

STATE OF MICHIGAN
COURT OF APPEALS

JOHN ZIMBALATTI,

Plaintiff-Appellee,

and

PROVIDENCE HOSPITAL,

Intervening Plaintiff-Appellee,

v

FARMERS INSURANCE EXCHANGE, a/k/a
FARMERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

March 29, 2007

No. 271557

Wayne Circuit Court

LC No. 05-513631-NF

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

In this action for first party no-faults benefits, defendant appeals as of right from a final order entered in favor of intervening plaintiff Providence Hospital. Defendant challenges the trial court's earlier order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). The court concluded that there was no genuine issue of material fact that plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

After an exchange of profanities with Paul Klebba, a back seat occupant of an S.U.V., plaintiff opened the door of the vehicle and leaned in. He and Klebba engaged in an altercation where "blows" were exchanged. When Klebba saw plaintiff step back and stop hitting him, he jumped into the front seat and began driving, without looking back. Plaintiff tried coming through the back door. Klebba was unsure if plaintiff was completely in the car. Another witness, Kevin Jariett testified that Klebba moved to the front seat and began driving the vehicle with the doors open and plaintiff "half-way in and half-way out" of the vehicle. The vehicle swerved, climbed a curb, went back onto the street, and ultimately ran into a fence. Plaintiff fell out of the vehicle at some point during the turn coming back onto the street. Jariett found him lying on the road unconscious.

Pursuant to MCL 500.3105(1), an insurer is liable to pay personal protection benefits for “accidental bodily injury arising out of the ownership, maintenance or use of a motor vehicle as a motor vehicle,” subject to other provisions that are not raised by the parties in this case. “[W]hether an injury arises out of the use of a motor vehicle ‘as a motor vehicle’ under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles.” *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998).

The trial court rejected defendant’s arguments that there were questions of fact regarding the cause of plaintiff’s injuries and further concluded that the injury was closely related to the transportational function of a motor vehicle.

On appeal, defendant first argues that the trial court erred in granting summary disposition because the injuries occurred during a chain of events involving an intentional assault, the vehicle was merely the situs of the injuries, and these were not related to the transportational function of vehicle.

Summary disposition may be granted under MCR 2.116(C)(10) when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.” This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Defendant relies on *Morosini v Citizens Ins Co of America (After Remand)*, 461 Mich 303; 602 NW2d 828 (1999), and decisions discussed therein that address assaults tangentially involving motor vehicles. We recognize that the occurrence of an assault in a vehicle alone is inadequate to establish the requisite connection. Here, however, plaintiff’s injuries were not merely in a vehicle; they resulted from the movement of the vehicle.

Defendant also argues that the trial court resolved disputed questions of fact on which reasonable minds could differ, weighing the evidence and judging credibility. Specifically, defendant claims that reasonable minds could differ regarding whether plaintiff’s injuries were caused by the motor vehicle as opposed to the altercation with Klebba. The only evidence that arguably supports the contention that plaintiff could have been injured in the altercation is Jariett’s testimony that “blows” went back and forth between plaintiff and Klebba. But defendant did not produce any evidence indicating that plaintiff’s injuries were likely caused by these blows, rather than by impact with the vehicle or with the ground as plaintiff fell from the moving vehicle. The neuropsychological report on which defendant relies does not purport to opine on the mechanism of plaintiff’s brain injury.

Defendant also claims that reasonable minds could disagree whether plaintiff fell out of or was “dragged” by the vehicle. Melissa Passmore’s testimony that she did not see anyone being dragged does not create a question of fact because she conceded that she could not say for sure if plaintiff was dragged or not. Klebba did not see or hear plaintiff fall out of vehicle, but his lack of knowledge does not contradict Jariett’s testimony that plaintiff was partially in the rear door when it began to move and then fell out. Klebba acknowledged that plaintiff was trying to jump back into the back of the vehicle when Klebba began driving. He also testified that plaintiff was “never in the vehicle.” Review of other portions of Klebba’s testimony indicates that he meant that plaintiff was never *completely* in the vehicle, which is consistent with Jariett’s account.

The trial court correctly concluded that there was no genuine issue of material fact that plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle.

We affirm.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens