STATE OF MICHIGAN

COURT OF APPEALS

RONALD BOREK,

Plaintiff-Appellant,

v

ACUITY and PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 29, 2011

No. 298753
Monroe Circuit Court
LC No. 09-027826-NF

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In this action for first-party no-fault benefits, plaintiff appeals as of right, challenging the trial court's orders granting summary disposition to defendant Pioneer State Mutual Insurance Company ("Pioneer") and defendant Acuity pursuant to MCR 2.116(C)(10). We reverse and remand.

At approximately 4:00 a.m. on September 4, 2008, plaintiff, in the course of his employment, was driving a truck and two trailers that were loaded with scrap metal. As plaintiff was travelling in the right traffic lane, his vehicle was struck from behind by another truck. Plaintiff exited his vehicle to check on the driver of the other vehicle. After advising the other driver that he was going to call the police, he took a few steps back toward his own vehicle. While outside the other truck, plaintiff was struck in the leg by a piece of metal that was propelled by a passing car, producing the injuries that are pertinent to plaintiff's claim for no-fault wage-loss benefits.

Plaintiff initiated the instant declaratory action against Pioneer, the insurer for plaintiff's personal vehicle, and Acuity, the insurer for plaintiff's employer, Warack Trucking, Inc, seeking no-fault benefits. Both defendants moved for summary disposition. The trial court granted defendants' motions, reasoning that plaintiff was not entitled to no-fault benefits because his injuries did not arise out of the operation or use of a motor vehicle as a motor vehicle as required by MCL 500.3105.

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). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

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). As recently explained in *Boertmann v Cincinnati Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293835, issued March 8, 2011), slip op at 3, lv pending:

> "Arising out of" means that the causal connection between the injury and the use of the motor vehicle must be "more than incidental, fortuitous, or 'but for.'" *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986); *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 582, 584, 586; 751 NW2d 51 (2008). The statutory language does not require "direct or proximate causation." *Id*. at 586. However, the fact that a vehicle is the situs of an injury is not sufficient to establish the requisite causal connection. See, e.g., *Bourne v Farmers Ins Exch*, 449 Mich 193, 200; 534 NW2d 491 (1995). The determination whether an injury may be characterized as arising out of the use of a motor vehicle as a motor vehicle depends on the unique facts of each case and must be made on a case-by-case basis. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 8; 423 NW2d 913 (1988).

"[T]he injury must be 'closely related to the transportational function of automobiles.'" *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 695; 760 NW2d 574 (2008), quoting *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 215; 580 NW2d 424 (1998). "'[M]oving motor vehicles are quite obviously engaged in a transportational function.'" *Univ Rehab Alliance, Inc*, 279 Mich App at 697, quoting *McKenzie*, 458 Mich at 221. The injuries need not arise from the claimant's own operation, use, ownership, or maintenance of a motor vehicle. *Boertmann*, ___ Mich App at ___ (slip op at 5). And, the injuries need not result from direct physical contact with a motor vehicle itself. *Id*.

This Court's decision in *Jones v Tronex Chem Corp*, 129 Mich App 188, 191-193; 341 NW2d 469 (1983), indicates that injuries that result from contact with material propelled by a moving vehicle arise from the use of a motor vehicle. In *Jones*, a pedestrian was injured when a city bus drove through a puddle and splashed lye on him. The city argued that the injury did not arise out of its use of the bus as a motor vehicle. This Court disagreed and stated that the plaintiff's "injury resulted directly from the force of the bus as it was being operated in a normal fashion as a motor vehicle. The fact that the bus itself did not strike him does not bar his claim." *Id*. at 194.

In the present case, the trial court erroneously focused on whether plaintiff's injuries arose from the vehicles involved in the collision, which were parked at the time of plaintiff's injury, but failed to consider the involvement of the car that struck the debris that injured plaintiff. Plaintiff was injured because a moving motor vehicle set in motion an object that struck and injured him. His injuries, like those to the plaintiff in *Jones*, arose from the use of a motor vehicle as a motor vehicle. Thus, the trial court erred in holding that plaintiff's injuries did not arise from the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. Because the trial court granted summary disposition to defendants solely on that basis, we reverse its decisions and remand for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly