

STATE OF MICHIGAN
IN THE SUPREME COURT

DANIEL KEMP,

Plaintiff-Appellant,

Supreme Court No.
Court of Appeals Case No. 319796
Wayne County Circuit Court
Case No. 13-008264- NF

vs.

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

Defendant-Appellee.

MARSHALL LASSER (P25573)
Marshall Lasser, P.C.
Attorney for Plaintiff-Appellant
Post Office Box 2579
Southfield, MI 48037
(248) 647-7722, Fax 647-1917
mlasserlaw@aol.com

MARK L. DOLIN (P45081)
VINCENT CARTER (P27442)
Kopka, Pinkus, Dolin & Eads, PLC
Attorneys for Defendant-Appellee
33533 W. Twelve Mile Rd., Suite 350
Farmington Hills, MI 48331-5611
(248) 324-2620, Fax 324-2610
mldolin@kopkalaw.com
vgcarter@kopkalaw.com

**APPLICATION FOR LEAVE TO
APPEAL OF PLAINTIFF-APPELLANT DANIEL KEMP**



JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Plaintiff appeals the judgment of the court of appeals dated May 5, 2015, and seeks reversal of that court's judgment, which affirmed the trial court's order granting summary disposition to defendant under MCR 2.116(C)(10). The Court of Appeals decision is attached as Exhibit A, and the trial court decision of Dec. 18, 2013 is Exhibit B.

QUESTIONS PRESENTED FOR REVIEW

I. MCL 500.3106(1)(b) PROVIDES NO FAULT COVERAGE WHEN "THE INJURY WAS A DIRECT RESULT OF PHYSICAL CONTACT WITH... PROPERTY BEING... LOWERED FROM THE VEHICLE IN THE... UNLOADING PROCESS." WAS A PERSON STRETCHING INTO THE BACK SEAT OF HIS TRUCK, LIFTING PROPERTY OUT BY HAND AND LOWERING IT TO THE GROUND WHEN HIS CALF MUSCLE RUPTURED, ENTITLED TO NO FAULT BENEFITS UNDER THIS PROVISION, WHERE HE HAD JUST TRANSPORTED THE PROPERTY TO HIS HOUSE?

II. IS MCL 500.3106(1)(b) AMBIGUOUS, SO THAT IF "THE INJURY WAS A DIRECT RESULT OF PHYSICAL CONTACT WITH...PROPERTY BEING... LOWERED FROM THE VEHICLE IN THE... UNLOADING PROCESS," HE MUST *ALSO* PROVE THE INJURY AROSE OUT OF THE "TRANSPORTATIONAL FUNCTION" OF THE TRUCK?

III. IF A CLAIMANT WHOSE INJURY FITS SQUARELY WITHIN MCL 500.3106(1)(b) MUST *ALSO* PROVE HIS INJURY WAS NOT "INCIDENTAL" TO THE "TRANSPORTATIONAL FUNCTION" OF THE TRUCK, WAS SUMMARY DISPOSITION UNDER MCR 2.116(C)(10) PROPER WHERE HE PRESENTED DEPOSITION TESTIMONY THAT HE DROVE HIS TRUCK HOME, BEGAN UNLOADING PROPERTY FROM IT, AND INJURED HIMSELF LOWERING HIS PROPERTY TO THE GROUND?

TABLE OF CONTENTS

JUDGMENT APPEALED FROM AND RELIEF SOUGHT..... i

QUESTIONS PRESENTED FOR REVIEW..... i

INDEX OF AUTHORITIESiii

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS1

STANDARD OF REVIEW AND ARGUMENT8

I. KEMP’S INJURY FITS “SQUARELY” WITHIN SECTION MCL 500.3106(1)(b) BECAUSE HE TORE HIS CALF MUSCLE AND INJURED HIS LOW BACK AS A DIRECT RESULT OF PHYSICAL CONTACT WITH PROPERTY WHILE LOWERING IT FROM A VEHICLE IN THE UNLOADING PROCESS.....8

II. THE COURT OF APPEALS MAJORITY ERRED IN TACKING ON TO MCL 500.3106(1)(b) A REQUIREMENT THAT THE INJURY FULFILL THE “TRANSPORTATIONAL FUNCTION” OF THE VEHICLE11

III. IF A CLAIMANT WHO IS ENTITLED TO BENEFITS UNDER MCL 500.3106(1)(b) MUST ALSO SATISFY A “TRANSPORTATIONAL FUNCTION” REQUIREMENT, KEMP DID SO, AND WAS ENTITLED TO JUDGMENT UNDER MCR 2.116(I)(2) 12

RELIEF REQUESTED..... 17

INDEX OF AUTHORITIES

CASE LAW

<i>Byker v Mannes</i> , 465 Mich 637, 646-647 (2002)	10, 11
<i>Cardinal Mooney High School v Michigan High School Athletic Assn</i> , 437 Mich 75, 80, 467 NW2d 21 (1991)	8
<i>Cf Williams v Pioneer State Mut Ins Co</i> , 497 Mich 875, 875-876 (2014)	15
<i>Krohn v Home-Owners Ins Co</i> , 490 Mich 145, 156 (2011).....	10, 11
<i>Maiden v Rozwood</i> , 461 Mich 109, 118 (1999)	9, 14, 16
<i>McKenzie [v Auto Club Ins Ass'n]</i> , 458 Mich [214] at 215 [1998]	12, 13, 14
<i>Pohutski v City of Allen Park</i> , 465 Mich 675, 683 (2002)	11
<i>Putkamer v Transamerica Insurance Corporation of America</i> , 454 Mich 626, 563 NW2d 683 (1997)	7, 8, 10, 11, 12, 15, 16
<i>Turner v Auto Club Ins. Assn</i> , 448 Mich. 22, 27, 528 NW2d 681 (1995)	8

MICHIGAN COMPILED LAWS

MCL 500.3106	1, 13
MCL 500.3106(1)(b)	i, ii, 2, 6, 7, 8, 10, 11, 12, 14, 16, 17

MICHIGAN COURT RULES

MCR 2.116(I)(2)ii, 12, 14, 16

MCR 2.116(C)(10)..... i, 1, 2, 9, 13, 14, 16, 17

MCR 7.302(B)(5)9, 11, 13

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a suit for first party no fault benefits involving the parked motor vehicle section of the no fault statute, MCL 500.3106. Farm Bureau insured Daniel Kemp's truck.

The Court of Appeals majority summarizes the facts as follows: "On September 15, 2012, plaintiff arrived home from work and parked his truck. He got out of the vehicle and collected personal effects from the back seat floorboard. In the process, he allegedly suffered an injury to his calf muscle."

Thus the majority held that at the time of his injury Kemp was using his truck to transport himself and his property, and that he was not using the truck as a storage shed.

The majority opinion omits details. Kemp presented to the trial court, in opposition to the MCR 2.116(C)(10) motion for summary disposition, deposition testimony that as he was unloading the personal effects he had just transported home from work, he stood on tip toes so he could lean far into the back seat, with his right hand picking up from the floorboard items he used at work as a long-haul truck driver: his briefcase, thermos bottle and garment bag. While in the motion of unloading the items from the back seat - lifting them up over a case of beer and twisting his body lowering them to the ground - he tore calf muscles and hurt his low

back. (Kemp deposition pages 33-42, 51-52, 56, Exhibit C.)

This case involves MCL 500.3106(1)(b), which provides that

(1) Accidental bodily injury does not arise out of the ownership, operation, maintenance or use of parked vehicle as a motor vehicle unless any of the following occur:

(b) ... 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.

Kemp filed suit in Wayne County Circuit Court. After deposing Kemp, Farm Bureau filed a motion for summary disposition (“MSD”) under MCR 2.116(C)(10), asserting that it was entitled to dismissal of the complaint as a matter of law, arguing the facts as alleged in the complaint and as described by Kemp at his deposition barred coverage under MCL 500.3106(1)(b). Farm Bureau attached to its brief in support of its motion a portion of Kemp’s deposition (the transcript is Exhibit C).

In the deposition, plaintiff described how his injury occurred:

A. I was in the process of unloading my personal items. I had a briefcase, I had a overnight bag and a thermos. I was unloading the items. I had one hand against the seat. I leaned in the vehicle, picked up my items, brought them outside as I twisted to set them down. That’s when I heard bang [from his right calf], stuff fell to the ground, I fell in the truck. (Dep 33)

Q Could you describe again...the sequence of action that took place as you reached into the vehicle to the point where you experienced the pain in your leg?

A I had my left hand on the back seat of the seat, the head rest.... I reached in and grabbed my brief case, the thermos and the overnight bag.... Lifted them up, brought 'em over the top of case of beer [in back seat of truck]. As I turned to lower them into the ground, that's when I heard the bang. (40-41)

Mr. Lasser: You were motioning lowering.

Mr. Kemp: Right.... That's what I said. Twisting, lowering them to the ground. (41-42)

A Well, from leaning in, my feet weren't flat on the ground, from leaning in. I was up on the top of my feet, so that's why I was asking you what you meant by movement of the feet. (42)

Q Had you actually put them [the three items] on the ground when you experienced this first sign of something being wrong with the lower part of your body?

A No, sir.

Q When you experienced this pain in your leg, did you experience any increased pain in your lower back?

A Yes, sir.

Q Immediately.

A Yes, sir. (56).

Farm Bureau *conceded* in its brief supporting its MSD that *the injury occurred as Kemp lowered his property to the ground, according to his testimony:*

...he had taken hold of his personal items, leaned back, turned to his right side to put the items on the driveway, and the injury incident occurred - an apparently spontaneous rupture of a muscle in his right calf. (Brief 6). (Exhibit D)

Farm Bureau also filed a Brief in Support of Defendant's Reply to Kemp's Response to the MSD, which *again conceded* Kemp's injuries (calf and back) occurred as plaintiff lowered his property to the ground, according to Kemp's testimony:

Plaintiff testified that the first experience of any physical discomfort during the sequence of the process of removing his personal items from the vehicle and then proceeding to move to place them on the driveway was the "pop" he heard as he was doing the latter. (Farm Bureau brief 4) (Exhibit E)

Again, relying upon his sworn deposition testimony, Plaintiff's first experience with back pain on the day of the incident came when he experienced the "pop" in his calf as he lowered his personal items top [sic] the driveway." (Farm Bureau brief 5)

Kemp included in his response to the MSD an affidavit from his treating physician Dr. Surinder Kaura (Exhibit F), in which the doctor stated the injuries to the calf and low back arose from the unloading of the property, and were not merely incidental to the unloading process:

2. He has read the deposition testimony of Daniel Kemp, in which Mr.

Kemp states that on Sept. 15, 2012, he injured a calf muscle and his low back while leaning into the cab of his pickup truck; that he lifted out of the cab several items, twisted his back as he lowered the items to the ground, and felt and heard a pop in the calf.

3. I have treated Mr. Kemp since October 2012, for injuries sustained in that incident.

4. It is my opinion that his calf and low back injuries arose out of the process of unloading the items as Mr. Kemp described, and were not merely incidental to the unloading process.

On a hearing held December 13, 2013, the circuit court granted the motion for summary disposition. The court rejected the affidavit of Dr. Kaura:

Forget that affidavit. As far as I'm concerned that affidavit has - can't add anything. The doctor can't say how this accident occurred. The doctor - he's the doctor, he's treating the injury, he can't say this accident happened as a result of him doing something, of lowering his briefcase. I mean, obviously the doctor - and it's not within the doctor's area of expertise anyway, and he wasn't present, he didn't witness the accident. It is clearly what the plaintiff told him. Not the doctor has any independent knowledge or any independent expertise that could add to this, that's ridiculous. (Transcript 17)

Then the trial court gave several reasons for granting the motion. First:

The injury also has to relate to the - whatever it is that they're touching on the vehicle and that must have caused the injury. This case - this is incidental. He could have been lifting up this briefcase in an office, in his home, anywhere..... (Trans 10)

...I think the fact that [Kemp] was unloading was just merely incidental that it happened to be in a car, he could have been lifting it up at his office, his home, anywhere, and I think it's merely incidental. (Trans 27, 28).

Second:

This guy was unloading his briefcase and his stuff. He had his hand on the seat, he opens the rear door, he's taking this stuff out of the car and all of a sudden his hamstring pops. That's the facts of this case. It's not really related to the use of a motor vehicle as a motor vehicle. (Trans 6)

Third:

We cannot say that this was a direct result, that the injury was a direct result of physical contact with.... property being lifted onto or lowered from the vehicle in the loading or unloading process. (Trans 20)

The court issued an order of dismissal on December 18, 2013. The Court of Appeals affirmed the dismissal by decision rendered May 5, 2015.

The majority held that although Kemp had just driven his truck home from work with his personal effects in the back seat, got out and was in physical contact with his effects as he unloaded them, and in the process injured himself, he was not entitled to benefits because the "injury had nothing to do with the 'transportational function' of his truck." Therefore "plaintiff is not eligible to receive no fault benefits under MCL 500.3016."

The dissent said, inter alia:

Here, given plaintiff's contention that he tore his calf muscle and injured his back as a direct result of lowering property from his vehicle in the process of unloading it, and viewing the evidence in the light most favorable to him, statutory coverage fits squarely within the provisions of MCL 500.3106(1)(b).

....And, contrary 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 these personal effects when the drive is finished. Here, plaintiff alleged that, in the process of unloading his personal effects from the vehicle, he sustained injuries. This is precisely within the second step of the *Putkamer [v Transamerica Insurance Corporation of America]*, 454 Mich 626, 563 NW2d 683 (1997)] and within the plain language of MCL 500.3106(1)(b).

ARGUMENT

I.

KEMP'S INJURY FITS "SQUARELY" WITHIN SECTION MCL 500.3106(1)(b) BECAUSE HE TORE HIS CALF MUSCLE AND INJURED HIS LOW BACK AS A DIRECT RESULT OF PHYSICAL CONTACT WITH PROPERTY WHILE LOWERING IT FROM A VEHICLE IN THE UNLOADING PROCESS.

Standard of Review

Because there was no dispute as to how the injury arose, the issue of whether Kemp's injury is compensable under MCL 500.3106(1)(b) is a legal one for a court to decide, not a factual issue for a jury. *Putkamer v Transamerica Ins. Corp*, 454 Mich 626, 631 (1997). In deciding whether Kemp's injury is compensable under this section,

As the cardinal rule of statutory interpretation, this Court gives effect to the Legislature's intent. *Turner v Auto Club Ins. Assn*, 448 Mich. 22, 27, 528 NW2d 681 (1995). Where the language of a statute is clear and unambiguous, the courts must apply the statute as written. *Id.* This court gives the statute's language its ordinary and generally accepted meaning. *Id.* The no fault act is remedial in nature and is to be liberally construed in favor of the persons who are intended to benefit from it. *Id.* at 28, 528 NW 2d 681. An issue of statutory interpretation is a question of law subject to de novo review. See *Cardinal Mooney High School v Michigan High School Athletic Assn*, 437 Mich 75, 80, 467 NW2d 21 (1991).

Putkamer, supra, 631.

Argument

The Court of Appeals decision is “clearly erroneous and will cause material injustice,” and “conflicts with a Supreme Court decision or another decision of the Court of Appeals,” MCR 7.302(B)(5), as the dissenting opinion in the Court of Appeals states in detail.

