STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER MITCHELL,

Plaintiff-Appellant,

v

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, a Pennsylvania corporation, MICHAEL C. BINGEN, and CHAMBERS, STEINER, MAZUR, ORNSTEIN and AMLIN, P.C.,

Defendants-Appellees.

JUL 30 1990

No. 116601

Before: Griffin, P.J., and Shepherd and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from a lower court order setting aside the default entered against defendant National Union Fire Insurance Company of Pittsburgh ("National Union"), and various orders granting summary disposition in favor of defendants Michael C. Bingen ("Bingen"); Chambers, Steiner, Mazur, Ornstein and Amlin, P.C. ("Chambers, Steiner"); and National Union. We affirm.

I

Plaintiff was injured on February 12, 1986, while employed by Pepsi-Cola Bottling Group as a transport driver. Plaintiff had connected the tractor to the loaded trailer, and left the engine running while he made a final inspection. Plaintiff was pulling on a padlock on the trailer's rear doors when he slipped on ice and fell to the ground. He suffered a herniated disc which required surgery.

Plaintiff's duties did not include loading or unloading products or any mechanical work on the tractor or trailer. The inspection he was conducting at the time of his injury was required by company rules and department of transportation regulations.

Plaintiff received benefits under the Workers' Disability Compensation Act, MCL 418.101 et seq.; MSA 17.237(101) et seq. Defendant National Union insured plaintiff's employer for workers' compensation and no-fault motor vehicle claims.

On December 8, 1986, plaintiff met with defendant Bingen, an attorney with defendant Chambers, Steiner. Plaintiff and Bingen discussed the accident and the benefits plaintiff was receiving. Neither Bingen nor any employee of Chambers, Steiner advised the plaintiff that he was eligible for no-fault benefits.

Thereafter, on April 15, 1988, plaintiff filed suit against National Union claiming no-fault benefits. He also named Bingen and Chambers, Steiner, alleging legal malpractice. He claimed that Bingen's failure to advise him of his eligibility for no-fault benefits exposed him to the defense of failure to file notice of injury within one year.

National Union did not file its answer until May 26, 1988, after plaintiff had already entered default under MCR 2.603(A)(1). The summons and complaint had apparently been misplaced, and resurfaced in their claims department on May 25, 1988. The trial court set aside the default on July 14, 1988, ruling that manifest injustice would otherwise result.

The trial court thereafter granted summary disposition to all defendants under MCR 2.116(C)(10), in the orders appealed from, ruling that the no-fault act, MCL 500.3101 et seq.; MSA 24.13101 et seq., did not apply to plaintiff's injuries.

II

Plaintiff raises five issues on appeal. First, he argues that the trial court abused its discretion by setting aside the default entered against National Union. We disagree.

MCR 2.603(D)(1) provides:

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

A trial court's decision concerning whether good cause has been shown or a meritorious defense has been presented will be affirmed on appeal absent an abuse of discretion. Cramer v Metropolitan Savings Ass'n (Amended Opinion), 136 Mich App 387, 398; 357 NW2d 51 (1984).

The trial court in the case at bar found that manifest injustice would result if the default were not set aside. We agree. As will be discussed with regard to plaintiff's issues II, III, and IV, infra, plaintiff is not entitled to no-fault personal injury protection (PIP) benefits. Accordingly, the trial court did not abuse its discretion by setting aside the default against National Union on plaintiff's claim for these PIP benefits.

III

Plaintiff in his second, third, and fourth issues, argues that the trial court erred by granting summary disposition to all defendants on the basis that, as a matter of law, plaintiff was not entitled to no-fault personal injury protection benefits. We disagree.

Summary disposition is proper under MCR 2.116(C)(10) where there is no genuine issue as to any material fact, and the moving party is entitled judgment or partial judgment as a matter of law. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. Dumas v Auto Club Ins Ass'n, 168 Mich App 619, 626; 425 NW2d 201 (1988).

