STATE OF MICHIGAN

COURT OF APPEALS

ANNIE MACK, Personal Representative of the Estate of ALBERT MACK,

Plaintiff-Appellee,

v

TRAVELERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

December 6, 1996

No. 170932
LC No. 86-032213-CK

Before: Saad, P.J., and Marilyn Kelly and M.J. Matuzak,* JJ.

PER CURIAM.

I concur in part and dissent in part.

Defendant initially moved for partial summary disposition on the issue of liability based upon stipulated facts. The circuit court granted the motion on the basis that MCL 500.3113(b); MSA 24.13113(b) precluded benefits to owners of uninsured vehicles involved in an accident. The court found that Mack's uninsured vehicle was involved in the accident because he was maintaining the vehicle. The court further found that Mack was not entitled to benefits under MCL 500.3106(1)(a); MSA 24.13106(1)(a) because his vehicle was parked in such a way as to cause unreasonable risk of bodily injury.

Mack appealed that decision and in *Mack v Travelers Ins Co*, 192 Mich App 691; 481 NW2d 825 (1992), this Court reversed the circuit court, holding that the uninsured vehicle was not involved in the accident for purposes of MCL 500.3113(b); MSA 24.13113(b) since none of the statutory exceptions of the parked vehicle provision, MCL 500.3106; MSA 24.13106, were applicable. Relying upon the Supreme Court's decision in *Heard v State Farm Mutual Automobile Ins Co*, 414 Mich 139; 324 NW2d 1 (1982), the panel concluded that plaintiff was entitled to no-fault benefits as a matter of law.

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

Upon remand, the parties entered into a consent judgment for the personal injury protection benefits. The circuit court then issued an opinion granting plaintiff's motion for prejudgment interest, penalty interest and attorney fees. The circuit court then concluded that defendant's refusal to pay benefits was unreasonable in light of the Supreme Court's decision in *Heard, supra*.

As stated in the majority opinion, defendant now argues that the circuit court erred in awarding attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1), and penalty interest pursuant to MCL 500.3142; MSA 24.13142. I agree with defendant with respect to the award of attorney fees, but disagree with respect to the award of penalty interest.

The circuit court's decision after remand awarding plaintiff attorney fees relied upon our Supreme Court's decision in *Heard, supra*. While there are some similarities between the instant case and *Heard*, the instant case involves additional considerations not present in *Heard*. Although pumping gas may not be considered maintenance, I would find a genuine question whether adding oil to a car with the hood up might be considered maintenance. There was an additional issue of whether the vehicle was parked in such a way as to cause of unreasonable risk of the bodily injury which occurred. See MCL 500.3106(1)(a); MSA 24.13106(1)(a).

Originally, the circuit court ruled that plaintiff was not entitled to personal protection benefits because plaintiff was performing maintenance on the vehicle, and the vehicle was parked in such a way as to cause an unreasonable risk of injury. In particular, the circuit court emphasized that the vehicle was parked facing traffic at the front of the parking space, thus exposing plaintiff's decedent "to cars in the driving lane while he worked in the front of the vehicle during the store's operating hours." Although the panel of this Court in *Mack, supra*, ultimately reversed the decision of the circuit court, the lower court's original decision signals the existence of legitimate questions of statutory interpretation. As such, under these circumstances, I believe that the later decision by the circuit court awarding plaintiff attorney fees under MCL 500.3148(1); MSA 24.13148(1) was clearly erroneous. *United Southern Assurance Co v Aetna Life & Casualty Ins Co*, 189 Mich App 485, 492-493; 474 NW2d 131 (1991).

On the other hand, I concur in the majority's conclusion that the award of penalty interest was proper pursuant to MCL 500.3142; MSA 24.13142. *Davis v Citizens Ins Co*, 195 Mich App 323, 329; 489 NW2d 214 (1992).

I concur in part and dissent in part.

/s/ Henry William Saad