARISING OUT OF" REQUIREMENT OF MCL 500.3105 FOR NO-FAULT BENEFITS CLAIMED FOR THE 2008 MOTORCYCLE ACCIDENT INJURIES. THE COURT OF APPEALS DECISION IS CONTRARY TO THE NO-FAULT ACT'S REQUIREMENT THAT THE CAUSAL CONNECTION BETWEEN AN INJURY AND THE USE OF A MOTOR VEHICLE BE MORE THAN INCIDENTAL, FORTUITOUS, OR BUT/FOR TO CLAIM NO-FAULT BENEFITS. 9-18

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**STATEMENT IDENTIFYING ORDER APPEALED
FROM AND RELIEF SOUGHT**

Appellant Progressive Michigan Insurance Company ("Progressive") is appealing the Michigan Court of Appeals opinion and order of January 10, 2012, which affirmed the denial of Progressive's motion for partial summary disposition.

Progressive is seeking reversal of the Court of Appeals determination and the trial court's order denying Progressive's partial summary disposition to Plaintiff's claim for first party no-fault benefits as it relates to a 2008 motorcycle accident.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this application for leave to appeal based on MCR 7.301(A)(2) and MCR 7.302(C)(2)(a).

The Court of Appeals decision affirming the denial of Progressive's motion for partial summary disposition was released on January 10, 2012.

This application is being filed within 42 days of the January 10, 2012, Court of Appeals decision. Therefore, this Court has jurisdiction to consider the application under MCR 7.302(C)(2)(a).

STATEMENT OF QUESTION PRESENTED

PLAINTIFF WAS IN AN AUTOMOBILE ACCIDENT IN 2007. IN 2008, WHILE RIDING HIS MOTORCYCLE, HE SWERVED OVER FOUR LANES STRIKING A PARKED CAR RESULTING IN HIS INJURIES. PLAINTIFF CLAIMED THAT A CONDITION CAUSED BY THE 2007 ACCIDENT RESULTED IN THE 2008 MOTORCYCLE ACCIDENT. THE COURT OF APPEALS HELD THAT THE PHYSICAL CONDITION FROM THE 2007 MOTOR VEHICLE ACCIDENT SATISFIED THE "ARISING OUT OF" REQUIREMENT OF MCL 500.3105 FOR NO-FAULT BENEFITS CLAIMED FOR THE 2008 MOTORCYCLE ACCIDENT INJURIES. IS THE COURT OF APPEALS DECISION CONTRARY TO THE NO-FAULT ACT'S REQUIREMENT THAT THE CAUSAL CONNECTION BETWEEN AN INJURY AND THE USE OF A MOTOR VEHICLE BE MORE THAN INCIDENTAL, FORTUITOUS, OR BUT/FOR TO CLAIM NO-FAULT BENEFITS?

The Court of Appeals said: "No."

Plaintiff-Appellee would answer: "No."

Defendant-Appellant Progressive says: "Yes."

STATEMENT OF FACTS

A. INTRODUCTION

This action involves two vehicle accidents -- one in 2007 which Plaintiff made claims for bodily injuries that undisputably are covered by no-fault personal protection insurance ("PIP"), since the accident clearly involved a motor vehicle; and the other in 2008 which produced catastrophic paralyzing injuries that are not covered by PIP as the accident did not involve a motor vehicle (it was a motorcycle accident, not a "motor vehicle accident"). In this lawsuit, Plaintiff seeks to circumvent the "arising out of" requirement of the Act for the second accident by characterizing the injuries he sustained in the motorcycle accident as having arisen out of the earlier motor vehicle accident. Plaintiff's theory, however, which strains to relate the cause of the second accident to injuries he sustained in the first accident, erroneously focuses on the *cause* of an accident, where the statute itself directs the inquiry *not* on the cause of an accident, but on whether the *accidental bodily injury arose out of* a motor vehicle accident. It is beyond dispute in this case that the accident which Plaintiff's subject injuries arose from did not involve a "motor vehicle," but did involve a motorcycle.

Hence, Plaintiff is not entitled to first party no-fault benefits because the no-fault Act requirement that an insurer is liable for only "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" is unmet in this instance. The Court of Appeals in this case determined that even if the motorcycle accident was an independent cause of Plaintiff's injuries, that did not bar recovery under the No-Fault Act. (See Court of Appeals Opinion, p. 4.)

The catastrophic injuries at issue in this case, therefore, fail to fall within the scope of no-

fault coverage and the trial court and the Court of Appeals erred in declining to grant partial summary disposition in favor of Progressive with respect to the 2008 injuries.

B. BACKGROUND FACTS

On November 25, 2007, Plaintiff was a passenger in a motor vehicle driven by his brother defendant, Christopher McPherson. The vehicle was involved in a one-car accident in Royal Oak, Michigan. (Exhibit 1, Complaint; Exhibit 2, Deposition of plaintiff, pp 5-6, 8, and exhibit 3, Deposition of Plaintiff's father, Robert McPherson, p. 53.) On that date, plaintiff was a resident relative of Christopher McPherson who was the named insured on an automobile policy of insurance issued by Progressive. On November 25, 2007, plaintiff was also a resident relative of his parents, Robert and Linda McPherson, who were the named insures on an insurance policy issued by defendant Auto Club Insurance Association.

Following the November 25, 2007, accident, Progressive processed plaintiff's first party no-fault claim and paid all the claimed benefits which amounted to \$24.25 of medical mileage.

On September 18, 2008, plaintiff was operating his motorcycle when he was involved in an accident involving only his motorcycle. (Transcript of hearing on Motion for Partial Summary Disposition, pp 4-5.) Plaintiff apparently swerved across four lanes and rear-ended a parked motor vehicle. (Exhibit 2, p. 20.) The injuries sustained from the motorcycle accident rendered plaintiff a quadriplegic. (Transcript of hearing on motion for summary disposition of March 17, 2010, p. 4.)

At the time of the motorcycle accident, it is undisputed that the motorcycle was titled and registered to plaintiff, and thought to be uninsured by both parties. (Exhibit 2, pp. 37-38; Exhibit 3, pp. 53-54; and Transcript of March 17, 2010, pp. 4-5.)

On November 10, 2008, plaintiff filed the instant action. (See Exhibit 1, Complaint.)

Without mentioning the September 2008 motorcycle accident, plaintiff claimed no-fault benefits from Progressive maintaining that all of plaintiff's injuries arose out of the November 25, 2007, accident. (See Exhibit 1, Complaint.)

On or about December 28, 2009, Progressive moved for partial summary disposition grounded on MCR 2.116(C)(8) and (10). The motion was premised on the plaintiff operating an uninsured motorcycle at the time of his September 19, 2008, accident.¹

In his response brief, plaintiff contended that he experienced a "seizure condition" the day after the November 2007 accident. (Plaintiff's Response to Motion for Summary Disposition, pp. 2-3.) Plaintiff claimed that he experienced a second seizure at the time he was operating his motorcycle in 2008 causing him to lose control of the motorcycle. (*Id.*, and Transcript of Motion for Summary Disposition of March 17, 2010, pp. 5-7.)² Contrary to plaintiff's representation in his response brief, Progressive never confirmed nor acknowledged that the claimed seizure in 2008 was related to the 2007 accident. (Plaintiff's Response Brief, pp. 3-4.)

Progressive filed its reply brief on or about February 19, 2010, noting several uncontested facts, to and including:

1. Plaintiff did not sustain a spinal cord injury in the motor vehicle accident of November 25, 2007;
2. The spinal cord injury resulting in plaintiff's quadriplegia was the result of

¹Since the Court of Appeals decision of January 10, 2012, it has been determined that in fact the motorcycle was insured.

²Plaintiff asserted that he never experienced any sort of seizures prior to the 2007 accident. (Exhibit 2, Plaintiff's Deposition, pp. 13-14; and Plaintiff's Response Brief to Partial Summary Disposition, p. 2.)

the September 19, 2008 motorcycle accident;

3. All claims for first party no-fault benefits arising out of the motor vehicle accident of November 2007, totaling \$24.25 for medical mileage, were paid by Progressive and there were no further claims submitted arising from the 2007 motor vehicle accident. New claims relating to a spinal cord injury were submitted following the September 2008 motorcycle accident;³
4. Progressive never agreed that plaintiff sustained a seizure arising out of the November 2007 motor vehicle accident nor did Progressive agree that plaintiff suffered from a seizure immediately prior to his motorcycle accident on September 19, 2008.

On March 17, 2010, oral argument on Progressive's motion for partial summary disposition was held in the Oakland County Circuit Court before the Honorable Rae Lee Chabot.

At the hearing, counsel for Progressive made the following argument with the salient point that the issue is not what caused the accident in regard to entitlement to first party no-fault benefits:

MR. BORIN: Plaintiff's argument is that the injuries that he sustained in the original accident were a causative factor in his second accident. But no-fault benefits are paid without regard to fault. It doesn't matter what caused the accident. He's not – he's not alleging that he aggravated a pre-existing injury. That might be a – a – a cause of action, that might have a color of factual dispute. There is no factual dispute here.

He sustained no injury in the November 2007 accident that has – that directly has resulted in an injury to his spinal cord, and the defendant's entitled to summary disposition.

³Plaintiff's medical care and expenses have been paid by MASSA, plaintiff's father's health insurance carrier.

At the conclusion of the argument, Judge Chabot ruled:

THE COURT: Okay. This is defendant Progressive Insurance Company's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). In accepting the facts in the complaint as true the elements of the claim have been satisfied. Plaintiff has set forth a claim upon which relief can be granted.

Further, reviewing the evidence in the light most favorable to plaintiff it is possible for a reasonable juror to determine the second accident was caused by the injuries suffered in the first. I'm not saying it's the best case and I'm not saying that you will necessarily prevail, but it does survive a summary disposition. So I'm denying the motion for summary disposition.

Transcript, pp. 7-8.

On March 31, 2010, Progressive filed a motion for rehearing and reconsideration of the denial of partial summary disposition. On August 19, 2010, the trial court denied Progressive's motion.

Progressive filed an interlocutory delayed application for leave to appeal from the denial of the motion for partial summary disposition. On September 21, 2010, the Court of Appeals denied the delayed application.

Progressive filed a timely motion for reconsideration and on November 1, 2010, and the Court of Appeals granted the motion and granted the delayed application for leave to appeal.

On January 10, 2012, the Court of Appeals released its unpublished, per curiam, two to one decision affirming the trial court's order. The Court of Appeals analysis focused on the causal nexus requirement of the No-Fault Act that a party's injuries "arise out of the ownership, maintenance or use of a motor vehicle as a motor vehicle," to qualify for PIP benefits. Relying on the decisions of *Shinabarger v Citizens Ins. Co.*, 90 Mich 307, 313 (1979) and *Scott v State Farm Mut. Automobile*

Ins. Co., 278 Mich App 578, 586 (2008), lv. den. on recon, 483 Mich 1032 (2009). The Court of Appeals determined that even though the motorcycle accident constituted a separate independent cause of Plaintiff's injuries, this did not preclude entitlement to no-fault benefits. Drawing on the *Shinabarger* and *Scott* decisions, the Court of Appeals seemingly concluded that almost any causal connection will suffice for the "arising out of" standard by suggesting that had Plaintiff injured his spinal cord by falling from a ladder during a seizure, Progressive "would potentially bear liability." Under this analysis, the No-Fault requirement of "arising out of a motor vehicle accident" is for all practical purposes eliminated as suggested by the following: "That Ian instead suffered a seizure while riding a motorcycle does not, standing alone, eliminate any connection between his 2007 head injury and the 2008 events." (See Court of Appeals Opinion p. 5.)

C. GROUNDS FOR GRANTING APPLICATION

Based on MCR 7.301(B)(3) and (5), this application presents issues involving legal principles of major significance to the state's jurisprudence. To the extent that the Court of Appeals decision in this case is inconsistent with decisions of this Court and Court of Appeals decisions concerning the "arising out of" standard for first party no-fault benefits, the Court of Appeals decision conflicts with those prior decisions. This case also involves the principles regarding the foundational requirement for entitlement of first party benefits under MCL 500.3101 and MCL 500.3105(1) that there must be a relationship between the injury and the vehicular use of a motor vehicle. Otherwise, the temporal continuum for receipt of no-fault benefits is unlimited contrary to the very language of the No-Fault Act.

STANDARD OF REVIEW

Progressive brought its motion for partial summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, and MCR 2.116(C)(10), no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

This Court reviews de novo the trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337 (1998).

A. Legal Standard Under MCR 2.116(C)(8).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*, at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

B. Legal Standard under MCR 2.116(C)(10).

In *Maiden v Rozwood*, 461 Mich 109, 119-121, the Court articulated the standard of review for a 2.116(C)(10) motion:

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co.*, 451 Mich 358, 547 NW2d 314 (1996).

* * *

A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.

* * *

The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

Further, review is limited to the evidence that had been presented to the Court at the time the motion was decided. *Innovative Adult Foster Care, Inc. v Ragin*, 285 Mich App 466, 476 (2009).

ARGUMENT

PLAINTIFF WAS IN AN AUTOMOBILE ACCIDENT IN 2007. IN 2008, WHILE RIDING HIS MOTORCYCLE, HE SWERVED OVER FOUR LANES STRIKING A PARKED CAR RESULTING IN HIS INJURIES. PLAINTIFF CLAIMED THAT A CONDITION CAUSED BY THE 2007 ACCIDENT RESULTED IN THE 2008 MOTORCYCLE ACCIDENT. THE COURT OF APPEALS HELD THAT THE PHYSICAL CONDITION FROM THE 2007 MOTOR VEHICLE ACCIDENT SATISFIED THE "ARISING OUT OF" REQUIREMENT OF MCL 500.3105 FOR NO-FAULT BENEFITS CLAIMED FOR THE 2008 MOTORCYCLE ACCIDENT INJURIES. THE COURT OF APPEALS DECISION IS CONTRARY TO THE NO-FAULT ACT'S REQUIREMENT THAT THE CAUSAL CONNECTION BETWEEN AN INJURY AND THE USE OF A MOTOR VEHICLE BE MORE THAN INCIDENTAL, FORTUITOUS, OR BUT/FOR TO CLAIM NO-FAULT BENEFITS.

While the Plaintiff's motorcycle has been determined to have been insured at the time of the accident, the issue still remains as to the proper framework for evaluating whether his injuries arose out of a motor vehicle accident for purposes of first party no-fault benefits. Given the holding of the Court of Appeals in this case, the Court's test for "arising out of" results in first party benefits for injuries that are simply too attenuated from a motor vehicle accident to be sufficiently identified as "arising out of" a motor vehicle accident.

MCL 500.3105 of the No-Fault Act provides the general statutory framework for payment of first party no-fault benefits, and in general, payment of benefits are due without regard to fault:

**MCL 500.3105 Personal protection benefits, existence, no-fault;
definitions, bodily injury, accidental injury
Sec.3105**

1. 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.

2. Personal protection insurance benefits are due under this chapter without regard to fault.

A motorcyclist is not required to have no-fault personal insurance protection (PIP). But, a motorcyclist injured in an accident involving a motor vehicle is entitled to receive no-fault PIP benefits. A motorcycle is excluded from the definition of motor vehicles under the No-Fault Act, MCL 500.3101(2)(e), *Peck v Auto Owners Ins. Co.*, 112 Mich App 329 (1982). So a person injured while riding a motorcycle is not entitled to no-fault benefits unless that person was injured in an accident involving a motor vehicle, even though the motorcycle does not qualify as a motor vehicle under the No-Fault Act. *Sanford v Ins. Co. of North America*, 151 Mich App 747 (1986). The point being that this case involves a specific motorcycle accident that is ordinarily not subject to no-fault reimbursement.

Under MCL 500.3106 of the No-Fault Act, parked motor vehicles are excluded from no-fault coverage, unless one of three exceptions is demonstrated:

MCL 500.3106. Parked motor vehicles, exclusion from coverage
Sec. 3106

1. Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
 - a. The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
 - b. Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process;

- c. Except as provided in subsection (2) . . . , the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

Thus, while the insured status of the motorcycle is no longer an issue, the identical analysis regarding the “arising out of” element necessary for entitlement to no-fault first party benefits still applies. That is, as the motorcycle accident did not arise out of the operation of a motor vehicle due to the fact that a parked motor vehicle was involved and motorcycle accidents are not motor vehicle accidents pursuant to 500.3101(d), Plaintiff is not entitled to receive no-fault benefits for injuries sustained from the 2008 accident.

