STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM MINCH,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
April 26, 2007

No. 273711
Barry Circuit Court
LC No. 06-000284-CK

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action for first-party no-fault benefits. Plaintiff was injured while trimming a tree, when he fell from a bucket attached to a boom that was permanently mounted to his truck. The trial court determined that the injury did not involve the use of a motor vehicle as a motor vehicle, MCL 500.3105(1), and furthermore, that none of the exceptions to the parked vehicle exclusion, MCL 500.3106, applied. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Moreover, where "there is no dispute about the facts, the issue whether an injury arose out of the use of a vehicle is a legal issue for a court to decide and not a factual one for a jury." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 216; 580 NW2d 424 (1998).

Pursuant to MCL 500.3105(1), an insurer is liable to pay personal protection benefits for "accidental bodily injury arising out of the ownership, maintenance or use of a motor vehicle as a motor vehicle," subject to other provisions of the act. The analysis for determining no-fault benefits under this provision involves a determination (1) whether the injury is covered, i.e., whether it is "accidental," "bodily," and arises out of the "ownership, maintenance or use of a motor vehicle as a motor vehicle"; and (2) whether the injury is subject to an exclusion and an exception to the exclusion. *Drake v Citizens Ins Co of America*, 270 Mich App 22, 25; 715 NW2d 387 (2006).

The parties do not dispute that plaintiff's injury was "accidental" and "bodily." The dispositive issue is whether the injury arose out of the "use of a motor vehicle as a motor vehicle." Our Supreme Court considered this phrase in *McKenzie, supra*, stating:

> As a matter of English syntax, the phrase "use of a motor vehicle 'as a motor vehicle' " would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a motor vehicle" from any other uses. While it is easily understood from all our experiences that most often a vehicle is used "as a motor vehicle," i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), *as a foundation for construction equipment*, as a mobile public library, or perhaps even when a car is on display in a museum. On those occasions, the use of the motor vehicle would not be "as a motor vehicle," but as a housing facility, advertising display, *construction equipment base*, public library, or museum display, as it were. It seems then that when we are applying the statute, the phrase "as a motor vehicle" invites us to determine if the vehicle is being used for transportational purposes. [*Id*., pp 218-219 (emphasis added).]

The *McKenzie* Court discussed *Winter v Automobile Club of Michigan*, 433 Mich 446; 446 NW2d 132 (1989), which involved a tow truck that the plaintiff was using to lift slabs of cement so that he could level the ground underneath. The slabs were attached to the tow truck with a hook at end of a winch cable. On one occasion, a piece of concrete broke off at the hook, and the slab fell, striking the plaintiff's hand. The *McKenzie* Court cited *Winter* as an example of where "the injury arose out of the use of a motor vehicle as a foundation for construction equipment and was not closely associated with the transportational function." *McKenzie, supra*, p 221.

McKenzie supports the trial court's determination that plaintiff's vehicle was not being used as a motor vehicle at the time of plaintiff's injury. It was being used as a foundation for tree-trimming equipment. Plaintiff contends that the transportation of the driver in a vertical direction is closely related to the transportational function of the truck itself so as to satisfy the *McKenzie* interpretation of MCL 500.3105(1). Like the trial court, we are not persuaded that the vertical movement of the bucket is significant to the transportational function that determines whether a motor vehicle is being used as a motor vehicle.

Drake, supra, does not compel a different result. Regardless of the criticism of the *McKenzie* analysis in *Drake*, the transportational function analysis remains controlling. *Drake, supra*, pp 29-39. Moreover, application of the *Drake* test is not helpful to plaintiff; at most, it indicates that the transportational function of a delivery truck includes the process of depositing the product. That holding does not suggest that the transportational function of a motor vehicle includes vertical movement of a bucket on a boom attached to a motor vehicle.

Because plaintiff's injury did not arise out of the use of a motor vehicle as a motor vehicle, the trial court properly granted defendant's motion for summary disposition. In light of our decision, it is unnecessary to address whether any of the exceptions to the parked vehicle exclusion in MCL 500.3106 are applicable.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen