STATE OF MICHIGAN

COURT OF APPEALS

KAREN D. BROWN,

Plaintiff-Appellant/
Cross-Appellee,

v

JERRY DAVIS,

Defendant,

and

AMERISURE COMPANIES and MICHIGAN MUTUAL INSURANCE COMPANY,

Defendants-Appellees/
Cross-Appellants.

UNPUBLISHED
April 21, 1995

No. 167596
LC No. 91-118591 NI

Before: Corrigan, P.J., and O'Connell and G.S. Allen, Jr.,* JJ.

PER CURIAM.

In this garnishment action, we are asked to decide whether the injuries sustained by one taxicab driver in a dispute over fares with another cab driver are injuries caused by an "accident" and resulting from the "ownership, maintenance or use" of a covered vehicle as those terms are used in a business insurance policy issued by defendants-appellees. The trial court answered this question in the negative and denied summary judgment in favor of plaintiff. We affirm.

Plaintiff Karen D. Brown and defendant Jerry Davis are taxi-drivers duly licensed to drive taxis by the City of Detroit. Davis' cab is covered by a business auto policy issued by Michigan Mutual Insurance Company and Amerisure Company.

On August 9, 1990, at approximately 4:40 a.m., plaintiff's cab was parked behind defendant's cab in a taxi waiting zone in front of the Greyhound Bus Station on Lafayette Street in downtown Detroit. Davis was asleep in his cab. Prospective customers approached plaintiff and requested her services. As plaintiff began loading the customer's bags into the trunk of her cab, Davis awoke, jumped out of his cab, accused plaintiff of "stealing his fares" and began removing the customer's luggage from plaintiff's vehicle and placing it in his own cab.

When plaintiff attempted to thwart Davis' transfer of the bags from one cab to the other, a struggle ensued during which plaintiff's arm was broken. According to Davis' deposition, the break occurred as he was standing at the rear of his cab attempting to place the luggage in the trunk of his cab.

On July 16, 1991, plaintiff filed a two-count complaint naming Davis and City Cab Company as defendants. Count I alleged assault and battery. Count II alleged negligence. Upon investigation of the incident, Michigan Mutual declined to defend the action on grounds that its policy did not extend

*Former Court of Appeals judge sitting by assignment.

coverage to the incident involved. On July 10, 1992, City Cab Company was dismissed as a party defendant pursuant to stipulation, and the matter was set for trial.

On December 14, 1992, after the jury was selected, plaintiff and Davis entered into a consent judgment against Davis for $40,000 based on the negligence count in plaintiff's complaint. Count I was dismissed with prejudice, and plaintiff agreed not to enforce the judgment against Davis individually, his estate or heirs. No notice of the consent judgment was given to the insurers.

On January 12, 1993, plaintiff filed the instant garnishment action against defendants to satisfy the judgment obtained in the underlying suit against Davis. On January 27, 1993, defendants filed a garnishee disclosure denying all liability on grounds that the policy issued to Davis "does not provide any coverage for the claims made by Brown against Davis and further provides no coverage for the consent judgment entered against Davis on December 14, 1992." Additionally, the garnishee disclosure set forth affirmative defenses more particularly set forth in defendants' motion for summary disposition.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). In support of her motion, plaintiff filed a brief with supporting case authority arguing that her injuries were incurred in an "accident" resulting from the ownership, maintenance and use of Davis' cab. See Allstate Ins Co v Freeman, 432 Mich 656, 669; 443 NW2d 734 (1989); Westchester Fire Ins Co v Continental Ins Co, 126 NJ Super 29; 312 A2d 664 (1973), aff'd 65 NJ 152; 319 A2d 732 (1974); State Farm Mutual Automobile Ins Co v Partridge, 10 Cal 3d 94; 109 Cal Rptr 811; 514 P2d 123 (1973); Home Indemnity Co v Lively, 353 F Supp 1191 (WD Okla 1972); Valdes v Smalley, 303 So2d 342 (Fla Dist Ct App, 1974).

Defendants also moved for summary disposition, arguing that plaintiff's injuries were not the result of an accident and did not arise out of the ownership, operation or maintenance or use of Davis' cab. See Thornton v Allstate Ins Co, 425 Mich 643; 391 NW2d 320 (1986); A & G Associates, Inc v Michigan Mutual Ins Co, 110 Mich App 293; 312 NW2d 235 (1981); Kangas v Aetna Casualty & Surety Co, 64 Mich App 1, 17; 235 NW2d 42 (1975).

Additionally, defendants set forth the following alternative grounds for grant of summary disposition:

(A) Plaintiff failed to contest Michigan Mutual's garnishee disclosure denying liability or seek discovery within 14 days after service of Michigan Mutual's disclosure, so the facts contained in Michigan Mutual's disclosure must be accepted as true.

(B) Because the allegations in plaintiff's complaint described an assault and battery instead of an "accident," defendants had no duty to defend.

(C) All claims made by plaintiff are barred by the intentional acts exclusion contained in the policy.

(D) Because Davis entered in a consent judgment without notifying Michigan Mutual and obtaining its written agreement, there is no coverage.

(E) Because the insured (Davis) had not sustained a loss, Michigan Mutual had no duty to pay.

Hearing and oral argument on the motions was held on May 28, 1993, and on July 29, 1993 the circuit court issued a comprehensive opinion from the bench denying plaintiff's motion and granting

defendant's motion. The court concluded that plaintiff's injury did not arise out of the ordinary use of the Davis cab:

> The leading case, I think the case that is most frequently cited is [Kangas, supra] and in that case the Court laid out the standard I think that has been adopted in many cases, particularly on page 17 of that opinion.
>
> * * *
>
> [W]hat happened here, the cause of this injury to the complainant was [an] altercation between Davis and the plaintiff over who would have the fare.
>
> This altercation, this disagreement started back at the plaintiff's cab, and when Davis took the bags and carried them over to the back of his taxicab, the rear of his cab is where the alleged injury occurred.
>
> The cause was the dispute, rather than as characterized by the plaintiff in Count I of the complaint as an assault and battery. . . .
>
> * * *
>
> The fact that Mr. Davis was in the process of putting the bags into the trunk [of his cab] I think is incidental. And while this is a close issue, I would say unrelated to the injury, I know though it occurred while Davis was putting the bags in the trunk was not foreseeable or pliable with the normal use other than maintenance of a motor vehicle. For that reason, I am going to grant disposition in favor of the garnisheed defendant on the basis that it was, it did not arise out of the ordinary use of a covered automobile. (Emphasis added.)

The relevant portions of the insurance policy covering Davis' cab read:

> Coverage
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, cause by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."
>
> B. Exclusions
>
> This coverage does not apply to any of the following:
>
> 1. Expected or Intended Injury
> "Bodily injury" or "property damage" expected or intended from the standpoint of the "insured."

The seminal case on the applicability or non-applicability of the above coverage provisions to the facts in the instant case is Kangas, supra. Twenty years ago, that opinion was authored by one member of the panel hearing the instant case. Passengers in Kangas' car exited the car and physically assaulted a pedestrian walking on the highway. A civil action for assault and battery was brought on behalf of the pedestrian against Kangas, Aetna refused to defend Kangas, who then sued Aetna for a declaratory judgment. The trial court granted summary judgment to Aetna. This Court affirmed, stating:

> Where the injury inflicted is by an assault by an insured on a third party or by a passenger in assured's vehicle, the great weight of authority is that the injury does not arise out of the ownership, maintenance or use of the automobile.

"When the insured, through irritation or anger, strikes and injures another person, it has been held that such injury does not arise from the use of the insured automobile." (Citations omitted).

* * *

Where the injury is the result of an assault or results from an action which has overtones of deliberateness, the courts have generally held that injury did not arise out of the ownership or use of the vehicle insured. 64 Mich App at 8-9 (emphasis added).

Plaintiff argues that the factual situation in Kangas is clearly distinguishable from the instant case and, accordingly, the trial court erred in relying on Kangas. Plaintiff is correct that in many respects the cases are distinguishable. In Kangas, the insurance policy was a family policy whereas in the instant case the policy was a business policy. In Kangas, there was absolutely no connection between the parked vehicle and the assault on the passing pedestrian, whereas, in the instant situation, the assault occurred while Davis was loading passenger baggage into Davis' covered vehicle. Certainly, argues plaintiff, disputes over which driver is entitled to the fare and loading baggage into one's own cab is closely related to one's ownership, use and maintenance of the covered cab.

While the instant case is a closer case than Kangas, the test for coverage set forth in Kangas is not whether there is some connection between the injury sustained and the use of the vehicle insured. Instead, the test is whether the injury "is foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." 64 Mich App at 17. Yes, loading baggage involves a normal use of a cab. But, forcibly removing baggage from another cab and twisting the arm of a protesting driver to the point the arm breaks is not a normal, foreseeable use of the insured vehicle. Although the break occurred at the back of Davis' vehicle, it all began at the back of plaintiff's cab.

Unlike the situation in the instance case, all of the cases relied upon by plaintiff involve objects thrown from a moving car. As observed by the court in Westchester Fire Ins Co, supra,

In our mobile society the act of throwing or dropping objects from moving vehicles is not such an uncommon phenomenon that such occurrence may not be anticipated nor so inconsequential that members of the public need no financial protection from the consequences thereof. 312 A2d at 669.

By contrast, the act of alighting from one vehicle and engaging in a shoving match with the driver of another car is not such a common occurrence as to be identified as the normal use, maintenance and ownership of the vehicle involved. Although Davis may not have intended to break plaintiff's arm, he did intend to wrest the luggage away from plaintiff. In Clarke v K Mart Corp, 197 Mich App 541, 549; 495 NW2d 820 (1992), this Court held that snatching a bag out of the plaintiff's hands or taking it out of plaintiff's shopping cart constituted an assault and battery. Assault and battery are intentional acts. Smorch v Auto Club Group Ins Co, 179 Mich App 125, 129; 445 NW2d 192 (1989).

Post-Kangas case law reinforces our decision that where the injury is the result of an assault or action by the insured which has overtones of assault, the injury is not one which arises out of the ownership or use of the vehicle insured. In A & G Associates v Michigan Mutual Ins Co, 110 Mich App 293; 312 NW2d 235 (1981), the cab driver, McDonald, after being paid by his passenger Burch, struck Burch with a tire iron and robbed him. Burch brought suit against the cab company and its insurance carrier. This Court held:

In the present case, McDonald utilized his role as taxi driver to select Curtis Burch as his robbery victim. Although there is, in that sense, a causal connection

between the use of the vehicle and Burch's injuries, we believe that that connection was an incidental one. The injuries suffered by Burch were not foreseeably identifiable with the normal use of the vehicle. Likewise, the fact that McDonald used a part of the vehicle, the tire iron, as the instrumentality of the assault was a mere fortuitous connection to the operation of the taxicab. 110 Mich App at 296-297.

Plaintiff attempts to distinguish A & G on grounds that the facts there were more egregious than the facts in the instant case: here Brown obtained a judgment based upon negligence, whereas in A & G the injuries were clearly intentional. We reject that distinction on grounds that the test in each case is whether the injuries occurred in the course of the normal method of conducting business.

In Marzonie v Auto Club Ins Ass'n, 441 Mich 522; 495 NW2d 788 (1992), the plaintiff and a passenger were driving home from a party. They became embroiled in a verbal dispute with passengers in the car driven by Vernon Oaks. Following the exchange of words, the plaintiff began pursuing the Oaks vehicle at a high rate of speed. Oaks drove home, where he and his friends went inside. The Marzonie car followed closely behind and pulled to a stop. Moments later, Oaks emerged from the house with a shotgun, aimed it at the grill of the Marzonie car and fired, striking Marzonie in the face and neck. Later, Oaks explained he had only intended to stop the car, not shoot the driver.

The plaintiff sought first party insurance benefits from the defendant insurer of the car the plaintiff was driving. The defendant insurer denied benefits on grounds that the plaintiff's injuries did not arise out of the operation, maintenance or use of the vehicle as a motor vehicle. On appeal, this Court held the plaintiff was entitled to first party benefits. Marzonie v Auto Club Ins Ass'n, 193 Mich App 332, 337; 483 NW2d 413 (1992). Writing in dissent, Judge MacKenzie said:

> [T]he inherent nature or the functional character of plaintiff's motor vehicle did not cause his injuries. Instead, plaintiff was injured as a result of his dispute with Oaks, and plaintiff's automobile merely served as the target of Oaks' gunfire and the situs where plaintiff was shot. Id at 338-339.

On appeal, the Supreme Court adopted Judge MacKenzie's reasoning and reversed, saying:

> [T]he testimony of the plaintiff clearly demonstrates that the shots were fired during the continuation of an argument that had begun before the chase. The involvement of the automobiles was incidental and fortuitous. Although Mr. Oaks says that the plaintiff's car was moving toward him at a "creep," the shooting arose out of a dispute between two individuals, one of whom happened to be occupying a vehicle at the time of the shooting. 441 Mich at 534.

Similarly, in the instant case, plaintiff was injured as a result of a dispute over fares with Davis, and the assault and battery initiated at the back of plaintiff's car. Clearly, the subsequent involvement of Davis' car was incidental and fortuitous. Further, plaintiff's injuries were not the result of an "accident" and were not foreseeably identifiable with the normal use of Davis' vehicle.

Our decision on this issue makes it unnecessary to address the issues raised by defendants as cross-appellants (the alternate grounds to uphold summary disposition, which the circuit court had rejected).

Affirmed.

/s/ Maura D. Corrigan
/s/ Peter D. O'Connell
/s/ Glen S. Allen, Jr.