Plaintiff’s sole argument is that the claimed injury suffered in the 2007 accident, an alleged seizure disorder, was a causative factor in the occurrence of the second accident involving the motorcycle. Yet, under the No-Fault Act, no fault benefits are paid without regard to fault no matter what caused the accident. MCL 500.3105(2). The analysis is concerned not with what caused the accident, but whether the bodily injury (here a spinal cord injury) arose out of an accident. If causation of the accident is to be interjected into the consideration of such cases then insurers could point to causative factors such as intoxication in declining to pay benefits. Causation is not relevant to the analysis and ultimately interjects concepts of fault prohibited by MCL 500.3105(2).

Therefore, the question is, did the accidental bodily injury arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle (the November 2007 accident) or did it arise out of the ownership, operation, maintenance or use of the motorcycle? The answer is obvious that it arose out of operation of the motorcycle, a new accident resulting in a new bodily injury. Therefore, the conclusion is that Mr. McPherson is not entitled to no-fault benefit coverage for injuries from the 2008 motorcycle accident.

Motorcycle accidents are contemplated as separate, distinct events under the no-fault statute. The statute defines a motorcycle accident under MCL 500.3101(d) to mean a loss: "Involving the ownership, operation, maintenance or use of a motorcycle as a motorcycle, but not involving the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle."⁴

Thornton v Allstate Ins. Co., 425 Mich 643, 659-666 (1986) is directly applicable to the instant situation. In that case, a taxicab driver sought first party no-fault benefits for gunshot wounds he sustained in the course of an armed robbery by a passenger. As framed by this Court, the sole issue was whether the injury sustained by Mr. Thornton arose out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle for purposes of no-fault personal injury protection benefits. *Thornton*, at pp. 645-646. This Court then turned its analysis to MCL 500.3105(1) acknowledging its obligation to discern the intent of the legislature in enacting the relevant provision. *O'Donnell v State Farm Mut. Ins. Co.*, 404 Mich 524, 544 (1979). After examining the historical meaning of "arising out of the ownership, maintenance or use" of a vehicle in cases from other jurisdictions, this Court resolved in *Thornton* as follows:

In drafting MCL§ 500.3105(1); MSA § 24.13105(1), the Legislature limited no-fault PIP benefits to injuries arising out of the "use of a motor 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 as 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." *Miller v Auto Owners, supra*. Therefore, the first consideration under

⁴Under MCL 500.3101(2)(f), the statute also defines a motor vehicle accident to mean a loss involving the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle regardless of whether the accident also involves the ownership, operation, maintenance or use of a motorcycle as a motorcycle.

MCL § 500.3105(10); MSA § 24.13105(1), must be the relationship between the injury and the vehicular use of a motor vehicle. Without a relation that is more than “but for,” incidental or fortuitous, there can be no recovery of PIP benefits.

* * *

The mere foreseeability of an injury as an incident to a given use of a motor vehicle is not enough to provide no-fault coverage where the injury itself does not result from the use of the motor vehicle as a motor vehicle. Likewise, the mere absence of foreseeability would not necessarily preclude coverage.

* * *

In this case, the injuries suffered by Mr. Thornton are not covered by PIP benefits under the no-fault policy because there was, at most, no more than an incidental and fortuitous casual relation between his injuries and the use of a motor vehicle as a motor vehicle.

Thornton, at pp. 659-660.

This Court in *Thornton* found that the injuries sustained by Mr. Thornton were no more than incidental, fortuitous, or but for. *Thornton*, at p. 660. Similarly, in this matter, it is beyond dispute that Plaintiff’s severe injuries did not arise from the 2007 motor vehicle accident. Rather, they arose solely from the separate 2008 motorcycle accident which was not a motor vehicle accident.

There is no question that plaintiff’s spinal cord injury was occasioned by the motorcycle accident, and not the earlier accident involving the motor vehicle operated by his brother. This is substantiated by the fact that there was no treatment or care claim submitted in relation to any spinal cord injury as a result of the earlier accident. Moreover, the fact that the later motorcycle accident is not even mentioned in the plaintiff’s complaint underscores the point that plaintiff is attempting to avoid the statutorily mandated outcome in this case that he is not entitled to first party no-fault benefits in relation to his spinal cord injury.

In his response brief in the trial court, plaintiff did not contend that he had any spinal cord injury arising out of the 2007 accident; rather plaintiff contended that he had a "sensation" just prior to the motorcycle accident, similar to the sensation he had following the November 2007 automobile accident inferentially resulting in the loss of control of his motorcycle.

The *Thornton* analysis was applied in the Michigan Court of Appeals decision of *Kochoian v Allstate Ins. Co.*, 168 Mich App 1 (1988), where a truck driver brought an action to recover no-fault benefits for a heart attack which allegedly arose out of an accident three months earlier. As a consequence of the accident, Mr. Kochoian sustained broken bones in his right arm and left ankle. Three months later during treatment for his injuries, Plaintiff felt an unusual pressure in his chest which apparently was a heart attack. The trial court found Plaintiff's heart attack did not arise out of the accident and the Court of Appeals affirmed.

The Court of Appeals found that Plaintiff's heart attack, "far from being caused by his accident," instead constituted a "independent disabling injury that prevented him from working." *Kochoian*, at p. 916. In commenting on the "arising out of" requirement, the Court of Appeals observed:

We reach this conclusion while well aware that the term "arising out of" does not require a showing of proximate causation, but rather something more than a showing that the causal connection between the injury and the use of the motor vehicle was merely incidental, fortuitous, or "but for." *Thornton v Allstate Ins. Co.*, 425 Mich. 643, 391 NW2d 32 (1986);

* * *

Whether an injury may be characterized as "arising out of" the use of a motor vehicle for purposes of no-fault personal protection benefits, and thus based on a relationship with the use of the motor vehicle which is more than merely incidental, fortuitous or "but for" with that

use – or, put differently, is not so remote or attenuated as to preclude a finding that it arose out of the use of a motor vehicle -- is a determination which depends on the unique facts of each case and, thus, must be made on a case-by-case basis.

Kochoian, at p. 8.

Kochoian also acknowledged that it was appropriate for a court to consider the length of time between the accident and the injury when faced with a complex issue apprehending the causative link, if any, between the motor vehicle and the injury. The Court of Appeals noted:

It is only logical to conclude that, as the period of time between accident and injury increases, so likewise may increase the number of possible other causes for the injury sustained.

Kochoian, at p. 10.

Despite the fact that there needs to be something more than fortuitous, incidental or but for to obtain no-fault benefits, the Court of Appeals decision disregarded this causal requirement between the injury and the use of a motor vehicle. This is most evident in the Court's suggestion that if Plaintiff's injury occurred in 2008 by falling from a ladder during a seizure, Progressive would potentially bear liability. See Court of Appeals decision, pp. 4-5. Or, in other words, as viewed by the Court of Appeals, the 2007 motor vehicle accident and the claimed seizure disorder is one continuous event such that any time that Plaintiff is subsequently injured and it is claimed that the seizure disorder is a possible precipitating cause with no motor vehicle involvement, this would meet the requirement of arising out of the use of a motor vehicle. Apparently, the Court of Appeals reached its conclusion by relying on *Scott v State Farm Mutual Ins. Co.*, 278 Mich App 578, 586 (2008), *lv. den. on recon*, 483 Mich 1032 (2009).

In *Scott, supra*, Plaintiff sustained injuries in a 1981 automobile accident and sought benefits

for the costs of cholesterol medication. Over the years, the Plaintiff developed high cholesterol allegedly as a consequence of her injuries that limited her ability to lead a normal, active life. The Court of Appeals in *Scott* affirmed the trial court's denial of State Farm's motion for summary disposition that it was not obligated to pay for Plaintiff's cholesterol medication because the need for the cholesterol medication did not arise out of the 1981 accident. In reaching its conclusion, the Court of Appeals in *Scott* referenced *Bradley v Detroit Automobile Ins. Exchange*, 130 Mich App 34, 42 (1983) for the proposition that the use of the motor vehicle need only be one of the causes of the injury and that there may be other independent causes such that "almost any causal connection or relationship will do." See *Scott*, at p. 585-586.

On December 3, 2008, this Court in *Scott* determined that in lieu of granting leave to appeal, "We vacate the portion of the judgment of the Court of Appeals that stated, with respect to the causation test under MCL 500.3105(1), 'almost any causal connection or relationship will do,' [citing *Shinabarger v Citizens Mutual Ins. Co.*, 90 Mich App, 307, 313-314 (1979); and *Bradley v Auto Interinsurance Exchange*, 130 Mich App 34, 42 (1983)]. *Scott v State Farm*, 482 Mich 1074 (2008). Once more, this Court stated that, "To the extent of that description of the required causal connection, those cases are inconsistent with the other authorities relied upon by the Court of Appeals such as [*Thornton v Allstate Ins. Co.*, *supra*, and *Kochoian v Allstate Ins. Co.*, *supra*.] However, on June 5, 2009, this Court granted for reconsideration of the December 3, 2008 order which it vacated. See *Scott v State Farm Mut. Ins. Co.*, 483 Mich 1032 (2009).

This is yet one more reason to review this matter given that this Court has expressed concerns with the application of the "arising out of" standard as articulated by the Court of Appeals.

While the Court of Appeals in this case relied upon *Scott* in arriving at its decision as to the

causation requirement, *Scott* actually should be confined to issues regarding medical causation and the Court of Appeals expanded the scope of the inquiry beyond the appropriate legal application of the “arising out of” standard. In addition, in the present case, Plaintiff’s quadriplegia – whether involving hitting a parked car or falling from a ladder – was not from a motor vehicle accident. At most, the connection to the 2007 motor vehicle accident is a but for causal relationship and thus no more than “incidental, fortuitous or but for.”

In this matter, the Court of Appeals analysis fails to conform to the requirements of the “arising out of” standard under § 3105(1) for entitlement to no-fault benefits. There is no dispute the Plaintiff was involved in two separate and distinct vehicle accidents that produced distinct bodily injury – 1) on November 25, 2007, involving his brother’s motor vehicle; and 2) nearly 10 months later on September 19, 2008, involving his motorcycle. It is further undisputed the spinal cord injury resulting in Plaintiff’s quadriplegia resulted from the September 19, 2008, motorcycle accident. These undisputed facts demonstrate Plaintiff’s spinal cord injury failed to meet the requirement that the injury arose out of the 2007 motor vehicle accident, or in other words, was more than incidental, fortuitous or but for.

In addition, the Court of Appeals opinion as to the “arising out of” standard conflicts with its earlier decision in *Keller v Citizens Ins. Co.*, 199 Mich App 714, 715-716 (1992). In that case, the Plaintiff claimed emotional distress resulting from the death of her son in a motor vehicle accident. The Court of Appeals applied *Thornton, supra*, and explained:

For plaintiffs to recover no-fault benefits, Margaret Keller’s injury must have arisen out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. MCL 500.3105 . . . In order for an injury to arise out of the use of an automobile, there must be more than an incidental or fortuitous connection between the injury and the

use of the automobile. *Thornton, [supra]* . . . Moreover, it is insufficient to show that, but for the automobile, the injury would not have occurred. *Auto Owners Ins. Co., v Rucker*, 188 Mich App 125, 127; 469 NW2d 1 (1991). Thus “[t]he automobile must not merely contribute to the cause the condition which produces the injury, but must, itself, produce the injury.” *Thornton, supra*, p. 651, quoting 6B Appleman, Insurance law & Practice (Buckley ed), § 4317, p. 369.

The Court of Appeals concluded that Ms. Keller’s emotional distress resulting from the death of her son in a motor vehicle accident had only a “but for,” incidental and fortuitous connection to the use of an automobile. Therefore, it was outside the scope of coverage intended by MCL 500.3105. *Keller, supra*, at p. 716.

Similarly here, the motor vehicle accident in 2007 did not produce Plaintiff’s spinal cord injury. If the Court of Appeals analysis and reasoning is accepted, then the requirement that the injury arising from motor vehicle accident be more than “but for,” incidental and fortuitous is eliminated. This is reflected in the Court of Appeals suggestion that if Plaintiff injured his spinal cord in 2008 by falling from a ladder during a seizure, this would be within the scope of the “arising out of” requirement of the No-Fault Act for payment of first party no-fault benefits. This is contrary to the expressed intent of the No-Fault Act as reflected in 3105(1)’s “arising out of” requirement.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant Progressive Michigan Insurance Company respectfully requests that this Court grant its application for leave to appeal and peremptorily or upon final determination, reverse the Court of Appeals decision and vacate the order denying Progressive's motion for partial summary disposition and direct that an order be entered granting Progressive's motion for plaintiff's claim for no-fault benefits for injuries sustained in the 2008 motorcycle accident that did not arise out of the use of a motor vehicle, together with any and such further relief as this Court deems necessary and just.

Respectfully submitted,



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