STATE OF MICHIGAN

COURT OF APPEALS

OCT 20 1987

GARY McFADDEN,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

FOR PUBLICATION

No. 102286
(On Remand)

BEFORE: H. Hood, P.J., J. H. Gillis and D. H. Sawyer, JJ.

PER CURIAM

This case, originally published at 155 Mich App 266; 399 NW2d 58 (1986), comes to us on remand from the Supreme Court, the Court ordering us to reconsider our prior opinion in light of Bialochowski v Cross Concrete Pumping Co, 428 Mich 219; ____ NW2d ____ (1987).

The facts are set forth in our prior opinion. We held that the crane on which plaintiff was working when he was injured was not a motor vehicle within the meaning of § 3101(2)(c) of Michigan's no-fault act, MCL 500.3101(2)(c); MSA 24.1301(2)(c), because at the time of plaintiff's injuries, it was not in its highway mode. McFadden v Allstate Ins Co, 155 Mich App 266, 270, 273; 399 NW2d 58 (1986). In addition, we held that, even if the crane was a motor vehicle, no-fault personal protection insurance benefits were not payable because the injury did not arise out of the use of the crane as a motor vehicle within the meaning of § 3105(1) of the act, MCL 500.3105(1); MSA 24.13105(1). Id., 273. Section 3105(1) states that benefits are payable for injury arising out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle."

Our decision was based in large part on Johnston v Hartford Ins Co, 131 Mich App 349; 346 NW2d 549, lv den 419 Mich 893 (1984). In Johnston, we held that although a crane virtually indistinguishable from the crane in the case at bar was a motor vehicle, personal protection insurance benefits were not payable since the injury did not arise out of the use of the crane as a motor vehicle. Johnston, supra, 361-62. The Johnston plaintiff was injured when climbing onto the cab right after the crane had lifted a steel beam onto the top of a building under construction. Id., 352. The crane was fully rigged, and in that condition, could not have been driven. Id.

In Bialochowski, the Court held that an injury which occurred when the boom of a cement truck collapsed upon the plaintiff did arise out of the use of a motor vehicle as a motor vehicle. Bialochowski, supra, 229. The truck was parked and stabilized at the time, and was pumping concrete through the boom. Id., 223. More importantly, the Court stated that the Johnston panel interpreted the phrase "use of a motor vehicle as a motor vehicle" too narrowly. Id., 228. The Court stated:

> "Second, and more importantly, we believe that the Court of Appeals in Johnston interpreted the statutory phrase 'use of a motor vehicle as a motor vehicle' contained in §3105 too narrowly. The no-fault act is remedial in nature, as evidenced by the fact that the act 'was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or 'fault') liability system.' The no-fault act was designed 'to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses.' In exchange for a more certain recovery under the no-fault act, an injured person's right to recover damages from a negligent owner or operator of a motor vehicle in a tort action is limited. This remedial nature of the no-fault act would be advanced by broadly construing its provisions to effectuate coverage.
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> "Applying a broad remedial interpretation to the phrase 'use of a motor vehicle as a motor vehicle,' it becomes clear that it is not limited to normal vehicular movement on a highway. Motor vehicles are designed and used for many different purposes. The truck involved in this case is a cement truck capable of pouring cement at elevated levels. Certainly one of the intended uses of this motor vehicle (a motor vehicle under the no-fault act) is to pump cement. The accident occurred while this vehicle was being used for its intented [sic] purpose. We, hold that the phrase 'use of a motor vehicle as a motor vehicle' includes this use." Id., 228-29 (footnotes omitted).

Thus, the Court stated that a vehicle does not have to be traveling at the time of the accident for personal protection no-fault benefits to be payable pursuant to § 3105(1). As long as the vehicle is being used for one of its intended purposes, the statutory requirement is met.

Applying Bialochowski to the instant case, we now believe that plaintiff's injury, did arise out of the use of the crane as a motor vehicle. Just before plaintiff's injury, the crane had finished its "pick". The outriggers were withdrawn, the boom locked in place, and the crane was driven 100 yards across a road to ready the crane for highway travel. The only other step necessary before the crane was ready for highway travel was removal of the counterweights. It was during removal of the counterweights that plaintiff was injured. We believe that, because the crane had been driven 100 yards and was about to be driven on the highway, the injury arose out of the use of the crane as a motor vehicle. The crane was not in an immobile state performing a "pick" as in Johnston. Rather, the crane was traveling, and was stopped only to remove the counterweights. Thus, the injury arose out of the "use of a motor vehicle as a motor vehicle."

Since we now affirm the trial court, we must address defendant's second issue. Defendant claims that pursuant to MCL 500.3109(1); MSA 24.13109(1), it is entitled to set off all payments for medical expenses which Transamerica Insurance Company, plaintiff's employer's workers' compensation carrier, would have made absent the redemption agreement.

MCL 500.3109(1); MSA 24.13109(1) states:

"Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."

After his accident, plaintiff was paid $22,000 in workers' compensation benefits by Transamerica. In his claim against defendant for no-fault benefits, plaintiff sought

$12,452.27 in work loss and $2,923.00 for chiropractic treatment rendered. On July 8, 1983, plaintiff redeemed further workers' compensation payments for $8,000. In exchange, Transamerica agreed to waive its lien on any recovery made by plaintiff in plaintiiff's action against Ford Motor Company, Manitowac Company and Gale Electric Company.

There has previously been a conflict in this Court as to whether, when the plaintiff redeems his workers' compensation claim, a no-fault insurer may set off only the actual redemption amount, or may set off the total amount which would have been paid by the workers' compensation insurer absent the redemption. Cf. Thacker v DAIIE, 114 Mich App 374; 319 NW2d 349 (1982), lv den 419 Mich 875 (1984); James v Allstate Ins Co, 137 Mich App 222; 358 NW2d 1, lv den 419 Mich App 946 (1984); and Deppmeier v Associated Truck Lines, Inc, 143 Mich App 244; 372 NW2d 521 (1984) (no-fault insurer not limited to amount of redemption, but entitled to set off the entire amount the workers' compensation insurer would have paid) with Gregory v Transamerica Ins Co, 139 Mich 327; 367 NW2d 268 (1984), rev'd 425 Mich 625 (1986) and Divito v Transamerica Corp, 141 Mich App 29; 366 NW2d 231 (1985), vacated 426 Mich 868 (1986) (setoff limited to amount of redemption agreement). The Michigan Supreme Court has recently resolved this conflict in Gregory v Transamerica Ins Co, 425 Mich 625; 391 NW2d 312 (1986) by holding that setoff is allowed for the amount the workers' compensation carrier would have paid absent the redemption. The Court relied partially on Moore v Travelers Insurance Co, 475 F Supp 891 (ED Mich, 1979), which had also taken that position. Moore also made it clear that workers' compensation payments should only be offset to the extent that they are duplicative of the no-fault benefits sought. Thus, in Moore, the court held that no offset against the plaintiff's claimed wage loss could be made for any medical payment made by the employer's insurance company, and that, in regard to wage

loss, the benefits, to be duplicative, must be for the same time period. Moore, supra, 894.

In the instant case, defendant requests only that the trial court's award of duplicative medical benefits be reversed. Apparently, defendant is requesting us only to reverse the trial court's award of $2,923 for chiropractic treatment. Defendant does not contest the trial court's award of $12,452.27 in work loss. We agree that, under Gregory, defendant is entitled to set off the $2,923 if this is a payment that would have been made by Transamerica absent the redemption agreement. Since we are unable to determine from the record whether Transamerica would have had to make the payment, we remand this case to the trial court for an evidentiary hearing on this point. If the court finds that Transamerica would have had to make this payment, and that thus, the award is duplicative, defendant shall not be liable for it. If the court finds that Transamerica would not have had to make the payment, defendant shall be liable for it.

Remanded. We do not retain jurisdiction.

/s/ Harold Hood
/s/ John H. Gillis
/s/ David H. Sawyer