STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

LARRY PARKER,

Plaintiff,

vs. File No: 87-23282-CK

AUTO CLUB INSURANCE ASSOCIATION,

Defendant.
_____/

Thomas J. Evans
400 Hackley Bank Building
Muskegon, MI 49440

William J. Hipkiss
297 Clay, Suite 106
Muskegon, MI 49440
_____/

TRIAL OPINION

Trial was held October 14, 1988, before this Court. Testimony was taken from Plaintiff Larry J. Parker, and his deposition was admitted, along with two exhibits indicating damages. Defendant offered only the deposition of Larry Parker taken at an earlier date, December 29, 1987.

The parties entered various stipulations, one of which is essential to the outcome of this case, that is, that if there was involvement of the Plaintiff's motorcycle with another vehicle, Plaintiff was entitled to insurance coverage and a judgment should be entered against Defendant. Conversely, if there was no "involvement" with another motor vehicle, coverage would not exceed, and judgment should enter for Defendant.

This Court finds that there was involvement with another motor vehicle and judgment should enter for Plaintiff.

BACKGROUND FACTS

An accident occurred August 12, 1987, at the point of exit on US 131 heading north from Grand Rapids where two lanes exit from US 131 onto what the Court understands to be I96, proceeding west to Muskegon. This highway section is also referred to as M296, but this Court believes that label is incorrect.

Plaintiff was proceeding northbound and was intending to take the exit to proceed to return to his home in Muskegon at approximately 10:00 p.m., when he was approaching the exit to go to I96, leaving US 131. At that juncture of the highway, there are four lanes of traffic and he was in the second lane from the lefthand side, which would then place him in the right lane of the two lanes exiting from US 131. Upon approaching the exit, he looked in his rearview mirrors (2), and his mirrors were dominated by the lights of a fast approaching vehicle. He had been traveling approximately 55 to 60 miles per hour in a speed limit zone zoned for 55 miles per hour traffic. He was slowing down to make the ~~corner~~ curve when he saw the lights in his rearview mirrors. He made a judgment that the car in his lane of traffic behind him was approaching so fast that it would hit him unless he moved into the lane to his left or the lane to the right. The lane to his left already had a car, and he was now approaching the point where the pavement split to allow the exiting traffic from I96.

Therefore, he decided to travel to the right, which forced him to get into the median area and reapproach US 131 in the lefthand lane of the two lane northbound traffic lane. He re-entered the lefthand northbound lane only to find another car approaching him rapidly from the rear in that lane, causing him to decide to leave the lefthand lane of traffic and reapproach the shoulder of the road. At this point he encountered loose gravel and an embankment which became steeper, and he attempted

to ride out the bide rather than jumping off. Upon doing so he struck a concrete culvert near the bottom of the embankment causing severe hip and arm injuries, a condition he suffers to this day. The injuries caused a permanent disability and a loss of his employment, which is uncontested.

LEGAL ISSUES AND DISCUSSION

THE ISSUE: Was there a casual connection between the use of a "vehicle" and the injury? Without getting into a description of the laws applicable, which are adequately set forth in Plaintiff's Brief, being MSA 24.13105(1) and MSA 24.13114, suffice it to say that both parties have stipulated to the legal issue involved in this case as to whether or not there was a sufficient nexus between the use of any vehicle and the injury.

Defendant relies on the Shinabarger v Citizens Insurance Co, 90 Mich App 307 (1979), wherein they were discussing the facts of the case as it related to the "use of an automobile". In the Shinabarger case, one person was handing a shotgun to another person during a deer shinning incident. The gun discharged inside the vehicle and Mr. Shinabarger was struck in the head and died. That case was remanded on the issue of whether the accident occurred during the loading and unloading of the passengers from the vehicle, but during the discussion they discussed the other issue as to whether or not liability could arise if the passengers had been simply in the car at the time the gun was passed from back to front seat. Defendant relies upon the citation which is quoted within the Shinabarger case, specifically as follows:

> 'Case law indicates that the injury need not be the proximate cause of "use" in the strict sense, but it cannot be extended to something distinctly remote. Each case turns on its precise individual facts. The question to be answered is whether the injury "originated from", "had its origin in", "grew out of" or "flowed from" the use of the vehicle.' (cited at pg 314, citation from Southeastern

Fidelity Insurance Co v Stevens, 236 SE 2d 550, at pg 551 (1977)).

However, the Shinabarger case continued with the following:

> Where the injury is entirely the result of an independent cause in no way related to the use of the vehicle, however, the fact that the vehicle is the site of the injury will not suffice to bring it within the policy coverage, ... (citations omitted). (pg 314)

This Court believes the Shinabarger is distinguishable on the facts because in that case, although there was a lingering factual question as to whether or not the acccident occurred during the loading and unloading process, during which liability might attach, the discussion as to the connection between the accident and the site of the car as the scene of the accident required some connective factual tissue to the injury itself.

This Court, therefore, feels that the case of Bromley v Citizens Insurance Co, 113 Mich App 131 (1982) is quite applicable to our factual circumstances. In Bromley plaintiff alleged an unidentified car crossed the centerline forcing him off the road, resulting in injuries. No contact occurred between the cycle and the car. The court held for Bromley stating the true issue was not whether contact occurred, but was rather:

> The property point of inquiry is whether or not the accident arose from the use of a motor vehicle. The fact that the car did not actually touch the motorcycle is irrelevant as long as the casual nexus between the accident and the car is established. (pg 134-135)

If Plaintiff could sustain the burden of proof that the phantom car existed and caused the accident, he has presented a claim upon which relief can be granted and summary judgment was improper as to this issue.

Applying the law above to the facts in this case, this Court specifically determines that such cars did exist, and whether or not the proximate locations or speeds of these vehicles were as the Plaintiff perceived them to be is irrelevant to the

discussion. Even if his judgment was erroneous in this regard, the perception that the first vehicle was bearing down on him and would strike him unless he made some move, which required the Plaintiff to then veer into the median and back onto the lefthand lane of the northbound portion of the US 131 expressway. Upon entering that lane of traffic he again saw another vehicle bearing down on him very rapidly, causing him to again leave the highway to his left and down a steep embankment causing the accident.

The Court recognizes too that he had been originally traveling at a slightly faster rate of speed than the speed limit of 55 miles per hour, was slowing down to make the turn when he began his evasive tactics from the first vehicle. He then was in the process of continuing to slow down during the point where he approached the US 131 pavement, and at this point another vehicle was bearing down on him at a rapid rate of speed, causing him to take evasive action a second time.

There was some discussion and speculation as to whether there were one or two vehicles, that is, whether the second vehicle was actually the first which Plaintiff misperceived being directly behind him instead of being in one lane to the right, that is, the northbound lane of traffic on 131. This Court again finds that fact immaterial, but unlikely that the car he observed immediately behind him as he was proceeding to make a left turn on the exit and that car that he later perceived behind him as he crossed median and got back onto the northbound US 131 was the same car.

A more reasonable interpretation would be that a second car in the other farther righthand lane traveling on US 131 caught up with him, since he was in the process of slowing down to make the turn and slowed down even more as he came through the median and back out onto the travel portion of the road.

In conclusion, therefore, the Court feels that the Bromley case is applicable, and that there is a sufficient nexus between the injury and the use of the vehicle. As stated in Bromley:

> If plaintiff could sustain the burden of proof that the phantom car existed and caused the accident he has presented a claim upon which relief can be granted ... (pg 135)

Only Plaintiff testified, and defense counsel introduced Plaintiff's deposition from which he argues a possible set of facts, and based on the lack of credibility of Plaintiff I should choose a hypothetical set of facts rather than the uncontested testimony of Plaintiff. The testimony of Plaintiff was uncontested, and the Court finds Plaintiff very credible and his testimony a logical explanation of how this accident occurred, since he was both an experienced motorcycle rider, as well as familiar with that section of the road, having driven it at least three times a week over a sustained period of time. This was not a situation where he missed his turn or forgot to make the turn properly and was trying to cross over, loosing control of his motorcycle, resulting in an injury to himself. Rather, this Court feels another vehicle or two vehicles caused him to make a decision which resulted in injury as the more reasonable, plausible explanation of what occurred, resulting in injuries.

Judgment shall enter for Plaintiff according to the stipulated amounts of damages and those specific work losses as will be computed and submitted in the proposed judgment by attorney for Plaintiff. Judgment shall enter within 21 days from the date of this opinion. Costs to Plaintiff.

Dated: October 18, 1988

Honorable Michael E. Kobza
Circuit Judge, P16100