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| MEEMIC INSURANCE COMPANY,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>June 5, 2012 |
| v<br><br>WALTER SAKOWSKI, Personal Representative of the Estate of MARY JO MCNAMARA,<br><br>Defendant-Appellee. | No. 301157<br>Wayne Circuit Court<br>LC No. 10-010980-NF |

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Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff MEEMIC Insurance Company appeals as of right the trial court's order granting summary disposition in favor of defendant Mary Jo McNamara and denying MEEMIC's motion for summary disposition. The motions were brought pursuant to MCR 2.116(C)(10). We reverse and remand for entry of judgment in favor of MEEMIC.

McNamara was a backseat passenger in a car that had just been parked at a condominium after McNamara and friends had finished a day of shopping. McNamara sustained serious injuries as the result of falling to the pavement outside of her car door after losing her balance in an unsuccessful attempt to stop a glass bottle of water she had purchased from falling and breaking. After the instant appeal was filed, McNamara unfortunately died.

McNamara was a named insured on a policy issued by MEEMIC, and, pursuant to the no-fault act, MCL 500.3101 *et seq.*, a claim for personal protection insurance (PIP) benefits was submitted to MEEMIC, which denied the claim on the basis that McNamara was not entitled to PIP benefits under MCL 500.3105 and MCL 500.3106. MEEMIC proceeded to file a declaratory judgment action to settle the dispute. McNamara, in support of her position that PIP benefits were due and payable, relied on MCL 500.3106(1)(b), which provides:

> (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:
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> * * *

> (b) Except as provided in subsection (2) [inapplicable Worker's Disability Compensation provision], *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*. [Emphasis added.]

McNamara maintained and argues on appeal that MCL 500.3106(1)(b) is applicable because the injuries were a direct result of physical contact with property, i.e., the water bottle, as it was being lowered from Sheeran's car in the unloading process. On competing motions for summary disposition, the trial court denied MEEMIC's motion and granted McNamara's motion, finding that MCL 500.3106(1)(b) was indeed applicable as a matter of law. The court cited *Sherman v Mich Mut Ins Co*, 124 Mich App 700; 335 NW2d 232 (1983), in support of its ruling. MEEMIC appeals as of right, setting forth numerous arguments with respect to why MCL 500.3106(1)(b) does not apply to the factual circumstances presented in this case.

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal, *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011), as is a question of statutory interpretation, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, to weigh the evidence, or to resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

As indicated above, MCL 500.3106(1)(b), the statutory provision at issue, provides as follows:

> (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:
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> * * *
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> (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*. [Emphasis added.]

In *Arnold v Auto-Owners Ins Co*, 84 Mich App 75; 269 NW2d 311 (1978), this Court found the statutory provision quoted above to be ambiguous in tackling the question of whether the two clauses in the statute, i.e., the "equipment" and "property" clauses, were dependent or independent clauses. The Court found that the clauses were independent and held that § 3106(1)(b) "makes compensable injuries which are a direct result of physical contact with property being lifted onto or lowered from the parked vehicle in the loading or unloading process." *Id.* at 80. In *Celina Mut Ins Co v Citizens Ins Co*, 136 Mich App 315, 319-321; 355 NW2d 916 (1984), this Court found that § 3106(1)(b) applied where a truck owner was injured when a bundle of steel tubing fell and struck him during the loading and unloading process.

In *Dembinski v Aetna Cas & Surety Co*, 76 Mich App 181, 182; 256 NW2d 69 (1977), this Court noted the following facts:

> While plaintiff was carrying a ceramic mold from his store through a vestibule or hallway toward an outside doorway to load the mold into his truck, he slipped in a puddle of water, fell, and injured his back. He was twenty feet from his truck when he fell. The mold did not land on him.

Examining § 3106, the *Dembinski* panel first found that the injury did not occur in the loading or unloading process. *Id.* at 183. Furthermore, the Court held that the plaintiff's injury was not "a direct result of physical contact with property being lifted into the truck;" rather, the "injury was a result of slipping in the puddle, and the mold, not having landed on plaintiff, did not contribute to the injury." *Id.*

In *Frohm v American Motorists Ins Co*, 148 Mich App 308, 309-310; 383 NW2d 604 (1985), this Court, setting forth the events that led to the plaintiff's injury, stated:

> In the course of plaintiff's employment as a driver of a refuse truck, he loaded large free-standing metal waste containers onto his truck by attaching a metal cable to the waste container and engaging a hydraulic mechanism on his truck to winch the container onto the bed of the vehicle. In order to operate the hydraulic mechanism, it was necessary to keep the engine of the truck running and to use levers located inside the cab to maneuver the container.
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> On April 21, 1981, the date of plaintiff's injury, plaintiff hooked the cable to the waste container, but prior to engaging the hydraulic mechanism he climbed onto the adjacent loading dock to throw wooden pallets into the waste container. While throwing a pallet into the waste container, and standing with one foot on the loading dock and one foot on the waste container, plaintiff injured his back.

With respect to § 3106, this Court held that "even if his loading of the containers to be loaded onto the vehicle was considered part of the loading or unloading process, and even though plaintiff was in contact with the property, *i.e.*, waste container, to be loaded, his injury did not *directly result from* physical contact with *the property, i.e.* the waste container, *being lifted onto or lowered from his vehicle*." *Id.* at 311 (emphasis in original).

Here, the evidence indicates that it was the loss or lack of physical contact with the bottled water that set into motion the act of McNamara falling to the ground. McNamara's physical contact with the bottle, in and of itself, did not cause or result in her injuries; she was apparently trying to gain physical contact or control when the fall occurred. Moreover, McNamara's injuries were not the result of being struck by the bottle of water. The bottled water did not fall on her and cause her injuries. McNamara focuses on the fact that she was holding or had physical contact with the water bottle before she was injured, but physical contact with the property alone does not establish the applicability of § 3106(1)(b). The injury must be the *direct* result of the person's physical contact with the property, and such was simply not the case here relative to McNamara's injuries and any physical contact with the bottled water. We also question whether it can be said that the water bottle was being "lowered" from the car as required by § 3106(1)(b). The factual circumstances in this case, when viewed in a light most favorable to McNamara, do not support the conclusion that § 3106(1)(b) was implicated.

The trial court's reliance on *Sherman*, 124 Mich App 700, was misplaced, where there this Court relied on MCL 500.3106(c), now MCL 500.3106(1)(c), in finding that the plaintiff was "occupying" the vehicle at the time of his injury. The *Sherman* panel did not even analyze the provision at issue here. The trial court erred in ruling that McNamara was entitled to summary disposition pursuant to MCL 500.3106(1)(b), and it erred in denying MEEMIC's motion for summary disposition. Given that McNamara placed sole reliance on MCL 500.3106(1)(b) and that said provision is not applicable as a matter of law, we remand for entry of judgment in favor of MEEMIC.

Reversed and remanded for entry of judgment in favor of MEEMIC. We do not retain jurisdiction. Having prevailed in full, MEEMIC is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan