

STATE OF MICHIGAN  
COURT OF APPEALS

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DAVID TOLLERS,

Plaintiff-Appellee,

v

AMERISURE COMPANIES/MICHIGAN MUTUAL  
INSURANCE COMPANY,

Defendant-Appellant.

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June 16, 1993

No. 144505  
LC No. 90-017206-NZ

Before: Gribbs, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Defendant Amerisure Companies/Michigan Mutual Insurance Company appeals as of right from an order of the circuit court granting plaintiff David Tollers' motion for summary disposition. We affirm.

I

Tollers brought this action for no-fault insurance benefits after he was burned and injured by hot asphalt, which was accidently dumped into the cab of the truck in which he sat while waiting for hot asphalt to be loaded into the truck trailer. On July 10, 1989, Tollers, then employed by R & B Contracting Company, drove his asphalt hauler to Iafrati Asphalt to obtain a load of hot asphalt. The Iafrati employee instructed Tollers to pull his truck into spot number two, below a silo which contained asphalt. Typically hot asphalt was dumped into the truck trailer through a chute.

Tollers waited in spot number two, in the truck cab, while his load of asphalt was mixed. He left the engine running, but put the truck into neutral and activated the parking brake. He remained in the truck because, in order to load the asphalt properly, he had to pull the truck forward to evenly distribute the weight of the asphalt in the truck bed.

As he was waiting, chute number one, which was located directly above the truck cab, opened suddenly and dumped a load of hot asphalt, weighing about 7-1/2 tons, on top of the cab. The asphalt came into the cab. Although at one point during his deposition Tollers testified that the asphalt came in through the windshield, he immediately thereafter admitted that he could not recall if the windshield broke or whether asphalt came in through the open side windows. The asphalt began to fill the cab and it pinned Tollers to the seat. The door handle inside the cab was buried under hot asphalt. Toller could not open the door from inside. He reached out through the side window, opened the door from the outside, and escaped from the cab.

Tollers was treated for burns to his legs, abdomen, and right arm. He also sought treatment for leg and back pain, which was still present at the time of an independent medical examination in June 1990.

R & B insured the truck Tollers was driving through Michigan Mutual under the Michigan No-Fault Insurance Act, MCL 500.3100 *et seq.*; MSA 24.13105 *et seq.* When Tollers was unable to return to work following this accident and sought ongoing no-fault benefits, Michigan Mutual required an evaluation by an independent medical examiner, who found no organic basis for Tollers' persistent pain. Thereafter, Michigan Mutual declined to extend additional no-fault insurance benefits to Tollers.

Tollers thereafter filed this suit. Michigan Mutual filed a motion for summary disposition, arguing that Tollers was parked at the time this accident occurred and, therefore, was subject to the parked vehicle

After reviewing the record, we conclude that the trial court did not err in finding that the truck Tollers was driving at the time of the accident simply was not a parked vehicle and therefore the above statute is inapplicable to this case. As noted above, when the accident occurred, Tollers was sitting in the cab of the truck with the engine running waiting to move the truck to more easily facilitate the loading process. The truck was in neutral with the parking brake on. We cannot conclude, under these facts, that the truck was a parked vehicle. Accordingly, we affirm the order granting summary disposition in Tollers' favor.

Even if we were to find that the truck was a parked vehicle, we would find that the loading/unloading exception contained in subsection 2(a) of the statute does not apply in this case because Tollers was not participating in loading the truck when the hot asphalt was dumped into the cab of his truck, although he was waiting to do so.

Affirmed.

/s/ Roman S. Gibbs  
/s/ Donald E. Holbrook, Jr.  
/s/ Janet T. Neff