S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JOHN A. FULTON, Plaintiff-Appellee,	UNPUBLISHED January 16, 2007
v	No. 270644 Lapeer Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant.	LC No. 05-035904-CK(H)

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant State Farm appeals by leave granted the trial court orders denying its motion for summary disposition and granting plaintiff's motion for summary disposition. We conclude that plaintiff's injury was the direct result of physical contact with the tractor while it was being lowered from the trailer during the unloading process. Accordingly, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

The issues presented on appeal involve statutory construction of the no-fault act, MCL 500.3101 *et seq*. Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the

Legislature's intent. *Id.* at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id*.

MCL 500.3105(1) provides, "Under personal protection insurance 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." Injuries that arise out of contact with a parked vehicle are generally not covered by the no-fault act, but "an injury related to a parked vehicle is compensable if one of the . . . exceptions" under MCL 500.3106 is applicable. *Drake v Citizens Ins Co of America*, 270 Mich App 22, 26-27; 715 NW2d 387 (2006). MCL 500.3106, the parked vehicle provision of the no fault act, provides in relevant part:

> (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:
>
> * * *
>
> (b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.

In the context of this case, MCL 500.3106(1)(b) can be read to apply if plaintiff's injury was the direct result of physical contact with property being lowered from the vehicle in the unloading process. State Farm argues that plaintiff was not actually lowering the tractor from the trailer when the accident occurred; therefore, MCL 500.3106(1)(b) is inapplicable and plaintiff is not entitled to personal injury protection benefits. We disagree.

Lowering the tractor from the trailer encompassed driving the tractor off the trailer, which procedure, by necessity, initially required starting the tractor as part of the unloading process. Plaintiff started the tractor, through use of a hand crank, but unfortunately the tractor was in gear and not in park, as plaintiff believed, and it lurched or moved forward, pinning him to the trailer and causing injury. Importantly, the tractor was in operation and moving when the accident occurred as plaintiff had indeed started the tractor. Accordingly, the tractor was in the process of being lowered, albeit incorrectly done and in an unintentional manner. The situation is no different then if plaintiff was able to start the tractor from the operator's seat, instead of standing next to the tractor and using the crank, and it unexpectedly lurched forward as he was attempting to drive the tractor off the trailer.

Any reliance on *Perez v Farmers Ins Exchange*, 225 Mich App 731; 571 NW2d 770 (1997), and *Dembinski v Aetna Cas & Surety Co*, 76 Mich App 181; 256 NW2d 69 (1977), for a contrary conclusion is misplaced because the cases are distinguishable. In *Perez*, *supra* at 732, the following facts were recited:

> [P]laintiff . . . drove his pickup truck, with an attached flatbed trailer, to a farm to pick up a load of straw. . . . After plaintiff and his son loaded the bales of hay onto the trailer, plaintiff sought to secure the load using elastic "bungee cords." As plaintiff was pulling one of the cords, the hook gave way, causing the cord to snap back and strike him in the left eye.

The *Perez* panel stated that MCL 500.3106(1)(b) expressly limited its application to the "loading" or "unloading" process. *Perez, supra* at 735. This Court rejected the plaintiff's attempt to recover no-fault benefits because the injury was not "due to contact with property that was being lifted onto or lowered from the vehicle in the loading process." *Id.* at 736. Because the "plaintiff's injury occurred after he had finished loading all the straw onto the trailer," i.e., after the loading process, this Court held that the parked vehicle exception in MCL 500.3106(1)(b) was inapplicable. *Perez*, *supra* at 736.

In *Perez*, the hay had already been lifted onto the truck when the injury occurred. Here, however, it cannot logically be said that plaintiff had yet to commence the unloading or lowering process when he was injured, where he was struck by the tractor while the engine was running and the tractor was moving after plaintiff had started the tractor in his attempt to lower the tractor from the trailer. The injury occurred during the unloading and lowering process and as a direct result of contact with the tractor. For these same reasons *Dembinski* is distinguishable.

In *Dembinski, supra* at 182, the following facts were recited:

> While plaintiff was carrying a ceramic mold from his store through a vestibule or hallway toward an outside doorway to load the mold into his truck, he slipped in a puddle of water, fell, and injured his back. He was twenty feet from his truck when he fell. The mold did not land on him.

The *Dembinski* panel found that he could not recover under an insurance contract, which contained language comparable to that in MCL 500.3106, because the "plaintiff was not lifting the mold into the truck, he was not loading the truck. He was merely preparing to load the truck." *Dembinski, supra* at 183. Here, plaintiff's injury cannot reasonably be deemed as occurring when he was merely preparing to unload or lower the tractor from the trailer. Plaintiff was on the trailer and had started the tractor and was then injured when it lurched forward and struck him. Had plaintiff injured himself as he approached the trailer and tractor prior to starting the tractor, then *Dembinski* might be applicable, but under the facts here, *Dembinski* is simply inapposite.

We additionally hold as a matter of law that plaintiff's injury arose out of the operation, ownership, maintenance, or use of a motor vehicle "as a motor vehicle" under *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998), where the vehicle involved is a trailer used to haul machinery, and where the trailer was being used as such in transporting the tractor when the injury occurred. Accordingly, plaintiff's injury was closely related to the trailer's transportational function as required by *McKenzie* and that Court's interpretation of

MCL 500.3105. See *Drake, supra* at 26.[1] Finally, we hold as a matter of law that plaintiff's injury had a causal relationship to the parked trailer that was more than incidental, fortuitous, or but for, where plaintiff fell back against his truck after the tractor, located on the trailer, lurched forward and plaintiff tripped over a bumper, where plaintiff's leg ended up on the top of the trailer jack, and where his leg then became pinned to the trailer when the tractor came down on plaintiff's leg. See *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635-636; 563 NW2d 683 (1997).[2]

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski

---

[1] In *Drake*, the plaintiff was injured when his hand became entangled in the auger of his parked grain delivery truck as he was delivering animal feed to a farm, and the panel held:

> The vehicle involved is a delivery truck, and it was being used as such when the injury occurred. Accordingly, plaintiff's injury is closely related to the motor vehicle's *transportational function*, and therefore arose out of the operation, ownership, maintenance, or use of a motor vehicle "as a motor vehicle" pursuant to *McKenzie, supra* at 220. [*Drake, supra* at 26 (emphasis in original).]

[2] In *Putkamer*, *supra* at 636, the Supreme Court, finding that the necessary causal relationship existed, stated:

> There is no dispute that, after opening the door of her parked vehicle, [plaintiff] lifted her right leg into the vehicle, shifted her weight to her left leg, and slipped on the ice while stepping into the vehicle. The act of shifting the weight onto one leg created the precarious condition that precipitated the slip and fall on ice.

Here, plaintiff's injury likewise bore a substantial causal relationship to his use of the parked trailer.

STATE OF MICHIGAN

COURT OF APPEALS

JOHN A FULTON,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMNPANY,

Defendant-Appellant.

UNPUBLISHED
January 16, 2007

No. 270644
Lapeer Circuit Court
LC No. 05-035904-CK

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

Kelly, J. *(dissenting in part and concurring in part)*.

I respectfully dissent from the majority's conclusion that plaintiff's injuries fall within the parked car exception created by MCL 500.3106(1)(b) of the Michigan no-fault automobile insurance act, MCL 500.3101 *et seq*. Pursuant to the plain language of MCL 500.3106(1)(b), I would conclude that the trial court erred in denying Defendant State Farm Mutual Automobile Insurance Company's (State Farm) motion for summary disposition and granting plaintiff's motion for summary disposition.

The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). "Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). If the statutory language is clear and unambiguous, the court must apply the statute as written, and judicial construction is neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

Under Michigan's no-fault act, an insurer is responsible to pay first-party personal injury protection benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. MCL 500.3105(1); *Stewart v State*, 471 Mich 692, 696; 692 NW2d 376 (2004). Generally, no such injury arises out of the ownership, operation, maintenance, or use of a parked vehicle. MCL 500.3106(1). But an exception exists if:

> the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, *or*

property being lifted onto or lowered from the vehicle in the loading or unloading process. [MCL 500.3106(1)(b) (emphasis added).]

In *Perez v Farmers Ins Exchange*, 225 Mich App 731; 571 NW2d 770 (1997), this Court examined the exceptions to the parked car exclusion listed in MCL 500.3106(1)(b)(2). The plaintiff in *Perez* suffered injury when the bungee cord he was using to secure a load of straw onto a trailer snapped back and struck him in the eye. *Id.*, 732. This Court noted that MCL 500.3106(1)(b) expressly limits the meaning of the terms "loading" and "unloading." *Id.*, 735. Because the plaintiff's injury occurred after he finished lifting the straw onto the trailer, the exception to the parked car exclusion set forth in MCL 500.3106(1)(b) was inapplicable. *Id.*, 736.

Similarly, in *Dembinski v Aetna Cas & Surety Co*, 76 Mich App 181, 182; 256 NW2d 69 (1977), the plaintiff slipped and injured his back while carrying a ceramic mold to his truck. He sought payment of personal protection benefits under his insurance contract, alleging that his injuries arose from loading of the truck. *Id.* This Court noted that the insurance contract at issue, which mirrored the language of MCL 500.3106, only provided coverage for injuries that were the direct result of property being lifted onto or lowered from a vehicle in the loading or unloading process. *Id.*, 183. And it stated that, rather than actually lifting the mold into the truck, the plaintiff was merely preparing to load the vehicle. *Id.* Consequently, this Court denied coverage and affirmed the trial court's grant of summary disposition in favor of the insurer. *Id.*, 183-184.

In the instant case, as in *Perez*, the parked vehicle exclusion set forth in MCL 500. 3106(1) precludes plaintiff from recovering under the no-fault act. The unambiguous language of MCL 500.3106(1)(b) provides for payment of benefits if plaintiff's injuries arose due to physical contact with property being "lifted onto or lowered from" the trailer. By specifically identifying the acts of lifting or lowering property, the Legislature clearly did not intend to extend coverage to the entire process of loading or unloading a vehicle. See *Perez*, *supra*, 735. Here, plaintiff testified that he intended to start the tractor using the hand crank before getting onto the vehicle and backing it down off the trailer. But as soon as he turned the crank, the tractor lurched forward causing his injuries. The tractor was not, in fact, being lowered from the trailer; rather, plaintiff was merely beginning the process of unloading. Thus, because the tractor was not actually being "lowered from" the trailer at the time of plaintiff's accident, the exception created by MCL 500.3106(1)(b)(2) does not apply.

I reluctantly concur in the majority's conclusion that

> plaintiff's injury arose out of the operation, ownership, maintenance, or use of a motor vehicle "as a motor vehicle" under *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998), where the vehicle involved is a trailer used to haul machinery, and where the trailer was being used as such in transporting the tractor when the injury occurred. Accordingly, plaintiff's injury was closely related to the trailer's transportational function as required by *McKenzie* and that Court's interpretation of MCL 500.3105. See *Drake* [*v Citizens Ins Co of America,* 270 Mich App 22, 26; 715 NW2d 387 (2006)] [Ante at ___ (footnote omitted).]

However, I concur only because I am compelled to do so pursuant to MCR 7.215(J)(1). I believe that *Drake* was wrongly decided for the reasons stated in the dissent. Were it not for the precedential effect of *Drake*,[1] I would reverse and remand for entry of an order granting summary disposition to State Farm.

/s/ Kirsten Frank Kelly

[1] I would also note that this specific issue was not raised before the trial court or on appeal.