

S T A T E   O F   M I C H I G A N  
C O U R T   O F   A P P E A L S

RAYNARD JONES,

Plaintiff-Appellant,

v

No. 83689

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

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BEFORE: R. S. Gribbs, P.J., S. J. Bronson & C. D. Stephens,\* JJ.

PER CURIAM

Plaintiff Raynard Jones appeals the Genesee County Circuit Court's order of March 1, 1985, denying his motion for reconsideration of the court's order granting summary judgment to defendant Allstate Insurance Company. We reverse.

Plaintiff alleged that, on January 12, 1983, he was occupying his father's 1974 Plymouth, which was insured by defendant Allstate Insurance Company. According to plaintiff's complaint, Ronald Thompson discharged a firearm into the driver's side of the vehicle, causing plaintiff to suffer serious personal injuries.

Defendant moved for summary judgment, contending that plaintiff's injuries did not arise out of the ownership, operation, maintenance or use of a motor vehicle, as required by MCL 500.3105(1); MSA 24.13105(1). Defendant relied upon the affidavit of Roy Yingling, which reads as follows:

"I, Roy Yingling, being duly sworn, depose and say:

"1. That I am the claims representative assigned to handle the claim made by Plaintiff, Raynard Jones, for personal protection insurance benefits.

"2. That I am fully aware of the facts and circumstances surrounding the subject incident, and that I have conducted a full and reasonable investigation of same.

"3. That I am aware of no facts or allegations which make the subject insured vehicle anything more than the situs of the incident, and in no way is the subject vehicle implicated as an instrumentality of the harm alleged by Plaintiff Jones.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

"4. That pursuant to the allegedly applicable policy of automobile insurance, as it conforms to MCLA 500.3105(1), payments of personal protection insurance benefits are only to be made where an injury arises out of the 'use, operation, or maintenance of a motor vehicle'.

"5. That based upon my training and experience in the area of automobile accident claims adjustment, it was, and is, my considered opinion that no benefits are due and owing to Plaintiff Raynard Jones as a result of the subject January 12, 1983 shooting incident, for the specific reason that the involvement of a motor vehicle in that instance was merely fortuitous, and further, because of the insured automobile was clearly not an instrumentality of harm."

Plaintiff submitted the affidavit of David S. Grant, Jr., which reads as follows:

"I, DAVID S. GRANT, JR., being duly sworn, depose and say:

"1. That I am an attorney-at-law duly licensed to practice in the State of Michigan, County of Genesee.

"2. That I represented a certain Ron Thompson in a criminal action brought against him for a shooting incident that occurred in the City of Flint on or about the 12th day of January 1983.

"3. That I am fully aware of the facts and circumstances surrounding that incident, by virtue of my interviews with the client and my review of the investigation of the incident taken by the Detective Division of the Flint Police Department.

"4. That if called upon to testify, I will be competent to state under oath that Ron Thompson did not discharge his firearm at Raynard Jones, but rather at the vehicle in which Raynard Jones was sitting and that he shot at that vehicle because it had been driven upon his private property and that he resented the encroachment of the vehicle on his private property and that he fired upon said vehicle in anger while in an irrational state of mind." (Emphasis added.)

Plaintiff also submitted a police report of the incident, which stated, in pertinent part:

"At 11:42 PM, Wednesday, January 12, 1983, District 203, Officers Kenneth Sparks and Robert Studer, received a radio call from Officer Terrill Bravender, dispatcher, to 4533 Trumbull regarding a car hitting a house and someone being shot. On arrival, the officers found that the incident had taken place at 4529 Trumbull. The officers observed a 1974 Plymouth, Michigan license FXL 550, setting under the severely damaged northeast corner of the garage at that address. The auto appeared to have run through the wall and struck the chain link fence on the north side of the lot. There was a male/black subject, latter identified as the victim, Raynard Jones, m/b/20, 1379 E. Downey, who, according to Flint Fire Department Unit 1170, Paramedics Michael Murphy and Mark Warren, and Unit 161 personnel, David Wolfenden and Jack Smyth, appeared to have been shot in the left side. The officers were unable to talk to Jones as the Flint Fire Department paramedics were administering first aid to him.

Jones was subsequently transported to Hurley Medical Center by Flint Fire Department Ambulance 161. At the hospital, he was examined by Dr. Tommie Stevens and Dr. Michael Macksood and was then transferred to Surgery. Officers Studer and Sparks were approached by one Ronald Thompson. Officer Studer asked Thompson if he had witnessed any part of the incident. Thompson said he had shot the gun (Jones), and that he (Thompson) was unsure of the name. Thompson told the man that he had the wrong house. Thompson said he then heard a car in his driveway with the horn blowing constantly. Thompson then opened the door and saw the 1974 Plymouth, FXL 550, containing a male/black subject. The man in the car was waving what looked to be a gun at him (Thompson). Thompson said he then grabbed his rifle, which was located just inside his front door, pointed it in the direction of the car and fired it once at the car. Thompson said he then saw the car go forward and then heard a loud crash. The officers obtained Thompson's I.D. Thompson invited the officers in to his house and pointed to the rifle, which was setting in the kitchen doorway against the wall. Thompson said he had used that rifle to shoot at the car. Sgt. Jerry Nugent arrived on the scene and advised the officers to take Thompson to the Criminal Investigations Bureau. Nugent then contacted the Patrol Desk and had Homicide Squad officers notified." (Emphasis added.)

A no-fault insurer must pay 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); MSA 24.13105(1).

In Thornton v Allstate Ins Co, 425 Mich 643; 391 NW2d 320 (1986), the Supreme Court noted:

"In drafting MCL 500.3105(1); MSA 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 MCL 500.3105(1); MSA 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." 425 Mich 659-660.

An assault by an armed assailant upon the driver of a car is generally not the type of conduct that is reasonably identifiable with the use of an automobile, O'Key v State Farm Mutual Automobile Ins Co, 89 Mich App 526; 280 NW2d 583 (1979), lv den, 406 Mich 1014 (1979); DAIIE v Higgenbotham, 95 Mich App 213; 290 NW2d 414 (1980); Hamka v Automobile Club of Michigan, 89 Mich App 644; 280 NW2d 512 (1979); Ciaramitaro v State Farm Ins Co, 107 Mich App 68; 308 NW2d 661 (1981); lv den 413 Mich 861

(1982); Shaw v Allstate Ins Co, 141 Mich App 331; 367 NW2d 388 (1985); Thornton, supra, 646. However, when an assault is directed at the vehicle itself, rather than the driver, the causal relationship is sufficient for liability, Mann v DAIIE, 111 Mich App 637; 314 NW2d 719 (1981) lv den 414 Mich 903 (1982); Saunders v DAIIE, 123 Mich App 570; 332 NW2d 613 (1983). In such a case, the automobile is not merely the situs of the injury, and there is a direct relation between the functional character of the motor vehicle and the injuries. See Thornton, supra, 660.

In this case, plaintiff has presented evidence indicating that the assault was directed not at him, but at his automobile. If that is so, defendant may be liable to him for his injuries. Because a material factual issue was presented, we reverse the trial court's grant of defendant's motion for summary judgment and affirm the trial court's denial of plaintiff's motion for summary judgment.

Affirmed in part; reversed in part.

/s/ Roman S. Gibbs  
/s/ Cynthia D. Stephens

Judge Bronson not participating.