STATE OF MICHIGAN

COURT OF APPEALS

BRIAN SCHAIBLE,

Plaintiff-Appellee,

v

TRANSPORTATION INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 26, 1999

No. 205493
Wayne Circuit Court
LC No. 96-611207 CK

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying its motion for summary disposition, pursuant to MCR 2.116(C)(10), and granting plaintiff's cross-motion for summary disposition pursuant to MCR 2.116(I)(2). We reverse.

The facts in this case are undisputed. Plaintiff, a cement truck driver for the Ann Arbor Concrete Company, drove his truck to a job site to deliver cement. After emptying the cement from his truck at the construction site, plaintiff drove to another location at the construction site to wash down his vehicle. In the course of washing his truck, plaintiff was injured when he slipped on a pad while climbing down from the top of the truck. Plaintiff received workers' compensation benefits, and filed this lawsuit to recover no-fault automobile insurance benefits as well. Defendant filed a motion for summary disposition in the trial court, arguing that plaintiff was precluded from recovering no-fault insurance benefits because he had received workers' compensation benefits, and because his injury did not arise out of the ownership, operation, maintenance or use of a parked vehicle as a motor vehicle under MCL 500.3106(2); MSA 24.13106(2). Plaintiff filed a cross motion for summary disposition asserting that he was entitled to benefits because he was engaged in the maintenance of a motor vehicle as a motor vehicle at the time of his injury pursuant to MCL 500.3105; MSA 24.13105. The trial court denied defendant's motion for summary disposition and granted plaintiff's cross-motion for summary disposition pursuant to MCR 2.116(I)(2).

This Court reviews a trial court's grant or denial of summary disposition de novo. *Hughes v PMG Building, Inc*, 227 Mich App 1, 4; 574 NW2d 691 (1997). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transportation*, 456

Mich 331, 337; 572 NW2d 201 (1998). Summary disposition may be granted where 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). In deciding the motion, the court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it. *Id.*

Initially, we note that, at oral arguments, defendant argued for the first time that the injuries plaintiff sustained while he was washing the cement truck were not injuries arising out of the use of the truck as a motor vehicle as defined in MCL 500.3105(1); MSA 24.13105(1). Defendant referenced *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986) in support of his position. However, because this argument was neither raised in the trial court, nor briefed on appeal, the issue is not preserved for appellate review and we decline to address the claim. *Blackwell v Citizens Ins Co of America*, 457 Mich 662, 673-674; 579 NW2d 889 (1998); *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995).

Plaintiff argues that pursuant to MCL 500.3105; MSA 24.13105, a no-fault insurer is liable to pay benefits for accidental bodily injury sustained in connection with motor vehicle use:

> (1) 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.

However, where an injury is sustained while the vehicle is parked, coverage otherwise available under § 3105(1) is qualified by the provisions of §3106, and recovery is generally precluded. *Winter v Automobile Club of Michigan*, 433 Mich 446, 457; 446 NW2d 132 (1989); *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 631; 552 NW2d 671 (1996). Here, it is undisputed that the truck on which plaintiff was injured was a parked vehicle at the time of the incident. Therefore, the dispositive issue is whether plaintiff can nonetheless recover no-fault benefits pursuant to one of the statutory exceptions to the parked vehicle exclusion. In this regard, MCL 500.3106; MSA 24.13106 is controlling, and a determination of whether relief is available under MCL 500.3105; MSA 24.13105 is insufficient. *Putkamer v Transamerica Ins Co of America*, 454 Mich 626, 633; 563 NW2d 683 (1997).

Defendant next argues that the trial court erred in finding, as a matter of law, that plaintiff was entitled to recover no-fault benefits under MCL 500.3106(2)(a); MSA 24.13106(2)(a) because he was not engaged in the unloading process at the time he sustained his injuries, but was simply washing the vehicle. MCL 500.3106(2)(a); MSA 24.13106(2)(a) sets forth the exemption from recovery of no-fault benefits for injuries sustained while loading or unloading a parked vehicle:

> (2) 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 . . . are available to an employee who sustains the injury in the course of his or her employment while doing either of the following:

> (a) Loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from, or secured to, as cargo or freight, a motor vehicle.

