STATE OF MICHIGAN

COURT OF APPEALS

TERESA BRENNAN,

Plaintiff-Appellee,

v

AMERCO, U-HAUL INTERNATIONAL, INC., U-HAUL LEASING AND SALES COMPANY, U-HAUL COMPANY OF TEXAS, U-HAUL COMPANY OF MICHIGAN, DAVID MCKINSTRY, d/b/a SPACE PLACE TRUCK RENTAL, STATE FARM INSURANCE COMPANY, JEFFREY SKALITZKY, and PETER RUBINO,

Defendants,

and

REPUBLIC WESTERN INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 17, 2002

No. 231284
Oakland Circuit Court
LC No. 99-016838-NO

TERESA BRENNAN,

Plaintiff-Appellant,

v

AMERCO, U-HAUL INTERNATIONAL, INC., U-HAUL LEASING AND SALES COMPANY, U-HAUL COMPANY OF TEXAS, U-HAUL COMPANY OF MICHIGAN, DAVID MCKINSTRY, d/b/a SPACE PLACE TRUCK RENTAL, STATE FARM INSURANCE COMPANY, JEFFREY SKALITZKY, and PETER RUBINO,

No. 235116
Oakland Circuit Court
LC No. 99-016838-NO

Defendants,

and

REPUBLIC WESTERN INSURANCE COMPANY,

Defendant-Appellee.

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

In Docket No. 231284, defendant Republic Western Insurance Company[1] appeals as of right the trial court's order granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition. In Docket No. 235116, plaintiff appeals as of right the trial court's order awarding her attorney fees. We affirm the trial court's order granting summary disposition in favor of plaintiff rather than defendant, but vacate the trial court's order concerning attorney fees and remand for action consistent with this opinion.

The basic facts of this case are not in dispute. On August 1, 1998, plaintiff and her boyfriend, Jeffrey Skalitzky, were in the process of moving and rented a U-Haul truck to assist them in transporting their belongings. The U-Haul truck was equipped with a loading ramp that slid out from underneath the rear of the truck. At some point in the moving process, it became necessary to move the truck; however, when attempting to slide the ramp into its storage position, they found that it had become stuck. Because the truck could not be driven with the loading ramp extended, plaintiff went under the U-Haul truck in an attempt to fix it. While plaintiff was lying on her back, propped up on her elbows under the truck and attempting to determine if the ramp was overextended, Skalitzky and/or his friend, Peter Rubino, pushed on the loading ramp, causing it to suddenly free up and slide back toward its storage position underneath the truck. As it slid back, the ramp struck plaintiff in the face, causing her to suffer facial injuries.

Plaintiff submitted to defendant an application for personal protection insurance benefits (no-fault benefits), but defendant denied the application. After receiving the denial, plaintiff filed suit against defendants alleging negligence, among other things, and seeking no-fault benefits. Thereafter, plaintiff moved for summary disposition against defendant pursuant to MCR 2.116(C)(10). In her motion, plaintiff argued that she was entitled to no-fault benefits from defendant under MCL 500.3105(1) because her injury arose from the maintenance of the U-Haul truck and defendant was first in priority to pay benefits. Defendant countered by filing its own motion for summary disposition, asserting that MCL 500.3106 controlled the case because the truck was parked at the time of the incident and that plaintiff was not entitled to

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[1] Throughout this opinion we utilize the term "defendant" to refer solely to Republic Western Insurance Company.

benefits. At the hearing on the competing motions, the trial court held that MCL 500.3105, rather than MCL 500.3106, controlled the case. Further, the trial court determined that plaintiff was engaged in maintenance of a motor vehicle at the time she sustained injuries and was entitled to no-fault benefits. Thus, the trial court entered an order granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition. Later, a consent judgment was entered in favor of plaintiff and against defendant for $45,403.74.[2] Subsequently, the trial court determined that defendant's denial of no-fault benefits was unreasonable, awarded plaintiff attorney fees under MCL 500.3148 and interest pursuant to MCL 500.3142, and dismissed "all remaining claims and issues as to all remaining parties in this litigation." These appeals ensued.

In Docket No. 231284, defendant first argues, in essence, that the trial court erred in granting plaintiff's motion for summary disposition and in denying defendant's motion for summary disposition. Specifically, defendant asserts that plaintiff does not qualify for no-fault benefits because her injuries did not arise out of the use of a motor vehicle "as a motor vehicle" under MCL 500.3105(1). We disagree. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Likewise, we review de novo the interpretation and application of statutes. *In re Contempt of Tanksley*, 243 Mich App 123, 127; 621 NW2d 229 (2000).

In evaluating a motion for summary disposition brought pursuant to MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001).

This appeal requires us to once again apply the language of MCL 500.3105(1) to a unique factual situation and thereby determine whether plaintiff's injuries are covered.

MCL 500.3105(1) provides:

> 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, subject to the provisions of this chapter.

Plaintiff in the present case maintains that her injuries arose out of the maintenance of a motor vehicle "as a motor vehicle," and thus she is entitled to benefits. Defendant disagrees with plaintiff's assertion that her investigation of a "stuck" loading ramp constitutes maintenance of a

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[2] In the consent judgment, defendant expressly reserved its right to appeal the trial court's "order denying summary disposition as to plaintiff's claims for no-fault benefits, granting plaintiff's motion for summary disposition as to no-fault claims, and ruling plaintiff is entitled to no-fault benefits."

motor vehicle within the meaning of MCL 500.3105(1), that is "as a motor vehicle," and insists that no-fault benefits must be denied to plaintiff.

Previously, in a case applying MCL 500.3105(1), our Supreme Court has explained that "where 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." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 216, n 1; 580 NW2d 424 (1998), quoting *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 630; 563 NW2d 683 (1997). In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998), our Supreme Court interpreted the phrase "use of a motor vehicle 'as a motor vehicle'" and held that "whether 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." *Id*. at 225-226. Although the present case deals with "maintenance" rather than "use," we believe that the *McKenzie* Court's holding is equally applicable. Thus, we must determine whether plaintiff's injuries that occurred while she was trying to fix the loading ramp on a U-Haul truck constituted maintenance of a motor vehicle that is closely related to its transportational function.

Under the *McKenzie* transportational function test, we find that plaintiff's injuries did, in fact, arise out of the maintenance of a motor vehicle "as a motor vehicle." Here, plaintiff submitted documentary evidence that the U-Haul truck could not be driven while the loading ramp was extended. Specifically, the U-Haul Household Moving Van User Instructions provide, "**NEVER** put the Household Moving Van in motion while the loading ramp is extended." Plaintiff testified that the ramp was stuck and that she, Skalitzky, and Rubino were attempting to put the ramp back in its proper place so that they could move the truck. After the ramp would not return to its proper position, plaintiff went beneath the truck in order to try to fix the ramp, at which time she was injured. Thus, plaintiff's injuries arose out of the maintenance of the motor vehicle "as a motor vehicle" because the act of replacing the ramp was necessary to drive the vehicle.[3] Accordingly, the trial court properly granted plaintiff's motion for summary disposition.

Defendant also argues that plaintiff's injuries do not fall under MCL 500.3106, the parked vehicles exception. However, where injury occurs during the maintenance of a vehicle as a motor vehicle, the no-fault act requires compensation without regard to whether the vehicle might be considered parked at the time of the injury. *Miller v Auto-Owners Ins Co*, 411 Mich 633, 641; 309 NW2d 544 (1981); *McMullen v Motors Ins Corp*, 203 Mich App 102, 104-105, 107; 512 NW2d 38 (1993); *Yates v Hawkeye Security Ins Co*, 157 Mich App 711, 715; 403 NW2d 208 (1987). Therefore, we find it unnecessary to determine whether plaintiff's injuries also fell under MCL 500.3106.

In Docket No. 235116, plaintiff argues that the trial court abused its discretion in awarding plaintiff's attorney fees in the amount of $5000. From our review of the record, it is

[3] Cf. *Putkamer v Transamerica Ins Corp*, 454 Mich 626, 636; 563 NW2d 683 (1997) (addressing a claim under MCL 500.3106, the Court determined that the "plaintiff was entering the vehicle with the intention of traveling to her brother's home . . . as a matter of law, she was using the parked motor vehicle as a motor vehicle when she was entering the motor vehicle [when she slipped and fell on ice]").

apparent that the trial court awarded attorney fees to plaintiff pursuant to MCL 500.3148(1).[4] However, in doing so, the trial court, as best that we can determine, relied on a figure to compute the award that was not an expression of what was reasonable, but rather was a mechanism that plaintiff used to keep track of work hours.[5] Consequently, we vacate the trial court's order concerning attorney fees and remand for a determination of reasonable attorney fees.[6]

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra

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[4] Because defendant raised no argument on appeal concerning whether the trial court erred with respect to determining whether defendant unreasonably refused to pay the claim or unreasonably delayed in making proper payment, we do not address whether defendant's actions were reasonable.

[5] Plaintiff asserts, and it appears plausible, that the trial court awarded plaintiff attorney fees at a rate of $75 per hour for the 66.1 hours expended ($4,957.50, i.e., approximately $5000), having misunderstood plaintiff's documentation supporting her request for attorney fees. The documentation showed the use of $75 to track hours, but plaintiff explained below and on appeal that that amount was actually the overhead figure used for internal tracking that has nothing to do with a reasonable rate. Rather, plaintiff's attorney, who had over thirty years of experience, requested a fee of $180 per hour, and defendant's only challenge to the rate was that defendant was paid $120 per hour to handle the same case. Given this record, it is difficult to reach any other conclusion than that the trial court relied on the $75 figure, and there is no basis on which to conclude that that is reasonable compensation per hour.

[6] We note that there is no precise formula for computing the reasonableness of attorney fees; however, there are certain factors to consider. See, e.g., *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).