STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

No. 179333
LC No. 93-030999-NF

Before: McDonald, P.J., and Markman and C. W. Johnson,* JJ.

MARKMAN, J. (dissenting).

I respectfully dissent. Although Ronald Parrish was undeniably "maintaining" the Honda when he was tragically injured, there was an insufficient nexus, in my judgment, between the kerosene heater and Parrish's activities at the time. As a result, I believe that the trial court properly determined that Parrish's injuries did not "arise out of" the maintenance of the automobile and that defendant was entitled to summary disposition as a matter of law.

The no-fault act provides that a no-fault insurer is liable to pay personal injury protection (PIP) benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1); MSA 24.13101(1). The only question in the instant case is whether Parrish's injuries "arose out of" maintenance of the automobile. Such phrase requires that there be a causal connection between the injury and the maintenance of the automobile. MCL 500.3105(1); MSA 24.13105(1*); Turner v Auto Club Ins*, 448 Mich 22, 31; 528 NW2d 681 (1995); *Auto-Owners Ins v Citizens Ins*, 189 Mich App 458, 460; 473 NW2d 753 (1991).

In *Central Mut Ins v Walter*, 143 Mich App 332; 372 NW2d 542 (1985), a fire occurred at a service station when fuel leaking from an automobile was ignited by an open flame of a hot water heater in the service bay. This Court held that the fire did not "arise out of" the maintenance of the vehicle; rather, the fire resulted from a premises hazard (the placement of a water heater with an open

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

flame in the service bay) unrelated to the normal maintenance and repair of motor vehicles. *Id*. at 336-37. A similar result was reached in *Auto-Owners Ins, supra*, in which mechanics were draining a vehicle's fuel line when gasoline fumes were ignited by the pilot light of a nearby water heater. Although the plaintiff attempted to distinguish *Walter* by arguing that the mechanics used hot water to wash and flush automobile parts, this Court rejected this theory and held that that there was no connection between the hot water heater and the maintenance that the vehicle was undergoing. *Id*. at 460. This Court held that "there must be a *close and direct connection* between the maintenance of the vehicle was undergoing and the source of the ignition." *Id*. [Emphasis supplied.] Cf. *Wagner v Michigan Mutual Ins*, 135 Mich App 767; 356 NW2d 262 (1984); *Buckeye Union Ins v. Johnson*, 108 Mich App 46; 310 NW2d 268 (1981).

On appeal, plaintiff acknowledges the holdings in *Walter, supra*, and *Auto-Owners Ins, supra*, but attempts to distinguish them on the grounds that they involved claims for property protection benefits rather than PIP benefits. However, the Supreme Court has observed that the analysis of the causal nexus required for PIP benefits under MCL 500.3105(1); MSA 24.13105(1) and that required for property protection benefits under MCL 500.3121(1); MSA 24.13121(1) are "almost identical." *Turner, supra* at 31 n 7. Moreover, this Court in *Walter* relied on cases involving PIP benefits in reaching its conclusion. See, e.g., *Walter, supra* at 336, citing *Ricciuti v DAIIE*, 101 Mich App 683; 300 NW2d 681 (1980); and *Williams v Citizens Mutual Ins*, 94 Mich App 762; 290 NW2d 76 (1980).

The facts in the instant case are analogous to those in *Walter* and *Auto-Owners*. I do not believe that the source of the ignition causing Parrish's injuries, the kerosene heater, was sufficiently related to his maintenance of the automobile to permit the recovery of the PIP benefits under the no-fault act. The heater was not directly involved in the actual maintenance of the automobile and it was not directly connected to the replacement of the automobile's fuel filter. A different result might be required if, for example, the heater were being used to warm a radiator hose or other engine part. Although, presumably, the heater was being used to keep Parrish warm during his maintenance of the automobile, this is not the type of "close and direct" relationship toward which the no-fault statute is directed. One could argue just as easily that injuries resulting from a structural collapse of the garage in which Parrish was working or an electrical injury resulting when Parrish plugged in a power tool "arose out of" his maintenance of the vehicle. However, something more than a "but for" relationship between the source of the injury and the insured's activities is required to satisfy property protection standards, as well as PIP standards, under the no-fault act and the precedents of this Court. The close physical proximity of the heater to Parrish's workplace, a factor emphasized by the majority opinion, does not transform the essential relationship-- or lack of a relationship-- between the source of the injury and the maintenance of the automobile.

Nor am I persuaded by plaintiff's argument that Parrish's injuries "arose out of" his maintenance of the automobile because "it is entirely foreseeable that a source of heat, be it a furnace or a kerosene heater, might be used to warm a backyard garage in the middle of the winter when performing routine maintenance on a vehicle." The Supreme Court has addressed this argument of foreseeability under MCL 500.3105(1); MSA 24.13105(1):

> The introduction of the concept of foreseeability, which is essentially a fault concept, into MCL 500.3105(1); MSA 24.13105(1) might, indeed, run counter to one of the basic purposes of Michigan's no-fault legislation: to provide assured compensation for the broad range of accidental injuries which arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, without regard to fault.

Thornton v Allstate Ins, 425 Mich 643, 661 n 11; 391 NW2d 320 (1986). The mere foreseeability of an injury is not enough to establish no-fault coverage in the absence of a causal relationship between the injury and the maintenance, that is, a finding that the injury "arose out of" the maintenance of the vehicle. *Id*. at 661.

Therefore, I would affirm the trial court's grant of summary disposition in favor of defendant.

/s/ Stephen J. Markman