# STATE OF MICHIGAN

# COURT OF APPEALS

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| GRANGE INSURANCE COMPANY OF MICHIGAN,<br><br>Plaintiff/Counter-Defendant-Appellant/Cross-Appellee, | UNPUBLISHED<br>June 6, 2013 |
| v | No. 304557<br>Monroe Circuit Court |
| DENNIS ARTHUR BOZUNG, CYNTHIA LYNN BOZUNG, MICHAEL JOHN STOWELL, and KIMBERLY THERESE STOWELL,<br><br>Defendants/Counter-Plaintiffs-Appellees/Cross-Appellants. | LC No. 09-027326-NF |

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

In this case under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals the trial court's order of judgment. Plaintiff challenges the trial court's denial of its motion for summary disposition and the court's decision to grant a directed verdict in favor of defendants/counter-plaintiffs-appellees.[1] On cross-appeal, defendants challenge the trial court's order that denied its motion for attorney fees under the no-fault act, MCL 500.3148(1). We affirm in part, reverse in part, and remand for a new trial.

## I. FACTS

This case arises from a multi-vehicle accident that occurred on September 20, 2009, in Columbia Township. Dennis Bozung was operating a motorcycle and his wife, Cynthia Bozung, was riding as a passenger. John Stowell was also operating a motorcycle and his wife, Kimberly Stowell, was riding as a passenger. All four were injured in the accident and sought personal injury protection (PIP) benefits from plaintiff. Plaintiff insures a 2004 Chevrolet Suburban

[1] For purposes of this opinion, "plaintiff" refers to Grange Insurance Company of Michigan and "defendants" collectively refers to Dennis Arthur Bozung, Cynthia Lynn Bozung, Michael John Stowell, and Kimberly Therese Stowell.

owned and driven by Ryan Heimlich. The parties dispute whether the Suburban was "involved in the accident" as that term is used in the Michigan no-fault act, MCL 500.3114(5). They do not dispute that, if the Suburban was involved, defendants are entitled to PIP benefits from plaintiff.

## II. SUMMARY DISPOSITION

Plaintiff contends that the trial court erroneously denied its motion for summary disposition under MCR 2.116(C)(10). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Cedroni Assoc v Tomblinson, Harburn Assoc*, 492 Mich 40, 45; 821 NW2d 1 (2012). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A summary disposition motion brought under MCR 2.116(C)(10) should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. This Court also reviews de novo issues of law, including issues of statutory construction. *Titan Ins Co v State Farm Mut Auto Ins*, 296 Mich App 75, 83; 817 NW2d 621 (2012).

Under the no-fault act, MCL 500.3101 *et seq.*, a motorcycle is not a "motor vehicle." MCL 500.3101(2)(e). For an injured motorcyclist to recover PIP benefits, the accident must involve a motor vehicle. MCL 500.3105; *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 331 n 1; 671 NW2d 132 (2003). MCL 500.3114(5) establishes the order of priority with respect to which insurer must pay the benefits:

> 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:
>
> (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. [Emphasis added.]

The terms "involved in the accident" and "involvement of a motor vehicle" are not defined in the no-fault act. See MCL 500.3101 *et seq*. Generally, when there is physical contact between the injured party and a motor vehicle, that motor vehicle is involved under MCL 500.3114(5). See *Auto Club Ins Ass'n*, 258 Mich App at 339-341. In *Auto Club Ins Ass'n*, this Court stated:

> While no case clearly states that physical contact between the injured party and a vehicle renders the vehicle "involved" in the accident under MCL 500.3114(5) and obligates the insurer to pay personal injury protection benefits, there is no case where there was physical contact between the injured party and a vehicle where the vehicle was found not to be involved. It appears that a question is raised regarding involvement, and analysis under *Turner*[2] becomes necessary, only when there is no physical contact between the injured party and the vehicle. [*Id*. at 339-340.]

The last sentence states that a motor vehicle's involvement is an issue *only* when there was no physical contact between the injured party and the vehicle. *Id*. Thus, physical contact with the injured party and the vehicle constitutes involvement.

If there was no physical contact, a motor vehicle may be involved in an accident under certain circumstances. See *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995); *Frierson v West American Ins Co*, 261 Mich App 732, 736-737; 683 NW2d 695 (2004); *Auto Club Ins Ass'n*, 258 Mich App at 340-341. In *Turner*, 448 Mich at 39, the Supreme Court held:

> [F]or a vehicle to be considered "involved in the accident" under § 3125,[3] 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."

Plaintiff argues that whether the Heimlich Suburban was involved in the accident is a question of law that should have been decided by the trial court at summary disposition. Plaintiff is correct that issues of statutory interpretation, including interpretation of the no-fault act, are questions of law. *Frierson*, 261 Mich App at 734. Here, whether the Suburban was involved in the accident is a question of law, but the trial court correctly ruled that underlying disputed issues of fact precluded a decision on a motion for summary disposition.

Importantly, there was a genuine issue of material fact whether the Bozung motorcycle had physical contact with the Heimlich Suburban. If there was contact, then the Heimlich Suburban was, as a matter of law, involved in the accident under MCL 500.3114(5). See *Auto Club Ins Ass'n*, 258 Mich App at 339-341. Evidence showed that, at the scene of the accident, Mr. Heimlich told Officer Richard Rodden that he felt the Bozung motorcycle strike his Suburban. However, Mr. Heimlich testified at his deposition that he did not feel an impact. In

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[2] See *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995).

[3] MCL 500.3125 addresses the priority of insurers that are responsible for paying property protection benefits to an individual who has suffered accidental property damage in a motor vehicle accident. This Court subsequently applied the *Turner* analysis to cases involving PIP benefits as well. See *Auto Club Ins Ass'n*, 258 Mich App at 340-341.

his affidavit, Mr. Bozung stated that his body and motorcycle made physical contact with Mr. Heimlich's vehicle. According to Mr. Bozung, his motorcycle hit the rear tire of Mr. Heimlich's Suburban and then deflected into the westbound lane. Further, evidence showed there was damage to the rear bumper and side mirror of the Heimlich Suburban. Mr. Stowell also reported that the Bozung motorcycle hit one of the vehicles stopped in the eastbound lane. These conflicting statements created a question of fact regarding whether there was contact between the Bozung motorcycle and the Heimlich Suburban.

Further, evidence created a genuine issue of material fact with regard to whether Mr. Heimlich placed his Suburban in park while waiting behind another vehicle, or if he had the vehicle in drive with his foot on the brake. If a finder of fact concludes that the Suburban was in park, then the Suburban was involved in the accident as a matter of law because it actively contributed to the accident. See MCL 500.3106(1)(a); *Turner*, 448 Mich at 39. An individual can recover PIP benefits for an accidental bodily injury arising out of the ownership, operation, maintenance, or use of a parked vehicle when that vehicle is parked "in such a way as to cause unreasonable risk of the bodily injury which occurred." MCL 500.3106(1)(a). If the Suburban was parked, it was parked unlawfully in the middle of Jefferson Road and it would be irrelevant whether there was physical contact between the Bozung motorcycle and the Heimlich Suburban.

Mr. Bozung stated in his affidavit that he did not see any brake or tail lights on the Heimlich Suburban. Mr. Heimlich testified at his deposition that he kept his Suburban in drive while stopped behind the car waiting to turn left on Eagle Point Road. Officer Rodden verified at the accident scene that the brake and tail lights on the Suburban were working properly. Thus, conflicting evidence created an issue of fact regarding whether the brake lights on the Heimlich Suburban were activated at the intersection where the accident occurred.

Plaintiff maintains that defendants' injuries did not arise out of the ownership, operation, or use of a motor vehicle as a motor vehicle. The causal nexus required for a motor vehicle to be involved in an accident is less stringent than that required for an individual's injuries to have arisen from the use of a motor vehicle as a motor vehicle. *Turner*, 448 Mich at 41-42. There must be a connection between the injury sustained and the "vehicular use of a motor vehicle." *Id.* at 32, citing *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986). That relationship "must be more than incidental, fortuitous, or but for, and the vehicle's connection with the injury should be directly related to its character as a motor vehicle." *Turner*, 448 Mich at 32 (internal citations omitted).

Mr. Heimlich was driving the Suburban home from his son's soccer game on a public road. He stopped behind another vehicle that was waiting to make a left turn while a parade of motorcycles passed. The Bozung motorcycle was approaching the Suburban from behind and Mr. Bozung laid down his motorcycle to avoid hitting the Heimlich Suburban. As a result, both Mr. and Mrs. Bozung flew off of the motorcycle and sustained injuries. The Stowells' injuries were also a result of Mr. Bozung laying down his motorcycle to avoid hitting the Suburban. Somehow, possibly because it bounced off of the Heimlich Suburban, the Bozung motorcycle slid into the westbound lane and into the Stowell motorcycle, injuring both Mr. and Mrs. Stowell. Defendants' injuries were a direct result of Mr. Bozung's attempts to avoid hitting the Suburban. Thus, the injuries arose from the use of the Heimlich Suburban as a motor vehicle. See *Turner*, 448 Mich at 32, 41-42.

## III. DIRECTED VERDICT

Plaintiff argues that the trial court erred in granting defendants' motion for a directed verdict. "A directed verdict is appropriate when reasonable minds could not differ on a factual question." *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011). When deciding a motion for a directed verdict, the trial court should consider all of the evidence, and make all inferences, in favor of the nonmoving party. *Id*. "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008). Furthermore, "it is the factfinder's responsibility to determine the credibility and weight of trial testimony." *King v Reed*, 278 Mich App 504, 522; 751 NW2d 525 (2008) (internal citations omitted). It is improper for the trial court to make such determinations when deciding a motion for a directed verdict. *Id*.

Here, the trial court granted defendants' motion for a directed verdict on its own determinations of witness credibility. See *King*, 278 Mich App at 522. As discussed, there are two ways that the Heimlich Suburban could have been involved in the accident, (1) if there was contact between the Bozung motorcycle and Heimlich Suburban, or (2) if Mr. Heimlich placed the Suburban in park while waiting for the westbound parade of motorcycles to pass. See MCL 500.3106(1)(a); *Turner*, 448 Mich at 39. Whether there was contact between the motorcycle and Suburban and whether the brake lights were activated on the Suburban are both questions of fact.

The evidence at trial conflicted with respect to both of these factual issues. Mr. Heimlich testified that he never heard or felt the Bozung motorcycle impact his vehicle. Mr. Heimlich admitted that there was minor damage to his rear bumper and a crack in his driver's side mirror. He was not sure how the damage occurred and suggested it could have been from flying debris from any of the vehicles involved in the accident. Angela Heimlich, who was a passenger in the Suburban at the time of the accident, also testified that she did not hear or feel an impact to the Suburban during the accident. Mr. Bozung, on the other hand, testified that his motorcycle slid under the Suburban and both his body and his motorcycle struck the driver's side rear wheel. At trial, Mr. Heimlich also testified that he did not put his Suburban in park while waiting for the westbound motorcycles to pass. Mr. Bozung testified that he did not see the brake lights or turn signal activated on the Suburban as he approached, so he thought the Suburban was moving.

Because the testimony clearly conflicted, the trial court made a credibility determination when it granted defendants' motion for a directed verdict. The court stated that Mr. Heimlich's statements were inconsistent and stated that Mr. Bozung was a very credible witness. It is improper for the trial court to rule on this basis when deciding a motion for a directed verdict. *King*, 278 Mich App at 522. Rather, it is the jury's responsibility to weigh the testimony of witnesses and credit or discredit that testimony. *Id*. Furthermore, by improperly making a credibility determination and choosing to disbelieve Mr. Heimlich, the trial court erroneously failed to consider the evidence in favor of plaintiff. See *Chouman*, 293 Mich App at 441. The trial court erred in granting defendants' motion for a directed verdict.

## IV. ATTORNEY FEES

On cross-appeal, defendants contend that the trial court erred in denying its request for attorney fees under MCL 500.3148(1). This Court reviews a trial court's decision to grant or deny attorney fees under MCL 500.3148(1) for clear error. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66; 737 NW2d 332 (2007). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id.*, quoting *Solution Source Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002).

Defendants sought attorney fees under MCL 500.3148(1), which provides:

> (1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

When an insurer refuses to pay PIP benefits or delays payment, it is presumed that the refusal or delay is unreasonable. *Ivezaj v Auto Club*, 275 Mich App 349, 353; 737 NW2d 807 (2007). The insurer can rebut that presumption by justifying its refusal or delay. *Id*. "A delay in making payments 'is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty.'" *Id*, quoting *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999).

For the reasons stated, there remain questions of fact about the dispositive issue of whether the Heimlich Suburban was involved in the accident. Accordingly, the trial court did not clearly err in ruling that plaintiff's refusal to pay benefits was reasonable. There was conflicting evidence regarding whether the Bozung motorcycle hit the Heimlich Suburban and whether the Heimlich Suburban's brake lights were activated. Given the factual uncertainties, an award of attorney fees on this basis would have been improper.

For the reasons stated, we affirm the trial court's denial of plaintiff's motion for summary disposition, we reverse the trial court's order that granted defendants' motion for a directed verdict and its judgment in favor of defendants, and remand for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan