STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH H. WEBB,

Plaintiff-Appellee,

v

FARMERS INSURANCE EXCHANGE,

Defendant-Appellant.

July 30, 1992

No. 128556

UNPUBLISHE

Before: Reilly, P.J., and Holbrook, Jr. and Marilyn Kelly, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court order denying its motion for summary disposition and granting plaintiff's counter-motion for summary disposition, resolving the liability issue in favor of plaintiff. The parties stipulated to judgment in the amount of $150,489.57, due and payable upon entry of the consent judgment, covering all medical expenses, lost wages, and replacement services up to March 22, 1990, as well as uninsured motorist benefits. Plaintiff's entitlement to no fault benefits thereafter was left to future litigation. We affirm.

Plaintiff sued defendant insurance company claiming no fault automobile insurance benefits and uninsured motorist coverage for crippling injuries sustained in Georgia on April 2, 1989. Plaintiff had been riding as a passenger in a van owned by Peter Bill when it broke down. The driver, Mr. Bill, was able to maneuver the van over to the shoulder. As Mr. Bill was disabled, plaintiff left the inoperative van and walked approximately 1/4 to 3/4 mile to obtain help when he was struck and seriously injured by an unidentified hit and run driver.

Plaintiff had no automobile insurance of his own, and had been denied coverage by Michigan's assigned claims facility. Plaintiff acknowledges that he may be entitled to social security disability and workers' compensation benefits.

The vehicle in which plaintiff had been riding was insured by the defendant. The defendant's insurance contract with Mr. Bill provides that defendant will pay no fault benefits as provided by Chapter 31 of the Michigan insurance code to "an insured person" who suffers bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. The policy defines an insured person, in relevant part, as any person "occupying" the Bill's van. "Occupying" is defined in the contract as "in, on, getting into or out of." The coverage does not apply to bodily injuries sustained by any person, other than a member of the Bill family, not occupying a motor vehicle if the accident occurs outside of the state of Michigan. The contract also excludes coverage for bodily injury sustained by any person arising out of the ownership, operation, maintenance, or use of a parked motor vehicle unless it was parked in such a way as to cause unreasonable risk of the bodily injury which occurred, or the bodily injury was a direct result of physical contact with (a) permanently mounted equipment on the motor vehicle while the equipment was being operated or used or (b) property being lifted or lowered in the loading process, or the person was "occupying" the parked vehicle.

The contract also provides uninsured motorist coverage. In Part II of the contract, the defendant agrees to pay all sums which an insured person, i.e. "any person while occupying" the van, is entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the injured person. An uninsured motor vehicle is defined in relevant part as a hit and run

vehicle whose operator or owner has not been identified and "which strikes either a member of the Bill family, or a vehicle which a member of the Bill family is occupying."

As there is no dispute as to the facts, the interpretation of the contract is a question of law, which this Court reviews de novo. Mueller v Frankenmuth Mutual Insurance Co, 184 Mich App 669, 671; 459 NW2d 28 (1990), lv den 437 Mich 879 (1991).

We believe that our decision in this case regarding the no fault coverage for personal protection insurance benefits is controlled by Rohlman v Hawkeye Security Ins Co, 190 Mich App 540; 476 NW2d 461 (1991) pursuant to Administrative Order 1990-6, rather than Rosner v Michigan Mutual Ins Co, 189 Mich App 229; 471 NW2d 923 (1991), because Rohlman interpreted the word "occupying" in an insurance contract providing coverage similar to the coverage being considered here, whereas Rosner interpreted the word "occupant" in the no fault statute. As the defendant's contract did not incorporate the language of the statute, but provided its own definitions, we believe we are required to look to the contract and its definitions to resolve the matter before us.

In Rohlman, the plaintiff left the insured vehicle and walked across the road to the left turn lane on the opposite side of the highway in order to retrieve a two-wheel utility trailer which had broken loose from the vehicle in which he had been riding. While the plaintiff was attempting to lift the trailer, he was struck by an unidentified hit and run driver. The majority in Rohlman determined that Nickerson v Citizens Mutual Ins Co, 393 Mich 324; 224 NW2d 896 (1975) was controlling and, therefore, as a matter of law the contract term "occupying" covered the plaintiff even though at the time of the accident he was some distance from the vehicle in which he had been a passenger. We cannot distinguish the Rohlman case simply because the plaintiff in the instant case was a greater distance away from the vehicle than the plaintiff was in Rohlman when he was struck. Both Mr. Rohlman and Mr. Webb left the vehicles in which they had been riding for the purpose of remedying an immediate problem involving the vehicle and both intended to resume travel in the vehicles as soon as they accomplished their tasks.

Accordingly, we affirm the trial court's order granting summary disposition in favor of plaintiff as to the no fault personal protection insurance benefits.

With respect to the uninsured motorist coverage, however, we are convinced that the trial court erred. First, we do not agree that the Bill's van was "parked in such a way as to cause unreasonable risk of the bodily injury which occurred." The fact that the disabled van was driven to the shoulder of the expressway is not a sufficient basis to conclude that plaintiff's injury was related to the manner in which the van was parked, or its location on the shoulder as opposed to the highway itself. Secondly, even though Rohlman requires a determination that plaintiff was occupying the vehicle and was therefore an insured person, that status alone is not sufficient to qualify plaintiff for uninsured motorist coverage. According to the contract, the defendant agrees to pay all sums which an insured person is entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the injured person. Although it is undisputed that plaintiff was struck and injured by a hit and run driver, the vehicle which struck plaintiff does not qualify as "an uninsured motor vehicle" under the contract as it did not strike a member of the Bill family or a vehicle which a member of the Bill family was occupying. As the plaintiff would not be entitled to recover damages from the owner or operator of an uninsured motor vehicle as defined in the contract, plaintiff is not entitled to the uninsured motorist coverage under the contract.

The order granting summary disposition in favor of plaintiff is affirmed with respect to personal protection insurance benefits, but reversed with respect to uninsured motorist coverage.

/s/ Donald E. Holbrook, Jr.
/s/ Marilyn Kelly

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REILLY, P.J. (concurring.)

As explained in my dissenting opinion in Rohlman v Hawkeye Security Ins Co, 190 Mich App 540; 476 NW2d 461 (1991), I am not convinced that the term "occupying" in an insurance contract which is defined as "in, on, getting into, or out of" a motor vehicle, should be given an expansive interpretation beyond the ordinary meaning of the word. See Rosner v Michigan Mutual Ins Co, 189 Mich App 229; 471 NW2d 923 (1991); However, I agree that Rohlman controls our decision pursuant to Administrative Order 1990 6.

Furthermore, plaintiff had no automobile insurance of his own and, because the accident occurred outside the state of Michigan, plaintiff was ineligible for automobile insurance benefits from the assigned claims facility. Even though plaintiff may be entitled to some financial assistance by way of social security disability benefits, workers compensation benefits, or health insurance coverage, I believe the public policy rationale of Nickerson v Citizens Mutual Ins Co, 393 Mich 324; 224 NW2d 896 (1975) would be controlling here as those benefits may not be coextensive with the no fault PIP benefits payable under defendant's contract. Therefore, I concur in the decision by the majority.

/s/ Maureen Pulte Reilly

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...However, we find the court properly ...ed to dismiss the claim for lost rents.

...firmed.

...Bldg Co. v. Steinhurst, et al. (Lawyers ...y No. MA-5270 - 2 pages).

Summary by KMP.

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Licenses And Permits - Revocation Without Hearing

Where plaintiff's business license was not necessarily valid, the court improperly granted plaintiff a directed verdict.

Plaintiff applied for a business license to operate a video arcade. Plaintiff was granted the license and began operating the arcade. However, when the licensing committee chairman signed the license, he realized that the area in which the arcade was located was not zoned for arcades. The matter was referred to the city council. The council voted to rescind the application. Plaintiff sued. Defendant's motion for summary disposition was denied. Plaintiff was granted a directed verdict on the issue whether plaintiff was given a certificate that appeared valid.

The matter then went before a jury. The jury awarded plaintiff $48,035 for defendant's wrongful revocation. Defendant appeals.

Defendant claims plaintiff never received a valid certificate to operate an arcade. Therefore, plaintiff did not have any property rights that entitled him to notice and hearing before termination of that right.

For a valid certificate of license, an application must be sent to the police, fire, health, and building departments for review. The application is then reviewed by a licensing committee who makes recommendations as to whether the council should vote to approve or deny the license. The council then votes on the application. Here, the only review was by the council. Therefore, the certificate was not necessarily valid just because it appeared valid. The trial court's grant of a directed verdict for plaintiff is reversed.

Affirmed in part. Reversed in part.

Zoma v. City of River Rouge. (Lawyers Weekly No. MA-5209 - 3 pages) (MacKenzie, J.).

Summary by KMP.

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Medical Malpractice - Arbitration Agreement

Where defendants' arbitration agreement was not in strict compliance with sec. 5042 of the Malpractice Arbitration Act (MAA), the court improperly granted defendants summary disposition.

Plaintiffs sued defendants for malpractice. Plaintiff signed an arbitration agreement when she was admitted to defendant-hospital. Immediately before the signature line, the arbitration agreement stated that it could "be revoked within 60 days *after execution*...." The MAA requires that immediately before the signature line the agreement must state that it can "be revoked *within 60 days after discharge*...." Defendants were granted summary disposition because plaintiffs never attempted to revoke the agreement. Plaintiffs appeal.

"An arbitration agreement under the MAA is not legally valid unless it is in strict compliance with the arbitration statute." The arbitration agreement is not in strict compliance with the statute. Therefore, the court should not have granted defendants summary disposition.

Reversed and remanded.

Mania, et al. v. Verberg, et al. (Lawyers Weekly No. MA-5244 - 2 pages).

Summary by KMP.

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Negligence - Proximate Cause

Where the court denied plaintiff's motion for judgment n.o.v., or in the alternative, a new trial, we affirm.

Plaintiff sued defendant for negligence. The jury returned a verdict of no cause of action, finding that although defendant was negligent, his negligence was not the proximate cause of the accident. The court denied plaintiff's motion for judgment n.o.v., or in the alternative, a new trial. It found that a question existed for the jury, and that the jury had decided it reasonably. We affirm. Competent evidence existed to create a jury question on the issue of proximate cause.

Affirmed.

Schultz v. Webb. (Lawyers Weekly No. MA-5212 - 2 pages).

Summary by MGC.

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No-Fault - 'Occupying' Vehicle

Even though plaintiff was some distance from the van when he was hit, the court properly found that he was "occupying" the vehicle.

Plaintiff was a passenger in a van. The van broke down and plaintiff started walking to get help. Plaintiff was hit by an unidentified hit and run driver. Plaintiff had no auto insurance of his own. The Michigan assigned claims facility denied plaintiff coverage. Plaintiff sued defendant-no-fault insurer for no-fault personal protection benefits and uninsured motorist benefits. Defendant was the driver's insurer. Defendant's motion for summary disposition was denied. Defendant appeals.

Defendant's policy defines an insured person "as any person 'occupying'" the vehicle. This case is controlled by *Rohlman v. Hawkeye Security Ins. Co.*, 190 Mich. App. 540 (1991). In *Rohlman*, the court found that the plaintiff was occupying the vehicle "even though at the time of the accident he was some distance from the vehicle in which he had been a passenger. ... We cannot distinguish the *Rohlman* case simply because the plaintiff in the instant case was a greater distance away from the vehicle than the plaintiff was in *Rohlman* when he was struck." Therefore, the court properly found plaintiff was entitled to no-fault benefits.

The uninsured motorist insurance provision is worded to provide coverage only to members of the insured's family. "Although it is undisputed that plaintiff was struck and injured by a hit and run driver, the vehicle which struck plaintiff does not qualify as 'an uninsured motor vehicle' under the [insurance] contract as it

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did not strike a member of the [insured's] family or a vehicle which a member or the [insured's] family was occupying."

Affirmed in part and reversed in part.

Webb v. Farmers Ins. Exchange. (Lawyers Weekly No. MA-5262 - 2 pages).

Summary by KMP.

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No-Fault - Uninsured Motorist Set-Off Provision

Where the court found that plaintiff's uninsured motorist claim was barred because of the policy's set-off provision, we affirm.

Plaintiff was injured in a car accident. Plaintiff's husband, who was driving, swerved to miss a car that ran a red light. Their car hit a tree. Plaintiff's husband died. Plaintiff filed a claim with her husband's no-fault insurer based on her husband's negligence. Defendant-insurer paid plaintiff the $25,000 policy limit. Plaintiff also filed a claim based on her husband's uninsured motorist coverage. Plaintiff sued to compel defendant to arbitrate. Defendant was granted summary disposition. Plaintiff appeals.

The policy's uninsured motorist provision provided that any coverage available under it would be reduced by payment made under the policy's liability insurance provision. The uninsured motorist coverage had a policy limit of $20,000. Therefore, "the set-off provision clearly precludes the payment of additional noneconomic or excess economic benefits to plaintiff." Summary disposition was proper.

Affirmed.

Colaccelli v. Auto Club Ins. Ass'n. (Lawyers Weekly No. MA-5255 - 2 pages).

Summary by KMP.

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Probate - Parental Rights Improperly Terminated

Where 1) grounds for termination had not been established by clear and convincing evidence and 2) the court terminated respondents' parental rights based solely on their refusal to submit to psychological evaluations, we reverse the court's termination of their parental rights.

"There was some evidence of neglect, and some reason to be concerned about respondents' ability to supervise their son properly. However, we are left with the definite and firm conviction that there was not clear and convincing evidence establishing grounds for termination. We believe the probate court's decision was ... based only on respondents' refusal to submit to psychological evaluations.... [T]he lack of psychological evaluations were not shown to be necessary to returning the boy to respondents' care.

"We do not condone respondents' refusal to undergo evaluation. However, termination of parental rights is not some club to hold over parents' heads to obtain obedience to court orders. ... If a psychological evaluation is truly needed for the boy's health and safety, that need must be clearly demonstrated before respondents' refusals can be interpreted as demonstrating an unwillingness to provide for the care and custody of their son."

Reversed and remanded.

In the Matter of Dobbins. (Lawyers Weekly No. MA-5400 - 4 pages).

Summary by LCC.

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Probate - Parental Rights Terminated

Where there was clear and convincing evidence that respondent-mother 1) abandoned her children, 2) still had a drug problem and 3) would be in no condition to provide proper care and custody for the children within a reasonable time, the court properly terminated her parental rights.

Affirmed.

In the Matter of Rubart, et al. (Lawyers Weekly No. MA-5398 - 3 pages).

Summary by LCC.

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Probate - Parental Rights Terminated

Where the court terminated respondent-father's parental rights in this stepparent adoption proceeding, we affirm.

Respondent conceded that he did not pay child support for over three years. The court also found respondent failed to regularly and substantially visit, contact, or communicate with the children for two years before the petition was filed. "The evidence was sufficient to justify termination of respondent's parental rights under the Adoption Code."

Affirmed.

In the Matter of Allen, et al. (Lawyers Weekly No. MA-5416 - 2 pages).

Summary by LCC.

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