STATE OF MICHIGAN

COURT OF APPEALS

KAREN JORDAN,

Plaintiff-Appellant,

v

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant-Appellee.

UNPUBLISHED
August 19, 2014

No. 316125
Wayne Circuit Court
LC No. 12-015537-NF

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

In this action to recover benefits under the no-fault act, MCL 500.3101 *et seq*., plaintiff appeals as of right from a trial court order granting defendant's motion for summary disposition. Plaintiff initiated this instant action seeking to recover personal injury protection benefits,[1] survivors' loss benefits,[2] and attorney fees from defendant, claiming that defendant had unreasonably refused or delayed making proper payment[3] following a fatal motorcycle accident involving plaintiff's decedent and a parked semi-truck and trailer[4] insured by defendant. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), arguing that there was no genuine issue of material fact regarding whether the semi-truck and trailer was parked in such a way as to cause unreasonable risk of bodily injury within the meaning of MCL 500.3106(1)(a). After a hearing, the trial court issued an order granting defendant's motion for summary disposition on the grounds that the parked semi-truck and trailer did not pose an unreasonable risk as a matter of law under the framework established by *Stewart v Michigan*, 471 Mich 692; 692 NW2d 376 (2004). We affirm.

[1] MCL 500.3107.

[2] MCL 500.3108.

[3] MCL 500.3148.

[4] Since the semi-truck and trailer together operate (and were parked as) a single unit, we refer to them in the singular.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On September 11, 2012, at approximately 1:43 p.m., plaintiff's decedent was traveling northbound on Rawsonville Road—a five-lane roadway with a posted speed limit of 50 miles per hour—when his motorcycle collided with a parked semi-truck and trailer insured by defendant. Prior to the accident, the driver of the semi-truck and trailer heard a "loud pop" and started experiencing mechanical difficulty with the trailer's brakes. Upon concluding that an emergency stop was necessary, the driver pulled over and parked the semi-truck and trailer in the right-hand lane of Rawsonville Road as close to the curb as possible, and did not block any other lanes of traffic. At this particular location on Rawsonville Road, and at this time of the day, the road was straight and visibility was clear. The driver claims that, once parked, he immediately activated the vehicle's emergency flashers and placed warning triangles on the road behind the parked semi-truck and trailer. The driver stated that several vehicles traveling northbound were able to pass the parked semi-truck and trailer without incident prior to the accident taking place. At the time of the accident, the weather was clear and the road was dry.

Following the accident, plaintiff sought to recover no-fault benefits from defendant as the insurer of the semi-truck and trailer, but defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). Defendant argued that the semi-truck and trailer was not parked in such a way as to cause unreasonable risk of bodily injury, MCL 500.3106(1)(a), and thus plaintiff was not entitled to recover the claimed benefits under the no-fault act, MCL 500.3105(1), because the accident involved a parked motor vehicle and none of the parked vehicle exceptions applied, MCL 500.3106(1)(a)-(c).

In opposing defendant's motion, plaintiff argued that a genuine issue of material fact existed regarding whether the semi-truck and trailer posed an unreasonable risk. Plaintiff offered a photograph taken from Van Buren Police Department video footage of the accident scene as evidence that the driver violated 49 CFR § 392.22 by failing to activate the vehicle's emergency flashers and by failing to place the correct number of warning triangles behind the parked semi-truck and trailer or that one was missing prior to the accident. Plaintiff's attorney filed an affidavit stating that he had viewed the actual video footage and was unable to observe the emergency flashers activated at the scene of the accident. Further, plaintiff's attorney stated that he had listened to an audio recording of the 911 phone call made by the driver where the driver mentioned that at least one of the warning triangles had been run over by another vehicle prior to the accident. In the alternative, plaintiff argued that defendant's motion for summary disposition was premature, as no depositions had been taken of the driver or any witnesses to determine whether the parked semi-truck and trailer posed an unreasonable risk or whether the driver was performing maintenance on the vehicle at the time of the accident.

Following a hearing, the trial court issued an order granting defendant's motion for summary disposition. In granting the motion, the trial court reasoned that *Stewart v Michigan*, 471 Mich 692; 692 NW2d 376 (2004), was controlling, as the facts there were similar to the facts in this instant action. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(10).[5] *Stewart v Michigan*, 471 Mich 692, 696; 692 NW2d 376 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In deciding a motion for summary disposition, a court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Id*. "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when, after viewing the record in the light most favorable to the non-moving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

"When the facts are undisputed, the determination of whether an automobile is parked in such a way as to create an unreasonable risk of bodily injury within the meaning of § 3106(1)(a) is an issue of statutory construction." *Stewart*, 471 Mich at 696. Issues of statutory construction are also reviewed de novo. *Id*.

III. ANALYSIS

Plaintiff argues that the trial court's grant of summary disposition in favor of defendant was premature as no discovery had been conducted, and that a genuine issue of material fact existed regarding whether the semi-truck and trailer was parked in such a way as to cause unreasonable risk of bodily injury. We disagree.

Pursuant to MCL 500.3105(1), "[A]n insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." However, "[a]ccidental bodily injury does not arise out of the ownership, operation, maintenance or use of a *parked* motor vehicle as a motor vehicle" unless one of the parked vehicle exceptions apply. MCL 500.3106(1) (emphasis added). Of the three statutory

[5] The trial court did not specify under which subrule it granted defendant's motion; however it is clear from the record that the trial court considered material outside the pleadings in making its rulings. In such a situation, this Court reviews the trial court's decision as based on MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

exceptions, the only exception at issue here involves whether "[t]he vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred." MCL 500.3106(1)(a).[6]

In *Miller v Auto-Owners Ins Co*, 411 Mich 633, 639; 309 NW2d 544 (1981), our Supreme Court explained the policy behind excluding parked vehicles from no-fault coverage pursuant to MCL 500.3106(1) as follows:

> Injuries involving parked vehicles do not normally involve the vehicle as a motor vehicle. Injuries involving parked vehicles typically involve the vehicle in much the same way as any other stationary object (such as a tree, sign post or boulder) would be involved. There is nothing about a parked vehicle as a motor vehicle that would bear on the accident.

Regarding the exceptions contained in MCL 500.3106(1) that allow for no-fault coverage where an accident involves a parked motor vehicle, the *Miller* Court explained that "[e]ach exception pertains to injuries related to the character of a parked vehicle as a motor vehicle—characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents." *Id*. at 640. "Whenever a vehicle is parked, it necessarily creates a degree of risk of collision with vehicles moving in proximity." *Wills v State Farm Ins Co*, 437 Mich 205, 212; 468 NW2d 511 (1991). Accordingly, MCL 500.3106(1)(a) "recognizes that the act of parking can be done in a fashion which causes an *unreasonable risk* of injury." *Miller*, 411 Mich at 640 (emphasis added).

However, the statutory language in MCL 500.3106(1)(a) "does not create a rule that whenever a motor vehicle is parked entirely or in part on a traveled portion of a road, the parked vehicle poses an unreasonable risk." *Stewart*, 471 Mich at 697. Therefore, "factors such as the manner, location, and fashion in which a vehicle is parked are material to determining whether the parked vehicle poses an unreasonable risk." *Id*. at 689-699.

Based on the manner, location, and fashion in which the semi-truck and trailer was parked on Rawsonville Road, we conclude as a matter of law that the parked vehicle did not pose an unreasonable risk of bodily injury. The white semi-truck and trailer was parked on a straight portion of Rawsonville Road, a five-lane roadway with a posted speed limit of 50 miles per hour. The driver parked as close to the east side curb as possible, and the semi-truck and trailer did not protrude into any other lanes of traffic. The fact that the semi-truck and trailer was parked entirely on a traveled portion of Rawsonville Road in the right-hand lane does not automatically lead to the conclusion that the parked vehicle posed an unreasonable risk. *Stewart*, 471 Mich at 697. The accident occurred during the day in clear weather and under dry road conditions. Further, the driver had placed emergency warning triangles in the roadway behind the trailer. On these facts alone, there is nothing in the record to suggest that an oncoming driver traveling northbound on Rawsonville Road would not have had an ample opportunity to observe, react to,

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[6] The other statutory exceptions relate to injury sustained (a) from contact with equipment mounted on or being lifted or lowered from a vehicle, and (b) while occupying, entering into, or alighting from the vehicle. MCL 500.3106(1)(b), (c). Those exceptions are not at issue in this case.

and avoid the hazard posed by the parked semi-truck and trailer. *Stewart*, 471 Mich at 699. To the contrary, the record reflects that a number of drivers in fact did so.

Even when viewing the evidence in the light most favorable to plaintiff and assuming that the driver did, in fact, fail to activate the vehicle's emergency flashers and did not place the correct number of warning triangles behind the vehicle or that one was missing prior to the accident, the parked semi-truck and trailer did not pose an unreasonable risk to oncoming traffic. Plaintiff's attempt to demonstrate the driver's violation of a federal regulation requiring the activation of emergency flashers and placement of warning triangles is not sufficient to show that the parked semi-truck and trailer created an unreasonable risk within the meaning of MCL 500.3106(1)(a). *See Wills v State Farm Ins Co*, 437 Mich 205, 214; 468 MW2d 511 (1991).

Next, plaintiff argues that summary disposition was premature because no depositions had been taken of the driver or any witnesses. We disagree. While summary disposition is generally premature before discovery is complete on a disputed issue, *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), summary disposition is proper where discovery does not stand a fair chance of uncovering factual support for the non-moving party's position. *Kelly-Nevils v Detroit Receiving Hosp*, 207 Mich 410, 421; 526 NW2d 15 (1994). Plaintiff argues that discovery could have given plaintiff the opportunity to uncover more facts showing that the semi-truck and trailer posed an unreasonable risk; however, "[a] reviewing court may not employ a standard citing the mere possibility that the claim might be supported by [the] evidence produced." *Maiden v Rozwood*, 461 Mich 109, 121; 598 NW2d 817 (1999). Based on "the substantively admissible evidence actually proffered in opposition to the motion," *id*., the trial court was correct in concluding that discovery would not have stood a fair chance of uncovering factual support for plaintiff's position given the photographic and affidavit evidence presented. *Kelly-Nevils*, 207 Mich App at 421. As mentioned, even if discovery would have allowed plaintiff to prove that the emergency flashers were not activated and that one warning triangle was missing, the white semi-truck and trailer was parked on a straight, five-lane road during daylight under clear weather and dry road conditions, and at least two warning triangles remained positioned behind the trailer. Under the circumstances, an oncoming northbound driver would have been able to observe the white semi-truck and trailer parked in the right-hand lane with ample opportunity to react to and avoid the hazard it created. *Stewart*, 471 Mich at 699.

Plaintiff further argues that discovery was premature because there was no opportunity to determine whether the driver was performing maintenance on the semi-truck and trailer at the time of the accident. We disagree.

MCL 500.3105(1) allows for recovery of no-fault insurance benefits for accidental bodily injury "arising out of the . . . maintenance . . . of a motor vehicle as a motor vehicle." Under *Miller*, 411 Mich 633, 641, a plaintiff is entitled to recover no-fault benefits without having to satisfy one of the parked vehicle exceptions if this "maintenance" provision is satisfied. Michigan courts have broadly interpreted the term maintenance. *Gentry v Allstate Ins Co*, 208 Mich App 109, 116; 527 NW2d 39 (1994) (finding the term "maintenance" encompassed plaintiffs waiting to have their vehicle towed), and coverage extends to a passerby for an injury

arising out of the "maintenance performed by someone else." *McMullen v Motors Ins Corp*, 203 Mich App 102, 105; 512 NW2d 38 (1993).

However, even if further discovery would have uncovered factual support for a finding that maintenance was being performed on the parked vehicle, plaintiff would not be entitled to recover under the no-fault act, as the injury was not one "arising out of" the alleged maintenance of the vehicle. Rather, the causal connection between any maintenance being performed and the injuries sustained by plaintiff's decedent in colliding with the parked semi-truck and trailer was not "more than incidental, fortuitous, or 'but for.'" *Thornton v Allstate Ins Co*, 425 Mich 643, 660; 391 NW2d 320 (1986). While plaintiff's decedent likely would not have collided with the semi-truck and trailer but for the parked vehicle's occupation of the right-hand lane of Rawsonville Road, there is no evidence showing the type of causal connection necessary for recovery under the maintenance provision of the no-fault act. *Id*. at 659-660. Nor does any part of the record suggest that further discovery would uncover facts that would demonstrate such a causal connection, rendering plaintiff's claim fundamentally speculative. *Maiden*, 461 Mich at 121. For that reason, we hold that the trial court was correct in granting summary disposition to defendant. *Kelly-Nevils*, 207 Mich App at 421.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra