

STATE OF MICHIGAN
COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

UNPUBLISHED
March 21, 2013

Plaintiff-Appellant,

v

No. 307492
Oakland Circuit Court
LC No. 10-113550-NF

AUTOMOBILE CLUB OF MICHIGAN, MIC
GENERAL INSURANCE CORPORATION and
HOME-OWNERS INSURANCE COMPANY,

Defendants-Appellees,

and

AUTO OWNERS INSURANCE COMPANY,

Defendant.

Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the orders denying its motion for summary disposition and granting summary disposition pursuant to MCR 2.116(C)(10)¹ in favor of defendants in this action under the no-fault act, MCL 500.3101 *et seq.* We affirm the orders denying plaintiff's motion for summary disposition and granting summary disposition in favor of Home-Owners Insurance Company (Home-Owners), but we reverse the orders granting summary disposition in favor of Automobile Club of Michigan (AAA) and MIC General Insurance Corporation (MIC).

¹ Because the parties relied on documents outside the pleadings, we treat the motion as if it had been granted under MCR 2.116(C)(10). See *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008).

This case arises from an automobile accident that occurred on September 27, 2009. It was a sunny Sunday afternoon. The accident occurred on northbound I-275 near the I-96 interchange. Five vehicles were damaged in the accident: a Honda Civic driven by Cathy Layman and insured by Home-Owners; an orange Jeep Wrangler driven by Paul Doherty and insured by AAA, a black Cobalt driven by Tiana Tocco and insured by MIC, a Honda motorcycle driven by John Honyoust and insured by plaintiff, and a green Mercury Tracer driven by Kori Buchan and insured by plaintiff. Honyoust was injured when his motorcycle was struck from behind by Buchan's vehicle, forcing his motorcycle into the vehicle in front of him and launching him off of his motorcycle. Each driver provided accounts of the events that preceded the accident. Plaintiff sought reimbursement from defendants for a pro rata share of Honyoust's personal injury protection (PIP) benefits under the relevant statutes² that established the order of priority for payment of no-fault benefits in this circumstance. The trial court found that the vehicles insured by defendants were not actively involved in the accident and found no evidence that the drivers of these vehicles had to stop suddenly. The trial court denied plaintiff's motion for summary disposition and granted defendants' motions for summary disposition.

We review de novo a trial court's decision on a motion for summary disposition. *Patterson v CitiFinancial Mtg Corp*, 288 Mich App 526, 528; 794 NW2d 634 (2010). A motion under subrule (C)(10) is properly granted if "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). When deciding a motion under (C)(10), the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 672-673; 816 NW2d 464 (2012) (citations omitted).]

Plaintiff contends that (1) the trial court erred in granting summary disposition in favor of defendants based on its finding that none of the vehicles insured by defendant were involved in the accident, (2) the trial court erred in granting summary disposition in favor of defendants because there was a question of fact regarding whether the vehicles insured by defendants were involved in the accident, and (3) the trial court erred in finding that the vehicle insured by MIC was not involved in the accident even though it was struck by the motorcyclist.

A motorcycle is not a "motor vehicle" for purposes of the no-fault act. MCL 500.3101(2), (3). For a motorcyclist to be entitled to no-fault PIP benefits, the accident must involve a motor vehicle. *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 331 n 1; 671 NW2d 132 (2003) The order of priority for accidents involving motorcycles and motor vehicles is established by MCL 500.3114(5) and (6), which provide:

(5) 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:

² MCL 500.3114(5) and (6).

- (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.
- (6) If 2 or more insurers are in the same order of priority to provide personal protection insurance benefits under subsection (5), an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among all of the insurers.

The issue is whether the vehicles insured by defendants were involved in the accident, MCL 500.3114(5), such that defendants must reimburse plaintiff for a portion of the Honyoust's PIP benefits, MCL 500.3114(6).

Generally, if there is physical contact between the injured party and a vehicle, that vehicle is considered involved in the accident. See *Auto Club Ins Ass'n*, 258 Mich App at 339. In *Auto Club Ins Ass'n*, a line of five or six vehicles was stopped for a flag person holding a stop sign. *Id.* at 330. Vehicle one stopped behind the line of vehicles and vehicle two stopped behind vehicle one. *Id.* A motorcyclist, driving at a high rate of speed, was unable to stop and collided with vehicle two. *Id.* It was disputed whether the motorcycle also hit vehicle one. *Id.* This Court found a factual question existed regarding whether the motorcyclist hit vehicle one. *Id.* at 335. This Court found that regardless of the vehicle's lack of movement, if the motorcyclist hit vehicle one, then vehicle one contributed to the accident and became involved when it was struck by the motorcyclist. *Id.* at 340-341.

Where there is no physical contact between the injured party and the vehicle, it is necessary to consider whether the vehicle actively contributed to the accident. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995); *Auto Club Ins Ass'n*, 258 Mich App at 337-340. The *Turner* Court held:

[F]or a vehicle to be considered "involved in the accident" under § 3125, 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.]

Although *Turner* involved MCL 500.3125, “‘Involvement’ in an accident is construed in harmony with the other provisions of the no-fault act that refer to a motor vehicle being ‘involved’ in the accident.” *Wright v League Gen Ins Co*, 167 Mich App 238, 245; 421 NW2d 647 (1988).

In general, vehicles properly stopped at intersections will not be considered involved in an accident. In *Brasher v Auto Club Ins Ass’n*, 152 Mich App 544, 545-546; 393 NW2d 881 (1986), two vehicles collided at an intersection. After the collision, one of the vehicles veered off and also hit a pedestrian and the other vehicle veered off and hit a vehicle stopped at the traffic signal. *Id.* at 546. This Court found that the vehicle stopped at the traffic signal was not involved in the accident because it did not engage in any activity contributing to the accident. *Id.* In *Utley v Mich Muni Risk Mgt Auth*, 454 Mich 879, 879; 562 NW2d 199 (1997), the Michigan Supreme Court, in a cursory opinion, confirmed the notion of passive involvement, reversed a decision of this Court, and found that a truck was not involved in an accident. Although these cases involve vehicles stopped at intersections, *Auto Club Ins Ass’n*, 258 Mich App at 340-341, suggests that vehicles stopped in line for purposes other than traffic signs or signals would also only be passively involved.

If, however, the vehicle takes some action contributing to the accident, then the vehicle will be considered involved in the accident. In *Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 785; 432 NW2d 439 (1988), a truck changed lanes causing the vehicle behind it to suddenly stop. A driver in the chain of traffic was unable to stop and a multi-vehicle rear-end collision occurred. *Id.* The driver directly behind the vehicle behind the truck came to a sudden stop and the motorcycles behind him collided. *Id.* This Court found that the trucker’s action caused everyone in the chain of traffic to stop, which contributed to the motorcyclists’ injuries. *Id.* at 788. The Court found a question of fact regarding whether two of the vehicles in the line were involved in the accident. *Id.* at 788-789.

Plaintiff argues that each of the vehicles insured by defendants was involved in the accident. With regard to each vehicle, it is necessary to consider whether there was contact with the motorcyclist and, if not, whether the vehicle actively contributed to the accident.

I. LAYMAN’S VEHICLE

There is no question of fact that Honyoust did not come into contact with Layman’s vehicle. See *Auto Club Ins Ass’n*, 258 Mich App at 339. The evidence established that Layman’s vehicle was struck only by the Jeep.

There is also no question of fact that Layman’s vehicle did not actively contribute to the accident. See *Turner*, 448 Mich at 39; *Auto Club Ins Ass’n*, 258 Mich App at 337-340. Although she saw vehicles ahead suddenly stop and she pumped her brakes, the accident occurred 10 to 30 seconds after she was completely stopped in the lane in front of the Jeep. There was no evidence that Layman stopped suddenly, causing the drivers behind her to react because Doherty, driving the Jeep, was also stopped when the accident occurred.

Accordingly, there was no question of fact that Layman’s vehicle was not involved in the accident and Layman’s insurer, Home-Owners, was not obligated to pay a pro rata share of

Honyoust's PIP benefits. See *KBD & Assoc, Inc*, 295 Mich App at 672-673; *Auto Club Ins Ass'n*, 258 Mich App at 331 n 1. The trial court did not err by granting summary disposition in favor of Home-Owners.

II. DOHERTY'S VEHICLE

A question of fact exists with regard to whether Honyoust came into contact with Doherty's vehicle. See *Auto Club Ins Ass'n*, 258 Mich App at 339. According to Doherty, only the motorcycle came into contact with his Jeep, while Honyoust did not. However, Honyoust's testimony created a question of fact regarding whether Honyoust came into contact with the Jeep while he was still on his motorcycle. According to Honyoust, he was hit by Buchan as he was putting his feet down to stop. The collision with the green car forced his motorcycle into the vehicle in front of him and he was then launched off of the motorcycle. Although Honyoust did not identify the vehicle in front of him, according to both Layman and Doherty, the motorcycle was behind Doherty's Jeep. On the other hand, Honyoust testified that he was initially in the right lane and had moved into the far left lane in front of Buchan's vehicle before his motorcycle was hit. Layman's vehicle and Doherty's vehicle were in the second to left lane. Buchan and Tocco were in the far left lane. Given the existence of green paint on the rear of Tocco's vehicle, Tocco's vehicle was ahead of Buchan's vehicle. Therefore, there is a question of fact whether Honyoust hit Tocco's vehicle or Doherty's vehicle.

There is, however, no question of fact that Doherty's vehicle did not actively contribute to the accident. See *Turner*, 448 Mich at 39; *Auto Club Ins Ass'n*, 258 Mich App at 337-340. Like Layman, Doherty's vehicle was stopped in the line of vehicles and did not brake suddenly or cause the vehicles behind him to react.

Accordingly, questions of fact existed with regard to whether Doherty's vehicle was involved in the accident and whether Doherty's insurer, AAA, was obligated to pay a pro rata share of Honyoust's PIP benefits. See *KBD & Assoc, Inc*, 295 Mich App at 672-673; *Auto Club Ins Ass'n*, 258 Mich App at 331 n 1. The trial court erred in granting summary disposition to AAA. Because a question of fact remained, the trial court did not err in denying plaintiff's motion for summary disposition.

III. TOCCO'S VEHICLE

There is also a question of fact whether Honyoust came into contact with Tocco's vehicle. See *Auto Club Ins Ass'n*, 258 Mich App at 339. Tocco did not know who or what had hit her. However, her vehicle was hit on the rear passenger side and there was green paint on the rear of her car, suggesting that Buchan's vehicle hit Tocco's vehicle. The passenger side of Tocco's vehicle also sustained damage. As discussed above, there is a question of fact regarding whether Honyoust hit either Tocco's vehicle or Doherty's vehicle before he was launched off of his motorcycle.

There is, however, no question of fact that Tocco's vehicle did not actively contribute to the accident. See *Turner*, 448 Mich at 39; *Auto Club Ins Ass'n*, 258 Mich App at 337-340. Like Layman's vehicle and Doherty's vehicle, Tocco's vehicle was stopped for approximately 30

seconds before the accident occurred. There is no evidence that she braked suddenly or caused the vehicles behind her to react.

Accordingly, a question of fact exists with regard to whether Tocco's vehicle was involved in the accident and whether Tocco's insurer, MIC, was obligated to pay a pro rata share of Honyoust's PIP benefits. See *KBD & Assoc, Inc*, 295 Mich App 672-673; *Auto Club Ins Ass'n*, 258 Mich App at 331 n 1. The trial court erred in granting summary disposition to MIC. Because a question of fact remained, the trial court did not err in denying plaintiff's motion for summary disposition.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly