STATE OF MICHIGAN

COURT OF APPEALS

EMC INSURANCE COMPANY, as subrogee of SCHMUCKAL OIL COMPANY, Plaintiff-Appellee,	UNPUBLISHED January 15, 2008
v	No. 267643 Ottawa Circuit Court
JEFFREY ROGER RICHTER, Defendant-Appellant.	LC No. 05-052654-CZ

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order that denied defendant's motion for summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant drove a GMC Yukon to a gas station owned by Schmuckal Oil Company and accidentally caused a fire while filling a 28-gallon container with gasoline. The container was in the back of the vehicle. Plaintiff alleges that the gas ignited as defendant attempted to fill the container with gasoline. Defendant maintains that he had completed filling the tank and was removing the nozzle when he saw flames coming from the container. In any event, plaintiff alleges that the gas ignited because defendant failed to remove the 28-gallon container from the back of his truck before filling it with gasoline, and otherwise failing to ground the container, thereby allowing a static charge to build and ignite the gasoline. Plaintiff, the insurer and subrogee of Schmuckal Oil Company, brought this action for negligence against defendant, seeking to recover $114,386.90 that it paid for the damage caused by the fire.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the action should be brought against the no-fault insurer of the Yukon. According to defendant, the property damage arose out of the "use" of a motor vehicle because the vehicle was being used for its intended and contemplated use.

The trial court reasoned that no-fault coverage was not available under MCL 500.3121:

> Was there a causal connection between defendant's use of the Yukon and the injury to plaintiff's subrogor? This Court believes not. The damage was caused while the vehicle was parked and unoccupied and a tank or container not

> part of the vehicle but [sic] was being loaded with gasoline while it was not properly grounded. It had nothing to do with the use of a motor vehicle as a motor vehicle. The vehicle, although apparently having the capability of carrying a gasoline container, was not specifically designed or built with that specific intent. Therefore, this Court holds that the Yukon was not being used as a motor vehicle when the injury which was merely incidental or fortuitous to its use occurred.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We agree with the trial court that the damage did not arise out of the use of a motor vehicle as a motor vehicle.

In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 220; 580 NW2d 424 (1998), the Court explained that the phrase "use of a motor vehicle as a motor vehicle," in § 3105 indicated that the Legislature "intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." The Court's reasoning, which focused on the syntax of § 3105, applies equally to § 3121.

Defendant did not establish that the damage arose from the use of the vehicle as a motor vehicle. The allegations in plaintiff's complaint indicate that the damage arose from the manner in which defendant dispensed fuel into a portable container.[1] The dispensing of fuel into a portable container is not related to the transportational function of a vehicle, even where the container sits in the vehicle. The vehicle was "merely the situs" of the fire that caused the damage. *McKenzie, supra* at p 222.

Defendant asserts that plaintiff's claim is barred by the no-fault act and cites MCL 500.3135(3):

> Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to [circumstances not present in the instant case.]

He notes that that this section does *not* contain the limiting clause "as a motor vehicle" that is present in MCL 500.3105(1), and argues, "By not including the phrase 'as a motor vehicle' in § 3135, our [L]egislature obviously intended broad tort immunity in situations involving a vehicle's use."

This argument was not preserved below. The abolition of tort liability under § 3135(3) was not raised in defendant's motion for summary disposition. An issue not raised before and

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[1] Defendant did not submit any evidence in support of his motion for summary disposition. For purposes of a motion for summary disposition under either MCR 2.116(C)(8) or (10), the allegations of the complaint are viewed in the light most favorable to the nonmoving party. *Maiden, supra,* at 119-120.

considered by the trial court is generally not preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). In any event, "the abolition of 'tort liability arising from the ownership, maintenance, or use . . . of a motor vehicle' carries the implicit sense of tort liability for injuries or damage *caused by* the ownership, maintenance, or use of a motor vehicle." *Citizens Ins Co of America v Tuttle,* 411 Mich 536, 545; 309 NW2d 174 (1981). Plaintiff's allegations do not indicate that the damage in this case was caused by the "ownership, maintenance or use of a motor vehicle." Rather, the damage was caused by the manner in which defendant filled the container with fuel, and the vehicle's connection with the incident was merely fortuitous.

Affirmed.

/s/ Henry William Saad
/s/ Christopher M. Murray