STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER LEE LYVERE,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 17, 1995

No. 169267
LC No. 92-077251-NO

Before: Saad, P.J., and Bandstra and M.G. Harrison,* JJ.

PER CURIAM.

This appeal stems from a suit by plaintiff Lyvere against defendant Auto-Owners Insurance Company to recover work loss benefits, pursuant to MCL 500.3107(1)(b); MSA 24.13107(1)(b), caused by injuries that plaintiff suffered in an automobile accident. While driving his aunt's uninsured vehicle, plaintiff, who did not possess a valid operator's license, was involved in an accident. Because neither plaintiff nor his aunt possessed a policy of no-fault insurance, as required by the no-fault act, MCL 500.3101 et seq.; MSA 24.13101 et seq., the Assigned Claims Facility (ACF) assigned plaintiff's claims to defendant. At first, defendant paid benefits to plaintiff, including work loss benefits; but defendant subsequently stopped paying the work loss benefits. Plaintiff then sued defendant to compel the payment of accrued benefits. A jury awarded plaintiff a verdict of $20,571.00, plus interest and costs. The trial court entered an order of judgment effectuating the jury verdict on October 8, 1993. Defendant appeals from that judgment as of right. We affirm.

I

Defendant argues that MCL 500.3113(a); MSA 24.13113(a) precludes plaintiff's claim for work loss benefits under MCL 500.3107(1)(b); MSA 24.13107(1)(b) because plaintiff unlawfully operated his aunt's vehicle without a valid operator's license. However, our Supreme Court has held that the relevant language of MCL 500.3113(a); MSA 24.13113(a) which precludes benefits when a vehicle is "taken unlawfully" applies to car thieves. Turner v Auto Club Ins Ass'n, 448 Mich 22, 36; 528 NW2d 681 (1995). Further, this Court has held that section 3113(a) does not exclude coverage for an unlicensed driver who drives a vehicle with the owner's permission because "it is the unlawful nature of the taking, not the unlawful nature of the use, that forms the basis of the exclusion under the statute." Bronson Methodist Hospital v Forshee, 198 Mich App 617, 627; 499 NW2d 423 (1993). Thus, while plaintiff's use of the vehicle in this case was unlawful, the vehicle was not "taken unlawfully" so as to preclude benefits under section 3113(a). Id.; Turner, supra. Cf. Priesman v Meridian Ins Co, 441 Mich 60; 490 NW2d 314 (1992).

Next, defendant raises two ancillary arguments under this issue: 1) public policy should exclude coverage under the facts of this case; and 2) the agreement between plaintiff and his aunt operates as a constructive fraud, thus precluding coverage. Although we might find some merit to these arguments, we decline to review these issues for the first time on appeal, as defendant did not raise them in the trial court below. Booth Newspapers, Inc v Univ of Michigan Bd of Regents, 444 Mich 211, 234; 507

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

NW2d 422 (1993). Further, it appears that these arguments must fail in light of the holdings in Bronson and Turner, discussed supra.

II

Defendant argues that the trial court erred when it excluded evidence that plaintiff was unlicensed and that the vehicle was uninsured because it was relevant to the issue of whether plaintiff's taking of the vehicle was unlawful. We find no error. The proffered evidence was only indicative of the lawfulness of plaintiff's use of the vehicle, not the lawfulness of the taking. This important distinction is discussed in Issue I, supra. Since the evidence was not relevant to the issue of the lawfulness of the taking of the vehicle, the trial court did not abuse its discretion when it excluded the evidence. MRE 402; Price v Long Realty, Inc, 199 Mich App 461, 466; 502 NW2d 337 (1993).

III

Defendant argues that the trial court erred when it excluded evidence that the ACF, not defendant, was responsible for plaintiff's benefits. Defendant contends that this evidence was admissible to show that defendant had no financial interest in the action and was not biased. We disagree with defendant's arguments. Whether defendant or ACF was ultimately responsible for plaintiff's benefits was irrelevant to plaintiff's claims, and was potentially prejudicial. The substantive issue in the case was whether plaintiff was entitled to work loss benefits, not the structure of the ACF system. Accordingly, the trial court properly excluded the evidence as irrelevant. MRE 402; Price, supra at 466.

The order of judgment of the trial court is affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra

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HARRISON, J. (concurring)

I concur in the result as mandated by existing case law. Nevertheless, the licensing of those who use the public highways is a critical public safety function which is subverted by such an outcome. When those who are not licensed for valid reasons potentially jeopardize the well-being of others with minimal consequences to themselves, such a result, I suggest, is contrary to sound public policy and should be reviewed by the Legislature, which I urge.

/s/ Michael G. Harrison

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