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

AUTO-OWNERS INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED February 24, 2011
v	No. 295123 Oakland Circuit Court
AUTO CLUB INSURANCE ASSOCIATION and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	LC No. 2008-094130-CK

Before: SAAD, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that denied its motion for judgment notwithstanding the verdict (JNOV) or a new trial. For reasons, set forth below, we affirm.

Plaintiff's insured, Jessica Borsum, was involved in a multi-vehicle accident that resulted in injury to two people on a motorcycle that rear-ended Ms. Borsum's car. Plaintiff argues that the trial court erred when it partially denied its motion for summary disposition because there was no question of fact regarding whether defendant, State Farm Mutual Auto Insurance Company's insured, Eric Allen, was involved in the accident pursuant to MCL 500.3114(5).

This Court reviews the grant or denial of a motion for summary disposition under MCR 2.116(C)(10) de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought under MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. There is a genuine issue of material fact when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt*, 481 Mich 419, 425; 751 NW2d 8 (2008). This Court considers only that evidence which was properly presented to the trial court in deciding the motion. *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Statutory interpretation is a question of law that is reviewed de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

"Generally, under MCL 500.3101(1) and MCL 500.3114(1), an individual must seek no-fault benefits from his own insurer unless one of the exceptions enumerated in MCL 500.3114(2), (3), or (5) applies." *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 111; 724 NW2d 485 (2006). MCL 500.3114(5), the subsection at issue, 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.

The term "involved in the accident" is used in sections 3111, 3113, 3115, and 3125 of the no-fault act, but is not defined by the no-fault act. This Court has held that the phrase "involved in the accident" should be consistently construed throughout the no-fault act. See *Wright v League Gen Ins Co*, 167 Mich App 238, 245; 421 NW2d 647 (1988). Generally speaking, it is presumed that physical contact between the injured party and a vehicle means that vehicle was involved in the accident pursuant to MCL 500.3114(5). *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 339; 671 NW2d 132 (2003). Therefore, to determine whether a vehicle was involved in an accident pursuant to MCL 500.3114(5), the *Turner*[1] test is necessary only when there is no physical contact between the injured party and another vehicle that is somehow a part of the collision. *Auto Club*, 258 Mich App at 339-340. The *Turner* test provides:

> for a vehicle to be considered 'involved in the accident' … the motor vehicle, being operated or used as a motor vehicle, must actively, as opposed to passively, contribute to the accident. Showing a mere 'but for' connection between the operation or use of the motor vehicle and the damage is not enough to establish that the vehicle is 'involved in the accident.' Moreover, physical contact is not required to establish that the vehicle was 'involved in the accident,' nor is fault a relevant consideration in the determination whether a vehicle is 'involved in an accident.' [*Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995).]

---

[1] *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995).

I. SUMMARY DISPOSITION RULING

Viewed in the light most favorable to the nonmoving party, the evidence presented a question of fact regarding whether Mr. Allen was actively involved in the multi-vehicle accident. Michigan law provides that when a legally stopped vehicle is struck after two other vehicles collide with each other, the stopped vehicle did not actively contribute to the collision, and thus, it is not actively involved in the accident. *Utley v Mich Mun Risk Mtg Auth*, 454 Mich 879; 562 NW2d 199 (1997); *Amy v MIC Gen Ins Corp*, 258 Mich App 94, 128-133, 136; 670 NW2d 228 (2003), rev'd in part *Stewart v State*, 471 Mich 692 (2004); *Mich Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 628-630, 637; 455 NW2d 352 (1990); *Brasher v Auto Club Ins*, 152 Mich App 544, 545-547; 393 NW2d 881 (1986). However, case law also provides that when a vehicle suddenly brakes and causes a collision between two vehicles behind it, its sudden braking does actively contribute to the collision between the two other vehicles behind it, and thus, it is actively involved in the accident. *Turner*, 448 Mich at 25-26, 42-43, 45; *Hastings Mut v State Farm*, 177 Mich App 428, 431-435; 442 NW2d 684 (1989); *Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 785-789; 432 NW2d 439 (1988).

Here, the trial judge properly held that there was a question of fact about whether Mr. Allen gradually or suddenly activated the brakes on his vehicle. Thus, the trial court properly left this question for the jury to decide. Mr. Allen was driving behind a truck that was pulling a fishing boat. Mr. Allen testified that he gradually slowed down at the same rate of speed as the truck ahead of him. Diane Hoskins, a passenger in Mr. Allen's vehicle, stated that Mr. Allen gradually slowed down and he maintained the same distance between his vehicle and the truck pulling the fishing boat. Both stated that Mr. Allen's vehicle was beginning to slowly maneuver around a bale of hay that had fallen from another truck when they heard a crash and, approximately 10 to 30 seconds later, the red car rear-ended Mr. Allen's vehicle. Ms. Borsum, plaintiff's insured, was driving behind the red car. She testified that while the line of vehicles did begin to gradually slow down, at some point, the red car suddenly rear ended Mr. Allen's vehicle, and that accident caused Ms. Borsum to rear end the red car. Because there were factual disputes regarding whether Mr. Allen's actions were sufficient to have actively contributed to the accident, there was a question of fact for the jury and the trial court properly denied plaintiff's motion for summary disposition.

II. JNOV

Plaintiff argues that the trial court erred in denying its motion for JNOV or a new trial because the jury's verdict was contrary to law and against the great weight of the evidence. We disagree. A trial court's decision on a motion for JNOV is reviewed de novo. *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 255; 761 NW2d 694 (2008). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 517-518; 742 NW2d 140 (2007). A JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Id*. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Foreman v Foreman*, 266

Mich App 132, 136; 701 NW2d 167 (2005); *Zantel Mktg Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

Also, a trial court's determination on a motion for a new trial is reviewed for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). In deciding whether to grant or deny a motion for a new trial, the trial court must determine whether the overwhelming weight of the evidence favors the losing party. *Phinney*, 222 Mich App at 525. This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. *Ellsworth v Hotel Corp*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Neither this Court nor the trial court should substitute its judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.*

As previously discussed, pursuant to MCL 500.3114(5), a vehicle must be involved in an accident with a motorcycle before the person on the motorcycle can claim personal protection insurance benefits from the vehicle's insurer. *Auto Club*, 258 Mich App at 339-340. The *Turner* test for determining if a vehicle was actively involved in the accident provides:

> for a vehicle to be considered 'involved in the accident' … the motor vehicle, being operated or used as a motor vehicle, must actively, as opposed to passively, contribute to the accident. Showing a mere 'but for' connection between the operation or use of the motor vehicle and the damage is not enough to establish that the vehicle is 'involved in the accident.' Moreover, physical contact is not required to establish that the vehicle was 'involved in the accident,' nor is fault a relevant consideration in the determination whether a vehicle is 'involved in an accident.' [*Turner*, 448 Mich at 39.]

In reviewing the evidence in the light most favorable to the nonmoving party, there was sufficient evidence presented at trial to create an issue of fact for the jury regarding whether Mr. Allen was actively involved in the accident. Mr. Allen testified that he began to gradually apply his brakes as soon as the truck pulling the fishing boat began gradually braking, and he was able to respond to the truck's braking because there was ample room between Mr. Allen and the truck. Ms. Hoskins stated that Mr. Allen had enough time to gradually brake and he drove at a slow rate of speed. Both testified that, while Mr. Allen was following the truck around the bale of hay, they suddenly heard a crash and, seconds later, Mr. Allen's vehicle was rear ended by the red car. On the other hand, Ms. Borsum testified that while the line of vehicles she was driving behind did begin to gradually slow down, the red car suddenly rear ended Mr. Allen's vehicle, and then Ms. Borsum rear-ended the red car seconds before the motorcycle rear ended her vehicle because she was unable to quickly stop. Based on the foregoing evidence, reasonable jurors could have concluded that Mr. Allen's vehicle did not actively contribute to the accident, and thus, he was not actively involved in the accident. Sufficient facts existed for the jury to reach this conclusion and, therefore, the trial court's denial of plaintiff's JNOV motion was proper.

Likewise, the trial court did not abuse its discretion in finding that the jury's verdict comported with the great weight of the evidence. "It is the jury's responsibility to determine the credibility and weight of the trial testimony." *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). The jury was provided with contradictory evidence regarding which vehicles

initially collided in the multi-vehicle accident. The jury's verdict suggests it found Mr. Allen and Ms. Hoskins to be more credible witnesses than Ms. Borsum. In reviewing the evidence presented at trial, we cannot conclude that a miscarriage of justice would occur if the jury verdict is allowed to stand because the evidence amply supports the verdict. The trial court did not abuse its discretion by denying plaintiff's motion for a new trial.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio