STATE OF MICHIGAN

COURT OF APPEALS

BULKMATIC TRANSPORT CO., a foreign corporation, and HASTINGS MUTUAL INSURANCE CO., subrogee,

Plaintiffs-Appellants,

v No. 104012

INDUSTRIAL IRON & METAL CO., a Michigan corporation

Defendant-Appellee.

Before: Beasley, P.J., and Sawyer and T.J. Foley,* JJ.

PER CURIAM

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). The trial court ruled that the Michigan no-fault statute, MCL 500.3135(2); MSA 24.13135(2), is applicable to the facts of this case. We disagree and reverse.

The parties stipulated to the facts of the case. On the night of July 30-31, 1984, defendant's employee was driving a semi-tractor and trailer, owned by defendant, westbound on I-69. The truck was hauling bales of newspaper and cardboard scrap, weighing about a ton each. One or more of these bales fell onto the highway.

At approximately 4:00 a.m., on July 31, 1984, a semi-truck and trailer, owned by Delbert C. Bamberg, carrying a load of sugar, collided with the bales that had fallen from defendant's vehicle. The parties stipulated that the bales of scrap were on the highway no longer than five hours.

There was damage to both Bamberg's vehicle and cargo. Hastings, subrogee of Bamberg, paid Bamberg $14,310 for the damage to his vehicle. Plaintiff Bulkmatic, owner of the sugar cargo, sustained damages in the amount of $24,784.40.

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

Plaintiffs allege that defendant was negligent in improperly loading the cargo, and in failing to remove the fallen scrap from the road. Defendants contend that plaintiffs' tort action is barred by the no-fault statute, MCL 500.3135(2); MSA 24.13135(2), which provides:

> "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(3) and (4) was in effect is abolished except as to: , . . "

The parties agree that the damage was not intentionally caused by defendant and that defendant had the proper security required by MCL 500.3101; MSA 24.13101.

In this case, the parties disagree about whether the accident arose out of the "ownership, maintenance or use" of a motor vehicle. In Kangas v Aetna Casualty & Surety Co, 64 Mich App 1, 17; 235 NW2d 42 (1975), this Court enunciated the test for determining whether an accident arises out of the "ownership, maintenance or use" of a motor vehicle:

> "[W]e conclude that while 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."

See, Thornton v Allstate Insurance Co, 425 Mich 643, 650, 660-661; 391 NW2d 320 (1986); Gooden v Transamerica Insurance, 166 Mich App 793, 797; 420 NW2d 877 (1988); Ford v Insurance Company of North America, 157 Mich App 692, 697; 403 NW2d 200 (1987). The language of MCL 500.3135(2); MSA 24.13135(2), requires that the injuries arise out of the use of the motor vehicle as a motor vehicle and that the motor vehicle be the instrumentality of the injuries. Thornton, supra, 660-661; Ford, supra, 696-697.

Defendant argues that the nature of its vehicle is to transport large items over highways and that it is foreseeable that some items may fall from the truck. Defendant argues that

the accident arose out of the normal use of a motor vehicle and that, therefore, tort liability is precluded by MCL 500.3135(2); MSA 24.13135(2). In support of its position, defendant cites several cases where the no-fault act was applicable when a plaintiff was injured by using a vehicle according to its inherent or functional nature. Perryman v Citizens Insurance Company of America, 156 Mich App 359; 401 NW2d 367 (1986); Bauman v Auto-Owners Insurance Co, 133 Mich App 101; 348 NW2d 49 (1984); Koole v Michigan Mutual Insurance Co 126 Mich App 483; 337 NW2d 369 (1983).

We agree with plaintiffs that the accident in this case did not arise from the ownership, maintenance or use of defendant's vehicle, and that the no-fault statute is not applicable. In this case, defendant had left the scene before the accident occurred. The parties stipulated that the bales of scrap could have lain on the highway for as long as five hours before plaintiffs' truck hit them. Defendant's vehicle was not the instrumentality which caused the accident. The accident was caused by defendant leaving bales of scrap sitting on the highway which created a hazardous condition in the road.

We hold, as a matter of law, that plaintiffs' damages did not arise out of defendant's "ownership, maintenance or use" of a motor vehicle, and that plaintiffs' tort action is not barred by MCL 500.3135(2); MSA 24.13135(2). The trial court's grant of summary disposition in favor of defendant is reversed, and the case is remanded for further proceedings consistent with this opinion.

/s/ William R. Beasley
/s/ David H. Sawyer
/s/ Thomas J. Foley