STATE OF MICHIGAN

COURT OF APPEALS

GWENDOLYN NEILL, Personal Representative of the Estate of WILLIAM NEILL, Deceased,

Plaintiff-Appellant,

v

MEEMIC INSURANCE COMPANY,

Defendant,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
April 7, 2009

No. 281293
Macomb Circuit Court
LC No. 2007-000535-NF

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

In this action to obtain automobile no-fault personal protection benefits, plaintiff appeals as of right the order of the trial court granting defendant's motion for summary disposition. We affirm.

While engaging in his employment duties, decedent was killed when a large machine fell from a trailer and struck decedent in the head. Progressive Michigan Insurance Company (Progressive) insured the trailer, as well as decedent's personal motor vehicle. Decedent's wife (his estate's personal representative) insured her personal motor vehicle through a policy issued by Meemic Insurance Company (Meemic). When defendant's failed/refused to pay personal protection insurance benefits on behalf of decedent, plaintiff initiated the instant action to recover such benefits.

Progressive moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff was not entitled to no-fault benefits because (1) plaintiff received workers' compensation benefits concerning the death of decedent, and (2) decedent was engaged in the unloading of a parked vehicle such that MCL 500.3106(2)(a) precludes the recovery of no-fault benefits. The trial court agreed and granted Progressive's motion. This appeal followed.

This Court reviews a trial court's decision to grant or deny a motion for summary disposition de novo. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). A motion brought under MCR 2.116(C)(10) operates to test the factual support for a claim. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion brought under MCR 2.116(C)(10), this Court construes the pleadings, admissions and other evidence submitted by the parties in a light most favorable to the non-moving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007); *Id*. Because a "mere promise" to offer factual support for a party's position at trial is insufficient to overcome a motion brought under MCR 2.116(C)(10), this Court considers "the substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

The construction and application of the no-fault act presents a question of law that this court reviews de novo. *Farmers Ins Exch v AAA of Michigan*, 256 Mich App 691, 694; 671 NW2d 89 (2003). In interpreting a statute, the fundamental task of a court is to "discern and give effect to the Legislature's intent as expressed in the words of the statute." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Where the plain and ordinary meaning of the statutory language is clear, further judicial construction is unwarranted. *Nastal v Henderson & Assocs Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). See, also, *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Judicial construction of a statute is proper only where reasonable minds could differ about the meaning of the statute. *Adrian School District v Michigan Public School Employees Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998). "Where there is no dispute about the facts, the issue whether an injury arose out of the use of a motor vehicle as a motor 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).

On appeal, plaintiff first argues that the trial court improperly granted defendant's motion for summary disposition because there was a genuine issue of material fact regarding whether the motor vehicle, from which the equipment fell and caused decedent's death, was parked in a manner which caused an unreasonable risk of bodily injury. We find that summary disposition was appropriate.

Under the Michigan no-fault act, an insurer must pay personal protection benefits for "accidental bodily injury arising out of the ownership, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1). To determine whether personal protection benefits are payable, the court inquires whether the injury is covered, and whether a statutory exclusion or exception to an exclusion applies. *Drake v Citizens Ins Co of America*, 270 Mich App 22, 25; 715 NW2d 387 (2006). Only "injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function" are compensable under the no-fault act. *McKenzie, supra* at 220.

As a general rule, no-fault personal protection benefits are unavailable for injuries involving parked vehicles because "[i]njuries involving parked vehicles do not normally involve the vehicle as a motor vehicle." *Miller v Auto-Owners Ins Co*, 411 Mich 633, 639-640; 309 NW2d 544 (1981). MCL 500.3106(1), however, provides:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance or use of a parked motor vehicle unless any of the following occur:
>
> (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.

Thus, in order to recover first-party personal protection benefits for an injury related to a parked motor vehicle, a party is required to show that "(1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle; and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for." *Putkamer, supra* at 634.

Here, plaintiff contends that the affidavit attached to her response to defendant's motion for summary disposition, in which expert George Bombyk opined that the tractor and trailer were parked in such a way as to cause unreasonable risk of the injury which occurred, created a question of fact with respect to whether defendant was liable to pay no-fault benefits under MCL 500.3106(1)(a), and thus, rendering summary disposition inappropriate. However, even if the Bombyk affidavit arguably created a question of fact regarding whether the vehicle was parked in an unreasonable manner pursuant to the plain language of MCL 500.3106(1)(a), plaintiff failed to further demonstrate that decedent's injury arose "out of the ownership, operation, maintenance or use of the parked motor vehicle as a motor vehicle," and that "the injury had a causal relationship to the parked motor vehicle that [was] more than incidental, fortuitous, or but for." *Putkamer, supra* at 634.

Viewing the evidence in a light most favorable to plaintiff, we conclude that the motor vehicle, the tractor and trailer from which the equipment fell and killed decedent was, at most, incidentally involved in decedent's death, and the vehicle was not engaged in its transportational function when the accident occurred. In other words, at the time of the incident that resulted in decedent's fatal injury, the parked tractor and trailer was being used not as a motor vehicle, but instead, as a temporary storage platform. Thus, the vehicle was being used in a storage function, and not its transportational function. Because the trial court reached the right result when it granted defendant's motion for summary disposition, albeit for different reasons, we affirm the trial court's ruling. See, *Gleason v Dept of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Plaintiff next argues that the trial court improperly relied on MCL 500.3106(2)(a) as a basis for granting defendant's motion for summary disposition. Specifically, plaintiff contends that the language of MCL 500.3106(2)(a) does not foreclose her from recovering benefits regardless of whether worker's compensation benefits were available. According to plaintiff,

MCL 500.3106(2)(a) does not apply because decedent was merely a bystander, and was not engaged in the loading or unloading process, when he was injured. Because our determination, above, is conclusive as to plaintiff's ability to recover no-fault benefits we need not consider plaintiff's second argument.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto