STATE OF MICHIGAN

COURT OF APPEALS

UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY and ROBERT BOWERS,

Defendants-Appellees.

August 23, 1991

No. 115393

Before: Jansen, P.J., and Sullivan and Weaver, JJ.

PER CURIAM.

In this subrogation action, plaintiff appeals by right the orders granting summary disposition to defendants. We affirm.

There is no dispute that during the early morning of March 25, 1987, defendant Robert Bowers' car, which had been driven into or immediately adjacent to Harrison Elementary School, was intentionally set on fire. The ensuing fire caused extensive damage to the school building and its contents.

Plaintiff United States Fire Insurance Company insured the real and personal property owned by the Wayne-Westland Community School District, which includes Harrison Elementary School. Plaintiff paid the school district for the damages and loss sustained.

Plaintiff sought reimbursement from defendant Allstate Insurance Company. Under a no-fault automobile insurance policy, defendant Allstate Insurance Company insured Bowers' leased car which was set on fire. Plaintiff alleged that the loss and damage to the school arose out of the ownership, operation or use of the insured car.

Plaintiff also sought reimbursement from defendant Robert Bowers, alleging in part that Bowers intentionally set the fire.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), on the ground that the property damage did not arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. In its response, among other things, plaintiff argued that the building sustained damages resulting from the car hitting it and from the fire.

The trial court initially granted summary disposition to defendant Allstate on the claim arising out of the fire damage because the fire damage did not arise out of the ownership, operation, maintenance or use of the motor vehicle as a motor vehicle. However, with regard to the damages allegedly sustained as a result of the car striking the building, the court gave plaintiff ten days in which to produce an affidavit showing that the building sustained vehicular damage separate from the fire damage. Plaintiff thereafter submitted an affidavit of one of its adjusters to the effect that the vehicular damage was separate and identifiable and that out of the $149,079.92 loss, $1,350 represented the damage caused by the car striking the building. Specifically, $815 was for security, $500 for wrecking and debris removal, and $35 for permits.

The trial court subsequently granted summary disposition to defendant Allstate on the claim relating to property damage as a result of the car striking the building. The court explained that these losses--security, wrecking and debris removal and permits--were indistinguishable from those resulting from the fire:

> I have made reference earlier to the evidence indicating that the building was wide open, and that supports the fact that this security expense would have been required as a result of the fire. It can't be distinguished. There is nothing to indicate that the wrecking and debris removal were occasioned by the impact rather than the fire. And I think it is quite obvious also, that the building permit would also have been required because of the fire.
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> Similarly, I guess I'm of the opinion and come to the conclusion that the entire loss was paid by the Plaintiff, was for the fire loss and any minor damage that may have been caused by the impact was overcome by the fire. There is no question of fact on any of this, and the Defendant is, therefore, entitled to summary disposition on that claim.

The trial court further explained that the proof of loss forms and release and subrogation receipt indicate that plaintiff paid money for fire damage, and vehicular damage was not claimed: "You [plaintiff] don't acquire the subrogation right unless you paid for it, and I don't think that's what happened here." Therefore, plaintiff was not entitled to reimbursement for the alleged vehicular damage.

Finally, the court granted summary disposition to defendant Robert Bowers because plaintiff failed to present any evidence that Bowers had a motive to destroy his leased car.

With regard to the fire damage to the building and its contents, we agree with the trial court, and find it beyond peradventure, that the damage did not arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. MCL 500.3121; MSA 24.13121.

In interpreting the phrase "use of a motor vehicle as a motor vehicle," our Supreme Court stated that:

> [T]his 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." Thornton v Allstate Ins Co, 425 Mich 643, 659; 391 NW2d 320 (1986).

The Court further noted that "The mere foresecability of an injury as an incident to a given use of a motor vehicle is not enough to provide no-fault coverage where the injury itself does not result from the use of the motor vehicle as a motor vehicle." Id., p 661.

In the instant case, plaintiff seeks reimbursement for property damage caused by an intentionally set fire. Plaintiff's complaint alleges: "On March 26, 1987, the aforementioned 1985 Subaru crashed into Harrison Elementary School, then said vehicle was set afire. The fire spread from the automobile to the building causing extensive damages to both the building and its contents."

On its face, this complaint fails to state a claim. The involvement of the car in the damage to the building was not directly related to its character as a motor vehicle. As suggested by defendants, the car was not being used, operated or maintained as a motor vehicle, but instead was used as a torch or kindling. Summary disposition was proper under MCR 2.116(C)(8). Even if the court went beyond the pleadings in deciding the motion, which apparently it did not, summary disposition was proper under MCR 2.116(C)(10).[1]

Moreover, with regard to the alleged vehicular damage to the building, the trial court did not err by granting summary disposition to defendant Allstate. Plaintiff claimed that "The fire doesn't bend the door frame. The fire doesn't cause bricks to be knocked out of place. And the fire may or may not have cracked the windows." Plaintiff, therefore, concluded that the damage caused by the vehicle was separate from the damage caused by the fire. The court then gave plaintiff time to produce an affidavit showing the separate damages. On plaintiff's request, plaintiff was given ten days.[2] Even after the affidavit was produced, the court ruled that the claimed vehicular damage to the building was "overcome" by the fire damage. On appeal, plaintiff argues that the affidavit showed that it was possible to distinguish between the fire damage and vehicular damage. Having reviewed the record before the trial court in light of the MCR 2.116(C)(10) summary disposition standard, Pantely v Garris, Garris & Garris, PC, 180 Mich App 768, 773; 447 NW2d 864

(1989), we conclude that the trial court did not err by granting summary disposition with respect to the alleged damage caused by the vehicle hitting the building. Plaintiff's belated attempt to show that it was entitled to reimbursement for damage caused by the vehicle striking the building fails in light of the proof of loss forms, the release and subrogation receipt, the excerpts of the deposition before the court, and even the complaint itself.

Finally, we conclude that the trial court did not err by granting summary disposition to defendant Bowers. Both parties agree that the only issue is whether a genuine issue of fact exists regarding whether Bowers had a motive to have his leased vehicle destroyed. In response to Bowers' motion for summary disposition and accompanying affidavit, plaintiff failed to submit an affidavit, deposition or other documentary evidence setting forth facts showing that a genuine issue of fact existed. MCR 2.116(G)(4). Pure speculation concerning motive, without any supporting evidence, is not enough to withstand a motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen
/s/ Joseph B. Sullivan
/s/ Elizabeth A. Weaver

[1] On appeal, plaintiff cites numerous cases in support of its contention that recovery should be permitted because the arsonist in this case "assaulted" a motor vehicle, not a person within a motor vehicle. However, the cases upon which plaintiff relies are distinguishable because the injured persons were using the motor vehicles as motor vehicles.

[2] Hence, plaintiff's appellate argument that the trial court erred by giving plaintiff only ten days is not well taken.