

STATE OF MICHIGAN
COURT OF APPEALS

MARY MCCORMICK,

Plaintiff-Appellee/Cross-Appellant,

v

PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

June 14, 2011

No. 297873

Delta Circuit Court

LC No. 08-019682-NF

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I concur in the majority's decision to affirm the trial court's grant of summary disposition to plaintiff Mary McCormick, but write separately to propose another basis for upholding the trial court.

The majority resolves plaintiff's claim for first-party no-fault benefits by applying the tripartite test announced in *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635-636; 563 NW2d 683 (1997). The test applies "where a claimant suffers an injury in an event related to a parked motor vehicle," and obligates the claimant to "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 (emphasis in original). I agree with the majority's conclusion that because plaintiff fractured her hip while maneuvering to alight from her pickup truck, she has satisfied *Putkamer's* requirements. However, I respectfully suggest that in adopting the tripartite test for cases covered by MCL 500.3106, *Putkamer* improperly strayed from the statutory text. I would hold that enforced as written, the plain language of MCL 500.3106(1)(c), standing alone, mandates personal injury protection coverage for plaintiff's hip fracture.

Under Michigan's no-fault insurance act, MCL 500.3101 *et seq.*, "victims of motor vehicle accidents ... receive insurance benefits for their injuries as a substitute for their common-law remedy in tort." *Shavers v Attorney Gen*, 402 Mich 554, 579; 267 NW2d 72 (1978). The act directs that every "owner or registrant of a motor vehicle required to be registered in this state

shall” carry personal protection insurance. MCL 500.3101(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” certain other provisions of the no-fault act. MCL 500.3105(1). “The phrase ‘arising out of the ownership, maintenance or use’ of a vehicle has commonly been used in automobile insurance policies, and was apparently used in the no-fault act in awareness of that history.” *Miller v Auto-Owners Ins Co*, 411 Mich 633, 638; 309 NW2d 544 (1981).

This Court first construed a similar phrase in *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1; 235 NW2d 42 (1975). In *Kangas*, the Court considered whether bodily injury sustained by a pedestrian who had been beaten by the occupants of the plaintiff’s vehicle arose “out of the ownership, maintenance or use of the owned automobile.” *Id.* at 3-4 (emphasis omitted). A policy exclusion exempted coverage for bodily injury “caused intentionally by or at the direction of the Insured.” *Id.* at 4. This Court concluded that the intentional act exclusion relieved the defendant from defending the plaintiff, but expressly declined to rest its decision “on the exclusion clause alone.” *Id.* at 8.

The Court commenced an alternate analysis by observing that no previous Michigan decisions had directly construed “the phrase ‘arising out of the ownership, maintenance or use of a vehicle,’” despite that “case law on the subject from other jurisdictions is voluminous.” *Kangas*, 64 Mich App at 8. This Court concentrated its review of the other case law on cases involving assaults committed by an insured or the insured’s passenger. Under those circumstances, the Court explained that “the great weight of authority is that the injury does not arise out of the ownership, maintenance or use of the automobile.” *Id.*

The plaintiff in *Kangas* conceded that his automobile did not proximately cause the pedestrian’s injuries, but argued the assault would not have occurred “but for” the automobile journey that ultimately connected the passengers with the victim. *Kangas*, 64 Mich App at 10. The plaintiff theorized that “but for” causation sufficed to establish that the claim arose from the ownership or use of the vehicle. This Court analyzed that contention by reviewing case law construing similar policy language in cases involving: (1) injuries resulting from projectiles negligently or deliberately thrown from moving and parked vehicles, and (2) injuries caused by firearms discharged within a vehicle. *Id.* at 10-15. The Court concluded that although the insured vehicle need not itself have proximately caused 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 16. In *Putkamer*, the Supreme Court adopted precisely this language as the third prong of the test governing whether an injury “arose out of the ownership, operation, maintenance, or use of the parked vehicle.” 454 Mich at 635-636.

Section 3105(1) of the no-fault act incorporates as follows the phrase construed in *Kangas*: “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 act broadly defines as “accidental” virtually all injuries “unless suffered intentionally by the injured person or caused intentionally by the claimant.” MCL 500.3105(4). The next section of the no-fault act, MCL 500.3106(1),

sets forth the general proposition 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 the injury occurs under specific, limited circumstances noted in MCL 500.3106(1)(a), (b), (c) or (2). One such circumstance encompasses injuries “sustained by a person while occupying, entering into, or alighting from the vehicle.” MCL 500.3106(1)(c).¹

In *Miller*, 411 Mich at 639, the Supreme Court described the policy underlying § 3106, “the parking exclusion,” as follows:

Injuries involving parked vehicles do not normally involve the vehicle *as a motor vehicle*. Injuries involving parked vehicles typically involve the vehicle in much the same way as any other stationary object (such as a tree, sign post or boulder) would be involved. There is nothing about a parked vehicle *as a motor vehicle* that would bear on the accident. [Emphasis in original.]

