STATE OF MICHIGAN

COURT OF APPEALS

VINCENT J. DUQUETTE, Plaintiff-Appellant,	UNPUBLISHED June 19, 2014
v	No. 316026 Shiawassee Circuit Court
TROY M. REISTER, Defendant-Appellee.	LC No. 11-002842-NI

Before: O`CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

In this case involving the collision of an automobile and a snowmobile, plaintiff appeals by right the trial court's order granting disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

On the night of the accident, plaintiff was riding a snowmobile in Shiawassee County. Carol Marchwinski was on her own snowmobile behind plaintiff. Plaintiff testified that as he approached the intersection of Carland Road and McBride Road, he looked for traffic, then looked back at Marchwinski, before turning back to look at the roads in front of him. He said he then "took off." Plaintiff did not recall seeing defendant's vehicle. Defendant said that he was travelling at 50 to 55 miles per hour when he first noticed the lead snowmobile. Defendant watched the lead snowmobile stop on the opposite side of a ditch. Defendant then noticed the second snowmobile and saw the rider of the lead snowmobile look back at the second snowmobile. The lead snowmobile then darted into the road, defendant testified. Defendant said it was so quick that he only had time to hit the brakes and hold onto the steering wheel. Defendant said he was driving travelling about 45 miles per hour when the impact occurred. Plaintiff filed suit, and defendant moved for summary disposition, arguing that plaintiff was more than 50 percent at fault for the accident and therefore not entitled to recovery. The trial court agreed and granted the motion.

Plaintiff argues that the trial court erred in granting summary disposition because there were genuine issues of material fact. A trial court's decision on a motion for summary disposition is reviewed de novo. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009).

Summary disposition under MCR 2.116(C)(10) is appropriate when the moving party is able to demonstrate that there are no disputed material fact issues and entitlement to judgment as

a matter of law. *Id*. The moving party can use affidavits, deposition, admissions, and other documentary evidence to support the position that no genuine issue of material fact exists. MCR 2.116(G)(2). The non-moving party then has the burden of demonstrating through similar documentary evidence that there is a genuine issue of material fact. MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). If a genuine issue of material fact exists, summary disposition is inappropriate. *Watts v Michigan Multi-King, Inc*, 291 Mich App 98, 103; 804 NW2d 530 (2010). When considering the motion, the trial court must examine the evidence provided by the parties in a light most favorable to the non-moving party, *id*. at 102, but may not make factual determinations or judge the credibility of a witness, *White v Taylor Distributing Co*, 275 Mich App 615, 625; 739 NW2d 132 (2007).

Under the no-fault act, a person is not subject to tort liability for noneconomic loss with respect to his or her ownership, maintenance, or use of a motor vehicle when the party seeking damages is more than 50 percent at fault for an accident. MCL 500.3135(2)(b). Generally questions of fact regarding comparative fault are for the jury and therefore not subject to summary disposition. *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998). But if "no reasonable juror could find that defendant was more at fault than the [plaintiff] in the accident as required by MCL 500.3135(2)(b)[,]" summary disposition is appropriate under MCR 2.116(C)(10). *Huggins v Scripter*, 469 Mich 898, 898-899; 669 NW2d 813 (2003).

According to MCL 257.401(1) an operator of a motor vehicle has a duty to operate a vehicle in with ordinary care to prevent causing injury to people or property. Even in the absence of the statute, "it is [a] motorist's duty in the use and operation of his automobile to exercise ordinary and reasonable care and caution, that is, that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances." *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956).

The trial court determined that the only factual disputes were not material. Specifically, it was undisputed that defendant had the right of way, and regardless of whether plaintiff looked both ways, plaintiff proceeded across the road at his own risk. Plaintiff asserts that the trial court erred because there was eyewitness testimony that plaintiff looked both ways twice, and defendant's wife made a statement to the effect that defendant thought he gave plaintiff enough time to cross the road. Plaintiff maintains that this testimony created a genuine issue of material fact as to whether plaintiff was more than 50 percent at fault.

Viewed in the light most favorable to plaintiff, deposition testimony established that plaintiff did not see defendant's vehicle, but defendant saw plaintiff. Nonetheless, defendant still had the right of way. Defendant also indicated he slowed down twice once he saw plaintiff and was driving at 45 miles per hour, 10 miles less than the posted speed limit, when the impact occurred. Sergeant Douglas Chapman of the Shiawassee Sheriff's Department said that the evidence at the scene was consistent with defendant's story, and there was no evidence to indicate defendant had been speeding. Chapman testified that there is no stop sign on Carland Road where it intersects with McBride Road. He testified that he concluded that plaintiff failed to yield the right of way; consequently, he was at fault for the accident.

Allowing the case to go to the jury would require the jury to establish what other actions defendant should have taken to exercise ordinary and reasonable care and caution. Plaintiff did not present any evidence that demonstrated he did not "take off" or "dart" in front of defendant's vehicle. Even the alleged statement from defendant's wife that "we thought we gave [plaintiff] enough time to cross" does not change the outcome. Even considering this statement as some sort of confession of culpability, from a legal standpoint we must focus on the fact that defendant still had the right of way and proceeded with reasonable caution.

In sum, no reasonable juror could find that defendant was more at fault than plaintiff in causing the accident as required by MCL 500.3135(2)(b); therefore, the trial court did not err in granting defendant's motion for summary disposition. *Huggins*, 469 Mich at 898-899.

We affirm. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey