STATE OF MICHIGAN

COURT OF APPEALS

DANIEL STRAHAN,

Plaintiff-Appellee,

v No. 114523

AMERICAN STATES INSURANCE COMPANY,

Defendant-Appellant.

Before: MacKenzie, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

On December 2, 1986, plaintiff, employed as a tow truck operator, was dispatched to assist a vehicle stranded in the median of I-75. Plaintiff attached his tow cable to the vehicle and had started walking back towards the tow truck when another vehicle travelling on I-75 left the highway and struck him. Plaintiff estimated that he was approximately five or six feet from the tow truck when he was hit, and that he had been out of his truck for approximately twenty-five minutes before he was hit.

Plaintiff filed this suit against defendant, the insurer of his employer's tow truck, for personal injury protection (PIP) benefits pursuant to MCL 500.3114(3); MSA 24.13114(3), which provides:

> An employee . . . who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle. [Emphasis added.]

Defendant's subsequent motion for summary disposition was based on the contention that it could not be liable to plaintiff for PIP benefits because plaintiff was not an "occupant" of the tow truck at the time he was injured. The trial court denied the motion. On appeal, defendant argues that

the court erred in ruling that plaintiff was an occupant of the truck entitled to PIP benefits from defendant. We agree.

In Royal Globe Ins Co v Frankenmuth Mutual Ins Co, 419 Mich 565; 357 NW2d 652 (1984), the plaintiff was struck by a vehicle which her husband was backing into a garage. At the time she was hit, the plaintiff had just exited the vehicle and was attempting to open the door of the house. Id., pp 567-568. The insurance company's responsibility for the payment of no-fault benefits to the plaintiff turned upon whether the plaintiff was an occupant of the vehicle. The Royal Globe Court concluded that she was not an occupant. In reaching this conclusion, the Court held that the term "occupant" as used in the no-fault act must be construed according to its primary and generally understood meaning. See 419 Mich 573.

Since the Royal Globe decision, this Court has consistently applied its holding, that the term "occupant" should be construed according to its primary and generally understood meaning. See Bell v White, 146 Mich App 321; NW2d (1985), lv den 424 Mich 908 (1986) (driver injured after exiting car to close hood, held not an occupant); Lankford v Citizens Ins Co of America, 171 Mich App 405; 431 NW2d 59 (1988), lv den 433 Mich 856 (1989) (driver injured after exiting car to assess damage, held not an occupant); Hackley v State Farm Mutual Automobile Ins Co, 147 Mich App 115; 383 NW2d 108 (1985), lv den 424 Mich 907 (1986) (driver injured after exiting car to check stalled engine, held not an occupant). See also Michigan Mutual Ins Co v Farm Bureau Ins Corp, ___ Mich App ___; ___ NW2d ___ (No. 116016, rel'd 5/7/90), slip op p 3 (where student struck after exiting school bus, "there really is no question that [he] was not an occupant of the school bus," citing Royal Globe).

In this case, it is undisputed that at the time plaintiff was struck, he was standing some five to six feet from the tow truck and had been outside of the tow truck for approximately 25 minutes. Under these circumstances, it may not be said that plaintiff was an "occupant" of the tow truck as that term is primarily and generally understood.

Plaintiff's reliance on Davis v Auto-Owners Ins Co, 116 Mich App 402; 323 NW2d 418 (1982), lv den 419 Mich 895 (1984), for the proposition that he was an occupant of the tow truck, is misplaced. Davis is factually distinguishable, since in that case the plaintiff was standing on his tow truck's "B-ring" and manipulating levers on the truck at the time he was injured. Furthermore, Davis was decided two years before the Supreme Court's decision in Royal Globe. As noted in Bell, supra, pp 323-324:

> While the [Royal Globe] opinion leaves undecided the status of "persons within and upon a motor vehicle as well as those entering into and alighting from it", 419 Mich 576, it is eminently clear that the term occupant does not include a person who has exited from his or her motor vehicle and is standing outside the vehicle, several feet away from the door, when struck by another automobile.

Here, plaintiff was not "upon a motor vehicle" as in Davis, and thus cannot claim to come within the class of cases left undecided by Royal Globe. Instead, the plain construction of the term "occupant" set forth in Royal Globe controls. Defendant is not liable to plaintiff for PIP benefits under MCL 500.3114(3); MSA 24.13114(3).

Reversed.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Martin M. Doctoroff