STATE OF MICHIGAN

COURT OF APPEALS

VIBRA OF SOUTHEASTERN MICHIGAN, LLC,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY and HOME-OWNERS INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
July 22, 2021

No. 355287
Wayne Circuit Court
LC No. 19-009663-NF

Before: RIORDAN, P.J., and M. J. KELLY and SHAPIRO, JJ.

RIORDAN, P.J. (*dissenting*).

I respectfully dissent and would reverse the trial court's denial of defendants' motions for summary disposition and the trial court's granting of plaintiff's motion for summary disposition. I also would reverse the trial court's entry of a stipulated order awarding plaintiff attorney fees and interest based upon the underlying no-fault action.

The trial court erroneously concluded that MCL 500.3106(1)(b) rendered defendants liable for PIP benefits associated with Randall Baran's injury. MCL 500.3106(1)(b) consists of two separate clauses and "provides coverage when the injury was the direct result of physical contact with either (1) equipment permanently mounted on the vehicle, while the equipment was being operated or used, *or* (2) property being lifted onto or lowered from the vehicle in the loading or unloading process." *Adanalic v Harco Nat Ins Co*, 309 Mich App 173, 181; 870 NW2d 731 (2015) (quotation marks omitted). As the majority points out, the parties agree that the first clause does not apply. The liftgate was not equipment permanently mounted on the Jeep Grand Cherokee but rather was part of the Grand Cherokee itself. See *Frazier v Allstate Ins Co*, 490 Mich 381, 386; 808 NW2d 450 (2011) (holding that a vehicle's door constituted a part of the vehicle itself, rather than equipment mounted on the vehicle). I diverge with the majority, and the trial court, on the applicability of the second clause of MCL 500.3106(1)(b) to the facts of the case before us.

As previously stated, the second clause of MCL 500.3106(1)(b) "provides coverage when the injury was the direct result of physical contact with . . . property being lifted onto or lowered from the vehicle in the loading or unloading process." Here, Randall's injuries were not a direct result of his physical contact with the Tupperware dishes for which he was reaching. Rather, his

contact with the Tupperware merely was incidental and played no role in the Grand Cherokee's liftgate—the source of Randall's injury—falling on him. Thus, the trial court was in error in its conclusion that the injury was the direct result of physical contact with property being unloaded. The majority's analogization of Randall's injury to that of the plaintiff's in *Adanalic* is misplaced. While the injury to the plaintiff in *Adanalic* did occur as "a direct result of physical contact with . . . property being lifted onto or lowered from the vehicle," Randall's injury did not.

In *Adanalic*, the plaintiff's injury was the direct result of his physical contact with a pallet in the unloading and re-loading process from a disabled box truck onto a semi-trailer. 309 Mich App at 177. The plaintiff was pulling and loading pallets onto the semi-trailer by strapping them to his back. *Id.* at 178. One of the loaded pallets fell from the loading ramp and the pallet pulled Adanalic down, who was attached to it by straps, and in the process injured him. *Id*. Unlike the injury here, where Randall reached for Tupperware and the Grand Cherokee's liftgate fell and struck him, independent of any connection with the Tupperware, the *Adanalic* plaintiff's injuries were directly caused by loading a pallet, that was physically strapped to his back, which fell from a ramp suspended between two trucks, and pulled him to the ground. In the matter presently before us, again unlike that occurring from direct contact with the pallet strapped to the back of the *Adanalic* plaintiff, Randall's injury was not the direct result of the plaintiff's physical contact with the Tupperware being unloaded from the Grand Cherokee. As plaintiff recognizes, and the facts in the matter before us clearly show, the Tupperware being removed from the Jeep did not strike or otherwise injure Randall. Thus, *Adanalic* is neither analogous, nor controlling, in relation to the facts before us.

I also disagree that the trial court properly concluded that MCL 500.3106(1)(c) rendered defendants liable for PIP benefits associated with Randall's injury. MCL 500.3106(1)(c) applies when "the injury was sustained by a person while occupying, entering into, or alighting from the vehicle." The facts before us show that Randall was neither occupying, entering into, nor alighting from the Grand Cherokee when his injury occurred. Unlike the majority, I also find this as a basis to reverse the trial court.

There is no evidence in the record that Randall was attempting to enter the vehicle at the time of the injury, as that term is used in the context of MCL 500.3106(1)(c). The caselaw addressing an injured party "entering into" a vehicle does so within the context of the injured party attempting to enter the vehicle using one of the doors, either the driver's door or a passenger door. See, e.g., *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 632; 552 NW2d 671 (1996); *Hunt v Citizens Ins Co*, 183 Mich App 660, 664; 455 NW2d 384 (1990); *Teman v Transamerica Ins Co of MI*, 123 Mich App 262, 265; 333 NW2d 244 (1983).[1] Moreover, the cases focus on details such as whether the claimant was holding his or her car keys, *Hunt*, 183 Mich App at 664, or whether the claimant had opened one of the vehicle's doors, *Shanafelt*, 217 Mich App at 632; *Teman*, 123 Mich App at 265. The facts in the present case are distinguishable. Here, Randall's wife, Vawn Baran, testified that Randall exited the passenger side of the Grand Cherokee and walked around

[1] Opinions from this Court issued before November 1, 1990, are not binding upon this Court but may be persuasive. *Jackson v Dir of Dep't of Corrections*, 329 Mich App 422, 429 n 5; 942 NW2d 635 (2019).

to the back of the Grand Cherokee to retrieve dishes from the cargo area. Vawn further testified that Randall reached into the back of the Grand Cherokee to retrieve the dishes. He did this, she testified, so that Randall would not have had to crawl in the Grand Cherokee to retrieve the dishes after they had parked it in their family garage for the night.

The no-fault act does not define the term "occupying" for the purposes of MCL 500.3106(1)(c). *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 531; 502 NW2d 310 (1993). However, "it is permissible for an insurance policy to provide for broader coverage than is required by statute, in which case the policy may be enforced as written." *Bronson Health Care Group, Inc v State Auto Prop and Cas Ins Co*, 330 Mich App 338, 343 n 4; 948 NW2d 115 (2019). Defendants provided a definition of "occupying" in the no-fault insurance endorsement section of their insurance policy with Randall. Specifically, defendants defined "occupying" as "in or entering into or alighting from a motor vehicle." The policy did not define the term "in." In *Frazier v Allstate Ins Co*, 490 Mich 381, 387; 808 NW2d 450 (2011), our Supreme Court rejected the application of MCL 500.3106(1)(c) where a "plaintiff had been standing with both feet planted firmly on the ground outside of the vehicle." Although the plaintiff had been in physical contact with the vehicle door at the time of her injury, "she was entirely in control of her body's movement, and she was in no way reliant upon the vehicle itself." *Frazier*, 490 Mich at 386-387.

Here, Randall was not "in" the Grand Cherokee when he was retrieving the Tupperware. He was standing on the ground, outside of the Grand Cherokee. He was entirely in control of his body while standing outside of the Grand Cherokee and reaching for the Tupperware. Nor was he entering or occupying the Grand Cherokee. He and his wife were home for the night, had parked the Grand Cherokee in their garage and he reached to grab the dishes to take them into his home. Thus, he was not "occupying" the Grand Cherokee and defendants are not liable for PIP benefits pursuant to MCL 500.3106(1)(c).

While sympathetic to Randall because of his injuries, this action may be more properly characterized as a products liability suit due to the malfunctioning of the Grand Cherokee's liftgate, rather than as a suit under Michigan's no-fault act based upon the act of reaching for Tupperware.[2]

[2] Any claim against the Tupperware manufacturer likely would be unsuccessful as it does not appear, from the facts in the record, that it was the proximate or legal cause of Randall's injuries. See *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004) (the causation element of a negligence claim requires a plaintiff to prove both "cause in fact and legal, or proximate, cause). The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Id*. at 86-87. "A plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Legal cause, or proximate cause, normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Craig*, 471 Mich at 86-87. To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable." *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) (quotations and

In summary, the trial court erred as to the applicability of both MCL 500.3106(1)(b) and MCL 500.3106(1)(c). This error also requires reversal of the trial court's opinion and order denying defendants' motions for summary disposition and granting plaintiff's motion for summary disposition. It also requires reversal of the stipulated order awarding plaintiff attorney fees and interest in the underlying no-fault action.

/s/ Michael J. Riordan

citation omitted). It is completely unforeseeable that the manufacturing of Tupperware would create such a risk of harm as occurred here.