STATE OF MICHIGAN

COURT OF APPEALS

HARRY JOE WALTERS, Conservator of the ESTATE OF JACQUELYN MARIE WALTERS,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 5, 1995

No. 162923
LC No. 91-07280-NO

Before: Gribbs, P.J., and Markman and Shelton,* JJ.

PER CURIAM.

Plaintiff appeals the Kent Circuit Court's dismissal of plaintiff's claim seeking personal protection insurance benefits from defendant. We affirm.

On April 5, 1991, Jacquelyn Walters, her brother Jewell, and Ken Norton drove to Deep Lake Campground in Barry County looking for Jeff Walters. All three of the truck's occupants were drinking beer. Jacquelyn Walters and Ken Norton were in the front passenger seat with Jewell Walters who was driving the truck. When they arrived at the campground, Jewell Walters and his passengers drove around to various campsites calling out for Jeff Walters. When they were unable to find Jeff, Jewell drove erratically around the campground several times. Lloyd Richter and Bonnie Clark testified at their depositions that Jewell Walters' truck was being driven in a very reckless manner. The truck drove past their campsite several times with the passengers and driver yelling and screaming at them. Richter yelled at the driver to leave them alone. On the last pass, however, the truck narrowly missed hitting a car parked near Richter and Clark's campsite. The driver yelled at Richter and Clark. Richter then fired a single shot from a pistol, hitting and paralyzing Jacquelyn Walters. Richter testified that he had attempted to fire over the truck to scare them off and never intended to shoot anyone in the truck.

Plaintiff sued defendant to obtain personal protection insurance benefits under the No-Fault Act. Defendant moved for summary disposition on the basis that Walters' injuries did not arise out of the ownership, operation, maintenance or use of a motor vehicle under MCL 500.3105(1); MSA 24.13105(1). The trial court found that the case was controlled by Marzonie v Auto Club Ins Ass'n, 441 Mich 522; 495 NW2d 788 (1992), and granted summary disposition for defendant.

Plaintiff argues that the trial court erred in granting summary disposition as plaintiff's injuries "arose out of either the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." Plaintiff further argues that there were issues of material fact which should have precluded summary disposition. We disagree.

MCL 500.3105(1); MSA 24.13105(1) provides:

> Under personal protection insurance, an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

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

In Marzonie, supra, the plaintiff was in an automobile when he was shot by a man who was on foot and with whom the plaintiff earlier had engaged in an argument. The Michigan Supreme Court concluded that the plaintiff's injuries did not "arise out of the ownership, operation, maintenance or use of motor vehicle as a motor vehicle" under MCL 500.3105(1); MSA 24.13105(1). The Court held that the proper focus of inquiry was not on the intent of the assailant but rather on the relation between the injury and the use of a motor vehicle as a motor vehicle. Id. at 532-534; Mueller v Auto Club Ins Ass'n, 203 Mich App 86, 89-90; 512 NW2d 46 (1993). The Supreme Court further held that the involvement of the plaintiff's automobile was merely incidental and fortuitous and not within the ordinary risks of driving a motor vehicle. Marzonie, supra, at 534; Mueller, supra, at 89-90. In Mueller, supra, this Court followed Marzonie and concluded that a driver who was accidently shot during deer season was not entitled to no-fault benefits because the injury did not "arise out of the operation, ownership, maintenance, or use of a motor vehicle as a motor vehicle" under the No-Fault Act.[1]

The Michigan Supreme Court recently held in Bourne v Farmers Ins Exchange, ___ Mich ___; ___ NW2d ___ (No. 98820 rel'd 7/6/95), that a plaintiff's physical injuries sustained from a "carjacking" were not compensable under MCL 500.3105(1); MSA 24.13105(1) as they did not arise out of the use of the plaintiff's vehicle as a motor vehicle. The Court found that plaintiff's injuries "arose out of blows inflicted on him by a carjacker. Hence, plaintiff suffered a personal physical attack." Bourne, slip op at 4. The Court pointed out that "[g]enerally, such an attack is not compensable." Id. The Court further found that "plaintiff's vehicle was at best the situs of the injury, which is not a sufficient condition to establish the requisite causal connection between the injury and the vehicle." Bourne, slip op at 7. The Court concluded that under the facts presented "there was not a sufficient causal connection between plaintiff's injuries and the use of his motor vehicle as a motor vehicle to find liability on the part of defendant." Bourne, slip op at 9.

We conclude that there are no issues of material fact and that plaintiff's injuries did not arise out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." We acknowledge that Jacquelyn Walters' injury occurred while she happened to be in the motor vehicle. Furthermore, Jewell Walters' erratic driving of the motor vehicle may have contributed to any provocation felt by Richter. Nevertheless, there was not a sufficient causal connection between plaintiff's injuries and the use of the motor vehicle as a motor vehicle. Bourne, supra.[2] Any relation between the injury and the use of the vehicle as a motor vehicle was merely "but for" or incidental. Marzonie, supra. Jacquelyn Walters was injured by Richter's gunfire. The motor vehicle was not the instrumentality of the injury nor was the injury caused by the inherent nature of the vehicle. Thornton v Allstate Ins Co, 425 Mich 643, 660-661; 391 NW2d 320 (1986); Mueller, supra at 91. Gunfire by a camper, even one perhaps angered or provoked by the reckless driving of a motor vehicle, is not "within the ordinary risks of driving a motor vehicle." Marzonie, supra.

Affirmed.

/s/Roman S. Gribbs
/s/Stephen J. Markman

I concur in result in only.

/s/Donald E. Shelton

[1] In Mueller, supra, at 92-93, this Court concluded that Kreighbaum v Auto Club Ins Ass'n, 170 Mich App 583; 428 NW2d 718 (1988), upon which plaintiff relies in part, was wrongly decided.

[2] We believe that injuries sustained during the course of a car theft, as in Bourne, supra, are closer to being "within the ordinary risks of driving a motor vehicle" and closer to having a sufficient causal connection with the use of the motor vehicle as a motor vehicle than injuries sustained from the shooting of a passenger in a vehicle by an individual, outside of a highway, who is threatened or provoked by the purposefully erratic driving of such vehicle.