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STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS MUTUAL INSURANCE CO.,

Plaintiff-Appellee,

v

STATE FARM INSURANCE CO.,

Defendant-Appellant,

and

AUTO-OWNERS INSURANCE CO. and CITIZENS INSURANCE CO. OF AMERICA,

Defendants and Cross-Appellants.

June 6, 1989

No. 106465

Before: Weaver, P.J., and Murphy and Griffin, JJ.

GRIFFIN, J.

Defendants State Farm, Auto-Owners, and Citizens appeal a judgment entered pursuant to a nonjury verdict ordering each defendant to pay plaintiff Hastings a pro rata share of no-fault insurance benefits arising from the death of Arthur Spielmaker. We affirm.

I

On April 17, 1986, motorcyclist Arthur Spielmaker was tragically killed in a multi-vehicle, chain reaction collision. When the police arrived at the scene, they found in the intersection: three damaged automobiles, Spielmaker's damaged motorcycle, and the body of Arthur Spielmaker. A fourth damaged automobile was on the perimeter of the intersection. Skid marks leading from the fourth vehicle showed that it had run over Mr. Spielmaker while the automobile was attempting to avoid the melee.

Although there were some factual disputes, Kent Circuit Court Judge George V. Boucher determined that the following scenario occurred. Carrie Levenworth (#1 insured by Hastings) was traveling southbound on Cascade Road, Kent County, Michigan, when her automobile collided with the rear of an automobile owned and operated by Rose Mary Martin (#2 insured by Auto-Owners). Judge Boucher found that at the time of impact, Martin (#2) was decelerating rapidly in an effort to make a left turn. Levenworth's vehicle (#1) after striking the rear panel of Martin's vehicle, spun clockwise across both lanes of northbound Cascade. Levenworth's vehicle (#1) was thereafter struck by Mary Alderink (#3 insured by State Farm), whose automobile was traveling northbound on Cascade. Levenworth's vehicle (#1) was then struck broadside by Spielmaker (#4) while Spielmaker was operating his motorcycle southbound on Cascade. Jennifer VanderVoort (#5 insured by Citizens) driving northbound on Cascade, swerved to the right in an effort to avoid the pile up. Although VanderVoort (#5) missed the other automobiles, she violently struck motorcyclist Spielmaker. According to an eyewitness: "The whole accident happened fairly instantaneously. Everybody hit everybody and it was a big blur."

Hastings paid $37,700 in no-fault personal protection insurance benefits as a consequence of Spielmaker's death and then brought suit for partial recoupment against the other insurers.

The trial court found that all four automobiles were "involved" in the accident. Judge Boucher thereafter apportioned responsibility for no-fault benefits equally among the four insurers.

State Farm, Auto-Owners, and Citizens appeal arguing that the trial court's finding of "involvement" by their insureds was clearly erroneous. In addition, Citizens appeals the equal or pro rata apportionment among the four insurers. Citizens argues that apportionment should be on the basis of respective fault, rather than pro rata.

II

The appeals in this case require construction of §3114(5) and § 3114(6) of the Michigan No-Fault Automobile Insurance Statute:

> "(5) A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> "(a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> "(b) The insurer of the operator of the motor vehicle involved in the accident.
>
> "(c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> "(d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.
>
> "(6) If 2 or more insurers are in the same order of priority to provide personal protection insurance benefits under subsection (5), an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among all of the insurers." MCL 500.3114(5)(6); MSA 24.13114(5)(6) (Emphasis added.)

As a matter of first impression, we are asked to construe the critical triggering phrase "shows evidence of the involvement of a motor vehicle." In Stonewall Ins Group v Farmers Ins Group, 128 Mich App 307; 340 NW2d 71 (1983), this Court addressed the nonoccupant priority provisions of the no-fault act § 3115 (MCL 500.3115; MSA 24.13115) and construed the phrase "motor vehicles involved in the accident." In Stonewall we held that for a motor vehicle to be "involved," the vehicle must play an active role which contributes to the accident. This Court quoted with approval the following statement made by the trial judge:

> "I would say that I would agree that there 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." Stonewall Ins Group v Farmers Ins Group, supra at 309. (Emphasis in original.)

The requirement of an active role contributing to the accident was affirmed in Bachman v Progressive Ins Co, 135 Mich App 641; 354 NW2d 292 (1984), and Brasher v Auto Club Insurance Association, 152 Mich App 544; 393 NW2d 881 (1986).

Additionally, in Wright v League General Ins Co, 167 Mich App 238, 245; 421 NW2d 647 (1988), this Court applied the Stonewall Ins Group definition of "involvement" to § 3113(b) [MCL 500.3113(b); MSA 24.13113(b)] concerning uninsured vehicles. In rejecting the defendant's assertion that the phrase "involved" under § 3113 should be construed differently, we stated:

"Contrary to League General's contention, the phrase involved in the accident should be consistently construed throughout the no-fault act, Dussia v Monroe Co Employees Retirement System, 386 Mich 244, 248; 191 NW2d 307 (1971); Grand Rapids v Crocker, 219 Mich 178, 1982-183; 198 NW2d 221 (1922), and, consequently, cases which construe the phrase under § 3115 of the act would be applicable to § 3113." Wright v League General Ins, supra at 245.

This Court then applied the active/passive test of Stonewall and concluded that the plaintiff's uninsured vehicle, which was struck from the rear, was "involved" in the accident:

"Plaintiff contends that his car did not contribute the happening of the accident. Rather, the sole cause of his injury was the 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 struck in the rear, 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 interpretation gives effect to the intent of the Legislature, which is to deny benefits to those whose uninsured vehicles are involved in accidents." Wright v League General Ins, supra at 246. (Emphasis added.)

Although the uninsured automobile in Wright was not the vehicle which ran over plaintiff's leg, its actions and motions nevertheless contributed to plaintiff's injuries.

In the instant case, we hold that the Stonewall definition of an active link contributing to the accident should also be applied to § 3114(5). In addition, we note that under §3114(5) there must be "evidence" which "shows" the involvement of a motor vehicle.

Following a nonjury trial, the lower court found that the evidence showed involvement by all four automobiles in the accident. On appeal, such findings of fact will not be set aside unless clearly erroneous. MCR 2.613(C).

Eyewitnesses and expert testimony support the trial court's findings that each of the four automobiles actively contributed to the accident. Two of the vehicles (#1 and #5, Levenworth and VanderVoort) struck Spielmaker in rapid succession. Damaged vehicles #2 and #3 (Martin and Alderink), while not contacting Spielmaker, collided with the other vehicles and thus actively influenced their paths of travel.[1] The trial court was therefore correct in viewing the chain reaction collisions as one accident. The lower court's findings of "involvement" by all four automobiles are not clearly erroneous.

III

Next, Citizens argues that the trial court clearly erred in finding that its insured (VanderVoort #5) contributed to the death of Spielmaker. Citizens relies on the opinion of the medical examiner who testified that Spielmaker's skull fracture and spine fractures were caused by the initial collision with (#1) Levenworth rather than the subsequent collision with (#5) VanderVoort.

The testimony of the medical examiner was contradicted by accident reconstruction expert and former state police trooper Thomas G. Bereza who testified that Spielmaker's spine and skull fractures were likely caused by the VanderVoort collision. Citizens asserts that the trial court abused its discretion by allowing such testimony from Bereza. We disagree.

The injuries of a skull fracture and spine fractures are not sufficiently complex to require medical testimony as to their origins. Rather, accident reconstruction expert and former state police trooper Bereza possessed sufficient expertise as to speeds and impacts to testify that a second high-speed collision would likely cause a skull fracture and spine fractures to a motorcyclist.

In addition, we note the instantaneous nature of the chain reaction collisions. The trial court was not clearly erroneous in concluding that both impacts were a proximate cause of Spielmaker's death. The argument that Spielmaker was already dead at the time he was run over by the VanderVoort automobile is implausible in view of the time frame between the respective collisions.

IV

Finally, Citizens argues that the trial court erred by apportioning responsibility among the four insurers pro rata rather than by a percentage of fault of their respective insureds. Although Citizens cites no case law in support of its position, it argues that a pro rata recoupment from insurers in the same order of priority is not an "equitable distribution of the loss among all the insurers" as mandated by the statute. We disagree and decline the invitation to put fault back into no-fault.

The common law has held that absent a specific statute or policy provision, when several insurers are each liable for a loss, the insurer who pays is entitled to partial recoupment from the coinsurers on a pro rata basis. Couch on Insurance 2d (Rev. Ed) §62:2. The purpose of this rule is to equalize the burden and thus achieve equity:

> "Where several insurers bind themselves to pay the entire loss in case of the destruction of the subject of the insurance, and one insurer pays the whole loss, the one so paying has a right of action against its coinsurers for a ratable proportion of the amount paid by it, because it has paid a debt which is equally and concurrently due by the other insurers. The purpose of this rule is to equalize the common burden by allowing reimbursement to the insurer paying the loss, for the excess paid over its share of the debt." 44 Am Jur 2d, Insurance, §1792, pp 780-781.

The partial recoupment provision in the no-fault act must be viewed in its historical context. At the time of its enactment, the Michigan general contribution statute authorized contribution on a pro rata basis without regard to fault.[2] Since there was no right of contribution at common law and contribution is controlled entirely by statute, Reurink Bros v Clinton Co, 161 Mich App 67; 409 NW2d 725 (1987), contribution provisions should be narrowly not liberally construed.

In the present case, three of the four major auto insurers argue that the custom and practice of the industry is to distribute a loss pro rata when insurers are within the same order of priority. It is asserted that pro rata recoupment achieves the goal of "equitable distribution of loss," MCL 500.3114(6); MSA 24.13114(6). We agree.

The equal, pro rata division of responsibility is consistent with primary purpose of the no-fault act which is the prompt resolution of claims without regard to fault. See Shavers v Attorney General, 402 Mich 554, 622-623; 267 NW2d 72 (1978). To assess damages against insurers based upon the percentage of fault of their insureds would subvert the goals of the no-fault act. Delays in paying claims would be occasioned as insurers argued and litigated percentages of fault. An already overburdened Assigned Claims Facility would be forced to pay an increasing number of claims because of factual disputes among insurers concerning their obligations. MCL 500.3172(1); MSA 241.3172(1). Fault would be resurrected as a predominate issue in all multi-vehicle no-fault cases.

Michigan appellate decisions contain dicta that no-fault insurers in the same order of priority should pay no-fault benefits on a pro rata basis.

In DAIIE v Home Ins Co, 428 Mich 43; NW2d (1987), the Supreme Court agreed with DAIIE that Home Insurance was in the same order of priority and therefore should reimburse one half of the no-fault benefits paid:

> "The plaintiff insurer (DAIIE) began paying benefits to Patricia Piche, and tried unsuccessfully to persuade the defendant insurer (Home Insurance) to reimburse half of the benefits paid and bear half of the future expenses. DAIIE argued that, because it and Home

Insurance each had issued a policy insuring Vernon, the injured person, each must bear half the expense of providing benefits.

The Supreme Court although not specifically addressing the issue of distribution, agreed with DAIIE's position:

> "Since DAIIE and Home Insurance each had issued a policy that named Vernon Piche as an insured operator, these two insurers are of equal priority. Recoupment is thus appropriate under the language of MCL 500.3115(2); MSA 24.13115(2), quoted in n 5." DAIIE v Home Ins Co, supra at 48.

Likewise, this Court in Winters v National Indemnity Co, 120 Mich App 156, 164; 327 NW2d 423 (1982), approved a pro rata division of responsibility between two no-fault insurers who shared common priority:

> "Thus, because Winters was not an occupant of any motor vehicle involved in the accident, there is no clear reason for establishing any priorities between National Indemnity and DAIIE. We therefore affirm the trial court's order of partial summary judgment which divided the liability for plaintiff's no-fault benefits equally between the two insurers."

Such statements are supportive of the industry practice which has prevailed.

Based upon the above factors which include the spirit, intent, and goals of the no-fault statute, industry custom and practice, the language of the statutory provision and its historical context, we hold that liability for no-fault benefits as to no-fault insurers in the same order of priority shall be determined on a pro rata basis without regard to fault.

The judgment of the trial court is affirmed.

/s/ Richard Allen Griffin
/s/ Elizabeth A. Weaver

[1] State Farm argues that the great weight of the evidence suggests that Levenworth (#1) struck Spielmaker before the Alderink (#3) collision. Even if this were true, Alderink would nevertheless be involved since its debris influenced the path of travel of VanderVoort (#5)

[2] MCL 600.2925; MSA 27A.2925. By amendment effective April 28, 1982, (1982 PA 147) the general contribution statute now allows consideration of relative fault.

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MURPHY, J. (concurring).

I concur to the extent that the trial court's finding of involvement by all four automobiles is not clearly erroneous; further, the court in apportioning responsibility for no-fault benefits equally among the four insurers accomplished the equitable distribution of loss required by MCL 500.3114(6); MSA 24.13114(6). Accordingly, I would affirm the trial court.

/s/ William B. Murphy