STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR COUNTY OF GRAND TRAVERSE

BRAD SAFFRON and ELAINE SAFFRON
Plaintiffs,

-v

File No. 92-10653-NO
HON. PHILIP E. RODGERS, JR.

CH&P DRILLING COMPANY, a Michigan corporation,

Defendant.

GOODIN & BIGELOW CONSTRUCTION, INC., a Michigan corporation,

Plaintiff

File No. 92-10654-CK
HON. PHILIP E. RODGERS, JR.

v

CH&P DRILLING COMPANY, a Michigan corporation,

Defendant.

Timothy J. Bott,
Attorney for Plaintiffs

T. J. Phillips,
Attorney for Defendants

DECISION AND ORDER

Defendant filed a motion for partial summary disposition related to certain aspects of Plaintiff Brad Saffron's personal injury claims (File No. 92-10653-NO) and a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) related to

Plaintiff Goodin & Bigelow’s property damage claims (File No. 92-10654-CK). Plaintiff filed responses to the motions. The parties' oral arguments were heard on March 8, 1994. Defendant's motion for partial summary disposition was granted at the hearing. This Court took under advisement the motion for summary disposition related to Plaintiff Goodin & Bigelow's claims for property damages. This

Court will now present its review of the law and the facts related to the remaining motion.

The standard of review for a (C)(8) motion is set forth in Mitchell v General Motors Acceotance Coro. 176 Mich App 23 (1989)

A motion for summary disposition brought under MCR 2.116 (C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michioan Bell Telenhone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. MetroPolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).

The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 73S; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

In File No. 92-10654-CK, Plaintiff sued to recover for damage to tangible property, specifically Plaintiff's mobile crane which was involved in a construction site accident that occurred on or about June 26, 1992. The accident occurred when the crane operator, Brad Saffron , removed cement slabs from Defendant's semi-truck trailer hed and the crane became unstable and collapsed. Plaintiff sought to recover damages under the theory of misrepresentation; Plaintiff claims that Defendant's agent understated the weight of the cement slab when he contacted Plaintiff's firm to rent the crane. Plaintiff claims that the crane collapsed because the crane's frame and general construction were not sufficient to lift an object which weighed as much as the subject cement slab.

The issue is whether the Michigan No-Fault Act applies to Plaintiff's property damage claims. Defendant argues that the Michigan No-Fault Act has abolished Plaintiff's right to seek tort remedy against Defendant. Defendant contends that Plaintiff~s sole remedy lies with Defendant's no-fault insurance carrier. MCL 500.3121; MSA 24.13121. The property damage section of the no-fault statute, MCL 500.3121(1); MSA 24.1312tl) reads as follows:

Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the use, ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 2135 and 3127. (Emphasis added.)

The Court of Appeals has ruled that a crane is a "motor vehicle" for purposes of the no-fault act. MCLA 500.3101(2)(e); McFadden v Allstate Ins. Co.; 164 Mich App 20, 416 NW 2d 364 (1987); Johnston v Hartford Ins. Co., 131 Mich App 349; 346 NW 2d

549 (1984).1 In several cases, the appellate courts have ruled that loading and unloading is "use" for purposes of the no-fault

Footnote 1: Plaintiff acknowledges that the semi-truck and trailer constitute a parked motor vehicle. Plaintiffs' Response Brief, p 4

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act. The following text from Thomoson v TNT Overland, 201 Mich App 336, 338-339; 505 NW2d 918 (1993) provides a synopsis of those rulings:

> In Bell v F J Boutell Driveawav. Co, 141 Mich App 802; 369 NW2d 231 (1985), this Court adopted a broad meaning of the terms "loading" and 'unloading' as used in Section 3106(2). Id., p 809. "Those terms encompass activities preparatory to the actual lifting onto or lowering of property. The terms include the complete operation of loading and unloading." Id. See also Raymond v Commercial Carriers Inc, 173 Mich App 290, 292-293; 433 NW2d 342 (1988); Crawford v Allstate Ins Co, 160 Mich App 182, 186; 407 NW2d 618 (1987); Gibbs v United Parcel Service, 155 Mich App 300, 302-303; 400 NW2d 313 (1986); GraY v LibertY Mutual Ins Co, 149 Mich App 446; 449-450; 386 NW2d 210 (1986). Applying a broad definition of the terms "load)' and "unload", the Gibbs Court held that, like acts of preparation, acts incidental to the completion of the loading or unloading process fall within the scope of Section 3106(2). Id., p 305.

Defendant also cites BASF Wyandotte Coro v TransPort Ins Co, 523 Fed SuPp 515, ED Mich (1981) for the proposition that loading and unloading constitute use of a motor vehicle in a property damage case. Defendant's Brief, p 2. Judge Gilmore's review of the law is thorough and persuasive.

> Plaintiff, relying on Ford Motor Co v Ins Co of North America, 157 Mich App 692; 403 NW2d 200 (1987), argues that the unloading of the semi-truck and trailer with a mobile crane does not constitute the "use of a motor vehicle as a motor vehicle" for purposes of property protection benefits under MCL 500.3121; MSA 24.13121. Without question, these facts have been recognized as a "use" that qualifies one for section 3105 personal injury benefits. See Gordon v Allstate Ins Co, 197 Mich App 609, 617; 496 NW2d 357 (1992).

The per curiam Ford opinion described its rationale

as follows:

Since Kancas [v Aetna Casualtv & SuretY Co, 64 Mich App 1; 235 NW2d 42 (1975), lv den 395 Mich 787 (1975)], this Court has applied causation principles in construing "arising out of . . . ." clauses in the no-fault act. See, e.g., DAIIE v Clemons, 153 Mich App 244; 395 NW2d 53 (1986).

Ford would have us follow the reasoning of the federal district court in BASF WYandotte Corn v Transport Ins Co, 523 Fed Supp 515, 517 (ED Mich, 1981), that "use of a motor vehicle as a motor vehicle" must include the loading and unloading of the vehicle. Ford asserts that this Court already adopted Bauman v Auto-Owners Ins Co, 133 Mich App 101; 348 NW2d 49 (1984). However, Bauman was a personal injury case, and was based on a different section of the no-fault act in which the Legislature specifically provided that a plaintiff could recover for personal injuries in certain circumstances when the vehicle was being loaded or unloaded. MCL 500.3106(1)(b); MSA 24.13106(1)(b). No Michigan court has interpreted "use" in the property damage section of the no-fault act to include loading and unloading.

Ford, supra p 697. This opinion precedes AO 1990-6 and is not binding precedent.

The Ford Court reached its conclusion that loading and unloading is not "use" of a motor vehicle as a "motor vehicle" for purposes of property damage claims, because no language similar to that in the parked vehicle exclusion from personal injury benefits could be found in the section providing property damage benefits.

The Ford Court addressed this point as follows:

The first step in ascertaining that intent is to review the language in the statute itself. Id. Had the Legislature intended for "use" in Section 3121 to include loading and unloading it could have used those words, as it did in Section 3106(1)(b). See Bell v Boutell Driveaway Co, 141 Mich App 802, 809; 369 NW2d 231 (1985). Given the very limited nature of the exception in Section 3106(1)(b) to the parked vehicle exclusion, and the fact that this language is no-where found in the section providing benefits for property damage, we are reluctant

to declare a legislative intent to expand "use" to include any loading or unloading, as Ford would have us do. (Footnote omitted.)

Ford, supra p 698.

In this Court's view, the Ford analysis incorrectly elevates an exception to the parked motor vehicle exclusion from statutory accidental injury benefits into a definitional distinction between personal injury and property damage claims arising out of the "use" of a motor vehicle.2 This distinction would recognize loading and

Footnote 2: The relevant no-fault provisions are found at MCL 500.3105 and 500.3121. Both sections link entitlement to benefits to the " . . . use of a motor vehicle as a motor vehicle". Section 3106(1)(b) eliminates coverage for those accidental bodily injuries that arise out of the use of a parked motor vehicle unless one of several recognized uses occur e.g. loading, unloading or alighting to and from the vehicle. The exception to the parked motor vehicle exclusion does not create an entitlement to benefits for personal injury that would not otherwise exist in the absence of section 3106.

To the contrary, the use of a motor vehicle for one of its intended purposes creates liability for personal injury benefits under section 3105 without reference to section 3106. See Bialochowski v Cross Concrete PumDino Co., 428 Mich 219, 707 NW2d 355 (1987) where a cement truck was parked and stabilized at a construction site. One use of that vehicle was to pump cement and an injury which occurred during this use was held to arise out of the use of a motor vehicle as a motor vehicle.

Unloading as a covered “use” for personal injury claims but not in property damage cases.

Neither the structure of the statutory language, the remedial purpose of the legislation nor logic, suggest that a mobile crane is a motor vehicle as to the person who operates it in the unloading process but is not a motor vehicle as it is being operated! Were this Court to accept such a result here, it would reach the anomalous conclusion that the crane operator who was injured in the same accident that damaged the crane simultaneously was and was not using a motor vehicle as a motor vehicle. The recognition of such existential shades of reality are beyond the capacity of this trial court and would work no salutory purpose in

the enforcement of certain, predictable and understandable law.

BASF Wyandotte Coro, suDra and Bauman, sunra state clearly that loading and unloading constitute "use" of a motor vehicle. The relevant statutory section also provides property damage protection for damage occasioned by use. MCL 500.3121. It is the opinion of this Court that, at the time of the subject accident, Plaintiff's crane, (a dual purpose motor vehicle,) was being used for one of its intended purposes, and was imbued with the characteristics of a motor vehicle, intrinsically, and as to operator Brad Saffron as he unloaded the cement slab from the semi-truck trailer bed. MCL 500.3121(1). This Court chooses not to follow the holding in Ford as one inconsistent with other more compelling precedent.

Having made these findings of law on undisputed facts, it is impossible for Plaintiff's claims to be supported at trial. Michigan case law supports Defendant's argument that the no-fault act provides Plaintiff's sole remedy. Rizzo, supra. For the foregoing reasons, Defendant's Motion for Partial Summary Disposition is granted. Plaintiff's claims in File No. 92-10654-CX are dismissed.

IT IS SO ORDERED.

HON. PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 5/12/94