STATE OF MICHIGAN

COURT OF APPEALS

RONALD GROSSHEIM,

Plaintiff-Appellee,

v

ASSOCIATED TRUCK LINES, INC., No. 110781

Defendant-Appellant,

and

AUTO-OWNERS INSURANCE COMPANY,

Defendant.

Before: MacKenzie, P.J., and Weaver and Reilly, JJ.

PER CURIAM.

Defendant Associated Truck Lines (ATL) appeals as of right from an order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff is a Michigan resident employed by ATL, a foreign corporation. Plaintiff was injured in Ohio while operating a truck owned by ATL. The truck was registered in Illinois and was not insured under Michigan's no-fault act.

MCL 500.3102(1); MSA 24.13102(1) provides:

> A nonresident owner or registrant of a motor vehicle not registered in this state shall not operate or permit the vehicle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits.

ATL claimed it was not required to insure the truck in Michigan because the truck had not operated in Michigan for the thirty days required. MCL 500.3102(1); MSA 24.13102(1). The trial court granted plaintiff's motion for summary disposition.

Defendant maintains that the trial court erred by shifting the burden of proof to it to prove it was not liable under the statute. We find this contention without merit. Under MCR 2.116(G)(4), defendant is required to come forward with some

evidence, beyond its allegations or denials in the pleadings, to establish the existence of a material fact in dispute. It did not do so. Where the party opposing the motion fails produce any evidence the motion for summary disposition is properly granted. Boyle v Odette, 165 Mich App 737; 425 NW2d 472 (1988), Young v Oakland General Hospital, 175 Mich App 132, 137-138; ___ NW2d ___ (1989).

Furthermore, under Michigan law, an adverse inference may be drawn against a party who fails to produce evidence within its control. Daver v Zabel, 19 Mich App 195, 212; 172 NW2d 701 (1969), Griggs v Saginaw & Flint Railway Co, 196 Mich 258, 265-266; 162 NW 960 (1917). See also SJI 6.01. Since defendant claimed there were no records, and offered no alternative proof at the motion hearing, the trial court could properly conclude that it would be impossible for defendant's claim to be supported at trial because of a deficiency of evidence. Boyle, supra. Therefore, summary disposition was warranted.

Defendant contends that the trial court improperly awarded penalty interest under MCL 500.3142; MSA 24.13142. We disagree. Such interest is awarded when benefit payments become overdue. Payments are overdue if not paid within thirty days after an insurer receives reasonable proof of the fact, and amount, of loss sustained. There is no qualification under the statute for the good faith with which the insurer denies liability. Johnston v DAIIE, 124 Mich App 212, 216; 333 NW2d 517 (1983), lv den 417 Mich 1100.26 (1983). Joiner v Michigan Mutual Ins Co, 161 Mich App 285; 409 NW2d 808 (1987). Therefore, regardless of the good faith with which defendant denied liability, once it received reasonable proof of plaintiff's injury and losses, it was liable for the statutory interest on overdue payments.

Defendant also claims error in the awarding of attorney fees to plaintiff. Attorney fees are awarded when the court

finds the insured unreasonably refused or delayed making proper payment of benefits. A lower court's finding of unreasonable refusal or delay in making payment will not be disturbed on appeal unless clearly erroneous. Liddell v DAIIE, 102 Mich App 636, 650; 302 NW2d 260 (1981), lv den 411 Mich 1079 (1981), Darnell v Auto-Owners Ins Co, 142 Mich App 1, 11; 369 NW2d 243 (1985). Refusal or delay in making payment is not unreasonable where the insurer demonstrates a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, Wood v DAIIE, 99 Mich App 701, 708; 299 NW2d 370 (1980), aff'd with modifications 413 Mich 573; 321 NW2d 653 (1982).

Plaintiff presented evidence that defendant kept daily records of where its trucks were operating. Defendant claimed it had no records for the year in question. Plaintiff's claim for no-fault benefits was made less than seven months after the injury was sustained. The trial court could properly conclude, from defendant's lack of evidence, that no bona fide factual uncertainty was demonstrated and that the delay in making benefit payments was unreasonable.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Elizabeth A. Weaver

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Reilly, J. (concurring).

I concur in the result. Once the plaintiff-appellee provided uncontroverted evidence that the vehicle involved in the accident was owned by a non-resident, and not registered in Michigan, the burden of proof shifted to the defendant-appellant to show registration was not required under the no-fault act. MCL 500.3102 must be interpreted to impose the burden on the nonresident owner or registrant of the vehicle which is not registered in Michigan, to maintain records to support the claim that the vehicle had not been operated in Michigan for more than 30 days in the previous calendar year. To impose that burden of proof on the victim of an accident in which the nonregistered vehicle is involved would be ludicrous. Having failed to produce records or alternative proof, it is apparent that Associated Truck Lines cannot support its position that its vehicle was not operated more than 30 days in the previous calendar year. Under these circumstances the trial court properly granted plaintiff summary disposition pursuant to MCR 2.116(C)(10).

/s/ Maureen P. Reilly