



Motor Vehicle - No-Fault Practice Group

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## WILL THE 2009 MICHIGAN SUPREME COURT 'NEW MAJORITY' CONTINUE TO CHALLENGE PRIOR RULINGS?

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Claims professionals beware! Because the November 2008 election shifted power from the Michigan Supreme Court's "old (conservative) majority" to a "new (liberal) majority," the potential for seismic changes to the state's legal landscape may be forthcoming, if a recent decision is any indicator.

Vacating its 2008 opinion regarding the "almost any casual connection or relationship will do" test of causation, the 2009 Michigan Supreme Court "new majority" now states the causation test under MCL 550.3105(1) was precedent and was properly applied to Michigan No-Fault law.

In the case of *Scott v. State Farm Mutual Insurance Company*, 278 Mich. App. 578; 751 N.W.2d 51 (2008), the issue to be decided was whether the plaintiff's no-fault insurance carrier was required to pay for cholesterol medication prescribed in 1997, which was allegedly related to the plaintiff's 1981 automobile accident.

The plaintiffs, as representatives of the insured's estate, brought suit against State Farm Mutual Automobile Insurance Co. (State Farm) for first-party personal protection (PIP) benefits for Kristen Krohn, an incapacitated individual injured in a motor vehicle accident. Specifically, the plaintiffs sought PIP benefits for the cost of cholesterol medication for Krohn. The trial court denied summary disposition in favor of State Farm, which subsequently appealed.

Krohn was involved in a motor vehicle accident in 1981 in which she suffered brain and other injuries. In the years following the accident, Krohn received PIP benefits from State Farm for her care, recovery and rehabilitation.

In 1991, Krohn was diagnosed with high cholesterol. Her doctor prescribed cholesterol medication in 1997, opining that Krohn's high cholesterol was directly related to complications from her automobile accident.

State Farm refused to pay for the medication, arguing its necessity was insufficiently related to the 1981 motor vehicle accident. The question before the Michigan Court of Appeals was whether Krohn's cholesterol problem was "arising out of" the injuries sustained in the 1981 automobile accident. MCL § 500.3105(1). The trial court denied the defendant insurer's motion for summary disposition, and an appeal followed.

## Michigan Court of Appeals Decision

In the case brought before the Michigan Court of Appeals, the appellate court considered the evidence of the causal connection between the accident and the high cholesterol in the light most favorable to the plaintiff and ruled that the plaintiff presented evidence sufficient to raise a genuine issue of material fact.

The court, relying on *Shinabarger v. Citizens Mut. Ins. Co.*, 90 Mich. App. 307 (1979) and *Bradley v. Auto. Inter-Ins. Exch.*, 130 Mich. App. 34 (1983), stated that the test was not one of direct or proximate causation, but rather that “almost any causal connection will do” for purposes of the No-Fault Act. Therefore, the trier of fact must determine whether the high cholesterol problem was “arising out of” the accident, thus affirming the lower court’s denial of summary disposition in favor of State Farm. In 2008, State Farm subsequently sought leave to appeal from the Michigan Supreme Court.

## 2008 Michigan Supreme Court Decision – “The Old Majority”

On the contrary, the “old majority” Michigan Supreme Court members, considering the issue, and in an order dated Dec. 3, 2008, in lieu of granting leave to appeal, vacated the portion of the appellate court’s opinion with regard to the causation test under MCL 550.3105(1), in which the court had stated that “almost any causal connection or relationship will do.” The Supreme Court stated that this causation test was inconsistent with the holdings in prior Michigan caselaw.

In his concurrence, Justice Stephen J. Markman explained that the cases relied upon by the appellate court, *Shinabarger* and *Bradley*, were non-binding on the Supreme Court and pre-dated the court’s holdings in *Thornton v. Allstate Ins. Co.*, 425 Mich. 643 (1986) and *Putkamer v. Transamerica Ins. Corp. of America*, 454 Mich. 626 (1997). Justice Markman stated, in both *Thornton* and *Putkamer*, the Supreme Court adopted a more than “incidental, fortuitous, or but for” causation test. He noted that the court could have adopted the prior language from *Shinabarger* and *Bradley*, but implicitly rejected the “any causal connection” language.

In her dissent to the 2008 Opinion, Justice Marilyn Kelly indicated that she would have granted leave to appeal. Justice Kelly argued that the majority, in vacating the portion of the appellate court’s opinion regarding the “almost any causal connection will do” test for causation, had overturned a line of Michigan caselaw that was established in 1979. Her dissent argued that the precedent made clear that an injury requires more than an incidental, fortuitous, or but for causal connection, but did not require full proximate causation. Therefore, the “any causal connection will do” language, found in *Bradley*, could be read together, with the more than a “fortuitous, incidental, but for” causal connection found in *Thornton* and *Putkamer*, to mean that “evidence establishing almost any causal connection will suffice when it is more than merely fortuitous, incidental or but for.”

The dissent described this level of proof as a “scintilla of proximate cause” and concluded by arguing that the majority, before altering this standard, should have granted leave to appeal and make such a change only after due deliberation.

## 2009 Michigan Supreme Court Decision – “The New Majority”

On June 5, the 2009 “new majority” Michigan Supreme Court members granted the plaintiff’s motion for reconsideration of the prior court’s Dec. 3, 2008 order and, in an opinion reflecting the new thinking of the majority of the court, issued an order vacating its own Dec. 3, 2008 order and denied State Farm’s application for leave to appeal the 2008 opinion of the Michigan Court of Appeals.

The order was accompanied by a concurrence written by the new Chief Justice Marilyn Kelly and a dissent written by Justice Maura Corrigan.

Chief Justice Kelly stated in her concurrence that the prior order improperly vacated the appellate court's opinion concerning the inclusion of the language "almost any causal connection will do."

Reiterating her arguments from the prior order's dissent, Chief Justice Kelly stated that the "almost any casual connection or relationship will do" test of causation was precedent and that the appellate court had properly applied Michigan No-Fault law as it had been understood for 30 years.

In a sharp-toned dissent aimed at the thinking of what she called the "new majority" of the court, Justice Corrigan stated that the court's prior 2008 order had properly vacated the appellate court's decision as it pertained to causal connection for purposes of the Michigan No-Fault Act.

Furthermore, Justice Corrigan asserted that it was a "growing and troubling trend" that the new majority has chosen to ignore precedent rather than "forthrightly overruling decisions with which it disagrees."

The dissent continued by listing five cases, in addition to the present case, in which the majority had failed to follow precedent.

The Corrigan dissent concluded by arguing that the new majority "overrules by indirection... thereby sowing the seeds of confusion and making it difficult for the citizens of this state to comprehend precisely what our case law requires."

Justices Young and Markman joined the Corrigan dissent.

As the court moves forward in its current form, claims professionals need to keep a close eye on the court's rulings and how they may impact prior precedent – not only in PIP cases, but in auto related matters.