STATE OF MICHIGAN

COURT OF APPEALS

RUBEN ASCENCIO,

Plaintiff-Appellant,

v

DANIEL GERARD SNIDER, WILLIAM DOUGLAS SNIDER, and KELLIE SNIDER

Defendants-Appellees,

and

21ST CENTURY PREMIER INSURANCE COMPANY,

Defendant.[1]

UNPUBLISHED
September 23, 2014

No. 316643
Wayne Circuit Court
LC No. 11-006106-NI

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of the Snider defendants in this third-party no-fault insurance action. We affirm.

On November 16, 2010, plaintiff was riding his bicycle when he was struck by a vehicle owned by William and Kellie Snider, but being driven by their son, Daniel Snider. Plaintiff filed this third-party no-fault insurance action seeking to recover damages for his physical injuries pursuant to MCL 500.3135(1).

Eventually, the Snider defendants filed a motion for summary disposition under MCR 2.116(C)(10), arguing that Daniel was not negligent because, contrary to plaintiff's claim, he did not violate MCL 257.652. And, in the alternative, MCL 500.3135(2)(b) precluded plaintiff from recovering damages because he was more than 50 percent at fault for the accident. The Snider

[1] Plaintiff brought a first-party no-fault insurance claim against this defendant, but the claim was eventually dismissed by stipulation and order and is not at issue in this appeal.

defendants explained that Daniel was in the process of exiting a bank parking lot and, when he approached a sidewalk, he stopped. He then drove across the sidewalk, stopped on the apron of the exit, and waited for oncoming traffic to clear on the one-way, northbound road. Plaintiff, who had been riding his bicycle southbound on the sidewalk, testified that he saw Daniel's vehicle stopped on the apron of the parking lot exit from about 60 feet away. However, at about the same time that the oncoming northbound traffic cleared, plaintiff attempted to drive his bicycle around the front of Daniel's vehicle by entering the apron area from the passenger side (or south side) of the vehicle. Thus, when Daniel attempted to pull out onto the road, he collided with plaintiff. The Snider defendants argued that Daniel was not negligent and did not violate MCL 257.652 by failing to yield the right-of-way. Further, plaintiff was more than 50 percent at fault for the accident. The police officer who responded to the scene testified that it is not reasonable for a bicyclist to travel in front of a vehicle that is waiting to pull out onto the road when oncoming traffic clears. Further, the Snider defendants argued, plaintiff approached the parking lot exit area from a sidewalk located behind the vehicle, and from the passenger side of Daniel's vehicle, while Daniel was watching the one-way traffic coming from his left, waiting for it to clear. Thus, the Snider defendants argued, they were entitled to summary dismissal of this action.

Plaintiff responded to the Snider defendants' motion, arguing that Daniel violated MCL 257.652 because he failed to yield the right-of-way to plaintiff who was riding his bicycle and "had the right of way" when he "attempted to properly navigate the apron area." Consequently, plaintiff argued, the Snider defendants were not entitled to summary dismissal of this action.

Following oral arguments, the trial court entered an order granting the Snider defendants' motion for summary disposition, holding that there were no genuine issues of material fact in this case. Thereafter, plaintiff filed a motion for reconsideration, which was denied. This appeal followed.

Plaintiff argues that the trial court erred in granting the Snider defendants' motion for summary disposition because Daniel violated MCL 257.652 and a genuine issue of material fact existed on the issue whether plaintiff was more than 50 percent at fault for the accident. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and should be granted if the proffered evidences fails to establish a genuine issue regarding any material fact. *Id*. at 120. Documentary evidence submitted by the parties must be considered in a light most favorable to the nonmoving party. *Id*.

MCL 257.652 provides:

> (1) The driver of a vehicle about to enter or cross a highway from an alley, private road, or driveway shall come to a full stop before entering the highway and shall yield the right of way to vehicles approaching on the highway.
>
> (2) A person who violates this section is responsible for a civil infraction.

The record evidence established that Daniel came to a full stop and waited for the oncoming, one-way, northbound traffic to clear before attempting to pull out onto the road. Plaintiff testified that, when he was 60 feet away, he saw Daniel's vehicle stopped and waiting for traffic to clear. Plaintiff also testified that he did not drive his bicycle onto the roadway; rather, he drove his bicycle in a southbound direction across the apron of the parking lot exit and directly in front of Daniel's vehicle. Thus, Daniel yielded "the right of way to vehicles approaching on the highway" and only attempted to pull out onto the road when the traffic cleared.

However, even if Daniel violated MCL 257.652, a violation of a penal statute "creates only a prima facie case from which the jury may draw an inference of negligence." *Zeni v Anderson*, 397 Mich 117, 128-129; 243 NW2d 270 (1976). That is:

> [T]he proper role of a penal statute in a civil action for damages is that violation of the statute which has been found to apply to a particular set of facts establishes only a prima facie case of negligence, a presumption which may be rebutted by a showing on the part of the party violating the statute of an adequate excuse under the facts and circumstances of the case. [*Id*. at 129-130 (footnotes omitted).]

The person asserting an excuse has the burden of introducing exculpatory proof that "'would clearly explain or excuse his violation of the statute.'" *Id*. at 131-132 n 11 (citation omitted).

In this case, even if Daniel violated the statute by failing to yield the right-of-way to plaintiff, he had an adequate excuse under the facts and circumstances of this case. In brief, plaintiff darted unexpectedly in front of Daniel's vehicle. Daniel was situated in a parking lot exit, waiting for the one-way traffic coming from his left to clear so that he could proceed. Plaintiff saw from 60 feet away that Daniel was waiting for the one-way traffic to clear. Nevertheless, plaintiff entered the parking lot exit area from the right side and rode directly in front of the vehicle. Daniel would not be expected to anticipate that plaintiff was present, that plaintiff would enter the exit area of the parking lot from the right side, or that plaintiff would ride his bicycle directly in front of his vehicle. Thus, any presumption of negligence by Daniel is sufficiently rebutted. When a sufficient excuse exists, the appropriate standard of care then becomes that established by the common law, i.e., due care so as not to unreasonably endanger the person or property of others. *Id*. at 143. And, under the circumstances here, no reasonable juror could conclude that Daniel failed to exercise due care so as not to unreasonably endanger plaintiff. Accordingly, the trial court properly concluded that plaintiff failed to establish that a genuine issue of material fact existed on the issue whether Daniel was negligent.

Summary dismissal was also proper because plaintiff was precluded from recovering damages by MCL 500.3135(2)(b), which provides: "Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault." Although comparative fault is generally a question for the fact-finder, when reasonable minds could not differ regarding whether one party was substantially more at fault than the other party summary disposition is appropriate. *Huggins v Scripter*, 469 Mich 898, 898-899; 669 NW2d 813 (2003); *Laier v Kitchen*, 266 Mich App 482, 496; 702 NW2d 199 (2005).

And, in this case, reasonable minds could not differ; plaintiff was substantially more at fault than Daniel for the reasons set forth above.

Affirmed.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot