STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF SOCIAL SERVICES.

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

OCTOBER 17, 1988

No. 93421

Before: Cynar, P.J., and Beasley and K.B. Glaser, Jr.,* JJ.

K.B. GLASER, JR., J.

Plaintiff Department of Social Services as subrogee of Jackie Smith seeks to recover first party no-fault personal injury protection benefits arising out of an injury to Jackie Smith while he was operating a motorcycle. The stipulated facts submitted to the trial court are as follows:

> "On April 16, 1984, at approximately 12:40 P.M., Jackie Smith was operating his motorcycle, and Rosemarie Besant was operating an automobile insured by Defendant A.C.I.A. The Smith motorcycle and the Besant automobile were stopped, side by side in adjacent lanes, for a traffic light at an intersection. As the traffic light changed the Besant auto began to move forward slightly but the Smith motorcycle stalled. Mr. Smith immediately re-started his cycle but the throttle stuck and the cycle took off out of control. As the motorcycle proceeded into the intersection, it swerved toward the Besant vehicle in the adjacent lane, whereupon Mr. Smith, the cyclist, extended his leg and pushed off the left rear tire of the Besant vehicle. At that point the motorcycle swerved into the opposite direction, went up over the curve, and hit a brick wall. As the motorcycle had swerved away from the Besant auto and had travelled across the road at full throttle, Mr. Smith's feet were off the foot pegs of the motorcycle and he was hanging onto the handlebars. As a result of crashing into the brick wall, cyclist Smith sustained multiple severe injuries."

Plaintiff paid Jackie Smith's medical bills and seeks to recover them from defendant. Both parties moved for summary disposition pursuant to MCR 2.116(C)(10), alleging no genuine issue as to any material fact. The sole issue before the trial court was whether the Besant vehicle, insured by defendant, was "involved in the accident" such that Mr. Smith's injuries could be deemed to have "arisen out" of the operation of a motor vehicle pursuant to MCL 500.3105; MSA 24.13105. The trial court ruled there was a sufficient causal relationship and granted summary disposition to plaintiff. We affirm.

The statute in question reads in pertinent part as follows:

> "(1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily 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." MCL 500.3105; MSA 24.13105.

The Michigan Supreme Court in a case involving an assault in a taxicab construed the above statute as follows:

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

"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.

"The connection in this case between the debilitating injuries suffered by Mr. Thornton and the use of the taxicab as a motor vehicle is no more than incidental, fortuitous, or 'but for.' The motor vehicle was not the instrumentality of the injuries. Cf. Gajewski v Auto-Owners Ins Co, 414 Mich 968; 326 NW2d 825 (1982). The motor vehicle here was merely the situs of the armed robbery -- the injury could have occurred whether or not Mr. Thornton used a motor vehicle as a motor vehicle. Cf. Saunders v DAIIE, 123 Mich App 570; 332 NW2d 613 (19830, and Mann v DAIIE, 111 Mich App 637; 314 NW2d 719 (1981). The relation between the functional character of the motor vehicle and Mr. Thornton's injuries was not direct -- indeed, the relation is at most incidental." [Thornton v Allstate Ins Co, 425 Mich 643, 659-660; 391 NW2d 320 (1986). Emphasis in original.]

Defendant argues that the trial court in the instant case applied the wrong legal standard or test for determining motor vehicle "involvement." However, defendant also argues that if the correct standard had been applied, the stipulated facts of the instant case simply do not demonstrate a sufficient causal nexus between motorcyclist Smith's injuries and the Besant auto to qualify Mr. Smith for PIP coverage under the Besant vehicle's policy. We disagree.

Defendant bases the latter claim on an assertion that the motor vehicle must play an active (but not necessarily negligent), rather than merely passive, role in the accident in order to be deemed "involved." Defendant relies on Brasher v Auto Club Ins Ass'n, 152 Mich App 544; 393 NW2d 881 (1986); Bachman v Progressive Casualty Ins Co, 135 Mich App 641; 354 NW2d 292 (1984); Bradley v DAIIE, 130 Mich App 34; 343 NW2d 506 (1983); and Stonewall Ins Group v Farmers Ins Group, 128 Mich App 307; 340 NW2d 71 (1983). We, however, find Stonewall, Bachman, and Brasher distinguishable as cases in which the vehicle in question was stopped and did not play an "active" role as claimed by defendant.

In Stonewall, the vehicle in question was stopped waiting in a lawful position to turn. To avoid colliding with that vehicle, another car swerved sharply and hit a bicyclist. The panel in Stonewall held that the first vehicle was not involved in the accident between the second vehicle and the bicyclist within the meaning of the statute. In Bachman, the vehicle in question was also lawfully in position to turn when a motorcyclist collided with another vehicle, throwing the passenger from the motorcycle onto the subject auto. The Bachman Court held the subject auto to be only the situs of the injury and not "involved in the accident." In Brasher, a vehicle owned by Ellis was lawfully stopped waiting for a turn. Two other autos collided. One of them struck a pedestrian and the other vehicle hit the Ellis vehicle. This Court held that the Ellis vehicle was not "involved in the accident." The Brasher Court summarized these three cases as holding "there must be some activity with respect to the vehicle, which somehow contributes to the happening of the accident." Brasher, supra, p 546. [Emphasis added].

Bradley, on the other hand, supports plaintiff's position. Bradley was a case in which the plaintiff ran into a parked pickup truck. He was unable to avoid the truck because the defendant's vehicle was moving in the lane beside him. (The pickup truck was not alleged by either party to trigger the no-fault statute.) In finding a causal connection between the use of a motor vehicle and the plaintiff's injuries, the Bradley Court reasoned:

"The plaintiff was uncertain whether he first sped up or slowed down in order to switch lanes. This is not material in our view. The normal use of a motor vehicle, i.e., driving side by side with another vehicle, caused the plaintiff to react. Further, Bradley stated that he looked over his shoulder to see if he could switch lanes. It caused him to lose valuable time. Were Tefft's vehicle not in the position it was, the plaintiff would not have had to hesitate and look over his shoulder to see if he could switch lanes. And because Tefft's vehicle was proceeding normally through traffic, we do not feel it was fortuitous that the object which prevented the plaintiff from avoiding the accident was a motor vehicle." [Bradley v DAIIE, 130 Mich App 34, 43; 343 NW2d 506 (1983). Emphasis in original.]

While no iron-clad rule can be discerned as to what involvement is sufficient under MCL 500.3105; MSA 24.13105, some guidelines emerge from a reading of the cases.

First, it appears that a vehicle which is motionless in a lawful position is less likely to be considered involved.[1] Conversely, in view of the Thornton emphasis on the relation between an injury and the functional character of a motor vehicle, a moving vehicle is much more likely to be held to be involved in such injuries for purposes of the statute. Thornton, supra, pp 659-660. See also, Bramley v Citizens Ins Co of America, 113 Mich App 131; 317 NW2d 318 (1982).

In addition, in spite of the fact that no contact is necessary for such involvement in the accident (Bradley, supra), since Thornton emphasized that there was no direct relation between Thornton's injuries and the functional character of the motor vehicle in question, contact is much more likely to be held to result in involvement sufficient to trigger this statute. Indeed, it is difficult to conceive of a situation in which there is actual contact on a public highway between the injured party and/or his vehicle and a moving motor vehicle, which results in injury, that would not be sufficient for a "direct relation" between the injury and the functional character of the motor vehicle in view of present case law.[2]

Finally, it is clear that the injury must be foreseeably identified with the normal use, maintenance and ownership of the motor vehicle. Ricciuti v DAIIE, 101 Mich App 683; 300 NW2d 681 (1980); Kangas v Aetna Casualty & Surety Co, 64 Mich App 1, 17; 235 NW2d 42 (1975), lv den 395 Mich 787 (1975).

In this case, the Besant vehicle was being operated as a motor vehicle on the public highway. The movement of the automobile was one of the factors along with the movement of the motorcycle. The dynamics of the accident included the forces exerted by both vehicles -- the fact that they struck,[3] the angle and location at which they struck, and the course of the subsequent deflection which resulted in the injury. The relation between the functional character of the motor vehicle and Smith's injuries was direct. It was therefore more than incidental, fortuitous, or "but for." A collision between a motorcycle and an automobile while operating on a highway is clearly foreseeably identifiable with the normal use of a motor vehicle.

The trial judge correctly granted summary disposition to plaintiff.

Affirmed.

/s/ Kenneth B. Glaser, Jr.
/s/ William R. Beasley

[1]But see Jones v Allstate Ins Co, 161 Mich App 450, 455-460; 411 NW2d 457 (1987).

[2]One possibility might be where the injured party is fleeing on a motorcycle from a police cruiser if there is contact with the police cruiser. See Sanford v Ins Co of North American, 151 Mich App 747; 391 NW2d 473 (1986); Peck v Auto-Owners Ins Co, 112 Mich App 329, 334; 315 NW2d 586 (1982).

[3]As the dissent correctly notes, the vehicles themselves did not come in contact. However, the motorcycle rider was clearly on the moving motorcycle when he "pushed off."

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CYNAR, P.J. (dissenting).

I most respectfully dissent from the result reached in the majority opinion. There was no contact between the motorcycle and the Besant vehicle. Nor was there any indication that it would make any difference whether the Besant vehicle was stopped or moving in its own direction when the motorcyclist extended his leg and pushed off from the left rear tire of the Besant vehicle.

There was no more than "but for," incidental, or fortuitous connection between the injuries sustained by the motorcyclist and the "use of a motor vehicle as a motor vehicle." Thornton v Allstate Ins Co, 425 Mich 643; 391 NW2d 320 (1986). The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. Kangas v Aetna Casualty & Surety Co, 64 Mich App 1; 235 NW2d 42 (1975). In my opinion, reversal is appropriate.

/s/ Walter P. Cynar

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