STATE OF MICHIGAN

COURT OF APPEALS

WESTCHESTER FIRE INSURANCE COMPANY,

Plaintiff-Appellant,

v No. 97608

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee,

and

WILLIAM JONES,

Defendant.

Before: J.H. Gillis, P.J., and D.E. Holbrook, Jr., and S.N. Andrews,* JJ.

PER CURIAM

Plaintiff-appellant Westchester Fire Insurance Company appeals from the trial court's order granting defendant-appellee's motion for summary disposition on the ground that the motor vehicle, which allegedly caused personal property damage, was not being used as a motor vehicle at the time plaintiff's insured's property was destroyed. We reverse.

Defendant William Jones loaned his 1926 Studebaker to Paul Trabulsy, manager of Gardner-White Furniture store in Livonia, to use for advertising purposes. The Studebaker was parked in front of the furniture store and had a sign on it which read "Old Time Prices." Balloons were also attached to the Studebaker. Each night, Trabulsy drove the Studebaker through the parking lot into the furniture warehouse. Trabulsy then disconnected certain parts of the engine, including the positive battery cable, pursuant to Jones' instructions. Plaintiff alleges that thereafter the battery cable arced and ignited fuel which had leaked from the Studebaker. As a result, the furniture warehouse and its contents were damaged. Plaintiff, Gardner-White's fire insurer, paid for the damage and, then, filed the

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

present suit as Gardner-White's assignee. Plaintiff settled with defendant Jones. Count II of plaintiff's complaint alleged that the property damage to the warehouse and its contents arose out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle and, therefore, Allstate was liable under Michigan's no-fault act. MCL 500.3121; MSA 24.13121.

Allstate answered that plaintiff's injuries did not arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. On July 3, 1986, Allstate moved for partial summary disposition, claiming that the Studebaker was used for advertising purposes only and, therefore, was not being used as a motor vehicle. Plaintiff answered that, although the Studebaker was being used for advertising purposes, it was still a fully operational motor vehicle which had been driven into the warehouse and, subsequently, started a fire.

On August 1, 1986, the trial court heard plaintiff's motion. The court held that the Studebaker "was not being used 'as a motor vehicle' 53105 & 53121 [MCL 500.3105 and 500.3121; MSA 24.13105 and 24.13121]." Apparently, the court believed that because the Studebaker was driven a few feet on the furniture store's private parking lot and was not used for transportation, it had no relationship to the roadway and, therefore, was not being used as a motor vehicle.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. Morganroth v Whitall, 161 Mich App 785, 788; ___ NW2d ___ (1987). In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence. Id. See also MCR 2.116(G)(5). The nonmoving party is given the benefit of any reasonable doubt and this Court is liberal in finding a genuine issue of material fact. Id.

MCL 500.3121(1); MSA 24.13121(1) provides:

"Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property

arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125 and 3127." (Footnote omitted.)

MCL 500.3123(1); MSA 24.13123(1) provides:

"Damage to the following kinds of property is excluded from property protection insurance benefits:

"(a) Vehicles and their contents, including trailers, operated or designed for operation upon a public highway by power other than muscular power, unless the vehicle is parked in a manner as not to cause unreasonable risk of the damage which occurred.

"(b) Property owned by a person named in a property protection insurance policy, the person's spouse or a relative of either domiciled in the same household, if the person named, the person's spouse, or the relative was the owner, registrant, or operator of a vehicle involved in the motor vehicle accident out of which the property damage arose."

In Miller v Auto-Owners Ins Co, 411 Mich 633; 309 NW2d 544 (1981), the issue was whether a person, who had suffered bodily injury while maintaining his motor vehicle, was entitled to recover under the no-fault act. MCL 500.3105(1); MSA 24.13105(1) allowed a person to recover for accidental bodily injury arising out of the maintenance of a motor vehicle as a motor vehicle; however, MCL 500.3106; MSA 24.13106 only allowed recovery for such injuries which involved parked vehicles in three specific situations. None of these situations involved maintenance. Our Supreme Court resolved the conflict between these two statutory sections by discussing the policies behind each. The Court first concluded that MCL 500.3105(1); MSA 24.13105(1) was intended to provide compensation for injuries incurred in the course of repairing a motor vehicle. The Court then held:

"The policy underlying the parking exclusion is not so obvious, but once discerned, is comparably definite. Injuries involving parked vehicles do not normally involve the vehicle as a motor vehicle. Injuries involving parked vehicles typically involve the vehicle in much the same way as any other stationary object (such as a tree, signpost or boulder) would be involved. There is nothing about a parked vehicle as a motor vehicle that would bear on the accident.

"The stated exceptions to the parking exclusion clarify and reinforce this construction of the exclusion. Each exception pertains to injuries related to the character of a parked vehicle as a motor vehicle--characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents.

* * *

"Each of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle. The underlying policy of the parking exclusion is that, except in three general types of situations, a parked car is not involved in an accident as a motor vehicle. It is therefore inappropriate to compensate injuries arising from its nonvehicular involvement in an accident with a system designed to compensate injuries involving motor vehicles as motor vehicles." Miller, supra, 639-641. (Emphasis in original.)

In Miller, supra, 639-640 n 1, the Court noted that MCL 500.3123(1)(a); MSA 24.13123(1)(a) excludes property protection benefits for a vehicle unless it is parked in a manner so as not to cause an unreasonable risk of injury and, therefore, a properly parked vehicle is "treated as non-vehicular property for purposes of paying property protection benefits." The Court then held that the purposes of both sections required that an injury incurred as the result of maintaining an automobile be compensated because it involved the motor vehicle as a motor vehicle, regardless of the fact that it was parked.

In Heard v State Farm Mutual Automobile Ins Co, 414 Mich 139; 324 NW2d 1 (1982), reh den 414 Mich 1111 (1982), the plaintiff was injured when he was pumping gasoline into his parked vehicle and a moving vehicle struck him, trapping him between the two vehicles. The plaintiff was uninsured and sought to recover from the no-fault insurer of the other vehicle. An uninsured motorist is not entitled to benefits for accidental bodily injury if he is the owner of an uninsured motor vehicle involved in an accident. Our Supreme Court held that a parked vehicle is not involved in an accident unless one of the exceptions enumerated in the parked vehicle exclusion is applicable. The Court noted that that exclusion spelled out when a parked vehicle was deemed to be used as a motor vehicle. The Court held that the plaintiff's vehicle was not in use as a motor vehicle; instead, it was like any other stationary roadside object which can be involved in vehicle accidents. Heard, supra, 145. The Court again noted that a parked vehicle is not deemed

to be in use as a motor vehicle and, for purposes of the no-fault act, it is like any other stationary object.

In discussing MCL 500.3123(1)(a) and (b); MSA 24.13123(a) and (b), the Court held:

"A no-fault insurer is not required to pay property protection benefits for damage to a motor vehicle or its contents [because both insureds are expected to purchase their own collision insurance.] Nor is it required to pay such benefits for personalty owned by a person covered by a no-fault policy in respect to an owned or operated 'vehicle involved in the motor vehicle accident out of which the property damage arose.' Nevertheless, the no-fault insurer of a moving vehicle that strikes a parked vehicle is subject to liability for damage to contents as well as for damage to the vehicle.

"Reading the two subdivisions together, a parked vehicle is not 'involved in the motor vehicle accident out of which the property damage arose.' If a parked vehicle were held to be involved in a motor vehicle accident, the operative effect of 'and their contents' (§ 3123[1][a]) would be largely eliminated because, under § 3123(1)(b), benefits are not payable for personalty (contents) located in an involved vehicle owned or operated by a person (or family members domiciled in his household) covered by no-fault insurance. The incongruous result of such a construction would be that while the insured owner of a parked vehicle is entitled to recover (without regard to fault) for loss of the vehicle, neither he nor any family member domiciled in his household could recover for loss of the contents of the vehicle, and a non-family member alone could recover (without regard to fault) for contents left in the parked vehicle." Heard, supra, 151-152.

In Michigan Mutual Ins Co v Carson City Texaco, Inc, 421 Mich 144; 365 NW2d 89 (1984), reh den 421 Mich 1202 (1985), the plaintiff, as subrogee of its insured, sought reimbursement of benefits paid to its insured for damages to its vehicle repair facilities as a result of a fire which had occurred while it was repairing a heating oil truck owned by the defendant. The defendant's no-fault insurer was State Farm. Consistent with its prior holding in Miller, supra, our Supreme Court held that State Farm was required to pay no-fault insurance benefits pursuant to MCL 500.3121; MSA 24.13121 because the vehicle was being maintained when the property damage occurred. The Court also rejected State Farm's argument that the calibration of the fuel delivery meter did not constitute maintenance of the truck as a motor vehicle. The Court held:

"When a specially equipped motor vehicle is brought in for maintenance service and work is being performed on it, it is of little consequence which part is being serviced. Whether the

maintenance work is concerned with its motor, drive train, radio, heater, oil delivery equipment, upholstery or other part of the vehicle, the Michigan no-fault act contemplates coverage for damages arising out of such maintenance." Michigan Mutual Ins Co, supra, 149-150.

Here, the Studebaker was used for advertising purposes and was driven before the accident; however, at the time of the injury, it was parked. A parked vehicle is treated a non-vehicular property under the no-fault act unless the parking exclusion applies, the injury occurs while the vehicle is being maintained or the injury results from the parked vehicle's character as a motor vehicle. Michigan Mutual Ins Co, supra; Heard, supra; Miller, supra. The parking exclusion does not apply because this case involves property damage and not bodily injury. MCL 500.3106; MSA 24.13106.

On appeal, plaintiff claims that Trabulsy had to disconnect the battery cable in order to turn off the Studebaker. Although our courts have broadly defined maintenance, we cannot see how Trabulsy's action maintained the vehicle. But see Wagner v Michigan Mutual Ins Co (On Rehearing), 135 Mich App 767; 356 NW2d 262 (1984), lv den 422 Mich 940 (1985), where this Court held that the plaintiff-insured was entitled to no-fault benefits because he was maintaining his vehicle when he tried to start his semi-tractor trailer by placing a small charcoal fire underneath it to warm the engine oil so that it would start more readily in the cold. In fact, we agree with defendant that plaintiff's real claim is that Trabulsy's lack of maintenance resulted in the fire.

Nonetheless, we hold that, if the fire resulted from Trabulsy's act of disconnecting the battery cable to stop the Studebaker and the battery cable arced, igniting fuel which had leaked from the Studebaker, plaintiff's insured's injuries would have arisen from the Studebaker's character as a motor vehicle. See and compare Gajewski v Auto-Owners Ins Co, 112 Mich App 59; 314 NW2d 799 (1981), rev'd 414 Mich 968 (1982), where our Supreme

Court adopted Judge Cynar's dissenting opinion which held that, where the plaintiff was injured when he turned the ignition key and thereby detonated a bomb attached to the vehicle, he was entitled to no-fault benefits because turning the ignition key was the normal manner of starting the vehicle. Thus, plaintiff would be entitled to no-fault benefits under MCL 500.3121; MSA 24.13121 and, therefore, the trial court improperly granted defendant's motion for summary disposition.

Reversed.

/s/ John H. Gillis
/s/ Donald E. Holbrook, Jr.
/s/ Steven N. Andrews