STATE OF MICHIGAN

COURT OF APPEALS

CHERYL DINKINS,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 13, 2012

No. 307363
Oakland Circuit Court
LC No. 2010-115923-NF

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by right the opinion and order granting defendant's motion for summary disposition in this no-fault insurance action. We affirm.

Plaintiff alleges that the trial court erred by granting defendant's motion for summary disposition and dismissing her claim for no-fault insurance benefits because she was using her vehicle as a motor vehicle, and one of the parked vehicle exclusions applied to the circumstances of her accident. We disagree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Auto Club Group Ins Ass'n v Andrzejewski*, 292 Mich App 565, 569; 808 NW2d 537 (2011). "This Court considers only the evidence that was properly presented to the trial court in deciding the motion." *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). Summary disposition "is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "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 could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012).

Reviewing the lower court record in the light most favorable to plaintiff, there is no genuine issue of material fact, and defendant is entitled to judgment as a matter of law. Accordingly, the trial court properly granted summary disposition in favor of defendant.

"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. . . ." MCL 500.3105(1). With regard to parked vehicles, accidental bodily injury does not arise from the ownership, operation, maintenance or use unless one of the following occurs:

> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (b) Except as provided in subsection (2), 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.
>
> (c) Except as provided in subsection 2, the injury was sustained by a person while occupying, entering into, or alighting from the vehicle. [MCL 500.3106(1)(a)-(c).]

"[B]ecause recovery under the no-fault act for injuries involving parked vehicles is, in general, precluded, . . . plaintiff ha[s] the burden of demonstrating that the unrefuted evidence established both that one of the exceptions to the parked vehicle exclusion applie[s] and that injury arose out of the use of a motor vehicle as a motor vehicle." *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 632; 552 NW2d 671 (1996).

"LOADING OR UNLOADING" PARKED VEHICLE EXCLUSION, MCL 500.3106(1)(b)

"Whether or not what occurred comes within the insurance coverage of 'loading or unloading' is a question of law and is properly brought into issue by a motion for summary [disposition]." *Jasinski v Nat'l Indemnity Ins Co*, 151 Mich App 812, 820-821; 391 NW2d 500 (1986). "Section 3106(1)(b) of the no-fault act 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 820 (emphasis added). "[S]ubsection 3106(1), like subsection 3105(1), requires that, in order to recover, the injury must have a causal relationship to the motor vehicle that is more than incidental, fortuitous, or but for." *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635; 563 NW2d 683 (1997).

"The underlying policy of the parked motor vehicle exclusion of subsection 3106(1) is to ensure that an injury that is covered by the no-fault act involves use of the parked motor vehicle *as a motor vehicle*. . . . 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." *Putkamer*, 454 Mich at 633 (emphasis in original; further citation omitted).

Plaintiff stated in her complaint only that she, "while unloading items from her vehicle[,] was caused to slip and fall on black ice." Her deposition left open the question whether she last touched her car door or the bag she was retrieving when she slipped. Plaintiff testified that her "left hand was on the door, shutting it," and her right hand contained the bag she had been retrieving when she fell. Plaintiff has not satisfied her burden to put forth "unrefuted evidence" that one of the parked vehicle exceptions applies, see *Shanafelt*, 217 Mich App at 632, because it is not clear from the factual record that her injury was a "direct result of physical contact with *property* being lifted onto or lowered from the parked vehicle in the loading or unloading process." *Jasinski*, 151 Mich App at 820-821 (emphasis added). Although arguably the factual record contains evidence that plaintiff was injured "in the loading or unloading process," coverage does not apply under the parked vehicle exclusion unless the "direct result" requirement is also met. There are no characteristics about a bag containing DVDs that would cause an ordinary person to injure oneself in the process of unloading it from a parked car. If plaintiff's bag was peculiarly heavy or unwieldy in any way, it was not clearly set forth in the record before the trial court when it ruled on defendant's motion for summary disposition.

Plaintiff's assertions that she was in "physical contact with the motor vehicle" and that "her hand remained on the door" does not satisfy the "physical contact" requirement found in MCL 500.3106(1)(b). "Physical contact" refers to contact with "equipment permanently mounted on the vehicle," or with "property being lifted onto or lowered from the vehicle in the loading or unloading process." MCL 500.3106(1)(b). It does not refer to contact with the vehicle itself. The vehicle's door is not "equipment permanently mounted on the vehicle" for purposes of the parked vehicle exclusion. *Frazier v Allstate Ins Co*, 490 Mich 381, 386; 808 NW2d 450 (2011).

USE OF A MOTOR VEHICLE AS A MOTOR VEHICLE, MCL 500.3105(1)

"[W]here there is no dispute about the facts, 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*, 454 Mich at 630; see also *Krueger v Lumbermen's Mut Cas & Home Ins Co*, 112 Mich App 511, 514-515; 316 NW2d 474 (1982).

Even if plaintiff presented facts sufficient to show that her injury was a "direct result of physical contact with" the bag she was unloading, she failed to satisfy the second aspect of her burden: that the injury arose out of the use of a motor vehicle as a motor vehicle. *Shanafelt*, 217 Mich App at 632. "[W]hether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles. . . . While a vehicle need not be in motion at the time of an injury in order for the injury to 'arise out of the use of a motor vehicle as a motor vehicle,' . . . the phrase 'as a motor vehicle' does require a general determination of whether the vehicle in question was being used, maintained, or operated for transportational purposes[.]" *Drake v Citizens Ins Co of America*, 270 Mich App 22, 26; 715 NW2d 387 (2006) (citations omitted).

At the time of her accident, plaintiff was recovering from surgery on her back and was unable to drive. Plaintiff testified that "it had been so long" she could not remember how long her car had been parked in the same spot. Because her aide was not present at the time of the accident, and plaintiff was not in a condition to drive, plaintiff failed to establish that she

intended to use the vehicle for its transportational function. "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." *Putkamer*, 454 Mich at 633 (further citation omitted). As long as plaintiff was by herself at her apartment without an aide or friend to drive her, her car functioned less as a method of transportation and more as a locker or storage facility.

Plaintiff points to her deposition, wherein she testified that she had been at her girlfriend Shirley's house "earlier," establishing "that prior to the accident, she was at Shirley's house and exchanged DVDs," and that "[o]nce [plaintiff] was dropped off at home, she went up to her apartment, and went down later to get the DVDs." Plaintiff analogizes the facts surrounding her accident to someone unloading groceries from her car in repeat trips.[1] But the fact that a car was once used for its transportational function cannot confer transportational status on it for an indefinite period thereafter. Plaintiff's injury thus did not arise out of the use of a motor vehicle "as a motor vehicle," and is therefore ineligible for PIP benefits under MCL 500.3105.

Affirmed. Defendant, the prevailing party, may tax costs.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

[1] In response to the question, "[W]hen you parked your car in that spot, had it been earlier on the date of the incident, or had it been someday prior?", plaintiff responded, "It had been so long I can't remember." Most groceries are unloaded the same day of the trip to the store. It is unclear from the record whether plaintiff visited her girlfriend's house on the day of the accident.