STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK C. SCHROEDER, Individually and as Next Friend of LAURA SCHROEDER and JOELLE SCHROEDER,

Plaintiff-Appellant,

v No. 92839

FARMERS INSURANCE EXCHANGE,

Defendant-Appellee.

BEFORE: R. S. Gribbs, P.J., and D. E. Holbrook, Jr. and N. J. Lambros*, JJ.

PER CURIAM

Plaintiff appeals from the circuit court order, which denied his motion to vacate an arbitration award and confirmed the same award. The arbitration resulted in a determination that the liability of defendant, plaintiff's automobile insurance carrier, was limited to $10,000 for a claim made by plaintiff pursuant to the uninsured motorists coverage of his policy. We affirm.

Plaintiff sustained personal injuries in an automobile accident. The liability insurer of the other party to the collision paid plaintiff $20,000, which was the full amount of coverage afforded by that policy's limits. Since this amount was insufficient to fully compensate plaintiff's losses, plaintiff sought recovery against the $30,000 limits of uninsured motorists coverage provided by his own policy. Defendant asserted a setoff for $20,000 against the $30,000 uninsured motorists coverage and remitted the amount of $10,000.

The issue was submitted to arbitration. The neutral arbitrator construed the policy to afford defendant a $20,000 setoff and determined that defendant's liability to plaintiff was $10,000.

It may have been unclear whether the uninsured motorists provision contained in the original policy issued to

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the insured plaintiff afforded benefits in the event of an accident with a vehicle carrying residual liability coverage in an amount less than the limits of the uninsured motorists coverage. Generally, uninsured coverage, as distinguished from underinsured coverage, is applicable only when the insured is involved in an accident with a driver having no residual liability coverage. See St Bernard v DAIIE, 134 Mich App 178; 350 NW2d 847 (1984). However, any ambiguity in this respect was resolved by the addition of the following endorsement to plaintiff's policy, which afforded plaintiff underinsured motorists coverage:

> "The definition of 'Uninsured Motor Vehicle' under the Uninsured Motorist Coverage is amended to include a motor vehicle where there is bodily injury liability insurance or an applicable bond at the time of accident, but in amounts less than the limits carried by the insured under Uninsured Motorists Coverage.
>
> "**Limits of Liability**
>
> "The amount of bodily injury coverage provided under the Uninsured Motorists Coverage of this policy shall be reduced by the amount of any other bodily injury coverage available to any party held to be liable for the occurrence."

Plaintiff argues that the reduction for the $20,000 received from the liability insurer of the third-party tortfeasor should be applied to plaintiff's aggregate damages for which the third party is liable, not to the policy limits of plaintiff's uninsured/underinsured coverage. If plaintiff's contention is correct, then plaintiff would be entitled to the full $30,000, assuming that damages for his losses equaled or exceeded the combined coverages of $20,000 from the liability insurer and $30,000 from his own insurer. We think this argument is a strained reading of the terms of the endorsement, which deducts the setoff directly from "[t]he amount of bodily injury coverage provided under the Uninsured Motorists Coverage of this policy." Plaintiff's reliance on Michigan Mutual Liability Co v Karsten, 13 Mich App 46, 50-52; 163 NW2d 670 (1968), lv den 381 Mich 792 (1968), is misplaced because the setoff provision in that case was deemed ambiguous. The setoff there applied to "[a]ny amount payable" under the uninsured motorists provision, which this

was deemed ambiguous. The setoff there applied to "[a]ny amount payable" under the uninsured motorists provision, which this Court construed as the total amount of damages sustained by the plaintiff. No such ambiguity exists here, where the endorsement designates defendant's liability as the excess of the $30,000 underinsured motorists coverage over the amount of coverage available from the third party. Likewise, the explicit terms of this provision preclude the reasonableness of any contrary expectation on the part of the insured. Auto-Owners Ins Co v Lydon, 149 Mich App 643; 386 NW2d 628 (1986), lv den 428 Mich 886 (1987)("Since uninsured motorist coverage substitutes for residual liability coverage, an insurance contract may provide that benefits paid under one may be set off against benefits payable under the other." Id., pp 650-651.). Cf., Bradley v Mid-Century Ins Co, 409 Mich 1, 60-66; 294 NW2d 141 (1980).

