STATE OF MICHIGAN

COURT OF APPEALS

PAMELA HINES, Personal Representative of the Estate of Jeanette Hines,

Plaintiff-Appellant,

v

PIONEER STATE MUTUAL INSURANCE COMPANY and LINDEN SQUARE LIMITED DIVIDEND HOUSING ASSOCIATION, d/b/a PINE SHORE APARTMENTS,

Defendants-Appellees.

UNPUBLISHED
August 10, 2004

No. 247093
Genesee Circuit Court
LC No. 02-073709-NI

Before: Gage, P.J., and Meter and Fort Hood, JJ.

FORT HOOD, J. (concurring in part and dissenting in part).

I concur in the majority's disposition of the claim based on premises liability and uninsured motorist benefits. I respectfully dissent from the majority's disposition of the claim based on personal injury protection benefits (PIP).

We review a trial court's decision regarding a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden, supra*.[1] When deciding a motion for

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[1] Moreover, a party may not leave it to this Court to search for authority to sustain its position. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002). Plaintiff repeatedly cites to the deposition testimony of the decedent's daughter regarding statements made by the decedent. However, plaintiff failed to brief or address the admissibility of the
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summary disposition, a court may not assess credibility or determine facts. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, the court's task is to review the admissible evidence of record. *Maiden, supra*; *Skinner, supra*.

With regard to construction of a statute, issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The primary goal of statutory interpretation is to give effect to the intent of the Legislature by examining the plain language of the statute. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). Where there is no dispute concerning the facts of a claim involving the no-fault act, MCL 500.3101 *et seq*, the issue presents a legal question for the court, not a factual issue for the jury. *Putkamer v Transamerica Insurance Corp*, 454 Mich 626, 630; 563 NW2d 683 (1997).

Recovery for injuries arising out of the use of a parked vehicle is precluded unless one of three statutory exceptions is satisfied. MCL 500.3106(1). In the present case, plaintiff seeks recovery based on the exception for injury that "was sustained by a person while occupying, entering into, or alighting from the vehicle." MCL 500.3106(1)(c).

In *Krueger v Lumbermen's Mutual Casualty Co*, 112 Mich App 511, 515; 316 NW2d 474 (1982), the plaintiff was delivering items in his company van. From the front seat, the plaintiff picked up mats and began to climb out of the vehicle. He placed his right foot on the ground and brought his left foot down into a hole in the ground, which caused injury to his left ankle and lower back. *Id*. Because the facts were not in dispute, this Court concluded that it was appropriate to determine whether the plaintiff was "alighting" from the vehicle. *Id*. at 513, 515. This Court held:

> We must disagree, however, with the circuit court's conclusion that plaintiff was not "alighting", within the meaning of § 3106 and his employer's insurance policy, at the time of the injury. There is no statutory definition of the term "alighting" and little case law. The court below felt that since plaintiff was no longer in contact with the vehicle when the injury occurred, he had completed the process of alighting from the vehicle. Although it is unnecessary to attempt a complete definition of the term at this time, we are convinced that an individual has not finished "alighting" from a vehicle at least until both feet are planted firmly on the ground. Consequently, we hold that the cricuit [sic] court erred in concluding that plaintiff's injuries did not fall within § 3106(c). [*Id*. at 515.]

Defendant insurance company places great weight on the contention that there was no evidence that "both feet" were not firmly planted on the ground. However, as the *Krueger* Court noted, the definition of "alighting" was not definitively and completely defined. Rather, the noun "alight" is defined as "to come down and settle, as after flight" or "to dismount."[2] Based on the underlying circumstances and negative evidence, there was sufficient evidence to survive

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statements. Consequently, I do not consider the decedent's statement regarding the slip and fall, which most prominently addresses the premises liability claim, in addressing the PIP claim.

[2] The American Heritage Dictionary (1973), p 33.

summary disposition that plaintiff was dismounting the motor vehicle. The door of the vehicle was open, and the decedent's daughter had placed the walker near the door for the decedent to use. When the decedent was discovered on the ground, there was no evidence of oil on the walker or the decedent's shoes. However, there was a large oil mark on the pants that stained the pants after washing. Where the facts are in dispute, an issue for the jury has been presented. *Putkamer, supra*.

Moreover, review of the record reveals that the trial court cited to circumstances that are outside the scope of consideration when addressing a motion for summary disposition. The trial court noted in the motion hearings that the decedent's daughter had a "motive" to present evidence in a certain manner. The defense also cited to the health conditions of the decedent, noting her diabetes and her amputation of toes, creating the implication that any injury was the fault of the decedent. The trial court's citation to the credibility of the decedent's daughter and the potential fault of the decedent, particularly in light of the claim based on the no-fault act, are not appropriate considerations when deciding a motion for summary disposition. *Skinner, supra*.

Plaintiff clearly has a great obstacle to prevailing at trial. After the fall, the decedent went to her home and slept without incident that night. The next day, the decedent went to dialysis. After she returned home, the decedent fell asleep and could not be woken by her daughter. An ambulance took the decedent to the hospital, and she died ten days later. Without preserved testimony, the likelihood of success at trial is questionable. However, under the circumstances, I conclude that plaintiff presented sufficient proofs to survive the summary disposition challenge with regard to PIP benefits. I would reverse with regard to this claim only.

/s/ Karen M. Fort Hood