Because Kemp’s deposition testimony must be considered in the light most favorable to him, the non-moving party in Farm Bureau’s motion for summary disposition under MCR 2.116(C)(10), *Maiden v Rozwood*, 461 Mich 109, 118 (1999), the trial court and appellate courts must assume Kemp injured himself as he described: *as the direct result of physical contact with his property while he was lowering it his property from his vehicle in the unloading process.*¹

¹ Farm Bureau conceded this manner of injury:

...he had taken hold of his personal items, leaned back, turned to his right side to put the items on the driveway, and the injury incident occurred - an apparently spontaneous rupture of a muscle in his right calf. (Brief supporting MSD p. 6, Exhibit D)

Plaintiff testified that the first experience of any physical discomfort during the sequence of the process of removing his personal items from the vehicle and then proceeding to move to place them on the driveway was the “pop” he heard as he was doing the latter. (Exhibit E, p. 2, Brief in Support of Defendant’s Reply)

Given these facts, the Court of Appeals dissent correctly stated that Kemp is entitled to recover because his manner of injury “fits squarely within the provisions of MCL 500.3016(1)(b)”:

Here, given plaintiff’s contention that he tore his calf muscle and injured his back as a direct result of lowering his property from his vehicle in the process of unloading it, and viewing the evidence in the light most favorable to him, statutory coverage fits squarely within the provisions of MCL 500.3106(1)(b).

Simply put, plaintiff’s accidental bodily injury arose out of the use of his parked vehicle as a motor vehicle because, per the parked motor vehicle exception set forth in MCL 500.3106(1)(b), his “injury was a direct result of...property being...lowered from the vehicle in the...unloading process.” Giving accord to the “plain and ordinary meaning” of “every word or phrase” of the statute. *Krohn [v Home-Owners Ins Co, 490 Mich 145 (2011)]* at 156, and refraining from reading words into the statute, *Byker [v Mannes, 465 Mich 367 (2002)]* at 646-647, nothing could be more on point to the circumstances here. Contrary to defendant’s contention, the mere fact that plaintiff, like any one of us, could have injured those same body parts in other ways at other times has no bearing on whether the statute provides coverage in this instance. Rather, what is pertinent in this case is that plaintiff’s injuries occurred as a direct result of unloading his personal effects from the vehicle. MCL 500.3106(1)(b) expressly provides coverage in such an instance.

End of story. Kemp’s is a text-book example of an injury that fits “squarely” within the statute. The Court of Appeals majority opinion is a “clearly erroneous” reading of MCL 500.3106(1)(b), and should be reversed.

The majority opinion also conflicts with this court’s decision in *Putkamer*,

supra. As the dissent states, plaintiff's injury met *Putkamer's* three part test and therefore is compensable.

II.

THE COURT OF APPEALS MAJORITY ERRED IN TACKING ON TO MCL 500.3106(1)(b) A REQUIREMENT THAT THE INJURY FULFILL THE "TRANSPORTATIONAL FUNCTION" OF THE VEHICLE

Standard of Review

Plaintiff-appellant incorporates the standard of review from Argument I.

Argument

The Court of Appeal's decision is "clearly erroneous and will cause material injustice," and "conflicts with a Supreme Court decision or another decision of the Court of Appeals," MCR 7.302(B)(5). The dissent in the Court of Appeals correctly stated: (1) the majority disregarded this Court's rule that where a statute is "clear and unambiguous," a court may not engage in "statutory interpretation"; and (2) because MCL 500.3106(1)(b) is clear and unambiguous, the majority should not have tacked onto it a "transportational function" requirement. The dissent cited *Pohutski v City of Allen Park*, 465 Mich 675, 683 (2002), *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156 (2011), and *Byker v Mannes*, 465 Mich 637, 646-647 (2002). See also *Putkamer, supra*, 631.

Simply put, given that the majority agreed Kemp had just driven his truck home

with his property on the floor of the back seat, that he got out and began unloading the property from the truck, and that he was (for purposes of the motion for summary disposition) injured lowering items from the truck, it should not even have asked whether Kemp's injury arose out of the "transportational function" of his truck. The majority added to a clear and unambiguous statute.

III.

IF A CLAIMANT WHO IS ENTITLED TO BENEFITS UNDER MCL 500.3106(1)(b) MUST ALSO SATISFY A "TRANSPORTATIONAL FUNCTION" REQUIREMENT, KEMP DID SO, AND WAS ENTITLED TO JUDGMENT UNDER MCR 2.116(D)(2).

Standard of Review

Plaintiff incorporates the standard of review from the prior argument.

Argument

The Court of Appeals majority held:

Here, plaintiff testified that he injured himself while collecting personal effects from the back floorboard of his parked truck. The injury had nothing to do with "the transportational function" of his truck. *McKenzie [v Auto Club Ins Ass'n]*, 458 Mich [214] at 215 [1998]. Accordingly, his injury plainly 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." *Putkamer [v Transamerica Ins Corp of America]*, 454 Mich [626] at 636 [1997]. As a matter of law, and viewing his testimony and physician's affidavit in the light most

favorable to him, plaintiff is not eligible to receive no-fault benefits under MCL 500.3106. The trial court properly granted defendant summary disposition pursuant to MCR 2.116(C)(10), and its ruling is affirmed.

This decision is “clearly erroneous and will cause material injustice,” and “conflicts with a Supreme Court decision or another decision of the Court of Appeals,” MCR 7.302(B)(5), because:

(1) Kemp was injured unloading property *which he had just transported*. Even the Court of Appeals majority agreed. It said: “On September 15, 2012, plaintiff arrived home from work and parked his truck. He got out of the vehicle and collected personal effects from the backseat floorboard. In the process, he allegedly suffered an injury to his calf muscle...” This scenario satisfies the “transportational function” requirement which this Court explained in *McKenzie*, supra. Kemp’s injury was “closely related” to the “transportational function” of the pickup truck. *McKenzie*, 458 Mich at 219-220. Kemp’s injury is as compensable as a herniated disc suffered by a man lugging a 50 lb suitcase out of the trunk of a car he has just driven to Metro Airport, or a woman lifting a 40 lb bag of topsoil into the bed of her pickup truck at Home Depot.

The majority decision would be correct if Kemp had used his truck as a storage shed. If Kemp had permanently parked his truck on his driveway or put it up on blocks in his backyard and used it as an extra garage, to store stuff, then the truck would not have been used in its transportational function. But Kemp at time of injury used his truck to transport his personal effects home from work, and he fits “squarely” within MCL 500.3106(1)(b).

The decision by the Court of Appeals majority is a clearly erroneous interpretation of *McKenzie*. Kemp was entitled to summary disposition under MCR 2.116(I)(2), which provides that “If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.”²

(2) The fact that the truck was “merely the site where the injury occurred” did not make the injury “incidental” to the transportational use of

² Kemp submitted deposition testimony and the affidavit of treating Dr. Kaura averring that his injuries arose out of the unloading process, and this evidence was not contradicted by Farm Bureau. Farm Bureau in fact *agreed* in its trial court briefs that the injury happened as Kemp described (see Statement of Material Proceedings and Facts). Under *Maiden, supra*, summary disposition under MCR 2.116(C)(10) should not have been granted to Farm Bureau, and under MCR 2.116(I)(2), the trial court should have rendered judgment for Kemp and held that his injuries were covered by MCL 500.3106(1)(b).

the vehicle; the majority made a “clearly erroneous” misreading of *Putkamer*. The majority disregarded the fact that just about *any* motor vehicle injury could happen elsewhere: a brain injury could happen in a car crash but could happen when a person falls off a treadmill (viz. the recent death of Silicon Valley CEO Robert Goldman) or falls down stairs. A back injury could happen lifting a sack of concrete out of a car trunk or out of a storage shed. The majority’s interpretation would just about wipe out the entire no fault act because every injury that occurs using a motor vehicle could occur not using a motor vehicle. As the dissent states, Kemp’s injury

...had a causal relationship to the parked motor vehicle that was more than incidental, fortuitous or but for. Upon exiting the vehicle, plaintiff went to retrieve his personal effects from inside. In so doing, he leaned forward, procured his effects, and went to set them down, outside the vehicle. It was this very act - removing items from the vehicle and attempting to set them down - that was the cause of the alleged injury. Therefore, plaintiff’s injury had a direct causal relationship to the parked vehicle that was more than merely incidental, fortuitous or but for. See *Putkamer*, 454 Mich at 636. Cf *Williams v Pioneer State Mut Ins Co*, 497 Mich 875, 875-876 (2014) (holding that where a tree branch fell from above, hitting plaintiff in the head as she was entering her vehicle, the causal relationship, if any between the plaintiff’s injury and the parked car was at most incidental.) Our Supreme Court’s decision in *Putkamer*, 454 Mich at 636 (emphasis added), is illustrative in this regard. Notably, in *Putkamer*, our Supreme Court analyzed the causation prong with regard to a plaintiff who was alighting from her vehicle when she slipped and fell on ice, injuring herself. It held that

“[t]he act of shifting weight onto one leg created the precarious condition that precipitated the slip and fall on ice. *This injury appears to be exactly the kind of injury that the Legislature decided should be covered* when it established an exception to the parked vehicle exclusion for entering a parked vehicle under 3106(1)(c).”

Likewise, here, plaintiff’s act of raising up onto his tiptoes, angling his body into the interior of the car in order to lift up his property, and twisting his body in order to extricate the property from his vehicle and lower it onto the ground, which precipitated his calf muscle tear and back injury, appears to be *exactly the kind of injury that the Legislature decided should be covered* when it established an exception to the parked vehicle exclusion for “property being....lowered from the vehicle in the...unloading process” under 3106(1)(b). [Emphasis by the dissent] The mere fact that the plaintiff in *Putkamer* could have fallen on the ice moments after she alighted from her car, or that plaintiff here could have injured himself when placing his briefcase on the kitchen counter, is irrelevant to the analysis. Because plaintiff’s injuries occurred during and *because of* the activity covered in 3106(1)(b), just as the plaintiff’s injury in *Putkamer* occurred during and because of the activity covered in 3106(1)(b), *Putkamer* directs the outcome here regarding causation.

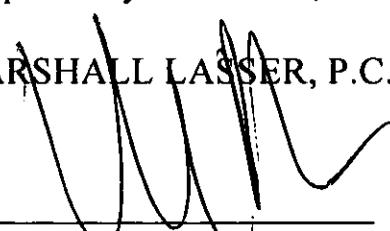
(3) If a transportational function requirement exists for a claimant who satisfies MCL 500.3106(1)(b), the trial court, in deciding defendant’s motion brought under MCR 2.116(C)(10), should either have (A) rendered judgment in his favor under MCR 2.116(I)(2), or (B) denied defendant’s motion on the ground that the evidence plaintiff presented in opposition to the motion (his deposition, Dr. Kaura’s affidavit, and defendant’s admissions in its brief) created a question of fact. *Maiden, supra*.

RELIEF REQUESTED

Plaintiff-Appellant Daniel Kemp asks this court to reverse the dismissal of his complaint by the circuit court; to hold that he was entitled to an order of summary disposition under MCR 2.116(C)(10) that his injuries arose from his unloading of his motor vehicle and that therefore he was entitled to benefits under MCL 500.3106(1)(b); and to remand the case for further proceedings in accordance with the decision of the court.

Respectfully Submitted,

MARSHALL LASSER, P.C.



Marshall Lasser (P25573)
Attorney for Plaintiff-Appellant
Post Office Box 2579
Southfield, MI 48037
(248) 647-7722
mlasserlaw@aol.com

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