STATE OF MICHIGAN

COURT OF APPEALS

GIUSEPPE BALSAMO,

Plaintiff-Appellee,

v

CORRIGAN ENTERPRISES, INC, and JUSTIN PRALL,

Defendants-Appellants,

and

JOHN DOE CORPORATION,

Defendant.

UNPUBLISHED
August 19, 2021

No. 354137
Oakland Circuit Court
LC No. 2019-170980-NO

Before: RIORDAN, P.J., and MARKEY and SWARTZLE, JJ.

PER CURIAM.

Defendants Corrigan Enterprises, Inc. and Justin Prall appeal by leave granted the trial court's denial of their motion for partial summary disposition under MCR 2.116(C)(10). See *Balsamo v John Doe Corp*, unpublished order of the Court of appeals, entered September 24, 2020 (Docket No. 354137). Because we conclude that plaintiff Giuseppe Balsamo's injuries arose out of the ownership, maintenance, or use of a motor vehicle under MCL 500.3135, the No-Fault Act applies to this lawsuit. Therefore, we reverse the trial court's order denying defendant's motion for partial summary disposition and remand for entry of an order granting that motion.

I. BACKGROUND

A. THE INCIDENT

On January 3, 2019, the Oakland County Sheriff's Department responded to a location in Rochester Hills, at the entrance to a new subdivision that is being built by Trowbridge Homes. The incident report stated that the sheriff's deputy responded to assist the Rochester Hills Fire Department regarding "occupational injuries," and that the deputy was dispatched "in reference to a piece of equipment that had fallen on top of a construction worker."

Upon his arrival, the sheriff's deputy saw a piece of heavy construction equipment, an Ingersoll Rand Roller, "tipped onto its left side, off the roadway on the east side of the road." Immediately to the north, he "observed a semi/flatbed trailer combination facing north." The sheriff's deputy spoke with plaintiff, who reported that he "had been in the operator's seat as he was unloading it [the roller] from the trailer when it struck the east curb and overturned"; he had been pinned underneath the machine; and he had suffered injuries. The Rochester Hills Fire Department transported plaintiff to the hospital with "non-life threatening injuries." The police report listed plaintiff as the victim, and described him as the "roller operator." The report listed two witnesses to the incident: Mark Poulter, an employee of Boss Construction, and defendant Prall, an employee of Corrigan, who was described as the "flatbed operator." The report listed Trowbridge Homes as the "employer of injured worker," R&B Pipe as the "owner of roller," and Corrigan as the "company delivering roller to job site."

At his deposition, Prall testified that he worked for defendant Corrigan as a "heavy hauler." His job responsibilities included loading equipment onto flatbed trailers and towing that equipment to job sites. On the day of the incident, Prall was operating a "tilt deck Landoll trailer" that was 49 or 50 feet long. This type of trailer "uses hydraulic rams to lift the deck of the trailer and a second set of hydraulic rams to pull the axles forward" so the operator can "take the very back of the trailer and set it on the ground, so the trailer turns into its own ramp." The trailer deck can be operated with manual levers located on the side of the trailer, or with a handheld device with push buttons.

On the day of the incident, Prall drove a semi-truck and its attached trailer to the construction site where plaintiff was working, to deliver two pieces of heavy equipment. Prall testified that he first removed one piece of heavy equipment, a "smooth drum roller," from the trailer. He did so by himself, while standing off to the side of the trailer and operating the handheld device. After the trailer deck was on the ground, Prall climbed into the driver's seat of the "smooth drum roller" and drove it to the spot on the construction site where he was motioned to park it.

Prall then sought help to remove the larger piece of heavy equipment from the trailer. According to Prall, he approached a group of three workers on the construction site and said, "[W]hich one of you brave souls wants to assist me?" Prall recalled that he said this "in a joking manner, because it was meant to be an icebreaker type of statement." He recalled that the men laughed, and asked why he needed help. Prall informed them that the trailer "deck was really slick and I was worried about trying to get it [the heavy equipment] off myself." According to Prall, plaintiff volunteered to help. Prall claimed that he asked plaintiff if he was sure that he wanted to help, and that he reiterated to plaintiff that the trailer deck was slick.

According to Prall, he and plaintiff walked over to the trailer, and Prall explained his plan regarding how he would unload the roller from the trailer. Plaintiff climbed up onto the roller, with the intention of "trying to hold the machine steady" while Prall tipped the trailer deck underneath it. After plaintiff climbed into the driver's seat of the roller, Prall started lifting the trailer deck. As Prall testified:

> I had already gotten it [the trailer deck] probably two and a half, three feet high and it [the roller] started sliding backwards. And then all the sudden, from my perspective, it just—I seen him [plaintiff] stand up and jump off towards the

passenger side of the truck, which would have been the left side of the machine, and then I seen the machine almost immediately flop off the side of the trailer.

Poulter testified that he was a heavy-equipment operator, and that he was on site to "move dirt" for the condominium development then under construction. Although Poulter was familiar with how to operate a roller like the one in question, and although he had offloaded such rollers from flatbed trailers before, that was not part of his responsibilities at this job site. On the day in question, Prall came over and asked for help unloading the larger roller from the trailer. Poulter declined because he felt that this was not his job responsibility. Instead, Poulter heard plaintiff volunteer to help Prall.

Poulter observed that the weather was cold that day, and that both the road and the trailer were icy and wet. As he observed plaintiff "hopping on the machine," he told plaintiff to "put his seat belt on," and asked plaintiff if he wanted a hard hat. He did not recall whether plaintiff responded about the seat belt, but he did recall that plaintiff declined the hard hat. According to Poulter, Prall "had the controls, he lowered it [the trailer deck] about two inches, and then the roller just start [sic] sliding and went off the edge." This all happened very quickly, and nobody had "a lot of time to react." Poulter observed plaintiff "holding on, and then at the last second, it [the roller] started tipping over and he [plaintiff] tried to jump off of it." According to Poulter, plaintiff "didn't jump far enough and it landed on him." Poulter opined that plaintiff should have used the seat belt on the roller because it "[w]ould have kept him in the seat" and because the roll bar would have protected him when the roller landed on its side.

Plaintiff testified that, on the date of the incident, he arrived on the job site at about 10:45 a.m., and that the incident occurred at about 11:00 a.m. The first thing plaintiff noticed was that Prall had arrived with a trailer carrying two pieces of heavy equipment. Plaintiff confirmed that Prall approached him and two other individuals and asked something to the effect, "Which one of you three brave souls wants to give me a hand?" Plaintiff confirmed that he volunteered to help, and Prall informed him that he needed plaintiff to "get up on the machine and drive it down for me." Because the "smooth drum roller" had already been unloaded from the trailer, Prall's request for help related to the larger of the two rollers.

Plaintiff noticed that the trailer was icy. According to plaintiff, he asked if Prall had any salt, or if Prall wanted to go purchase some salt. Prall said no. Plaintiff denied, however, that he was concerned about the ice. He stated that he only asked about the salt because he had "seen truck drivers throw salt on the deck of their trailers." After noticing the ice, plaintiff climbed up the side of the trailer and into the driver's seat of the roller.

Plaintiff recalled that Prall began to move the trailer deck, and plaintiff "tried to throttle forward gently" with the roller, but the roller "wasn't moving forward," and one tire began to spin. Prall informed plaintiff that the roller's parking brake was engaged, and Prall climbed up onto the trailer and released it. Prall then climbed back down to the ground, and used his wireless remote to operate the trailer deck. As he began to lift the trailer deck again, plaintiff "began to throttle forward gently" at a "crawl." According to plaintiff, the roller "just broke way and began to slide towards the edge of the trailer, the left side of the trailer," on the passenger side of the semi-truck. Plaintiff tried to adjust the steering wheel, but the "momentum and everything just sent it, you know, careening off that side of the trailer."

Plaintiff claimed that the roller "Threw me off, or I fell off in whatever manner." Plaintiff admitted that he did not fasten the seat belt when he climbed onto the roller, but stated that he had remained in the driver's seat until the machine hit the ground, and that is when he was thrown from the machine. Plaintiff expressly denied that he attempted to get off the roller as it was sliding. Plaintiff did not know how he came to rest under the machine. Plaintiff remembered that, after the roller slid off the trailer and pinned him to the ground, Prall and Poulter worked together to lift the roller off of him, using another piece of heavy equipment and a chain.

B. PLAINTIFF'S COMPLAINTS

Plaintiff filed five different complaints in the trial court: an original complaint, a First Amended Complaint, a Second Amended Complaint, and two different versions of a Third Amended Complaint (only the second version of the Third Amended Complaint was accepted for filing by the trial court). The parties and claims contained in those pleadings changed over time.

In his First Amended Complaint, plaintiff named Corrigan and Prall as defendants. Plaintiff alleged two claims against these defendants: Count I—negligence (against Prall and Corrigan) and Count II—vicarious liability/respondeat superior (against Corrigan). In this version of his complaint, plaintiff alleged that Corrigan "owned and operated" the flatbed trailer, and that Prall "had difficulty loading the subject roller onto the Corrigan trailer due, at least in part, to significant ice buildup and icy conditions on the trailer." Further, plaintiff alleged that "[i]n the process of removing the roller from the trailer," and "due to the icy conditions of the trailer," the roller "slid off the trailer and flipped over pinning plaintiff" and causing serious injuries. Plaintiff alleged that Prall was negligent in several respects, including "[f]ailing to de-ice the subject trailer," and any other "acts and omissions that become known through further discovery."

On August 27, 2019, plaintiff filed a motion seeking leave to file a Second Amended Complaint. In that motion, plaintiff stated that it had "recently come to Plaintiff's attention" that his First Amended Complaint did "not address the ownership liability of Defendant Corrigan." Plaintiff assured the trial court that he "is not changing his theories or stating a new claim, but that he was "merely making a correction to the Complaint." In his proposed Second Amended Complaint, plaintiff alleged three claims against Prall and Corrigan: Count I—negligence (against Prall and Corrigan), and Count II—vicarious liability/respondeat superior (against Corrigan), and Count III—ownership liability (against Corrigan). The trial court entered an order allowing plaintiff to amend his complaint to add the additional count against Corrigan regarding ownership liability.

In this version of the complaint, plaintiff alleged all of the matters discussed above regarding the First Amended Complaint, but added a count titled "Ownership Liability." Under that count, plaintiff alleged that "defendant Corrigan was the owner and/or registrant of the subject flatbed trailer," and that the trailer "was operated under the control and guidance" of Prall. Plaintiff further alleged, "While in the process of unloading the subject Ingersoll Rand Roller from the subject flatbed trailer, with plaintiff Balsamo driving and guiding the roller off the trailer at the instruction and direction of defendant Prall, the roller, due to the icy conditions of the trailer, slid off of the trailer and flipped over," injuring plaintiff. Plaintiff concluded by asserting that Corrigan was liable for his injuries, under the doctrine of ownership liability, because it purportedly owned the trailer.

C. DISPOSITIVE MOTIONS

After plaintiff filed his Second Amended Complaint, defendants submitted two dispositive motions to the trial court, on the same day. The premise of both motions was that plaintiff's claims against defendants was governed by the No-Fault Act and that defenses available under that act applied to limit defendants' liability. First, defendants filed a motion for summary disposition based on MCL 500.3135(2)(b), which provides that, in a lawsuit seeking threshold damages arising from an automobile accident, damages must not be assessed in favor of a party who is more than 50% at fault. Second, defendants filed a motion for partial summary disposition regarding plaintiff's ability to recover economic damages.

In plaintiff's response to defendants' dispositive motions, plaintiff raised two basic arguments: (1) the No-Fault Act does not apply to this lawsuit, and (2) regardless of whether the No-Fault Act applies, genuine issues of material fact existed concerning each party's alleged negligence or comparative negligence. Plaintiff argued that he had not filed an automobile-negligence case. Rather, plaintiff argued that he had filed "a straight forward construction accident case alleging general negligence (stupidity) not only on behalf of defendant Prall, but also his employers (defendants Corrigan/Brighton) due to a lack of employee supervision and training." According to plaintiff, "This suit sounds strictly in general negligence under traditional theories of tort liability in the context of construction law."

Plaintiff argued that, for the No-Fault Act to apply, plaintiff's injury had to arise from Prall's ownership, maintenance, or use of a motor vehicle. Plaintiff conceded that the flatbed trailer being operated by Prall at the time of the incident fell within the definition of a "motor vehicle" for purposes of the No-Fault Act. Plaintiff argued, nonetheless, that his injury did not arise from the ownership, maintenance, or use of a motor vehicle because there was no causal connection between his injury and Prall's use of the trailer as a motor vehicle. Plaintiff's argument had two prongs. First, plaintiff posited that his injury was not related to Prall's use of the flatbed trailer, but was only related to "the roller falling on top of him." Second, plaintiff argued that the flatbed trailer had been parked for some time—therefore, it was not *in use as* a motor vehicle at the time plaintiff's injuries occurred. Essentially, plaintiff argued that the trailer was not being *used* as a motor vehicle at the time that plaintiff and Prall were unloading it because it was not being *driven* at that moment. Therefore, according to plaintiff, his injuries were not caused by Prall's ownership, maintenance, or use of a motor vehicle. According to plaintiff, because the only possible motor vehicle involved in this case—the flatbed trailer—was not being used as a motor vehicle, the No-Fault Act did not apply to this lawsuit.

In his trial-court brief, plaintiff relied on a report prepared by his retained engineering-liability expert, Kevin Smith, a MIOSHA citation issued to defendant Corrigan, and the manual for the trailer. Plaintiff argued that the trailer's manual "required a completely different and safer operation of the trailer," including the use of a winch "to guide and control this type of roller" off the trailer. Plaintiff's expert witness concluded that "Prall clearly did not follow the proper unloading procedure" for the trailer, "causing the accident." The expert discussed the angle at which Prall had tilted the trailer deck, his failure to use the trailer's winch to secure the heavy equipment on the trailer deck, and his failure to ensure that no one was on the trailer deck while he was moving it. The MIOSHA citation likewise concluded that Prall "did not follow

manufacturers unloading procedure" for the trailer because he "did not have the winch attached to his soil compactor during the unloading process."

Plaintiff's brief then discussed first-party liability for PIP benefits under the No-Fault Act. Plaintiff pointed to MCL 500.3106(2), which states, "Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if" (1) an employee is paid workers' compensation benefits, (2) for an injury sustained in the course of his employment, (3) while loading, unloading, or doing mechanical work on a motor vehicle, (4) unless the injury arose from the use or operation of another motor vehicle. Citing the PIP statute, plaintiff argued that no portion of an incident falls under the No-Fault Act if the injured person is paid workers compensation benefits for an injury incurred while unloading from a parked vehicle. Plaintiff provided documentation that he had received workers' compensation benefits related to his injury and argued that, because he could not collect PIP benefits, the No-Fault Act did not apply to his claims against defendants.

The trial court issued two separate orders denying defendants' dispositive motions. On April 10, 2020, the trial court issued an order dispensing with oral argument and denying plaintiff's motion for summary disposition "for the reasons stated in plaintiff's response." The trial court's ruling on this motion is not before this Court on appeal. On May 27, 2020, the trial court issued an order dispensing with oral argument and denying defendants' motion for partial summary disposition regarding economic damages "for the reasons stated in plaintiff's response." The propriety of this second trial-court order is before this Court on appeal. Defendants subsequently moved the trial court for reconsideration of its decision denying defendants' motion for partial summary disposition regarding the availability of economic damages. The trial court denied the motion for reconsideration.

Defendants Corrigan and Prall filed in this Court an application for leave to appeal from the trial court's order denying their motion for partial summary disposition and the order denying the motion for reconsideration. On September 24, 2020, this Court granted leave to appeal, "limited to the issues raised in the application." *Balsamo v John Doe Corp*, unpublished order of the Court of appeals, entered September 24, 2020 (Docket No. 354137). Thereafter, the trial court entered an order staying further proceedings in this case "pending the outcome of Defendants' interlocutory appeal." The trial court's order denying defendants' motion for partial summary disposition now comes before this Court for interlocutory review.

II. ANALYSIS

On appeal, defendants challenge the trial court's denial of their motion for partial summary disposition filed under MCR 2.116(C)(10). A trial court's grant or denial of summary disposition is reviewed de novo on appeal. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). Under MCR 2.116(C)(10), summary disposition is appropriate if "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." MCR 2.116(C)(10). "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). This Court reviews questions of law de novo. *Gen Motors*, 466 Mich at 236.

"In ruling on a motion for summary disposition, a court considers the evidence then available to it," and will not consider evidence filed after the ruling. *Quinto v Cross & Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996). Accordingly, on appeal, this Court will not consider evidence that was not presented to the trial court for its consideration until after its ruling that is challenged on appeal. *Id*. In the present case, this includes anything alleged in or attached to the Third Amended Complaint, which was accepted for filing by the trial court after it ruled on defendants' motion for partial summary disposition.

A. THE NO-FAULT ACT

Defendants argue that plaintiff's lawsuit is properly understood as a third-party tort case under MCL 500.3135(1). We note that, if an injury arises out of the ownership, maintenance, or use of a motor vehicle, liability is governed by the provisions of the No-Fault Act. *Michigan Bell Telephone Co v Short*, 153 Mich App 431, 434; 395 NW2d 70 (1986). "Failure to plead the no-fault statute" is not dispositive of whether a plaintiff's cause of action falls under the act. *Id*. "Courts are not bound by the labels that parties attach to their claims. Indeed, it is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012) (cleaned up). Thus, to determine whether plaintiff's lawsuit is governed by the No-Fault Act, this Court must examine whether a "motor vehicle" was involved in this incident, and whether plaintiff's injuries arise out of the "ownership, maintenance or use" of that motor vehicle. See MCL 500.3135(1).

For purposes of the No-Fault Act, a "motor vehicle" is defined as "a vehicle, *including a trailer*, that is operated or designed for operation on a public highway by power other than muscular power and has more than 2 wheels." MCL 500.3101(3)(i) (emphasis added). It is clear that the trailer involved in this case is a "motor vehicle" under this statutory definition. See *Bialochowski v Cross Concrete Pumping Co*, 428 Mich 219, 226; 407 NW2d 355 (1987), overruled on other grounds by *Winter v Auto Club of Mich*, 433 Mich 446; 446 NW2d 132 (1989) ("There is no question that the equipment truck here involved meets this definition as it is designed for operation on a public highway by power other than muscular power and has four wheels."). See also *Parks v DAIIE*, 426 Mich 191, 198; 393 NW2d 833 (1986) (a semi-trailer is a "motor vehicle" with an identity separate from that of the semi-tractor to which it is attached); *Great American Ins Co v Old Republic Ins Co*, 180 Mich App 508, 512 n 8; 448 NW2d 493 (1989) ("A trailer is a motor vehicle under the no-fault act."); *Jasinski v National Indem Ins Co*, 151 Mich App 812, 819; 391 NW2d 500 (1986) (a semi-tractor and a semi-trailer are two separate motor vehicles within the meaning of the No-Fault Act); *Kelly v Inter-City Truck Lines, Inc*, 121 Mich App 208, 209-210; 328 NW2d 406 (1982) (a semi-trailer is a "motor vehicle" under the No-Fault Act even when it is not attached to the cab of a semi-tractor). The trailer involved in this case was designed for operation on a public highway by power other than muscular power, and it has more than two wheels. And, in any event, plaintiff conceded in his trial-court briefing that the trailer is a "motor vehicle," stating that "the flatbed trailer appears to fall under the statute's definition of a motor vehicle." Thus, the trailer involved in this case is a "motor vehicle" for purposes of the No-Fault Act.

In contrast to the trailer, the roller involved in this case is not a "motor vehicle" under MCL 500.3101(3)(i). The trial-court record indicates that the roller has only two wheels and a roller

drum with large metal lugs. It appears that the roller is intended for use as a piece of soil-compaction equipment and is not "designed for operation on a public highway." MCL 500.3101(3)(i). Plaintiff argued in the trial court that the roller did not qualify as a "motor vehicle" under the statute, and defendants conceded this point by stating, "This is a true statement." Thus, the roller involved in this case is not a "motor vehicle" for purposes of the No-Fault Act.

Having determined that the trailer is a "motor vehicle" as defined by the No-Fault Act and that the roller is not, we proceed to examine whether plaintiff's injuries arose out of the "ownership, maintenance, or use of a motor vehicle," i.e., the trailer. See MCL 500.3135(1). Relevant to this issue, the No-Fault Act provides:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
>
> (2) For a cause of action for damages under subsection (1) or (3)(d), all of the following apply:
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> * * *
>
> (b) Damages must be assessed on the basis of comparative fault, except that damages must not be assessed in favor of a party who is more than 50% at fault.
>
> * * *
>
> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(1) was in effect is abolished except as to:
>
> * * *
>
> (b) Damages for noneconomic loss as provided and limited in subsections (1) and (2). [MCL 500.3135.]

For purposes of this appeal, defendants do not dispute that plaintiff suffered a serious impairment of body function under MCL 500.3135(1), and there is similarly no dispute that the incident occurred "within this state" or that the security required by section 3101(1) was in effect. Therefore, if plaintiff's injuries arose from defendants' "ownership, maintenance, or use" of a motor vehicle, then plaintiff's potential recovery from defendants is limited to damages for noneconomic loss. MCL 500.3135(1), (3)(b).

In his Second Amended Complaint, plaintiff alleged that "defendant Corrigan was the owner and/or registrant of the subject flatbed trailer," and that "at all times relevant to this action, the subject flatbed trailer, was operated under the control and guidance of defendant Corrigan's employee, defendant Prall." Plaintiff obtained the trial court's permission to file the Second Amended Complaint based on his representation that he was "not changing his theories or stating

a new claim," but that he was "merely making a correction to the Complaint" because it had "recently come to Plaintiff's attention" that his First Amended Complaint did "not address the ownership liability of Defendant Corrigan." The count that plaintiff added through his Second Amended Complaint was an ownership-liability claim against Corrigan. See MCL 257.401(1): "The owner of a motor vehicle is liable for an injury caused by the *negligent operation* of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law." (Emphasis added.) Thus, plaintiff alleged clearly in his Second Amended Complaint that Prall had operated the trailer negligently, leading to ownership liability for Corrigan. At the time the trial court decided defendants' motion for partial summary disposition, plaintiff's complaint alleged negligent operation by defendant Prall of the motor vehicle owned by defendant Corrigan.

Several decisions of this Court discussing the unloading of "motor vehicles" are persuasive with regard to determining whether the No-Fault Act applies to plaintiff's claims in this lawsuit. See *Drake v Citizens Ins Co of America*, 270 Mich App 22; 715 NW2d 387 (2006); *Gunsell v Ryan*, 236 Mich App 204; 599 NW2d 767 (1999), overruled on other grounds by *Frazier v Allstate Ins Co*, 490 Mich 381; 808 NW2d 450 (2011)[1]; *Celina Mut Ins Co v Citizens Ins Co*, 136 Mich App 315; 355 NW2d 916 (1984); *Citizens Ins Co of America*, 135 Mich App 465; 354 NW2d 385 (1984).

In *Gunsell*, this Court held that a plaintiff could not bypass the strictures of the No-Fault Act by bringing a general-negligence action against a vehicle owner. In that case, the plaintiff was working as a mail dispatcher for the United States Postal Service. The plaintiff "injured his back when he lifted the rear door of defendant's small semitrailer, which was not working properly." *Gunsell*, 236 Mich App at 206. The plaintiff initially "appeared to bring this suit as a third-party claim under the [N]o-[F]ault [A]ct," but when he received a notice of lien regarding benefits paid to him through his employment, he amended his complaint to remove references to the No-Fault Act and attempted to proceed with the lawsuit "under a general negligence principle." *Id*. at 207. The trial court granted the plaintiff permission to amend his complaint, which "eased plaintiff's burden at trial, because plaintiff no longer had to prove a serious impairment of body function, and allowed him to pursue economic damages he could not have recovered under the [N]o-[F]ault [A]ct." *Id*. On appeal, this Court held that the trial court erred and that the case "should have been decided under the no-fault statute with its attendant limitations on third-party liability." *Id*. at 208. *Gunsell* is instructive for the general principle that a plaintiff cannot bypass the applicability of the No-Fault Act by framing his lawsuit as one alleging general or ordinary negligence.

In *Drake*, a "grain delivery truck" arrived at the farm where the plaintiff was employed to deliver animal feed. *Drake*, 270 Mich App at 24. The driver backed the truck to a silo and activated the truck's auger system to unload the feed. *Id*. The driver realized that the auger system had become clogged, and the plaintiff attempted to assist the driver in unclogging it. The driver

[1] In *Lefevers v State Farm Mut Auto Ins Co*, 493 Mich 960; 828 NW2d 678 (2013), the Michigan Supreme Court stated that its decision in *Frazier* "effectively disavowed" this Court's "discussion of MCL 500.3106(1)(b)" in *Gunsell* (concerning an injured person's "physical contact with equipment permanently mounted on the vehicle").

activated the auger without warning, and the plaintiff lost part of two fingers. *Id*. The trial court ruled that the plaintiff's injuries were covered under the No-Fault Act, and this Court affirmed that ruling. *Id*. at 24, 39. The Court's opinion in *Drake* is instructive here because it held that a plaintiff's injury sustained while helping a truck driver unload cargo from a parked vehicle is subject to the provisions of the No-Fault Act.

In *Citizens*, a semi-truck driver was injured while attempting to unload a trailer. This Court described the facts of the case as follows:

> The relevant facts are undisputed. On September 21, 1981, Roadway's employee, James A. Lang, was injured during the course of his employment. Upon arriving at a delivery location, Lang exited from the cab portion (tractor) of Roadway's 45-foot-long tractor-trailer combination and walked to the rear of the storage portion (trailer). In an attempt to open the trailer's overhead door, Lang fell off the trailer's rear ICC bar and injured his back. [*Citizens*, 135 Mich App at 467.]

On appeal, this Court faced the question whether the trailer was a separate and distinct "motor vehicle" from the tractor for purposes of the No-Fault Act. *Id*. at 469. This Court looked to *Kelly*, 121 Mich App at 211, where this Court held that "a semi-trailer, whether attached to a cab or freestanding, is a 'motor vehicle' under the no-fault act." *Id*. at 470. This Court then concluded that "a trailer remains a separate 'motor vehicle' when it is hooked up to a tractor." *Id*. at 471, citing MCL 500.3101(2)(c). For purposes of this case, *Citizens* is instructive because it establishes that: (1) a semi-trailer is a "motor vehicle" under the No-Fault Act; and (2) provisions of the No-Fault Act apply to injuries sustained by a person who falls off a parked semi-trailer during the process of unloading that trailer.

Finally, in *Celina*, this Court considered a case that involved the loading of steel tubing onto a semi-trailer. In that case, the semi-trailer was parked at a loading dock. A crane operator used "an overhead crane affixed to the loading dock's ceiling" to remove a bundle of steel tubing from the semi-trailer, stack them into piles, and reload them onto the truck. *Celina*, 136 Mich App at 317. In attempting to stack the tubing into piles, "the crane operator accidentally knocked a bundle off a previously stacked pile and that bundle rolled into and injured" the plaintiff. *Id*. at 317-318. The plaintiff sued "for negligent operation of the crane during the loading process." *Id*. at 318. This Court held that MCL 500.3106(1)(b) "makes compensable injuries which are a direct result of physical contact with property lifted onto or lowered from the parked vehicle in the loading or unloading process." *Id*. at 319. The Court's opinion in *Celina* is instructive here because it demonstrates that a claim for injuries arising from the loading or unloading of a parked semi-trailer is subject to the No-Fault Act.

Applying these authorities to the present case, and examining the gravamen of plaintiff's complaint and the evidence before the trial court at the time defendants filed their motion, we conclude that plaintiff's injuries arose out of the ownership, maintenance, or use of a motor vehicle, and that liability is therefore governed by the No-Fault Act.

B. CAUSATION

Plaintiff argued in the trial court, however, that the No-Fault Act does not apply to this lawsuit because his injuries did not arise from Prall's operation of the trailer, but arose from the fact that the roller fell on him. Therefore, plaintiff is arguing that an insufficient causal connection exists between Prall's operation of the trailer's tilt-deck and plaintiff's injuries. We conclude that this argument is without merit.

It is uncontested that, at the time of plaintiff's injuries, Prall was moving the tilt-deck of the trailer in an attempt to place it on the ground so that plaintiff could drive the roller off the trailer. In the trial court, plaintiff drew a direct connection between Prall's movement of the tilt-deck and plaintiff's injuries. In opposition to defendants' motion for partial summary disposition, plaintiff provided his expert-witness report to the trial court. That report concluded that Prall's actions in the "significant and unnecessary lifting of the tilt bed while someone was on the equipment on the trailer is the direct cause of the roller/compactor sliding off the trailer." Plaintiff also took issue with Prall's decision to operate the trailer's tilt-deck without salting it, alleging that Prall was negligent in "failing to de-ice the subject trailer" before operating it. On appeal, plaintiff likewise states that "Defendant Prall then used the remote control to lift the front of the trailer in an attempt to unload the roller, *causing* the roller to slide." (Emphasis added.)

If an injury arises out of the ownership, maintenance or use of a motor vehicle, liability is governed by the provisions of the No-Fault Act. *Michigan Bell*, 153 Mich App at 434. Thus, "some sort of causal connection between the injury and the ownership, maintenance, or use of the vehicle" is required for the No-Fault Act to apply. *Thornton v Allstate Ins Co*, 425 Mich 643, 649; 391 NW2d 320 (1986). Typical "but for" causation is insufficient:

> [W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. [*Id*. at 650-651, quoting *Kangas v Aetna Cas & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975).]

In this case, the tilt-deck trailer owned by Corrigan and operated by Prall was designed for the loading, carrying, and unloading of heavy cargo. The normal use of the motor vehicle involved operation of the tilt-deck while heavy equipment was located on that deck. Plaintiff alleged that Prall acted negligently because he tilted the deck—in icy conditions—without using the attached winch to secure the heavy equipment, which could have prevented that heavy equipment from sliding during movement of the underlying deck. In light of the allegations in plaintiff's Second Amended Complaint and plaintiff's expert-witness report, and under the *Thornton/Kangas* analysis, we conclude that there is no genuine issue of material fact. Plaintiff alleged that his injuries were causally connected to Prall's operation of the trailer, and the evidence before the trial court supported those allegations. The No-Fault Act applies to plaintiff's claims.

C. THE TRAILER AS A PARKED VEHICLE

It is uncontested that the trailer was parked at the time of plaintiff's injuries. In the trial court, plaintiff argued that, because the trailer was parked, it was not a motor vehicle *in use as a motor vehicle*, and therefore the No-Fault Act does not apply to this case. Plaintiff repeats this argument on appeal, positing that the No-Fault Act cannot apply to the unloading of a stationary trailer that was not involved in a motor-vehicle accident. We conclude that plaintiff's argument is an incorrect statement of Michigan law.

First, we note that plaintiff's argument runs contrary to the holdings in *Gunsell*, *Drake*, *Celina*, and *Citizens*, all of which involved a parked vehicle. Second, plaintiff's argument is based on language found in the PIP provisions of the No-Fault Act. "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). The term "accidental bodily injury" is not, however, found in the No-Fault Act's third-party tort provision, MCL 500.3135. As such, whether an "accidental bodily injury" has occurred, so as to enable plaintiff to recover PIP benefits, has no bearing on whether a defendant may avail himself of the protections of MCL 500.3135 when accused of negligence arising from his own use of a motor vehicle.

As defendants point out, this is not a PIP case. Plaintiff claims that, because MCL 500.3106 precludes him from collecting PIP benefits, his claims against Prall and Corrigan do "not fall within the No-Fault Act." Plaintiff cites no caselaw holding that, where a plaintiff receives workers' compensation benefits in lieu of PIP benefits, his injuries do not arise from the ownership, maintenance, or use of a motor vehicle. Plaintiff's argument is simply unsupported and should not have been relied upon by the trial court in denying defendants' motion for partial summary disposition. But, assuming arguendo that the statutory language applicable to PIP claims somehow applies to this non-PIP case, plaintiff's argument nonetheless fails.

In *Kemp v Farm Bureau Gen Ins Co of Michigan*, 500 Mich 245, 253; 901 NW2d 534 (2017), the Michigan Supreme Court addressed the meaning of MCL 500.3106(1), and 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. [*Id*. at 253 (cleaned up).]

The first factor of the *Kemp* test would be satisfied in this case because plaintiff's injuries arose when the roller fell on plaintiff as it was being "lowered from the vehicle in the loading or unloading process." MCL 500.3106(1)(b). That statutory section expressly delineates when accidental bodily injury arises from "the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle," if the vehicle is parked. The PIP provisions of the No-Fault Act apply to cases involving parked vehicles where "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*." MCL 500.3106(1)(b) (emphasis added). Thus, the No-Fault Act applies where the plaintiff's injury was a direct result of physical contact with property being lowered from a motor vehicle during the unloading process. In this case, the roller was being lowered from the trailer during the unloading process and it had direct physical contact with plaintiff. Therefore, the facts of the case fit within one of the three exceptions in subsection 3106(1).

With regard to the second *Kemp* factor, whether an injury arises out of the use of a motor vehicle as a motor vehicle under the PIP provisions of the No-Fault Act hinges on "whether the injury is closely related to the transportational function of motor vehicles." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998). The analysis requires examination of the activity in which the injured person was engaged at the time of the injury. *Kemp*, 500 Mich at 258. Our Supreme Court has held that "unloading property from a vehicle upon arrival at a destination constitutes use of a motor vehicle as a motor vehicle and satisfies the transportational function requirement." *Id*. at 262. In this case, the roller was being unloaded from the trailer upon arrival at the destination—the new subdivision under construction by plaintiff's employer, where the roller was going to be used to compact soil. Therefore, the trailer was being used as a motor vehicle at the time plaintiff's injuries occurred.

The final *Kemp* factor requires consideration of whether sufficient connection exists between the injuries and the use of the vehicle as a motor vehicle. As explained above, the *Thornton/Kangas* causation test provides:

> [W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. [*Thornton*, 425 Mich at 650-651, quoting *Kangas*, 64 Mich App at 17.]

The Supreme Court has ruled that an injury sustained while unloading property from a vehicle upon the arrival at a destination can be foreseeably identifiable with the normal use of a vehicle. See *Kemp*, 500 Mich at 264. It follows that plaintiff's injury in this case, sustained while unloading the roller, could be considered "foreseeably identifiable with the normal use of a vehicle." All three *Kemp* factors would be met in this case, and the strictures of the No-Fault Act therefore apply, despite the fact that the trailer was parked at the time plaintiff's injury occurred.

In this case, the trial court denied defendants' motion for partial summary disposition without oral argument, adopting by reference the analysis of plaintiff's briefing opposing that motion. Plaintiff argued in that brief that his lawsuit was not subject to the No-Fault Act because (1) his injuries did not arise out of the ownership, maintenance, or use of a motor vehicle; and (2) he was not entitled to PIP benefits because he collected workers' compensation benefits, and therefore, the No-Fault Act did not apply at all to a lawsuit arising from his injuries. We conclude that the trial court erred in denying defendants' motion for partial summary disposition. Because plaintiff's injuries arose from the ownership, maintenance, or use of a motor vehicle, the No-Fault Act applies to this case, and plaintiff's remedies are therefore limited to noneconomic damages. MCL 500.3135(1).

Because we conclude that the trial court erroneously denied defendants' motion for partial summary disposition, we need not reach defendants' argument that the trial court erroneously denied its motion for reconsideration.

III. CONCLUSION

Plaintiff suffered injuries during the unloading of a trailer owned by defendant Corrigan and operated by defendant Prall. Plaintiff clearly alleged and argued in the trial court that his injuries occurred because defendant Prall negligently operated the trailer while plaintiff was on the trailer's tilt-deck. Plaintiff also alleged and argued that his injuries occurred because defendant Prall decided to operate the trailer's tilt-deck without salting it. Examining the gravamen of plaintiff's action "by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim," *Buhalis*, 296 Mich App at 691-692 (cleaned up), we conclude that plaintiff's injuries arise from the ownership, maintenance, or use of a motor vehicle, i.e. the trailer. MCL 500.3135(1). Therefore, liability is governed by the provisions of the No-Fault Act. See *Michigan Bell*, 153 Mich App at 434; 395 NW2d 70 (1986).

We reverse the trial court's order denying defendant's motion for partial summary disposition and remand for entry of an order granting that motion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Brock A. Swartzle