STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE COMPANY, as subrogee of KRISTINE BRENNER,

Plaintiff-Appellee,

v

ANTHONY BRENNER,

Defendant,

and

FREMONT MICHIGAN INSURACORP, INC.,

Defendant-Appellant.

UNPUBLISHED
November 22, 2016

No. 328869
Montmorency Circuit Court
LC No. 14-003595-CZ

Before: BOONSTRA, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant Fremont Michigan Insuracorp, Inc. (Fremont), appeals as of right an order granting summary disposition in favor of plaintiff, Progressive Michigan Insurance Company (Progressive), under MCR 2.116(I)(2) ("If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."). The trial court determined that Progressive was entitled to partial recoupment from Fremont for the personal protection insurance (PIP) benefits it paid to Kristine Brenner, after concluding that Kristine was using her motor home as a motor vehicle at the time of her injury, thus entitling her to PIP benefits under Michigan's no-fault act, MCL 500.3101 *et seq.* We reverse and remand for entry of an order granting summary disposition in favor of Fremont.

On June 11, 2012, Kristine Brenner drove her motor home to her daughter's home and parked it in the driveway. Kristine explained during her deposition that she was planning to stay in the motor home that night and then drive it the next day with her husband, Anthony Brenner, to go watch demolition races. About two hours after she arrived at her daughter's house, after making four trips in and out of the motor home, and after eating lunch in the motor home, Kristine decided to retrieve a bag of baby clothes she brought for her granddaughter from the motor home. While Kristine was in the act of exiting the motor home with the bag of clothes,

the electronic step, which should have extended automatically when she opened the door, failed to fully extend. As Kristine stepped down out of the motor home toward the missing step, she fell and sustained injuries.

Progressive, which insured the motor home, paid $148,089 in PIP benefits as a result of Kristine's injuries, and later sought pro rata recoupment from Fremont, the insurer of two other vehicles owned by the Brenners, under the recoupment provision of Michigan's no-fault act, MCL 500.3115(2).[1] Fremont took the position that Kristine was not entitled to PIP benefits under Michigan law, so it was not obligated to reimburse Progressive for any benefits mistakenly paid. The trial court concluded that Kristine was entitled to PIP benefits, and thus, Fremont was required to partially reimburse Progressive for the benefits paid.

On appeal, Fremont argues that the trial court erred by granting summary disposition in favor of Progressive because Kristine was not using the motor home as a motor vehicle at the time she was injured, and therefore was not entitled to PIP benefits under Michigan's no-fault act. We review de novo a trial court's decision on a motion for summary disposition. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004).

Michigan's no-fault act exists "to broadly provide coverage for those injured in motor vehicle accidents without regard to fault." *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 55; 723 NW2d 922 (2006). Under the no-fault act, an insurance provider must pay PIP benefits to those whom it insures if such a person is injured while using a motor vehicle as a motor vehicle. MCL 500.3105(1). Specifically, MCL 500.3105(1) 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."

Pursuant to MCL 500.3106(1), the no-fault act provides that accidental bodily injury "does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle," except in the following three situations:

> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (b) . . . [T]he injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or

[1] MCL 500.3115(2) provides that "[w]hen 2 or more insurers are in the same order of priority to provide [PIP] benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers." Pursuant to MCL 500.3115(1)(a), Progressive and Fremont were in the same order of priority because they were both "[i]nsurers of owners or registrants of motor vehicles involved in the accident;" i.e., Anthony and/or Kristine owned the motor home and both insurance companies insured Anthony and/or Kristine.

used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.

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

In *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997), our Supreme Court set forth three requirements that a claimant must satisfy to demonstrate entitlement to PIP benefits for an injury arising out of the ownership, operation, maintenance, or use of a parked vehicle. To satisfy the *Putkamer* requirements, a claimant "must demonstrate that (1) his conduct fits one of the three exceptions of [MCL 500.3106(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 causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for." *Id.* at 635-636.

In this case, the trial court determined that Kristine was injured while alighting from the motor home as specified in MCL 500.3106(1)(c),[2] and that her injury was caused by the step of the motor home failing to fully extend as she exited the motor home. The parties do not dispute that the first and third requirements outlined in *Putkamer* were met. Rather, their dispute concerns whether Kristine was using the motor home "as a motor vehicle," under the second *Putkamer* requirement, at the time she fell and was injured. Further, the parties do not present factual disputes regarding the sequence of events. "[W]here 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." *Putkamer*, 454 Mich at 630, citing *Krueger v Lumbermen's Mut Cas & Home Ins Co*, 112 Mich App 511, 515; 316 NW2d 474 (1982). Therefore, it was proper for the trial court to decide, as a matter of law, whether Kristine was utilizing the motor home as a motor vehicle at the time of her injury.

The trial court concluded that Kristine was using the motor home as a motor vehicle at the time of her injury because she was still in the process of unloading the vehicle, which was "within the vehicle's continued transportational function." In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 220; 580 NW2d 424 (1998), our Supreme Court held that the use of a motor vehicle as a motor vehicle occurs when the vehicle's use is "closely related to [its] transportational function and only when engaged in that function." The Court noted that the statutory phrase, "use of a motor vehicle *as a motor vehicle*," in MCL 500.3105(1) (emphasis added), "assumes the existence of other possible uses and requires distinguishing use 'as a motor vehicle' from any other uses." *Id*. at 218. The Court explained that, although there are limited instances when a motor vehicle may be used as something other than " 'a motor vehicle,' i.e., to get from one place to another," such occasions include when the vehicle is being used "*as a*

[2] In *Frazier v Allstate Ins Co*, 490 Mich 381, 385-386; 808 NW2d 450 (2011), our Supreme Court explained that the process of alighting "begins when a person initiates the descent from a vehicle and is completed when an individual has effectively descended from a vehicle and has come to rest—when one has successfully transferred full control of one's movement from reliance upon the vehicle to one's body." (Quotation marks and brackets omitted).

housing facility, advertising display, construction equipment base, public library, or museum display, as it were." *Id*. at 219 (emphasis added).

In this case, Kristine drove the motor home to her daughter's home because they planned to attend a race together the next day. Kristine testified that she parked the motor home in her daughter's driveway approximately two hours before the accident, she intended to leave the motor home parked for the night and to sleep in it, and she exited and reentered the motor home approximately four times before the accident occurred. After parking the motor home, Kristine ate a meal in it. She testified that the motor home was fully functional in that it had water, a refrigerator, a generator, a television, and was completely stocked with clothing, toiletries, silverware, sheets, and pillows. Although Kristine had not yet turned on the generator at the time of the accident, she testified that she intended to turn it on that evening, possibly to watch television. Considering the facts of this case, we conclude that, at the time of the accident, Kristine had ceased using the motor home in a manner closely related to its transportational function and was instead using it as a housing facility.[3]

Progressive argues that Kristine's use of the motor home at the time of her injury was still closely related to its transportational function because she was in the process of unloading items that had recently been transported when she fell. In *Putkamer*, 454 Mich at 636, our Supreme Court concluded that a plaintiff was using her parked vehicle "as a motor vehicle" when she was injured in the process of "entering the vehicle with the intention of traveling to her brother's home." Progressive contends that the process of loading materials for transport or unloading materials at a destination constitutes use of a vehicle consistent with its transportational function, just as entering and exiting a vehicle are part of its transportational function. Consistent with Progressive's argument, the trial court concluded that "[a]lthough the vehicle had been parked for several hours, it was still in the process of being unloaded," so the transportational function of the motor home continued up through the time of Kristine's accident. We disagree.

The "nexus between the injury and the transportational function of the motor vehicle" must be sufficiently close to justify recovery of benefits. *McKenzie*, 458 Mich at 226; see also *Putkamer*, 454 Mich at 635. The record in this case does not reveal a precise timeline of events between when Kristine parked the motor home and when she fell while carrying a bag of baby clothes from the motor home. Kristine testified that the baby clothes were in a laundry bag that was only one-fourth full, so it is unlikely that she made the other four trips to and from the motor home after parking it for the purpose of unloading the clothes. Further, there is no evidence that delivering the baby clothes from the motor home was a two-hour process that required four trips.

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[3] We further note that both parties consistently describe the vehicle at issue in this case as a "motor home," which by its very name suggests that the useful purpose of the vehicle will alternate between being a mode of transportation and a housing or residential facility. Indeed, if a motor home does not become more "home" than "motor vehicle" two hours after arriving at its intended destination, after four trips in and out of the home by its owner, and after consumption of a meal inside the motor home, it is difficult to see when it ever would become divorced from its transportational function under the rule set forth in *McKenzie*.

Rather, the evidence indicates that Kristine used the motor home in a manner closely related to its transportational function to get to her daughter's house, which included entering and exiting the motor home for this purpose. Once this transportational purpose was fulfilled, however, some two hours before the accident, Kristine began using the motor home as a housing facility. Kristine explained that after she parked the motor home in her daughter's driveway, she intended to leave it there for the night and to sleep in it. She did not intend to use the motor home for travel again until the following day. Under the facts presented, there is simply not a sufficiently close nexus between Kristine's injury and her use of the motor home as a motor vehicle to justify her recovery of PIP benefits.[4] Accordingly, the trial court erred by granting summary disposition in favor of Progressive, and should have granted summary disposition in favor of Fremont because Kristine's injury did not result from the use of her motor home as a motor vehicle.

Reversed and remanded for entry of an order granting summary disposition in favor of Fremont. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Michael F. Gadola

[4] The parties contest whether the trial court erred by refusing to apply the analysis of the majority opinion in *Kemp v Farm Bureau Gen Ins Co of Mich*, unpublished opinion of the Court of Appeals, issued May 5, 2015 (Docket No. 319796); pp 2-3, in which this Court held that a plaintiff was not entitled to PIP benefits for an injury that occurred while he was unloading personal effects from his truck. Specifically, the plaintiff injured his calf muscle while he was collecting personal items from the backseat floorboard of his truck after he arrived home from work, parked his truck, and got out of the vehicle. *Id.* at 1. Consistent with our opinion in this case, the *Kemp* Court concluded that the plaintiff's injury "had nothing to do with 'the transportational function' of [the] truck" and "did not arise out of the use of a motor vehicle as a motor vehicle [because] plaintiff's truck, which he used as a storage space for his personal items, was merely the site where the injury occurred . . . ." *Id.* at 3.

The plaintiff in *Kemp* filed an application for leave to appeal in the Michigan Supreme Court, and on February 5, 2016, the Supreme Court issued an order directing the clerk to schedule oral argument on whether to grant the application or take other action and instructing the parties to file supplemental briefs addressing, in part, whether the plaintiff's injury was "closely related to the transportational function of his motor vehicle, and thus whether the plaintiff's injury arose out of the ownership, operation, maintenance, or use of his motor vehicle as a motor vehicle[.]" *Kemp v Farm Bureau Gen Ins Co of Mich*, 499 Mich 861, 861-862; 873 NW2d 595 (2016). Our Supreme Court held oral argument on the application on October 6, 2016. Although the majority opinion in *Kemp* is consistent with our opinion today, we note that the relationship between Kristine's injury and the transportational function of the motor home in this case is much more attenuated than the circumstances presented in *Kemp*. As such, the outcome of the appeal in *Kemp* should not disturb our opinion in the current action.

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SHAPIRO, J. (*concurring*).

I concur in the result only.

/s/ Douglas B. Shapiro