STATE OF MICHIGAN

COURT OF APPEALS

MARY MCCORMICK,

Plaintiff-Appellee/Cross-Appellant,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
June 14, 2011

No. 297873
Delta Circuit Court
LC No. 08-019682-NF

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

In this no-fault insurance case, defendant appeals the trial court's grant of summary disposition to plaintiff pursuant to MCR 2.116(C)(10). Plaintiff cross-appeals the trial court's denial of her request for attorney fees. We affirm.

Plaintiff broke her leg in 1968 at the age of nine. Her doctors placed a pin in her tibia. An infection started in the bone, which worsened over time and went undiscovered until July 2007. Once it was discovered, the treatment involved hollowing out the bone. Plaintiff was not allowed to bear weight on her leg until the end of October or beginning of November, 2007.

On December 29, 2007, after plaintiff and her husband returned home in their pickup truck, plaintiff began to exit the vehicle. As she was twisting out of her seat, she had one hand on the handle next to the passenger door and her right foot on the running board when she felt a snap and pain in her left hip. She had fractured her hip. Her doctor testified that she may have had an underlying stress fracture, and that the motion of getting out of the vehicle may have caused it to become a fully displaced fracture. He stated that the bone infection, known as osteomyelitis, and subsequent disuse of the leg may have contributed to the weakening of the bones in her hip and leg. He also testified that it would have been possible for this fracture to have occurred as plaintiff got off of a couch or out of a bed. Defendant denied benefits to plaintiff on grounds that the injury did not arise out of the operation, use or maintenance of a motor vehicle as a motor vehicle.

I. NO-FAULT COVERAGE

Resolution of this issue requires interpretation of the no-fault act.

> As the cardinal rule of statutory interpretation, this Court gives effect to the Legislature's intent. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). Where the language of a statute is clear and unambiguous, the courts must apply the statute as written. *Id.* This Court gives the statute's language its ordinary and generally accepted meaning. *Id.* The no-fault act is remedial in nature and is to be liberally construed in favor of the persons who are intended to benefit from it. *Id.* at 28. [*Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997)].

Issues of statutory interpretation are questions of law subject to de novo review. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 25; 748 NW2d 221 (2008).

Under MCL 500.3105(1), a no-fault insurer is liable for injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3106 addresses instances involving parked vehicles:

> (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:
>
> * * *
>
> (c) . . . [T]he injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

To establish that an injury related to a parked motor vehicle is covered, a claimant must show that

> (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation maintenance, or use of the parked motor vehicle as a motor vehicle, and (3) the injury had a casual relationship to the parked motor vehicle that is more than incidental fortuitous, or but for. [*Putkamer*, 454 Mich at 635-636].

In this case, defendant concedes that plaintiff was "occupying" the vehicle under MCL 500.3106(1)(c). However, defendant argues that the injury did not arise out of the use of the vehicle as a motor vehicle, and that the injury was not causally related to the vehicle.

In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998), the Supreme Court held that "whether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles." *Id.* at 225-226. Plaintiff argues that this transportational function test covers both the second and third prongs of the *Putkamer* test, but a close reading of *McKenzie* does not support plaintiff's conclusion. Although the *McKenzie* Court did state that it would deal with both prongs, and only analyzed the facts based on the transportational function test, the analysis maintained a clear distinction between the concepts of use "as a motor vehicle" and causation. More specifically, in discussing *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320

(1986) and *Bourne v Farmers Ins Exch*, 449 Mich 193; 534 NW2d 491 (1995), two cases that supported the Court's use of the transportational function test, the Court stated in a footnote:

> *Thornton* and *Bourne* focused on causation. We note that it is analytically helpful to consider "causation" separately from the question whether a motor vehicle is being used as a motor vehicle as *Putkamer* did. However, what constitutes use of a motor vehicle "as a motor vehicle" also figures in a causation analysis, i.e., whether an injury's relation to the use of a motor vehicle as a motor vehicle is more than "'but for,' incidental, and fortuitous." *Thornton*, 425 Mich at 661. Thus, *Thornton* and *Bourne* bear on what constitutes use of a motor vehicle as a motor vehicle. [*McKenzie*, 458 Mich at 222 n 8].

Although the Court suggested that the two prongs are interrelated, it did not conflate them. Instead, the Court found that the facts of the case failed to pass the second prong, so it was unnecessary to fully consider the third prong. *See McKenzie*, 458 Mich at 226.

Here, the facts do establish the second prong of the *Putkamer* test. In *Putkamer*, the plaintiff was entering a vehicle with the intent of travelling. The Court held that she was using it as a motor vehicle as a matter of law. 454 Mich at 636. The facts in this case are a mirror image. Plaintiff was exiting the truck upon arriving home. A vehicle cannot serve a transportational function unless passengers are able to both enter and exit the vehicle. Thus, plaintiff's injury did arise from the use of the parked vehicle "as a motor vehicle."

