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STATE OF MICHIGAN

COURT OF APPEALS

FARM BUREAU GENERAL INSURANCE COMPANY,

Plaintiff and Counter-Defendant-Appellee,

OCT 17 1990

v

No. 109392

STEPHEN B. HUBBS,

Defendant and Counter-Plaintiff-Appellant.

Before: Michael J. Kelly, P.J., and Holbrook, Jr. and Shepherd, JJ.

PER CURIAM.

Defendant appeals as of right from the order of the trial court granting plaintiff's motion for summary disposition. Plaintiff instituted suit for reimbursement of money paid to defendant for injuries sustained by plaintiff as he was alighting from his motor vehicle. The trial court found that defendant's injury did not arise out of the ownership, operation, maintenance or use of a motor vehicle and that plaintiff, in paying benefits for this injury, had made a mistake of fact. We affirm.

Summary disposition may be granted where, giving the benefit of any reasonable doubt to the nonmoving party, the court determines that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); Dumas v Automobile Club Ins Ass'n, 168 Mich App 619, 626; 425 NW2d 480 (1988). An insurer may recover payments made to an insured due to a mistake of fact provided the payment has not caused such a change that it would be unjust to require a refund. Adams v Auto Club Ins, 154 Mich App 186, 194; 397 NW2d 262 (1986), lv den 428 Mich 870 (1987).

Michigan's No Fault Act provides for compensation for injuries sustained by a person alighting from a parked vehicle

where the injury arises out of the ownership, operation, maintenance, or use of the motor vehicle as a motor vehicle. MCL 500.3106; MSA 24.13106. Defendant alleged that he was alighting from his car when the Achilles tendon in his foot "popped" causing him injury. It is plaintiff's contention that defendant was not injured while alighting from his car but was injured while getting up from his chair in his home. Plaintiff produced medical records which state that defendant told his doctor that his injury had occurred in this manner. Alternatively, plaintiff argues that even if defendant had sustained his injury when alighting from his car, the injury was not compensable under the No Fault Act. We agree.

The motor vehicle need not be the proximate cause of the injury but there must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile as a motor vehicle. Kangas v Aetna Casualty & Surety Co, 64 Mich App 1, 17; 235 NW2d 42 (1975), lv den 395 Mich 787 (1975). The causal connection must be more than incidental, fortuitous or but for. Id. The injury must be one which is foreseeably identifiable with the normal use of the vehicle. Id. There is no allegation that defendant tripped on any object while alighting or that he had any contact with the automobile which would have caused his injury. It is apparent that defendant's injury would have occurred in the same manner regardless of the location of the seat he was alighting from. Furthermore, it was not argued in the trial court or in this Court that the payment to plaintiff has caused such a change that to require a refund would be unjust.

We agree with the trial court that, on the facts as alleged by defendant, his injury is not compensable under the No Fault Act. The trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ John H. Shepherd

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MICHAEL J. KELLY, P.J. (Dissenting).

I respectfully dissent. In the light most favorable to the plaintiff, the evidence indicates, as it was originally assessed by plaintiff's claims representative, that plaintiff "had ruptured his Achilles tendon while exiting from his motor vehicle." I do not think it is the function of the court to say that exiting from the motor vehicle was incidental or fortuitous. I cannot agree with the majority that the injury "to the Achilles tendon of one's foot is not reasonably identifiable with the process of putting one's foot on the ground while stepping out of a motor vehicle." That it could have been just as easily identifiable with stepping off a porch or out of a chair seems to meld the analysis with a proximate cause analysis. We would not say that such an injury in a tennis match would be unrelated to the contest. How can we say here it is unrelated to exiting the motor vehicle?

The affidavit of defendant says:

> [w]hile exiting the vehicle I heard a loud popping and felt a sharp pain in the lower ankle area. I fell to my right knee * * *.

The witness, Michael L. Hubbs, stated:

> That as Stephen B. Hubbs was exiting the car, I heard a loud popping/snapping sound.

Admittedly, defendant's proofs would have been far more convincing if expert medical testimony had been submitted, but it seems to me that exiting an automobile could furnish the required causal connection between the vehicle and the injury for a no-fault claimant whose physique would be susceptible to the injury caused by the pressure of his own weight from the perch of the automobile.

I would reverse.

/s/ Michael J. Kelly