Michigan Supreme Court
Lansing, Michigan 48909

Opinion

Chief Justice
Michael F. Cavanagh

Associate Justices
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.

CLERK'S NOTE: The Court has determined that its deliberations have proceeded to the point that this opinion must be filed without further delay. Justice Levin dissents, and his opinion will follow. Chief Justice Cavanagh will join in that dissent.

FILED JUNE 29, 1993

FREDERICK ROBERT ROHLMAN,

Plaintiff-Appellee,

v — No. 92675

HAWKEYE-SECURITY INSURANCE COMPANY,

Defendant/Third-Party Plaintiff/
Appellant,

and

WILLS-HORTON-RENN AGENCY,

Defendant,

and

STATE FARM INSURANCE COMPANY,

Third-Party Defendant,

and

AUTOMOBILE CLUB OF MICHIGAN,

Third-Party Defendant/Appellee.

BEFORE THE ENTIRE BENCH

BRICKLEY, J.

In this case the plaintiff victim was struck by a hit-and-run driver in an out-of-state automobile accident while

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On August 5, 1985, the plaintiff, Frederick Rohlman, was a passenger in a minivan owned by Vicki Stevens, who is not a relative, registered in Michigan, and insured by defendant Hawkeye-Security Insurance Company. Ms. Stevens was driving the van through Ohio, pulling a small two-wheeled trailer that became unhitched, apparently after crossing some railroad tracks. The trailer overturned and came to rest in the center lane of the highway.

Ms. Stevens turned the van around and parked behind the trailer, and the plaintiff then got out of the van and walked ten to twenty feet toward the trailer intending to turn it over on its wheels. After approximately two minutes had passed, while the plaintiff was attempting to right the trailer, an unidentified vehicle struck the trailer and the plaintiff, injuring him severely.

The plaintiff, having no insurance of his own, sought to recover personal injury protection and uninsured motorist benefits from the defendant insurer, but was denied coverage. Plaintiff filed this declaratory action against Hawkeye on October 21, 1986, and Hawkeye moved for a summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the plaintiff was not related to the insured, and that he was not an occupant of either the insured vehicle or the trailer. The trial court denied the motion and, by broadly interpreting the term "occupant," held that the plaintiff was an occupant of

those benefits.[3] On the other hand, the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute.[4] Therefore, because uninsured motorist benefits are not required by statute, interpretation of the policy dictates under what circumstances those benefits will be awarded.

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> The policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract, for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract to carry out its purpose.
>
> A policy of insurance must be construed to satisfy the provisions of the law by which it was required, particularly when the policy specifies that it was issued to conform to the statutory requirement; and where an insurance policy has been issued in pursuance of the requirement of a statute which forbids the operation of a motor vehicle until good and sufficient security has been given, the court should construe this statute and the policy together in the light of the legislative purpose. [Couch, Insurance, 2d, § 45:694, pp 331-332.]
>
> The definition[s] in an automobile liability insurance policy required by statute, of the motor vehicles covered by it, [are] to be construed with reference to statutes with which it was intended to comply . . . . [Id. § 45:695, p 333.]

We think the same would hold true for no-fault policies.

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> A compulsory insurance statute is only concerned with the injured or harmed third persons, and therefore is not concerned with any matters which do not affect liability to such persons. Accordingly, collateral agreements between the insured and the insurer which do not alter the coverage or remedies provided by statute are valid. [Id. § 45:703, p 339.]

[MSA 24.13111]. It was not applicable to this lawsuit." We cannot agree.

The basic facts of this case are not in dispute, and it is clear the accident occurred in Ohio. Therefore, § 3111 directly applies, placing its interpretation at issue.[5] A careful reading of § 3111 demonstrates that, in order to recover the plaintiff must establish a number of criteria, only two of which are at issue. The plaintiff must show that he is 1) an occupant 2) of a vehicle involved in the accident.[6] A negative answer to either question would dispose of the issue; however, because the definition of occupant has been the source of many disputes and has caused as many courts to agonize over what that definition should be, we are determined to resolve the confusion.[7]

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[5]The plaintiff argues that §§ 3105 and 3106 apply in this situation and not § 3111. We do not agree. The Legislature has enacted a specific section of the no-fault act that applies to accidents occurring out of state, and it seems evident that this section ought to take priority over other sections that may arguably apply in a collateral manner to the facts of this case.

[6]The plaintiff was not the named insured, nor was he the spouse of, or related to, the named insured. Thus, the only way the plaintiff can recover under § 3111 is to establish himself as "an occupant of a vehicle involved in the accident . . . ."

Section 3111 also requires that the vehicle involved in the accident be insured under a personal protection insurance policy or other approved security. In this case, the van was insured by defendant Hawkeye, and the trailer was insured by defendant Automobile Club of Michigan (ACIA).

[7]Because of our resolution of the occupant issue it is unnecessary to decide whether the van was a vehicle involved in the accident under § 3111.

that term is used in the no-fault act. Royal Globe at 567-569.

In holding that Nickerson did not control the Royal Globe decision, this Court distinguished Nickerson in a number of ways—the most significant of which was the simple fact that Nickerson was a pre-no-fault act case and, thus, only required an interpretation of the insurance policy.[8] Id. at 572-573. We stated:

> It is a familiar and fundamental rule of construction of a private automobile insurance policy that the court's first duty is to determine, from the language used, the apparent intention of the contracting parties, and then to construe doubtful or ambiguous terms favorably to the insured and against the insurer as the contract drafter. The language of a statute, on the other hand, is required to be construed by assigning to the words used their primary and generally understood meaning consistent with the apparent intention of the Legislature in enacting the law. [Id. at 573. (Citations omitted.)]

Furthermore, we opined that "if this Court had not found Nickerson to be an occupant of the Parvin vehicle, Nickerson would have had no recovery for his injuries under the insurance policy since the vehicle which caused his injuries was uninsured." Id. at 574.

In deciding to follow Nickerson in this case, the Court of Appeals failed to acknowledge the significance of the adoption of the no-fault act, which was passed in the time between the Nickerson and Royal Globe decisions. It also

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[8]While the act does not define "occupant" as used in § 3111, the policies in question in Nickerson and Royal Globe both had definitions of the term materially indistinguishable from the definition given in the Hawkeye policy in the instant case, which is: "in, upon, getting in, on, out or off."

in a consistent fashion, which can only be accomplished by interpreting the statute, rather than individual policies.[10]

The question is whether, for purposes of PIP benefits, the plaintiff was an occupant of the van, as that term is used in § 3111, when the accident occurred.

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[10]In this case, as in Royal Globe, we have a situation in which the policy language provides a definition of occupant different from, and possibly broader than, the no-fault act. However, the issue was not argued by the litigants in Royal Globe, nor has it been presented by the parties in this case. In arguing that the policy definition of occupying controls, the plaintiff merely asks us to limit our Royal Globe decision to priority disputes between insurance companies and to apply Nickerson in those fact-sensitive cases where the plaintiff otherwise would not be entitled to a recovery as proposed by the dissenting opinion.

We emphasize that under the facts of this case and according to the arguments presented by the parties, the statute controls, and we do not deal with the question whether the policy can and, if so, did provide coverage broader than that required by the no-fault act. Although we reserve the issue for a case in which the issue is properly before us, we note the following from Couch, n 3 supra, § 45:697, p 334.

> A compulsory insurance statute in effect declares a minimum standard which must be observed, and a policy cannot be written with a more restrictive coverage.
>
> The statute is manifestly superior to and controls the policy, and its provisions supersede any conflicting provisions of the policy.

However,

> [A]lthough an insurer may not by its contract restrict its coverage to less than that required by statute, it may contract for a broader coverage than the statutory liability, as, for instance, with respect to territory, amount, circumstances of operation, etc., and in such case recovery is measured solely by the policy. The fact that the coverage of the policy may be broader than that required by statute is immaterial, for the contract of the parties may be enforced as written. Id. § 45:699.

Royal Globe decision and the intent of the no-fault act.[11]

B. PIP BENEFITS: THE TRAILER

While the parties mainly base their respective claims on the question whether the plaintiff was an occupant of the van, the plaintiff, albeit briefly, also contends that he was an occupant of the trailer and that the trailer was a "covered vehicle" under the Hawkeye policy covering the van. The trial court and the Court of Appeals did not find it necessary to make a determination whether the plaintiff was an occupant of the trailer because they concluded that he was an occupant of the van.

As far as PIP benefits are concerned, the analysis of whether plaintiff was an occupant of the trailer is similar to that discussed above with respect to the van. We acknowledge that occupying the trailer is a closer question

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[11]The dissent would hold that plaintiff was an occupant of and was occupying the van. Justice Levin states that he "would adopt the same approach [reading the policy definition of occupant into the no-fault act] in construing the term 'occupant' as used in § 3111." Slip op at 11.

Interestingly, in Heard v State Farm Ins, 414 Mich 139; 324 NW2d 1 (1982), Justice Levin used the same type of analysis to hold that a person who was pumping gasoline at a self-service gas station was not an occupant of his vehicle when it was struck by another vehicle. Mr. Heard had not purchased no-fault insurance, and, as a result, he would not have been entitled to PIP benefits under the no-fault act if his vehicle was involved in an accident while he was occupying it. Justice Levin held that "[b]ecause Heard's uninsured vehicle was not involved in the accident and he was a pedestrian and not a motorist or occupant of a motor vehicle (or, if one prefers, he was more like a pedestrian than a motorist or occupant), he is as much entitled—under the terms and policies of the no-fault act—to recover from the insurer of the vehicle that struck him as is a pedestrian . . . ." Id. at 146 (parenthetical in the original).

"covered vehicle."[13]

C. UNINSURED MOTORIST BENEFITS

The trial court also awarded uninsured motorist benefits. Any claim for these benefits must be based on the policy, which requires that the injury have occurred by accident and have been sustained by a "covered person."[14] To be considered a "covered person" the injured party must be the insured, a family member of the insured, or any other person <u>occupying</u> the <u>covered</u> <u>auto</u>. These questions must be asked with respect to the van and the trailer, and, because we are dealing with uninsured motorist benefits, the policy definitions control.

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[13]As far as PIP benefits are concerned, § 3111 controls, and it requires that the <u>vehicle</u> involved in the accident be <u>covered</u> by a personal protection insurance policy. See note 6 and accompanying text. It is evident that the van was a <u>vehicle</u> <u>covered</u> under Hawkeye's policy. For the trailer, however, the issue is more complex. The statute defines "[m]otor vehicle" as "a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels." MCL 500.3101(2)(e); MSA 24.13101(2)(e).

However, the insurance policy contains a different definition of "covered auto." Hawkeye contends that the statute controls for purposes of PIP benefits; however, it does not contest the applicability of the policy definition for purposes of uninsured motorist benefits, which makes the trailer a covered auto for those benefits. The plaintiff argues that the policy definition controls exclusively. The Court of Appeals did not have to deal with this issue because it ended its analysis with the van. We think the parties are entitled to have this issue resolved. (A fact that must be noted when resolving this issue is that ACIA insured the trailer.)

[14]It is not contested that the injury occurred by accident, and therefore that question, as it pertains to the following analysis, will not be discussed.

a covered vehicle;

2) For purposes of uninsured motorist benefits, whether Rohlman was occupying either the van or the trailer, as it is defined in the Hawkeye policy.

- was an "occupant" of the vehicle within the meaning of no-fault automobile liability act § 3111,[1] providing no-fault benefits for out-of-state accidents;
- was "occupying" the vehicle within the meaning of the policy of insurance, which provided—for both no-fault and uninsured motorist purposes—that "'[o]ccupying' means in, upon, getting in, on, out or off."[2]

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[1]The no-fault automobile liability act provides that where accidental bodily injury is suffered in a state other than Michigan, no-fault benefits may be recovered by the named insured and his "spouse" or a "relative" domiciled in the insured's household or by "an occupant of" the named insured's vehicle "involved in the accident":

"Personal protection insurance benefits are payable for accidental bodily injury suffered in an accident occurring out of this state, if the accident occurs within the United States, its territories and possessions or in Canada, and the person whose injury is the basis of the claim was at the time of the accident a named insured under a personal protection insurance policy, his spouse, a relative of either domiciled in the same household or an occupant of a vehicle involved in the accident whose owner or registrant was insured under a personal protection insurance policy or has provided security approved by the secretary of state under subsection (4) of section 3101." MCL 500.3111; MSA 24.13111.

[2]The policy begins with an "agreement" on the part of the insurer with the insured ("[W]e agree with you as follows") immediately followed by definitions, including the following:

> "'Occupying'" means in, upon, getting in, on, out or off." (Emphasis added.)

The no-fault endorsement (described in the policy as "personal injury protection coverage endorsement") states:

> "The Definitions and General Provisions of the policy apply unless modified by this endorsement." (Emphasis added.)

* * *

accident occurred."[6] (Emphasis added.)

A

The circuit judge awarded Rohlman no-fault benefits of $16,330 for medical expense and $8,400 for work loss, and $20,000 under the uninsured motorist coverage.[7]

The no-fault award, totaling $24,730, presents an issue of statutory construction concerning the meaning of the term "occupant" as used in § 3111. The $20,000 uninsured motorist award presents an issue of contract construction concerning the meaning of the term "occupying" as used in the policy of insurance.

B

The policy of insurance specifically provides that in the situation covered by § 3111, an accident occurring outside Michigan, a person "occupying" the vehicle may recover no-fault benefits.[8]

The term "occupant" is not defined in § 3111 or elsewhere in the no-fault automobile liability act. The term "occupying" is defined in the policy to include not only a

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[6]Slip op, p 12.

[7]The uninsured motorist provision of the Hawkeye policy of insurance states:

> "'Covered person' as used in this Part means:
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> "1. You or any family member.
>
> "2. Any other person occupying your covered auto.
>
> "3. . . . ." (Emphasis added.)

[8]See n 2.

were literally "on" and "upon" the trailer, which, until it became detached, had been hitched to the van.

Courts generally construe the "on" or "upon" language to include a person who leaves a vehicle before the termination of the journey, intending to resume occupancy of the vehicle, and who is injured, within a reasonable geographic perimeter of the vehicle, while servicing the vehicle or engaging in other "vehicle-oriented" conduct. See part II.

C

The analysis in the post-no-fault case, Royal Globe Ins Co v Frankenmuth Mutual Ins Co, 419 Mich 565; 357 NW2d 652 (1984), concerning the meaning of the term "occupant" as used in the no-fault act, is not applicable in the instant case because the policy of insurance provides greater coverage to a person "occupying" a vehicle than is provided to an "occupant" under § 3111, as that term is being construed by this Court.

Courts generally hold that a policy of insurance may provide greater coverage than is statutorily mandated.[10] The majority concludes that the question whether the policy definition of "occupying" was broader than the term "occupant" as used in § 3111 of the no-fault act was not "presented by the parties, the statute controls, and we do not deal with the question whether the policy can and, if so, did provide coverage broader than that required by the no-fault act."[11]

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[10]Couch, Insurance, 2d, § 45:699, quoted slip op, p 11, n 10.

[11]Slip op, p 11, n 10.

E

The question whether Rohlman can recover under the uninsured motorist coverage should not be affected by the majority's decision not to decide the question whether Rohlman can recover no-fault benefits under the no-fault endorsement of the policy defining "occupying" to include an injury suffered "upon" the vehicle. Resolution of the question whether Rohlman can recover under the uninsured motorist coverage depends solely on whether he was "occupying" the minivan _or_ trailer within the meaning of the policy. The answer to that question does not turn at all on legislative intent, but rather on a construction of the policy.

This Court's analysis in _Nickerson_, construing the "upon" language in a similar insurance policy, surely requires affirmance of at least the $20,000 uninsured motorist award to Rohlman. In _Nickerson_, the vehicle in which Nickerson was riding stalled in the highway, and he helped push it to the side of the road before reentering it. A passing motorist stopped, and Nickerson again left the vehicle and walked to the front of the vehicle. An uninsured vehicle then struck the insured vehicle.

In the instant case, an uninsured vehicle struck the trailer that Rohlman was attempting to right. The factual circumstances are almost identical to Nickerson. Hawkeye has conceded that the trailer was a "covered auto" for uninsured motorist purposes.

in their no-fault laws.[16] We would adopt the same approach in construing the term "occupant" as used in § 3111. The failure to do so may transfer to Michigan taxpayers the cost of providing medical and long-term care for Michigan residents seriously injured in vehicle-oriented out-of-state accidents; this the Legislature did not intend.

II

The automobile insurance policy language, providing that "occupying" means "in, upon, getting in, on, out or off," has been a feature of automobile policies before the enactment of no-fault laws. The language precedes the uninsured motorist endorsement.

This language generally has been construed to provide medical expense[17] and uninsured motorist coverage[18] to persons who are not physically in a vehicle when an accident occurs where, as in the instant case, the injured person physically occupied the insured vehicle before the accident, the accident occurred shortly after the injured person ceased physically to occupy the vehicle, the egress of the injured person from the vehicle occurred during a journey, not at the termination of the journey, the injured person left the vehicle because of an emergency necessitating servicing or other "clearly vehicle-oriented" conduct, and the injured person intended to

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[16]See part II(C).

[17]See part IV.

[18]See part V.

on his journey, "while he was leaning over the car with the bumper in his hands . . . ."[21]

The Supreme Court of Rhode Island, in Sherman v New York Casualty Co, 78 RI 393; 82 A2d 839 (1951), held that the words "in or upon" should be given a broad and liberal construction and the plaintiff recovered medical expense.[22]

A California appellate court awarded medical expense to a person struck by an automobile when changing a wheel where the policy provided "upon" coverage. Christoffer v Hartford Accident & Indemnity Co, 123 Cal App 2d 979; 267 P2d 887 (1954). The court said that the injured person was

> "'upon the automobile' as the term is employed in the policy, just as a fly is said to be 'upon the wall' or 'upon the ceiling,' or a painter is said to be 'upon the wall,' a person to be 'upon a raft' although only supported by the hand, or as a baseball player (the runner) is said to be 'upon the base' if any portion of his body is in contact with the bag." Id., pp 982-983.

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[21]The court focused on the word "upon" and asked:

> "Can it be said that the insurer attached to the word 'upon' a meaning so narrow as to encompass only such cases in which the entire weight of a person's body was resting upon or supported by the vehicle? Considering the usual positions of a person in relation to a car in use and the fact that other enumerated risks include acts of being upon the automobile in the sense of resting upon or being supported by it, it is reasonable to give the term a broader meaning including some acts in which the person is in contact with the car." Id., p 42.

[22]The insured had reached his destination. After leaving the automobile, he noticed it was rolling backward. In an attempt to stop the vehicle, he held onto the taillight and registration plate, and then he put his knee on the bumper and was injured when the vehicle hit a wall.

> "In our opinion, the better reasoned cases indicated that if one's activities are in such close proximity to the car and so related to its operation and use that they are an integral part of one's occupancy and use of the car, then one may be said to be 'upon' the car." Id., p 82.

Similarly, see Cocking v State Farm Mutual Auto Ins Co, 6 Cal App 3d 965, 971; 86 Cal Rptr 193 (1970), where a California appellate court said:

> "Under the agreed facts it is also evident that plaintiff was performing an act physically and directly related to the car. Since plaintiff was traveling under highway conditions requiring tire chains, his acts of stopping the vehicle to put chains on, and of undoing the bag containing the chains while in close proximity to the car, clearly suggest his intent to place those chains on the car's tires. Accordingly, we hold that plaintiff's position preparatory to placing the chains on the tires of the car put him in the requisite physical relationship to the car. His injury while in that position, therefore, occurred while he was 'using' the car and while he was 'upon' the Volkswagen within the meaning of the policy and [the statute]."

The Supreme Court of Montana, in Sayers v Safeco Ins Co of America, 192 Mont 336; 628 P2d 659 (1981), held that an insured could recover under the uninsured motorist coverage of his vehicle when he was injured while under the hood of another vehicle parked ten to twelve feet in front of his vehicle to facilitate the use of his vehicle's battery and jumper cables. The court said:

> "The 'physical contact' test for determining whether one is an occupant is not determinative under Montana law. This Court has developed a 'reasonable connection' test. The issue here is whether Sayers' activities at the time of the injury were so reasonably connected to the Galetti vehicle that, under the law, Sayers could be said to be an occupant within the policy's meaning.

* * *

although he had not been riding in the vehicle before it broke down and did not intend to ride in the insured vehicle after it was repaired. The court focused on the relationship between the claimant and the vehicle in determining that he was 'upon' the vehicle in the sense of the policy language.

The Texas Court of Appeals in Hart v Traders & General Ins Co, 487 SW2d 415 (Tex Civ App, 1972), held that a person injured while changing a vehicle's fuel pump was "upon" the vehicle and therefore an occupant of the vehicle for purposes of the uninsured motorist coverage.

Uninsured motorist recovery was allowed by the Ohio Court of Appeals, where a passenger was injured while placing a stereo in the open trunk of a vehicle. The court said:

> "In construing uninsured motorist provisions of automobile insurance policies which provide coverage to persons 'occupying' insured vehicles, the determination of whether a vehicle was occupied by a claimant at the time of an accident should take into account the immediate relationship the claimant had to the vehicle, within a reasonable geographic perimeter."[25]

The Wisconsin Supreme Court allowed uninsured motorist recovery to a person injured while waiting to enter an automobile, which had just pulled up to the curb. The court said that it adopted a test that:

> "considers whether the party was vehicle-oriented or highway-oriented at the time of the injury. The vehicle orientation test considers the nature of the act engaged in at the time of the injury and

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[25]Robson, n 13 supra, p 261, headnote.

Similarly, the Court of Appeals of Oregon held that a person injured while removing a packaged gift from her trunk was an occupant of her vehicle. Mackie v Unigard Ins Co, 90 Or App 500; 752 P2d 1266 (1988).

> completion of the objective occasioned by the brief interruption, he intends to resume his place in the vehicle, he does not cease to be a passenger."[27] (Emphasis added.)

Pennsylvania's intermediate appellate court, in Contrisciane v Utica Mutual Ins Co, 312 Pa Super 549; 459 A2d 358 (1983), allowed uninsured motorists recovery for the family of a driver killed while cooperating in the preparation of a police accident report. The driver was standing next to the police car, approximately ninety-seven feet from his own vehicle, when he was struck and killed by an uninsured motorist. The Pennsylvania Superior Court determined that the decedent was an occupant of his vehicle, under the "vehicle oriented/highway oriented" test because his vehicle remained on the highway and his passenger remained in the vehicle. Id., p 554.

Similarly, in White v Williams, 563 So 2d 1316 (La App, 1990), the Court of Appeals of Louisiana allowed uninsured motorist recovery for a person injured in the traffic lane of a service station as he walked from the cashier to his vehicle, which was parked in the outside lane of the pump island, after paying for gasoline. The court adopted the trial court's findings:

> "[P]laintiff had never abandoned his relationship as passenger of the insured vehicle. His physical departure was solely for the purpose of performing an act that was physically and directly related to the car. He never turned aside from this mission and was in fact in the process of

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[27] Id., p 780 (quoting Matter of Rice v Allstate Ins Co, 32 NY2d 6; 342 NYS2d 845; 295 NE2d 647 [1973]).

Most recently, the Supreme Court of Tennessee allowed uninsured motorist recovery for a person <u>who stopped to assist a disabled motorist</u> and was crushed between his own automobile and the disabled vehicle when a third vehicle struck the disabled vehicle. <u>Tata v Nichols</u>, 848 SW2d 649 (Tenn, 1993). After reviewing numerous authorities, the court said that the "cases indicate the relationship contemplated, but they also demonstrate that 'upon' has no precise meaning except in the context of particular facts." <u>Id</u>., p 653.

In <u>Estate of Cepeda v U S F & G</u>, 37 AD2d 454; 326 NYS2d 864 (1971), New York's intermediate appellate court determined that stepping out of an automobile is not, alone, determinative of occupant status. The decedents were passengers in an automobile that became involved in an accident on the highway. They left the vehicle, and were <u>walking to the rear of the vehicle to look for damage</u> when they were struck by an oncoming motorist. The New York court said:

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transportation, for example, repairing it, lashing baggage to the top of the vehicle even though it was not intended to be used that particular day or perhaps by that person as a means of transportation. Someone could even be sleeping in an automobile (an occupant in that car) in a parking lot, rest area or campground and an uninsured motorist could collide with the vehicle injuring its occupant. Although the insured in such a case would be 'in' the automobile, under the majority opinion it could be argued by a disclaiming insurer where another policy's [uninsured motorist] provision might be implicated that the automobile was not being or about to be immediately used as a means of transportation." <u>Id</u>., p 172.

