STATE OF MICHIGAN

COURT OF APPEALS

TOMO PERKOVIC,

Plaintiff-Appellant,

v

AARON WILLIAM BROWN,

Defendant-Appellee.

UNPUBLISHED
November 15, 2002

No. 235699
Macomb Circuit Court
LC No. 00-004399-NI

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff approached an intersection on a green light and waited to make a left turn. He entered the intersection when the light was yellow, checked for oncoming traffic and, seeing none, completed the turn. He was struck by defendant, who was proceeding from the opposite direction. The court dismissed the complaint, finding that the evidence showed plaintiff was more than fifty percent at fault.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

A person is subject to tort liability for noneconomic damages caused by his use of a motor vehicle if the injured person "suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). Generally, damages are to be assessed on the basis of comparative fault. However, "damages shall not be assessed in favor of a party who is more than 50% at fault." MCL 500.3135(2)(b). The determination of the parties' percentages of total fault is generally a question of fact for the trier of fact. MCL 600.6304(1).

The only evidence submitted below showed that the light was yellow or red when plaintiff made the turn.[1] Plaintiff's testimony showed that he proceeded on a yellow light when he could have stopped safely or proceeded on a red light in violation of MCL 257.612(1)(b) and (c)(i). He may have violated MCL 257.650(1) by failing to yield the right of way to an oncoming vehicle that was so close as to constitute an immediate hazard. Violation of a statute constitutes a rebuttable presumption of negligence, *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 194; 540 NW2d 297 (1995), and thus plaintiff was partially at fault for the accident.

Whether defendant was equally negligent cannot be determined on this record. Whether defendant also violated § 612(1)(b) cannot be determined because there is no evidence to show that he was so close to the intersection that he could not stop safely. Even though defendant had the right of way and was not required to anticipate plaintiff's negligence or to have his vehicle under such control as to be able to avoid a collision with a car coming illegally into his path, *McGuire v Rabaut*, 354 Mich 230, 234, 236; 92 NW2d 299 (1958), he was not absolved of the duty to drive with due care for the safety of others and was still required to exercise due care under the circumstances. *Placek v Sterling Heights*, 405 Mich 638, 669-670; 275 NW2d 511 (1979). Thus, once it became clear that plaintiff "was going to challenge or obstruct his right-of-way," he had a duty to try to avoid a collision. *McGuire*, *supra* at 236. Whether he was negligent in failing to do so cannot be determined due to the lack of evidence. Therefore, the trial court erred in ruling that defendant was entitled to judgment as a matter of law.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

[1] Although defendant asserted and the trial court found that the light was still green when defendant was only thirty feet from the intersection, neither party presented any evidence to that effect.