Order

Michigan Supreme Court
Lansing, Michigan

January 26, 2024

Elizabeth T. Clement,
Chief Justice

165146

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

JOHN STUTH,
Plaintiff/Counterdefendant-
Appellant,

v

SC: 165146
COA: 357244
Washtenaw CC: 19-000710-NF

HOME-OWNERS INSURANCE COMPANY,
Defendant/Counterplaintiff-
Appellee.

_____/

On December 6, 2023, the Court heard oral argument on the application for leave to appeal the October 6, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*dissenting*).

I respectfully dissent from the Court's decision to deny leave to appeal. I would reverse the judgment of the Court of Appeals and reinstate the judgment of the circuit court.

Plaintiff John Stuth was riding a motorcycle and veered off the road. He went over the handlebars and was injured. Defendant Home-Owners Insurance Company insured the motorcycle, and plaintiff tried to claim personal protection insurance (PIP) benefits under the policy. However, defendant denied the claim because the accident did not involve a "motor vehicle" as defined by the no-fault act, MCL 500.3101 *et seq*. The act specifically excludes motorcycles from the definition of "motor vehicle." MCL 500.3101(3)(i)(*i*). However, plaintiff alleged that there was a motor vehicle involved in the accident.

At the bench trial, plaintiff testified that there was a white van travelling the opposite direction on the road as plaintiff was rounding a curve. As they approached each other, the van veered toward plaintiff, crossing onto, but not completely over, the double yellow lines. Specifically, plaintiff said:

> And I thought this was—van or truck was going to cross the yellow line, the yellow—going into the double yellow. I don't know if he would have crossed or not, but I knew I needed to have an escape route.

> And I saw a field and the hill seemed to be kind of swelled and I thought I could just ride down there real easy and turn around the field and everything would be okay.

Plaintiff also testified that after he began his evasive maneuver the van course-corrected and did not complete its entry into plaintiff's lane, so in hindsight, plaintiff thought that if he had not veered there would not have been an accident. The van did not stop, and there were no other witnesses. Plaintiff's testimony was the only account of the accident.

Having heard plaintiff's testimony, the circuit court found plaintiff credible and determined that he was entitled to PIP benefits. The circuit court made several specific findings in support of this conclusion:

> First, the photos of the curve itself and I noticed it from the first aerial. And then the other photos. There was—this is right after the accident. The bike is there. There's no gravel in that curve. There's no sand in that curve. There's nothing to suggest that he lost control making that curve and it's not a significant curve.
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> His explanation to me makes sense. . . .
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> * * *
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> I also when looking at the photograph could absolutely see the way, as he's coming in that curve and if that big van is coming right towards him and it's looking like it's coming across those yellow lines, he, he described it today as flinching. That's absolutely what happens. He's trying to get off the road to recover and frankly that's when everything breaks up on him.
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> * * *
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> So I think that I believe him and again, I believe him. I find him credible.
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> * * *
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> I think it's more, counsel, I think it's more than even the [decision in *Turner v Auto Club Ins Ass'n*, 448 Mich 22 (1995)], I think assuming this goes up, in my opinion, that standard has been met.
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> . . . [A]nd it makes sense he wouldn't stop to see if it's coming all the way over on the yellow line. That look like [sic] it's coming right at him, he's going to get off to the side. He is not going to pay attention to that.

> And so I think it was more than just incidental.

MCL 500.3105(1) states that PIP benefits are payable when there is an injury "arising out of the . . . operation . . . of a motor vehicle as a motor vehicle . . . ." In *Turner*, we examined this same statutory language.[1] We said then that "[t]he primary consideration in the causation analysis 'must be the relationship between the injury and the vehicular use of a motor vehicle.' " *Turner*, 448 Mich at 32, quoting *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660 (1986). Further, "the relationship between the use of the vehicle as a motor vehicle and the injury 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." *Id.* (quotation marks and citation omitted).

In reversing the circuit court judgment in plaintiff's favor, the Court of Appeals in this case did not really rely on the *Turner* standard. Instead, it relied on its own decision in *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392 (2013) (*DMC*). In *DMC*, a motorcycle and motor vehicle were approaching each other, with the motorcycle traveling at approximately 100 miles an hour on a side street. The motorcyclist saw approaching headlights and applied his brakes, causing him to fishtail and ultimately crash. Neither the motorcyclist nor his motorcycle came into physical contact with the motor vehicle. Nevertheless, he was injured and sought PIP benefits. The Court of Appeals held:

> In this case, there is no evidence that the motorcyclist needed to take evasive action to avoid the motor vehicle. Rather, the evidence only established that the motorcyclist was startled when he saw the approaching headlights and overreacted to the situation. And while fault is not a relevant consideration in determining whether a motor vehicle is involved in an accident for purposes of no-fault benefits, we believe that principle is limited to not considering fault in the cause of the accident, not whether the motor vehicle was actually involved in the accident. That is, had the motorcycle actually collided with the motor vehicle, we would not consider whether the motorcyclist or the motor vehicle driver was at fault in causing the accident, nor would we consider whether the motorcyclist could have taken evasive

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[1] *Turner* actually involved MCL 500.3121(1), which relates to liability for damage to property. However, that provision also contains the requirement that an accident must "aris[e] out of the . . . operation . . . of a motor vehicle as a motor vehicle" to hold an insurer liable to pay benefits. Further, *Turner* relied on *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), which did involve MCL 500.3105(1). We said then, "While the specific no-fault benefits at issue in *Thornton* were PIPs, our analysis in *Thornton* of the causal nexus that must exist between the injury and the motor vehicle equally applies to property protection benefits." *Turner*, 448 Mich at 31. And so too here, our discussion of MCL 500.3121(1) informs our reading of MCL 500.3105(1).

> action and avoided the accident. But, where there is no actual collision between the motorcycle and the motor vehicle, we cannot say that the motor vehicle was involved in the accident merely because of the motorcyclist's subjective, erroneous perceived need to react to the motor vehicle. Rather, for the motor vehicle to be considered involved in the accident, the operation of the motor vehicle must have created an *actual* need for the motorcyclist to take evasive action. That is, there must be some activity by the motor vehicle that contributes to the happening of the accident beyond its mere presence.
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> Because the facts of this case did not support the conclusion that there was an actual, objective need for the motorcyclist to take evasive action, we conclude that the trial court erred by determining that the motorcyclist's injuries arose out of the use of a motor vehicle as a motor vehicle and that the motor vehicle was sufficiently involved in the accident to entitle the motorcyclist to personal protection insurance benefits under the no-fault act. [*DMC*, 302 Mich App at 398-399 (citations omitted).]

The Court of Appeals in this case interpreted *DMC* as creating a per se rule that a motorcyclist who is injured in an interaction with a motor vehicle is only entitled to PIP benefits if, but for the motorcyclist's evasive maneuvers, there would have been a collision. While *DMC* may or may not have reached the correct result on its facts, much of its reasoning departed widely from the language of the statute and should not be followed.

Most troubling is the *DMC* panel's focus on "fault." The panel gave no rationale for fashioning the new rule that "while fault is not a relevant consideration in determining whether a motor vehicle is involved in an accident for purposes of no-fault benefits, we believe that principle is limited to not considering fault in the cause of the accident, not whether the motor vehicle was actually involved in the accident." *Id*. at 398 (citation omitted). The panel provided no reason for this belief, and there is no statutory support for it. Certainly, the gaping gulf between the statutory language and the corollary the Court of Appeals derived from this belief illustrates the error.

Remember, the statutory requirement is that an injury "aris[es] out of the . . . operation . . . of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). But, apparently on the basis of its own belief that it should inject fault into the no-fault act, the *DMC* panel fashioned a requirement for "an actual, objective need for the motorcyclist to take evasive action" that goes beyond a "motorcyclist's subjective, erroneous perceived need to react to the motor vehicle" for an accident to arise out of the operation of a motor vehicle. Not only does this rule have no basis in the statute, it also does not actually tell us very much, unless it is used as a sort of hindsight decision-making evaluator, i.e., saying there is an "actual, objective need" for evasion only if contact would have resulted but for the evasion.

As the *DMC* panel recognized, this rule gestures in the direction of fault. That's a problem because, as discussed, fault should not be an issue in application of the no-fault act. But even if fault is what the *DMC* rule is meant to identify, it does not do a very good job. Generally, the law assigns fault in accidents by discussing duty, breach, causation (cause in fact and proximate cause) and harm. See, e.g., *Ford v Maney's Estate*, 251 Mich 461, 464-467 (1930); *Moning v Alfono*, 400 Mich 425, 437 (1977). This formulation of fault has been around for a very long time, see Owen, *The Five Elements of Negligence*, 35 Hofstra L Rev 1671 (2007) (tracing the emergence of the negligence tort to the mid-nineteenth century), and the *DMC* panel's formulation is inadequate in comparison. Run almost any set of facts through the two rules—the standard negligence test versus the "actual, objective need" for the motorcyclist to act test—and it becomes clear that they reach vastly different results. When we talk about fault, we should stick with the rule that American courts have been developing since the 1800s.

The *DMC* rule is also difficult, if not impossible, to apply. The *DMC* rule checks for fault in a decision to take evasive action on the basis of what *would have* happened if the evasive action had not happened. But there is no way to know for sure what *would have* happened in the alternate reality the rule contemplates. Take the facts of this case for example. The Court of Appeals panel opined that there would not have been a collision if plaintiff had not taken evasive action because the van course-corrected. But how do we know the van's course correction was not in response to the motorcycle's evasive action? We don't. And in practice it will always be a dubious effort at best to dissect the fast-moving and chaotic events of a motor vehicle accident to divine how events would have transpired with different choices over fractions of seconds.[2] The only way to evaluate the merits of any decision is on the basis of the information available to the decision-maker. Using the *DMC* rule is a bit like waiting until *after* a coin toss comes up tails to fault anyone who picked heads *beforehand*.

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[2] While courts and juries sometimes engage in such fact-intensive hypothetical inquiries in assessing causation, fault, and comparative negligence in traditional tort cases, such an inquiry is ill-suited for determining whether, as a matter of law, an accident falls within the scope of the no-fault act. Rather, the central inquiry in this context is the connection between the accident and the motor vehicle, which is best assessed by the reasonableness of a driver's response given the information available to that driver.

The rule from *DMC* is not worth salvaging in my opinion. It has no basis in statute and does not give any reasonable meaning to the statutory phrase at issue: "arising out of the . . . operation . . . of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). However, since this Court has chosen to deny leave, there is a way to mitigate the harm going forward. Rather than asking whether there is an "actual, objective need" to take evasive action *to avoid contact*, as the panel below reasoned, the rule should be understood to ask whether there is an "actual, objective need" *to avoid danger*.

This framing of the *DMC* rule better describes how careful drivers make decisions in the real world. Generally, drivers do not proceed into dangerous situations until the last possible moment, hoping other drivers will save them. And we should not encourage them to do so. Generally, careful drivers take appropriate defensive action when they perceive danger. The Court of Appeals judge who dissented in part would have reached a reasonable result even under *DMC*. He said:

> Apparently, under the majority's logic, had the van moved one inch farther and actually entered his lane, that would have been enough to have considered the van to be involved in the crash. This distinction and the split-second decision that needed to be made when Stuth observed the van on the yellow line, strikes me as ignoring reality. [*Stuth v Home-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued October 6, 2022 (Docket No. 357244) (M. J. KELLY, J., concurring in part and dissenting in part), p 2.]

Any reasonably perceived danger produces an "actual, objective need" for an appropriate response. In this case, the circuit court held a bench trial and concluded that "it makes sense he wouldn't stop to see if it's coming all the way over on the yellow line. That look like it's coming right at him, he's going to get off to the side." Indeed, Mr. Stuth's actions do make sense as a means to avoid perceived danger. The circuit court's decision should not have been disturbed.

WELCH, J., joins the statement of CAVANAGH, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 26, 2024

Clerk

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