UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNIE RAY VANOVER and
GOLDA VANOVER,

Plaintiffs,

v.

COMMERCIAL CARRIERS, INC.,
THOMAS McGOWAN, and GRANITE
STATE INSURANCE COMPANY,

Defendants.

File No. 1:90-CV-252

HON. ROBERT HOLMES BELL

O P I N I O N

Plaintiffs have sued Granite State Insurance Company, Plaintiff Johnnie Ray Vanover's employer's no-fault insurer, for injuries sustained in an automobile accident. This matter is before the Court on Granite State's motion to dismiss for failure to state a claim.

In their complaint against Granite State Plaintiffs allege that on January 6, 1988, Plaintiff Johnnie Ray Vanover, a truck driver for Ennis Automotive, was driving in a snow storm on I-94 in the course of his employment. As he prepared to exit I-94, a vehicle driven by Anita Baker struck his vehicle. Plaintiff parked his vehicle on the side of the exit ramp and walked across I-94 to exchange information with Baker. While Plaintiff was speaking to Baker, Thomas McGowan lost control of his vehicle and it struck Vanover and Baker.

The Michigan no-fault act provides that the insurer of an employer's vehicle is responsible for the payment of no-fault benefits if the employee is injured "while an occupant of" the

employer's vehicle or if the employer's vehicle was "involved in the accident." M.C.L.A. §§ 500.3114 & .3115; M.S.A. §§ 13114 & 13115.

In Royal Globe Ins. Cos. v. Frankenmuth Mut. Ins. Co., 419 Mich. 565 (1984), the Michigan Supreme Court held that "occupant", as that term is used in the no-fault act, should be given its common meaning, and that meaning does not include one who left the vehicle and walked some 60 feet away. Id. at 569.

Granite State contends that because Plaintiff Vanover had left his employer's vehicle and was standing on the opposite side of the freeway when he was injured, Plaintiff was not an "occupant" of the vehicle insured by Granite State.

Plaintiffs contend that Royal Globe is distinguishable from the facts of this case. They claim that Plaintiff Vanover was an "occupant" of the vehicle at the time of the accident because he had only temporarily exited his vehicle after a collision to exchange information and to render aid to another motorist as required by law. M.C.L.§§ 257.618 & .619; M.S.A. §§ 9.2318 & .2319. In contrast, the injured party in Royal Globe had reached her destination. 419 Mich. at 567. Moreover, Plaintiffs emphasize the fact that this case does not involve the priority of claims among concurrent insurers. If Plaintiff Vanover is not found to be covered by Granite State, he will have no recovery for his medical expenses and work loss. In contrast, the public policy of ensuring coverage was not at issue in Royal Globe. In Royal Globe there was no dispute that the injured party was entitled to no-fault

benefits. The only issue was which of two insurance companies was primarily liable. 419 Mich. at 574.

Many of the factors Plaintiffs have raised to distinguish this case from Royal Globe were discussed in Rohlman v. Hawkeye Sec. Ins. Co., 190 Mich.App. 540 (1991). In Rohlman the plaintiff, a passenger in a van, was injured after he alighted from the van in order to recover a trailer which had come unhitched. The plaintiff had no insurance coverage of his own. The court held that what was at issue was construction of the term "occupying" under the insurance policy rather than construction of the term "occupant" under the no-fault act. Id. at 550. Accordingly, the court held that Nickerson v. Citizens Mutual Ins. Co., 393 Mich. 324 (1975), was controlling, rather than Royal Globe. Applying the principle articulated in Nickerson that doubtful or ambiguous terms in an insurance policy are to be construed against the drafter, the court concluded that the plaintiff was "occupying" the van at the time of the accident and was thus entitled to no-fault benefits under the terms of the insurance policy covering the van. Rohlman, 190 Mich.App. at 547.

A critical issue suggested but not directly addressed by the parties is whether the coverage determination in this case is controlled by the no-fault statute or the no-fault insurance policy. Because this matter is before the Court on a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all of Plaintiffs' allegations as true and resolve every doubt in their favor. The Court should not dismiss the case for failure to state

a claim unless it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Craighead v. E.F. Hutton & Co., 899 F.2d 485, 489 (6th Cir. 1990).

In view of the fact that the Court does not have the Granite State policy before it nor any argument on the issue raised by Rohlman, the Court cannot conclude as a matter of law that Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Accordingly, Granite State's motion to dismiss must be denied.

An order consistent with this opinion will be entered.

Date: July 16, 1992

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

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O R D E R

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Defendant Granite State Insurance Company's motion to dismiss (Docket # 64) is **DENIED.**

Date: July 16, 1992

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

THE WEEK'S OPINIONS

Western District

(Continued)

(Continued from Page 7)

Plaintiff sought a security clearance (Sensitive Compartmented Information) from the National Security Agency (NSA) while working on a project for his employer. The NSA denied the clearance. Plaintiff sued. Defendant moves for dismissal.

The Supreme Court has held that denial of a security clearance is an executive prerogative, and cannot be reviewed administratively. The same analysis applies to judicial review. Thus, this court does not have jurisdiction over plaintiff's claim.

Plaintiff's complaint can also be interpreted as alleging defamation of character from denial of the security clearance. However, "[d]enial of a security clearance on unspecified grounds does not imply disloyalty or any other repugnant characteristic, and accordingly does not support a claim for defamation."

Surofchek v. National Security Agency. (Lawyers Weekly No. WD-5181 - 4 pages) (Bell, J.).

Summary by MJM.

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ERISA

Fiduciary Duty - Notification Of Termination Of Plan

Where plaintiffs claim that defendant had a fiduciary duty under the Employee Retirement Income Security Act (ERISA) to provide notice about termination of their health care coverage, defendant was not an ERISA fiduciary for the purposes of notification.

Plaintiffs were employed by a company that provided health care coverage from defendant-insurer. According to the parties' contract, defendant could terminate the coverage if the employer failed to pay premiums. However, defendant was not obligated to notify plaintiffs of the termination.

The employer had financial difficulties and stopped paying premiums to defendant. Defen-

No-Fault

Coverage For Occupant Policy Needed

Where the parties dispute whether plaintiff was an "occupant" of the accident vehicle, the court must review the no-fault insurance policy before deciding the issue.

Plaintiff got into a minor accident while driving a truck for his employer. The employer was insured by defendant. When plaintiff left the truck to talk to the driver of the other vehicle, he was struck by a third car and injured. Defendant refused to provide no-fault benefits. Plaintiff sued. Defendant moves for dismissal.

The no-fault act provides that the insurer of an employer's vehicle must provide coverage if the employee is injured while an "occupant" of the vehicle. Plaintiff claims he qualified as an occupant because he had only temporarily left the truck when injured. Defendant says plaintiff was not an occupant of the truck.

It is unclear whether the parties are basing their arguments on the no-fault act or the no-fault insurance policy issued by defendant. Since neither party has provided the court with the insurance policy, it must deny defendant's dismissal motion.

Vanover, et al. v. Commercial Carriers, Inc., et al. (Lawyers Weekly No. WD-5180 - 5 pages) (Bell, J.).

Summary by MJM.

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Tort

Excessive Force - Insufficient Evidence

dants say that plaintiff's injuries were caused by a fall after resisting arrest.

Plaintiff sued defendants under sec. 1983, claiming the police used excessive force. Defendants move for summary judgment.

Defendant-city cannot be held liable under a *respondeat superior* theory. Plaintiff alleged that the city's policies caused his injury. However, these allegations are sketchy and do not directly link his injury to the policies.

Plaintiff also claims defendants used excessive force during the arrest. Yet, besides the allegations in his complaint, plaintiff has no factual support for that claim. On the other hand, medical evidence tends to support defendants' claim that plaintiff received his facial injuries from a fall, rather than from a blow to the head. Since his excessive force claim is unsubstantiated, it is dismissed.

Reibel v. Shrift, et al. (Lawyers Weekly No. WD-5179 - 10 pages) (Bell, J.).

Summary by MJM.

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Bankruptcy Court

Exemptions

Individual Retirement Annuities - Federal Exemption Disallowed

Where the debtors wish to exempt their individual retirement annuities (IRAs), the IRAs are not exempt under sec. 522(d)(10)(E) of the Bankruptcy Code.

The debtors filed Chapter 7 bankruptcy. Initially, they elected state law exemptions under sec. 522(b)(2). Michigan law exempts IRAs. However, they subsequently amended Sched-

the support of the debtor and any dependent of the debtor....'" The debtors' accounts "provide for the future purchase of an annuity...." However, '[t]he fact that this account may one day be converted into an annuity does not render it an annuity at the present time. [The court] may not simply conclude that an individual retirement annuity is an annuity and therefore exempt. It, like an individual retirement account, must be examined as a 'similar plan or contract.'"

The issue of "control" is key to the determination. "The Debtors admit that they may obtain access to the funds[,] [e]ven though significant penalties may attach...." This case "was filed as a no-asset Chapter 7...." Even if a 50 percent penalty were invoked if the IRAs were cashed, "the Debtors would have an ability to presently realize over $17,000 while their creditors receive nothing. This same amount would enable the Debtors to pay roughly 20 percent of their unsecured debt, less administrative expenses."

Accordingly, "[t]he only significant difference between this investment and a bank savings account held by the Debtors for the purpose of purchasing an annuity at retirement age is the election the Debtors have made for tax purposes to create this investment as an IRA." The exemption is disallowed.

In re Moss, Jr., et al. (Lawyers Weekly No. BK-5238 - 6 pages) (Stevenson, J.) (Western District).

Summary by LCC.

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United States Magistrates

Civil Procedure

Discovery - After Discovery Testing

Where 1) plaintiff's expert conducted tests after the close of discovery but 2) plaintiff [illegible]