STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

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DONALD P. PARTLOW,

Plaintiff,

vs. File No. 87-22733-CK

AUTO OWNERS INSURANCE COMPANY, DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE and STATE OF MICHIGAN, DEPT. OF LICENSING & REGULATIONS INSURANCE BUREAU, ASSIGNED CLAIMS FACILITY,

Defendants.

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OPINION

Plaintiff files suit against defendants Auto-Owners Insurance Company and DAIIE seeking no-fault benefits. At the date of trial, both defendants filed motions for summary disposition pursuant to MCR 2.116 (c) (10), alleging no material issue of fact and that the moving party was entitled to judgment as a matter of law.

On April 28, 1986, Reginald Iervolina was attempting to pull out a stuck boom truck by pulling it with a chain attached to a dump truck he was driving. Plaintiff was operating a motorcycle and struck the dump truck as it was parked in a public roadway preparing to tow the stuck boom crane. Iervolina, the owner of the boom truck, had no insurance on the vehicle. The dump truck had no insurance coverage, either. Auto-Owners was the insurer of Iervolina's personal automobile. Plaintiff had no no-fault policy on his motorcycle, and DAIIE was the no-fault insurer of his personal automobile.

Auto-Owners first contends that it is not liable to pay no-fault benefits because Iervolina was not an "operator" of the dump truck. The Court holds that the applicable priority statute is MCL 500.3114 (5), MSA 24.13114 (5). Subsection (a) of this statute is inapplicable because both the dump truck and boom truck were uninsured at the time of the accident. Subsection (b) is applicable. It states that next in priority in motorcycle accident

claims is "[T] he insurer of the operator of the motor vehicle involved in the accident." MCL 257.36, MSA 9.1836 defines "operator" of a motc "every person, other than a chauffeur, who is in actual physical motor vehicle upon a highway." Auto-Owners argues that because had gotten out of the dump truck, parked it, and was standing be truck and boom truck moving a rock and disengaging a tow chain w accident occurred, he was not an "operator" within the meaning c However, the Court holds that Mr. Iervolina was an "operator" of truck while he temporarily parked it across a public roadway and a tow chain attached to the dump truck and the boom truck he war While there is no appellate case directly on point, the Court ap analogy the liberal construction of the statute to somewhat anal in Yates v. Hawkeye-Security Ins., 157 Mich App 711 (1987) and I Liability Co. v. Ohio Casualty Ins. Co., 123 Mich App 688 (1983 holds that one does not actually have to be behind the wheel of be in "actual physical control" of the vehicle. In the case at Iervolina was within a few feet of the dump truck, had put on tl lights of the dump truck, and was in the act of preparing that immediate towing purposes when the accident occurred in a publi(Thus, he was an operator of the dump truck at the time of the a(had not temporarily abandoned his actual physical control of th(when the accident occurred.

Auto-Owners also argues that its no-fault policy issued Iervolina's private automobile is not liable for payment of no- because it contains a "business-use" exclusion, and Mr. Iervoli in a business activity when he attempted to tow the boom truck truck. No briefs on this point were submitted by DAIIE or Plai review of the policy reveals that the first two pages of the co entitled "Michigan No-Fault Insurance Endorsement". A subhead of this endorsement is entitled "Exclusions". No where under t "Exclusion" section is there any exclusion of No-Fault benefits "business use" purpose. The "business use" exclusion appears o two-page "Michigan No-Fault Endorsement" at Section 4 (b) on Pa main body of the contract. Section 4 (b) does not even appear

ing suggesting "Exclusions"; rather, it appears in small print under a sub-heading entitled "Drive Other Cars". The Court holds that an ambiguity exists as to whether Section (4) (b) applies to the No-Fault Endorsement, or whether the exclusions of coverage spelled out on the No-Fault Endorsement are the only exclusions applicable to coverage mandated under the Michigan No-Fault Act. Because the scope and nature of the exclusionary language of Section 4 (b) is unclear and ambiguous, it is unenforceable pursuant to the rule in **Powers v. DAIIE,** 427 Mich 602 (1986).

Thus, the Court grants defendant DAIIE'S motion for summary disposition, denies defendant Auto-Owners' motion for summary disposition, and holds that defendant Auto-Owners is liable to pay no-fault benefits to plaintiff. Defendant Auto-Owners requested additional time to brief the issue as to penalty interest and actual attorney fees. Any party may file a motion and supporting briefs within 30 days as to an award or denial of penalty interest and reasonable attorney fees and the proper computation of any attorney fees which might be awarded.

Dated this 10 day of February, 1988.

James M. Graves, Jr.

James M. Graves, Jr., Circuit Judge

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