C

The approach adopted by this Court in Nickerson, and by the courts in other jurisdictions in construing the "on" or "upon" policy language in the context of medical expense and uninsured motorist coverage, has also been adopted by a number of courts in construing their no-fault acts.

No-fault benefits were denied by the Florida Court of Appeals in Industrial Fire & Casualty Insurance Co v Collier, 334 So 2d 148, 149 (Fla App, 1976), because the injured person, who was struck while standing outside the vehicle with it jacked up, removing the spare tire, had not insured the vehicle, and no-fault benefits were not payable under Florida law to an owner while "occupying"—defined to mean "in or upon, or entering into, or alighting"—an uninsured owned

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Courts have also denied recovery when the journey in which the injured passenger had participated had come to an end before the injury. In Government Employees Ins Co v Keystone Ins Co, 442 F Supp 1130 (ED Pa, 1977), an automobile passenger left the vehicle in which he was riding, approached a second (uninsured) vehicle, jumped on its hood for the purpose of starting a fight, and was injured when the driver of the second vehicle accelerated suddenly. The court concluded that "the only connection between [the passenger] and the Murray vehicle at the time of the injury was that [the passenger] had been riding in that vehicle when he decided to assault the person who subsequently injured him." In Colonial Penn Ins Co v Curry, ___ AD2d ___; 596 NYS2d 317 (1993), the court denied recovery to a person who sought to be covered solely because he was leaning on a truck with one foot resting on its running board when the truck was struck by another vehicle. Curry had no other connection to the vehicle—he had not been a passenger in the vehicle, he was not about to become a passenger in the vehicle, he was not entering or alighting from the vehicle. The court held that Curry's connection with the vehicle, which was "unrelated to its operation as a vehicle and not passenger-oriented," was insufficient to establish the status of "occupant." Id., 596 NYS2d 321.

of his to "bum" a cigarette. He testified that he intended to ask a friend if he wanted coffee, go to a newsstand and then meet his partner and exchange the cab for his partner's vehicle. The court determined that McGilley was not vehicle oriented, but rather was highway oriented at the time of the collision.

III

In Heard v State Farm Mutual Automobile Ins Co, 414 Mich 139; 324 NW2d 1 (1982), the injured person sought to recover no-fault benefits for injuries suffered when he was struck by an automobile while he was pumping gasoline into a vehicle owned by him. The question presented was whether he should be denied no-fault benefits because he was the owner of an uninsured "motor vehicle involved in the accident."[31]

This Court held that Heard was entitled to no-fault benefits and said:

> "[A] parked vehicle is not 'involved in the accident' unless one of the exceptions to the parked vehicle provision (§ 3106) is applicable. Those exceptions spell out when a parked vehicle is deemed to be in use as a motor vehicle; '[e]ach exception pertains to injuries related to the character of a parked vehicle as a motor vehicle—characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents.' Miller v Auto-Owners Ins Co, 411 Mich 633, 640; 309 NW2d 544 (1981). (Emphasis supplied.)
>
> "At the time of the accident, Heard's vehicle was not in use as a motor vehicle; rather, it was like 'other stationary roadside objects that can be involved in vehicle accidents.' Heard was entitled to PIP benefits from State Farm. § 3115(1)(a)." Id., pp 144-145.

In the opinion, this Court used the term "occupant" in

[31] MCL 500.3113; MSA 24.13113.

conduct of the injured person is vehicle oriented. Automobile insurance policies generally continue to be written defining "occupying" as including injuries suffered "on" or "upon" the vehicle. The Legislature, in drafting and enacting the no-fault law, did not write on a clean slate, but in that context. Case-by-case resolution is unavoidable, even in a no-fault system.

IV

We would affirm the judgment of the Court of Appeals.

Charles L. Levin
Michael F. Cavanagh