Stated differently, in enacting § 3106(1), the Legislature signaled that the phrase “use of a parked vehicle as a motor vehicle” would not exempt coverage for certain injuries connected with parked motor vehicles. The Supreme Court elaborated in *Miller*:

Section 3106(c) provides an exception for injuries sustained while occupying, entering or alighting from a vehicle, and represents a judgment that the nexus between the activity resulting in injury and the use of the vehicle as a motor vehicle is sufficiently close to justify including the cost of coverage in the no-fault system of compensating motor vehicle accidents.

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. [*Id.* at 640-641 (emphasis in original).]

Pursuant to well-established statutory interpretation principles, “[w]here the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.” *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002) (internal quotation omitted). In my view, § 3106(1) clearly and unambiguously expresses that an accidental bodily injury arises from the “ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle” if the claimant suffered the injury while “alighting from the vehicle.” Because enforcement of the statute as written demands coverage when an injury is sustained while alighting from a parked car, I believe that the Supreme Court in *Putkamer*, 454

¹ The exceptions to this rule listed in MCL 500.3106(2) are not relevant here.

Mich at 635-636, departed from the plain language of the statute when it adopted an additional layer of analysis.²

A second consideration also animates my analysis. The “causal connection” test announced in *Kangas*, 64 Mich App at 17, and adopted in *Putkamer*, 454 Mich at 635-636, finds its genesis in traditional negligence principles. Typically, insurance policies outside the no-fault context cover negligent acts. Consequently, liability under such a policy depends on a claimant’s proof of fault, which in turn requires evidence of proximate cause. Proximate cause involves an examination of the foreseeability of consequences and a determination whether a defendant should be held legally responsible for those consequences. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). In contrast, the no-fault compensation system intends to “provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses” regardless of fault. *Shavers*, 402 Mich at 578-579; see also MCL 500.3105(2) (“Personal protection insurance benefits are due under this chapter without regard to fault.”). Our Supreme Court explained in *Shavers*, 402 Mich at 578-579:

The Michigan No-Fault Insurance Act ... was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or “fault”) liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of *compulsory* insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort. [Emphasis in original.]

Michigan’s compulsory no-fault insurance system dictates that every policy issued must contain personal protection benefits. By mandating personal injury protection insurance, “with its comprehensive and expeditious benefit system,” the Legislature intended to counteract the “tort liability system,” which “denied benefits to a high percentage of motor vehicle accident victims,” overcompensated minor injuries, undercompensated serious injuries, commonly delayed payment, and overburdened the court system. *Shavers*, 402 Mich at 579. “In short, the no-fault act guarantees personal protection benefits to accident victims, even in the absence of

² Curiously, the Supreme Court recognized that § 3106 suffices to determine coverage for an injury related to a parked car when it wrote, “Where the motor vehicle is parked, the determination whether the injury is covered by the no-fault insurer generally is governed by the provisions of subsection 3106(1) alone. There is no need for an additional determination whether the injury is covered under subsection 3105(1).” *Putkamer*, 454 Mich at 632-633. The Court advanced no textual explanation for the judicial gloss it later imposed in adopting the tripartite test.

applicable insurance coverage, in exchange for limitations on the victim's ability to file a tort claim." *Husted v Auto-Owners Ins Co*, 459 Mich 500, 513; 591 NW2d 642 (1999).³

I propose that *Putkamer* inappropriately imposed a tort-law causation test in a pure no-fault setting. Although our Legislature may not have envisioned plaintiff's specific injury when it drafted MCL 500.3106(1)(c), the Legislature clearly intended to eliminate disputes about personal protection coverage for injuries sustained by persons "alighting" from a vehicle.⁴ Simply put, the act envisions that victims of a narrowly defined category of injuries related to parked cars will receive certain compensation. By legislative decree, alighting injuries arise out of the "use of a parked vehicle as a motor vehicle." MCL 500.3106(1)(c). Because defendant does not dispute that plaintiff's hip fractured as she alighted from her pickup truck, I believe that the statute compels coverage without a need for further legal analysis.

/s/ Elizabeth L. Gleicher

³ Personal protection benefits include medical expenses, MCL 500.3107(1)(a), wage loss benefits, MCL 500.3107(1)(b), replacement services, MCL 500.3107(1)(c), and survivor's loss benefits, MCL 500.3108.

⁴ If any traditional tort law principles apply to no-fault coverage, it is the precept that a tortfeasor takes the victim as he finds him.