We conclude that the arbitrator properly construed the policy and its endorsement and correctly decided that defendant was entitled to set off the $20,000 paid by the liability insurer against the $30,000 uninsured motorists coverage. Therefore, it cannot be said that the arbitrator committed a material error in contravention of controlling legal principles or exceeded his power by refusing to enforce the insurance contract. DAIIE v Gavin, 416 Mich 407; 331 NW2d 418 (1982); St Bernard, supra, pp 183-185, 189. In view of our decision, we need not express an opinion on defendant's alternative contention that the procedure used in the circuit court did not conform to MCR 3.602.

Affirmed.

/s/ R. S. Gribbs
/s/ D. E. Holbrook, Jr.
/s/ N. J. Lambros

STATE OF MICHIGAN

COURT OF APPEALS

MAR 09 1988

JOSEPH LYNN WRIGHT,

Plaintiff-Appellee,

v

No. 97427

FOR PUBLICATION

LEAGUE GENERAL INSURANCE COMPANY, a Michigan Insurance Corporation,

Defendant-Appellant,

and

THE DEPARTMENT OF STATE ASSIGNED CLAIMS FACILITY,

Defendant-Appellee.

Before: H. Hood, P.J., R.M. Maher and J.B. Sullivan, JJ.

PER CURIAM

Plaintiff commenced this action for personal protection insurance benefits (PIP) against League General Insurance Company, Allstate Insurance Company and the Assigned Claims Facility. The parties filed motions for summary disposition pursuant to MCR 2.116(C)(10). League appeals by right from the circuit court's order entering judgment in the amount of $7,256.35 against League and awarding plaintiff interest and reasonable attorney fees. We reverse.

The undisputed facts are that plaintiff was driving his uninsured vehicle when it ran out of gas. While plaintiff was coasting on the road, an oil tanker was in the same lane directly behind plaintiff's car. The driver of the tanker was aware that plaintiff was slowing down and had on his four-way flashers. Both vehicles stopped for a red light. Plaintiff exited his vehicle for the purpose of pushing it off the road and onto a side street. Plaintiff then began to push the disabled vehicle. When the traffic light turned green, the oil tanker accelerated and struck the rear end of plaintiff's vehicle which in turn

knocked plaintiff to the ground. Upon impact, plaintiff's vehicle was pushed down the street. The tanker then drove over plaintiff's right leg.

Plaintiff sought personal protection insurance benefits from League under an automobile insurance policy issued to plaintiff's father-in-law which was in effect at the time of the accident.[1] Plaintiff then commenced the instant action against League, Allstate Insurance,[2] and the Assigned Claims Facility, defendants herein, seeking payment of personal protection benefits. All parties, except the Assigned Claims Facility, filed motions for summary disposition pursuant to MCR 2.116(C)(10). League premised its motion on MCL 500.3113(b); MSA 24.13113(b), claiming that plaintiff was precluded from receiving personal protection insurance benefits because his uninsured vehicle was "involved in the accident" that injured him.

Following a hearing on the motions, the court granted both plaintiff's and Allstate's motions. League was found to be the priority insurer since plaintiff was a resident relative in his father-in-law's household. The court then denied League's motion for summary judgment, concluding that it would not determine as a matter of law that the plaintiff's car was parked in such a way as to cause an unreasonable risk or that plaintiff was not entitled to no-fault benefits.

Plaintiff then filed a motion for summary disposition requesting that the lower court enter a judgment in the amount of PIP benefits due plus penalty interest, MCL 500.3142(2); MSA 24.13142 and attorney fees, MCL 500.3148; MSA 24.13148.

Following a hearing, the court granted plaintiff's motion for summary judgment, including plaintiff's request for interest and attorney fees.

Defendant Assigned Claims Facility has filed a brief in support of the position taken by League and does not participate in all issues.

On appeal, League argues that plaintiff's uninsured vehicle was "involved in the accident" within the meaning of MCL 500.3113(b); MSA 24.13113(b), thereby precluding him from receiving personal protection insurance benefits. In addition, League contends that the trial court erred in awarding attorney fees to plaintiff pursuant to MCL 500.3148(1); MSA 24.13148(1). We agree with defendant in both respects.

The issue to be resolved in this case is whether plaintiff's uninsured motor vehicle was "involved in the accident" within the meaning of MCL 500.3113(b); MSA 24.13113(b), thereby precluding plaintiff from obtaining PIP benefits from defendant. We hold that plaintiff's uninsured vehicle was "involved in the accident." Thus, plaintiff, as an uninsured motorist, was not entitled to PIP benefits. MCL 500.3113(b); MSA 24.13113(b).

Michigan's no-fault insurance act requires all owners of motor vehicles to maintain personal protection insurance, property protection insurance and residual liability insurance. MCL 500.3101(1); MSA 24.13101(1). The act provides that an insurer is liable to pay personal protection insurance 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."[3] MCL 500.3105(1); MSA 24.13105(1). In Shavers v Attorney General, 402 Mich 554, 578-579; 267 NW2d 72 (1978), cert den sub nom Allstate Ins Co v Kelley, 442 US 934 (1979) our Supreme Court stated:

> "The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses."

The priority provisions of the act are designed to help implement these goals. Royal Globe Ins v Frankenmuth, 419 Mich 565, 575; 357 NW2d 652 (1984). The no-fault act is remedial in nature and must be liberally construed in favor of persons intended to benefit thereby. Gobler v Auto-Owners Ins Co, 428 Mich 51, 61; 604 NW2d 199 (1987).

As a corollary, the act provides for certain exclusions for those who are uninsured. MCL 500.3113; MSA 24.13113 sets forth three circumstances whereby a person would not be entitled to be paid personal protection insurance benefits for accidental bodily injury. At issue is subsection (b):

> "A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
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> * * *
>
> "(b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by * * * section 3101 or 3103 was not in effect."

This provision reflects a legislative policy to deny benefits to those whose uninsured vehicles are involved in accidents. Lewis v Farmers Ins Group, 154 Mich App 324, 327; 397 NW2d 297 (1986) citing Belcher v Aetna Casualty & Surety Co, 409 Mich 231; 293 NW2d 594 (1980). However, the disqualification of an uninsured owner is not absolute. Heard v State Farm Ins, 414 Mich 139, 145; 324 NW2d 1 (1982), reh den 414 Mich 1111 (1980).

The act also provides a parked vehicle exception. A parked uninsured vehicle is like a tree or pole for purposes of the no-fault act and is, therefore, not "involved" in the accident for purposes of § 3113 unless one of the exceptions to the parked vehicle provision, § 3106, is applicable. Heard, supra at 144, 147-149. In Miller v Auto-Owners Ins Co, 411 Mich 633, 639-641; 309 NW2d 544 (1981), the Supreme Court stated the following regarding § 3106:

> "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, sign post 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 non-vehicular involvement in an accident within a system designed to compensate injuries involving motor vehicles as motor vehicles."

League argues that since plaintiff's vehicle was in use as a motor vehicle on the roadway, it had not attained a status akin to a stationary roadside object. League claims further that plaintiff cannot seriously argue that his vehicle was "parked" at the time of the accident since plaintiff's vehicle was actually moving on the roadway, albeit by virtue of plaintiff's pushing the vehicle.

We agree that under these facts plaintiff's car was not "parked," thus rendering § 3106 inapplicable. We conclude that logic dictates that a moving vehicle is not "parked," nor is it akin to stationary objects.[4]

Plaintiff does not dispute that he is the owner of the vehicle or that it is uninsured. Rather, he argues that his vehicle was not "involved in the accident" within the meaning of § 3113.

In Heard, supra, the Supreme Court wrestled with the meaning of the phrase, "involved in the accident" as set forth in § 3113. The Court concluded the meaning "cannot be determined by abstract reasoning or resort to dictionary definitions" but instead, depends on the meaning derived from the purpose and structure of the no-fault act. Heard, supra at 147.

Contrary to League's contention, the phrase "involved in the accident" should be consistently construed throughout the no-fault act, Dussia v Monroe Co Emp Ret Sys, 386 Mich 244, 248; 191 NW2d 307 (1971); City of Grand Rapids v Crocker, 219 Mich 178, 182-183; 188 NW 221 (1922), and conseguently, cases which

construe the phrase under §3115 of the act would be applicable to § 3113. In Stonewall Ins v Farmers Ins, 128 Mich App 307, 309; 340 NW2d 71 (1983), this Court construed this phrase within the meaning of § 3115(1) and quoted the trial court with approval:

> "[t]here has to be a link in the chain of circumstances that somehow has to be sort of an active link as opposed to a passive link. While it would not go so far as fault, there must be some sort of activity that somehow contributes in the happening of the accident." (Emphasis in original.)

See also Brasher v Auto Club Ins Ass'n, 152 Mich App 544; 394 NW2d 415 (1986); Bachman v Progressive Casualty Ins Co, 135 Mich App 641; 354 NW2d 292 (1984).

Plaintiff contends that his car did not contribute to the happening of the accident. Rather, the sole cause of his injury was oil tanker driver's inattentiveness. However, we believe that plaintiff's car was an "active link" in the chain of circumstances causing the oil tanker to drive over his leg. Plaintiff was operating his vehicle when it ran out of gas and stalled on the roadway. Plaintiff then began pushing his vehicle, which was wholly in the lane of traffic, while reaching in the driver's side window to steer. When his vehicle was rear-ended, the impact pushed the vehicle forward which knocked plaintiff away from the vehicle and onto the ground where the oil tanker ran over plaintiff's leg. We find that plaintiff's vehicle was "involved in the accident" and that such an interpretation gives effect to the intent of the legislature which is to deny benefits to those whose uninsured vehicles are involved in accidents. Lewis, supra; Browden v International Fidelity Ins Co, 413 Mich 603; 321 NW2d 668 (1982). Accordingly, we conclude that plaintiff is not entitled to personal protection insurance benefits because plaintiff's uninsured vehicle was "involved in the accident" that resulted in his bodily injury. MCL 500.3113(b); MSA 24.3113(b).

We also reverse the trial court's order awarding attorney fees to plaintiff. MCL 500.3148; MSA 24.13148. Section

3148 of the no-fault act permits a court to award attorney fees for unreasonable refusal or unreasonable delay in making payments. However, a refusal or delay by an insurer will not be found "unreasonable" within the meaning of § 3148 where the delay is the result of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. Gobler v Auto-Owners Ins Co, 428 Mich 51, 66; 404 NW2d 199 (1987); Kondratek v Auto Club, 163 Mich App 634, 638; ___ NW2d ___ (1987).

In view of our decision that plaintiff is not entitled to no-fault benefits, we conclude that the court's finding of unreasonable refusal or delay in payment is clearly erroneous. Kondratek, supra at 638. Accordingly, we reverse.

Reversed.

/s/ Harold Hood
/s/ Richard M. Maher
/s/ Joseph B. Sullivan

FOOTNOTES:

[1] Although initially disputed, the court subsequently determined that plaintiff was a resident relative in his father-in-laws household at the time of the accident.

[2] Allstate was the insurer of the oil tanker.

[3] If a person is a pedestrian, he is awarded personal protection insurance benefits pursuant to the priorities established in MCL 500.3115(1); MSA 24.13115(1).

[4] We disagree with plaintiff's argument that in order for a vehicle to be 'used as a motor vehicle', "the vehicle must be moving by power imparted from a source other than muscular power." Plaintiff's construction of MCL 500.3101(2)(c); MSA 24.13101(2)(c), is incorrect. Since plaintiff's vehicle was designed for operation upon a highway by power other than muscular power and had more than two wheels, it is irrelevant under § 3101(2)(c) that he was pushing the vehicle. Plaintiff's vehicle is properly considered a motor vehicle under the act.