STATE OF MICHIGAN

COURT OF APPEALS

ANGEL MERCADO and KELLY MERCADO,

Plaintiffs-Appellants,

v

MELISSA FAYE LAHUIS, SHARON MARY KOWALCZYK and ALMA ENTERPRISES, LLC, d/b/a TIM HORTON'S,

Defendants-Appellees.

UNPUBLISHED
January 17, 2006

No. 256261
Macomb Circuit Court
LC No. 2002-003011-NO

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

Plaintiffs Angel and Kelly Mercado, husband and wife, were out riding their bicycles. Angel turned into the parking lot of a restaurant by riding his bicycle in the wrong direction through the drive-thru lane, against the flow of traffic. As he rounded a curve in the drive-thru lane, he collided with an automobile that was registered to defendant Kowalczyk and driven by her daughter, defendant Lahuis. Angel fell from his bicycle and sustained injuries to his left leg. The automobile's windshield and hood were damaged, as was the rear of Angel's bicycle. There was conflicting evidence whether Lahuis applied her brakes immediately before or immediately after the collision. The police officer who responded to the scene indicated that the shrubbery and dumpster in the parking lot prevented Lahuis from seeing plaintiff's bicycle until the instant of the collision, and he did not believe Lahuis could have done anything to avoid it.

Plaintiffs filed this no-fault action. Plaintiffs sought noneconomic damages, claiming that plaintiff's injuries satisfied the no-fault threshold. Plaintiffs also sought economic damages for medical expenses and lost earnings. Defendants moved for summary disposition, asserting that plaintiff had been more than fifty percent at fault, so plaintiffs' claims were barred by comparative negligence. Defendants also asserted that Lahuis should be absolved of liability for any negligence by the sudden emergency doctrine. The trial court granted defendants' motion and dismissed plaintiffs' complaint in its entirety. Plaintiff now appeals.

The trial court's reasons for granting summary disposition are unknown because the summary disposition hearing was never video recorded. Therefore, no transcript is available.

When transcripts are unavailable, the appellant must timely file a settled statement of facts for the trial court's approval. MCR 7.210(B)(2). Although plaintiffs failed to file a settled statement of facts in this case, we will consider the appeal insofar as the transcripts are not pertinent to the issues raised. *Barney v League Life Ins Co*, 167 Mich App 317, 321-322; 421 NW2d 674 (1988). We review motions for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). We also review de novo questions of law arising under the no-fault act. *Miller v Purcell*, 246 Mich App 244, 248; 631 NW2d 760 (2001).

Plaintiffs contend that the trial court improperly dismissed their claim for noneconomic damages on the basis of comparative negligence. We disagree.

Comparative negligence is usually a question for the trier of fact. *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998). However, comparative negligence may be decided on a motion for summary disposition where "no reasonable juror could find that defendant was more at fault than the decedent in the accident as required by MCL 500.3135(2)(b)." *Huggins v Scripter*, 469 Mich 898; 669 NW2d 813 (2003). When reasonable minds cannot differ whether one party was substantially more at fault than the other, summary disposition is appropriate. *Id*.

In *Huggins*, the defendant motorist, driving at night, was approaching a hill. *Huggins, supra* at 898. He was driving more slowly than the posted speed limit, and his automobile's headlights were on. *Id*. Although the evidence showed that the defendant looked away from the roadway just before the accident, the plaintiff's decedent, when struck, was wearing darkly-colored clothing, sitting or crouching in the middle of the unlit road, just beyond the crest of the hill. *Id*. Our Supreme Court found the defendant entitled to summary judgment. Similarly, no reasonable juror could find that Lahuis was more at fault than Angel. There is no dispute that Angel rode his bicycle the wrong way through the drive-thru lane, and the responding officer testified that Lahuis could not have avoided the collision. Other than Angel's testimony that the bicycle's rear wheel was damaged, suggesting a rear impact rather than a frontal impact, plaintiffs offered no evidence to suggest that defendant Lahuis had been negligent. Reasonable minds could not disagree that plaintiff was more than fifty percent at fault.

Plaintiffs contend that even if Angel was more than fifty percent at fault, the comparative negligence bar of MCL 500.3135(2)(b) applies only to claims for noneconomic damages, so the trial court erred in dismissing plaintiffs' claims for economic loss. We agree.

The trial court dismissed plaintiffs' entire complaint, including plaintiffs' claims for work loss and medical expenses brought under MCL 500.3135(3)(c). The comparative negligence bar of MCL 500.3135(2)(b) applies only to "action[s] for damages pursuant to subsection (1)," which addresses noneconomic damages only. MCL 500.3135(2)(b). By its own terms, the comparative negligence provision does not apply to claims for economic damages brought under subsection (3). Therefore, despite the trial court's finding that Angel was more than fifty percent at fault, plaintiffs' claim for economic damages under MCL 500.3135(3)(c) was not subject to

the comparative negligence bar. Plaintiffs' claims for medical expenses and lost earnings should have been allowed to proceed.[1]

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis

[1] Because we have no transcript of the summary disposition hearing, we do not know whether the trial court considered the sudden emergency doctrine in this case. On remand, the trial court should consider whether the sudden emergency doctrine applies to absolve defendants of liability. This doctrine applies when the circumstances presented to the driver are "unusual or unsuspected." *Vsetula v Whitmyer*, 187 Mich App 675, 680-681; 468 NW2d 53 (1991); *Farris for Farris v Bui*, 147 Mich App 477, 480; 382 NW2d 802 (1985). An event is "unsuspected" if: (1) the potential peril has not been in the motorist's clear view for any length of time, and (2) the potential peril was totally unexpected. *Id.* If there is no genuine issue of material fact regarding the applicability of the sudden emergency doctrine in this case, plaintiffs' claims for economic damages may be subject to dismissal on that basis.