STATE OF MICHIGAN

COURT OF APPEALS

TINA McCARTHY,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
June 4, 1999

No. 212629
Delta Circuit Court
LC No. 97-013816 NI

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

Defendant-appellant Allstate Insurance Company ("Allstate") appeals as of right a judgment for plaintiff-appellee Tina McCarthy ("McCarthy") that the trial court entered after granting McCarthy's motion for summary disposition. The trial court found that McCarthy was entitled to judgment as a matter of law based on the determination that a sufficient causal connection existed between her injury and her use of her motor vehicle as a motor vehicle. We reverse.

I. Basic Facts And Procedural History

The facts in this matter are not in dispute. In mid-May, 1997, McCarthy injured her back while removing a box of pasties from her parked, two-door automobile. McCarthy had been selling pasties to help raise funds for her son's hockey team and some of her coworkers had ordered pasties. McCarthy brought the pasties to work in a box in the back of her automobile and then left them in the automobile while she went into her place of work. About an hour and a half later, McCarthy returned to her automobile to unload the box of pasties. McCarthy entered the automobile through the driver's side door and sat in the driver's seat with both feet on the floor. McCarthy then twisted and turned to her right, reaching behind her and into the back passenger side of the automobile. McCarthy then lifted the box of pasties with both hands and attempted to lift it over the seat. McCarthy testified at her deposition that the box "got caught on the seat" and that she had to "yank on it." At this point, McCarthy experienced pain in her back and thought that perhaps she had pulled a muscle. After working that day and another two days, McCarthy saw her chiropractor but this only seemed to worsen her condition and she later received further medical treatment. McCarthy did not thereafter return to work.

After Allstate, her automobile insurer, refused to pay personal protection insurance ("PIP") benefits, McCarthy brought suit against Allstate, seeking those benefits. The trial court granted summary disposition for McCarthy pursuant to MCR 2.116(C)(10). The trial court later entered judgment for McCarthy in the amount of $62,453.19, representing her medical expenses, wage loss, and attorney fees, along with mediation sanctions and interest.

II. Standard Of Review

This Court reviews a trial court's decision whether to grant a motion for summary disposition based on MCR 2.116(C)(10) de novo. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). This Court must determine whether any genuine issue of material fact exists that would prevent entering a judgment for the moving party as a matter of law. *Id*. In making this determination, this Court must "consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Under the Michigan no-fault act, MCL 500.3101 *et seq*.; MSA 24.13101 *et seq*. (the "no-fault act"), an insurer must pay PIP benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1); MSA 24.13105(1). Where there is no factual dispute, as in this case, "the issue whether an injury arose out of the use of a vehicle is a legal issue for a court to decide and not a factual one for a jury." *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 630; 563 NW2d 683 (1997).

III. Analysis

A. Provisions Of The No-Fault Act Relating To Parked Vehicles

Under the no-fault act, if the injury involves a parked vehicle, MCL 500.3106(1); MSA 24.13106(1) applies. This section provides in part:

> (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) . . . [T]he 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) . . . [T]he injury was sustained by a person while occupying, entering into, or alighting from the vehicle. [Id.; emphasis supplied.]

B. The *Putkamer* Three-Pronged Test

The Michigan Supreme Court has set forth a three-part test for cases involving parked vehicles, holding:

> [W]here a claimant suffers an injury in an event related to a parked motor vehicle, . . . he must demonstrate that (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle *as a motor vehicle*; and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for. [*Putkamer*, *supra* at 635-636 (emphasis in original).]

Here, McCarthy was injured while sitting inside her parked vehicle with both feet on the floor, attempting to remove a box of pasties. McCarthy was clearly occupying the vehicle at the time of the injury, satisfying the first step of the *Putkamer* test since her conduct fits within the exception listed in § 3106(1)(c).

McCarthy also satisfies the second step of the *Putkamer* test. The Michigan Supreme Court has recently articulated a new standard for determining whether an injury arises out of the use of a motor vehicle as a motor vehicle. This determination "turns on whether the injury is closely related to the transportational function of motor vehicles." *McKenzie v ACIA*, 458 Mich 214, 225-226; 580 NW2d 424 (1998). Here, McCarthy's injury occurred as she was attempting to unload the box of pasties from the vehicle. Loading and unloading items from a vehicle may be an essential component of transporting those items; therefore, McCarthy's injury was closely related to the transportational function of motor vehicles. Her injury therefore arose out of the use of a motor vehicle as a motor vehicle.

C. Causal Connection

The issue then becomes whether there was a sufficient causal connection between McCarthy's injury and the motor vehicle. Allstate relies on *Shellenberger v Ins Co of North America*, 182 Mich App 601; 452 NW2d 892 (1990), for the proposition that no causal connection existed. In that case, the plaintiff was a truck driver who, after starting the truck engine, reached to move a briefcase inside the truck and injured his back. *Id.* at 602. The *Shellenberger* panel, following the standard set forth in *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), held that there was not a sufficient causal connection between the injury and the use of the vehicle as a motor vehicle. The *Shellenberger* panel stated:

> [M]oving the briefcase by reason of the configuration of the interior of the truck cannot be said to result from some facet particular to the normal functioning of a motor vehicle. The need to make similar movements in order to reach for a briefcase routinely occurs in offices, airports, homes, conference rooms, courtrooms, restaurants, and countless other settings where no-fault insurance does not attach. The fact that plaintiff's movement in reaching for the briefcase occurred in the interior of the truck does not

> transform the incident into a motor vehicle accident for no-fault purposes. [*Shellenberger, supra* at 605.]

Allstate argues that *Shellenberger* is dispositive because, as with the truck driver plaintiff in that case, McCarthy was moving something in the interior of the vehicle and injured her back. Allstate argues that McCarthy's vehicle was merely the situs of her injury and that the causal connection was not more than incidental, fortuitous, or but for. The trial court distinguished *Shellenberger* on the basis that McCarthy was in the process of removing the box of pasties, which she had transported, from her vehicle when she was injured, whereas the truck driver plaintiff in *Shellenberger* was not unloading the briefcase but was merely moving it around inside the vehicle. The trial court therefore concluded that McCarthy's injury had a causal connection with the use of her vehicle to transport the box of pasties that was more than incidental, fortuitous, or "but for."

We note that in *Perryman v Citizens Ins Co of America*, 156 Mich App 359; 401 NW2d 367 (1986), the plaintiff and a friend had transported gear for a bird hunting trip in the plaintiff's van. *Id.* at 361. When these two individuals arrived at their destination, they began unloading some of the gear. The plaintiff's friend took his shotgun out of its case and swung it over his body; in so doing, the shotgun fired, injuring the plaintiff. *Id.* at 361-362, 365. The *Perryman* panel affirmed a grant of summary disposition in favor of the plaintiff, holding that his injury was sufficiently connected causally to the use of his van as a motor vehicle. The panel stated that the van was more than the mere situs of the injury; rather, it contributed to the injury because of the "relatively confined and dimly lit quarters within which [the plaintiff's friend] had to maneuver his weapon in order to unload it from the van." *Id.* at 365-366.

While the *Shellenberger* decision and the *Perryman* decision may appear to be inconsistent,[1] we believe that the factual differences between the two cases explain the disparate results. In our view, McCarthy's situation here is, in our view, much more akin to the factual circumstances in *Shellenberger* than to those in *Perryman*. Unlike the situation in *Perryman*, McCarthy's injury was not causally related to either the relatively confined or dimly lit quarters in which she maneuvered to lift the box of pasties. Rather, the movements that she made to lift the box—twisting, turning, reaching behind her, attempting to lift the box—could have occurred in her home, her place of work, and "countless other settings where no-fault insurance does not attach." *Shellenberger, supra* at 605.

We therefore conclude that, regardless of whether an item is being loaded, unloaded, or merely moved around within the vehicle, an injury resulting from the movement of a person reaching for or handling that item is not sufficiently connected causally to the use of the vehicle to transport the item. Stated differently, we conclude that although McCarthy's injury occurred when unloading her vehicle and therefore arose out of her use of that vehicle as a motor vehicle, the injury resulted not from any circumstance peculiar to motor vehicles but from the act of lifting the box of pasties. As the *Shellenberger* panel noted, similar movements are made in a wide variety of settings, and we conclude that the fact that McCarthy's injury occurred inside a vehicle does not provide a sufficient causal connection. Simply put, we conclude that the vehicle in this case was merely the situs of injury and not the cause of it.

Reversed and remanded for entry of judgment in favor of Allstate. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Stephen J. Markman
/s/ Peter D. O'Connell

[1] Indeed, the *Shellenberger* panel criticized the *Perryman* decision, stating that it too readily discarded the *Thornton* standard by focusing on the physical characteristics of the vehicle. *Shellenberger, supra* at 604-605.