

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

Appeal from the Court of Appeals  
(Beckering, P.J., and Cavanagh and Saad, JJ.)

---

Daniel Kemp,  
Plaintiff/Appellant,

Supreme Court Docket 151719

v.

Court of Appeals Docket 319796

Farm Bureau General Insurance  
Company of Michigan,  
Defendant/Appellee.

Wayne Circuit 13-008264-NF  
Hon. Susan D. Borman

---

Marshall Lasser (P25573)  
MARSHALL LASSER, PC  
Attorney for Plaintiff-Appellant  
P.O. Box 2579  
Southfield, MI 48037  
(248) 647-7722  
mlasserlaw@aol.com

Mark L. Dolin (P45081)  
Valerie Henning Mock (P55572)  
KOPKA PINKIS DOLIN & EADS, PLC  
Attorneys for Defendant-Appellee  
33533 W. Twelve Mile Rd.  
Farmington Hills, MI 48331-5611  
(248) 324-2620  
mdolin@kopkalaw.com  
vhmock@kopkalaw.com

Liisa R. Speaker (P65728)  
Jennifer M. Alberts (P80127)  
SPEAKER LAW FIRM, PLLC  
Attorneys for Amicus Curiae  
Coalition Protecting Auto No-Fault  
230 N. Sycamore Street  
Lansing, MI, 48933  
(517) 482-8933  
lspeaker@speakerlaw.com  
jalberts@speakerlaw.com

George T. Sinas (P25643)  
Stephen H. Sinas (P71039)  
SINAS DRAMIS BRAKE BOUGHTON &  
MCINTYRE PC  
Co-Counsel for Amicus Curiae  
3380 Pinetree Rd  
Lansing, MI 48911  
(517) 394-7500  
georgesinas@sinasdramis.com  
stevesinas@sinasdramis.com

---

**AMICUS CURIAE BRIEF OF THE  
COALITION PROTECTING AUTO NO-FAULT**

---

**TABLE OF CONTENTS**

Index of Authorities ..... iii

Statement of Questions Presented ..... 1

Interest of Amicus Curiae ..... 2

Statement of Facts ..... 2

Argument ..... 4

    I. Section 3105(1) Establishes an “*Arising out of*” Causation Standard that has been Broadly Interpreted by our Appellate Courts to Further the Objective of the No-Fault Act to Provide Medical Expense Coverage to a Wide Range of Patients Sustaining Injury Related to Motor Vehicles, and that Objective Should not be Thwarted by an Overly Restrictive Definition of Causation Concepts such as “*Incidental*” or “*Fortuitous*” ..... 4

    II. The Legislature Has Made It Clear in the Parked Vehicle Provisions of Section 3106(1) that an Injury Involving a Parked Vehicle that Falls Within One of the Three Subsections of Section 3106(1) Qualifies for Benefits as Long as it Otherwise Satisfies the Requirements of Section 3105(1) . . . 13

    III. The Requirement that an Injury Be “Closely Related to the Transportational Function of a Motor Vehicle” Is a Judge-Made Rule that Cannot Be Interpreted or Applied in a Manner that Narrows Benefit Eligibility Under the Causation Standards Embodied in Sections 3105(1) and 3106(1) . . . . 15

    IV. The Plaintiff in this Case Satisfies the Causation Standards for Benefit Entitlement of Sections 3105(1) and 3106(1) and is, Therefore, Entitled to Recover No-Fault PIP Benefits Under the Act ..... 22

Conclusion ..... 23

Relief Requested ..... 23

## INDEX OF AUTHORITIES

### Cases:

<i>Barringer v Arnold</i> , 358 Mich 594; 101 NW2d 365 (1960) . . . . .	12
<i>Bourne v Farmers Ins Exch</i> , 449 Mich 193; 534 NW2d 491 (1995) . . . . .	7, 10
<i>Bradley v Detroit Auto Inter-Insurance Exchange</i> , 130 Mich App 34; 343 NW2d 506 (1983) .....	7
<i>Buckeye Union Ins Co v Johnson</i> , 108 Mich App 46; 310 NW2d 268 (1981) . . . . .	7
<i>Clute v General Acci Assurance Co</i> , 177 Mich App 411; 442 NW2d 689 (1989) . . . . .	7
<i>Detroit Med Ctr v Progressive Mich Ins Co</i> , 302 Mich 392; 838 NW2d 910 (2013) . . .	7
<i>Dowdy v Motorland Ins Co</i> , 97 Mich App 242; 293 NW2d 782 (1980) . . . . .	7
<i>Drake v Citizens Ins Co</i> , 270 Mich App 22; 715 NW2d 387 (2006) . . . . .	17-19
<i>Drake v Citizens Ins Co</i> , 480 Mich 918; 740 NW2d 239 (2007) . . . . .	19
<i>Gordon v Allstate Ins Co</i> , 197 Mich App 609; 496 NW2d 357 (1992) . . . . .	7
<i>Jones v Detroit Med Ctr</i> , 806 NW2d 304 (2011) . . . . .	12
<i>Kangas v Aetna Casualty &amp; Surety Co</i> , 64 Mich App 1; 235 NW2d 42 (1975) . . . . .	8
<i>Kirby v Larson</i> , 400 Mich 585; 256 NW2d 400 (1977) . . . . .	12
<i>Liberty Mut Ins Co v Allied Truck Equipment Co</i> , 103 Mich App 33; 302 NW2d 588 (1981) .....	7
<i>Mann v Detroit Auto Inter-Insurance Exchange</i> , 111 Mich App 637; 314 NW2d 719 (1981) .....	7
<i>Marzonie v Auto Club Ins Ass'n</i> , 441 Mich 522; 495 NW2d 788 (1992) . . . . .	10
<i>McKenzie v Auto Club Ins Ass'n</i> , 458 Mich 214; 580 NW2d 424 (1998) . . . . .	15-17
<i>McMillan v Vliet</i> , 422 Mich 570; 374 NW2d 679 (1985) . . . . .	12
<i>McPherson v McPherson</i> , 493 Mich 294; 831 NW2d 219 (2013) . . . . .	10

*Moreno v Farmers Ins Exch*, 454 Mich 878; 562 NW2d 199 (1997) . . . . . 10

*Morosini v Citizens Ins Co of Am*, 461 Mich 303; 602 NW2d 828 (1999) . . . . . 10

*Oostdyk v Auto Owners Ins Co*, 498 Mich 913; 870 NW2d 926 (2015) . . . . . 10-11

*Putkamer v Transamerica Ins Corp of Am*, 454 Mich 626; 563 NW2d 683 (1997) . 14-15

*Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578; 751 NW2d 51 (2008) . . . . . 7

*Scott v State Farm Mut Auto Ins Co*, 482 Mich 1074; 758 NW2d 249 (2008) . . . . . 10

*Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032; 766 NW2d 273 (2009) . . . . . 10

*Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307; 282 NW2d 301 (1979) . . . . . 4-6

*Thornton v Allstate Insurance Co*, 425 Mich 643; 391 NW2d 320 (1986) . . . . . 7-10

*Williams v Citizens Mut Ins Co*, 94 Mich App 762; 290 NW2d 76 (1980) . . . . . 7

**Statutes:**

MCL 500.3105 . . . . . 4, 12

MCL 500.3106 . . . . . 13-14

**STATEMENT OF QUESTIONS PRESENTED**

1. Under the historically broad “arising out of” causation standard applicable to determining a person’s entitlement to benefits under MCL 500.3105(1), did Daniel Kemp’s injuries arise out of “the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle”?

Appellant answers: Yes.  
Appellee answers: No.  
Trial Court answered: No.  
Court of Appeals answered: No.  
Amicus Curiae answers: Yes.

2. Should the transportational function test established by this Court in *McKenzie v ACIA* be construed to bar entitlement to PIP benefits for injuries arising from parked vehicles where the person sustained injuries in a manner that clearly satisfies one of the three exceptions to the parked vehicle exclusion under Section 3106 and the vehicle was being used in a manner consistent with the transportation of persons and property?

Appellant answers: No.  
Appellee answers: Yes.  
Trial Court answered: Yes.  
Court of Appeals answered: Yes.  
Amicus Curiae answers: No.

3. Is Daniel Kemp entitled to benefits when he sustained injury while alighting from his vehicle and unloading property that he had transported in the vehicle?

Appellant answers: Yes.

Appellee answers: No.

Trial Court answered: No.

Court of Appeals answered: No.

Amicus Curiae answers: Yes.

### **INTEREST OF AMICUS CURIAE**

The Coalition Protecting Auto No-Fault (CPAN) is an association of medical provider groups and consumer organizations formed to protect and preserve the vitality of the Michigan auto no-fault insurance system. It is CPAN's fervent belief that Michigan's auto no-fault insurance system cannot survive unless the Michigan appellate courts interpret the No Fault Act as the Legislature intended. The resolution of the causation issues presented in this case could materially affect the right of all people injured in motor vehicle accidents covered by the Act to recover their personal injury protection (PIP) benefits. Thus, CPAN has an interest in this Court's resolution of the issues.

### **STATEMENT OF FACTS**

This case concerns Plaintiff's claim of benefits under the No-Fault Act for injuries sustained while unloading his truck in his driveway.

On September 15, 2012, Plaintiff drove home from work and parked his truck in his

driveway. (05/05/15 COA Dissenting Opinion, p. 2). In the backseat of his truck, Plaintiff had a briefcase, overnight bag, and thermos. (05/05/15 COA Dissenting Opinion, p. 4). Plaintiff left his truck to retrieve his personal items from the backseat, and he was injured while he was unloading these items from the truck. (05/05/15 COA Opinion, p. 1). Plaintiff described the process as follows: he leaned into his truck with one hand on the seat, lifted the items out, and turned to set them down. (05/05/15 COA Dissenting Opinion, p. 4). He tore his calf as he was turning around with the items in his hand. (05/05/15 COA Dissenting Opinion, p. 4). Plaintiff sought No-Fault benefits under Sections 3105 and 3106 for the injuries he sustained.

The Trial Court granted summary disposition to Defendant, finding that there was an insufficient connection between the injuries and the use of the motor vehicle, and that the causal nexus between the two was merely incidental. (05/05/15 COA Dissenting Opinion, p. 2). The Court of Appeals affirmed, holding that the removal of personal items from a truck had nothing to do with the transportational function of the truck. (05/05/15 COA Opinion, p. 1). This Court granted argument on the Plaintiff's application for leave to appeal to this Court, posing the following questions:

(1) whether the plaintiff's injury is closely related to the transportational function of his motor vehicle, and thus whether the plaintiff's injury arose out of the ownership, operation, maintenance, or use of his motor vehicle as a motor vehicle; and

(2) whether the plaintiff's injury had a causal relationship to his parked motor vehicle that is more than incidental, fortuitous, or but for.

(02/05/16 S. Ct. Order).

## ARGUMENT

- I. **Section 3105(1) Establishes an “*Arising out of*” Causation Standard that has been Broadly Interpreted by our Appellate Courts to Further the Objective of the No-Fault Act to Provide Medical Expense Coverage to a Wide Range of Patients Sustaining Injury Related to Motor Vehicles, and that Objective Should not be Thwarted by an Overly Restrictive Definition of Causation Concepts such as “*Incidental*” or “*Fortuitous*.”**

The principle issues in this case deal with the subject of eligibility for no-fault PIP benefits under the Michigan auto no-fault law, MCL 500.3101, *et seq.* It becomes quickly apparent from reviewing the no-fault statute in its entirety, that no-fault PIP benefits are not restricted to traditional moving motor vehicle accidents. Rather, there are a number of situations under the statute where PIP benefits are payable where a vehicle is stationary and is being either occupied, loaded, or unloaded by the injured person. The pivotal section regarding eligibility for PIP benefits is Section 3105 of the Act. This is often referred to as the “*gateway section*” to the no-fault first-party benefit system. Within that section, subsection 3105(1) is the key provision. Section 3105(1) states in its entirety:

**Section 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.

The pivotal phrase in Section 3105(1), that gives rise to the causation standards that control PIP benefit eligibility, is the phrase “*arising out of*.” That phrase has been the subject of numerous appellate court decisions through the years. One of the earliest and most important decisions is the case of *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307; 282 NW2d 301 (1979). The *Shinabarger* case has been cited in numerous appellate decisions ever since its rendition. In that case, the Court of Appeals dealt with a situation

where the plaintiff sustained an injury while engaged in “shining deer” while using his automobile. *Id.* at 309. The plaintiff had stopped momentarily to get out of his vehicle to shoot an animal and then attempted to re-enter the vehicle while handing his shotgun to a friend seated in the front seat. *Id.* At some point during that process, the gun accidentally discharged, fatally wounding the plaintiff. *Id.* In determining whether there was a sufficient causal nexus between the plaintiff’s use of his vehicle and the accidental shooting to justify payment of no-fault PIP benefits under Section 3105(1), the Court of Appeals stated the following:

[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. See Anno: *Automobile liability insurance: what are accidents or injuries ‘arising out of ownership, maintenance, or use’ of insured vehicle*, 89 ALR2d 150. 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, see *State Farm Mutual Automobile Ins Co v Partridge*, 10 Cal 3d 94; 109 Cal Rptr 811; 514 P2d 123 (1973), *Cagle v Playland Amusement, Inc*, 202 So 2d 396 (La App, 1967).

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

‘[The] 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, see *Travelers Ins Co v Aetna Cas & Sur Co*, 491 SW2d 363 [Tenn 1973]: ‘Case law indicates that the injury need not be the proximate result of [the] “use” in the strict sense, but it cannot be extended to something distinctly remote. [Cit.] 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.’

*Southeastern Fidelity Ins Co v Stevens*, 142 Ga App 562, 563-564; 236 SE2d550, 551 (1977). See also *Baudin v Traders & General Ins Co*, 201 So 2d 379 (La App, 1967), *Reliance Ins Co v Walker*, 33 NC App 15; 234 SE2d 206 (1977).

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, see *Nationwide Mutual Ins Co v Knight*, 34 NC App 96; 237 SE2d 341 (1977), *Feltner v Hartford Accident & Indemnity Co*, 336 So 2d 142 (Fla App, 1976), *American Liberty Ins Co v Soules*, 288 Ala 163; 258 So 2d 872 (1972), *Azar v Employers Casualty Co*, 178 Colo 58; 495 P2d 554 (1972), *Brenner v Aetna Ins Co*, 8 Ariz App 272; 445 P2d 474 (1968), *Richland Knox Mutual Ins Co v Kallen*, 376 F2d 360 (CA 6, 1967). See also *Kraus v Allstate Ins Co*, 379 F2d 443 (CA 3, 1967).”

*Id.* at 313-314.

Reduced to its essence, the arising out of causation rule adopted by *Shinabarger* regarding the provisions of Section 3105(1) incorporates the following principles:

- (1) The arising out of concept imposes causation requirements that are less than those required by the tort law doctrine of proximate causation;
- (2) A motor vehicle need not be the instrumentality of an injury nor the direct cause of the injury;
- (3) If a motor vehicle is one of the causes of the injury, sufficient causation is established even though there are other causes;
- (4) Causation cannot be extended to something that is distinctly remote, such as where the vehicle is merely the situs of the injury without any further connection or relationship to the injury;
- (5) Almost any causal connection or relationship will do.

Over the years, the *Shinabarger* case and the arising out of causation principles it articulated have been cited numerous times, including in the cases of *Bourne v Farmers Ins Exch*, 449 Mich 193, 201; 534 NW2d 491 (1995); *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich 392, 397; 838 NW2d 910 (2013); *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 585; 751 NW2d 51 (2008); *Gordon v Allstate Ins Co*, 197 Mich App 609, 614; 496 NW2d 357 (1992); *Clute v General Acci Assurance Co*, 177 Mich App 411, 414; 442 NW2d 689 (1989); *Bradley v Detroit Auto Inter-Insurance Exchange*, 130 Mich App 34, 42; 343 NW2d 506 (1983); *Mann v Detroit Auto Inter-Insurance Exchange*, 111 Mich App 637, 639; 314 NW2d 719 (1981); *Buckeye Union Ins Co v Johnson*, 108 Mich App 46, 50; 310 NW2d 268 (1981); *Liberty Mut Ins Co v Allied Truck Equipment Co*, 103 Mich App 33, 40; 302 NW2d 588 (1981); *Dowdy v Motorland Ins Co*, 97 Mich App 242, 250; 293 NW2d 782 (1980); and *Williams v Citizens Mut Ins Co*, 94 Mich App 762, 764-765; 290 NW2d 76 (1980).

The Michigan Supreme Court further defined and amplified the arising out of causation standards of *Shinabarger* in the case of *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986). In the *Thornton* case, the Supreme Court addressed a situation involving a taxicab driver who sustained severe injuries when a passenger shot him in the neck with a pistol, robbed him, and dragged him from his vehicle. *Id.* at 646. The Supreme Court denied no-fault benefits on the basis that under arising out of causation principles, there was not a sufficient causal relationship between the vehicular use of the taxicab and the shooting of the plaintiff. *Id.* Rather, the Supreme Court found that the connection between the injury and the vehicular use was no more than “*incidental*,

*fortuitous, or but for.*” *Id.* at 660. In reaching this conclusion, the Supreme Court substantially adopted the principles of the *Shinabarger* standard and added principles that were first articulated in the case of *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1; 235 NW2d 42 (1975), which involved an accident that predated passage of the No-Fault Act. In discussing the causation principles applicable to Section 3105(1), the Supreme Court in *Thornton* held:

At the time our Legislature enacted the no-fault insurance statute in 1973, no Michigan court had addressed the question of what injuries are covered within the phrase ‘arising out of the ownership, maintenance or use of a motor vehicle.’ . . .

In *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1; 235 NW2d 42 (1975), the Court of Appeals interpreted the phrase ‘arising out of the ownership, maintenance or use of the owned automobile’ in the context of a pre-no-fault insurance contract. The insured sought coverage for liability arising out of an assault and battery perpetrated by the insured and others when they stopped the insured’s car, exited, and physically assaulted a person standing near the road. *Id.* at 4. In discussing whether the victim’s injuries arose out of the use of the insured’s vehicle, the *Kangas* Court surveyed national case law and, rejecting the proposal that ‘but for’ causation be sufficient, adopted the following test for the requisite connection between an injury and the use of a motor vehicle:

[W]e conclude that while the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. [*Id.* at 17.]

Under this test, the *Kangas* Court found that the injury did not arise out of the use of the insured’s vehicle for purposes of the automobile insurance contract involved because there was an insufficient connection between the use of the vehicle and the

assault and battery. . . .

. . . the *Kangas* requirement that there be more than a ‘but for’ connection between an injury and ‘the use of a motor vehicle’ was well-represented in the case law at the time the Michigan no-fault act was enacted. . . .

Many Michigan Court of Appeals decisions have dealt with whether persons assaulted while in a motor vehicle are entitled to no-fault benefits. These panels have applied the *Kangas* causation test and, generally, have found that the injury had an insufficient causal nexus with the normal use of a motor vehicle. . . .

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 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 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.’ . . .

MCL 500.3105(1); MSA 24.13105(1), requires that the injury arise out of the use of the motor vehicle *as a motor vehicle*. In this case, the inherent nature of the use of a motor vehicle did not cause Mr. Thornton’s injuries. Mr. Thornton was injured by a robber’s gunfire. . . . 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 causal relation between his injuries and the use of a motor vehicle as a motor vehicle.

*Thornton*, 425 Mich at 649-652, 659-661.

The principles of the *Thornton* case were applied by the Supreme Court in several other vehicular assault cases in which the Court found that the involvement of the motor vehicle was merely incidental or fortuitous, thereby failing to satisfy the arising out of causation requirement. These cases are *Marzonie v Auto Club Ins Ass'n*, 441 Mich 522; 495 NW2d 788 (1992); *Bourne v Farmers Ins Exch*, 449 Mich 193; 534 NW2d 491 (1995); *Moreno v Farmers Ins Exch*, 454 Mich 878; 562 NW2d 199 (1997); and *Morosini v Citizens Ins Co of Am*, 461 Mich 303; 602 NW2d 828 (1999).

In recent years, the Michigan Supreme Court has revisited the *Shinabarger-Thornton* causation test in three (3) cases: *Scott v State Farm Mut Auto Ins Co*, 482 Mich 1074; 758 NW2d 249 (2008), *vacated*, 483 Mich 1032; 766 NW2d 273 (2009); *McPherson v McPherson*, 493 Mich 294; 831 NW2d 219 (2013); and *Oostdyk v Auto Owners Ins Co*, 498 Mich 913; 870 NW2d 926 (2015). In all of these cases, the Supreme Court specifically analyzed the *Shinabarger* causation standard and disagreed with only one of its five (5) principles—that principle which states “*almost any causal connection or relationship will do.*” *Scott*, 482 Mich at 1074; *McPherson*, 493 Mich at 299; *Oostdyk*, 498 Mich at 913. After criticizing this “*almost any causal connection*” principle in the *Scott* and *McPherson* cases, the Supreme Court ultimately rejected it completely in *Oostdyk*, where the Court stated:

The Court of Appeals erred by relying on the ‘almost any causal connection’ standard of *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 586 (2008). The ‘almost-any’ standard is discredited and inconsistent with current law to the extent it suggests a plaintiff may meet the statutory causation requirement without proving the causal connection was ‘more than incidental, fortuitous, or but for.’ See *McPherson v McPherson*, 493 Mich 294, 299 (2013). However, denial is warranted because the trial court correctly instructed the jury that under MCL 500.3105(1), the plaintiff had to prove the causal connection between the injury and the use of the motor vehicle was ‘more than incidental, fortuitous, or but for.’ See *Thornton v Allstate Ins Co*, 425 Mich 643, 646 (1986).

*Oostdyk*, 498 Mich at 913.

The important point regarding these three recent Supreme Court cases is simply this: ***The only aspect of the Shinabarger arising out of causation standard that has received any criticism from the Supreme Court is the element that declares “almost any causal connection will do.” In all other respects, the causation principles articulated in Shinabarger and Thornton, continue to be good law and constitute the controlling causation law applicable to Section 3105(1).***

Central to the *Shinabarger-Thornton* arising out of test is the principle that no-fault PIP causation law is fundamentally different from traditional tort principles such as proximate causation. In this regard, it is important to remember that the doctrine of “proximate causation” in tort law, although broadly defined, is a limitation of liability principle that prevents a tortfeasor from being held legally liable for damages that the tortfeasor ***actually caused*** but which were not reasonably foreseeable to result from the tortfeasor’s conduct. This is not the proper analytical construct regarding legal entitlement to no-fault PIP benefits, which are explicitly made available “*without regard to fault,*” as is directly

stated in Section 3105(2) of the no-fault statute. That subsection succinctly states, “personal protection insurance benefits are due under this chapter without regard to fault.” MCL 500.3105(2). In accordance with that statutory directive, our appellate courts must refrain from applying the more restrictive fault-based proximate causation standards of tort law to the “*arising out of*” causation standards that control no-fault PIP benefit eligibility.

Having said that, however, the reverse also becomes true: If an injury satisfies the proximate causation requirements of tort law, it most certainly would satisfy the lesser demanding principles of arising out of causation applicable to PIP benefit eligibility under the *Shinabarger-Thornton* standard. In tort law, proximate causation focuses on whether an injury is a foreseeable, natural, and probable consequence of a tortious act. *Jones v Detroit Med Ctr*, 806 NW2d 304, 305 (2011). Since the proximate causation standard is a higher standard than the arising out of causation standard, those injuries that are a foreseeable, natural, and probable consequence of using a motor vehicle as a motor vehicle should clearly satisfy the arising out of causation standard. Moreover, even the doctrine of proximate causation recognizes that there may be more than one proximate cause of an injury. See, e.g., *McMillan v Vliet*, 422 Mich 570, 577–578; 374 NW2d 679 (1985); *Kirby v Larson*, 400 Mich 585, 605; 256 NW2d 400 (1977), overruled in part on other grounds by *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979); *Barringer v Arnold*, 358 Mich 594, 599–600; 101 NW2d 365 (1960).

Under the *Shinabarger-Thornton* arising out of causation standard, the causal relationship between an injury and vehicular use is insufficient only where that relationship is “*incidental*,” “*fortuitous*,” or “*but for*.” A careful review of Michigan appellate law reveals

that none of those three specific words have been explicitly defined in the context of Section 3105(1). ***The guiding definitional principle that should flow from the normal meaning of these words is the notion that the causal connection between an injury and vehicular use, under Section 3105(1), should only be considered insufficient if the connection is merely de minimis or clearly a fluke.*** As will be demonstrated in the arguments that follow, the relationship between Plaintiff Daniel Kemp's injury and the use of his motor vehicle clearly satisfies the *Shinabarger-Thornton* arising out of causation standards and their progeny.

**II. The Legislature Has Made It Clear in the Parked Vehicle Provisions of Section 3106(1) that an Injury Involving a Parked Vehicle that Falls Within One of the Three Subsections of Section 3106(1) Qualifies for Benefits as Long as it Otherwise Satisfies the Requirements of Section 3105(1).**

Although the issue of entitlement to PIP benefits begins with the "gateway" provisions of Section 3105, the analysis becomes more complicated if a parked vehicle is the only motor vehicle involved in the injury producing scenario. Parked vehicle situations call into play the provisions of Section 3106 of the Act. In essence, Section 3106 attempts to limit the availability of no-fault PIP benefits whenever the injury involves a parked vehicle. This section begins with the general rule that injuries involving parked vehicles do not qualify for PIP benefits (subject to a number of exceptions). What follows are three statutory exceptions (as well as a judicially created exception for maintenance) that render the parked vehicle exclusionary language of Section 3106(1) inapplicable. Section 3106 states:

(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.

Therefore, unless the claim fits into one of these three exceptions, a parked vehicle injury will not be compensable. However, the issue is whether satisfying one of the three exceptions of Section 3106 automatically satisfies the causal nexus requirements of §3105(1). Michigan law is somewhat confusing regarding this issue. That confusion primarily stems from this Court's decision in *Putkamer v Transamerica Ins Corp of Am*, 454 Mich 626; 563 NW2d 683 (1997). In *Putkamer*, this Court addressed the relationship between Section 3105 and Section 3106. On one hand, the Court seems to suggest that satisfying Section 3106, ipso facto, satisfies Section 3105. *Id.* at 632-633. However, the Court proceeds to suggest that satisfying Section 3106 is only the first step, with the next step being satisfying Section 3105. In this regard, this Court stated:

In summary, where 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.

*Id.* at 635-636.

In examining the issue of whether there are two separate requirements that have to be satisfied for injuries involving parked vehicles—Section 3105 and Section 3106—one conclusion clearly emerges: if one of the three exceptions to the parked vehicle exclusion under Section 3106 is satisfied, it would appear that, absent some unusual circumstances, the person would be entitled to benefits. In other words, given the language and structure of Section 3106, the Legislature seems to be clearly indicating its preference that those people whose injuries fall within the three exceptions to the parked vehicle exclusion under Section 3106 are entitled to PIP benefits.

**III. The Requirement that an Injury Be “Closely Related to the Transportational Function of a Motor Vehicle” Is a Judge-Made Rule that Cannot Be Interpreted or Applied in a Manner that Narrows Benefit Eligibility Under the Causation Standards Embodied in Sections 3105(1) and 3106(1).**

The analysis of the relationship between Section 3105 and Section 3106 became more complicated when this Court issued its decision in *McKenzie v ACIA*, 458 Mich 214; 580 NW2d 424 (1998). In *McKenzie*, this Court held that in order for a person to be entitled to PIP benefits, the injury must be closely related to the transportational function of the motor vehicle. *Id.* at 225-226. The plaintiff in *McKenzie* was injured under a unique fact pattern. Specifically, the plaintiff was non-fatally asphyxiated while sleeping in a camper/trailer that he was using for purposes of habitation and that was attached to his

parked pickup truck. *Id.* at 215. In ruling that the plaintiff was not entitled to benefits in this scenario, this Court found that the plaintiff's use of the camper/trailer bore no relationship whatsoever to the use of a motor vehicle "as a motor vehicle." *Id.* at 226. In this regard, this Court held:

While it is easily understood from all our experiences that most often a vehicle is used 'as a motor vehicle,' i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum. On those occasions, the use of the motor vehicle would not be 'as a motor vehicle,' but as a housing facility, advertising display, construction equipment base, public library, or museum display, as it were. It seems then that when we are applying the statute, the phrase 'as a motor vehicle' invites us to determine if the vehicle is being used for transportational purposes.

*Id.* at 218-219.

We conclude that plaintiff's injury is not covered by the no-fault act because it did not arise out of the use of a motor vehicle 'as a motor vehicle' as required by MCL 500.3105(1). . . .

Accordingly, we hold that whether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles.

If we apply this test here, it is clear that the requisite nexus between the injury and the transportational function of the motor vehicle is lacking. At the time the injury occurred, the parked camper/trailer was being used as sleeping accommodations. This use is too far removed from the transportational function to constitute use of the camper/trailer 'as a motor vehicle' at the time of the injury. Thus, we conclude that no coverage is triggered under the no-fault act in this instance.

*Id.* at 215, 225-226.

Despite the Court in *McKenzie* addressing a unique fact pattern regarding a person inhabiting a motor vehicle, the Court's decision has unfortunately created considerable confusion regarding the right to recover benefits in parked vehicle situations. In this regard, the plain language of Section 3106 clearly indicates that an injury which satisfies one of the three exceptions to the parked vehicle exclusion under Section 3106 should qualify for benefits. However, if an injury must be closely related to the transportational function of a motor vehicle, how can the Legislature's desire that injuries be compensable in certain parked vehicle situations ever be satisfied? A parked vehicle is never transporting anything. Parked vehicles, by definition, are not performing transportational functions. They are, by definition, performing non-transportational functions. Therefore, there is a fundamental disconnect between the compensability of injuries arising out of a parked motor vehicle and the requirement that an injury must be closely related to the transportational function of the motor vehicle. This conceptual and analytical anomaly was exposed by the Court of Appeals in *Drake v Citizens Ins Co*, 270 Mich App 22; 715 NW2d 387 (2006).

In *Drake*, the Court of Appeals affirmed summary disposition in favor of a man who sustained severe hand injuries when his hand became entangled in the auger system of a grain delivery truck. *Id.* at 23-24. The plaintiff was operating the auger when it became clogged. *Id.* at 24. To correct the problem, the plaintiff reached through an inspection door on the truck to clean the auger. *Id.* While he was doing so, a co-worker activated the auger without warning, causing injury to the plaintiff. *Id.* The Court of Appeals found that the injury satisfied the *McKenzie* transportational function test and in so holding stated, "The vehicle

involved is a delivery truck, and it was being used as such when the injury occurred. Accordingly, plaintiff's injury is closely related to the motor vehicle's transportational function, and therefore arose out of the operation, ownership, maintenance, or use of a motor vehicle 'as a motor vehicle' pursuant to *McKenzie*. . . ." *Id.* at 26. The Court, in *Drake*, then considered the parked vehicle exceptions of Section 3106 and found that this injury satisfied Section 3106(1)(b) because the plaintiff's injuries were a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used. *Id.* at 27. Specifically, the Court found that the truck's auger system was permanently mounted on the grain delivery truck, and that plaintiff was injured as a direct result of physical contact with that equipment. *Id.*

Having analyzed the case pursuant to *McKenzie*, the Court in *Drake* expressed concern about whether the application of the *McKenzie* transportational test was "at odds with the no-fault statutory scheme." *Id.* at 29. The Court of Appeals further stated:

Reading the plain language of MCL 500.3106, a cogent argument can be made that if any of the three parked-vehicle exceptions applies in a given case, the injury, by statutory mandate, does arise out of the ownership, operation, maintenance, or use of the parked vehicle as a motor vehicle; therefore, PIP benefits would be recoverable.

*Id.* at 30.

Moreover, in footnote 4, The Court stated:

Stating that '[a]ccidental 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[.]' is arguably comparable to stating that 'accidental bodily injury does . . . arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle [when] any of the following occur[.]'

*Id.* at 30 n.4.

The Court then engaged in a historical analysis of the jurisprudence of Section 3106. The Court concluded that the *McKenzie* decision was inconsistent with prior Supreme Court decisions and with the text of the no-fault law: “Indeed, the general concept of applying a test that focuses on the transportational function of a vehicle when considering parked vehicles seems illogical and, consequently, is, for all practical purposes, unworkable.” *Id.* at 38. Notably, this Court denied the defendant’s application for leave in *Drake*, 480 Mich 918; 740 NW2d 239 (2007).

In the case at bar, the Court of Appeals unjustifiably broadened the *McKenzie* exclusions when it applied the transportational function test to exclude from coverage a plaintiff who was injured while unloading items from his truck. (05/05/15 COA Opinion, p. 1). The Plaintiff had driven home, parked his truck in his driveway, and injured himself while leaning into the truck with one hand against the seat to collect his personal items, lifting them out, and turning to prepare to set them down. (05/05/15 COA Dissenting Opinion, pp. 2, 4). The Court of Appeals held that the removal of personal effects from a vehicle “cannot be said to result from some facet particular to the normal functioning of a motor vehicle” because similar movements are routinely required in other locations. (05/05/15 COA Opinion, p. 3). Thus, removing these personal items “had nothing to do with ‘the transportational function’ of his truck.” (05/05/15 COA Opinion, p. 3).

Ultimately, the Court of Appeals’ decision misconstrues *McKenzie* in the exact manner warned against by the Court of Appeals in *Drake*. Accordingly, if this Court is inclined to continue viewing *McKenzie* as viable precedent, it should declare that the

transportational function required by *McKenzie* is satisfied for injuries arising out of the normal use of a vehicle to transport persons or property. In this case, it was normal for the Plaintiff to use his vehicle to transport himself and his briefcase to and from work. Moreover, he was clearly in the process of alighting from the vehicle while unloading the personal property he had transported in the vehicle. In sum, because the Plaintiff in this case was using his truck to transport himself and his personal items, he was using it for transportational purposes. Part of that use includes having to leave the vehicle and unload his items from it. As Judge Beckering wrote in her dissenting opinion:

C]ontrary to defendant's suggestions, the injuries arose out of the operation or use of the parked vehicle in its transportational function. **Indeed, it is axiomatic that when one travels in a vehicle, one will take personal effects along for the ride and will seek to unload those personal effects when the drive is finished.**

...

It makes little sense to conclude that unloading oneself from a vehicle relates to the transportational function of a car, but that unloading one's possessions does not. Indeed, it is not a "mere fortuity" that one who just completed a drive in a motor vehicle will seek to remove his or her personal effects from that same motor vehicle. The very intent of a vehicle is to transport people and their property.

(05/05/15 COA Dissenting Opinion, pp. 5, 7 (emphasis added)). As Judge Beckering also noted, this scenario is exactly what the Legislature intended to cover when it enacted MCL 500.3106(1)(b). (05/05/15 COA Dissenting Opinion, p. 6).

Under the interpretation proffered by amicus curiae, circumstances that are too attenuated from the use of the motor vehicle would still be excluded. For example, if a plaintiff lifted items from his vehicle, carried them to his house, and then slipped and

injured himself on his porch, his injury does not arise out of his use of the motor vehicle. But when a plaintiff, as in this case, is injured while in the process of pulling items out of the vehicle, the injury is directly related to the use of the motor vehicle as a motor vehicle—he is essentially completing the motor vehicle’s transportation of the items from one place to the other by removing them from the motor vehicle. The Court of Appeals misconstrued *McKenzie* in holding otherwise.

The reality is that the transportational function test was only developed by this Court in *McKenzie* because of the unique facts in that case, in which the person sustained injuries arising from the person’s use of a motor vehicle as place of **habitation**. The injured person in *McKenzie* argued that PIP benefits were payable for the asphyxiation he sustained from inhaling toxic fumes while he was inhabiting a camper attached to a motor vehicle. The injured person based this argument on the use of the word “occupying” in Section 3106(1)(c), which states that PIP benefits are payable for injury “sustained by a person while occupying, entering into, or alighting from the vehicle.” Faced with the proposition that PIP benefits could be payable under this theory for any injury a person sustains while temporarily or permanently inhabiting a motor vehicle, this Court developed the transportational function test to prevent such a result. Any further application of *McKenzie* to limit PIP benefit entitlement under Section 3106 defies the plain language of the Act and the intent of the Legislature.

**IV. The Plaintiff in this Case Satisfies the Causation Standards for Benefit Entitlement of Sections 3105(1) and 3106(1) and is, Therefore, Entitled to Recover No-Fault PIP Benefits Under the Act.**

In this case, the Plaintiff was injured while unloading items from his truck in his driveway after driving home from work. (05/05/15 COA Opinion, p. 1). This was an injury “arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle” because the Plaintiff was using his truck for the ordinary purpose of a motor vehicle when he drove it home from work with some work items in his back seat. The Plaintiff’s need to remove the items from his truck was not merely incidental to his driving of the vehicle. Nor was the relationship between his use of the truck as a motor vehicle and his injuries while unloading it merely fortuitous or but-for. The Plaintiff used his truck precisely for its transportational function—to get himself and items such as his briefcase from his work to his home. Because he transported these items, he had to unload them once he arrived at his house.

It is foreseeable and natural that when a person has to transport items in a vehicle, they will have to remove those items from the vehicle and may be injured while lifting them from the vehicle. Indeed, that is probably why the Legislature enacted a provision specifically to address that situation, MCL 500.3106(1)(b), allowing recovery for injuries resulting from “property being lifted onto or lowered from the vehicle in the loading or unloading process.” MCL 500.3106(1)(b). Such injuries are foreseeably identifiable with the normal use of a motor vehicle. They arise out of use of the motor vehicle as a motor vehicle.

As explained in Argument Part III, *McKenzie* cannot be expanded in such a way as

to render Section 3106(1) meaningless. Injuries that fall under one of the Section 3106(1) exceptions and that are foreseeably identifiable with the normal use of a motor vehicle are covered. The Plaintiff's injuries should thus be covered under the No-Fault Act.

### CONCLUSION

This Court should reverse the Court of Appeals' decision because the "arising out of" standard is broad and meant to compensate for a variety of injuries, so long as they are related to the use of a motor vehicle in a way that is not merely incidental, fortuitous, or but-for. This Court should clarify that the test set out in *McKenzie* excludes only rare occupancy-type situations such as the ones listed in *McKenzie*. Use of a motor vehicle that is related to the transportational function of the vehicle includes entering and exiting the vehicle, loading and unloading, and other similar actions commonly associated with the use of a motor vehicle as a motor vehicle. This interpretation is necessary to give meaning to MCL 500.3106 and effectuate the intent of the Legislature with respect to that provision.

### RELIEF REQUESTED

Amicus Curiae Coalition Protecting Auto No-Fault respectfully requests that this Court reverse the decision of the Court of Appeals and clarify the law as discussed above.

Respectfully submitted,

Date: June 3, 2016

/s/ Liisa R. Speaker  
Liisa R. Speaker (P65728)  
Jennifer M. Alberts (P80127)  
SPEAKER LAW FIRM, PLLC

230 N. Sycamore Street  
Lansing, MI 48933

George T. Sinas (P25643)  
Stephen H. Sinas (P71039)  
SINAS DRAMIS BRAKE BOUGHTON &  
MCINTYRE PC  
3380 Pinetree Rd  
Lansing, MI 48911

RECEIVED by MSC 6/3/2016 3:51:13 PM