STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

PATRICIA MITCHELL,

Plaintiff,

v

File No. 98-7485-NO
HON. PHILIP E. RODGERS, JR.

LEAGUE GENERAL INSURANCE COMPANY,
a Michigan corporation,

Defendant.

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Daniel P. O'Neil (P37051)
Attorney for Plaintiff

Linda Marsh Raetz (P42883)
Attorney for Defendant

DECISION AND ORDER

ON DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

The Plaintiff in this case is seeking first party automobile no-fault benefits from the Defendant insurance company. The uncontested facts as presented by the Defendant are that the Plaintiff was injured in January of 1997 when she was returning to her car in the McDonald's parking lot in Bellaire. It was icy and snowy and, as she inched her way along the sidewalk in the front of the car, she used the car as a stabilizer or support. As she stepped off the sidewalk toward her door, she slipped and fell suffering personal injuries.

Uncontested additional facts supplied by the Plaintiff include that Plaintiff's husband had unlocked the car doors with a remote key and was already seated in the passenger seat when Plaintiff fell. Plaintiff had left her car keys in the ignition. When Plaintiff fell, she was holding onto the hood of the car and landed partially under the car, by the left front wheel.

The Defendant claims in its Motion for Summary Judgment under MCR 2.116(C)(8) and (10), and brief in support, that the facts establish as a matter of law that the Plaintiff is not entitled to first party no-fault benefits because her vehicle was parked and she was not using her vehicle "as a motor vehicle" at the time she was injured. Defendant cites *McKenzie v Auto Club Ins Assoc,* 458 Mich 214; 580 NW2d 424 (1998).

The standard of review for a (C)(10) motion is set forth in *Ashworth* v *Jefferson Screw*, 176 Mich App 737, 741; 440 NW2d 101 (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).
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> 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, 735; 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.

See also, *Patterson* v *Kleiman*, 447 Mich 429, 431-432; 447 NW2d 429 (1994).

In order to recover no-fault benefits for injuries sustained in connection with a parked vehicle, a claimant must suffer injuries falling within one of the categories enumerated in Sec. 3106 of the No-Fault Act, which provides:

> Sec. 3106. 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:

(a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

(b) The injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used or property being lifted onto or lowered from the vehicle in the loading or unloading process.

(c) The injury was sustained by a person while occupying, entering into or alighting from the vehicle." MCL Sec. 500.3106; MSA Sec. 24.13106. (Emphasis added.)

In *Miller v Auto-Owners Ins Co*, 411 Mich 633; 309 NW2d 544 (1981), the Michigan Supreme Court said, with respect to the policy underlying the parking exclusion:

Injuries involving parked vehicles do not normally involve the vehicle as a motor vehicle. Injuries involving parked vehicles typically involve the vehicle in much the same way as any other stationary object (such as a tree, sign post or boulder) would be involved. There is nothing about a parked vehicle as a motor vehicle that would bear on the accident.

The stated exceptions to the parking exclusion clarify and reinforce this construction of the exclusion. Each exception pertains to injuries related to the character of a parked vehicle as a motor vehicle characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents.

Section 3106(a), which excepts a vehicle parked so as to create an unreasonable risk of injury, concerns the act of parking a car, which can only be done in the course of using the vehicle as a motor vehicle, and recognizes that the act of parking can be done in a fashion which causes an unreasonable risk of injury, as when the vehicle is left in gear or with one end protruding into traffic.

Section 3106(b) recognizes that some parked vehicles may still be operated as motor vehicles, creating a risk of injury from such use as a vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the vehicle as a motor vehicle.

Section 3106(c) provides an exception for injuries sustained while occupying, entering or alighting from a vehicle, and represents a judgment that the nexus between the activity resulting in injury and the use of the vehicle as a motor vehicle is sufficiently close to justify including the cost of coverage in the no-fault system of compensating motor vehicle accidents. (Emphasis added.)

> Each of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle. The underlying policy of the parking exclusion is that, except in three general types of situations, a parked car is not involved in an accident as a motor vehicle. It is therefore inappropriate to compensate injuries arising from its non-vehicular involvement in an accident within a system designed to compensate injuries involving motor vehicles as motor vehicles.

Under 3106(1)(c), if a person is "entering into" his motor vehicle, he is "using his motor vehicle as a motor vehicle". In the matter of *Shanafelt v Allstate Ins Co*, 217 Mich App 625; 552 NW2d 671 (1996), the Court of Appeals found that the plaintiff was entitled to benefits for injuries caused by a slip and fall as she was entering her motor vehicle. The evidence established that plaintiff placed her hand on the door handle, opened the door, took a small step, and then fell. The Court held that plaintiff's injuries fell within the "entering into" a vehicle exception to the parked vehicle exclusion of the no-fault act. One of the exceptions to the parked vehicle exclusion allows recovery where an injury "was sustained by a person while . . . entering into . . . the vehicle." MCL § 500.3106(1)(c); MSA § 24.13106(1)(c), citing *Hunt v Citizens Ins Co*, 183 Mich App 660, 663; 455 NW2d 384 (1990), in which the plaintiff had his car keys in one hand and his other hand on the car door when he was struck by a vehicle and the Court concluded that the plaintiff was entering into the car when the accident occurred. In *Shanafelt, supra,* the Court found no material distinction between the *Shanafelt* case and the *Hunt* case. In fact, the Court said that the *Shanafelt* plaintiff had progressed further in "entering into" the vehicle than had the plaintiff in *Hunt.*

The Court also concluded that, as a matter of law, plaintiff's injury arose out of the use of a motor vehicle as a motor vehicle, a requirement sometimes referred to as the causative or causal nexus requirement. See, e.g., *Ansara v State Farm Ins Co*, 207 Mich App 320, 322; 523 NW2d 899 (1994). As stated by our Supreme Court in *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986): "The involvement of the car in the injury should be 'directly related to its character as a motor vehicle' [to satisfy the causal nexus requirement]," citing *Miller v Auto-Owners Ins Co*, 411 Mich 633, 640; 309 NW2d 544 (1981).

The *Shanafelt* Court found that because the involvement of the car must be "directly related to its character as a motor vehicle," *Thornton, supra*, quoting *Miller, supra*, and because the

"entering into" exception to the parked vehicle exclusion "pertains to . . . the character of the parked vehicle as a motor vehicle," *Miller, supra,* as a matter of law, the "entering into" exception satisfies the causative or "arising out of" requirement.

In *King v Aetna Casualty & Surety Co,* 118 Mich App 648; 325 NW2d 528 (1982), which is factually similar to the instant case, the Plaintiff drove his car to a Kroger store in Mt. Morris, Michigan, in order to do some shopping. He parked in the parking lot, locked the doors and proceeded to the store where he shopped for about ten minutes. While returning to his car, plaintiff slipped on some ice and fell, sustaining physical injury to his knee and leg. Plaintiff, while holding a bag of groceries in his left arm, had removed his car keys from his pocket and was reaching to unlock the car door when he fell. His hand was about two inches away from the car at the time of the fall, but he could not remember whether his key ever touched the car. The plaintiff argued that he was injured when he was "entering into" his vehicle.

The Court of Appeals, however, held that the undisputed facts showed that plaintiff was <u>not</u> "<u>entering his vehicle, but was merely preparing to enter it.</u>" *Id.* at 651. The Court also found plaintiff's claim "deficient because, in order to recover no-fault benefits for injuries sustained in connection with a parked vehicle, a claimant must establish both the applicability of one of the Sec. 3106 categories and, in addition, that the injuries arose out of the ownership, operation, maintenance or use of the parked vehicle. MCL Sec. 500.3105(1); MSA Sec. 24.13105(1), *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975), lv den 395 Mich 787 (1975), *Shinabarger v Citizens Mutual Ins Co*, 90 Mich App 307; 282 NW2d 301 (1979), *Dowdy v Motorland Ins Co*, 97 Mich App 242; 293 NW2d 782 (1980), *Block v Citizens Ins Co of America*, 111 Mich App 106; 314 NW2d 536 (1981), *Krueger v Lumbermen's Mutual Casualty*, 112 Mich App 511; 316 NW2d 474 (1982). According to *Kangas, supra,*

> [W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. *Id.* at 651.

Therefore, the Court concluded that the plaintiff had not shown a causal connection between the use, etc. of his parked vehicle and his injuries. "Slipping on ice is simply not foreseeably

identifiable with the act of entering a vehicle. It was the ice on the parking lot that caused plaintiff's injuries; the involvement of his parked vehicle was merely incidental. Consequently, even if we were to find that plaintiff was 'entering into' his vehicle when the accident occurred, we would nevertheless conclude that plaintiff was not entitled to no-fault benefits."

The Michigan Supreme Court addressed the issue of when an injury arises out of the use of a motor vehicle as a motor vehicle in *Thornton v Allstate Ins Co,* 425 Mich 643; 391 NW2d 320 (1986). The Court stated:

> At the time our Legislature enacted the no-fault insurance statute in 1973, no Michigan court had addressed the question of what injuries are covered within the phrase 'arising out of the ownership, maintenance or use of a motor vehicle.' However, at the time the no-fault law was enacted, that phrase had a relatively well-established meaning in insurance law. See Anno: Automobile liability insurance: What are accidents or injuries 'arising out of the ownership, maintenance, or use' of an insured vehicle, 89 A.L.R.2d 150. All courts agreed that some sort of causal connection between the injury and the ownership, maintenance, or use of the vehicle was required for coverage. Id. at 153; see also 6B Appleman, Insurance Law & Practice (Buckley ed.), Sec. 4317, p. 357. The dispute concerned what type of causal nexus was required. Id.; see also Appleman, supra, pp. 359-369.
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> In drafting M.C.L. Sec. 500.3105(1); M.S.A. Sec. 24.13105(1), the Legislature limited no-fault PIP benefits to injuries arising out of the 'use of a motor vehicle as a motor vehicle.' In our view, this language shows that the Legislature was aware of the causation dispute and chose to provide coverage only where the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' The involvement of the car in the injury should be 'directly related to its character as a motor vehicle.' *Miller v Auto-Owners, supra.* Therefore, the first consideration under M.C.L. Sec. 500.3105(1); M.S.A. Sec. 24.13105(1), must be the relationship between the injury and the vehicular use of a motor vehicle. Without a relation that is more than 'but for,' incidental, or fortuitous, there can be no recovery of PIP benefits. *Id.* at 657.

Another case which is factually similar to the instant case is *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 636-637; 563 NW2d 683 (1997). In *Putkamer*, the plaintiff's sister was seated in plaintiff's car which was parked in her parents' driveway. Plaintiff walked to the car, opened the driver's door and started to get into the car. While shifting her weight to her left leg and trying to put her right foot into the car, she lost her footing and fell. The Court held that she was entitled to first party no-fault benefits "because there is no dispute that (1) she was injured while

entering the parked motor vehicle under subsection 3106(1)(c); (2) her injury was related to her use of the vehicle as a motor vehicle, i.e., she was going to be driving the automobile when she entered it; and (3) there was a sufficient causal connection between her injury and the use of her parked vehicle." *Id.* at 638. (Emphasis added).

It is undisputed that the vehicle in the instant case was parked. The question presented is whether the uncontested facts establish, as a matter of law, that the Plaintiff was not "entering into" the parked motor vehicle when she slipped and fell and thus would not be entitled to benefits under 3106(1)(c).

The defense relies upon *McKenzie*, *supra*, to support its contention that as a matter of law Plaintiff was not using her motor vehicle as a motor vehicle and is not entitled to benefits. In *McKenzie*, the plaintiff was sleeping in the camper/trailer attached to the back of his pickup truck. He was injured when fumes from the propane-fueled, forced-air heater leaked in and overcame him. He filed for personal injury protection benefits under his no-fault insurance contract with defendant insurance company.

The Michigan Supreme Court held that "whether an injury arises out of the use of a motor vehicle as a motor vehicle. . . turns on whether the injury is closely related to the transportational function of motor vehicles. There must be a nexus between the injury and the transportational function of the motor vehicle." Since the plaintiff was using the vehicle as a bed and not as a motor vehicle, he was not entitled to benefits under the No-Fault Insurance Statute.

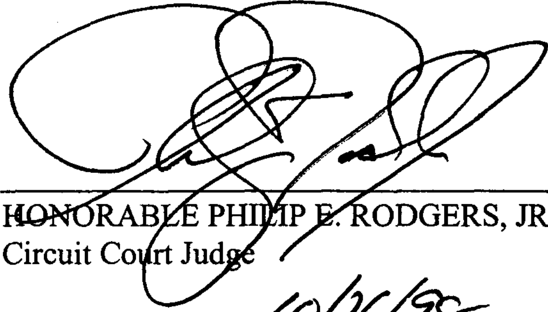
The Defendant in the instant case argues that since the Plaintiff was using her motor vehicle as a "stabilizer" or "support" and not for the transportational function, she is not entitled to benefits. The Plaintiff in the instant case testified at her deposition, that after eating at McDonald's, she and her husband were headed back to their motor vehicle, that the ground was snowy and icy, that she used the vehicle as a "support" or "stabilizer" as she inched her way along the front of the car. She further testified that her husband had already unlocked the car doors with his remote key and that her keys were in the ignition. As she stepped off of the curb toward the driver's door, both feet slipped out from under her. She was holding on to the hood of the car and landed near the left front wheel.

It seems beyond the pale of reasonable disagreement that the Plaintiff intended to enter her motor vehicle and drive it, but was she merely preparing to enter into her vehicle or was she actually

entering into her vehicle? Based on the uncontested facts and the authorities discussed above, the Court concludes, as a matter or law, that the Plaintiff was merely preparing to enter into her vehicle. *King, supra* at 651. MCR 2.116 (C)(10).

The Defendant's Motion For Summary Disposition is granted. No sanctions are ordered. The case was not frivolous. MCR 2.114. This case is dismissed with prejudice.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/26/98