The threshold requirement for entitlement to benefits under the no-fault act is the causal relationship; that the injury must have arisen out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. MCL 500.3105; MSA 24.13105[§ 3105].

The facts established by the documentary evidence in this case indicate that plaintiff slipped on a patch of ice while

he was pulling on a padlock on the rear door of the trailer of his employer's vehicle. At the time, plaintiff was in the course of a predeparture inspection of the vehicle.

Generally, a fall outside of a vehicle, regardless of the person's reason for being there, has been held to be only incidentally related to the vehicle as a vehicle, and, therefore, outside the scope of § 3105. Daubenspeck v Auto Club of Michigan, 179 Mich App 453; 446 NW2d 292 (1989); Rajhel v Auto Club Ins Ass'n, 145 Mich App 593; 378 NW2d 486 (1985); Griffin v Lumbermen's Mutual Casualty Co, 128 Mich App 624; 341 NW2d 163 (1983); King v Aetna Casualty & Surety Co, 118 Mich App 648; 325 NW2d 528 (1982), lv den 418 Mich 881 (1983); Block v Citizens Ins Co of America, 111 Mich App 106, 314 NW2d 536 (1981). The facts of the instant case are similar to the facts in Daubenspeck, supra. There, the plaintiff had been filling his gas tank at a self-service gas station. After filling the tank, but before replacing the gas cap, the plaintiff slipped and fell on the ice. The plaintiff contended that refueling constitutes maintenance of an automobile and that he was entitled to benefits under § 3105 of the no-fault act, because he was injured in the course of such maintenance.

This Court held that, even assuming that refueling constitutes maintenance, the connection between the act of pumping gas and the slip and fall was merely incidental or fortuitous. The plaintiff, the Court said, was injured by losing his footing on a patch of ice, an injury which could have happened anywhere. Daubenspeck, supra at 455.

Plaintiff's fall in the instant case was not causally related to the motor vehicle as a motor vehicle. Even if, as plaintiff suggests, the exertion of pulling on the padlock contributed to causing the fall, there is still no relationship between the fall and the trailer as a motor vehicle. Thus, plaintiff failed to meet the threshold requirement for bringing a

claim under the no-fault act, and the trial court properly granted summary disposition to defendants.[1] Given our resolution of this issue, we need not address the additional arguments raised by plaintiff in issues II, III, and IV of his brief on appeal.[2]

Given that plaintiff was not eligible for no-fault benefits as a matter law, plaintiff's final issue on appeal is also without merit. The trial court properly granted summary disposition of plaintiff's claim of legal malpractice against defendants Bingen and Chambers, Steiner.

Affirmed.

/s/ Richard Allen Griffin
/s/ John H. Shepherd
/s/ Martin M. Doctoroff

[1] The trial court granted summary disposition to defendants on the basis that, as a matter of law, plaintiff was not occupying the vehicle at the time of the fall. The issue of causal relationship, however, was fully briefed below, and we may affirm on grounds supported by the record even if they differ from those stated by the trial court. See Durbin v K-K-M Corp, 54 Mich App 38, 46; 220 NW2d 110 (1974), lv den 394 Mich 789 (1975).

[2] We find unpersuasive plaintiff's alternate bases of liability. Plaintiff had started the motor of the vehicle, then left it running while he conducted his inspection. Although plaintiff claims that the vehicle was stopped, not parked, this Court under similar circumstances applied the parked vehicle exclusions of MCL 500.3106; MSA 24.13106[§ 3106]. See Cobb v Liberty Mutual Ins Co, 164 Mich App 66; 416 NW2d 328 (1987); Davis v Auto-Owners Ins Co, 116 Mich App 402; 323 NW2d 418 (1982), lv den 419 Mich 895 (1984).

Nor do we agree with plaintiff that his activity at the time of his injury constituted "maintenance" which is an exception to the exclusion contained in § 3106.