

STATE OF MICHIGAN  
IN THE SUPREME COURT

DANIEL KEMP,

Plaintiff-Appellant,

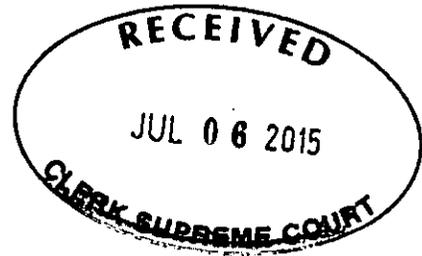
vs.

FARM BUREAU GENERAL  
INSURANCE COMPANY OF  
MICHIGAN, a Michigan corporation,

Defendant-Appellee.

MSC Case No. 151719

COA Case No. 319796  
Wayne County Circuit Court  
Case No. 13-008264-NF



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**DEFENDANT-APPELLEE'S BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S  
APPLICATION FOR LEAVE TO APPEAL**

**PROOF OF SERVICE**

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## ARGUMENT

### **I. THERE IS NO REASON FOR THIS COURT TO REVIEW THIS CASE BECAUSE THE DECISION OF THE COURT OF APPEALS AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION FOR THE DEFENDANT-APPELLEE WAS NOT CLEARLY ERRONEOUS AND DOES NOT CONFLICT WITH ANY SUPREME COURT DECISION OR OTHER DECISIONS OF THE COURT OF APPEALS**

There is no reason for this Court to review this case. First, the decision of the Court of Appeals was not clearly erroneous. "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *See, eg, Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000)(citation omitted). In this case, the well-reasoned decision of the Court of Appeals is entirely consistent with the statutory language of MCL 500.3106(1)(b) and both that court and this Court's prior decisions interpreting that provision. There is simply no basis to conclude with a definite and firm conviction any mistake was made. Furthermore, the decision does not conflict with this Court's decisions in *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997) or *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998). Rather, it fits directly within the test delineated in *Putkamer* as further clarified by *McKenzie*. *Putkamer* set forth the parameters to determine when an injury falls within the parked vehicle exception of MCL 500.3106(1), to-wit:

(1) His conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle, and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental fortuitous, or but for.

*Putkamer, supra* at 635-36. This Court in *McKenzie* specifically stated with respect to the second part of the test - use of the parked motor vehicle as a motor vehicle - that the intended coverage of injuries under the No-Fault Act and specifically parked vehicle exception are for

those only resulting from the use of a motor vehicle when it is engaged in its transportational function. *McKenzie, supra*, at 220. The circumstances of this case fit precisely within that clarification as the Court of Appeals correctly noted, “[t]he injury had nothing to do with ‘the transportational function’ of his truck. . . and [thus] did not arise out of the use of a motor vehicle as a motor vehicle – plaintiff’s truck which he used as a storage space for his personal items, was merely the site where the injury occurred, and any causal relationship between the injury and the parked truck was ‘incidental.’” Opinion, at 3.

Contrary to Plaintiff-Appellant’s argument, the Court of Appeals did not “tack on” another requirement to the parked vehicle exception. The court’s references to a requirement of fulfilling the transportational function of the vehicle is simply a reiteration of the fact that just because an injury occurs somewhere in or near a vehicle does not automatically make it compensable under the No-Fault Act. The injury still must arise out of the “ownership, operation, maintenance or use of a parked vehicle as a motor vehicle” so indeed that needs to be the first question asked – was the vehicle being used as a motor vehicle – i.e. fulfilling its transportational function. As the majority aptly concluded, the Plaintiff’s injury did not arise out of the use of the motor vehicle as a motor vehicle – the truck was simply a storage space for Plaintiff’s personal items and happened to be the site where the injury occurred. Simply because it was his truck does not make his injury compensable under the No-Fault Act. The causal relationship between his injury and the vehicle was simply incidental.

“Section 3106(b) recognizes that some parked vehicles may still be operated as motor vehicles, creating a risk of injury from such use as a vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the vehicle as a motor vehicle .

. . Each of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle. The underlying policy of the parking exclusion is that, except in three general types of situations, a parked car is not involved in an accident *as a motor vehicle*. It is therefore inappropriate to compensate injuries arising from its non-vehicular involvement in an accident within a system designed to compensate injuries involving motor vehicles as motor vehicles.” *Miller v Auto-Owners Ins Co*, 411 Mich 633; 309 NW2d 544 (1981).

Hence, with that established contextual framework, Plaintiff-Appellant’s pick-up truck at the time of his experiencing his injury, having been parked, was no differently involved as an object than if it was any other any stationary object (such as a tree, sign post or boulder, to cite the Court’s language; or perhaps more appropriate to the facts: a shed, a cupboard, or a wheelbarrow) would be involved.

Furthermore, Plaintiff-Appellant’s lifting of his personal effects from his pick-up truck does not fit within the definition of “loading and unloading” and a causal link as has been interpreted by this Court and the Court of Appeals. In *Shellenberger v Ins Co of North America*, 182 Mich App 601; 452 NW2d 892 (1990) the Court of Appeals upheld denial of no-fault PIP benefits to a truck driver who ruptured a disk when reaching to move his briefcase within the interior of his delivery truck. Although the truck had been started and therefore not strictly parked in that term’s narrowest sense, the court construed the application of MCL 500.3105, but the court’s reasoning is equally applicable as applied to construction of MCL 500.3106.

The *Shellenberger* court initially cited *Thornton v Allstate Ins Co*, 425 Mich 643, 659-60; 391 NW2d 320 (1986), as explaining the requisite causal connection between a motor vehicle and an injury:

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 Ins. Co.*, 411 Mich. 633, 640-641, 309 N.W.2d 544 (1981). Therefore, the first consideration under MCL 500.3105(1); 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 *Shellenberger* court applied that governing application principle to its facts as follows:

"We are not persuaded that the test and underlying rationale of *Thornton* should be so readily discarded. In the instant case, it may have been necessary for plaintiff to carry the briefcase in the fulfillment of his job duties as a truck driver, but it does not follow that those duties were congruent with the operation or use of the truck as a motor vehicle. Similarly, moving the briefcase by reason of the configuration of the interior of the truck cannot be said to result from some facet particular to the normal functioning of a motor vehicle. The need to make similar movements in order to reach for a briefcase routinely occurs in offices, airports, homes, conference rooms, courtrooms, restaurants, and countless other settings where no-fault insurance does not attach. The fact that plaintiff's movement in reaching for the briefcase occurred in the interior of the truck does not transform the incident into a motor vehicle accident for no-fault purposes. See also *Krause v. Citizens Ins. Co. of America*, 156 Mich.App. 438, 440, 402 N.W.2d 37 (1986) (accidental discharge of gun placed on top of car; held, summary disposition dismissing claim for PIP benefits affirmed); *Gooden v. Transamerica Ins. Corp. of America*, 166 Mich.App. 793, 805-806, 420 N.W.2d 877 (1988), lv. den. 431 Mich. 862 (1988) (plaintiff fell from bed of truck used to position ladder against a house; held, judgment of no cause of action dismissing claim for PIP benefits affirmed). See also *Michigan N.R. Co. v. Auto-Owners Ins. Co.*, 176 Mich.App. 706, 440 N.W.2d 108 (1989)."

*Shellenberger, supra* at 604.

The Court of Appeals has since applied the same principles in construction of MCL 500.3106 in another instance of a no-fault PIP claimant reaching into a motor vehicle to move

property when a shotgun discharged, causing him injury. *Estrada v Farmers Ins Exchange*, unpublished per curiam opinion of the Court of Appeals 217520 (July 21, 2000). The court once again looked to *Putkamer* as having established the context in which MCL 500.3106 was to be interpreted as applied to parked vehicle PIP claim scenarios:

[W]here a claimant suffers an injury in an event related to a parked motor vehicle, he must establish that the injury arose out of the ownership, operation, maintenance, or use of the parked vehicle by establishing that he falls into one of the three exceptions to the parking exclusion in subsection 3106(1). In doing so under § 3106, he must demonstrate that (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle *as a motor vehicle*; and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for. *Putkamer v Transamerica Insurance Corp.*, 454 Mich 626, 635-636, 563 NW2d 683 (1997)

The *Estrada* Court found that “the involvement of the parked vehicle in his [plaintiff’s] injury was not directly related to its character as a motor vehicle; rather it was merely incidental, fortuitous, or ‘but for.’ *Id.* at 636; see also *Shellenberger v. Ins Co of North America*, 182 Mich.App 601, 603-604; 452 NW2d 892 (1990); *Krause v. Citizens Ins Co of America*, 156 Mich.App 438, 440; 402 NW2d 37 (1986). Here, the motor vehicle was merely the site of the accident.”

If the movement of property within a parked vehicle, unrelated to the vehicle itself or its operation, maintenance or use is to be construed as not within the loading or unloading exception of MCL 500.3106, consistency would also dictate that setting down on adjacent pavement objects removed from a vehicle would also not present a situation falling within the exception. Plaintiff-Appellant’s claimed injury, based on his own sworn description of the circumstances, happened to occur while he was twisting to his right and setting down personal items he had in his hand while he stood next to his vehicle. It did not occur while he was

positioning or contorting his body within or around his truck in order to move or remove anything within it. As the Court in *Shellenberger, supra*, noted, his activity could have occurred in an office, an airport, his home, a conference room, a courtroom, a restaurant, and countless other settings where no-fault insurance does not attach. In the broadest sense, that his unfortunate injury occurred in his driveway where he had parked his truck is no more than incidental, fortuitous, or whatever might be meant by the appellate court decision-makers in their use of the term “but for.”

In conclusion, the decision of the Court of Appeals was not clearly erroneous nor does it conflict with any decisions of this Court or the Court of Appeals. Its decision affirming the trial court’s grant of summary disposition for the Defendant-Appellee must stand.

**RELIEF REQUESTED**

Defendant-Appellee respectfully requests this Court deny Plaintiff-Appellant’s Application for Leave to Appeal or, in the alternative, affirm the decision of the Court of Appeals, and enter any other relief this Court deems appropriate, together with all costs and attorney fees sustained on appeal.

Respectfully Submitted,

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