STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY W. PETERSON,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 24, 1996

No. 179372
LC No. 92079269 CK

Before: Saad, P.J., and Marilyn Kelly and M. J. Mautzak,* JJ.

PER CURIAM.

Plaintiff, Jeffrey Peterson, appeals as of right from a grant of summary disposition for defendant pursuant to MCR 2.116(C)(10) in this action for no-fault benefits. He argues that a genuine issue of material fact exists regarding whether his injuries arose from the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. We reverse.

The injuries occurred when plaintiff, on a hunting trip, was sitting on the passenger side of his parked truck with the ignition key in the "off" position. He had loaded his shotgun with five shells and was preparing to alight from the vehicle when the gun discharged. The shotgun blast resulted in amputation of the front half of plaintiff's foot.[1]

Plaintiff filed suit for personal protection insurance benefits under an insurance policy issued by defendant State Farm.[2] The trial court denied defendant's initial motion for summary disposition without prejudice on February 11, 1993. On July 19, 1993, it denied the parties' cross motions for summary disposition, finding that issues of material fact remained to be resolved. On May 31, 1994, defendant filed a supplemental motion for summary disposition, based on the then-recent case of *Mueller v Auto Club Ins Assoc*, 203 Mich App 86; 512 NW2d 46 (1993). Plaintiff responded that his claim was meritorious, because *Mueller* did not affect the holding of *Perryman v Citizens Ins Co*[3], upon which he had relied previously. The trial court granted defendant's motion for summary disposition.

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

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). A (C)(10) motion tests the factual basis underlying a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Summary disposition is permitted only when no genuine issue of material fact is found. We consider the pleadings and any other evidence in favor of the nonmoving party and grant that party the benefit of any reasonable doubt. *Id*.

Section 3105(1) of Michigan's No-Fault act, 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. [MCL 500.3105(1); MSA 24.13105(1).]

Also relevant to this appeal, Section 3106(1) addresses the specific circumstances under which personal protection insurance benefits are payable for an accidental bodily injury involving a parked vehicle. It provides:

> 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:
>
> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (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.
>
> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle. [MCL 500.3106(1); MSA 24.13106(1).]

Gordon v Allstate Ins Co,[4] found that, where a § 3106 exception to the parked vehicle exclusion applies, recovery may be had regardless of whether the vehicle was being used "as a motor vehicle" under § 3105(1). Therefore, our inquiry is limited to whether one of the § 3106 exceptions is applicable.

Here, there is no question that plaintiff sustained his injury while occupying or alighting from his vehicle. Plaintiff loaded his gun while sitting in his truck. As he maneuvered himself and the gun to emerge from the vehicle, the gun accidentally discharged, striking him in the foot. Therefore, the trial judge erred in granting summary disposition to defendant. Since there is no genuine issue of material fact, plaintiff is entitled to summary disposition as a matter of law with respect to liability.

We believe that the holding in *Gordon* is incorrect. The *Gordon* panel based its conclusion on its interpretation of *Winter v Automobile Club of Michigan*. 433 Mich 446; 446 NW2d 132 (1989). In *Winter*, the plaintiff sought personal injury protection insurance benefits under § 3106 when a slab of concrete fell from the hook of a parked tow truck injuring his hand. The Supreme Court stated:

> In limiting no-fault benefits to injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle," the Legislature realized that it would be inherently difficult to determine when a *parked* vehicle is in use "as a motor vehicle." Accordingly, the Legislature specifically described in subsections (a)-(c) of § 3106(1) the limited circumstances when a parked vehicle is being used "as a motor vehicle." Thus, it is apparent that if a vehicle is "parked," coverage otherwise available under § 3105(1) is qualified by the provisions of § 3106(1). In the instant case, because the tow truck was parked, coverage is excluded by § 3106(1) unless one of its exceptions is applicable. [10]

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[10] In *Bialochowski*, supra at 229, we stated:

> Having concluded that the equipment truck was a motor vehicle being used as a motor vehicle, our inquiry is not complete. In order to receive no-fault benefits for an injury involving a parked vehicle, one of the criteria established in § 3106 of the no-fault act must be met.
>
> To the extent that this passage can be read to mean that a determination of whether § 3105(1) is fulfilled is to be made separately from a determination of whether § 3106(1) is fulfilled, it is overruled.

The panel is *Gordon*, *supra*, relied upon footnote 10 from *Winter* to support its conclusion that "it is unnecessary to make separate determinations whether §§ 3105(1) and 3106 are fulfilled." However, we believe that the panel in *Gordon* misinterpreted *Winter*. The Supreme Court overruled *Bialochowski* only to the extent that it could be read to mean that § 3105 can be applied independently of § 3106. It did not hold that the parked vehicle exception should be viewed independently of the use being made of the vehicle at the time of the injury. In fact, it held the opposite: when a parked vehicle is involved, § 3105 and § 3106 must be considered together. Accordingly, we do not believe that footnote 10 in *Winter* stands for the proposition advanced by this Court in *Gordon*.

Before the decision in *Gordon*, this Court overwhelmingly held that, to recover where a parked vehicle is involved, a claimant must show that: (1) an exception to the parked vehicle exclusion applies and (2) the injury arose out of the use of a motor vehicle as a motor vehicle. See, e.g., *Gooden v Transamerica Ins Corporation of America*, 166 Mich App 793, 797; 420 NW2d 877 (1988) and cases cited therein. In fact, two recent decisions of this Court follow that analysis: *Yost v League General Ins Co*, 213 Mich App 183, 184-185; 539 NW2d 568 (1995); *McKenzie v Auto Club Ins Ass'n*, 211 Mich App 659, 662; 536 NW2d 301 (1995). Unfortunately, neither *Yost* nor *McKenzie*

addresses the implications of *Gordon*. However, it is clear that, where there are two conflicting opinions published after November 1, 1990, the first one governs. Administrative Order 1990-6, 436 Mich lxxxiv; AO 1994-4, 445 Mich xci; AO 1996-4, 451 Mich xxxiii; *People v Young*, 212 Mich App 630, 638-639; 538 NW2d 456 (1995). Therefore, we follow the analysis employed in *Gordon*, rather than the one in *Yost* and *McKensie*.

Even if we were to follow *Yost* and *McKensie*, we would find that a question of fact exists as to whether the injury resulted from the use of a motor vehicle as a motor vehicle. MCL 500.3105(1); MSA 24.13105(1). Section 3105 "speaks to the requisite causal connection between the motor vehicle and the ensuing injury." *Shellenberger v INA*, 182 Mich App 601, 603; 452 NW2d 892 (1990). The causal connection between the injury and the use of the motor vehicle as a motor vehicle must be "more than incidental, fortuitous, or 'but for.'" *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986). The involvement of the car in the injury should be directly related to its character as a motor vehicle. *Perryman v Citizen's Ins Co*, 156 Mich App 359, 365; 401 NW2d 367 (1986).

Here, plaintiff's deposition testimony is that the injuries occurred in part because he was using his motor vehicle as a motor vehicle. *Perryman, supra*. The transportation of hunting gear and equipment, including guns, for hunting or camping is a reasonable and foreseeable use of one's motor vehicle as a motor vehicle. *Id*. Plaintiff's testimony presents a factual issue concerning whether the truck's confines contributed to the accidental discharge.

Plaintiff testified that, after he finished loading the shotgun, he pushed the door open to get out of the vehicle. Although he expressed it somewhat unclearly, plaintiff apparently attempted to remove the gun from its case while beginning to alight. It was at that point that the gun discharged. The confining nature of the truck's interior arguably played a role in how plaintiff maneuvered the gun while alighting from the vehicle. *Perryman, supra,* p 366.[5] A factual question was presented as to whether plaintiff's truck was more than merely the site of an accident. Hence, summary disposition would have been improper, even had we followed *Yost* and *McKensie*.

Reversed and remanded for further proceedings on the issue of damages. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Michael J. Matuzak

[1] One of the issues raised in this appeal concerns whether the vehicle was parked or moving at the time of the incident. However, the only testimony cited by the parties which substantiates the claim that the vehicle was moving is the deposition testimony of Bixler, the driver. Our review of the record reveals that Bixler's deposition was not presented to the trial judge for his consideration. A party may not attempt to enlarge the record on appeal. *Tope v Howe*, 179 Mich App 91, 105; 445 NW2d 452 (1989). Accordingly, we will not consider Bixler's testimony in deciding this case.

[2] A second defendant, Michigan Educational Employees Mutual Insurance Company, was dismissed from the case by stipulation of the parties. There was no dispute that State Farm was the primary insurer with respect to payment of no-fault benefits.

[3] 156 Mich App 359; 401 NW2d 367 (1986).

[4] 197 Mich App 609, 612; 496 NW2d 357 (1992).

[5] *Mueller, supra*, relied upon by defendant, is distinguishable. There, the Court concluded that the vehicle was not the instrumentality of the injury, nor was the injury caused by the inherent nature of the vehicle. Here, the vehicle directly contributed to plaintiff's injury.