STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE COMPANY, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED February 17, 2011
v	No. 294553 Lenawee Circuit Court
WILLIAM LOWELL ELSTON, Defendant/Counter-Plaintiff-Appellant.	LC No. 08-003177-NF

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action to determine defendant's entitlement to no-fault benefits. We reverse and remand.

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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*, 469 Mich at 183.

"Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle[.]" MCL 500.3105(1). A motor vehicle is "a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels," but "does not include a motorcycle . . . ." MCL 500.3101(e). A motorcyclist involved in a single-vehicle accident is not entitled to no-fault benefits, *Hill v Aetna Life & Cas Co*, 79 Mich App 725, 729; 263 NW2d 27 (1977), but "a motorcyclist who suffers

bodily injury as the result of an accident involving a motor vehicle is entitled to no-fault benefits." *Ricciuti v Detroit Auto Inter-Ins Exch,* 101 Mich App 683, 685; 300 NW2d 681 (1980).

"[W]hether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles." *McKenzie v Auto Club Ins Ass'n,* 458 Mich 214, 220, 225-226; 580 NW2d 424 (1998). As this Court explained in *Keller v Citizens Ins Co of America,* 199 Mich App 714; 502 NW2d 329 (1993):

> In order for an injury to arise out of the use of an automobile, there must be more than an incidental or fortuitous connection between the injury and the use of the automobile. Moreover, it is insufficient to show that, but for the automobile, the injury would not have occurred. Thus, " '[t]he automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury. ' " [*Id*. at 715-716 (citations omitted).]

The parties here do not dispute that a genuine issue of fact exists with respect to whether another motor vehicle was present on the road at the time of defendant's accident. The only issue is whether the evidence would support a finding that defendant's injuries arose out of the use of that motor vehicle as a motor vehicle. According to *Bromley v Citizens Ins Co,* 113 Mich App 131, 133-135; 317 NW2d 318 (1982), there is a sufficient connection to support a finding that a motorcyclist's injuries arose out of the use of a motor vehicle as a motor vehicle when the motor vehicle forces the motorcyclist off the road. We concur. Such a situation involves much more than a "but for" involvement of the motor vehicle. In forcing a motorcyclist off the road, the motor vehicle forces the motorcyclist to take evasive action to avoid a collision, thereby causing the motorcyclist to lose control and crash. In such a case, the use of a motor vehicle as a motor vehicle is a proximate cause of the injuries.

Here, defendant's testimony creates a question of fact as to whether he lost control as a result of taking evasive action to avoid an oncoming car. He specifically testified that it appeared to him that the approaching car was taking the turn "very widely," and that, while he could not pinpoint exactly how much of the car was in his lane, that the car was "way over his half" of the road. He further testified that, due to the car's position, defendant was "pinched" over toward the curb on his side of the road, and that his right foot peg hit the curb "almost the same instant" that the car passed him.

Moreover, Jacob Cranford's affidavit also supports such a finding. According to Cranford, defendant stated at the scene "that he had crashed while attempting to avoid a collision with a motor vehicle that had" veered into his lane. Evidence that the motor vehicle provoked defendant's evasive maneuver indicates that the vehicle's causal connection was not merely incidental or fortuitous. While Cranford's testimony relies on hearsay, defendant's hearsay statement would arguably be admissible under MRE 803(1) (present sense impression) or MRE 803(2) (excited utterance). Although other evidence suggested that defendant was not able to clearly speak just after the crash, that is also a question of fact for the jury to determine. Because there was evidence sufficient to create a genuine issue of fact, the trial court erred in granting plaintiff's motion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro