STATE OF MICHIGAN

COURT OF APPEALS

LORI SEXTON,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
June 4, 1996

No. 175067
LC No. 93-333044-AV

Before: Taylor, P.J., and Murphy and E. J. Grant,* JJ.

PER CURIAM.

Defendant appeals by leave granted from the order of the circuit court affirming the district court's denial of its motion for summary disposition in this action involving no-fault insurance benefits. We reverse and remand to the district court for entry of summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant.

The facts are undisputed. Plaintiff parked her car in the parking lot of the Southland Mall. Her twin one-year-old sons were in the back seat of her two-door car. After parking the car, plaintiff got out, opened the trunk, removed a stroller for her sons, and positioned the stroller near the back of the car. Plaintiff got one of her sons out of the car and fell as she turned and started taking steps toward the stroller. Neither plaintiff nor her son hit the car when they fell. Plaintiff claimed that her fall was caused by a hole in the parking lot. After the accident, plaintiff claimed no-fault personal protection insurance benefits from defendant, her automobile insurer. Defendant started paying benefits and then stopped after determining that plaintiff's injury was not covered under the no-fault act.

Plaintiff brought this action in the circuit court, alleging breach of contract. After mediation, the case was removed to the district court. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The district court found that plaintiff's claim was viable under the loading or unloading exception to the parked-vehicle exclusion of the no-fault act, MCL 500.3106(1)(b); MSA 24.13106(1)(b), as well as the alighting exception, MCL 500.3106(1)(c); MSA 24.13106(1)(c).

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

Accordingly, the district court denied defendant's motion for summary disposition. On appeal, the circuit court affirmed the district court.

Defendant sought leave to appeal that decision in this Court. Relying on *McPherson v Auto-Owners Ins Co*, 90 Mich App 215; 282 NW2d 289 (1979)[1], this Court denied defendant's application for leave to appeal. Defendant's motion for rehearing was subsequently granted, and the Court vacated its prior order and granted defendant's application for leave to appeal.

In reviewing the grant or denial of summary disposition, this Court reviews the record de novo to determine whether the moving party was entitled to judgment as a matter of law. *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 48; 530 NW2d 99 (1995). The parties agree on the events that transpired on the day in question, but disagree about whether those events establish that plaintiff was "unloading" or "alighting" from the vehicle when her injury occurred. These are legal issues. *Krueger v Lumbermen's Mutual Casualty Co*, 112 Mich App 511, 514-515; 316 NW2d 474 (1982).

No-fault benefits may be recovered 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); MSA 24.13105(1); *Gordon v Allstate Ins Co*, 197 Mich App 609, 611; 496 NW2d 357 (1992). Where an injury is sustained while the vehicle is parked, recovery under the no-fault act is generally precluded. *McKenzie v Auto Club Ins Ass'n*, 211 Mich App 659, 662; 536 NW2d 301 (1995); *Gooden v Transamerica Ins Corp*, 166 Mich App 793, 796; 420 NW2d 877 (1988). However, MCL 500.3106; MSA 24.13106 provides several statutory exceptions to this "parked vehicle exclusion." *Gooden, supra* at 796.

The relevant portions of MCL 500.3106; MSA 24.13106 provide:

> (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:
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> * * *
>
> (b) [T]he 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.
>
> (c) [T]he injury was sustained by a person while occupying, entering into, or alighting from the vehicle. [MCL 500.3106(1)(b), (c); MSA 24.13106(1)(b), (c).]

Defendant argues that plaintiff's injury did not arise out of the use of a parked vehicle as a motor vehicle. We agree.

The district court erred in applying MCL 500.3106(1)(b) and (c); MSA 24.13106(1)(b) and (c) to this case. As plaintiff claimed that her fall was caused by a hole in the parking lot, that she did not hit the car as she fell, that she had already removed her son from the car, and that she had started taking steps toward the stroller when the accident occurred, the loading and unloading exception is inapplicable. The reason is that plaintiff's injury was not a direct result of physical contact with equipment permanently mounted on the vehicle or property being lifted onto or lowered from the vehicle in the loading or unloading process.

Plaintiff's argument that she was in the unloading process because her other son was still in the car is without merit. MCL 500.3106(1)(b); MSA 24.13106(1)(b) limits the loading or unloading process to "property being lifted onto or lowered from the vehicle." The stroller had already been removed when she fell and her son, who was in the car, was not "property." Further, even if one broadly construed the concept of property to include the child who was still in the car, plaintiff was not unloading that son from the car when she stepped into the hole and fell. She was carrying a son who was out of the car and had taken steps toward the stroller when the she fell. See *Johnson v Auto-Owners Ins Co,* 138 Mich App 813, 818; 360 NW2d 310 (1984) (holding that the plaintiff, who slipped and fell on a boat ramp as he was attempting to align his boat with a trailer, was not injured as a direct result of the process of loading the boat onto the trailer or in his attempt to step on the trailer, but was injured because of the slippery condition of the boat ramp); *Block v Citizens Ins Co,* 111 Mich App 106, 109; 314 NW2d 536 (1981) (finding that the plaintiff was not loading a motor vehicle but was only preparing to load the vehicle when she slipped and fell on ice while she was carrying a box to the vehicle).

With regard to MCL 500.3106(1)(c); MSA 24.13106(1)(c), the alighting exception, plaintiff's deposition indicates that she was not alighting from the vehicle when she stepped into a hole and fell in the parking lot. Plaintiff had already gotten out of the car, removed her son from the car, and started taking steps toward the stroller at the rear of the car when she fell. These facts preclude application of the alighting exception. *Harkins v State Farm Mutual Auto Ins Co,* 149 Mich App 98; 385 NW2d 741 (1986); *Krueger, supra* at 515.

Reversed and remanded to the district court for entry of summary disposition in favor of defendant.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant

[1] We find *McPherson* inapplicable. We first note that *McPherson* has been criticized several times. We further note that *McPherson* applied a definition of "occupying" a motor vehicle which the Supreme Court rejected in *Royal Globe Ins Co v Frankenmuth Ins Co*, 419 Mich 565, 571-576; 357 NW2d 652 (1984). See also *Farm Bureau v MIC General Ins Corp*, 193 Mich App 317, 321-324; 483 NW2d 466 (1992).