Defendant argues that this case is similar to *Thornton*, where a taxi driver sustained a gunshot wound during the course of an armed robbery. 425 Mich at 646. The Supreme Court held that there was no sufficient causal connection because the motor vehicle "was merely the situs of the armed robbery—the injury could have occurred whether or not Mr. Thornton used a motor vehicle as a motor vehicle." *Id.* at 660. However, *Thornton* is distinguishable because in the present case it was the act of getting out of the car that physically broke plaintiff's hip. Plaintiff's vehicle was not merely the situs of her injury. She had to exit the vehicle, and this process broke her hip. Thus, Plaintiff's injury had a direct casual relationship to the parked motor vehicle, rather than merely an incidental or fortuitous connection.

Defendant also relies on *Shellenberger v Ins Co of North America*, 182 Mich App 601; 452 NW2d 892 (1990),where the plaintiff injured his back while reaching for a briefcase inside his truck. *Id.* at 602. Addressing the transportational function test, the Court noted that using a motor vehicle did not require one to reach for a briefcase; it was not part of the use of a motor vehicle as a motor vehicle. *Id.* at 604-605. The Court noted that one routinely makes similar movements at the office, at home, and many other places. *Id.* at 605. However, the present case differs from *Shellenberger*. Using a motor vehicle does require one to get in and out of the vehicle. Although plaintiff could have made the same movement in a different setting with similar results, in a different setting, unlike the present one, she would not have been using a motor vehicle. Notably, the injury in *Putkamer* could also have occurred in a variety of places, but the Supreme Court nevertheless held that it was covered.

Defendant also cites *Daubenspeck v Auto Club of Mich*, 179 Mich App 453; 446 NW2d 292 (1989), where the plaintiff injured himself in a slip and fall accident that occurred after he

finished pumping gas but before he replaced the gas cap. *Id.* at 454. The Court held that the connection between the act of pumping gas and the slip and fall was merely incidental, fortuitous, or but for, because the injury could just as well have occurred anywhere. *Id.* at 455 (quotations omitted). In contrast, the act of climbing out of the car caused plaintiff's injury. Further, the Supreme Court distinguished *Daubenspeck* in *Putkamer*, stating that *Daubenspeck* is based on maintenance of a vehicle under MCL 500.3105(1), whereas *Putkamer*, as in the present case, involve the entering and exiting exception under subsection 3106(1)(c). 454 Mich at 637 n11.

In the present case, getting out of the vehicle forced the plaintiff to twist in her seat, which caused her hip to break. Because getting out of the vehicle was part and parcel of using it as a motor vehicle, plaintiff's use of her motor vehicle as a motor vehicle was causally connected to her injury. This connection is more than incidental, fortuitous or but for.

II. ATTORNEY'S FEES

A no-fault insurer may be charged with a claimant's attorney fees if the insurer unreasonably refuses to pay no-fault benefits.

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. [MCL 500.3148(1)].

The only question in this case is whether defendant unreasonably refused to pay. The trial court held that it was not unreasonable.

> . . . "The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). This Court reviews de novo questions of law, but we review findings of fact for clear error. *Id.* "A decision is clearly erroneous when 'the reviewing court is left with a definite and firm conviction that a mistake has been made.'" *Id.*, quoting *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). Moreover, we review a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.* [*Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008)].

When benefits are denied or delayed, there is a rebuttable presumption that the insurer acted unreasonably. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). However, a refusal to pay is not unreasonable if it is based on a "legitimate question of statutory construction." *Moore*, 482 Mich at 520. The determination of reasonability must be

made as of the time that the insurer denied payment. *Ivezaj v Auto Club Ins Assoc*, 275 Mich App 349, 353; 737 NW2d 807 (2007).

Plaintiff argues that *Shanafelt v Allstate Ins Co*, 217 Mich App 625; 552 NW2d 671 (1996) requires an award of attorney fees. In *Shanafelt*, the claimed question of statutory interpretation involved what constituted "entering into" a vehicle. *Id.* at 636. This Court upheld the trial court's award of attorney fees because it was clear from precedent both that climbing into a vehicle constituted "entering" it, and that entering a vehicle with the intent to drive somewhere constituted use of the vehicle as a motor vehicle. *Id.* However, the question in the present case was whether there was a sufficient causal connection between plaintiff's vehicle and her accident. Although the outcome can be determined based on existing case law, the present case involves a unique set of facts. We are not left with a definite and firm impression that the trial court erred by holding that defendant's original denial of plaintiff's claim was reasonable. Accordingly, the trial court did not abuse its discretion by denying the request for attorney fees.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto