STATE OF MICHIGAN

COURT OF APPEALS

LYNDELL FRYMAN,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTO INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 27, 2002

No. 227423
Van Buren Circuit Court
LC No. 96-041904-NO

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant State Farm Mutual Insurance Company appeals as of right from an order denying its motion for summary disposition and granting summary disposition in favor of plaintiff Lyndell Fryman pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts And Procedural History

In 1995, Fryman was driving a motorcycle northbound on Old Swamp Road when she came upon a slow-moving van, which State Farm insured. Kathy Hylka, who owned the van, was driving. Fryman, who apparently did not know why the van was moving slowly, drove at least partially into the lane for oncoming traffic twice in order to peer around the van to determine whether the traffic was clear to pass. Fryman did not pass either time because a car appeared in the oncoming lane of traffic. According to Fryman, she did not see a vehicle in front of the van either time.

On her third attempt at passing, Fryman accelerated to get around the van. When Fryman came alongside the van, she noticed for the first time that there was a farm tractor, which Enrique Herrera was driving, traveling in front of the van. Within seconds of when Fryman first saw the tractor, it suddenly veered to the left in front of her motorcycle. Fryman did not notice any indicator that the tractor intended to turn left, but a passenger on the left side of the tractor was waiving a hat in the air and she assumed he was waiving her around the tractor. When Fryman saw the tractor come over the center line toward her, she had no room to move to the right because the van was there, so she swerved to the left to avoid a collision. Fryman thought that if she turned left, either the tractor driver or passenger would swing around, see her, and stop the tractor.

Fryman estimated that five seconds passed between the time she first saw the tractor and the moment she hit it. Fryman thought that the van, which had prevented her from seeing the

tractor, never left its own lane, did not strike her motorcycle, and was out of her line of vision when the tractor made its left turn in front of her. As a result of the accident, Fryman sustained injuries requiring medical treatment and filed a claim against State Farm for personal injury protection (PIP) benefits.

In a separate action, Fryman also filed third-party claims against Willbrandt Farms, Inc., and Enrique Herrera. The trial court in this case presided over a bench trial on Fryman's third-party claim and found in her favor. When Fryman filed her brief in opposition to summary disposition, she attached portions of the record from this other litigation as documentary evidence to support her argument that the van was involved in the accident.[1] This evidence included deposition testimony from Daniel G. Lee, Ph.D., an "accident reconstructionist hired in the third party action who testified on behalf of Willbrandt Farms, Inc., that the Hylka vehicle was 'involved' in the Plaintiff's accident." Dr. Lee is a defensive driving instructor certified by the National Safety Council for Defensive Driving and a member of the Michigan State University faculty who served as director of the education training research for accident investigation within the College of Engineering. In Dr. Lee's opinion, the "operation of the motorcycle and the positioning of the van" were primarily responsible for the accident. He believed that the van was following the tractor at a distance of one to two car lengths, which was "fairly close and start[ed] to reduce sight distance," which contributed to the accident and may have violated a tailgating statute. Lee asserted that the very reason tailgating statutes exist is to make stopping safer and to increase visibility because, when a second vehicle follows too closely behind a first vehicle, it is difficult for the third vehicle to see the first vehicle with the second vehicle is in the way.

State Farm moved for summary disposition of Fryman's complaint, arguing that the van was not "involved in the accident" between the motorcycle and the farm tractor within the meaning of MCL 500.3114(5), and, therefore, State Farm was not liable to Fryman. State Farm also contended that the van did not "actively contribute to the accident," and its association with the accident was remote. Fryman countered that the van was involved in the accident because it was traveling too closely behind the tractor, which directly affected her ability to pass the van safely. In Fryman's view, had the van kept a safer distance from the tractor, the accident would not have occurred. The trial court denied State Farm's motion, stating that if the facts showed that the van accelerated when Fryman was passing it, it was in violation of a statutory obligation and, therefore, a factual question concerning negligence would exist. In other words, the trial court believed there was evidence suggesting that the van driver was involved in the accident.

State Farm again moved for summary disposition. It noted that the trial court had not yet entered an order denying its first motion for summary disposition, and argued that through discovery it had learned that the motorcycle Fryman owned and was operating at the time of the accident was not covered by no-fault insurance. Therefore, State Farm maintained, MCL 500.3113(b) barred Fryman's claim for PIP benefits. Fryman, in responding to this motion,

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[1] At oral arguments in this case, State Farm challenged the evidence in the record that originally came from the previous litigation. However, it did not identify this issue for our review in the statement of issues presented, nor did it brief the issue. Therefore, we do not consider its arguments on this issue. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

noted that the motorcycle was insured at the time of the accident, attached a copy of the proof of insurance, and requested a hearing to settle the proposed order.

At a second motion hearing, the trial court and parties agreed that, in denying State Farm's motion for summary disposition, the trial court intended to grant Fryman's verbal motion for summary disposition at that hearing. The trial court then entered an order denying State Farm's motion for summary disposition and granting Fryman's motion for summary disposition because, it reasoned, the van was "actively involved in the accident." State Farm then filed a claim of appeal in this Court, which this Court dismissed for lack of jurisdiction because the order entered by the trial court was not a final order.

Back in the trial court, State Farm renewed its motion for summary disposition, arguing that the Supreme Court's peremptory reversal of this Court's unpublished opinion in *Utley v Michigan Municipal Risk Management Authority*[2] clarified the active involvement requirement under MCL 500.3114(5), and the trial court was obligated to reconsider its previous decision. The trial court, however, determined that the facts of the case

> demonstrate that there was an involvement within the meaning of the law because the van in several ways was actively involved. It was involved in traveling down the road at the distance it maintained behind the tractor, which if it was further back would have rendered the tractor more visible to the motorcyclist behind. It was involved in its response when the motorcycle was past as the tractor turned, although it was somewhat abrupt in that the van could have decelerated, moved further to the right, taken some other action. So in that sense I believe that the van was involved within the meaning of the law and still would sustain my original conclusion in this case and would deny the motion for summary disposition in spite of the Supreme Court's reversal of *Utley*.

The trial court then entered an order denying State Farm's motion for summary disposition. Following stipulations by the parties on the amount of Fryman's damages, the trial court entered judgment in the amount of $59.056.62.

II. Standard Of Review

State Farm contends that, contrary to the trial court's determination, the van, which it insured, was not involved in Fryman's accident because it did not actively contribute to the accident as the no-fault act requires. We review de novo a trial court's decision to grant a motion for summary disposition,[3] as well as issues requiring statutory interpretation.[4]

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[2] *Utley v Michigan Municipal Risk Management Authority*, unpublished per curiam opinion of the Court of Appeals, issued April 26, 1996 (Docket No. 173391), rev'd 454 Mich 879; 562 NW2d 199 (1997).

[3] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[4] *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (2000).

III. Legal Standards

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.[5] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.[6] Only if there is no factual dispute, making the moving party entitled to judgment as a matter of law, would summary disposition be appropriate.[7] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[8]

The process of applying a statute intersects with this legal standard for summary disposition at the point where the trial court deciding a motion for summary disposition considers whether the moving party is entitled to judgment as a matter of law. In other words, the trial court must understand what the law is in order to determine which party is entitled to judgment when there is a settled factual record.[9]

IV. "Involved In An Accident"

Under the no-fault act, motorcyclists are entitled to PIP benefits from the insurer of the owner, registrant, or operator of a motor vehicle "involved in the accident" under MCL 500.3114(5), which states:

> 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.

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[5] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[6] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1997).

[7] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

[8] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[9] See, generally, *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 737-744; 613 NW2d 383 (2000) (interpreting statute in order to determine whether trial court erred in granting summary disposition).

(d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

Although the Legislature did not define the term "involved in the accident," it used that term in §§ 3111, 3113, 3115, and 3125 of the no-fault act, and this Court has held that the phrase should be consistently construed throughout the no-fault act.[10] In *Turner v Auto Club Ins Ass'n*,[11] the Michigan Supreme Court held that, for a vehicle to be "involved in the accident," the vehicle "must actively, as opposed to passively, contribute to the accident." "In other words, there must be an 'active link' between the injury and the use of the motor vehicle as a motor vehicle for the vehicle to be deemed 'involved in the accident.'"[12] "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.'"[13] However, "physical contact is not required to establish that the vehicle was 'involved in the accident,' nor is fault a relevant consideration in the determination whether a vehicle is 'involved in an accident.'"[14] Even a parked vehicle can be "involved in the accident" if one of the statutory exceptions to the parked-vehicle statute, MCL 500.3106, applies.[15]

In *Michigan Mut Ins Co v Farm Bureau Ins Group*,[16] a twelve-year-old student got off a school bus that had come to a complete stop with its warning flashers activated.[17] While the bus was in that position, an oncoming vehicle entered the road and struck the student.[18] This Court determined that, in order for the school bus to have been "involved in the accident," "there must have been some activity of the school bus as a motor vehicle which actively contributed to the happening of the motor vehicle accident."[19] Because the bus did not actively contribute to the student's injuries, the Court concluded that the bus was not involved in the accident.[20]

In *Turner, supra*, a police officer was investigating a stolen car that the thief was driving when the officer approached a red light.[21] The officer slowed his vehicle, hoping to dissuade the thief from entering the intersection against the red light.[22] However, the driver ignored the

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[10] See *Wright v League General Ins Co*, 167 Mich App 238, 245; 421 NW2d 647 (1988).

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

[12] *Witt v American Family Mut Ins Co*, 219 Mich App 602, 606-607; 557 NW2d 163 (1996).

[13] *Turner*, *supra* at 39.

[14] *Id.*

[15] See *Mack v Travelers Ins Co*, 192 Mich App 691, 694; 481 NW2d 825 (1992).

[16] *Michigan Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626; 455 NW2d 352 (1990).

[17] *Id*. at 628.

[18] *Id.* at 628-629.

[19] *Id.* at 637.

[20] *Id.* at 629-630.

[21] *Turner*, *supra* at 25.

[22] *Id*. at 25.

signal, drove through the intersection, crashed into a pickup truck and then another truck.[23] The impact broke the second truck into two parts.[24] The rear portion of the second truck smashed into a nearby building and the truck's gas tank exploded, causing the building to catch on fire, which in turn destroyed the building and its contents.[25] Luckily, the police car did not collide with any other vehicle.[26] Nonetheless, the Supreme Court determined that both the stolen vehicle and the police vehicle were "involved in the accident" under MCL 500.3125.[27] As the Supreme Court described it,"[T]he use of the police vehicle as a motor vehicle had an active link with the damage, making it 'involved in the accident[.]'"[28]

In *Utley*, the plaintiff was a motorcyclist driving behind a pickup truck the City of Sterling Heights owned.[29] The pickup truck was forced to come to a stop as it approached an intersection.[30] The plaintiff looked down at his speedometer, noticed the stopped truck when he looked up again, and applied his brakes.[31] He lost control of the motorcycle, which fell on its side and slid toward the truck.[32] This Court determined that there was a sufficient causal connection between the plaintiff's injuries and the pickup truck, which had stopped "in the normal course of driving," to find that the truck was "involved in the accident."[33] In a peremptory order, the Michigan Supreme Court reversed this Court's decision, stating that, "[o]n the facts in this case, the truck owned by the City of Sterling Heights was not 'involved' in the accident" within the meaning of MCL 500.3114(5).[34]

The facts of this case differ from the facts in *Michigan Mutual* and *Utley* in one important respect: the van in this case prevented Fryman from completing her traffic maneuver in a safe manner by blocking her view of the tractor. As Dr. Lee testified, the van obstructed Fryman's view of the road by following the tractor too closely. In contrast, in *Utley*, only the driver's failure to pay attention to the truck, which was stopping in what we assume from the opinion's language was a proper manner, caused the accident. Similarly, the school bus at issue in *Michigan Mutual* was stopped and displaying the proper warnings to approaching vehicles that should have alerted the driver that struck the student that it should stop. Only the car driver's inattentiveness to or disregard for the school bus caused the accident. This case is much more like *Turner*. Though the police officer in *Turner* was not driving unsafely, even the officer's

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[23] *Id*. at 25-26.

[24] *Id*. at 26.

[25] *Id*.

[26] *Id.* at 25-26.

[27] *Id.* at 42, 45.

[28] *Id*. at 43.

[29] *Utley*, *supra*, slip op at 1.

[30] *Id*. at 1-2.

[31] *Id*. at 2.

[32] *Id*.

[33] *Id*.

[34] *Utley*, *supra*, 454 Mich at 879.

actions suggest that he knew that the very fact he was pursuing the thief would prompt the thief to flee through the intersection, which was extremely dangerous. Though we have no reason to believe that the police officer was driving unsafely, he purposefully undertook steps to minimize the risk the fleeing thief posed to other drivers by slowing as he approached the intersection. This effort, however, failed when the catastrophic accident happened while the thief was fleeing the officer. Clearly, the thief could have chosen to wait for the light just as Fryman could have chosen not to pass the van at the time she actually did so. However, in both instances, the insured vehicle was involved in the accident because it affected the other driver's conduct; the officer's presence made the thief flee and the van's position on the road misled Fryman into thinking it was safe to pass.

Under the circumstances of this case, and considering *Turner*, the trial court correctly interpreted and applied the statute when it concluded that the van was "involved in the accident." Accordingly, the trial court did not err in denying defendant's motion for summary disposition and entering judgment in Fryman's favor.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot