

STATE OF MICHIGAN
IN THE SUPREME COURT

IAN MCPHERSON,

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: 144666
Court of Appeals No: 299618
Lower Court No: 08-095926-NI

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**DEFENDANT-APPELLANT PROGRESSIVE MICHIGAN
INSURANCE COMPANY'S SUPPLEMENTAL BRIEF IN
SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL**

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**DEFENDANT-APPELLANT PROGRESSIVE MICHIGAN
INSURANCE COMPANY'S SUPPLEMENTAL BRIEF IN
SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL**

Per this Court's September 21, 2012 order pertaining to Progressive's application for leave to appeal and directing that the application be scheduled for oral argument, Progressive submits this optional supplemental brief in support of its application for leave to appeal.

As discussed in its application, the following is undisputed in this matter:

1. The plaintiff was involved in two separate vehicular accidents.
2. In the first accident on November 25, 2007, involving his brother's motor vehicle, Plaintiff did not sustain a spinal cord injury.
3. In the September of 2008, while riding his motorcycle, Plaintiff swerved across four lanes and rear-ended a parked motor vehicle resulting in his quadriplegic condition and for which he seeks first party no-fault benefits from Progressive.
4. That due to the circumstances of the motorcycle accident, Plaintiff does not qualify for no-fault benefits because the parked motor vehicle was not parked in such a way as to cause an unreasonable risk of bodily injury. MCL 500.3106(1)(a).
5. Recognizing that Plaintiff has no claim for no-fault benefits for his spinal cord injuries arising from the 2008 motorcycle accident, he has asserted a right for no-fault benefits from the 2007 accident where he sustained no such injuries

In asserting his claim for no-fault benefits for the 2007 accident, he claims to have suffered a condition from that accident which caused the 2008 motorcycle accident. The Plaintiff's argument is ultimately unavailing.

The issue on appeal, which was either overlooked or confused by the lower courts, was not what caused the accident in regard to entitlement to first party no-fault benefits, but rather whether his spinal cord injury arose out of the use of a motor vehicle as a motor vehicle in the 2007 accident or arose out of the use of his motorcycle in the 2008 accident. In other words, it is which accident resulted in Plaintiff's injuries in this matter, not what caused the accident.

For the Court's benefit, MCL 500.3105(1), regarding payment of first party no-fault benefits is set forth:

**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*. [Italics added.]

The Court of Appeals was blurring the distinction that no-fault benefits are payable for *injuries* without regard to fault for the accident, with *fault for the accident* as reflected in the analysis on p. 4 of the majority opinion:

Drawing on case law from other jurisdictions, the *Shinabarger* [*v Citizens Insurance Co.*, 90 Mich App 307, 313 (1979)] the Court emphasized that "the relationship between use of the vehicle and the injury need not approach proximate cause," and that "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." . . .

Viewed in a light most favorable to Ian, sufficient evidence establishes *a question of fact concerning whether the 2008 motorcycle crash* 'originated from,' had its 'origin in,' 'grew out of,' or 'flowed from,' the 2007 car accident."

Court of Appeals Opinion, p. 4.

This passage from the Court of Appeals opinion demonstrates the Court of Appeals confusion in regard to conditions for payment for first party no-fault benefits. The no-fault statute plainly states under 3105(2) that no-fault benefits are paid without regard to fault. Yet, the Court of Appeals' analysis is focused on the *cause* of the 2008 motorcycle crash as opposed to whether the injuries arose out of the use of the motor vehicle as a motor vehicle, here the 2008 motorcycle accident where Plaintiff sustained his injuries after he struck a parked motor vehicle. The Court of Appeals again quotes *Shinabarger* noting that the existence of an independent cause for a claimant's *injuries* does not bar recovery under the no-fault act: "Where the use of a vehicle is one of the causes of an injury, a sufficient causal connection is established even though there exists an independent cause. . . ." *Shinabarger*, 90 Mich App, p. 313 First, the Court of Appeals fails to analyze what injury is being referenced. It is obvious that the injury involved in this case is the injury sustained by the Plaintiff from the motorcycle accident and not the injuries from the 2007 accident. Hence, the injury causal connection or "arising out of" is from the 2008 motorcycle accident, because in the 2007 accident, Plaintiff sustained no spinal cord injury.

The majority opinion in the Court of Appeals then acknowledged that, "The motorcycle accident constitutes the most proximate cause of Ian's spinal cord injury" but then reconfigures its analysis with the observation that: "Rather the statute commands, an insurer pay benefits for accidental *bodily injuries* "arising out of the . . . operation, or use of a motor vehicle as a motor vehicle, 'subject to certain limitations.'" [Italics added.] The Court of Appeals shifting of its analysis from cause of the accident to cause of injuries ultimately underlies the fundamental problem with the opinion in that personal insurance benefits are due without regard to fault or causation of the

accident. Or as is observed by the dissenting opinion in the Court of Appeals decision: “There is no question that Ian was operating [a motorcycle] *at the time he sustained the injuries for which he seeks coverage*, [and] the trial court erred in failing to grant Progressive summary disposition. [Italics and emphasis in original.]

The dissent also recognized the core issue where it is observed: “The attempt to draw a connection to the 2007 [accident] requires a discussion of causation and fault – neither of which is relevant under our No-Fault Statute.” Dissenting Opinion, p. 4. Indeed, MCL 500.3105 predicates first party no-fault benefits for bodily injury that “arises out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.” Simply stated, the bodily injury in this case, Plaintiff’s quadriplegia, arose out of the operation of his motorcycle. As explained in Progressive’s application, however, the motorcycle accident did not arise out of the operation of a motor vehicle due to the fact that the parked motor vehicle was not parked in such a way as to cause unreasonable risk of the bodily injury which occurred and motorcycle accidents are not otherwise motor vehicle accidents pursuant to MCL 500.3101(2)(d). Also see, MCL 500.3106(1)(a).

Under the statutory framework, the Court of Appeal’s majority’s observation that “Ian has established a triable issue of fact whether his spinal injuries arose from Christopher’s operation of the vehicle involved in the 2007 accident” is in derogation of the statutory language reflected in MCL 500.3105. Yet to formulate the issue in such a way answers the issue that this Court is presently reviewing. It is undisputed that Plaintiff’s spinal cord injuries did not involve the 2007 motor vehicle accident.

If, as Plaintiff in the underlying courts contends, causation of the accident is to be interjected into the consideration of no-fault benefit payment, then insurers could point to causative factors, such

as intoxication or a purported defect in the vehicle in declining to pay benefits. Causation is not relevant to this analysis and contradicts MCL 500.3105(2).

In sum then, Defendant-Appellant Progressive Michigan Insurance Company respectfully requests that this Court grant its application for leave to appeal, and either peremptorily or after plenary review, direct that summary disposition be entered in favor of Progressive together with any and such further relief as this Court deems necessary and just.

Respectfully submitted,



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