STATE OF MICHIGAN

COURT OF APPEALS

DANIEL VINCE CONSTANTINO,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

UNPUBLISHED
January 12, 2012

No. 300961
Kent Circuit Court
LC No. 10-005407-NI

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

BECKERING, J. (*dissenting*).

I respectfully dissent because I do not agree with the majority's causation analysis. In this first party no-fault case, plaintiff Daniel Constantino appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(8) in favor of defendant Citizens Insurance Company of America. The majority affirms the decision of the trial court, holding that plaintiff failed to allege sufficient facts in his complaint to establish that his injury arose out of the use of a motor vehicle as a motor vehicle under MCL 500.3105(1).[1] I disagree and would reverse the trial court's order granting summary disposition to defendant.

According to the allegations in plaintiff's complaint, which we accept as true for purposes of a motion under MCR 2.116(C)(8), on or about January 6, 2010, plaintiff was a "pedestrian who was struck by a snowmobile [while] walking his dog on 127th Avenue," and the accident occurred when the "snowmobile operator was . . . blinded by the bright lights of an oncoming motor vehicle causing an obstruction in his vision such that he could not avoid striking [plaintiff]." The sole issue on appeal is whether the trial court properly concluded that plaintiff's factual allegations fail to establish that his injuries arose out of the use of a motor vehicle as a motor vehicle under MCL 500.3105(1).

[1] MCL 500.3105(1) states in pertinent part that "[u]nder personal protection insurance an 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 . . . ."

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted." *Id.* (quotations omitted). "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Id.* "When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party." *Id.* at 304-305. A court should grant summary disposition under MCR 2.116(C)(8) "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id.* at 305. (quotation and citation omitted).

A plaintiff looking to recover personal protection insurance benefits must meet the causation requirements in MCL 500.3105(1). *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 530-531; 697 NW2d 895 (2005). Specifically, a plaintiff must show an "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1); see also *Griffith*, 472 Mich at 531. "The relationship between use of the vehicle and the injury need not approach proximate cause." *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 313; 282 NW2d 301 (1979); see also *Thornton v Allstate Ins Co*, 425 Mich 643, 650; 391 NW2d 320 (1986). Indeed, this Court has stated that "almost any causal connection or relationship will do." *Shinabarger*, 90 Mich App at 314; see also *Bradley v Detroit Auto Inter-Ins Exch*, 130 Mich App 34, 42; 343 NW2d 506 (1983). However, a plaintiff must show a causal connection that is "more than incidental, fortuitous, or 'but for.'" *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 32; 528 NW2d 681 (1995). "The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." *Kangas v Aetna Cas & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975).

In the present case, the majority concludes that the bright lights of the oncoming vehicle were a mere "but for" cause of the accident, and thus, the requisite causal connection set forth in MCL 500.3105(1) is lacking. The majority deduces from the facts stated in the complaint that the snowmobile driver must have been proceeding "on a course of travel prior to the accident that would result in a collision with [plaintiff], and that a collision between them was inevitable unless one of them took action to avoid it," and, thus, that "the accident ultimately occurred because neither took timely evasive action." The majority further concludes that "blinding bright lights was only one of many reasons why the driver of the snowmobile might have failed to notice [plaintiff] and take evasive action" and that the snowmobile driver's "failure to observe and avoid the collision could just as easily have been the result of a setting sun, momentary inattention or any other type of distraction." With all due respect for my esteemed colleagues, I find this analysis both speculative and legally faulty.

First, we must accept as true plaintiff's allegation that the accident happened because the snowmobile operator was blinded by the bright lights of an oncoming motor vehicle, which caused his vision to be obstructed such that he could not avoid striking plaintiff. Consequently, whether any other distraction "might have" caused the snowmobile driver to fail to notice and avoid hitting plaintiff, such as a setting sun or momentary inattention, is irrelevant. What is relevant is whether the blinding bright lights of the oncoming vehicle were more than a "but for," fortuitous, or incidental cause of the accident.

Second, I do not agree with the majority's characterization of the cause of the accident as being that plaintiff and the snowmobile driver were essentially headed on a course of disaster unless one of them took action to avoid it and that the accident "ultimately occurred because neither took timely evasive action." Anyone who has ever driven at night can appreciate that one must be able to see a pedestrian walking along the road in order to take evasive action, which may involve crossing over the centerline, in order to create a safe distance and avoid striking the pedestrian. If a person's vision is obstructed by blinding headlights, such that he cannot see hazards in the roadway, he would not know to take evasive action. The same proposition is true for a snowmobile driver.

The relevant question in this case is whether plaintiff's injury was "foreseeably identifiable with the normal use, maintenance and ownership of the vehicle." See *Kangas*, 64 Mich App at 17. The parties in this case do not dispute that using one's headlights is considered a normal and necessary part of operating a vehicle at night. In fact, it is required by law. MCL 257.684(a); MCL 257.700. It is also clear under Michigan law that using one's bright lights can obstruct the vision of others and cause an accident. For example, MCL 257.700(b) requires that "[w]henever the driver of a vehicle approaches an oncoming vehicle within 500 feet, such driver shall use a distribution of light or composite beam so aimed that the glaring rays are not projected into the eyes of the oncoming driver." In *Knoor v Borr*, 334 Mich 30; 53 NW2d 667 (1952), our Supreme Court determined that it was a question of fact for a jury whether, among other actions, the use of a vehicle's bright lights in the face of oncoming traffic, thereby interfering with the vision of an oncoming driver, was negligent and constituted a proximate cause of the ensuing accident. See also *Spencer v Phillips & Taylor*, 219 Mich 353; 189 NW 204 (1922). If the use of one's bright lights in the face of oncoming traffic is enough to be considered a proximate cause of an accident, it is surely enough to constitute the necessary causal connection required in MCL 500.3105(1). It most certainly meets the "almost any causal connection or relationship" set forth in *Shinabarger*, 90 Mich at 314.

As acknowledged by the majority, the no-fault act does not require "proximate causation." See *Boertmann v Cincinnati Ins Co*, 291 Mich App 683; ___NW2d___ (2011), slip op at 3, lv gtd 490 Mich 887 (2011). Under Michigan law, the fact that the motor vehicle itself did not strike plaintiff does not bar plaintiff's claim. See *id.* at 5 ("To the extent that defendant is claiming that there must be physical contact between the claimant and the motor vehicle, caselaw . . . does not support the argument."); *Jones v Tronex Chem Corp*, 129 Mich App 188, 194; 341 NW2d 469 (1983) ("The fact that the bus itself did not strike [the plaintiff] does not bar his claim."); *Bradley*, 130 Mich App at 42 ("[A]ctual contact with the motor vehicle is not required."). Indeed, the motor vehicle's failure to exert any physical force on the snowmobile does not require the conclusion of an insufficient causal connection. See *Shinabarger*, 90 Mich App at 313-314 ("The term 'arising out of" does not . . . require . . . that the insured vehicle was exerting any physical force upon the instrumentality which was the immediate cause of the injury."). "Where use of the [motor] vehicle is one of the causes of the injury, a sufficient causal connection is established even though there exists an independent cause." *Id.* at 313; see also *Bradley*, 130 Mich App at 42.

Our decision in *Jones*, 129 Mich App at 192-194, is instructive as it illustrates that a sufficient causal connection may exist where a motor vehicle causes an instrumentality

independent of the motor vehicle to injure a plaintiff, even when the character of the injury is bizarre and unexpected. In *Jones*, employees of a business that compounded liquid detergents flushed lye that had spilled into the business's parking lot down an ally and into a puddle near a bus stop. *Id.* at 190-191. The plaintiff, who was standing at the bus stop, was severely injured when a bus drove through the puddle and splashed water with lye into the his eye. *Id.* at 191. This Court concluded that a sufficient causal connection existed between the plaintiff's injury and the use of the bus as a motor vehicle. *Id.* at 192-194. We explained that it was "eminently foreseeable that a bus, upon encountering a pool of water, may propel that water and whatever may be mixed with it in the direction of nearby pedestrians." *Id.* at 192-193. "The likelihood that the puddle of water would contain a caustic chemical [was] not relevant . . . . It is the manner in which the injury occurs that must be 'foreseeably identifiable with the normal use of the vehicle', not the quality of the injury." *Id.* at 193.

This principal is also evident in the case of *Gajewski v Auto-Owners Ins Co*, 112 Mich App 59; 314 NW2d 799 (1981), rev'd 414 Mich 968 (1982). In *Gajewski*, the plaintiff was severely injured when an explosive device attached to his motor vehicle by an unknown person detonated after the plaintiff turned the ignition key to start his vehicle. *Gajewski*, 112 Mich App at 60. A majority of this Court concluded that "there was an insufficient causal relationship between [the] plaintiff's use of the vehicle and his injuries" because "[e]ven though [the] plaintiff's act of turning the ignition key detonated the explosion, the explosive device, rather than the automobile, was the true instrumentality of the injury." *Id.* at 62. Judge Cynar dissented, arguing that a sufficient causal connection existed. *Id.* at 62-63. In lieu of granting leave to appeal, our Supreme Court reversed for the reasons stated in Judge Cynar's dissenting opinion. *Gajewski v Auto-Owners Ins Co*, 414 Mich 968; 326 NW2d 825 (1982). According to Judge Cynar, a sufficient causal relationship existed because the plaintiff's motor vehicle was more than merely the site of his injury and turning the ignition key could be identified with the normal manner of starting a vehicle. *Gajewski*, 112 Mich App at 63.

Thus, a sufficient causal connection may exist when there is a cause of the injury that is independent of the motor vehicle; however, the fact that the vehicle is the site of the injury will not suffice to bring it within the policy coverage where the injury was entirely the result of an independent cause in no way related to the use of the vehicle. *Shinabarger*, 90 Mich App at 314. In this case, it cannot be said that either the snowmobiler operator's failure to observe plaintiff in time to avoid the collision or the actual collision of the snowmobile with plaintiff was "an independent cause in no way related to the use of the [motor] vehicle." See *id.* The motor vehicle in the present case was more than merely the site of plaintiff's injury. See *id.* Like the lye in *Jones* and the explosive device in *Gajewski*, the normal operation of a motor vehicle caused an instrumentality independent of the motor vehicle to injure plaintiff. And, although the motor vehicle in the present case did not come into physical contact with the instrumentality as the motor vehicles did in both *Gajewski* and *Jones*, Michigan law does not require that the motor vehicle exert any physical force upon the instrumentality that was the immediate cause of the injury. *Shinabarger*, 90 Mich App at 313-314.

Contrary to the majority's conclusion, it does not matter whether the snowmobile operator's vision hypothetically could have been obstructed by something other than a motor vehicle. What matters is whether that which did blind him in this instance—the bright lights of an oncoming motor vehicle driving on the road—can be identified with the normal operation of a

motor vehicle; it can. See *Gajewski*, 414 Mich at 968; *Gajewski*, 112 Mich App at 63; see also *Bradley*, 130 Mich App at 38-39. The plaintiff in *Bradley* was riding a motorcycle in the far-left lane of a one-way street when he noticed a "shadow" ahead of him. *Bradley*, 130 Mich App at 38-39. Upon seeing the "shadow," the plaintiff wanted to move into the lane to his right, but a motor vehicle in the lane (driven by Harold Tefft) prevented the plaintiff from switching lanes. *Id.* at 39. The plaintiff ultimately ran into the back of a parked pickup truck in the far-left lane. *Id.* This Court concluded:

> [I]t could be arguably concluded that Bradley's injuries did not arise from the use of an automobile and that any object could have prevented him from switching lanes. Therefore, the fact that it was a motor vehicle was merely fortuitous. We believe, however, that a causal connection between the use of a motor vehicle and the plaintiff's injuries was established.
>
> * * *
>
> In the instant case, . . . the plaintiff was forced to temper his actions once he spotted the parked pickup truck in view of the fact that a car was in the lane to his immediate right. Tefft's vehicle was positioned next to the plaintiff because Tefft was proceeding in a manner foreseeably identifiable with the normal use of an automobile.
>
> * * *
>
> The normal use of a motor vehicle, *i.e.*, driving side by side with another vehicle, caused the plaintiff to react. . . . Were Tefft's vehicle not in the position it was, the plaintiff would not have had to hesitate and look over his shoulder to see if he could switch lanes. And because Tefft's vehicle was proceeding normally through traffic, we do not feel it was fortuitous that the object which prevented the plaintiff from avoiding the accident was a motor vehicle. [*Id.* at 42-43 (internal citations omitted).]

In this case, the normal use of a motor vehicle, *i.e.*, driving down the road with one's bright lights activated, obstructed the vision of the oncoming snowmobile driver, causing him to be unable to see and avoid hitting plaintiff. Accordingly, I would hold that plaintiff alleged sufficient facts in his complaint showing that his injury arose out of the operation or use of a motor vehicle as a motor vehicle. The trial court's order granting summary disposition for defendant under MCR 2.116(C)(8) should be reversed.

/s/ Jane M. Beckering