STATE OF MICHIGAN

COURT OF APPEALS

LESLIE C. BRAVERMAN, as conservator for PAMELLA JEAN SMUTZKI, deceased, Plaintiff-Appellee,	UNPUBLISHED August 20, 2013
v	No. 306492 Oakland Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 2010-110523-NF

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

In this action under the no-fault act, MCL 500.3101 *et seq.*, defendant appeals as of right the trial court's order granting summary disposition in favor of plaintiff. We reverse in part, affirm in part, and remand for further proceedings.

I. FACTS

This case arises from an accident that occurred on September 15, 2006, at approximately 10:00 p.m. Pamella Jean Smutzki, her boyfriend, Jason Harwood, and their friend, Jim Garbasic, were each driving a motorcycle south bound on Haggerty Road between Van Born and Ecorse Roads. In that area, Haggerty is a straight, two-lane road, with one lane of travel in each direction. It is a commercial area with little to no street lighting. The speed limit is 45 miles per hour. Harwood was leading the group of motorcyclists. Smutzki was riding behind him and to his right, toward the shoulder. Garbasic was riding behind her.

At one point, Smutzki accelerated past Harwood on his left. This was unusual because Smutzki and Harwood rode together frequently and Harwood always rode as the lead motorcycle. Harwood was traveling at 35 to 40 miles per hour. When Smutzki passed Harwood, she was looking down toward her right hand, where the throttle is located. Harwood saw Smutzki look up and he saw a tractor-trailer stopped in the lane in front of Smutzki. It appeared to Harwood that Smutzki tried to brake but the brakes locked, so she laid down her motorcycle to avoid hitting the tractor-trailer. Smutzki slid to the right of the tractor-trailer; neither she nor her motorcycle came into contact with it. Harwood did not see the tractor-trailer until Smutzki swerved to avoid it, because according to Harwood, the tractor-trailer did not have any lights or turn signal on. In his incident report, Officer Frederick Sweet wrote that Harwood told him the truck's flashers or turn signals were on. Both Harwood and Garbasic slammed on their brakes to

avoid hitting the tractor-trailer. They were able to stop without making contact or laying down their motorcycles. Smutzki subsequently died from a brain injury she sustained in the accident.

Erwin Lee was driving a Mercury Cougar one and a half to two car-lengths behind the three motorcycles. He did not notice the tractor-trailer until he saw Smutzki jerk and fall to the ground. The tractor-trailer appeared to be sitting in the road. Lee did not remember seeing any brake lights or turn signal on the tractor-trailer, but he could not say with certainty if those lights were on or off. He abruptly stopped and did not hit the motorcycles.

Kirk Kulisch was driving the tractor-trailer. The trailer was 53 feet long and the tractor was 20 feet long. At his deposition, Kulisch testified that he was halfway into the driveway of L&W Plant 1 when the accident occurred. Kulisch was coming from L&W Plant 2, which is 0.25 to 0.75 miles north of Plant 1.[1] Kulisch testified that he turned left out of Plant 2, went through his gears, came to the driveway for Plant 1, turned on his left turn signal, and began making the left turn. Kulisch said that he was not driving "even close" to the speed limit of 45 miles per hour. He explained that the tractor-trailer is "geared so low you're going through three or four gears just to go from 0 to 10 miles per hour." When his tractor-trailer was more than halfway into the driveway of Plant 1, he heard tires screeching and saw a headlight moving back and forth in his rearview mirror. Kulisch explained that the motorcycle had to be at least 20 to 30 feet behind him because if it was closer, it would have been in his blind spot.

Kulisch said that his turn signals were on and his tractor-trailer was well-lit, with "turn signals all down the side, all over the back, even extra ones on that trailer." After he pulled into the driveway of Plant 1, Kulisch got out and confirmed that his lights were working. He explained that the tractor-trailer had over 50 marker lights on the sides and back. The lights are yellow on the sides and red on the back and they automatically turn on when the headlights are turned on. Kulisch was sure that his headlights and the side lights on the trailer were on; he saw the sidelights on the truck in his rearview mirror as he was turning left into the driveway. Kulisch said that when he closed his back door before leaving Plant 2, the red lights on the back of the trailer were on. When police later arrived at the scene, they confirmed that the lights on the tractor-trailer were working.

Plaintiff, as conservator for Smutzki, sought personal injury protection (PIP) benefits from defendant, which insured the tractor-trailer. Plaintiff is only entitled to PIP benefits from defendant if the tractor-trailer was "involved" in the accident, pursuant to MCL 500.3114(5). Initially the trial court held that there was a genuine issue of material fact on that issue because there was a dispute in the testimony as to whether the lights were operating on the tractor-trailer at the time of the accident. Subsequently, however, the trial court granted plaintiff's motion for summary disposition and held that the tractor-trailer was involved as a matter of law because plaintiff reacted to the truck as it proceeded so slowly on the road, essentially causing an obstruction on the roadway.

II. SUMMARY DISPOSITION

[1] According to Kulisch, L&W Plant 1 and Plant 2 are approximately 0.4 miles apart.

First, defendant argues that the trial court erred in granting summary disposition in favor of plaintiff. We agree.

A trial court's decision on a motion for summary disposition is reviewed 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 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 PIP benefits to the injured motorcyclist:

> 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.]

Thus, if the tractor-trailer was "involved in the accident" that led to Smutzki's injuries and death, then plaintiff can recover PIP benefits from defendant under MCL 500.3114(5)(a).

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 this case, the parties agree that neither Smutzki nor her motorcycle ever came into contact with the tractor-trailer. However, even if there was no physical contact, a motor vehicle can still be involved in an accident. 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,[2] 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[.]" [Footnote added.]

In *Turner*, 448 Mich at 25-26, a police car had its lights activated and was quickly pursuing a stolen vehicle. The stolen vehicle ran a red light and hit two trucks. *Turner*, 448 Mich at 25-26. One of the trucks split into two and crashed into a building, causing a fire and extensive property damage. *Id.* at 26. The police car did not collide with the stolen vehicle or either truck. *Id*. Nonetheless, our Supreme Court held that the police car was involved in the accident because its pursuit of the stolen vehicle prompted that vehicle's driver "to ignore the red light and collide with the other vehicles," so its insurer was responsible for paying property protection benefits with respect to the damaged building. *Id.* at 42-43.

In this case, the trial court reluctantly concluded that the tractor-trailer was involved in the accident as a matter of law because the accident occurred when Smutzki reacted to the tractor-trailer in the road. The court compared the tractor-trailer to the police car in *Turner*, 448 Mich at 42-43, which the Court held was involved in the accident that caused property damage because the police car's lights and speed caused the car it was pursuing to crash into another vehicle, which then crashed into a building. Given this conclusion, the trial court ruled in plaintiff's favor as a matter of law.

We conclude that the trial court erred in holding that the tractor-trailer was involved in the accident as a matter of law. The trial court in essence applied a "but for" analysis by finding that the tractor-trailer was involved because Smutzki was reacting to its *presence* in the road. To be involved in an accident, a vehicle must *actively* contribute to the accident. See *Turner*, 448 Mich at 39. A passive contribution is insufficient. *Id*. Thus, more than just the normal operation of a motor vehicle is required. On a two-lane road, a vehicle seeking to make a left turn must slow or stop, requiring the traffic behind to slow or stop as well. There was no evidence that the tractor-trailer stopped suddenly. In fact, the evidence showed that it was travelling at an extremely slow speed and had been for 0.4 miles, since pulling out of Plant 2. The fact that the tractor-trailer was making or preparing to make a left turn, by itself, does not establish its involvement in the accident. Summary disposition in favor of plaintiff on this basis was improper.

However, defendant was also not entitled to the grant of summary disposition. As plaintiff asserted in her response to defendant's motion for summary disposition, and the trial court recognized in addressing the first motion for summary disposition, there is a genuine issue

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[2] 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.

of material fact regarding whether the tractor-trailer had any lights on at the time of the accident. Harwood testified that he would have crashed into the tractor-trailer if he were in the lead because it did not have any lights or turn signal on. Lee did not remember seeing any brake lights or turn signal on the tractor-trailer, but he could not definitely say if those lights were on or off. On the other hand, Kulisch testified in detail about the various lights on the tractor-trailer. He was certain that his turn signal was on, along with his marker lights and "fourways." If the tractor-trailer did not have any lights on, this failure could mean that its presence in the road actively contributed to the accident, given that the accident occurred at about 10:00 p.m. on a road with no streetlights and lights were required to be in use at the time. MCL 257.697. In addition, there was some evidence that the tractor-trailer would have been visible from a distance even if it did not have any lights on. Therefore, we remand to the trial court to proceed to trial.

III. DISCOVERY ON SMUTZKI'S INSURANCE COVERAGE

Defendant also asserts that the trial court abused its discretion in prohibiting it from conducting discovery or raising at trial the issue of Smutzki's insurance coverage at the time of the accident. We disagree.

MCL 500.3113(b) provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
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> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

Thus, if Smutzki did not have proper coverage on September 15, 2006, the date of the accident, plaintiff cannot recover PIP benefits. See MCL 500.3113(b). In a separate case between plaintiff and Smutzki's insurance provider, Dairyland Insurance Company (the Dairyland case), the trial court determined as a matter of law that Smutzki did, in fact, have coverage on the date in question. Defendant was not a party in that case. When Dairyland did not appeal the trial court's decision, defendant sought to intervene. The trial court denied defendant's motion to intervene because it was filed too late—23 days after the trial court granted summary disposition in favor of plaintiff.

When defendant sought to conduct discovery on this issue in the instant case, plaintiff moved for a protective order, arguing that defendant was bound by the declaratory judgment in the Dairyland case. Plaintiff also filed a motion in limine to prevent defendant from raising the issue of Smutzki's insurance coverage at trial. The trial court granted both motions and defendant challenges these decisions.

"We review for an abuse of discretion a trial court's decision on a motion for a protective order." *Alberto v Toyota Motor Corp*, 289 Mich App 328, 340; 796 NW2d 490 (2010). A trial court's decision to admit or exclude evidence is also reviewed for an abuse of discretion. *Dep't*

of Transp v Gilling, 289 Mich App 219, 243; 796 NW2d 476 (2010). "An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes." *Id*. The application of collateral estoppel is a question of law that this Court reviews de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

The purpose of collateral estoppel is "to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication[.]" *Monat v State Farm Ins Co*, 469 Mich 679, 692-693; 677 NW2d 843 (2004) (quotation marks and citation omitted). "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Id.* at 682-684 (quotation marks, citations, internal brackets, and footnote omitted). Mutuality of estoppel exists when the party asserting collateral estoppel would have been bound by the previous litigation, had the judgment gone against him. *Id.* at 684-685.

First, the Dairyland case resulted in a final judgment. About six months after the trial court granted summary disposition in favor of plaintiff, plaintiff and Dairyland stipulated to the case's dismissal.

Second, defendant had a fair and full opportunity to litigate this issue in the Dairyland case. Defendant admitted that it had notice of the litigation and was monitoring its progress. Nonetheless, it did not move to intervene until 23 days after the trial court granted summary disposition in plaintiff's favor. The trial court denied defendant's motion to intervene because of this delay. Our Court has held that when a party had actual notice of the prior action and could have intervened, collateral estoppel prevents the party from retrying the issue. *Wilcox v Sealey*, 132 Mich App 38, 48; 346 NW2d 889 (1984); see also *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 200; 452 NW2d 471 (1989). The party who fails to intervene "is collaterally estopped from denying the validity and binding effect of the declaratory judgment[.]" *Wilcox*, 132 Mich App at 46. Furthermore, defendant's claim that its interests were not protected in the Dairyland case lacks merit. At the hearing on its motion to intervene, defendant conceded that its interests were identical to Dairyland's interests; in arguing its motion to intervene, defendant stated that Dairyland's counsel was more than competent in defending Dairyland's interests and its own.

Finally, there is mutuality of estoppel. If the trial court had concluded in the Dairyland case that Smutzki lacked proper insurance coverage on September 15, 2006, defendant could have used that judgment in the instant case to assert that plaintiff is not entitled to PIP benefits pursuant to MCL 500.3113(b).

IV. ADMISSIBILITY OF THROTTLE EVIDENCE

Defendant next contends that the trial court abused its discretion in granting plaintiff's motion in limine with respect to any testimony espousing the theory that the throttle on Smutzki's motorcycle may have stuck right before the accident. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 689; 777 NW2d 511 (2009).

At his deposition, Harwood opined that Smutzki braked suddenly and laid down her motorcycle because the throttle stuck. Harwood explained that the throttle on Smutzki's motorcycle stuck one time previously when he was driving it. Harwood also said that when she passed him right before the accident, Smutzki was looking down at her right hand, where the throttle is located. Harwood admitted that he did not know for certain if the throttle stuck:

> *Q.* Okay. And your [sic] hypothesizing that [Smutzki's] throttle may have stuck. That's just a guess, correct?
>
> *A.* That's just a guess on—you know, that's the only thing I could come up with after all this time.

Plaintiff filed a motion in limine seeking to exclude any testimony at trial, from Harwood or another witness, regarding *the theory* that Smutzki's throttle stuck shortly before the accident. In part, plaintiff argued that the testimony was speculative and inadmissible under MRE 602 and MRE 701. MRE 602 provides that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Similarly, MRE 701 states that a non-expert witness may only testify to his opinions or inferences when they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

The trial court granted plaintiff's motion in limine, relying on plaintiff's arguments and noting that Harwood's theory was speculative. This decision was not an abuse of discretion. Harwood can testify to matters on which he does have personal knowledge—like the fact that the throttle stuck once when he was driving Smutzki's motorcycle and the fact that he saw Smutzki looking down, in the direction of her throttle, when she passed him right before the accident occurred. However, he does not have personal knowledge that the throttle stuck on this occasion, so this precise testimony as to this conclusion or theory is inadmissible under MRE 602. It was also not an abuse of discretion for the trial court to conclude that the testimony would not be admissible under MRE 701.

V. ADMISSIBILITY OF KARL V. EBNER'S TESTIMONY

Finally, defendant asserts it should be allowed to call Dr. Karl V. Ebner, an expert toxicologist originally retained by plaintiff, as a witness at trial and to use Dr. Ebner's deposition testimony and report at trial even if he does not testify. We agree in part.

After deciding not to call Dr. Ebner as a witness at trial, plaintiff sought to preclude defendant from calling Dr. Ebner as a witness or using his report or deposition testimony at trial, relying on MCR 2.302(B)(4). Meanwhile, defendant moved for leave to "utilize" Dr. Ebner's testimony. In response, the trial court entered an order prohibiting defendant from using the transcript of Dr. Ebner's deposition at trial, for any purpose, because it was taken as a discovery-only deposition. The court subsequently entered a second order prohibiting defendant from calling Dr. Ebner as a witness at trial or making any reference to him or his report. The court stated that its decision was based on plaintiff's arguments.

"We will not disturb a trial court's decision to exclude evidence unless it is established that it abused its discretion." *City of Westland v Kodlowski*, 298 Mich App 647, 663; 828 NW2d

67 (2012). However, we review questions of law, including the interpretation and application of court rules, de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

The trial court erred by relying on plaintiff's argument that MCR 2.302(B)(4) applies to this issue. MCR 2.302(B)(4)(b) provides:

> A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except
>
> (i) as provided in MCR 2.311,[3] or
>
> (ii) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.[Footnote added.]

Thus, MCR 2.302(B)(4) addresses the *discovery* of materials prepared by a nonwitness expert. In this case, however, defendant has already deposed Dr. Ebner and obtained a copy of his report. Defendant is not seeking "the identity of and facts known or opinions held by" Dr. Ebner; defendant already has this information. Rather, it appears defendant is seeking: (1) to call Dr. Ebner as a witness at trial; (2) to use Dr. Ebner's deposition testimony and report at trial as admissions of a party-opponent pursuant to MRE 801(d)(2); or (3) to use Dr. Ebner's deposition testimony and report to impeach plaintiff's new toxicology expert.

There is no reason that defendant cannot call Dr. Ebner as a witness. As discussed above, MCR 2.302(B)(4)(b) does not apply to the admission of evidence or use of witnesses at trial. Plaintiff briefly argues that defendant cannot call Dr. Ebner as a witness because he was not on defendant's witness list. MCR 2.401(I) requires both parties to file and serve witness lists; the trial court can prohibit a witness from testifying if he is not listed. However, defendant's witness list includes "all witnesses listed on any Witness List by other parties, former or present, to this action" and "all rebuttal witnesses." Dr. Ebner was listed on plaintiff's former witness list, so the first category applies. Dr. Ebner could also be used as a rebuttal witness. Therefore, this argument lacks merit.

With respect to Dr. Ebner's deposition testimony, defendant can only use it at trial for impeachment purposes. Defendant noticed Dr. Ebner's deposition as "discovery-only." Plaintiff objected to the use of the deposition for discovery only, but the court later entered a stipulated order permitting defendant to take the discovery-only depositions of plaintiff's experts, including Dr. Ebner. When a deposition is taken for discovery only, it is not admissible at trial except to impeach. See MCR 2.302(C)(7).

[3] MCR 2.311 addresses physical and mental examinations; thus, it is inapplicable in this case.

Finally, neither Dr. Ebner's deposition testimony nor his report can be used as an admission by plaintiff pursuant to MRE 801(d)(2). MRE 801(d)(2)(C) provides that a statement is not hearsay if it is offered against a party and "a statement by a person authorized by the party to make a statement concerning the subject[.]" In support of its argument, defendant cites *Barnett v Hidalgo*, 478 Mich 151; 732 NW2d 472 (2007). The statements at issue in *Barnett* were affidavits of merit attached to plaintiff's complaint in a medical malpractice case. *Id.* at 160-163. Because an affidavit of merit is submitted as part of the pleadings, it is considered an adoptive admission by the plaintiff. *Id*. at 161. In concluding that the affidavits were the plaintiff's adoptive admissions, and therefore not hearsay, our Supreme Court noted that the plaintiff chose to include those particular affidavits with her complaint *and* called the same experts at trial. *Id*. at 161-162. In this case, plaintiff has not taken any steps to adopt Dr. Ebner's testimony or report as her own admissions. In fact, plaintiff has chosen *not* to call Dr. Ebner as a witness at trial. Therefore, defendant cannot present Dr. Ebner's deposition testimony or report at trial as plaintiff's admissions.

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

No costs to either party, neither having prevailed in full. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray