STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

JON P. HENDRY, EVELYN J. HENDRY, EVELYN J. HENDRY on behalf of EMILY J. HENDRY, a Minor, SARA M. HENDRY, a Minor, JOSHUA P. HENDRY, a Minor, and JON P. HENDRY, a Minor, NATHAN L. BORAVICH, and NICHOLAS T. BORAVICH,

Defendants-Appellees,

and

WILLIAM NEIL SPAULDING, MISTY LEE TRIPP, and DANIELLE LOUISE PEACOCK,

Defendants.

UNPUBLISHED
July 27, 2001

No. 226002
Alger Circuit Court
LC No. 98-003219-CZ

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

SAWYER, P.J. (*dissenting*).

I respectfully dissent.

The trial court found that, while the Bronco was available for Nathan's use, it was not available for his "regular use." The trial court cited the fact that Nathan had to perform relatively minor mechanical work on the Bronco the day of the accident to make it driveable and that, given its unlicensed, uninsured, and unregistered status, it was not available for highway driving, which the trial court concluded was necessary for the vehicle to be available for regular use. I disagree.

As for the maintenance issue, nothing is pointed to that any automobile owner does not have to occasionally do, such as replace a battery, replenish fluids, and add air to a tire. As for the fact that it was not (legally) available for use on the highway, I am not persuaded that this is a relevant factor. The insurance policy refers to the auto being "available for the regular use" and does not refer to use on or off the highway. Further, to impose such a requirement would

completely defeat the purpose of such exclusions because the automobile's status as being uninsured (and, therefore, cannot be legally driven on the highway) would be what renders it insured. This is a non sequitur.

Furthermore, the fact that Nathan may not have regularly used the vehicle is not relevant to this case. The policy language refers to being "available for the regular use," not that it is, in fact, regularly used. In the case at bar, Nathan's father left the keys in the Bronco's ignition so that Nathan could use it whenever he desired and Nathan did not need to request permission each time he used it. Therefore, he could use it regularly if he so desired.

The majority, as well as defendants, relies on our decision in *State Farm Mut Automobile Ins Co v Burbank*, 190 Mich App 93, 96; 475 NW2d 399 (1991). However, this case is significantly different than the *Burbank* case. In *Burbank, supra* at 100, we specifically noted that the driver did not reside with the insured and only infrequently visited the insured:

> In the case at bar, Christopher Clemens [the driver] lived in the State of Florida. He maintained an apartment there, spent most of his time there, received mail there, was licensed to drive there, and had registered his motor vehicle there. Accordingly, the facts support but one conclusion: Robert Clemens [the owner] did not live with Christopher Clemens.

The Court had also noted that Christopher visited his parents approximately four times a year and a maximum of three weeks each visit. *Id.* at 98. In the case at bar, Nathan lived with his father, though he apparently did travel extensively for work. In any event, it would appear that Nathan's access to the Bronco in this case is more extensive than was Christopher Clemens' access to his father's vehicle in the *Burbank* case.

For the above reasons, I conclude that the trial court clearly erred in finding that the Bronco was not available for Nathan's regular use and would reverse.

/s/ David H. Sawyer