

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW KENNEDY,

Plaintiff-Appellant,

v

FARM BUREAU MUTUAL INSURANCE
COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

August 3, 2006

No. 268021

Monroe Circuit Court

LC No. 05-019503-NF

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10)¹ in this suit arising from defendant's denial of plaintiff's claim for personal injury protection (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.* We affirm.

On the day he was injured, plaintiff had hauled a load of hot asphalt in his dump truck to a road resurfacing work site in Wixom. One of the hydraulic lines supporting the dump box blew while plaintiff was feeding the asphalt from the dump box of his truck into the road paver. The dump box crashed back down, leaving plaintiff unable to unload the asphalt. Plaintiff then drove the truck back to his home in Monroe² to repair the hydraulic line. After installing a new hydraulic line, plaintiff raised the dump box, then stepped out of the truck to inspect the hydraulic system. He noticed that the lower fitting connecting the hydraulic line to the diverter valve was leaking. Plaintiff knelt on the truck's lift axle and attempted to tighten the diverter valve. When the fitting blew off, the dump box came crashing down, pinning plaintiff's right arm from the elbow down. Attempts to save plaintiff's arm were unsuccessful and the arm was amputated. Plaintiff brought the present action following defendant's refusal to pay PIP benefits.

¹ Although plaintiff also moved for summary disposition pursuant to MCR 2.116(C)(8), it is apparent that the trial court based its decision on (C)(10).

² The distance between Wixom and Monroe is approximately 50 miles.

The trial court granted summary disposition in favor of defendant on the basis that plaintiff was not engaged in a transportational function at the time of the injury. See *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998). A trial court's ruling on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

To establish entitlement to PIP benefits under the no-fault act, a plaintiff must first demonstrate that his injury is covered under MCL 500.3105(1), which provides that "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." See *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 33; 651 NW2d 188 (2002). An injury arises out of "the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" if "the injury is closely related to the transportational function of" the motor vehicle. *McKenzie, supra* at 226.

Here, plaintiff was injured while repairing the hydraulic system mounted to his truck. Plaintiff argues that the hydraulic system was related to the transportational function of the vehicle because the vehicle was designed for transporting items in the dump box, which could not realistically be unloaded without a functioning hydraulic system. In support of his position, plaintiff cites *Drake v Citizens Ins Co*, 270 Mich App 22; 715 NW2d 387 (2006). The plaintiff in *Drake* was injured while attempting to unclog an auger system on a grain delivery truck that was in the process of attempting to deliver grain. *Id.* at 24. This Court found that the plaintiff's injury was closely related to the vehicle's transportational function because "[t]he vehicle involved is a delivery truck, and it was being used as such when the injury occurred." *Id.* at 26.

In concluding that the grain delivery truck in issue was being used as a motor vehicle at the time of the plaintiff's injury, *Drake* distinguished *Bialochowski v Cross Concrete Pumping Co*, 428 Mich 219; 407 NW2d 355 (1987), which our Supreme Court abrogated in *McKenzie*. *Drake, supra* at 28. In *Bialochowski*, the plaintiff was injured when a concrete pump attached to a cement truck exploded while being used. *Bialochowski, supra* at 222-223, 229. *Drake* distinguished *Bialochowski* as follows:

Before the *Bialochowski* cement truck could begin unloading concrete, the vehicle had to be stabilized, effectively transforming the cement truck from a motor vehicle into a platform for construction equipment. Therefore, at the time of the injury in *Bialochowski*, the cement truck was no longer functioning "as a motor vehicle," but rather as a foundation for construction equipment. In contrast, the grain truck in the case at bar never lost its essential character as a motor vehicle. At all times it remained drivable, and no transformation or mechanical alteration was necessary before it could begin unloading grain. [*Drake, supra* at 28-29.]

The present case is distinguishable from *Drake*. While plaintiff's dump truck remained drivable, it was not being used as a dump truck when plaintiff's injury occurred. Rather, plaintiff had driven the vehicle away from the work site and parked it before attempting to repair the hydraulic system. Therefore, *Drake* does not mandate the conclusion that plaintiff's injury arose from his use of the dump truck as a dump truck.

We further conclude that plaintiff was not maintaining the truck as a motor vehicle when his injury occurred because the hydraulic system was not related to the transportational purpose of the vehicle. Rather, plaintiff was repairing a system on the truck that had nothing to do with the vehicle's capacity "to get from one place to another[.]" *McKenzie, supra* at 219. Thus, plaintiff's injuries did not arise out of the maintenance of the motor vehicle "as a motor vehicle" because the act of repairing the hydraulic system was not necessary to drive the vehicle. Thus, plaintiff cannot establish that he is entitled to no-fault coverage and this Court need not address whether any of the exceptions to the parked vehicle exclusion are applicable here. *Rice, supra* at 38.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad