STATE OF MICHIGAN

COURT OF APPEALS

JUNE A. WEIGLE,

Plaintiff-Appellant,

v No. 107672

TRANSAMERICA INSURANCE CORPORATION OF AMERICA, a Michigan corporation,

Defendant-Appellee.

Before: Shepherd, P.J., and Murphy and T. Gillespie,* JJ.

PER CURIAM.

Plaintiff appeals by right from a March 18, 1988 order granting summary disposition in favor of the defendant no-fault insurer and denying plaintiff's countermotion for summary disposition brought pursuant to MCR 2.116(C)(10). The sole issue concerns whether the parked vehicle exclusion of MCL 500.3106(1); MSA 24.13106(1) precludes plaintiff from recovering personal injury protection benefits. We affirm the trial court's holding that the exclusion precluded plaintiff's recovery.

The material facts are not in dispute. On June 6, 1986, plaintiff was injured while assisting her husband and son move a refrigerator from the back of a pickup truck into their house. The truck was driven by plaintiff's husband and backed up to the foot of the back porch steps. Plaintiff's husband and son carried the refrigerator up the four steps to the porch before it became apparent that the refrigerator would not fit through the door. While they were resting the refrigerator on the porch, plaintiff made an effort to help by going to the truck bed to retrieve the end of the refrigerator's electric cord which was caught on the tailgate hinge. Plaintiff took the cord out of the hinge, closed the tailgate and then began walking up the steps.

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

When plaintiff reached the step closest to the porch with the cord still in her hand, plaintiff lost her balance and fell down the steps. Her shoulder struck the bumper of the truck before plaintiff fell to the ground. Plaintiff sustained injuries to her arm and leg.

After the defendant insurer denied plaintiff's claim for personal injury protection benefits, plaintiff commenced this suit. Defendant moved for summary disposition based on the parked vehicle exclusion while plaintiff filed a countermotion asserting that her injuries came within two of the exceptions to the exclusion. The trial court ruled that the parked vehicle exclusion precluded plaintiff's recovery. We agree with the trial court.

In order to recover for injuries sustained when a vehicle is parked, a claimant must show that (1) an exception to the parked vehicle exclusion applies and (2) the injury arose out of the use of a motor vehicle as a motor vehicle. Gooden v Transamerica Ins Corp, 166 Mich App 793, 797; 420 NW2d 877 (1988), lv den 431 Mich 862 (1988).

The two exceptions relied on by plaintiff provided the following at the time of her injury:

> "(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 contract 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." MCL 500.3106(1); MSA 24.1306(1) (emphasis added).

With regard to the first exception, plaintiff argues that a review of the photographs submitted to the trial court support an argument that the pickup truck was parked in an unreasonable manner for unloading a heavy object. The focus of this exclusion is on whether the act of parking can be done in a fashion which causes unreasonable risk of injury, as where a

vehicle is left in gear or with one end protruding into traffic. Miller v Auto-Owners Ins Co, 411 Mich 633, 640; 309 NW2d 544 (1981).

In the instant case, the trial court, relying on Autry v Allstate Ins Co, 130 Mich App 585, 591-592; 344 NW2d 588 (1983), lv den 422 Mich 879 (1985), held that the question of whether an "unreasonable risk" existed was a matter of statutory construction for the court where, as here, there is no factual dispute. While this was a correct application of the holding in Autry, we do not believe that Autry sets forth the proper test. Autry adopted this rule of statutory construction based on Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), which held that the trial court must decide whether the plaintiff suffered a serious impairment of body function within the meaning of § 3135 (1) of the no-fault act whenever there is no material factual dispute as to the nature and extent of the plaintiff's injuries. Subsequently, in DiFranco v Pickard, 427 Mich 32, 58; 398 NW2d 896 (1986), our Supreme Court modified Cassidy, holding that the issue must be submitted to the jury even if the evidentiary facts are undisputed. With regard to motions for summary disposition, the DiFranco court stated:

> "Even where there is no material factual dispute, a motion for summary disposition (as well as directed verdict and judgment notwithstanding the verdict) should not be granted if the facts can support conflicting inferences. 73 Am Jur 2d, Summary Judgment, § 27, p 754." DiFranco, supra, 54.

Accordingly, we will review the trial court's decision based on the general principles applied in reviewing motions for summary disposition under MCR 2.116(C)(10). The appropriate inquiry is whether the record which might be developed, giving the benefit of any reasonable doubt to the nonmoving party, will leave open an issue upon which reasonable minds might differ. Jubenville v West End Cartage, Inc, 163 Mich App 199, 203; 413 NW2d 705 (1987), lv den 429 Mich 881 (1988). The lower court's decision will be affirmed where no factual development could justify recovery by the nonmoving party. Id., p 203.

While we are faced with countermotions for summary disposition in this case, we are satisfied that the trial court's ruling that the first exception did not apply to plaintiff was correct. The risk of bodily injury in this case arose from the fact that plaintiff lost her balance on the steps leading up to the porch. The fact that the truck was backed up to the steps did not increase that risk and was not an uncommon or unreasonable technique to use when unloading a heavy object. Under these circumstances, reasonable minds could not differ in concluding that the exception to the parked vehicle exclusion contained in subsection (1)(a) did not apply to plaintiff's injury.

With regard to the exception contained in subsection (1)(b), plaintiff's principal argument seems to be that this Court misconstrued this subsection in Arnold v Auto-Owners Ins Co, 84 Mich App 75; 269 NW2d 311 (1978), lv den 405 Mich 804 (1979), as containing two independent clauses: (1) injuries directly resulting from physical contact with equipment permanently mounted on the motor vehicle while such equipment was being operated or used or (2) injuries which are a direct result of physical contact with property being lifted onto or lowered from the parked vehicle in the loading or unloading process.

We find that the Arnold Court correctly concluded that the statute was ambiguous and construed it in accordance with legislative intent. The ambiguity in the statute arose from the lack of a "," before the phrase "or property." The Legislature corrected this ambiguity effective June 1, 1987 when it amended the statute to add the "," in 1986 PA 318.

Construing the statute as set forth in Arnold, we agree with the trial court's conclusion that plaintiff's injury did not come within the exception. With regard to the "equipment" clause, plaintiff argues that the bumper she fell on was the equipment. Even if this true, the equipment clause did not apply

to plaintiff because the equipment was not being operated or used at the time of injury. It was merely the situs of plaintiff's fall. With regard to the "property" clause, plaintiff argues that the refrigerator was the property. There was, however, no evidence that plaintiff's injury was a direct result of physical contact with the refrigerator. Although there was evidence that plaintiff was holding onto the cord of the refrigerator when she fell, plaintiff sustained no injury as a result of physical contact with the cord. Plaintiff's injury occurred when she lost her balance and fell down the steps. Therefore, neither of the clauses contained in subsection (1)(b) apply to plaintiff.

Having concluded that none of the exceptions relied on by plaintiff were applicable, we conclude that summary disposition was correctly granted in favor of defendant. Even if an exception was applicable, we would not reverse since no factual development could show that plaintiff's injury arose out of the use of a motor vehicle. As noted in Gooden, supra, 796-797, this is a separate inquiry that requires a showing of a sufficient causal nexus between the use of the motor vehicle and the injury.

Here, plaintiff argues that a sufficient nexus was shown because she was assisting in the "unloading" of the refrigerator from the pick-up truck at the time of her fall. We disagree. It was undisputed that plaintiff's injury arose when she lost her balance and fell down the steps. There was no showing of any connection to the truck or the actual process of unloading causing plaintiff to fall.

We find that the circumstances of this case are similar to Block v Citizens Ins Co, 111 Mich App 106, 111; 314 NW2d 536 (1981). In that case, the plaintiff had parked a vehicle to make a delivery. After making the delivery, the plaintiff was returning to the vehicle with some empty cartons. Just before she reached the vehicle, the plaintiff slipped on some ice, fell,

and came to rest on the vehicle. This Court affirmed a grant of summary judgment on the basis that the slip and fall on the ice was without causal connection with the ownership, maintenance, and use of the vehicle. We agree and, accordingly, affirm the trial court's grant of summary disposition in this case.

In sum, we conclude that plaintiff failed to demonstrate that an exception to the parked vehicle exclusion of MCL 500.3106(1); MSA 24.13106(1) applied to her injury or that her injury arose out of the use of a motor vehicle as a motor vehicle. Accordingly, we affirm the trial court's decision to grant summary disposition in favor of defendant and to deny plaintiff's countermotion for summary disposition.

Affirmed.

/s/ John H. Shepherd
/s/ William B. Murphy
/s/ Tyrone Gillespie