STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0209

Brian Pettey,
Appellant,

vs.

American Family Insurance,
Respondent

Filed August 28, 2017
Affirmed
Worke, Judge

Morrison County District Court
File No. 49-CV-16-380

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

Matthew D. Lutz, Eden Prairie, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant-insured argues that the district court erred in granting summary judgment to respondent-insurer, asserting that his injuries arose out of the maintenance or use of a motor vehicle entitling him to basic economic loss benefits. We affirm.

D E C I S I O N

Appellant Brian Pettey suffered a spinal injury following an incident of which he has no memory. Respondent American Family Insurance denied Pettey's claim for basic economic loss benefits under his automobile-insurance policy. Pettey initiated a lawsuit, and the district court granted summary judgment in favor of American Family. Pettey challenges the district court's award of summary judgment.

A district court must grant a motion for summary judgment if the evidence demonstrates "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court reviews de novo "whether there are any genuine issues of material fact and whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). This court "view[s] the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.*

Pettey argues that his injury is covered under the Minnesota No-Fault Automobile Insurance Act because he fell while unloading cargo from his truck. *See* Minn. Stat. §§ 65B.41-.71 (2016). Under the act, "[b]asic economic loss benefits shall provide reimbursement for all loss suffered through injury arising out of the maintenance or use of a motor vehicle." Minn. Stat. § 65B.44, subd. 1(a). Under the act,

> "Maintenance or use of a motor vehicle" means maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying,

> entering into, and alighting from it. Maintenance or use of a motor vehicle does not include (1) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or (2) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it.

Minn. Stat. § 65B.43, subd. 3.

"The legal issue of whether an accident arises out of the use or maintenance of an automobile is a recurring question which defies a simple test." *Cont'l W. Ins. Co. v. Klug*, 415 N.W.2d 876, 877 (Minn. 1987). The result of each case will depend "on the particular facts presented." *Id.* at 877-78 (quotation omitted). Pettey bears the burden of proving the occurrence of an accident arising out of the use or maintenance of a motor vehicle. *See LaValley v. Nat'l Family Ins. Corp.*, 517 N.W.2d 602, 605 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994).

The Minnesota Supreme Court has established a three-part test to address the issue. *Klug*, 415 N.W.2d at 878. First, a court considers "the extent of causation between the automobile and the injury." *Id.* This causation standard is described as "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury." *Id.* (quotation omitted). "[T]he vehicle must be an active accessory in causing the injury." *Id.* (quotation omitted); *see also Fire & Cas. Ins. Co. of Conn. v. Ill. Farmers Ins. Co.*, 352 N.W.2d 798, 799 (Minn. App. 1984) (stating "active accessory" means that the "accident happened because the vehicle's use was actively connected with the injury").

Second, if a court finds causation, it must determine "whether an act of independent significance occurred, breaking the causal link between use of the vehicle and the injuries." *Klug*, 415 N.W.2d at 878 (quotation omitted). Intervening acts have been found to occur when a vehicle is involved in an incident, but is not the cause of the injury. *See, e.g.*, *Wieneke v. Home Mut. Ins. Co.*, 397 N.W.2d 597, 598-99 (Minn. App. 1986) (intervening act when individuals accused each other of driving improperly and one driver exited his vehicle, walked to the other driver's vehicle and punched him—injury resulted from assault, which did not require vehicle), *review denied* (Minn. Jan. 21, 1987); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 399 N.W.2d 95, 96-98 (Minn. App. 1986) (intervening act when assailant drove victim to countryside and killed her—death resulted from violent acts, which did not require vehicle), *review denied* (Minn. Mar. 13, 1987).

Finally, if a court finds causation and no intervening act, it "must determine what type of 'use' of the automobile was involved." *Klug*, 415 N.W.2d at 878. "[C]overage will exist only for injuries resulting from uses for transportation purposes . . . ." *Classified Ins. Corp. v. Vodinelich*, 368 N.W.2d 921, 922-23 (Minn. 1985) (holding vehicle not used for transportation purposes when individual committed suicide by idling the engine of her automobile parked in the garage and carbon monoxide leaked into the house through the door connecting the house and garage causing the deaths of her children). *But see Norwest Bank Minn., N.A. v. State Farm Mut. Auto. Ins. Co.*, 588 N.W.2d 743, 745, 747 (Minn. 1999) (holding vehicle used for transportation purposes when driver accidentally failed to turn the vehicle's engine off after parking in garage attached to home and home's occupants died of carbon monoxide poisoning).

The district court determined that Pettey established causation because if it accepted Pettey's theory that he fell from his truck, then the truck, at least in part, caused Pettey's injury. The district court also determined that there was no intervening act. The district court determined, however, that Pettey failed to establish that his injury resulted out of the use of the vehicle "for transportation purposes." We agree.

The record shows that on Friday, November 13, 2015, Pettey left work and put his lunch box in the front center of the bed of his pickup truck. The next day, Pettey drank beer as he completed chores at his home. That evening, Pettey drove his son's truck to his brother-in-law's hunting land. The next thing that Pettey remembers is "laying on the ground behind" his pickup truck, which was parked at his home. Pettey was face down behind the center of the truck, underneath the tailgate, which was down. Pettey had no memory of how he got on the ground—he had no memory of falling out of the truck, jumping out of the truck, or losing his balance.

Pettey called his wife, Amy, and told her that he was outside on the ground. Amy found Pettey's truck tailgate open and Pettey lying on the ground "right straight down beside it, behind it." Amy did not see anything on the ground near Pettey. Amy did not know how Pettey got on the ground.

An ambulance transported Pettey to the hospital. A report from the ambulance trip noted, "male lying on his left side behind a pickup truck" "says that he does not remember how he got here, [he says] 'I just woke up on the ground cold and called somebody.'" It also noted, "[p]atient has a strong smell of alcohol and says 'I have been drinking all day,' approximately a case of beer." A report from the emergency trauma center noted: "male

who had been drinking alcohol. He apparently fell outside and passed out. He had been drinking a large amount of alcohol. . . . He said he was working on his truck, fell off the cab and onto his yard." It noted that Pettey's alcohol level was 0.21. A medical report from November 15 noted that Pettey "states he woke up on the ground near his truck, but not sure how. He had been drinking and cleaning up the yard. He was unwitnessed. He's here with his wife who thinks he may have tried to jump off his truck." A follow-up report from November 18 noted that Pettey suffered "an L1 burst fracture after a presumed fall or jump from his parked truck." It further noted that Pettey reported:

> drinking while at the hunting cabin, and had driven back home . . . . He isn't quite sure what happens but thinks he pulled into his driveway, parked, and may have climbed onto the top of his truck to retrieve a lunch pail and when he woke up, was face down on the ground partially under the truck.

Pettey cannot meet his burden on the third *Klug* factor because he cannot remember the incident that caused his injury, the incident was unwitnessed, and there is no other evidence to explain the incident. The medical reports emphasize Pettey's lack of memory and suggest several different versions of what could have happened. Viewing the incident in any of the possible ways described in the medical reports does not support the conclusion that Pettey was using the vehicle for "transportation purposes." *See Klug*, 415 N.W.2d at 878.

Pettey relies on an unpublished opinion from this court to support his position that his unloading of cargo—his lunch pail—constituted use of the vehicle for transportation purposes. In *Minkel v. Progressive Cas. Ins. Co.*, Minkel was helping his mother move a box into the back of a pickup truck and his mother lost her balance, which forced Minkel

to fall off the end of the truck. No. C5-98-1177, 1998 WL 811559, at *1 (Minn. App. Nov. 24, 1998), *review denied* (Minn. Jan. 21, 1999). The district court granted the insurance company's motion for summary judgment, but this court reversed. *Id.* The main issue in *Minkel* was whether an act of independent significance occurred when Minkel's mother lost her balance and pushed him out of the pickup. *Id.* at *3. This court determined that, while Minkel's mother set the accident in motion, it did not diminish the role of the truck's features (elevation and placement) in causing the injury. *Id.* This court did not consider whether the vehicle was being used for transportation purposes because the insurance company conceded that factor. *Id.* at *2 (stating that appellate review was limited to the first two *Klug* factors). Because this court did not consider the third *Klug* factor and because it is an unpublished case, Pettey's reliance on *Minkel* is inappropriate.

But even if we were to look at *Minkel*, it does not support Pettey's position. Pettey claims that "[t]he only difference between *Minkel* and this case is that in *Minkel* the claimant was injured while loading something into the pickup and here Pettey was injured while attempting to unload something from the pickup." But that difference is significant. Minkel *was loading* something into the truck—"a box containing a plastic and metal china hutch." *Id.* at *1. Pettey was allegedly *attempting* to unload something. There is no evidence that Pettey unloaded his lunch box. Pettey does not remember unloading his lunch box. Pettey was found with his body partially under the tailgate, which makes it seem unlikely that he fell from the bed of the truck. Additionally, it is illogical to suggest that he jumped from the bed of the truck because the lunch box was not found on the ground

near Pettey. He would have had to jump before reaching the lunch box, which defeats the alleged purpose for going onto the truck bed.

Another difference is where the trucks were parked. In *Minkel*, the "pickup was parked abutting the deck of his mother's home. . . . The pickup's tailgate was open, and a horizontal space of about two feet separated the deck from the pickup." *Id.* The position of the truck "abutting the deck" suggests that Minkel was loading a box onto the truck intending to transport it shortly thereafter. Individuals do not typically park a vehicle for an extended period abutting a deck. But Pettey parked his vehicle on the south side of his shop when he returned home on Friday. Nobody moved the vehicle on Friday night or Saturday. Thus, as the district court concluded, Pettey had not recently used the vehicle for transportation purposes nor was he intending to drive the vehicle at or near the time of his injury. Based on the record, the district court did not err in granting summary judgment in favor of American Family.

Affirmed.