STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM DEARIE,

Plaintiff-Appellee,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 29, 2007

No. 274102
Oakland Circuit Court
LC No. 06-072625-NF

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying defendant's motion for summary disposition in this no-fault case. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff slipped and fell on ice in a parking lot. He filed this action for no-fault benefits under the parked vehicle exception to the no-fault act, MCL 500.3106(1)(c), claiming that he fell while he was entering his van. Plaintiff testified at his deposition that he fell after he passed the left rear wheel of the van while he was between that wheel and the door handle to the driver's side door. He believed he had already unlocked the door, using a key fob, and that his right leg slipped on the ice. He explained that when he fell, he was "real close" to the driver's side door and was reaching out as he hit the key fob. However, he fell before he touched the door handle. Plaintiff was not touching any part of the van at the time of the fall, although he slid down the side of the van while he was falling. When asked if the van contributed to his fall in any way, plaintiff answered that it had not, but indicated that it may have slowed him on the way down.

Defendant moved for summary disposition, arguing that plaintiff was not entitled to benefits under the no-fault act because he was not entering his van at the time he fell. The trial court denied the motion, finding that plaintiff's testimony had created a question of fact as to whether benefits were recoverable.

We review de novo the trial court's denial of a motion for summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider in a light most favorable to the nonmoving party all affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties. *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). Summary disposition under this rule is appropriate if there is no genuine issue of

material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Greene*, *supra*.

Under the no-fault act, defendant, as plaintiff's no-fault insurer, is required to provide benefits to plaintiff for certain injuries related to a motor vehicle. MCL 500.3105(1) provides that "an insurer is liable to pay benefits 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 this chapter." However, MCL 500.3106(1) further provides:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> * * *
>
> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

The sole issue on appeal is whether plaintiff was "entering into" his parked vehicle at the time of the accident, within the contemplation of the exception to the parked vehicle exclusion in MCL 500.3106(1). We conclude that he was not.

In *Putkamer v Transamerica Ins Corp*, 454 Mich 626; 563 NW2d 683 (1997), our Supreme Court clarified that for the exception in § 3106(1)(c) to apply, the injury that occurs while the plaintiff enters the vehicle "must be 'directly related' to the vehicle's character as a motor vehicle." "[T]he injury must have a causal relationship to the motor vehicle that is more than incidental, fortuitous, or but for." *Id*. at 635. To demonstrate that an injury falls within an exception in § 3106 and that he is entitled to no-fault benefits based on that injury, a plaintiff must establish that: (1) the conduct falls within one of the three exceptions of § 3106(1); (2) "the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle *as a motor vehicle*"; and (3) there is a causal relationship between the injury and the parked motor vehicle that is more than merely incidental, fortuitous or but for. *Id*. at 635-636.

Various decisions have outlined the scope of this exception, which has been generally found to require, at the least, that the claimant had been touching the door of intended entry at the time of the accident. In *Putkamer*, *supra*, the Court found that the plaintiff demonstrated that she was injured while entering her car, and therefore was entitled to benefits where she had opened the door and was starting to enter the car. While she shifted her weight from her right to left leg in order to put her right foot in the car, she lost her footing and fell to the ground. *Id*. at 628, 636-637.

In *Shanafelt v Allstate Ins Co*, 217 Mich App 625; 552 NW2d 671 (1996), the plaintiff had put her hand on the truck door, opened the door, and took a small step toward the truck. She then slipped and fell. *Id*. at 628. The *Shanafelt* Court determined that she was entering the vehicle at the time of her injury. *Id*. at 632-633.

In contrast, in *King v Aetna Casualty & Surety Co*, 118 Mich App 648; 325 NW2d 528 (1982), the plaintiff was returning to his car carrying groceries after shopping. He had taken his

car keys from his pocket, and he fell as he was reaching to unlock his car door. His hand was about two inches away from the car when he fell; he could not recall whether his key ever touched the car. *Id.* at 649-650. The *King* Court concluded that the plaintiff was not entering his vehicle when he slipped and fell, but was merely preparing to enter the vehicle, and that the plaintiff's injuries were not covered by the no-fault act. *Id*. at 651.

The plaintiff in *Hunt v Citizens Ins Co*, 183 Mich App 660; 455 NW2d 384 (1990), was struck by a car when he had car keys in his hand and one hand on the car door. *Id.* at 663. The *Hunt* Court distinguished those circumstances from *King*, *supra*, and concluded that because the plaintiff had his car keys in his hand and a hand on the car door, he was not merely preparing to enter the car, but was actually in the process of entering it. *Id*. at 664.

Plaintiff notes that previous cases from this Court establish that one need not be touching the car at the time of injury in order to satisfy § 3106(1)(c). However, we find plaintiff's citation to *Ansara v State Farm Ins Co*, 207 Mich App 320; 523 NW2d 899 (1994), unpersuasive, given the somewhat unique facts of that case. In *Ansara*, *supra*, the plaintiff started his car, and then got out to help his wife get in on the passenger side. When he got out of the driver's side, he left the door open. The plaintiff assisted his wife, then walked around the rear of the car and then toward the driver's side door. As he was approaching the driver's side door, he stepped on something and fractured his ankle. He was about one foot away from the driver's seat when he was injured, and caught himself on the car and sat down on the car seat after he was injured. The *Ansara* Court determined that plaintiff was entering his car at the time he was injured. *Id*. at 321-322.

In *McCaslin v Hartford Accident & Indemnity*, 182 Mich App 419, 422; 452 NW2d 834 (1990), this Court noted that § 3106(1)(c) does not address the injured person's *intent* with regard to entering a vehicle. In that case, the plaintiff walked between the back of his truck and the front of a car that had pulled up behind his truck. The car lurched forward, pinning the plaintiff between the vehicles. *Id*. at 420. The plaintiff argued that when he was injured, he was walking to his truck with the intent to enter it. *Id*. at 422. The *McCaslin* Court rejected this argument, noting that the "plaintiff had not crossed the plane or threshold of the truck's door [or] made physical contact with the truck's door when the accident occurred." *Id*. It found that he was not a person entitled to benefits under § 3106(1)(c). *Id*.

We find that the trial court erred in denying defendant's motion for summary disposition. The undisputed facts do not establish that plaintiff was entering into his vehicle when he fell and sustained his injury. Plaintiff was admittedly close to his van, reaching for the door handle, and he believes he had unlocked it using the remote entry fob. However, he had not yet touched the van and was not actually in the process of entering the van. Plaintiff was merely preparing to enter the van by reaching to open the door. That he may have been intending to enter at the time of his fall does not change this result. *Id*. at 422. Under these circumstances, the exception of § 3106(1)(c) is not satisfied.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens