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STATE OF MICHIGAN

COURT OF APPEALS

RICHARD and PAMELA McLEAN,

Plaintiffs-Appellants,

v No. 109447

WOLVERINE MOVING & STORAGE CO., JACK STURM, and JOHN STURM,

Defendants-Appellees.

RICHARD and PAMELA McLEAN,

Plaintiffs-Appellees,

v No. 111578

WOLVERINE MOVING & STORAGE CO.,

Defendant-Appellee,

and

JOHN STURM,

Defendant,

and

JACK STURM,

Defendant-Appellant.

OCT 0 4 1990

Before: Michael J. Kelly, P.J., and D.E. Holbrook, Jr. and Shepherd, JJ.

PER CURIAM.

Defendant Sturm appeals as of right from the verdict of the jury finding him liable to plaintiff for injuries sustained as a result of an automobile accident that occurred in Indiana (Court of Appeals #111578). Defendant Sturm was the driver of the car and plaintiff was a passenger. Both are Michigan residents. Plaintiff appeals from the trial court's order denying his motion for judgment notwithstanding the verdict against defendant Wolverine (Court of Appeals #109447).

Defendant Sturm argues that the trial court erred when it failed to limit the award of damages received to those recoverable under the No-Fault Act. The trial court found that the No-Fault Act's abolition of tort liability was not applicable to this case because the accident did not occur in the state of Michigan. In pertinent part the No-Fault Act provides:

> Sec. 3135. (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
>
> (2) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(3) and (4) was in effect is abolished except as to:
>
> (a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer such harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.
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> (b) Damages for noneconomic loss as provided and limited in subsection (1).
>
> (c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured. * * * [MCL 500.3135; MSA 24.13135.]

Defendant first asserts that the trial court erred when it allowed the jury to award economic damages in excess of those recoverable under the No-Fault Act. We disagree. Where the Legislature has used certain and unambiguous language in a statute, its plain meaning must be followed. Browder v Int'l Fidelity Ins Co, 413 Mich 603, 611; 321 NW2d 668 (1982). Section 3135(2) governs the abolition of tort liability. It expressly states that tort liability is abolished where liability arises from ownership, maintenance, or use within this state of a motor vehicle. Liability in this case arises out of the use of a motor vehicle in the state of Indiana. Thus by its plain terms

the statute does not operate to abolish tort liability for economic losses arising out of an out-of-state accident. See Workman v DAIIE, 404 Mich 477, 510-511, n 15; 274 NW2d 373 (1979).

More troubling to us is defendant's claim that the No-Fault Act's threshold requirement for tort recovery for non-economic damages is applicable to this case. Were we to read this statute literally we would find that § 3135(1), which retains tort liability for non-economic damages only in certain cases, would not apply to a person whose tort liability was never abolished under 3135(2). In other words if liability arises from an out-of-state accident, Michigan law does not operate to abolish tort liability and therefore it does not operate to preserve tort liability only in certain limited circumstances. However, while we are bound by principles of statutory construction we are also bound to follow the precedents of our Supreme Court.

In Auto Club Ins Ass'n v Hill, 431 Mich 449; 430 NW2d 636 (1988), our Supreme Court held that the limitations for tort recovery for non-economic damages contained in § 3135(1) were applicable to an uninsured motorist whose tort liability was not abolished under the general provisions of § 3135(2). The Court in Hill held that § 3135(1) clearly specified to whom its terms applied and since no limitation based upon whether the person was insured was made in § 3135(1) then it must be assumed that no such limitation exists. Similarly, if we read § 3135(1) as completely separate from § 3135(2), as the Court in Hill did, it applies to all suits for non-economic damages arising from the ownership, maintenance or use of a motor vehicle. Section 3135(1) contains no limitation that the injury must arise out of the use of the motor vehicle within this state. Thus pursuant to the Supreme Court's holding in Hill plaintiff's right to recover non-economic tort injuries is limited by the threshold requirement of § 3135(1).

Additionally, application of § 3135(1) of Michigan's no-fault statute to plaintiff's claim is not unreasonable. Both plaintiff and defendant Sturm are Michigan residents and the vehicle was insured under the no-fault laws of this state. Olmstead v Anderson, 428 Mich 1, 28; 400 NW2d 292 (1987). We conclude that the trial court erred when it failed to submit to the jury the question of whether plaintiff's non-economic injuries met the threshold requirement of the statute.

Nevertheless we conclude that the error was harmless. The only issue would have been whether plaintiff suffered a serious impairment of body function under § 3135(1). Once that determination is made, a plaintiff is entitled to all non-economic damages, not merely those attributable to that portion of the injury which is a serious impairment of body function. We find from the record that no reasonable jury could have found against plaintiff on that issue.

We agree with plaintiff's analysis of the facts:

> The two injuries for which plaintiff sought compensation were to his back and his wrist. Plaintiff had wrist fusion surgery which has left him unable to bend his wrist in any direction or rotate it. His treating physician stated quite unequivocally that it was related to the accident. Defendants offered no contrary medical evidence. The complete loss of the ability to move one's wrist must be considered the impairment of an important body function.
>
> Similarly, the plaintiff had fusion surgery at three levels in his lumbar spine. This caused him to lose the flexibility in his lower spine and he will never be able to lift more than twenty pounds. This qualifies, without question, as a serious impairment. No reasonable juror could find otherwise.
>
> With regard to plaintiff's back, the issue was not impairment, but rather causation. The question at trial was whether the subject accident caused his back condition, or did prior and subsequent incidents cause it. The causation issue was submitted to the jury which found for plaintiff on liability. Therefore, because reasonable minds could not differ that the injuries complained of met the no-fault threshold, any error in not submitting the issue to a jury must be considered harmless.

Defendant Sturm next asserts that the trial court erred when it refused to allow him to amend his answer to assert the existence of a joint enterprise as an affirmative defense. Under this theory, the negligence of one person is imputed to another

to charge the latter with liability to a third person injured by reason of the negligence of the former. Troutman v Ollis, 164 Mich App 727, 733; 417 NW2d 589 (1987). The theory rests on the assumption that the person sought to be held responsible was engaged in a joint venture with the one who was actually negligent. Id. In Bostrom v Jennings, 326 Mich 146, 152; 40 NW2d 97 (1949), the Michigan Supreme Court held that the theory of joint enterprise does not operate to impute the negligence of the driver of an automobile to his passenger-plaintiff to bar plaintiff from suing the driver. Thus the theory of joint enterprise has been limited to third parties injured as a result of the negligent activity of the joint enterprise. See also DeGrove v Sanborn, 70 Mich App 568, 573; 246 NW2d 157 (1976).

We find the authority relied on by defendant Sturm to be inapplicable to this case. In Boyd v McKeever, 384 Mich 501; 185 NW2d 344 (1971), the Supreme Court found that the plaintiff was not involved in a joint enterprise at the time of the automobile accident which gave rise to her injuries. The Court in Boyd was confronted with a plaintiff who sought to avoid the bar of the guest passenger statute claiming that she was involved in a joint enterprise with the driver of the car and therefore could recover against the driver for negligence. The Court's holding that there was no joint enterprise and therefore plaintiff's suit was barred by the guest passenger statute is not relevant to this case. We therefore find no error in the trial court's denial of defendant Sturm's motion to amend his answer as amendment would be futile. Burgess v Holloway Construction, 123 Mich App 505; 332 NW2d 584 (1983).

Plaintiff appeals from the trial court's denial of his motion for judgment notwithstanding the verdict on the jury's finding that Jack Sturm was not an agent of defendant Wolverine. Plaintiff further argues that the jury's finding of no agency relationship is against the great weight of the evidence presented at trial. When deciding a motion for judgment

notwithstanding the verdict, the trial court must view the evidence in a light most favorable to the nonmoving party and determine if the facts presented preclude judgment for the nonmoving party as a matter of law. May v Beaumont Hospital, 180 Mich App 728, 749; 448 NW2d 497 (1989). If the evidence is such that reasonable minds could differ, a judgment notwithstanding the verdict is improper. Id. Additionally, a trial court's finding that the verdict is not against the great weight of the evidence presented at trial will not be reversed absent an abuse of discretion. Jernigan v General Motors Corp, 180 Mich App 575, 585; 447 NW2d 822 (1989). Where there is competent evidence to support the jury's finding, the verdict should not be set aside. Bell v Merritt, 118 Mich App 414, 422; 325 NW2d 443 (1982), lv den 419 Mich 880 (1984).

Generally, a principal is held liable for the torts of its agent which are committed in the scope of the agency. Kerry v Turnage, 154 Mich App 275, 281; 397 NW2d 543 (1986), lv den 428 Mich 856 (1987). The existence of an agency relationship is a question of fact. Id. It is our opinion that competent evidence to support the jury's verdict was presented and therefore the trial court properly denied plaintiff's motion for a new trial or judgment notwithstanding the verdict. Evidence was presented that Sturm was an independent contractor of Wolverine who owned his own power unit, ran his own business and subcontracted work to other workers. Sturm worked pursuant to a contract with Wolverine. On the particular job which Sturm and the other truckers were working, the truckers transported cars to various cities for car shows. After dropping the cars off the truckers were required to keep their trucks in that city. The truckers did not work during the show and were free to leave the city if they chose. As part of a licensing certification the truckers were required to attend driving school once every several years.

At the time of the accident involved in this case Sturm was driving from Minnesota to Michigan to attend a driving school as he had been informed by Wolverine that his three year period had almost expired. Evidence was introduced that Wolverine did not require Sturm to go to the particular session of the driving school. Evidence was also presented that the drivers incurred all of the expenses of the driving school. While evidence was presented which conflicted with the above stated evidence, viewing the evidence in a light most favorable to defendant Wolverine, we conclude that the jury's verdict was not against the great weight of the evidence presented at trial.

Due to our affirmance of the jury's verdict finding no agency between defendant Wolverine and defendant Sturm, it is unnecessary for us to address plaintiff's other claims of error.

The jury verdict against defendant Sturm is affirmed (Court of Appeals #111578). The verdict in favor of defendant Wolverine is affirmed (Court of Appeals # 109447).

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ John H. Shepherd