S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ESTATE OF TIMOTHY HUGHES,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY,

Defendant/Cross-Defendant-Appellee,

and

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Defendant/Cross-Defendant-Appellant,

and

STATE FARM INSURANCE COMPANIES,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
January 23, 2007

No. 259987
Oakland Circuit Court
LC No. 2000-024949-CZ

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant Empire Fire and Marine Insurance Company ("Empire") appeals as of right from a judgment holding it responsible for the payment of personal protection insurance (PIP) benefits in this insurance priority dispute. The circuit court required Empire to reimburse defendant State Farm Insurance Companies ("State Farm") for the amount of benefits State Farm paid previously as the assigned claims insurer, and also held Empire liable to plaintiff, the Estate of Timothy Hughes, for attorney fees, penalty and prejudgment interest, and costs. We affirm.

I

This action arises from a fatal motorcycle accident in which the operator of the motorcycle, Timothy Hughes, was killed. Hughes lost control of his motorcycle while riding on

I-75 in Oakland County, after being hit by a red car that was never identified. He landed on the pavement a distance away from the motorcycle. No one saw the cause of Hughes' fall, but evidence indicated that the unidentified red vehicle was involved because red paint was found on the motorcycle, as well as damage. After Hughes was thrown to the pavement, he was run over by a Taurus driven by Steven Myre, and insured by Empire. Hughes' skull was crushed.

Empire insured the Taurus, defendant Citizens Insurance Company (Citizens) insured Hughes' automobiles, which were not involved in the accident, and State Farm was the assigned claims facility insurer, MCL 500.3172, which paid no-fault benefits to plaintiff Estate.

II

On appeal, Empire challenges the circuit court's determination that it was first in priority for payment of no-fault benefits. We find no error.

The circuit court found:

> The evidence clearly shows that Timothy Hughes was struck by a red car while riding his motorcycle northbound on I-75. It is also clear that the accident left Hughes lying in the roadway after which he was struck in the head by a car driven by Steven Myre and insured by Defendant Empire Fire and Marine Ins Co. According to the medical examiner, Hughes suffered injuries to his head consistent with a fatal crushing injury, while the remaining injuries were not "major" and would not have been "incompatible with life." At the same time, however, the medical examiner also testified that he could not determine with any reasonable degree of medical certainty that Hughes was alive when struck by Myre's vehicle. Nor could he rule out the possibility that Hughes died of a spinal injury unrelated to the collision with Myre's vehicle. Specifically, the medical examiner agreed that "there is no way of telling one way or another what the actual cause of death was, whether it was the blunt force impact of falling off the motorcycle in the first place or the crushing injury later, because the crushing injury itself took away all the evidence in his head that would have allowed [such a] conclusion." Based on this evidence, the Court finds that it is just as likely as not that Hughes was dead when struck by Myre's vehicle. The Court cannot say, however, that it is more likely than not that Hughes was dead when struck by Myre's vehicle.
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> . . . . Thus, the Court finds that Myre's vehicle was "involved" in the accident despite the fact that it is impossible to tell whether Hughes was alive or dead when the collision occurred. As a result, Empire is the first priority insurer for payments of personal protection benefits pursuant to MCL 500.3114(5).

Under MCL 500.3114(5), a motorcyclist who is injured in an accident involving a motor vehicle is to claim PIP benefits from the insurer of any motor vehicles or motor vehicle operators involved in the accident, before looking to recover benefits under an insurance policy issued to him, i.e., to the injured motorcyclist. Section 3114(5) provides:

> A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

Empire's liability for PIP benefits thus depends on whether the Taurus was "involved in the accident" within the meaning of MCL 500.3114(5)(a). Empire does not dispute that if the Taurus was involved in the accident it is first in line in priority.

Because the evidence showed that Hughes was thrown to the pavement after losing control of his motorcycle due to the red car; that he was then struck and his skull crushed by the Taurus; that the injuries attributable to the Taurus necessarily would have been fatal; and that it cannot be established that while it appears the Taurus inflicted bodily injury, it did not because Hughes was actually dead, the circuit court did not err in determining that the Taurus was a vehicle involved in the accident. See *Hastings Mut Ins Co v State Farm Ins Co,* 177 Mich App 428, 435; 442 NW2d 684 (1989). *Hastings, supra,* involved a multi-vehicle accident resulting in the decedent, a motorcyclist, being killed. As in the instant case, one of the vehicles had run over the motorcyclist. The vehicle that had struck the motorcyclist argued it was not involved since it did not contribute to the decedent's accident. The circuit court found that all four automobiles were "involved" in the accident. Several insurers appealed, arguing that finding was clearly erroneous. This Court disagreed, and affirmed the circuit court:

> Eyewitnesses and expert testimony support the trial court's findings that each of the four automobiles actively contributed to the accident. Two of the vehicles . . . struck Spielmaker [the motorcyclist] in rapid succession. The vehicles of Martin and Alderink, while not contacting Spielmaker, collided with the Levenworth vehicle [the first vehicle involved, which rear ended Martin's vehicle] and thus actively influenced its path of travel. The trial court was therefore correct in viewing the chain-reaction collisions as a single accident. The lower court's findings of "involvement" by all four automobiles are not clearly erroneous. [*Hastings,* 177 Mich App at 435.]

A

Empire argues it was entitled to judgment as a matter of law because the circuit court found that it was impossible to determine whether Hughes was still alive when the Taurus struck

him and crushed his skull, whereas in *Hastings, supra,* there was evidence that Spielmaker was still alive. We disagree.

The question is whether a vehicle that is clearly involved in a sequential fatal accident must be shown to have been involved while the victim was still alive, or whether it is liable as the insurer of an involved vehicle unless it can be shown that the accident was effectively over before the vehicle became involved because the victim was dead. The issue is likely to emerge in many scenarios, some of which will generate a dispute not between the injured person's own insurer and the insurer of the assertedly-involved vehicle, but between the assigned claims insurer and the insurer of the assertedly-involved vehicle. There is no reason to believe that the Legislature intended that the insurer of an involved vehicle be excused and the obligation to pay benefits assumed under the assigned claims system, whenever the injuries inflicted by the vehicle are so severe that it cannot be shown that the victim was still alive when the vehicle became involved. For example, a pedestrian who does not own a vehicle is hit by car, and that car is immediately rear ended by a truck, which causes the car to run over the victim. It cannot be determined whether the victim was still alive after the initial impact by the car because her body was so badly crushed when run over. The car is uninsured. If it must be shown that the victim was still alive when the truck caused the car to run the victim over in order to show that the truck was involved in the accident, then the truck is not an involved vehicle and PIP benefits will be paid from the assigned claims fund, rather than the insurer of the truck. The plain meaning of the word "involved" leads us to conclude that a vehicle that participates in an accident by running the accident victim over is involved in the accident, even if the person is injured so badly that it cannot be determined whether he or she was alive when run over.

B

Empire also argues that even if the Taurus caused Hughes' death, it is not liable under MCL 500.3114(5) because Hughes was not operating the motorcycle when the Taurus struck him. We are not persuaded by Empire's claim that Hughes, after having been involuntarily ejected from his motorcycle, ceased being the operator of a motorcycle for purposes of MCL 500.3114(5), and became subject to § 3114(1). As the circuit court found, Hughes was "a person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator . . . of a motorcycle." MCL 500.3114(5).

C

Empire also argues that the circuit court improperly awarded plaintiff Estate attorney fees, penalty interest, and prejudgment interest. We disagree.

The court awarded attorney fees of $2,500.00, penalty interest for a 4 ½ month period on benefits actually due and owing during that period, and prejudgment interest for a one-year period from the time the complaint was filed until State Farm paid the claim. We find no error. "Personal protection insurance benefits are payable as loss accrues," and are overdue if not paid within thirty days after the insurer receives reasonable proof of loss. MCL 500.3142. MCL 500.3142(3) provides that "[a]n overdue payment bears simple interest at the rate of 12% per annum." The purpose of the twelve percent interest is to penalize the insurer for unreasonable delay rather than to compensate the claimant. See *Wood v Detroit Automobile Inter-Ins Exch,* 413 Mich 573, 589 n 17; 321 NW2d 653 (1982). "Penalty interest must be assessed against a no-

fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits." *Davis v Citizens Ins Co of America,* 195 Mich App 323, 328; 489 NW2d 214 (1992). Here, Empire did not promptly pay no-fault benefits due and the award of penalty interest was proper. It matters not that the claim was presented to Empire by Citizen's adjuster. The claim was received by Empire and remained unpaid. We find no error in the court's limited award of penalty interest.

MCL 500.3148(1) provides:

> [a]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

"[T]he inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable." *Shanafelt v Allstate Ins Co,* 217 Mich App 625, 635; 552 NW2d 671 (1996). "[A] delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Id.* Empire argues that there were legitimate issues of factual uncertainty and that its delay in paying benefits was not unreasonable. "However, when the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits." *Regents of the Univ of Michigan v State Farm Mut Ins Co,* 250 Mich App 719, 737; 650 NW2d 129 (2002). The circuit court did not err in awarding attorney fees to plaintiff.

D

Finally, Empire contends that plaintiff was not entitled to prejudgment interest from August 1, 2000, the date the lawsuit was filed, until August 9, 2001, the date the claim was settled, because plaintiff was not awarded a money judgment. Prejudgment interest is authorized by MCL 600.6013, and is due from the time a complaint is filed. MCL 600.6013(5). Prejudgment interest is intended to compensate a party for the costs of bringing an action, and for any delay in payment. The prejudgment interest statute is "a remedial statute to be construed liberally in favor of the plaintiff." *Attard v Citizens Ins Co,* 237 Mich App 311, 319; 602 NW2d 633 (1999). Settlement before judgment will normally waive statutory interest when no final judgment is entered against the defendant, because, when a plaintiff accepts a settlement, he generally "trade[s] off the loss of interest for the waiting period in exchange for the certainty of the settlement." *Darnell v Auto-Owners Ins Co,* 142 Mich App 1, 16; 369 NW2d 243 (1985). Unlike the situation in *Darnell*, however, Empire was not the party who settled plaintiff's claim. Instead, the case proceeded to a money judgment against Empire, which included amounts paid by State Farm to which plaintiff Estate was entitled, and which it did not receive until after litigation was commenced, due to Empire's refusal to pay under its policy. We find no error in the court's limited award of prejudgment interest.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Helene N. White