

IN THE SUPREME COURT OF TEXAS

No. 02-0069

TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY, PETITIONER,

v.

JEFF A. STURROCK, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued on April 16, 2003

JUSTICE OWEN, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE BRISTER, dissenting.

The average person would not think that tripping over the threshold of a pickup truck's door while exiting is a "motor vehicle accident." Because the Court does not give these words their commonly understood meaning, I respectfully dissent.

I

This case was submitted to the trial court on stipulated facts. Sturrock had been driving his truck. He stopped the vehicle, parked, and turned off the ignition. The parties' agreed statement of facts says, "Sturrock then turned and opened the door, and as he was exiting the vehicle, his left foot somehow became entangled, and he almost slipped and fell and caught himself, and that is when he felt the burning in his neck and shoulder area. The exiting the vehicle [sic] caused him to do

that.” In describing the incident further, the agreed statement of facts said, “[h]e hung his foot on the raised portion of the door facing on his truck,” “Sturrock somehow injured his neck, shoulder, and upper back as he was getting out of his pick-up,” and “Sturrock’s injury on April 10 was not caused by an impact between any portion of his body and any portion of his pickup.”

The personal injury protection (PIP) provisions of Sturrock’s policy say:

- A. We will pay Personal Injury Protection benefits because [of] bodily injury:
 - 1. resulting from a motor vehicle accident; and
 - 2. sustained by a covered person.
- * * *
- C. “Covered person” as used in this Part means:
 - 1. You or any family member:
 - a. while occupying; or
 - b. when struck by;a motor vehicle designed for use mainly on public roads or a trailer of any type.
 - 2. Any other person while occupying your covered auto with your permission.

The trial court concluded that Sturrock’s injuries were covered. A divided court of appeals affirmed.¹

There is no dispute that Sturrock is a “covered person.” The parties so stipulated. There is no dispute that Sturrock was occupying a motor vehicle at the time of his injury. But coverage under the PIP provisions does not attach simply because an insured was injured “[w]hile occupying” a covered motor vehicle. “[B]odily injury” must “result[] from a motor vehicle accident.”

¹ 65 S.W.3d 763.

This Court had occasion in *Farmers Texas County Mutual Insurance Co. v. Griffin*² to construe the term “auto accident.” Royal, the insured, was driving a vehicle when his two passengers fired gun shots and wounded Griffin in the leg as he walked down a street. Griffin alleged negligence and gross negligence. The issue was whether Royal’s insurer was required to defend or indemnify him.³ Royal’s policy said that the insurer ““will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident.””⁴ Coverage extended to ““you or any family member for the *ownership, maintenance, or use* of any auto or trailer.””⁵ We held that the term “auto accident” is not ambiguous.⁶ Quoting *State Farm Mutual Insurance Co. v. Peck*,⁷ we said, ““The term “auto accident” refers to situations where one or more vehicles are involved with another vehicle, object, or person.””⁸ We held, “To read Griffin’s petition as alleging an ‘auto accident’ would strain that term beyond any reasonable meaning.”⁹ Griffin’s injuries were not from an auto accident, but from a drive-by shooting, even though the shooter was using a covered vehicle for transportation at the time of the shooting.

² 955 S.W.2d 81 (Tex. 1997).

³ *Id.* at 81.

⁴ *Id.* at 82.

⁵ *Id.*

⁶ *Id.* at 83.

⁷ 900 S.W.2d 910, 913 (Tex. App.—Amarillo 1995, no writ).

⁸ 955 S.W.2d at 83. We omitted the words “in some type of collision or near collision” from this quote, without indicating the omission. The statement in *Peck* was: “[T]he term ‘auto accident’ refers to situations where one or more vehicles are involved in some type of collision or near collision with another vehicle, object, or person.” 900 S.W.2d at 913.

⁹ 955 S.W.2d at 83.

The *Peck* decision, cited in *Griffin*, is instructive. Salazar was a passenger in Peck’s vehicle while Peck, the insured, was taking her dog from a groomer to a veterinarian. Salazar was sitting in the back seat with the dog when the dog bit him, inflicting severe lacerations to his face.¹⁰ The insurer sought a declaratory judgment that it had no obligation to defend Peck in Salazar’s suit against her.¹¹ The policy provided that the insured “‘will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an *auto accident*.’”¹² The court of appeals held that the term “auto accident” was unambiguous, and that it must apply that term’s “ordinary and generally accepted meaning.”¹³ The court of appeals concluded “that the ordinary and generally accepted meaning of the term ‘auto accident’ refers to situations where one or more vehicles are involved in some type of collision or near collision with another vehicle, object, or person.”¹⁴ It then said, “[f]urthermore, we are persuaded that the automobile must, in some manner, be involved in the accident,” and “[t]he mere fact that an accident takes place in or near an automobile does not mean the accident was an ‘auto accident.’”¹⁵

The ordinary, generally accepted meaning of “motor vehicle accident” does not call to mind tripping over the threshold of a vehicle while exiting, notwithstanding a decision from a court of

¹⁰ *Peck*, 900 S.W.2d at 911.

¹¹ *Id.* at 912.

¹² *Id.* at 911-12.

¹³ *Id.* at 913.

¹⁴ *Id.*

¹⁵ *Id.*

appeals more than thirty years ago, which held that injury had occurred in a motor vehicle accident when an insured with phlebitis in his leg “was favoring it as he twisted in order to get out of the car and as he did so his right knee caught and the cartilage snapped.”¹⁶ This Court’s decision in *Mid-Century Insurance Co. of Texas v. Lindsey*¹⁷ does not hold otherwise.

The *Lindsey* case construed another section of the Texas standard auto policy, the uninsured/underinsured motorist provision.¹⁸ Lindsey was the insured. He was sitting in a car parked next to Metzger’s truck when Metzger’s nine-year-old son attempted to climb into the cab of the truck through its sliding rear window and caused a gun on a gun rack mounted over the rear window to discharge. Lindsey was struck by the gunshot. After the \$20,000 limits of Metzger’s policy were paid, Lindsey sued his insurer under the uninsured/underinsured motorist provisions.

The policy provided:

“We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured [or underinsured] motor vehicle because of bodily injury sustained by a covered person, or property damage, caused by an accident.

The owner’s or operator’s liability for these damages must arise out of the ownership, maintenance or use of the uninsured [or underinsured] motor vehicle.”¹⁹

¹⁶ *Berry v. Dairlyland County Mut. Ins. Co. of Tex.*, 534 S.W.2d 428, 429 (Tex. Civ. App.–Fort Worth 1976, no writ).

¹⁷ 997 S.W.2d 153 (Tex. 1999).

¹⁸ *Id.* at 154.

¹⁹ *Id.* at 155 (alteration in original).

The Court's decision in *Lindsey* primarily focused on the ““arise out of the ownership, maintenance or use of the . . . motor vehicle”” language.²⁰ We examined decisions from this²¹ and other²² jurisdictions that had considered the meaning of “arose out of the use of a motor vehicle.” We then looked, in particular, at situations in which a gun was involved and whether and under what circumstances the discharge of a firearm “arose out of the use” of a vehicle.²³ We concluded that “Lindsey’s injury arose out of the use of the Metzger truck” because “Metzger’s son’s sole purpose was to gain entry into the truck to retrieve his clothing.”²⁴ He was not playing with the gun, trying to shoot it, or load or unload it.²⁵ He was using the vehicle “*qua* vehicle, rather than simply as an article of property,”²⁶ and his use of the underinsured vehicle injured the insured.

In the instant case, the policy provision at issue does not contain the broad “arise out of the ownership, maintenance or use of the . . . motor vehicle” language. The policy instead says that coverage applies only if there is “bodily injury: resulting from a motor vehicle accident” while a covered person is “occupying” or “struck by” a motor vehicle. Sturrock’s injury occurred when he was alighting from his vehicle. But that does not answer the question of whether his injury was one “resulting from a motor vehicle accident,” as the PIP provisions of his policy require.

²⁰ *Id.* at 156-64.

²¹ *Id.* at 156 n.11, 157 n.18.

²² *Id.* at 157 n.21.

²³ *Id.* at 157-61 & nn.21, 25 & 26.

²⁴ *Id.* at 158.

²⁵ *Id.*

²⁶ *Id.* at 156.

In *Lindsey* we only briefly discussed what constitutes an “auto accident.”²⁷ The policy provision required that the injury result from “an accident.” There was no question that the shooting in *Lindsey* was “an accident.” We explained that the boy “did not intend to cause the shotgun to discharge or Lindsey to be injured, nor was it reasonably foreseeable that either consequence would result from the boy’s trying to enter the pickup through the rear window.”²⁸ But the insurer argued that “accident” should be read to mean “auto accident.” In addressing that argument, we assumed, without deciding, that the term “accident” as used in the uninsured/underinsured motorist policy provision could be limited to an “auto accident.” We then cited our decision in *Griffin*, quoting its holding that “[t]he term ‘auto accident’ refers to situations where one or more vehicles are involved with another vehicle, object, or person.”²⁹ We then concluded that “[n]othing in the language or holding of either case suggests that an ‘auto accident’ requires a collision or excludes occurrences like the one in this case.”³⁰

Nothing in *Lindsey* suggests that the mere fact that an accident took place in an automobile means that it was an “auto accident.” To the contrary, we cited *Peck* with approval for the proposition that when a vehicle is merely the situs of the injury, there is no “auto accident.”³¹ We approved the rationale in *Peck*, affirming “that a dog bite inflicted while the victim was in a car was

²⁷ *Id.* at 155-56.

²⁸ *Id.* at 155.

²⁹ *Id.* (quoting *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 83 (Tex. 1997) (quoting *State Farm Mut. Ins. Co. v. Peck*, 900 S.W.2d 910, 913 (Tex. App.—Amarillo 1995, no writ) (words omitted from *Peck* by *Griffin*))).

³⁰ *Id.* at 156.

³¹ *See id.*

not an auto accident.”³² The vehicle in *Peck* was being used for transportation when the dog bite occurred, and it was certainly an accident from the insured’s point of view. But the vehicle was merely the location of an accident that could have occurred anywhere, just as Sturrock in the case presently before us could have tripped and injured himself in many locales other than his parked truck. By contrast, the accidental shooting in *Lindsey* could only have occurred from use of the “vehicle *qua* vehicle.”³³ The shotgun was on a gun rack mounted to the vehicle, and the boy came into contact with it when he was attempting to retrieve his clothing stored in the vehicle. We said that “[i]f the discharge or incident could have occurred regardless of the vehicle, the courts seem to be consistent in holding there is no coverage.”³⁴ Accordingly, we said that if the boy had been handling the gun while in the vehicle and it had accidentally discharged, there would have been no coverage.³⁵ We recognized in *Lindsey* that the question of whether there was even a *use* of a motor vehicle was “a close case,”³⁶ as evidenced by the numerous, sometimes conflicting decisions from other jurisdictions.³⁷

The Court today cites five cases from other jurisdictions that find coverage when an insured is injured entering or exiting a vehicle or is injured near a vehicle.³⁸ But the policy language in each

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 159 (alteration in original) (quoting 8 COUCH ON INSURANCE 3D § 119:64, at 119-98 (1997)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 157 n.21, 158 n.22, 159 n.25, 161 n.26, 162 nn.27-30.

³⁸ See ___ S.W.3d at ___ n.____.

of these cases is different from Texas's standard PIP provision. Each of the policy provisions afforded broader coverage than Texas's PIP provision, and most importantly, none of the policy provisions in those cases required an auto or motor vehicle accident as a prerequisite to coverage.³⁹

The Court cannot convincingly distinguish the decisions that *do* deal with policies that require an auto or motor vehicle accident in order for coverage to apply. In *Farmers Insurance Co. of Washington v. Grellis*,⁴⁰ which was cited and relied on in *Peck*,⁴¹ the policy provided coverage “for injury to each insured person caused by an automobile accident.”⁴² The policy defined “accident” as “a sudden event . . . resulting in bodily injury neither expected nor intended by the

³⁹ See *Walker v. M&G Convoy, Inc.*, No. CIV.A.88C-DE-191, 1989 WL 158511, at *1 (Del. Super. Ct. Nov. 2, 1989) (finding coverage when statute provided that PIP coverage shall apply to each person “occupying a motor vehicle” and plaintiff slipped and fell on ice while walking around his employer’s car trailer, onto which he was loading new cars, the engine was running and plaintiff was preparing to travel with the loaded trailer); *Padron v. Long Island Ins. Co.*, 356 So.2d 1337, 1338-39 (Fla. Dist. Ct. App. 1978) (finding coverage when PIP statute said “bodily injury . . . arising out of the ownership, maintenance, or use of a motor vehicle” and insured’s foot slipped as he was exiting the vehicle “causing his right leg to hit the bottom part of the car door and break his leg. The plaintiff did not slide out of the car, but injured himself on the car door threshold as he was alighting therefrom.”); *Putkamer v. Transamerica Ins. Corp. of Am.*, 563 N.W.2d 683, 686 (Mich. 1997) (finding coverage under statute requiring coverage for “accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle” and the statute said “[a]ccidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless . . . [T]he injury was sustained by a person while occupying, entering into, or alighting from the vehicle” when the insured fell on ice as she placed her foot on the floor board of her car (alteration and emphasis in original)); *Haagenson v. Nat’l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 650-51 (Minn. 1979) (finding coverage under statute that required coverage for “injury arising out of the maintenance or use of a motor vehicle” and the policy said “[m]aintenance or use of a motor vehicle” includes use “[i]ncident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it” when passenger accompanied a friend to the scene of an accident and was electrocuted by a downed power line as he was opening the door of his vehicle (alterations added)); *Hill v. Metro. Suburban Bus Auth.*, 555 N.Y.S.2d 803, 805 (N.Y. App. Div. 1990) (finding coverage under statute covering “use or operation” of a bus when the bus door caught the plaintiff’s arm and she tripped on a nail or tile on the staircase of the bus, lost her footing, and fell to the sidewalk).

⁴⁰ 718 P.2d 812 (Wash. Ct. App. 1986).

⁴¹ 900 S.W.2d at 913.

⁴² *Grellis*, 718 P.2d at 813.

insured person.”⁴³ The policy defined “‘injured person’” as “‘an insured person who is injured by accident while occupying or being struck by an automobile.’”⁴⁴ The insured was in his van, parked on the side of a boulevard when he allowed a stranger to enter and was then robbed. The robber tripped on a part of the front seat of the van, which caused him to lunge forward and stab the insured. The robber then ordered the insured to drive away. The Washington court held this was not an “automobile accident.”⁴⁵ That court reasoned that “[t]he fact that the van seats were incidentally involved does not convert this incident into an ‘automobile accident.’”⁴⁶ The court concluded that “cases construing the words ‘arising out of the ownership, maintenance, or use of the owned automobile,’ a phrase which is common in many insurance policies . . . [are] of no value because that language does not appear in the endorsement in question.”⁴⁷

Subsequently, the Washington Supreme Court had occasion to construe the term “motor vehicle accident” when used in a policy. The policy provided coverage for “‘**bodily injury** to each **insured person** caused by a *motor vehicle accident*.”⁴⁸ The insured owned a camper affixed to his pickup. When he purchased the camper, it included an unattached wooden object intended as a step to facilitate entering and exiting. The insured was injured when he was in a park for overnight

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 814.

⁴⁸ *Tyrrell v. Farmers Ins. Co. of Wash.*, 994 P.2d 833, 835-36 (Wash. 2000).

camping and exited the camper. He “stepped down from the truck’s tailgate onto the unattached wooden step that had been placed on the ground. The step somehow gave way, causing [the insured] to fall. In falling, his arm caught on the edge of the tailgate, cutting it.”⁴⁹ The Washington court held this was not a motor vehicle accident.⁵⁰ The court gave several examples of injuries that might occur while entering or exiting a vehicle that would not “comport with the plain, ordinary, and popular meaning of that term,” including entering and exiting pickups and sport utility vehicles.⁵¹

The court said:

An image that easily comes to mind is an insured tripping while making the oft-difficult step down from the high doorway of a pickup truck or sports utility vehicle. Another is tripping—over, say, the threshold or a seatbelt—while *entering* a vehicle. Making all such accidents “motor vehicle accidents” for insurance purposes is a logical extension of the Court of Appeals’ holding that “the use of a vehicle depends on an insured’s ability to safely enter and exit it.” However, this definition does not fit with “a *fair, reasonable, and sensible* construction as would be given to the contract by the *average* person purchasing insurance.” Nor would this construction of the term “motor vehicle accident” comport with the plain, ordinary, and popular meaning of that term.⁵²

⁴⁹ *Id.* at 835.

⁵⁰ *Id.* at 838.

⁵¹ *Id.* at 837.

⁵² *Id.* (citations omitted); *see also State Farm Mut. Auto. Ins. Co. v. Rains*, 715 S.W.2d 232, 233 (Ky. 1986) (finding that there was no “motor vehicle accident” in two separate, consolidated cases when, in the first case, the insured was hit in the head by an assailant with a baseball bat while trying to enter his vehicle, and in the second case, when the insured was in a vehicle that overturned when the driver was shot and killed, and the insured was shot while crawling out of the vehicle); *Jordan v. United Equitable Life Ins. Co.*, 486 S.W.2d 664, 666 (Mo. Ct. App. 1972) (finding no coverage under a policy that required “accidental bodily injury” caused “solely by reason of an automobile . . . accident” when the insured taxicab driver was robbed and shot to death by his passenger); *but see Ganiron v. Haw. Ins. Guar. Assoc.*, 744 P.2d 1210, 1212 (Haw. 1987) (finding coverage under policy that required a “motor vehicle accident” for insured who was struck by a bullet from a gun fired from another vehicle on the freeway); *Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d 308, 310 (Me. 1987) (finding coverage under policy that required an “auto accident” when on hunting trip, insured’s shotgun accidentally discharged, injuring passenger, when insured reached for the gun, which was in the back seat); *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 350 S.E.2d 66, 67 (N.C. 1986) (finding coverage under policy that required “bodily injury . . . for which any covered person becomes legally

The Washington Supreme Court correctly discerned that there are quite a number of insurance policies that use language much broader than “bodily injury resulting from a motor vehicle accident,” which is the language in the Texas personal injury protection provisions. Cases construing policies with broader language, including those relied upon by the Court in this case, are inapposite when faced with a policy that requires a “motor vehicle accident” or “auto accident.”

Even when the language is broader and does not require an auto or motor vehicle accident, courts are divided on what is and is not covered. Courts have found no coverage under policy provisions covering (or directed by statute to cover) injuries incurred when “occupying, entering into, alighting from or using an automobile,”⁵³ or from the “use of the automobile . . . while in or upon, entering or alighting from the automobile,”⁵⁴ or “arising out of operation, maintenance or use”

responsible because of an auto accident” when passenger was injured when a rifle accidentally discharged as the insured reached into the vehicle to retrieve a gun; rifle was not stored in a gun rack, but in a storage area behind the driver’s seat).

⁵³ *Kordell v. Allstate Ins. Co.*, 554 A.2d 1, 2 (N.J. Super. Ct. App. Div. 1989) (finding no coverage when PIP statute said “sustained bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile” and insured died of a heart attack while stopped at a red light).

⁵⁴ *Ross v. Protective Indem. Co.*, 62 A.2d 340, 341 (Conn. 1948) (finding no coverage under policy that required “bodily injury, caused by accident and arising out of the use of the automobile . . . while in or upon, entering or alighting from the automobile” when passengers exited from vehicle that had pulled onto the shoulder, went to the rear of the vehicle to urinate, and were struck by another vehicle while conversing after urinating).

of a vehicle,⁵⁵ or “arising out of the maintenance or use” of a vehicle,⁵⁶ or simply “arising out of the use” of a vehicle.⁵⁷ Conversely, coverage has been found when a policy covers (or is required by statute to cover) injury “arising out of the ownership, maintenance or use” of a vehicle,⁵⁸ or “arising

⁵⁵ *Boykin v. State Farm Mut. Auto. Ins. Co.*, 393 S.E.2d 470, 471 (Ga. Ct. App. 1990) (finding no coverage when statute said “accidental bodily injury” includes “bodily injury . . . arising out of the operation, maintenance, or use of a motor vehicle [as a motor vehicle] which is accidental” when insured slipped on wet oily pavement about two feet from her car as she was approaching the vehicle after stopping at a convenience store for fueling); *Cole v. N.H. Ins. Co.*, 373 S.E.2d 36, 37, 38 (Ga. Ct. App. 1988) (finding no coverage when statute provided ““a]ccidental bodily injury” means bodily injury . . . arising out of the operation, maintenance, or use of a motor vehicle. . . . [o]ccupying’ means to be in or upon a motor vehicle or engaged in the *immediate* act of entering into or alighting from the motor vehicle. . . . “[o]peration, maintenance, or use of a motor vehicle” means operation, *maintenance*, or use of a motor vehicle *as a vehicle*” and insured slipped and fell while walking around her car after she had pumped and paid for gasoline, striking her arm on the fender and her knee on the pavement).

⁵⁶ *Marklund v. Farm Bureau Mut. Ins. Co.*, 400 N.W.2d 337, 338 n.2, 341 (Minn. 1987) (finding no coverage under statute that said “injury arising out of the maintenance or use of a motor vehicle” when insured slipped on ice and fell on a self-service gasoline station’s concrete apron after filling and capping his car’s gas tank; insured did not come into physical contact with the vehicle after completing the refueling operation, although he was walking toward the passenger seat with the intention of getting a check from his wife to pay for the gas).

⁵⁷ *Classified Ins. Corp. v. Vodinelich*, 368 N.W.2d 921, 923 (Minn. 1985) (finding no coverage under policy that required “arising out of the use” of a motor vehicle when children died of carbon monoxide poisoning when their mother committed suicide by running the insured vehicle in an enclosed garage while leaving the door to the house ajar).

⁵⁸ *Padron v. Long Island Ins. Co.*, 356 So.2d 1337, 1338 (Fla. Dist. Ct. App. 1978) (finding coverage when PIP statute said “bodily injury . . . arising out of the ownership, maintenance, or use of a motor vehicle” and insured’s foot slipped as he was exiting the vehicle “causing his right leg to hit the bottom part of the car door and break his leg. The plaintiff did not slide out of the car, but injured himself on the car door threshold as he was alighting therefrom”).

out of maintenance or use” of a vehicle,⁵⁹ or “while occupying” a vehicle,⁶⁰ or “while alighting” a vehicle,⁶¹ or simply “arising out of use” of a vehicle.⁶²

To bolster its conclusion that Sturrock’s injuries come within the PIP provision, the Court cites a number of decisions that hold there is coverage when a vehicle collides with someone

⁵⁹ *Blish v. Atlanta Cas. Co.*, 736 So.2d 1151, 1153, 1155 (Fla. 1999) (finding coverage under PIP policy provision that required injury “‘arising out of the ownership, maintenance, or use of a motor vehicle’” when insured was attacked by several assailants after his tire blew out and he stopped to change it); *Hernandez v. Protective Cas. Ins. Co.*, 473 So.2d 1241, 1242-43 (Fla. 1985) (finding coverage under PIP policy provision that required injury “‘arising out of the ownership, maintenance or use of a motor vehicle’” when insured suffered injuries in the course of his arrest for an alleged traffic violation; supreme court inferred insured was occupying the vehicle at the time); *Barry v. Ill. Farmers Ins. Co.*, 386 N.W.2d 299, 300-01 (Minn. Ct. App. 1986) (finding coverage under policy that said “‘maintenance or use of a motor vehicle’” means “‘maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it’” when insured backed vehicle out of her garage, got out to close the garage door with vehicle idling and slipped and fell on the ice as she approached the car door to get back in); *Jorgensen v. Auto-Owners Ins. Co.*, 360 N.W.2d 397, 399-401 (Minn. Ct. App. 1985) (finding coverage when statute said “‘all loss suffered through injury arising out of the maintenance or use of a motor vehicle’” and “‘maintenance or use of an automobile’” means “‘maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it. Maintenance or use . . . does not include . . . loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it’”); plaintiff was burned when he caught fire after a can of gasoline stored inside the trunk of his father’s car exploded as he was opening the trunk to retrieve some jumper cables; plaintiff was not injured by the initial explosion; rather, he was injured when he reached in to remove the gas can, fearing that the car would blow up or cause the gas station (where the car was) to explode, and he tipped or caught the gasoline can on the trunk of the insured vehicle, causing gasoline to spill on himself; the parties stipulated that a defective trunk wire ignited the gas fumes); *Spisak v. Nationwide Mut. Ins. Co.*, 478 A.2d 891, 892 (Pa. Super. Ct. 1984) (finding coverage under policy that required losses sustained “‘as a result of an accident that arises out of the maintenance or use of a motor vehicle as a motor vehicle’” when insured and a female companion died of carbon monoxide poisoning in the backseat of the insured vehicle while engaging in sex acts with one another).

⁶⁰ *Walker v. M&G Convoy, Inc.*, No. CIV.A.88C-DE-191, 1989 WL 158511, at *1 (Del. Super. Ct. Nov. 2, 1989) (finding coverage when statute provided that PIP coverage shall apply to each person “occupying a motor vehicle” and plaintiff slipped and fell on ice while walking around his employer’s car trailer, onto which he was loading new cars, the engine was running, and plaintiff was preparing to travel with the loaded trailer).

⁶¹ *Mid-Continent Cas. Co. v. Giuliano*, 166 So.2d 443, 445 (Fla. 1964) (finding coverage under PIP policy provision that required “bodily injury . . . caused by accident while . . . alighting from” the insured motor vehicle when insured injured his back while exiting the insured motor vehicle).

⁶² *State Farm Mut. Auto. Ins. Co. v. Barth*, 579 So.2d 154, 155 (Fla. Dist. Ct. App. 1991) (finding coverage under PIP policy provision that required “‘loss sustained . . . as a result of bodily injury . . . arising out of . . . use of a motor vehicle’” when insured was attacked by an assailant while sitting in her car, struggled free, and fell out the driver’s door).

entering or exiting a covered vehicle.⁶³ But no one questions that there has been an auto or motor vehicle accident when a vehicle strikes a pedestrian.

The Court cites two Texas cases to support its holding. One is *Southern Surety Co. v. Davidson*,⁶⁴ in which the policy did not require an auto or motor vehicle accident. The policy was not even an automobile liability policy. It covered “[t]he effects resulting exclusively of all other causes from bodily injury sustained by the insured during the life of this policy solely through external, violent and accidental means.”⁶⁵ The other case cited by the Court is *Berry v. Dairyland County Mutual Insurance Co. of Texas* in which the court of appeals concluded “the phrase ‘motor vehicle accident’ can be construed as having more than one meaning” and that it was therefore the court’s “duty . . . to give the phrase the construction that is most favorable to the insured.”⁶⁶ As discussed above, this Court has since held that the term “auto accident” is unambiguous,⁶⁷ and *Berry*’s holding is therefore unsound.

II

Sturrock contends that the policy’s provision requiring a “motor vehicle accident” as a prerequisite for coverage contravenes the statute that governs PIP provisions in Texas.⁶⁸ I disagree.

⁶³ ___ S.W.3d at ___ & n. __.

⁶⁴ 280 S.W. 336 (Tex. Civ. App.–Fort Worth 1926, no writ).

⁶⁵ *Id.* at 336 (alteration added).

⁶⁶ 534 S.W.2d 428, 433 (Tex. Civ. App.–Fort Worth 1976, no writ).

⁶⁷ *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 83 (Tex. 1997).

⁶⁸ TEX. INS. CODE art. 5.06-3.

First enacted in 1973,⁶⁹ that statute requires automobile liability insurance policies to offer PIP coverage.⁷⁰ It says,

No automobile liability insurance policy, including insurance issued pursuant to an assigned risk plan established under authority of Section 35 of the Texas Motor Vehicle Safety-Responsibility Act, covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state unless personal injury protection coverage is provided therein or supplemental thereto.⁷¹

The statute's definition of "personal injury protection" is detailed, but it does not specify whether merely "an accident" will trigger coverage or whether a "motor vehicle accident" is required.⁷² The statute uses the term "the accident" six times, and the phrase "the date of accident" once, without expressing whether "the accident" contemplates, or does not contemplate, an automobile or motor vehicle accident:

(b) "Personal injury protection" consists of provisions of a motor vehicle liability policy which provide for payment to the named insured in the motor vehicle liability policy and members of the insured's household, any authorized operator or passenger of the named insured's motor vehicle including a guest occupant, up to an amount of \$2,500 for each such person for payment of all reasonable expenses arising from *the accident* and incurred within three years from the date thereof for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services, and in the case of an income producer, payment of benefits for loss of income as the result of *the accident*; and where the person injured in *the accident* was not an income or wage producer at the time of *the accident*, payments of benefits must be made in reimbursement of necessary and reasonable expenses incurred for essential services ordinarily performed by the injured person for care and maintenance of the family

⁶⁹ Act of April 11, 1973, 63d Leg., R.S., ch. 52, § 1, 1973 Tex. Gen. Laws 90, 90-93.

⁷⁰ TEX. INS. CODE art. 5.06-3(a).

⁷¹ *Id.*

⁷² *Id.* art. 5.06-3(b)-(h).

or family household. The insurer providing loss of income benefits may require, as a condition of receiving such benefits, that the insured person furnish the insurer reasonable medical proof of his injury causing loss of income. The personal injury protection in this paragraph specified shall not exceed \$2,500 for all benefits, in the aggregate, for each person.

(c) The benefits required by this Act shall be payable without regard to the fault or non-fault of the named insured or the recipient in causing or contributing to *the accident*, and without regard to any collateral source of medical, hospital, or wage continuation benefits. An insurer paying benefits pursuant to this Act shall have no right of subrogation and no claim against any other person or insurer to recover any such benefits by reason of the alleged fault of such other person in causing or contributing to *the accident*.

(d) All payments of benefits prescribed under this Act shall be made periodically as the claims therefor arise and within thirty (30) days after satisfactory proof thereof is received by the insurer subject to the following limitations:

(1) The coverage described in this Act may prescribe a period of not less than six months after *the date of accident* within which the original proof of loss with respect to a claim for benefits must be presented to the insurer.⁷³

The decision in *Le v. Farmers Texas County Mutual Insurance Co.* considered whether this statute permitted the State Board of Insurance to promulgate a policy that required a “motor vehicle accident” and concluded that it did.⁷⁴ That court reasoned that “[i]t is likely that the statewide cost for injuries which happen to occur in a car is higher than the cost of paying for injuries which result from a motor vehicle accident.”⁷⁵ It gave deference to the Board, concluding, “[w]e do not find the Board’s construction repugnant to the statute.”⁷⁶ The court of appeals disagreed with *Berry v.*

⁷³ *Id.* art. 5.06-3(b), (c), (d)(1) (emphasis added).

⁷⁴ 936 S.W.2d 317, 323-24 (Tex. App.–Houston [1st Dist.] 1996, writ denied).

⁷⁵ *Id.* at 324.

⁷⁶ *Id.*

Dairyland County Mutual Insurance Co., which had decided, in resolving a venue plea, that the term “motor vehicle accident” was repugnant to article 5.06-3.⁷⁷

The reasoning in *Le v. Farmers Texas County Mutual Insurance Co.* is sound. It is certainly reasonable and permissible under article 5.06-3 for a policy providing personal injury protection to require the occurrence of a “motor vehicle accident” before coverage is applicable. The coverage afforded under article 5.06-3(c) is in addition to any other insurance coverage, including medical insurance.⁷⁸ An insurer paying personal injury protection coverage has no right of subrogation for the fault of another person in causing or contributing to “the accident.”⁷⁹ Article 5.06-3 does not prohibit automobile policies issued in this state from requiring that the injuries be sustained as a result of a “motor vehicle accident.”

* * * * *

We are constrained by the policy’s language. Sturrock’s injuries did not constitute “bodily injury . . . resulting from a motor vehicle accident.” I would reverse and render judgment for the insurer in this case.

⁷⁷ 534 S.W.2d 428, 431 (Tex. App.—Ft. Worth 1976, no writ).

⁷⁸ TEX. INS. CODE § 5.06-3(c).

⁷⁹ *Id.*

Priscilla R. Owen
Justice

OPINION DELIVERED: August 27, 2004