In examining the legislative intent behind the enactment of this statute, this Court has noted that the Legislature intended to eliminate duplication of benefits for work-related injuries except where the actual driving or operation of a vehicle is involved. *Raymond v Commercial Carriers, Inc*, 173 Mich App 290, 293; 433 NW2d 342 (1988); *Gibbs v United Parcel Service,* 155 Mich App 300, 302; 400 NW2d 313 (1986). To effectuate the Legislature's intent, this Court has found it appropriate to broadly interpret the terms "loading" and "unloading" to mean the complete operation of loading or unloading, including acts incidental to completion of the loading or unloading process. *Gibbs, supra* at 302-303; *Gray v Liberty Mutual Ins Co,* 149 Mich App 446, 448; 386 NW2d 210 (1986); *Bell v FJ Boutell Driveaway Co,* 141 Mich App 802, 805; 369 NW2d 231 (1985).

As this Court has consistently done in prior cases, we apply a broad definition of the terms "load" and "unload" and hold that plaintiff's injuries arose from activities involving a parked vehicle that were incidental to the unloading of cement from the truck. We find that the complete operation of unloading the vehicle in question encompasses washing the vehicle down after the cement is deposited because, as plaintiff explained in his deposition testimony, both his employer and the Washtenaw County Road Commission required that all cement trucks be cleaned at the end of the unloading project. Washing the truck immediately after unloading the cement was necessary or the cement would harden and the driver would be unable to unload his next deposit of cement. Indeed, the truck was washed after each individual cement deposit, as distinguished from washing the truck at the end of the day after several deposits have been made. In fact, there was a water tank and hose provided on each truck for this task. Moreover, the purpose of washing the vehicle was functional, i.e., to prepare the truck for subsequent cement deposits, prevent debris from spreading on public roads, and enable the drivers to properly view the roads while driving, and was not simply to enhance the appearance of the vehicle. Furthermore, plaintiff testified that the cement was unloaded through a shoot that was attached to the front of the truck, and the shoot was not closed, thereby completing the unloading process, until washing of the vehicle was completed.

Finally, the fact that the vehicle was moved a short distance from the unloading point in order to wash the vehicle does not alter our conclusion. Plaintiff moved his truck a short distance because of limited on-site availability for the trucks to deposit cement. Washing the truck at the precise location where plaintiff deposited the cement would have resulted in unnecessary delays and traffic for the other trucks because only one vehicle could fit in the unloading area at a time. Instead, the drivers would take their trucks to a "washout site" located on the project premises. The drivers had utilized the "washout site" for cleaning their vehicles for approximately one month prior to plaintiff's date of injury. In any event, the vehicle remained in the same general vicinity on the construction site as where the unloading of cement occurred. Under these circumstances, we find that plaintiff's act of washing the truck was the final step of the unloading process, as well as preparatory to the loading and unloading of subsequent deliveries, and thus, it fell within MCL 500.3106(2)(a); MSA 24.13106(2)(a). See *Gibbs, supra* at

305-306; *Gray, supra* at 451. Cf. *Marshall v Roadway Express, Inc*, 146 Mich App 753, 756; 381 NW2d 422 (1985).

In the instant case, we are confronted with exactly the situation envisioned by the Legislature--a work-related injury unrelated to the operation of a vehicle--and to permit this plaintiff to recover both workers' compensation benefits and no-fault benefits would lead to a result which the Legislature sought to avoid. Therefore, we find that plaintiff was not entitled to no-fault insurance benefits under MCL 500.3106(2)(a); MSA 24.13106(2)(a), and the trial court erred in denying defendant's motion for summary disposition. Accordingly, we reverse the order of summary disposition in favor of plaintiff and remand for entry of an order of summary disposition in favor of defendant on plaintiff's claim for no-fault insurance benefits.

In light of our conclusion, we need not address defendant's remaining claims.

Reversed and remanded for entry of an order granting summary disposition to defendant and vacating the order granting plaintiff summary disposition. Jurisdiction is not retained.

/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs
/s/ Kurtis T. Wilder