STATE OF MICHIGAN

COURT OF APPEALS

BUDGET RENT-A-CAR SYSTEM, INC.,

Plaintiff-Appellee,

V

CITY OF DETROIT, and DETROIT POLICE DEPARTMENT,

Defendants-Appellants.

UNPUBLISHED
February 1, 2007

No. 271703
Wayne Circuit Court
LC No. 05-501303-NI

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendants, City of Detroit and Detroit Police Department, appeal as of right the trial court's orders granting summary disposition and entry of judgment in favor of plaintiff, Budget Rent-A-Car System, Inc., in this action seeking reimbursement of personal injury protection (PIP) benefits paid to the injured party, Mark Hurt, under Michigan's no-fault automobile insurance act. MCL 500.3101 *et seq*. Because the trial court properly found that Hurt was not an occupant of a motor vehicle when he was injured, and properly found that the rented vehicle was parked at the time of the collision, we affirm.

Hurt rented a 2004 Monte Carlo automobile from plaintiff on approximately December 27, 2003. Hurt was operating the vehicle on January 16, 2004 when the Detroit Police observed Hurt allegedly engaged in a suspected narcotics transaction. Detroit Police Officer Arthur Wimmer responded to a radio call regarding the transaction. Wimmer, who was driving an unmarked police vehicle, stopped the vehicle as part of a traffic stop. As Wimmer approached the rented vehicle on foot, Hurt sped away at a high rate of speed. Wimmer followed Hurt's vehicle at an accelerated pace until Hurt lost control of the rented vehicle and it eventually came to a stop off the traveled portion of the road. Wimmer's police report and deposition state that he remained in his police vehicle while he approached Hurt in an attempt to contain Hurt until additional police assistance arrived. The police report also states that Hurt exited the driver's door of the rented vehicle with a handgun in his hand and pointed it directly at Wimmer from a semi-crouched position between the open door and the interior of the automobile. Wimmer ducked down, accelerated, and crashed into the driver's side door of the rented vehicle, resulting in damage to the vehicle and injury to Hurt. Hurt then ran away into an alley where police took him into custody. Hurt suffered laceration of his left leg and received treatment at Detroit Receiving Hospital.

Plaintiff paid PIP benefits to Hurt but subsequently filed a complaint seeking indemnification from defendants after receiving the police report which indicated that Hurt was not an occupant of a motor vehicle at the time of the collision. The trial court concluded that defendants had first priority for payment of PIP benefits to Hurt pursuant to MCL 500.3115(1)(a) and were liable for damage to the rental car under MCL 500.3123(1)(a) and granted summary disposition in favor of plaintiff. Defendants filed a motion for reconsideration attempting to introduce deposition testimony given by Hurt in a separate lawsuit against the City of Detroit. Plaintiff was never apprised of the separate lawsuit and was neither a participant, nor had notice of the deposition taken of Hurt after the trial court had already granted the motion for summary disposition. Defendants sought no relief from their prior admission of facts establishing that Hurt was a non-occupant of a motor vehicle at the time of the collison.[1] Holding that defendant was trying to "assert facts that could have been pleaded before the Court issued its ruling on the Motion for Summary Disposition[,]" the trial court denied defendants' motion for reconsideration. This appeal followed.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim, and is properly granted if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Under Michigan's no-fault act, every "owner or registrant of a motor vehicle required to be registered in this state" must have personal protection insurance. MCL 500.3101(1). An insurer who elects to provide automobile insurance is liable to pay PIP benefits subject to the provisions of the no-fault act. MCL 500.3105(1). Under MCL 500.3114 and MCL 500.3115 an insurer may become liable for the payment of PIP benefits to someone other than an insured. In addition to providing persons with the right to file PIP claims against insurers, these sections also set out priorities that govern claims by a person injured in an automobile accident where the person may be entitled to make PIP claims against multiple insurers. See *Belcher v Aetna Casualty & Surety Co*, 409 Mich 231, 251; 293 NW2d 594 (1980).

MCL 500.3115(1) addresses claims for PIP benefits by persons who were injured while not occupying a motor vehicle. MCL 500.3115(1) states that, except as provided in MCL 500.3114(1),

> a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim [PIP] benefits from insurers in the following order of priority:
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> (a) Insurers of owners or registrants of motor vehicles involved in the accident.
>
> (b) Insurers of operators of motor vehicles involved in the accident.

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[1] See MCR 2.312(D)(1).

MCL 500.3114(1) provides that, except under situations not relevant here, "a personal protection insurance policy described in [MCL 500.3101(1)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident."

Courts have interpreted the reference to MCL 500.3114(1) in MCL 500.3115(1) as requiring an insured to seek compensation from his or her own no-fault insurer before seeking compensation from the insurers of the owners or operators of the vehicles involved in the accident. See *Underhill v Safeco Ins Co*, 407 Mich 175, 191-192; 284 NW2d 463 (1979); *Esquivel v American Fidelity Fire Ins Co*, 90 Mich App 56, 59-60; 282 NW2d 240 (1979). Hence, Hurt must first, where applicable, seek benefits from his own insurer or the insurer of his spouse or a relative of either domiciled in the same household. But, Hurt provided evidence in the trial court that neither Hurt, nor a relative with whom he resided had no-fault insurance at the time Hurt was injured.

Defendants first argue that Hurt did not suffer "accidental bodily injury" arising out of the use of a motor vehicle as a motor vehicle such as to entitle him to PIP benefits as described in MCL 500.3105(1) and (4). Defendants argue that Hurt's actions "exhibited a degree of recklessness such that his injuries cannot be deemed accidental, but must be deemed intentional." But defendants' claims that Hurt intended his injuries are belied by the facts contained in the record. MCL 500.3105(4) states that

> Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself.

The facts show that Hurt completely exited the vehicle and crouched down behind the door of the rental car while he had his weapon drawn to protect himself from possible injury while he aimed at Wimmer. The record also shows that Wimmer acted in self-defense when he attempted to contain Hurt between the police vehicle and the rented vehicle. Stated otherwise, defendants have not shown that Hurt's injuries were "suffered intentionally" by Hurt, or "caused intentionally" by Hurt. MCL 500.3105(4). Therefore, defendants have not supported a claim that Hurt intended to injure himself so as to disqualify him from claiming accidental bodily injury outside of MCL 500.3105(1) and (4).

Defendants next argue that Hurt's injury did not arise out of the use of a motor vehicle as a motor vehicle. In particular, defendants argue that the injury occurred as a result of Hurt's decision to aim a firearm at a police officer and are not related to the transportation function of a vehicle. The dispositive issue is whether Hurt's injury arose out of the use of a vehicle "as a motor vehicle." This question is controlled by *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998). Under *McKenzie*, "the Legislature intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." *Id*. at 220. The facts of this case show that the unmarked police vehicle was driven by Wimmer, accelerated into, and collided with the rented vehicle. It is undisputed that Hurt's injuries arose out of Wimmer's use of the police vehicle as a

motor vehicle when he drove into plaintiff's vehicle and into Hurt. We are not persuaded that Hurt's injuries did not arise out of the use of a motor vehicle as a motor vehicle.

Defendants also argue that the trial court erred when it granted summary disposition in favor of plaintiff because Hurt was an "occupant" of the rented vehicle and therefore the priority provisions found in MCL 500.3114(4) should apply to determine responsibility for PIP benefits. In contrast, plaintiff argues, and the trial court held, that Hurt was not an "occupant" of the rented vehicle at the time of the injury and thus the priority provisions found in MCL 500.3115(1) apply to determine responsibility for PIP benefits. Our review of the record reveals that during the discovery phase of this litigation defendants specifically admitted that Wimmer's account of the incident was accurate. Wimmer's account of the incident specifically states that Hurt had exited the rented vehicle and was crouched outside of the vehicle between the open door and the interior of the vehicle. Defendants clearly admitted that Hurt was not an "occupant" of the rented vehicle at the time of the collision and injury and accordingly, MCL 500.3115(1) applies to determine responsibility for PIP benefits. Defendants have shown no error.

Defendants next argue that the trial court erred when it granted summary disposition in favor of plaintiff because the rented vehicle was parked in a manner to cause unreasonable risk of injury, and Hurt was occupying, entering into, or alighting from the vehicle. Thus, the issue is whether the rented vehicle was, for purposes of MCL 500.3106(1)(a), "parked in such a way as to cause unreasonable risk of the bodily injury which occurred." The record is unequivocal that the rented vehicle sped off the roadway and came to rest in the yard of a residence. Considering the facts, we agree with the trial court's assessment that the rented vehicle "was parked in a manner that made it unlikely that a moving vehicle would crash into it." And that "Hurt's subsequent actions, exiting the vehicle and brandishing a weapon at . . . Wimmer, were unrelated to the manner in which the vehicle was parked." Defendants have not established error.

Next, defendants argue that even if Hurt was not an "occupant" of the rented vehicle, the rented vehicle was involved in the accident. MCL 500.3115(1) states that, except as provided in MCL 500.3114(1), a person who suffers bodily injury while not an occupant of a motor vehicle shall claim PIP benefits from, first, the insurers of owners or registrants of vehicles involved in the accident. Defendants argue that there should be no question that the rented vehicle was involved in the accident within the meaning of MCL 500.3115(1) as the lead car in a police chase and then used as a "shield and/or stabilizer." But defendants have provided no support for their argument. A party may not simply announce a position and leave it to this Court to find support for it. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). In any event, after reviewing the record, we have determined that Hurt was not operating the rental car in any manner related to its automotive function as a vehicle while he used it as a shield when he was injured. The fact that Hurt happened to be crouched behind the door of the rental car was, as the trial court concluded, "merely incidental." *McKenzie, supra*. Again, defendants have shown no error.

Finally, defendants argue that the trial court erred when it determined that plaintiff was entitled to receive property protection benefits for collision damage to the rented vehicle. Under the no-fault act, a person suffering accidental property damage in an accident involving a motor vehicle is entitled to seek property protection benefits from the no-fault insurer of the owner of the motor vehicle. MCR 500.3121(1) states in pertinent part:

> Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125, and 3127.

And MCL 500.3123(1)(a) states in pertinent part:

> Damage to the following kinds of property is excluded from property protection insurance benefits:
>
> (a) Vehicles and their contents, including trailers, operated or designed for operation upon a public highway by power other than muscular power, unless the vehicle is parked in a manner as not to cause unreasonable risk of the damage which occurred.

Because we have already concluded that the rented vehicle was parked in a manner "as not to cause unreasonable risk of the damage which occurred," the trial court properly determined that defendants are liable to plaintiff for property protection insurance benefits. MCL 500.3123(1)(a).

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra