STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA, Subrogee of Frances S. Kinkle,

Plaintiff-Appellee,

APR 22 1987

v

No. 83350

JOANNE LOWERY,

Defendant-Third-Party Plaintiff-Appellant,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Third Party-Defendant.

BEFORE: J.H. Shepherd, P.J., M.J. Kelly and R.L. Tahvonen*, JJ

TAHVONEN, J.

Defendant Joanne Lowery appeals by leave granted from a circuit court order reversing a district court order and remanding the case for entry of judgment in favor of Citizens Insurance Company of America in the amount of $2,500 pursuant to the parental liability statute, MCL 600.2913; MSA 27A.2913. We affirm.

The parties have stipulated to the facts. On May 21, 1982, Joseph Lowery, the 15-year-old son of the defendant, Joanne Lowery, stole a car owned by Frances S. Kinkle. The vehicle was insured by Citizens. The trial court found that Joseph Lowery operated the vehicle in a manner which was "reckless to the point of [being] wilful and wanton misconduct," resulting in damage to the Kinkle car, a garage and a legally parked car.

Citizens paid the collision loss on the Kinkle vehicle and also paid no-fault property protection benefits to the owners of the damaged garage and parked car. Citizens, as subrogee of Frances Kinkle, brought an action in district court against Mrs. Lowery under the parental liability statute, MCL 600.2913; MSA 27A.2913. Joanne Lowery filed a third-party action against her

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

homeowner's carrier, Pioneer State Mutual Insurance Company. The district court found against Citizens on its claim under the parental liability statute and for Mrs. Lowery on her third-party claim against Pioneer for failure to defend. Citizens alone appealed. The circuit court reversed and remanded for entry of judgment in the amount of $2,500 for Citizens.

Mrs. Lowery appeals by leave, arguing in this Court that Citizens is not entitled to recover under the parental liability statute for three reasons. First, Citizens is not the real party in interest because it purports to sue as a subrogee of its insured (who had no duty to pay) and not as subrogee of the owners of the garage and the parked car to whom payment was in fact made. Second, Mrs. Lowery's liability is abolished by the no-fault act, MCL 500.3135; MSA 24.13135, because the damage was caused by the operation of a motor vehicle. Third, Citizens' claim for reimbursement is barred by the no-fault act itself, MCL 500.3116; MSA 24.13116.

Defendant raises the claim that Citizens is not the real party in interest in this lawsuit for the first time in this Court although the circuit court raised the issue sua sponte in its written opinion reversing the district court's order. While a party's failure to raise an issue below normally precludes appellate review, this rule is not inflexible. Because the issue is a question of law concerning which the necessary facts have been presented, the issue merits consideration. See Ledbetter v Brown City Savings Bank, 141 Mich App 692, 702; 369 NW2d 243 (1985).

As to the damage to the Kinkle automobile, Citizens is subrogee to Frances Kinkle pursuant to the subrogation clause in the insurance policy. See Michigan Medical Service v Sharpe, 339 Mich 574; 64 NW2d 713 (1954).

Citizens' claim for reimbursement of property protection benefits paid for the damage to the garage and parked automobile presents a different problem. As Kinkle's no-fault carrier, Citizens was the party directly responsible for payment

of property damage benefits. MCL 500.3121; MSA 24.13121. Because Citizens paid for the damage done to the garage and parked automobile, it is entitled to reimbursement from those persons responsible for the damage. Citizens stands in the property owners' shoes and has the same right of reimbursement as the property owners. This right to reimbursement is similar to the right of indemnity. See 42 CJS, Indemnity, §§ 21, 23, pp 596-598, 600; Langley v Harris, 413 Mich 592; 321 NW2d 662 (1982); Dale v Whiteman, 388 Mich 698, 704-706; 202 NW2d 797 (1972).

We note that technically Citizens should have sued in its own name for reimbursement of the personal property protection benefits rather than as subrogee of Frances Kinkle. However, defendant has not been ignorant of the real object of Citizens' lawsuit, and given that defendant raises this issue herself for the first time in this Court, we refuse to elevate form over substance to disallow Citizens' cause of action for reimbursement of property protection benefits paid for damage done by defendant's minor son. Compare, Hiner v State Highway Commission, 96 Mich App 497, 500-502; 292 NW2d 709, lv den 409 Mich 914 (1980).

Defendant claims that Citizens' cause of action in this case is barred by section 3135 of the no-fault act, which abolishes tort liability arising from the ownership, maintenance, or use of an automobile. Section 3135 states in part:

"(2) Notwithstanding any other provision 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. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer such harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

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

"(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of

the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

"(d) Damages up to $400.00 to motor vehicles, to the extent that the damages are not covered by insurance. An action for damages pursuant to this subdivision shall be conducted in compliance with subsection (3)." MCL 500.3135(2); MSA 24.13135(2).

We find that section 3135(2) of the no-fault act does not abolish tort liability in the instant case. The parties have stipulated that 15-year-old Joseph Lowery's operation of the stolen Kinkle automobile was "reckless, to the point of [being] wilful and wanton misconduct."[1] The Supreme Court in Gibbard v Cursan, 225 Mich 311, 320; 196 NW 398 (1923), described wilful and wanton misconduct, distinguishing it from negligence:

"If one wilfully injures another, or if his conduct in doing the injury is so wanton or reckless that it amounts to the same thing, he is guilty of more than negligence. The act is characterized by wilfulness, rather than by inadvertence, it transcends negligence -- is different in kind."

The Gibbard Court further noted that wilful and wanton misconduct is in the same class as intentional wrongdoing. 225 Mich 321. See also, Burnett v City of Adrian, 411 Mich 536, 562-563; 309 NW2d 174 (1981).

Intentionally caused harm to persons or property is an exception to the no-fault act's abolition of tort liability. MCL 500.3135(2)(a); MSA 24.13135(2)(a). Because acts resulting from wilful and wanton misconduct fall within the class of intentional acts, defendant's tort liability in the instant case is not abolished by the no-fault act. In addition, under such circumstances, a no-fault carrier has a right to subtraction from or reimbursement of property protection benefits. MCL 500.3116(2); MSA 24.13116(2).

Citizens' cause of action against Joanne Lowery has been brought pursuant to the parental liability statute, MCL 600.2913; MSA 27A.2913, which reads:

"A municipal corporation, county, township, village, school district, department of the state, person, partnership, corporation, association, or an incorporated or unincorporated religious organization may recover damages in an amount not to exceed $2,500.00 in a civil action in a court of competent

jurisdiction against the parents or parent of an unemancipated minor, living with his or her parents or parent, who has maliciously or wilfully destroyed real, personal, or mixed property which belongs to the municipal corporation, county, township, village, school district, department of the state, person, partnership, corporation, association, or religious organization incorporated or unincorporated or who has maliciously or wilfully caused bodily harm or injury to a person."

The statute does not provide a new cause of action but rather provides a method for collecting damages for the tortious conduct of an unemancipated minor child. Liability is imposed for malicious or wilful destruction of property, independent of the means the child employs to cause the destruction. See McKinney v Caball, 40 Mich App 389; 198 NW2d 713 (1972); Shelby Mutual Insurance Co v United States Fire Insurance Co, 12 Mich App 145; 162 NW2d 676 (1968).

In the instant case, Joseph Lowery operated a vehicle in a manner constituting wilful and wanton misconduct and caused damage to a garage and parked vehicle. Therefore, Citizens is allowed to recover from defendant under the parental liability statute.

Affirmed.

/s/ John H. Shepherd
/s/ Michael J. Kelly
/s/ Randy L. Tahvonen

FOOTNOTE

[1]This finding is taken from the parties' stipulated statement of facts. The circuit court in its opinion concluded that the district court found that the young man operated the automobile "in a manner constituting wilful and wanton misconduct." The circuit court relied on a statement by the district court in its opinion in a third party action premised on Pioneer's failure to defend. In the referenced portion of its opinion, the district court stated:

> "Defendant Lowery was sued as the mother of an unemancipated minor child, the child having taken a motor vehicle without the consent of the owner and operated the vehicle in a manner constituting wilful and wanton misconduct. Defendant Lowery's involvement in this case was as a result of being the mother of an unemancipated minor child and not because of any fault on her part."

However, later in the same opinion, the district court judge wrote:

> "In the instant case, it was decided by this Court that the parent would not be liable because of the fact that the damage was occasioned by the use of a motor vehicle and under the No-Fault Act the operator would not be liable whether he be negligent or reckless, whether he be an adult or unemancipated minor child. The parents liability being vicarious, there would be no liability on the part of the parent."

It could fairly be concluded that the trial court's statements concerning the driver's conduct were not findings of fact but rather descriptions of the claims made by Citizens -- the nature of the claims fixing Pioneer's duty to defend under the home-owner's policy. We note this aspect of the record to emphasize that (1) the parties and the circuit court have agreed and acted on the basis of a presumed trial court finding of a "wilful and wanton misconduct" and (2) no one is challenging the sufficiency of the evidence to support that presumed finding.