STATE OF MICHIGAN

COURT OF APPEALS

RONALD L. HEAD,

Plaintiff-Appellee,

v

ALAN CURTIS RUSSELL, PENSKE TRUCK LEASING CORPORATION, KEYSTONE FOODS CORPORATION, a/k/a M & M RESTAURANT SUPPLY, CAMDEN FIRE INSURANCE COMPANY, and GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA,

Defendants-Appellants.

UNPUBLISHED
July 22, 1997

No. 185170
Saginaw Circuit Court
LC No. 92-048110-ND

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment for $197,337.52 plus statutory interest entered in favor of plaintiff and against defendants Alan Curtis Russell, Penske Truck Leasing Corporation, and Keystone Foods Corporation. This suit arose from an accident in which a semi-truck driven by Russell while he was working for Keystone, which was doing business under the name of M & M Restaurant Supply, struck plaintiff's semi-truck that was parked along northbound I-75. We affirm, but remand for correction of the judgment.

Defendants first argue that the trial court erred by denying their motions to dismiss the non-insurer defendants as improper parties to the action. MCL 500.3135(2); MSA 24.13135(2)[1] generally abolishes tort liability for damages arising from the use of a motor vehicle. Under MCL 500.3121; MSA 24.13121 and MCL 500.3123(1)(a); MSA 24.13123(1)(a), an insurer is liable to pay property protection insurance benefits for damages caused by its insured to another vehicle that "is parked in a manner as not to cause unreasonable risk of the damage which occurred." See, also, *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 30; 528 NW2d 681 (1995) (where property protection benefits are provided, they are paid to third parties whose property is damaged because of a motor vehicle). With

regard to liability, the only question asked of the jury was whether plaintiff's tractor-trailer was "parked in a manner as not to cause unreasonable risk of the damage which occurred." Regardless of whether the non-insurer defendants were properly named as parties, the jury was asked the proper question with regard to liability. Thus, defendants have not established any prejudice with regard to the jury's special verdict from the inclusion of the non-insurer defendants as named parties.

In *Totzkay v DuBois*, 107 Mich App 575, 578-579; 309 NW2d 674 (1981), this Court concluded, arguably in dicta, that an insurer's ultimate liability under MCL 500.3121; MSA 24.13121 does not require naming the insurer rather than the insured as a defendant when benefits are sought under that statute. However, in *Matti Awdish, Inc v Williams*, 117 Mich App 270, 275 & n 3; 323 NW2d 666 (1982), this Court concluded that, with regard to property protection benefits under § 3121, only the insurer, and not an insured driver, was the proper defendant. We need not resolve this split of authority because, unlike the insurers in *Totzkay* and *Matti Awdish*, defendant insurers were named as parties to this action. Regardless of whether *Totzkay* or *Matti Awdish* reached the better conclusion regarding naming an insured as a defendant, in both cases the Court stated that the insurers would be ultimately liable for any property protection benefits owed by the insureds. We note that, in this case, the trial court entered the judgment against the non-insurer defendants. We remand to the trial court for amendment of the judgment so that it is entered solely against defendant insurers Camden Fire Insurance Company and General Accident Insurance Company of America.

Next, defendants argue that the trial court improperly precluded the jury from knowing that defendant insurers were parties. Defendants cite *Shinabarger v Citizens Mutual Ins Co*, 90 Mich App 307; 282 NW2d 301 (1979), for the proposition that where a no-fault damages case goes to trial against one party defendant but the other party defendant is not allowed to participate and present proofs, the other party is entitled to a new trial. However, in this case, defendant insurers were able to participate and offer proofs through defendants' counsel regardless of whether the jurors were aware that defendant insurers were parties. In *Shinabarger*, this Court concluded that the trial court ruled incorrectly regarding which insurer was liable and remanded for a new trial as the liable insurer had not been represented at trial. *Id.* at 309-310, 316. Defendants have not established error requiring reversal on this basis.

Defendants argue that the trial court improperly excluded evidence of settlement offers made to plaintiff by his own insurance carrier and by defendant insurers, and evidence of a $3,000 payment that defendant General Accident made to plaintiff for the damage to plaintiff's vehicle. Defendants maintain that this was relevant to the issue of mitigation. In both contract and tort actions, "an injured party must make every reasonable effort to minimize damages." *Bak v Citizens Ins Co of America*, 199 Mich App 730, 736 (Corrigan, J.), 740-741 (Holbrook, Jr., J., concurring); 503 NW2d 94 (1993). However, the jury found that plaintiff suffered a total of $20,500 in damages to his tractor, trailer, and contents. Because the settlement offers totaled less than this amount, the jury could not reasonably have determined that plaintiff should have accepted the offers because they would not have fully compensated him for the property damage that he suffered. Any possible error in the exclusion of this evidence was harmless, and our refusal to grant a new trial is not inconsistent with substantial justice. MCR 2.613(A)

Defendants also contend that certain repair invoices and "trip leases" should have been excluded from evidence as hearsay because they did not qualify under the business records exception to the hearsay rule, MRE 803(6). Because defendants did not preserve this specific argument with regard to the repair invoices, we review their admission for manifest injustice. *In re Forfeiture of $19,250*, 209 Mich App 20, 32; 530 NW2d 759 (1995). We agree that the repair invoices were inadmissible under MRE 803(6) because there was no testimony that they were prepared "in the course of a regularly conducted business activity." *Price v Long Realty, Inc*, 199 Mich App 461, 467-468; 502 NW2d 337 (1993). However, if defendants had objected on this basis below, the contents of the invoices could nevertheless have been read into the record under the recorded recollection exception of MRE 803(5), even though they could not have been received as an exhibit unless offered by defendants as the adverse party. For a writing to be admissible under MRE 803(5), it must meet three prerequisites: (1) it must pertain to matters about which the declarant once had knowledge; (2) the declarant must now have insufficient recollection as to such matters; and (3) it must be shown to have been made by the declarant or, if made by another, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matter was fresh in the declarant's memory. *People v Hoffman*, 205 Mich App 1, 15-16; 518 NW2d 817 (1994). Our review of the lower court record and plaintiff's testimony regarding the repair invoices leads us to conclude that the three prerequisites to MRE 803(5) were fulfilled. Accordingly, we find no manifest injustice because the substance of this testimony would have been admissible under MRE 803(5).

Because defendant preserved his argument that the trip leases were outside the business records exception, we review that claim for an abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361; 533 NW2d 373 (1995). These trip leases were contractual agreements memorializing plaintiff's contracts to haul various loads with his vehicle between August 1990 and January 1991, offered in connection with proving damages from lost profits. Acts or conduct that are not intended as assertive are not hearsay. *People v Davis*, 139 Mich App 811, 812-813; 363 NW2d 35 (1984); accord *People v Watts*, 145 Mich App 760, 762; 378 NW2d 787 (1985). The trip leases were not hearsay because, as written contracts, they were not assertive in nature. See *United States v Bellucci*, 995 F2d 157, 161 (CA 9, 1993) (written contract falls outside the definition of hearsay). Accordingly, the trip leases did not need to fall within the business records exception to the hearsay rule, MRE 803(6) (or any other hearsay exception) to be admissible. Although the trial court's rationale was technically flawed to the extent that it concluded that the trip leases were admissible hearsay, defendants have not established that the court abused its discretion by admitting the trip leases.

Finally, defendants argue that the trial court abused its discretion by failing to give a requested instruction limiting damages for plaintiff's loss of use of his vehicle to a reasonable time. The determination whether jury instructions are accurate and applicable is in the trial court's sound discretion. *Rice v ISI Mfg, Inc*, 207 Mich App 634, 637; 525 NW2d 533 (1994). There is no error requiring reversal if, on balance, the applicable law and the theories were adequately and fairly presented to the jury. *Id*. Recovery for loss of use allowed by MCL 500.3121; MSA 24.13121 includes recovery for lost profits. *Michigan Mutual Ins Co v CNA Ins Companies*, 181 Mich App 376, 382-384; 448 NW2d 854 (1989). However, "the amount of lost profits must be shown to a reasonable certainty." *Id.* at 384. The trial court explicitly instructed the jury that loss of use included

reasonable loss of profits and business interruption losses, and that a person has a duty to use ordinary care to minimize damages after the person's property has been damaged. Although the court did not explicitly state that damages were limited to a reasonable time, this is inherent in a reasonable understanding of the trial court's instructions that damages for loss of use included *reasonable* loss of profits. Defendants have not established error requiring reversal based on this issue.

We remand for amendment of the judgment so that it is entered solely against defendant insurers. Otherwise, the judgment is affirmed. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra

[1] Effective March 28, 1996, the statutory language contained in MCL 500.3135(2); MSA 24.13135(2) has been renumbered and is now contained in MCL 500.3135(3); MSA 24.13135(3). 1995 PA 222.