

STATE OF MICHIGAN
COURT OF APPEALS

JOHN A FULTON,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

January 16, 2007

No. 270644

Lapeer Circuit Court

LC No. 05-035904-CK

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

Kelly, J. (*dissenting in part and concurring in part*).

I respectfully dissent from the majority's conclusion that plaintiff's injuries fall within the parked car exception created by MCL 500.3106(1)(b) of the Michigan no-fault automobile insurance act, MCL 500.3101 *et seq.* Pursuant to the plain language of MCL 500.3106(1)(b), I would conclude that the trial court erred in denying Defendant State Farm Mutual Automobile Insurance Company's (State Farm) motion for summary disposition and granting plaintiff's motion for summary disposition.

The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). "Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). If the statutory language is clear and unambiguous, the court must apply the statute as written, and judicial construction is neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

Under Michigan's no-fault act, an insurer is responsible to pay first-party personal injury protection benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. MCL 500.3105(1); *Stewart v State*, 471 Mich 692, 696; 692 NW2d 376 (2004). Generally, no such injury arises out of the ownership, operation, maintenance, or use of a parked vehicle. MCL 500.3106(1). But an exception exists if:

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. [MCL 500.3106(1)(b) (emphasis added).]

In *Perez v Farmers Ins Exchange*, 225 Mich App 731; 571 NW2d 770 (1997), this Court examined the exceptions to the parked car exclusion listed in MCL 500.3106(1)(b)(2). The plaintiff in *Perez* suffered injury when the bungee cord he was using to secure a load of straw onto a trailer snapped back and struck him in the eye. *Id.*, 732. This Court noted that MCL 500.3106(1)(b) expressly limits the meaning of the terms “loading” and “unloading.” *Id.*, 735. Because the plaintiff’s injury occurred after he finished lifting the straw onto the trailer, the exception to the parked car exclusion set forth in MCL 500.3106(1)(b) was inapplicable. *Id.*, 736.

Similarly, in *Dembinski v Aetna Cas & Surety Co*, 76 Mich App 181, 182; 256 NW2d 69 (1977), the plaintiff slipped and injured his back while carrying a ceramic mold to his truck. He sought payment of personal protection benefits under his insurance contract, alleging that his injuries arose from loading of the truck. *Id.* This Court noted that the insurance contract at issue, which mirrored the language of MCL 500.3106, only provided coverage for injuries that were the direct result of property being lifted onto or lowered from a vehicle in the loading or unloading process. *Id.*, 183. And it stated that, rather than actually lifting the mold into the truck, the plaintiff was merely preparing to load the vehicle. *Id.* Consequently, this Court denied coverage and affirmed the trial court’s grant of summary disposition in favor of the insurer. *Id.*, 183-184.

In the instant case, as in *Perez*, the parked vehicle exclusion set forth in MCL 500.3106(1) precludes plaintiff from recovering under the no-fault act. The unambiguous language of MCL 500.3106(1)(b) provides for payment of benefits if plaintiff’s injuries arose due to physical contact with property being “lifted onto or lowered from” the trailer. By specifically identifying the acts of lifting or lowering property, the Legislature clearly did not intend to extend coverage to the entire process of loading or unloading a vehicle. See *Perez, supra*, 735. Here, plaintiff testified that he intended to start the tractor using the hand crank before getting onto the vehicle and backing it down off the trailer. But as soon as he turned the crank, the tractor lurched forward causing his injuries. The tractor was not, in fact, being lowered from the trailer; rather, plaintiff was merely beginning the process of unloading. Thus, because the tractor was not actually being “lowered from” the trailer at the time of plaintiff’s accident, the exception created by MCL 500.3106(1)(b)(2) does not apply.

I reluctantly concur in the majority’s conclusion that

plaintiff’s injury arose out of the operation, ownership, maintenance, or use of a motor vehicle “as a motor vehicle” under *McKenzie v Auto Club Ins Ass’n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998), where the vehicle involved is a trailer used to haul machinery, and where the trailer was being used as such in transporting the tractor when the injury occurred. Accordingly, plaintiff’s injury was closely related to the trailer’s transportational function as required by *McKenzie* and that Court’s interpretation of MCL 500.3105. See *Drake [v Citizens Ins Co of America]*, 270 Mich App 22, 26; 715 NW2d 387 (2006) [Ante at ___ (footnote omitted).]

However, I concur only because I am compelled to do so pursuant to MCR 7.215(J)(1). I believe that *Drake* was wrongly decided for the reasons stated in the dissent. Were it not for the precedential effect of *Drake*,¹ I would reverse and remand for entry of an order granting summary disposition to State Farm.

/s/ Kirsten Frank Kelly

¹ I would also note that this specific issue was not raised before the trial court or on appeal.