STATE OF MICHIGAN

COURT OF APPEALS

HUBERT LAFAVE,

Plaintiff-Appellee,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 349227
Dickinson Circuit Court
LC No. 18-019622-NF

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendant Progressive Michigan Insurance Company appeals by leave granted[1] the trial court's order denying Progressive's motion for summary disposition under MCR 2.116(C)(10) in this first-party no-fault action in which plaintiff sought to recover personal protection insurance (PIP) benefits for an injury that allegedly arose out of the operation or use of a motor vehicle. We affirm.

At the time the injury occurred, plaintiff was assisting his son-in-law, who owns a construction and trucking company, with the cleanup of debris from a hurricane in south Florida. The son-in-law was operating a logging truck with two large attached boxes in which debris was collected for transport elsewhere. The truck had an attached crane that was used to load debris onto the truck for removal. On the back of the truck were two permanently mounted hydraulic cylinders, referred to as outriggers. The outriggers operated by being lowered to the ground during stops and the debris-loading process, thereby safely stabilizing the truck. The incident occurred when plaintiff's son-in-law was at the controls of the outriggers and preparing to load a pile of debris onto the truck using the crane. He began lowering the outriggers for stabilization and did

[1] *LaFave v Progressive Mich Ins Co*, unpublished order of the Court of Appeals, entered October 17, 2019 (Docket No. 349227).

not see his father-in-law approaching on foot. One of the outriggers, which do not make noise when being lowered or raised, came down on plaintiff's foot, crushing it.

In light of the injuries, plaintiff filed a claim for PIP benefits with Progressive, his no-fault insurance carrier. Progressive denied the claim, and plaintiff filed the instant lawsuit. Progressive moved for summary disposition under MCR 2.116(C)(10), arguing that the truck was not being used "as a motor vehicle" at the time of the accident within the meaning of the insurance policy and MCL 500.3105(1), which is a provision in the no-fault act, MCL 500.3101 *et seq*.

The trial court denied the motion, concluding that the truck was being used as a motor vehicle at the time of the accident. The trial court recited a number of facts that it considered in arriving at this conclusion. First, the truck was parked with the engine running. Also, the vehicle was in the roadway at the time of the accident, essentially blocking traffic, and was being used to collect hurricane debris for transportation to a disposal site. Furthermore, the outriggers were raised and lowered frequently as part of the operation of the truck. The trial court noted that although it could be argued that the vehicle was being used as a base or foundation, no special effort was required to make the truck drivable. The trial court additionally observed that at the time of the injury, the outriggers had not been fully deployed, but rather they were in the process of being deployed. Consequently, the logging truck had not yet been fully stabilized.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). We also review de novo issues of statutory interpretation. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State*, 301 Mich App at 377. "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6). "[W]here there is no dispute about the facts, the issue whether an injury arose out of the use of a vehicle is a legal issue for a court to decide and not a factual one for a jury." *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 630; 563 NW2d 683 (1997).

"Under personal protection insurance 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*, subject to the provisions of this chapter." MCL 500.3105(1) (emphasis added). It is undisputed that plaintiff suffered an accidental bodily injury. Plaintiff's foot was crushed by an outrigger that was permanently attached to the truck, and he suffered substantial injury. The issue in this appeal is whether plaintiff established that the injury arose out of the operation or use of the truck as a motor vehicle. We must first, however, set the proper legal framework given that the truck was parked at the time of the accident. MCL 500.3106 concerns parked vehicles and provides, in pertinent part, as follows:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> * * *
>
> (b) Except as provided in subsection (2),[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. [Emphasis added.]

"[I]n the case of a parked motor vehicle, a claimant must demonstrate that his or her injury meets one of the requirements of MCL 500.3106(1) because unless one of those requirements is met, the injury does not arise out of the use of a vehicle as a motor vehicle, under MCL 500.3105(1)." *Frazier v Allstate Ins Co*, 490 Mich 381, 384; 808 NW2d 450 (2011).

In this case, plaintiff's injury occurred when an outrigger was being operated or used. And the outrigger was permanently mounted on the vehicle. Accordingly, plaintiff's injury fell under the exception in MCL 500.3106(1)(b). Progressive does not argue to the contrary and in fact agrees. But the analysis does not end there. In *Kemp v Farm Bureau Ins Co of Mich*, 500 Mich 245, 253; 901 NW2d 534 (2017), our Supreme Court explained:

> This Court has provided a three-step framework to analyze coverage of injuries related to parked motor vehicles. First, the claimant must demonstrate that his or her conduct fits one of the three exceptions of subsection 3106(1). Second, the claimant must show that the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle. Finally, the claimant must demonstrate that the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for. [Quotation marks, citations, and alteration omitted.]

As mentioned earlier, the case before this panel is focused on step two and whether plaintiff showed that the injury arose out of the operation or use of the truck as a motor vehicle. Whether

[2] MCL 500.3106(2) applies to individuals who are entitled to workers' compensation benefits and is inapplicable in this case.

an injury arises out of the operation or use of a motor vehicle as a motor vehicle turns on whether the injury is closely related to the transportational function of the motor vehicle. *Kemp*, 500 Mich at 258; *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998). "There is no requirement that the activity at issue 'result from' the vehicle's transportational function—that requirement would confuse the transportational function and causation inquiries." *Kemp*, 500 Mich at 260-261. "Instead, . . . the question at this stage is simply whether the activity plaintiff was engaged in at the time of the injury was closely related to the vehicle's transportational function." *Id.* at 261.

In *McKenzie*, the plaintiff was denied no-fault coverage for carbon monoxide poisoning that resulted from a defective heater in a camper/trailer. *McKenzie*, 459 Mich at 216. The Michigan Supreme Court ruled:

> [I]t is clear that the requisite nexus between the injury and the transportational function of the motor vehicle is lacking. At the time the injury occurred, the parked camper/trailer was being used as sleeping accommodations. This use is too far removed from the transportational function to constitute use of the camper/trailer "as a motor vehicle" at the time of the injury. Thus, we conclude that no coverage is triggered under the no-fault act in this instance. [*Id.* at 226.]

In contrast, in *Drake v Citizens Ins Co*, 270 Mich App 22, 23-24; 715 NW2d 387 (2006), this Court addressed the following set of circumstances:

> Plaintiff filed this action for no-fault benefits under his automobile insurance coverage with defendant insurer after he was injured in an accident involving a grain delivery truck. On May 31, 2002, Thomas Lee Passmore, a delivery truck driver for Litchfield Grain Company, arrived to deliver animal feed at a farm where plaintiff was employed. Passmore backed the truck up to a silo and activated the truck's auger system to unload the feed. Passmore realized that the feed was not dropping onto the auger system, which had apparently become clogged. Plaintiff was assisting Passmore in unclogging the truck's auger system when he was injured. As plaintiff reached through an inspection door on the truck to clean the animal feed from the augers, Passmore activated the augers without warning, apparently unintentionally. Plaintiff lost his right index finger and a portion of his right middle finger.

The *Drake* panel found that the facts in the case were clearly unlike those presented in *McKenzie*. *Id.* at 26. The Court explained that the vehicle at issue was a delivery truck and was being used as such when the injury occurred. *Id.* Thus, according to the Court, the plaintiff's injury from the augers was closely related to the delivery truck's transportational function. *Id.*

Here, the truck was being used in the process of removing hurricane debris when the injury occurred. Plaintiff's son-in-law was loading the debris onto his truck and transporting it to another location. This entailed driving to a debris pile, stopping the truck, lowering the outriggers, using the crane to load the debris, raising the outriggers, and moving on to the next pile of debris. Undeniably, the purpose for which the truck was being used was to haul away the debris. As in *Drake*, the injury occurred while the vehicle was engaged in a transportational function. Once

again, the Supreme Court in *Kemp* expressed that the focus must be on "whether the activity plaintiff was engaged in at the time of the injury was closely related to the vehicle's transportational function." *Kemp*, 500 Mich at 261. In this case, plaintiff and his son-in-law, at the time of the injury, were participating in the activities of collecting, removing, and *transporting* hurricane-related debris. Indeed, the whole endeavor was about ridding areas of debris and transporting the debris to other locations.[3] Absent a transportational function, the debris would have remained in place. Accordingly, the trial court did not err by denying Progressive's motion for summary disposition.[4]

We affirm. Having fully prevailed on appeal, plaintiff may tax costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Michael F. Gadola

---

[3] "Transport" means "to transfer or convey from one place or another," and "transportation" is defined as "an act, process, or instance of transporting or being transported." *Merriam-Webster's Collegiate Dictionary* (11th ed). In *Kemp*, 500 Mich at 259-260, the Supreme Court held:

> In this case, it is undisputed that plaintiff was injured while unloading personal items from his vehicle upon arrival at his destination. We believe the conveyance of one's belongings is also closely related to—if not an integral part of—the transportational function of motor vehicles. Lending support to our interpretation of the statutory language is that the dictionary definition of vehicle is any device or contrivance for carrying or conveying persons or objects, especially over land or in space. We have little difficulty concluding that a person who is engaged in the activity of unloading his or her personal effects from a vehicle upon arrival at a destination is using the vehicle for its transportational function, i.e., for the conveyance of persons or objects from one place to another.

By analogy, we have little difficulty concluding that the activity of loading debris on a truck for removal to a different site, which requires the deployment of outriggers, entails using the truck for its transportational function.

[4] With respect to the third step in the analysis concerning a causal relationship between the injury and the parked motor vehicle, *Kemp*, 500 Mich at 253, it is not a subject at issue on appeal. Moreover, such a causal relationship certainly existed in light of the undisputed fact that an outrigger on the parked truck smashed plaintiff's foot.