STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

SUSAN OAKLAND,

Plaintiff,

v

File No: 99-35703-NF
Hon. Thomas L. Solka

AUTO-OWNERS INSURANCE COMPANY,

Defendant.

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ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AS TO LIABILITY ONLY

At a session of said Court held on the 14th day of June, 1999 at the Courthouse in the City of Marquette

PRESENT: THE HONORABLE THOMAS L. SOLKA, Circuit Judge

This matter having come to be heard pursuant to notice, and the Court having reviewed the briefs filed by the parties, and heard the arguments of counsel, now therefore,

IT IS ORDERED that the Plaintiff's Motion for Declaratory Judgment as to Liability is **GRANTED**; and

IT IS FURTHER ORDERED that the death of Richard Oakland is covered by the Michigan No-Fault Act and the Defendant is the no-fault insurer responsible for payment of first-party no-fault automobile insurance benefits to the Plaintiff.

The Court does not, at this time, make any determination as to the amount of such benefits, and will do so upon the application of any party.

Thomas L. Solka

THOMAS L. SOLKA
Circuit Judge

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AS TO LIABILITY ONLY

This is a first-party no-fault (PIP) benefits case. The deceased, Richard Oakland, was killed in an accident on September 12, 1998. The sole question for the Court at this time is whether or not the circumstances of Mr. Oakland's death give rise to liability on the part of the applicable no-fault carrier for survivor's loss benefits and replacement services expenses, as well as allowable expenses for ambulance and funeral bills.

FACTS

The Plaintiff is Susan Oakland, widow of Richard Oakland. Richard Oakland was a 42 year old resident of Chocolay Township who had worked as a machinist for Lake Superior & Ishpeming Railroad for over 20 years and was still employed there at the time

of his death. He enjoyed snowmobiling and was a member of the Hiawathaland Snowmobile Club and was a volunteer with Hiawatha Trails, Inc. It was in his volunteer work for the latter organization that he met his death.

On Saturday, September 12, 1998, Richard Oakland was doing volunteer work for Hiawatha Trails, Inc. This work consisted of bulldozing and clearing areas to be used for snowmobile trails in the Negaunee Township area in the general vicinity of C.R. 492 and M-35. A John Deere 650G bulldozer and a rubber tired front end loader, both owned by Premeau Construction, were being used in this work. The work started that morning at one site, was completed there, and then was to continue at another site some two miles away. The bulldozer was therefore loaded on to a 1975 Fayette Low Boy trailer owned by R & S Trucking, which was being pulled by a 1979 Ford dump truck also owned by R & S Trucking.

Mr. Oakland drove the Ford dump truck with its attached Fayette Low Boy trailer and the John Deere bulldozer to the next work site. There are no eyewitnesses to what happened next, but the physical evidence and investigation by the Michigan State Police makes it clear that the following sequence of events occurred:

1. Mr. Oakland arrived at the next work site and parked the dump truck with its attached trailer on the shoulder of C.R. 492. There was a slope on the shoulder leading down to a ditch, so that the truck and trailer as parked had a slant to the right.

2. He then unfastened the bulldozer, extended the trailer ramps to the ground, and proceeded to begin to back the bulldozer off of the trailer.

3. Part of the trailer decking was wood and part was metal. When the bulldozer tracks reached the part of the decking that was metal, they lost traction and the bulldozer slid sideways off the trailer and fell to the ground on its side.

4. Richard Oakland was thrown from the bulldozer as it fell off the trailer, and the canopy came down on his chest, crushing him against the ground and causing his death within a few seconds.

5. One of the decedent's co-workers, Donald Britton, left the first job site at the same time that Richard Oakland did. Britton was driving a rubber-tired front-end loader which had a maximum speed of 25mph. It therefore took him longer to transverse the two miles or so to the next job site than it did Richard Oakland who was driving the Ford dump truck. Both men left the first job site at the same time, traveling the same route, and by the time Donald Britton arrived at the place where Richard Oakland had parked, the accident had already occurred and Richard Oakland was dead.

The Defendant is the Michigan no-fault automobile insurance carrier for the owner of the 1979 Ford dump truck and 1975 Fayette Low Boy trailer, namely, R&S Trucking of Marquette. An application

for no-fault benefits and documentation supporting the losses sustained by Mr. Oakland's surviving widow, Plaintiff Susan Oakland, were timely submitted but were denied by the Defendant by letter dated March 1, 1999 (copy attached as Exhibit A).

The facts of this incident do not appear to be disputed. Rather, the dispute centers on whether or not these facts give rise to coverage under the Michigan No-Fault Act or the Defendant's policy issued to R&S Trucking. The parties have agreed to ask the Court for a ruling on liability only, with damages, if applicable, to be pursued thereafter.

ARGUMENT

I. BASIC COVERAGE ISSUES

The basic coverage of the Michigan No-Fault Act is set forth in MCL 500.3105(1) as follows:

> "Under personal protection insurance, an insurer is liable to pay benefits for accidental 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."

A prefatory comment about the classification of the three vehicles involved (i.e., the dump truck, the trailer and the bulldozer) may be in order. The 1979 Ford dump truck which Richard Oakland had been driving was obviously a motor vehicle. The 1975 Fayette Low Boy trailer was also a "motor vehicle" under the Michigan No-Fault Act, specifically MCL 500.3101(2)(e), which provides in pertinent part:

> "'Motor vehicle' means a vehicle, including a trailer, operated or designed for operation upon a public highway

by power other than muscular power which has more than two wheels."

Thus, in Truby v. Farm Bureau, 175 Mich App 569; 438 NW2d 249 (1988); lv den 432 Mich 876 (1989), the Court of Appeals held that a trailer used to carry pick-up trucks was a "vehicle" for purposes of personal injury protection benefits regardless of whether it was attached to a cab or freestanding at the time of the accident. A case with a similar holding as to a semi-trailer is Kelly v. Inter-City Truck Lines, Inc., 121 Mich App 208; 328 NW2d 406 (1982).

The John Deere 650G bulldozer involved in this incident was not a "motor vehicle" under the No-Fault Act, because it was not designed for operation upon a public highway and did not have more than two wheels.

II. THE PARKED VEHICLE EXCEPTION

The legislature enacted MCL 500.3106 to address the no-fault coverage afforded when an injury arises out of the ownership, operation, maintenance, or use of a parked motor vehicle. There is no question in this case but that the 1979 Ford dump truck and 1975 Fayette Low Boy trailer were both parked at the time of Mr. Oakland's death. MCL 500.3106 provides in pertinent part:

> ***500.3106. Parked motor vehicles, accidental bodily injury***
>
> *Sec. 3106. (1) 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) Except as provided in subsection (2), 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) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

(Subsection 2 of section 3106 deals with situations involving workers' compensation and is not applicable here.)

The applicable subdivision in the instant situation is MCL 500.3106(b). Although initially this subsection appeared to be ambiguous as to whether or not the second clause was dependent on the first clause (i.e. whether the injury always had to occur as a direct result of physical contact with equipment permanently mounted on the vehicle, or whether it could also occur as a result of direct physical contact with property being lifted onto or lowered from the vehicle in the loading or unloading process), that ambiguity was resolved by Arnold v. Auto-Owners Ins Co, 84 Mich App 75; 269 NW2d 311 (1978), with the Court holding that this subsection "makes compensable injuries which are a direct result of physical contact with property being lifted onto or lowered from the parked vehicle in the loading or unloading process." Any further ambiguity is further answered by the wording of the defendant's own policy. That policy provides in pertinent part:

"2. EXCLUSIONS

We will not pay personal injury protection benefits for:....

c. bodily injury arising out of the ownership, operation, maintenance, or use of a parked motor vehicles unless:

(1) the motor vehicle was parked in such a way as to cause unreasonable risk of the bodily injury; or

(2) the bodily injury was a direct result of physical contact with:

(a) equipment permanently mounted on the motor vehicle while the equipment was being operated or used; or

(b) property being lifted onto or lowered from the motor vehicle in the loading or unloading process;

(3) the bodily injury was sustained by the injured person while occupying the motor vehicle."

The word "property" as used in MCL 500.3106(1)(b) is not a term of art defined in the No-Fault Act itself, and therefore has its common meaning, which would apply to the bulldozer in question in this case.

The parked vehicle exception to the No-Fault Act was extensively discussed by the Supreme Court in the relatively recent case of Putkamer v. Transamerica Insurance Corporation of America, 454 Mich 626, 563 NW2d 683 (1997). Some holdings of Putkamer are pertinent to the instant case:

> ". . . [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 the jury." [Id. at 631]
>
> "The no-fault act is remedial in nature and is to be liberally construed in favor of the persons who are intended to benefit from it." [Id. at 631]
>
> "Where the motor vehicle is parked, the determination whether the injury is covered by the no-fault insurer generally is governed by the provisions of subsection 3106(1) alone [citations omitted]. There is no need for an additional determination whether the injury is covered under subsection 3105(1)." [Id. at 632-633]

"In summary, where a claimant suffers an injury in an event related to a parked motor vehicle, he must establish that the injury arose out of the ownership, operation, maintenance, or use of the parked vehicle by establishing that he falls into one of the three exceptions to the parking exclusion in subsection 3106(1). In doing so under §3106, he must demonstrate that (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked 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]

III. THE APPLICATION OF THE PARKED VEHICLE EXCEPTION TO THE FACTS OF THIS CASE.

A. LOADING/UNLOADING

The Defendant is obligated to provide coverage for this tragic accident if Richard Oakland's injuries resulted "from direct physical contact with . . . property being lifted onto or lowered from the vehicle during in the loading or unloading process," and if the injury arose out of the use of a motor vehicle as a motor vehicle, and had a causal relationship to that motor vehicle. The Plaintiff submits that both prongs of this test are satisfied. There is no question that Richard Oakland was unloading the bulldozer from the trailer at the time of his death, and that his injuries to him were "a direct result of physical contact with . . . property [i.e., the bulldozer] being lifted onto or lowered from the vehicle [i.e., the trailer] in the loading or unloading process." The bulldozer, weighing several tons, could not be "lifted onto or lowered from" the trailer except by driving it up

or down ramps extended from the trailer to the ground for that purpose. This is precisely what Mr. Oakland was doing at the time of the accident which took his life.

Similarly, there can hardly be a question but that the injury arose out of the use of the parked motor vehicle as a motor vehicle and had a causal relationship to the parked motor vehicle. The motor vehicle (i.e., the Fayette Low Boy trailer) was specifically designed to carry heavy cargo (and particularly construction equipment) from one site to another. The no-fault act itself includes "trailers" in the categorization of motor vehicles. Obviously, most trailers will be used for transporting cargo of some kind or nature from one location to another. It is their function. It was that function which this trailer was performing at the time of this incident. The accident had a causal relationship to the parked trailer, because it arose from the unloading of the trailer and also because it arose from the slant that the trailer had as a result of being parked on the shoulder of the road.

The closest case the Plaintiff can find on point is an unpublished Court of Appeals decision which is attached as Exhibit B. Jamison v. Farmers Insurance Exchange [Michigan Court of Appeals No. 145677, 1993]. In that case, the Plaintiff was loading a vehicle onto a flat bed trailer attached to the Plaintiff's van. The Plaintiff's wife drove the vehicle (a newly purchased Lincoln) onto the trailer while the Plaintiff stood between the van and the attached trailer. Although the Plaintiff motioned for his wife to

stop the vehicle, the Lincoln kept moving forward and crashed into the van, catching the Plaintiff's right arm between the Lincoln and the van and injuring it. The Defendant was the no-fault insurer of the van and also insured the trailer. The Lincoln automobile being loaded was uninsured. The Court of Appeals affirmed the trial court's order granting the Plaintiff's motion for summary disposition, holding:

> "Section 3106(1)(b) contains two exceptions to the parked vehicle exclusion: 1) For injuries which are the direct result of physical contact with equipment permanently mounted on the vehicle while this equipment is being used, and 2) for injuries which result from property which is lifted or lowered from the vehicle during the loading or unloading process. Winter [v. Automobile Club of Michigan, 433 Mich 446; 446 NW2d 132 (1989)], supra, at 458-459. In this case, plaintiffs argue that the second exception applies. Under that exception, plaintiffs are entitled to personal protection insurance benefits if the insured vehicles, the trailer and attached van, were parked at the time of the accident, and plaintiff's injury resulted from the trailer being loaded or unloaded.
>
> There is no question that the van and trailer, both insured vehicles, were parked at the time of the injury. When plaintiff was injured he was in the process of loading the newly-purchased Lincoln onto the trailer. Furthermore, there is no question that the trailer was a motor vehicle. Truby [v. Farm Bureau, 175 Mich App 569; 438 NW2d 249 (1988);lv den 432 Mich 876 (1989)] supra, at 573. Clearly, plaintiff's injury occurred during the loading process of an insured motor vehicle, the trailer.
>
> Additionally, we believe the injuries received by plaintiff while loading the Lincoln were sufficiently related to the ownership, operation, and use of the trailer for its intended purpose, that being the hauling of cargo. It just so happens that the cargo in this case was another motor vehicle. We do not believe that the fact that the object being loaded onto the trailer was a motor vehicle bars plaintiffs' recovery under §3106(1)(b). See Truby, supra. Plaintiff was in the process of loading the trailer when he was struck by the 1966 Lincoln. The injury arose from the use of the

trailer and there was a causal connection between the use of the trailer and the injury sustained. Plaintiffs have satisfied their burden of showing that an exception to the parked vehicle exclusion applies in this case, and, therefore, summary disposition was properly granted in their favor."

B. UNREASONABLE RISK

The bulldozer which crushed Mr. Oakland slid off of the trailer because the trailer and the dump truck which towed it were parked at an angle on the shoulder of the road. It was this angle which caused the bulldozer to slide off the trailer once its traction was lost.

Section 3106(1)(a) of the no-fault act provides for coverage if the "vehicle was parked in such a way as to cause unreasonable risk of the injury which occurred." While at first glance it may seem unusual that the "parker" of a vehicle could himself receive benefits if he is injured as a result of improperly parking the vehicle, the language of the statute so provides, and cases such as Lankford v. Citizens Ins Co, 171 Mich App 413, 416-516; 431 NW2d 59 (1988) have affirmed this interpretation of the statute.

CONCLUSION

Both the plain language of the no-fault statute and the holding in Plaintiff's cited cases support the Plaintiff's Motion and compel the result that the Plaintiff is entitled to the relief sought.

RESPECTFULLY SUBMITTED,

STEWARD & SHERIDAN, P.L.C.

Dated: May ___, 1999

By_____
Brian D. Sheridan
Attorney for Plaintiff