STATE OF MICHIGAN

COURT OF APPEALS

JOHANNES WINTER,

Plaintiff-Appellant,

v

AUTOMOBILE CLUB OF MICHIGAN (AAA),

Defendant-Appellee.

OCT 14 1987

No. 92528

BEFORE: R. S. Gribbs, P.J., D. E. Holbrook, Jr. and N. J. Lambros,* JJ.

PER CURIAM

Plaintiff appeals the February 25, 1986, order granting summary disposition in favor of defendant in plaintiff's action to recover no-fault benefits for injuries sustained by plaintiff when using a tow truck to lift a slab of sidewalk concrete in order to level the ground underneath. The question on appeal is whether at the time of the accident the tow truck was a motor vehicle being used as a motor vehicle as defined under the no-fault act.

Plaintiff resided in Grosse Pointe Farms, Michigan, and was notified by that city that three sidewalk slabs in front of his house had to be leveled or replaced. On June 25, 1984, plaintiff borrowed a tow truck from an acquaintance. The tow truck owner also sent Banks, one of his employees, to assist plaintiff. Along with a third person, Denolf, they used the tow truck to level the slabs. The tow truck was backed up so that the hook on the end of the tow truck cable was over the slab to be lifted. The truck was perpendicular to the street, its back wheels were almost to the sidewalk, and the front wheels were at the curb but were not chocked. The hand brake was on, and the truck was in neutral gear. The controls which lower the cable were on the outside at the back of the truck and could not be operated from inside the cab.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

With no one in the cab, Banks lowered the cable from the outside. Denolf then connected the hook to each slab to be lifted by sliding it under the edge in the middle of the street side of the slab. Banks then lifted the slab to allow plaintiff and Denolf to shore it with pieces of wood. Once propped, plaintiff and Denolf would level the ground underneath by removing roots and rocks and by placing sand on the ground.

Banks, who had left with the truck after the slabs had been lifted, returned and repositioned the truck as before. Denolf attached the hook to the slab and Banks raised the slab enough to allow the shoring under the slabs to be removed. After lowering the slab to the ground, the process had to be repeated. The third time the slab was raised, the slab fell severing the fingers on plaintiff's right hand. The fingers were reattached but plaintiff has very limited use of that hand. The record is conflicting over whether a piece of the slab broke off causing the slab to fall or whether the slab slipped off the hook.

As a result of the injury, plaintiff's employment as a police officer was terminated due to permanent disability. Plaintiff sought but was denied no-fault benefits from defendant, the insurer of plaintiff's automobile.

Plaintiff then instituted an action in the circuit court to recover no-fault benefits and defendant filed a motion pursuant to MCR 2.116(C)(10) averring that plaintiff's injury did not arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. Plaintiff filed a motion for partial summary disposition on the basis that his injury did arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, and that his claim was not barred by the parked vehicle exclusion of MCL 500.3106(1); MSA 24.13106(1). The trial court granted defendant's motion for summary disposition. At the hearing on the motion, the trial

court ruled that under the facts of this case the tow truck was not being used as a motor vehicle, thereby precluding plaintiff from recovering benefits under the no-fault act.

We find and defendant does not dispute that the tow truck was a motor vehicle under the no-fault act, MCL 500.3101(2)(C); MSA 24.13101(2)(C). The primary question to be answered here is whether plaintiff's injury arose out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, MCL 500.3105(1); MSA 24.13105(1). If this condition is met in the instant case, then that statute provides that a no-fault insurer is liable to pay benefits for the accidental bodily injury which occurred.

We find that our inquiry is controlled and answered by the recent decision of the Supreme Court in Bialochowski v Cross Concrete Piping Co. (Docket No. 76180, Rel'd June 1, 1987). We note that neither the trial court nor the parties had the benefit of this decision prior to the filing of this appeal.

In Bialochowski, the plaintiff, during the course of his employment, was rendered a paraplegic when the boom on a concrete truck, which was in the process of pouring concrete, collapsed and fell on him when the concrete pump on the truck exploded.

The defendant in Bialochowski argued that the truck was not being used as a motor vehicle. Instead, defendant argued that it was being used as a piece of construction machinery, a cement pump which poured concrete at elevated levels.

The defendant in Bialochowski, like the trial court and defendant in the case at bar, relied heavily on Johnston v Hartford Ins Co, 131 Mich 349; 346 NW2d 549, lv den 419 Mich 893 (1984), for their argument that the vehicle in question was not being used as a motor vehicle at the time of the accident. The Supreme Court in Bialochowski explained Johnston, stating:

"In Johnston, a crane operator was injured when he slipped after getting out of the cab of the crane that contained

the controls used to operate the lifting mechanism of the crane, and while entering the cab that contained the controls for driving the crane. The crane was immobilized by outriggers, retraction of its wheels, and the placement of fifty-four tons of counterweights. It took three days to rig the crane, which then could not be driven. The crane was used to lift structural steel and other objects to the upper levels of the construction project.

"The crane operator in Johnston brought suit against his personal no-fault insurer under §§ 3105 and 3106 of the no-fault act. The Court of Appeals held that plaintiff was not entitled to no-fault benefits because the crane was a dual-purpose vehicle which was not being used as a motor vehicle at the time of the accident. In so holding, the Court of Appeals stated:

"'A too technical approach, i.e., one dictating that, once a dual-purpose vehicle has been ruled a motor vehicle, it is a motor vehicle at all times and for all purposes, would destroy the intent of the statute and create undesirable results. A common sense approach, however, dictates that the intention of the Legislature was to limit the act's coverage here to motor vehicles whose function at the time of the accident was one compatible with that of a motor vehicle. The intent of the Legislature should not be defeated by a technical or forced interpretation of the statutory language.'" Sl op at 5-6 (Footnotes omitted).

The Bialochowski Court then distinguished and implicitly overruled Johnston, stating:

"Defendant's reliance on Johnston is misplaced for several reasons. First, the truck in the present case is dissimilar to the crane in that it did not require three days and the attachment of counterweights and outriggers to immobilize it. Rather, although this truck was parked and stabilized, the stabilizers could have been disengaged, the truck started, and then driven away.

"Second, and more importantly, we believe that the Court of Appeals in Johnston interpreted the statutory phrase 'use of a motor vehicle as a motor vehicle contained in § 3105 too narrowly. The no-fault act is remedial in nature, as evidenced by the fact that the act 'was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system.' The no-fault act was designed 'to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses.' In exchange for a more certain recovery under the no-fault act, an injured person's right to recover damages from a negligent owner or operator of a motor vehicle in a tort action is limited. This remedial nature of the no-fault act would be advanced by broadly construing its provisions to effectuate coverage.

"Applying a broad remedial interpretation to the phrase 'use of a motor vehicle as a motor vehicle,' it becomes clear that it is not limited to normal vehicular movement on a highway. Motor vehicles are designed and used for many different purposes. The truck involved in this case is a cement truck capable of pouring cement at elevated levels. Certainly one of the intended uses of this motor vehicle (a motor vehicle under the no-fault act) is to pump cement. The accident occurred while this vehicle was being used for its intended purpose. We hold that the phrase 'use of a motor vehicle as a motor vehicle' includes this use.

Applying this guidance from Bialochowski, we believe that plaintiff's use of the tow truck in this case qualifies as the use of a motor vehicle as a motor vehicle. For the identical reason expressed in Bialochowski, the tow truck is also dissimilar to the crane in Johnston. Like the cement truck, the tow truck could have easily been driven away.

Additionally, and also more importantly, one of the intended uses of a tow truck is to lift and lower. The entire boom mechanism, with the boom, cable, hook, and the separate gearing to operate it, is designed to lift and lower heavy objects, as distinguished from merely pulling -- which could be accomplished without the lifting made possible by the boom. Further, the record below demonstrates that this particular tow truck had on numerous occasions been put to uses very similar to the use which resulted in plaintiff's injury.[1] Certainly this use of the tow truck can be characterized as one of its intended uses. Accordingly, after applying a broad interpretation to the phrase "use of a motor vehicle as a motor vehicle" as required by Bialochowski, we hold that this use of a tow truck is included within that phrase.

Defendant also argues that if this Court finds that the tow truck was being used as a motor vehicle at the time of the accident, plaintiff is nevertheless barred from recovering no-fault benefits because the tow truck was parked and none of the exceptions contained in MCL 500.3106(1)(a)-(c); MSA 24.13106(1)(a)-(c) applies. Section 3106, in relevant part, provides:

> "(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:
>
> "(a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> "(b) Except as provided in subsection (2), the injury was a direct result of physical contact with the 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.

"(c) Except as provided in subsection (2), for an injury sustained in the course of employment while loading, unloading, or doing mechanical work on a vehicle, the injury was sustained by a person while occupying, entering into, or alighting from the vehicle." MCL 500.3106(1)(a)-(c); MSA 24.13106(1)(a)-(c).

We have no hesitation in finding that the tow truck was parked at the time of the accident. See MacDonald v Michigan Mutual Ins Co., 155 Mich App 650, 655-656; 400 NW2d 305 (1986); Davis v Auto-Owners Ins Co., 116 Mich App 402, 407-408; 323 NW2d 418 (1982). Although we agree with defendant that the tow truck was parked, we find that plaintiff is nevertheless entitled to no-fault benefits.

The purpose behind the parking exclusion and its exceptions was well explained in Miller v Auto-Owners, 411 Mich 633, 640-641 (1981):

"Each of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle. The underlying policy of the parking exclusion is that, except in the three general types of situations, a parked car is not involved in an accident as a motor vehicle. It is therefore inappropriate to compensate injuries arising from its non-vehicular involvement in an accident within a system designed to compensate injuries involving motor vehicles as motor vehicles."

We have already found that the tow truck was involved in the accident while being used as a motor vehicle. Accordingly, the purpose behind the parking exception is not applicable.

In any event we find that plaintiff's injury in this case fits within at least two of the exceptions to the no-fault act. Consistent with the rationale expressed in Bialochowski and given that the instant facts do not present a situation where the parking exclusion was intended to apply, we are of the firm opinion that a broad interpretation of the exceptions should be utilized.

In Bialochowski, the Court held that the exception in Section 3106(1)(b) applied because the accident occurred as a result of contact with the boom, which was permanently mounted on

the truck, while the pump and boom were being used for their intended purpose. We believe that plaintiff's accident, having his fingers severed when the concrete slab broke or slipped off the hook, also falls within the subsection (b) exception that the injury be a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated. We reject as incompatible with the purpose behind the parking exclusion any suggestion that the tow truck boom and/or hook must make physical contact with the plaintiff's person. The boom, cable and hook were permanently mounted on the vehicle. Plaintiff's injury was a direct result of physical contact with this equipment. The concrete slab slipped or broke off from the hook while it was being lifted.

Additionally, although declining to engage in any extensive analysis, we do not adopt defendant's argument that the exception for property being lifted or lowered from the vehicle in the loading or unloading process does not apply as well. We see little significance in drawing a line between, for example, loading articles onto the bed of a truck, and the type of lifting that the tow truck was utilized for in the instant case.

The pertinent inquiry is to determine whether the accident occurred while the motor vehicle was being used as a motor vehicle. The parked vehicle exclusion was crafted onto the no-fault because "[t]here is nothing about a parked vehicle as a motor vehicle that would bear on the accident". Miller, supra, 639. That not being the facts of this case, the trial court erred in granting defendant's motion for summary disposition.

Reversed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Nicholas J. Lambros

Footnote.

1. The record below revealed that this particular tow truck raised tree stumps out of holes, loaded cement blocks onto trucks, raised a furnace out of a basement, lifted cars out of the lake, and pulled out fenders. The record also disclosed that tow trucks are capable and commonly used for many other lifting functions.