STATE OF MICHIGAN

COURT OF APPEALS

DANIEL MacDONALD,

Plaintiff-Appellant,

v

MICHIGAN MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

MAY 7 1986

No. 84355

Before: J.H. Gillis, P.J., and T.M. Burns and W.F. Hood,* JJ.

PER CURIAM

Plaintiff appeals from an order of the circuit court granting defendant's motion for summary judgment pursuant to GCR 1963, 117.1(3).

Plaintiff injured his back on May 6, 1982, during the course of his employment as a mechanic for a trucking company and as a result received benefits pursuant to the worker's compensation act. The injury occurred when plaintiff pulled up on a lever to release a pin holding a trailer box in place over the trailer axle. The purpose of releasing the pin was to permit the trailer box to slide over the axle so that the position of the wheels relative to the box could be changed; sliding the trailer box back and forth would place the wheels closer to the front or closer to the back of the trailer. After the lever is pulled to release the pin, the trailer is moved by being pulled forward or pushed back by the tractor or cab. While the box is being moved in this fashion, the wheels of the trailer are locked and remain stationary throughout the process.

Plaintiff filed a complaint claiming entitlement to benefits pursuant to the Michigan No-Fault Act, MCL 500.3101 et seq.; MSA 24.13101 et seq. On November 4, 1983, defendant filed a motion for summary judgment pursuant to GCR 1963, 117.2(1), claiming that plaintiff was performing mechanical work when the

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

injury occurred and was therefore barred by MCL 500.3106(2); MSA 24.13106 from recovering no-fault benefits. The trial court denied the motion.

Subsequently, plaintiff filed a motion for summary judgment under GCR 1963, 117.2(3), and defendant responded with its own motion under that subrule. On March 15, 1985, the lower court denied plaintiff's motion and granted defendant's cross-motion, concluding the plaintiff was working as a motor vehicle mechanic and was performing a function within the scope of his employment duties at the time of the injury. It would appear, then, that the trial court found that plaintiff was in fact performing mechanical work at the time of his injury, contrary to its ruling on defendant's earlier motion for summary judgment under rule 117.2(1).

Pursuant to MCL 500.3105; MSA 24.13105, no-fault benefits are available for "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle", subject to the provisions of the no-fault act. As mentioned above, one of those provisions, MCL 500.3106(2), was relied upon by the trial court in finding plaintiff ineligible for benefits. Section 3106(3) provides as follows:

> "Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws, are available to an employee who sustains the injury in the course of his or her employment while loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle."

In finding plaintiff ineligible for no-fault benefits under the above provision, the trial court obviously concluded that the vehicle in question, i.e., the trailer, was parked at the time of the injury. Plaintiff now argues that § 3106 is inapplicable because the vehicle was not in fact parked since the tractor was moving back and forth slightly in order to reposition the trailer

box in relation to the wheels. However, plaintiff never raised this issue before the trial court, apparently conceding the trailer's status as a parked vehicle. Defendant argues that plaintiff has waived his right to raise the issue on appeal, while plaintiff contends that this general rule is not applicable since consideration of the claim is necessary to a proper resolution of the case and the question is one of law which may be decided without reference to material issues of fact in dispute. Harris v Pennsylvania Erection & Construction, 143 Mich App 790, 795; 372 NW2d 663 (1985). Although we do not condone plaintiff's failure to raise this issue before the trial court, we agree that the parties do not materially dispute the facts surrounding the incident, and since necessary to a proper resolution of the case, we will consider the issue.

Although not an easy question to answer in light of the unique factual situation presented, we believe that, in determining whether the vehicle was in fact parked, the focus should be on the wheels, rather than the trailer box. Under the no-fault act, a motor vehicle is defined as a vehicle, including a trailer, designed for operation on a public highway by power other than muscular power. MCL 500.3101(2)(c); MSA 24.1301(2)(c). Since it is the wheels of the trailer, rather than the box, which enable its operation on a highway, we conclude that only the movement of the former is relevant in determining whether the vehicle was parked. Here, defendant was injured when he pulled a lever which would allow movement of the trailer box over the axles. At the time of the injury, the wheels of the trailer were locked by the brakes and thus did not move during the procedure which led to the plaintiff's injury. Therefore, we conclude that the vehicle was parked, as that term is used in § 3106 of the no-fault act.

The next question presented, then, is whether the trial court erred in finding that the injury, which indisputably arose

in the course of plaintiff's employment and for which worker's compensation benefits were available, occurred while plaintiff was "doing mechanical work on a vehicle * * *". MCL 500.3106(2). We believe so. Plaintiff was a mechanic employed to service vehicles on his employer's premises. He was injured while working on a vehicle which was completely stationary. Neither his occupation nor his injury were related to the hazards of moving vehicles. Thus, he fits squarely within the group to which the Legislature, by adoption of § 3106(2), evidenced an intent to deny no-fault benefits.

It could be argued that since plaintiff was not repairing a defect but was only shifting the trailer's axle from one normal position to another to alter its operating characteristics, plaintiff was not doing mechanical work. However, if plaintiff's purpose had been to restore the axle to a position from which it had been moved by accident or mistake, plaintiff would more clearly be deemed to have been repairing a defect and doing mechanical work. We believe that to distinguish on this basis would be both pointless and irrelevant to the language and purpose of § 3106(2). Therefore, we conclude that a mechanic engaged in servicing a vehicle, whether he is engaged in repairing a defect, performing preventative maintenance or making an adjustment to alter operating characteristics, is performing mechanical work within the meaning of § 3106(2).

Furthermore, even if one were to conclude that plaintiff was not doing mechanical work, he would not be entitled to no-fault benefits since § 3106(2) also provides for ineligibility where the injury occurred while the employee was loading or unloading the vehicle. In Bell v F J Boutell Driveaway Co, 141 Mich App 802; 369 NW2d 231 (1985), this Court had an opportunity to consider this aspect of § 3106(2), and concluded that the terms should be broadly construed to encompass the complete operation of loading and unloading, including

"activities preparatory to the actual lifting onto or lowering of property". 141 Mich App 809.

Applying this broad definition of the terms "loading" and "unloading", it is clear that plaintiff is unentitled to no-fault benefits. Plaintiff admitted in his deposition that his purpose in pulling the lever which releases a pin holding the trailer axle in place was so that the trailer could be backed into the loading dock more easily. The purpose for backing into the dock was to either load or unload the trailer. Therefore, at the time of his injury, plaintiff was engaged in an activity preparatory to the actual procedure of loading or unloading goods from the trailer. Pursuant to Bell, supra, this brings plaintiff's injury within the contemplation of § 3106(2).

As his final argument, plaintiff makes the conclusory statement that, even assuming § 3106(2) is otherwise applicable to bar his claim, he is nonetheless entitled to benefits as a result of the last portion of that section, which excludes from its effect injuries which "arose from the use or operation of another vehicle". Plaintiff contends that his injury arose out of the operation of the tractor, thus bringing this portion of the statute into application.

We disagree. In Kalin v Detroit Automobile Inter-Ins Exchange, 112 Mich App 497; 316 NW2d 467 (1982), this Court stated that where the "involvement of the moving vehicle is merely incidental or fortuitous", the parked vehicle exclusion still applies. 112 Mich App 501. Here, plaintiff's back "popped out" when he pulled a lever on the trailer. Any movement of the tractor played absolutely no part in causing this injury, and thus whatever involvement one might wish to ascribe to it would have to be characterized as incidental or fortuitous. Therefore, plaintiff's position is untenable.

We conclude that the trial court ruled correctly in

denying plaintiff's motion for summary judgment and in granting the cross-motion of the defendant.

Affirmed.

/s/ John H. Gillis
/s/ William F. Hood

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T. M. BURNS, J., Dissenting

Because I disagree with the majority's conclusion in regard to interpretation and application of the phrase "doing mechanical work" and of the terms "loading" and "unloading", I dissent. I believe that the trial court erred by granting summary judgment in favor of defendants.

First, this Court recently considered the meaning of "mechanical work" as the term is used in §3106(2), and concluded that the phrase refers to "work normally done by a mechanic which is for the purpose of maintaining or repairing the vehicle". Marshall v Roadway Express Inc, 146 Mich App 753; ___ NW2d ___ (1985). In Marshall, this Court stated:

> "As noted by the legislative history, though, the trucking industry was primarily concerned with mechanics collecting no-fault benefits for injuries that occurred while they were doing repair work or maintenance work on the vehicles. In the instant case, it is undisputed that plaintiff was not performing mechanical repair or maintenance work. Defendants, however, now urge us to adopt a broad definition of 'doing mechanical work' as that term is used in §3106(2). While a broad definition of that term may be appropriate, we do not feel that it should include activity which is not designed to maintain or repair the truck and is routinely performed in the truck's operation. While detaching the trailer requires some level of skill, as the trial court noted, we do not feel that this function was 'mechanical work' as that term is used in §3106(2). We feel that 'mechanical work' means that work normally done by a mechanic which is for the purpose of maintaining or repairing the vehicle. Plaintiff was removing the trailer from his tractor for increased mobility, not to maintain or repair it. Therefore, plaintiff was not performing mechanical work and the trial court erred in granting summary judgment on this basis." 146 Mich App 757.

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Likewise in this case, it is undisputed that plaintiff was not performing mechanical repair or maintenance work. Plaintiff's injury occurred when he pulled on a lever to release a pin holding a trailer box in place over the trailer axle. This activity was not designed to maintain or repair the truck and is routinely performed in the truck's operation. After the lever is pulled to release the pin, the trailer is moved by being pulled forward or pushed back by the tractor or cab. I find Marshall, supra, to be controlling on this question. Plaintiff was not performing mechanical work when the injury occurred since his purpose in pulling the lever was to allow the trailer box to be repositioned over the axle so that the trailer could be backed into a loading area more easily. The plaintiff was not engaged in work normally performed by a mechanic for the purpose of repairing the vehicle. Thus, I conclude that the trial court erred in denying no-fault benefits on the ground that plaintiff was doing "mechanical work" within the contemplation of §3106(2).

Second, I do not dispute the appropriateness of applying a broad interpretation to the terms "loading" and "unloading". See e.g. Marshall, supra and Dowling v Auto Club Casualty Ins Co, 147 Mich App 482; ___ NW2d ___ (1985). However, I do dispute that a liberal construction of those terms leads to the conclusion that the §3106(2) exclusion applies.

As noted earlier, plaintiff's injury occurred when he pulled on a lever to release a pin holding a trailer box in place over the trailer axle. After the lever is pulled to release the pin, the trailer is moved by being pulled forward or pushed back by the tractor. In my opinion, plaintiff's action was not part of the unloading process as that term is used in §3106(2). Plaintiff was engaged in action which was preparatory to the completion of the truck's arrival at the

unloading dock. The driver had not yet finished completely backing the tractor-trailer assembly to its final position at the dock. While the assembly was parked at the time, after plaintiff pulled the lever, the main portion still needed to be moved closer. This movement would involve the use of the tractor. This case is more analogous to situations in which a tractor-trailer driver is not finished backing up to the dock than it is to situations where all the driving is finished and the unloading simply needs to be done.

I acknowledge that plaintiff's actions took place prior to the actual unloading. However, almost any action which takes place after the goods are initially loaded and the truck has left the point of origin is done in contemplation that the goods will be unloaded after the destination is reached. In that sense, even driving on the highway can be considered an activity which is preparatory to the actual procedure of unloading goods from the trailer. While a liberal interpretation of the term "unloading" contemplates some actions which are preparatory to actual unloading, this does not mean that no line can be drawn to mark a point where "unloading" has not yet begun.

I believe that plaintiff's action in this case is more properly considered as a part of the delivery process than as a part of the unloading process. There would be no dispute as to "loading" and "unloading" in this case if plaintiff was injured in a situation where the driver simply stopped his truck a few feet from the dock, took a further look, and then finished backing the truck the extra few feet.

In this case, the driver had not yet properly positioned his tractor and trailer at the unloading dock when plaintiff was injured. In my opinion, the delivery was still taking place and no one was yet preparing to unload the goods from the vehicle. Plaintiff's purpose in pulling

the lever was to release a pin so that the trailer could be backed into the loading dock more easily. Thus, he was aiding in the process of delivery.

I would reverse.

/s/ Thomas M. Burns