STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION,
a Michigan insurance corporation,

Plaintiff-Appellant,

FEB 23 1987

v

No. 85828

GREGORY J. HILL,

Defendant-Appellee.

BEFORE: Danhof, C.J., S.J. Bronson and T. Gillespie*, JJ

PER CURIAM

This case arises out of an automobile accident that occurred on April 9, 1981. Defendant, Gregory J. Hill, was stopped at a red light when his car was hit from behind by an uninsured driver. As a result of the accident, Hill developed pain in his neck and shoulder region, as well as a headache. Hill then made a claim under the uninsured motorist coverage provisions of his policy with plaintiff, Auto Club Insurance Association.

On March 20, 1985, an arbitration hearing was held. The arbitrators awarded Mr. Hill $11,000. In making this award, the arbitrators held that the threshold requirements of MCL 500.3135(1); MSA 24.13135(1) did not apply to defendant's claim. The Auto Club subsequently filed a motion with the circuit court to vacate the arbitration award. Defendant filed a motion to confirm the award. Following a hearing on this motion, the trial court confirmed the arbitrators' award.

The Auto Club appeals the trial court's decision as of right. The issue presented before this Court is whether the threshold requirement for non-economic loss applies where uninsured motorists are involved.

We affirm.

---

*Circuit judge, sitting on the Court of Appeals by assignment.

The Michigan Supreme Court has adopted the following standard for judicial review of an arbitration award resulting from automobile insurance:

"Where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside." DAIIE v Gavin, 416 Mich 407, 443; 331 NW2d 418 (1982).

The relevant portions of the No-Fault Act are:

"Sec. 3135. (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

"(2) Notwithstanding any other provisions of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(3) and (4) was in effect is abolished except as to:

"(a) Intentionally caused harm to persons or property.
. . .

"(b) Damages for noneconomic loss as provided and limited in subsection (1).

"(c) Damages for allowable expenses, work loss, and survivor's loss..." MCL 500.3135; MSA 24.13135.

In Smith v Sutherland, 93 Mich App 24; 285 NW2d 784 (1979), a panel of this Court found that subsection (2) of this statute controls the issue in this case. The Court held that:

"Unless a defendant has brought himself within Sec. 3135(2) by purchasing insurance, Section 3135(1) would not apply." Id., 31.

However, there is presently a conflict of authority on this issue. One view was taken in Caplan v DAIIE, 102 Mich App 354; 201 NW2d 471 (1980) which held that, based on the language used by the Supreme Court in Bradley v Mid-Century Ins Co, 409 Mich 1, 62-63; 294 NW2d 141 (1980), the threshold requirement for non-economic loss recovery in the No-Fault Act would apply even in cases against uninsured motorists.

The language relied on in Caplan quoted from Bradley, p 61, is as follows:

"Under the no-fault motor vehicle liability act an insured may collect from his insurer for work loss and medical expenses without regard to fault. He may sue the negligent tortfeasor for excess economic loss and, if the threshold of

injury is met, for noneconomic loss. The statute requires that motorists carry residual liability insurance in addition to no-fault insurance to provide a source of recovery to persons severely injured as a result of driver negligence. If a motorist is uninsured he may be sued for all economic loss as well as above-threshold non-economic loss."

We also note that Bradley at page 63 explains:

"In providing insurance against the uninsured motorist, the insurer promises the insured that his right of action for greater than threshold injuries will not be worthless if the tortfeasor turns out to be uninsured." (Emphasis added.)

Since the Caplan decision, however, two other panels of this Court, Jones v DAIIE, 124 Mich App 363; 335 NW2d 39 (1983), lv den 418 Mich 878 (1983) and Stephenson v Associated General Ins Co, 148 Mich 1; 384 NW2d 62 (1985), have held that the issue is determined by Citizens Ins Co of America v Tuttle, 411 Mich 536; 309 NW2d 174 (1981) which the above panels interpret to hold that the protection of the No-Fault Act as to tort liability is not extended to anyone not contributing to the system.

Both Bradley and Tuttle concluded that the Legislature, in promulgating the No-Fault Insurance Act, intended to retain tort liability as to uninsured motorists, but neither decision addresses directly the situation presented here.

It remains for the Legislature or the Supreme Court to resolve the conflict. The Supreme Court has so far denied leave to consider or reconsider Jones, 418 Mich 878 (1983) or to consider a certified conflict, 422 Mich 1205 (1985).

It is well-settled that an uninsured motorist is outside of the basic no-fault system and remains subject to tort liability. Tuttle, supra, 546-547; Aetna Casualty & Surety Co v Collins, 143 Mich App 661, 665; 373 NW2d 177 (1985), Smith v Sutherland, supra.

One of the protections provided in the no-fault system is freedom from suit except in certain situations outlined by the Act. To require the seriousness of injury as provided by the Act as a condition to allow suit to be brought would be to allow the uninsured motorist to use the system of which he or she has not availed himself as a shield to protect him or her from below threshold non-economic losses.

A further reason not to apply the act is noted in McKendrick v Petrucci, 71 Mich App 200, 207; 247 NW2d 349 (1976) where the Court said:

> "In providing that the uninsured tortfeasor does not have the same immunity that exists when there is insurance coverage, the act creates another significant incentive towards the goal of insurance coverage for all automobiles."

We therefore join with the panels in Jones, supra, and Stephenson, supra, in holding that the No-Fault Act and its protections are available only to those who have obtained the required no-fault insurance or other security.

Further, in so holding we cannot find that the arbitrators made an error of law in following Jones.

Affirmed.

/s/ Tyrone Gillespie

Judge Bronson not participating.

STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION,
a Michigan insurance corporation,

Plaintiff-Appellant,

v No. 85828

GREGORY J. HILL,

Defendant-Appellee.

BEFORE: Danhof, C.J., S.J. Bronson and T. Gillespie*, JJ

DANHOF, C.J. (Concurring)

I concur in the result reached by the lead opinion but write separately because I believe affirmance is justified for a different reason. Although I agree with the holding in Caplan v DAIIE, 102 Mich App 354; 201 NW2d 471 (1980), because there is a split of authority in our Court, I cannot say that the arbitrator made an error of law in following Jones v DAIIE, 124 Mich App 363; 335 NW2d 39 (1983) lv den 418 Mich 878 (1983).

Judge Bronson not participating.

/s/ Robert J. Danhof

---

*Circuit Judge, sitting on the Court of Appeals by assignment