STATE OF MICHIGAN

COURT OF APPEALS

LOREN D. MONARCH,

Plaintiff-Appellant,

v

CITY OF BATTLE CREEK and
DAVID LYLE BROXHOLM,

Defendants-Appellees.

January 7, 1992

No. 120990

Before: Marilyn Kelly, P.J., and MacKenzie and Gribbs, JJ.

PER CURIAM.

This case arises out of a collision between an automobile and a motorcycle. We affirm in part and reverse in part.

Defendant David Lyle Broxholm, a police officer for the City of Battle Creek, was driving a marked patrol car on the night in question. Officer Broxholm noticed a motorcycle, operated by plaintiff Loren D. Monarch, traveling at an excessive speed. Officer Broxholm turned on the patrol car's siren and lights and pursued the motorcycle for some time. The motorcycle travelled at speeds up to 80 miles per hour in a 35 m.p.h. zone, traveled the wrong way on a one-way street, and ran a stop sign. The motorcycle, which was not equipped with brake lights, eventually came to a stop in the middle of the road. Officer Broxholm was unable to stop the patrol car without hitting the motorcycle. Plaintiff was thrown from the motorcycle and injured. It was later learned that plaintiff's operator's license had been suspended and that he was intoxicated. The motorcycle plaintiff was driving had been borrowed from a friend.

Plaintiff filed suit against Officer Broxholm and the City of Battle Creek alleging that Officer Broxholm was negligent and claiming that plaintiff was entitled to no-fault personal protection insurance (PIP) benefits. MCL 500.3105; MSA 500.3114(5); MSA 24.13105; MSA 24.13114(5). Plaintiff's motion for summary disposition on the issue of no-fault PIP benefits was denied. At the subsequent jury trial, the trial court instructed the jury that, as to plaintiff's no-fault claim, Officer Broxholm was required to refrain from wanton and wilful misconduct.

After deliberations, the jury found that Officer Broxholm was negligent and that his negligence was a proximate cause of plaintiff's injuries. The jury attributed ten percent of the fault to Officer Broxholm and ninety percent of the fault to plaintiff. The jury found that plaintiff had sustained zero damage.

The trial court subsequently amended the jury verdict to award plaintiff 10% of plaintiff's medical expenses.

On appeal by right, plaintiff argues that the trial court erred in denying plaintiff's motion for summary disposition as to no-fault PIP benefits. We agree. Defendant incorrectly asserts that "foreseeability is the issue" in this case. Thornton v Allstate Ins Co, 425 Mich 643, 661; 391 NW2d 320 (1986). Plaintiff's injuries in this case clearly arose out of the "use of a motor vehicle as a motor vehicle". MCL 500.3105(1); MSA 24.13105(1). Unlike Sanford v Ins Co of North America, 151 Mich App 747; 391 NW2d 473 (1986), and Peck v Auto-Owners Ins Co, 112 Mich App 329, 334; 315 NW2d 586 (1982), the motorcycle here actually collided with the motor vehicle. As such, compensation is provided under the statute, without regard to fault. Lack of foreseeability is not enough to preclude coverage. Thornton, 425 Mich at 661.

We recognize that such a result appears contrary to public policy and common sense. The collision in this case was caused by plaintiff's disregard of the law. Plaintiff was intoxicated and driving without a valid operator's license. He was speeding, driving in a reckless manner and later pled guilty to fleeing and evading the police. Even after plaintiff decided to flee, the collision could have been avoided if plaintiff had pulled to the side of the road instead of stopping (without benefit of brake lights) near the center line. It is, as defendants suggest, outrageous that the defendant city should be liable for plaintiff's injuries under these circumstances and it is difficult to imagine that the legislature foresaw such a result when they drafted the no-fault act. Nevertheless, all of plaintiff's offensive actions in this case involve "fault", and we are specifically instructed by statute that no-fault PIP benefits "are due . . . without regard to fault". None of the three statutory exceptions to no-fault PIP benefits applies in this case. MCL 500.3113; MSA 24.13113. Accordingly, we remand for a determination of no-fault PIP benefits to be awarded in this case. However, we urge the legislature to consider drafting a fourth exception that would prevent the egregious result required here.

The trial court did not abuse its discretion in denying plaintiff a new trial on the issue of damages. The trial court amended the verdict to comport with plaintiff's documented medical expenses. It is evident that the jury rejected plaintiff's remaining damage claims, which were largely unsupported by documentary evidence. Compare Bozak v Hutchinson, 422 Mich 712; 375 NW2d 333 (1985).

Plaintiff argues that he is entitled to 12% penalty interest from January 12, 1988, because the City of Battle Creek denied no-fault PIP benefits to plaintiff on that date. MCL 500.3142; MSA 24.13142. No finding was made below as to whether plaintiff submitted reasonable proof of the fact and of the amount of loss sustained to the city. This matter should be addressed by the trial court on remand. See Kreighbaum v Auto Club Ins, 170 Mich App 583, 586-587; 428 NW2d 718 (1988), lv den 433 Mich 906 (1989). Cf Grossheim v Assoc Truck Lines, 181 Mich App 712; 450 NW2d 40 (1989).

The trial court did not err in denying plaintiff attorney fees under MCL 500.3148; MSA 24.13148. Since there was no showing that plaintiff provided reasonable proof of the amount of loss, the trial court did not clearly err in finding that the city had not unreasonably refused to pay. See Gobler v Auto Owners Ins Co, 428 Mich 51, 66; 404 NW2d 199 (1987).

The trial court's denial of summary disposition as to no-fault PIP benefits is reversed and this matter is remanded for further proceedings consistent with this opinion. The amended damage award and the trial court's denial of attorney fees are affirmed.

/s/ Roman S. Gribbs
/s/ Marilyn Kelly

STATE OF MICHIGAN

COURT OF APPEALS

LOREN D. MONARCH,

Plaintiff-Appellant,

v No. 120990

CITY OF BATTLE CREEK and
DAVID LYLE BROXHOLM,

Defendants-Appellees.

Before: Marilyn Kelly, P.J., and MacKenzie and Gribbs, JJ.

MacKENZIE, J. (dissenting).

I disagree with the majority's conclusion that the trial court erred in refusing to grant summary disposition in favor of plaintiff. In my view, this case is indistinguishable from Peck v Auto-Owners Ins Co, 112 Mich App 329; 315 NW2d 586 (1982).

In Peck, supra, the issue before this Court was whether "a motorcyclist injured in an accident while fleeing from police [may] recover personal protection benefits . . . when the only motor vehicle involved [was the] police cruiser" giving chase. 112 Mich App 331. The panel in Peck concluded that the fleeing motorcyclist was not entitled to no-fault benefits because the police cruiser had insufficient "involvement" in the accident to allow recovery:

> We hold that the accident arose not from the police use of a vehicle but from the plaintiff's act of fleeing from the police. The resultant accident would have been equally likely had the police been pursuing plaintiff on a motorcycle, in a helicopter, or on horseback. The involvement of the cruiser was merely fortuitous. [112 Mich App 334]

The majority distinguishes Peck from this case on the ground that the motorcycle in this case actually collided with the police cruiser. This is not a meaningful factual distinction, however. In Peck, the determinative factor was not the presence or absence of physical contact with the cruiser; indeed, it was apparently unresolved whether there was an actual collision between the police cruiser and the fleeing motorcyclist. See 112 Mich App 334. The decisive factor in Peck was that the accident was caused by the plaintiff's flight, and would have been caused by the plaintiff's flight whether or not a motor vehicle was involved. The same is true of Sanford v Ins Co of North America, 151 Mich App 747; 185 NW2d 264 (1986), also distinguished by the majority. See also Dep't of Social Services v Auto Club Ins Ass'n, 173 Mich App 552, 558 n 2; 434 NW2d 419 (1988).

In this case, as in Peck and Sanford, the accident was caused by plaintiff's flight rather than the involvement of an automobile; the accident "would have been equally likely had the police been pursuing plaintiff on a motorcycle". Peck, supra, p 334. See also Sanford, supra, p 751. Because the involvement of the police cruiser was merely fortuitous rather than the cause of the accident, I would hold that plaintiff's injuries did not arise out of the operation or use of a motor vehicle under MCL 500.3105(1); MSA 24.13105(1). I would therefore affirm the trial court's decision not to grant summary disposition in favor of plaintiff.

/s/ Barbara B. MacKenzie