STATE OF MICHIGAN

COURT OF APPEALS

WEELA LOWELL, Plaintiff-Appellant,	UNPUBLISHED January 15, 2015
v	No. 318709 Macomb Circuit Court
PROGRESSIVE MICHIGAN INSURANCE COMPANY, Defendant-Appellee.	LC No. 2012-005348-NF

Before: FORT HOOD, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Plaintiff, Weela Lowell, appeals as of right the circuit court's order granting the motion of defendant, Progressive Michigan Insurance Company (Progressive), for summary disposition under MCR 2.116(C)(10) and dismissing Lowell's claims for first-party benefits under Michigan's no-fault insurance act, MCL 500.3101 *et seq*. Lowell was injured while attempting to stop home invaders from driving away in a vehicle. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

At about 4:00 a.m. on January 19, 2012, Lowell heard the sound of an alarm in his garage. When Lowell investigated, he saw two masked men run away. Lowell pursued the men, and they entered a vehicle that was parked in front of his house. At his deposition, Lowell testified about the altercation that then took place:

> [A]s they got in their vehicle, I punched their windshield, which I broke my hand at the same time and fractured my wrist, and I was holding onto the driver's side mirror as they took off and pulled me down to the ground. . . .

Lowell clarified that, when he was punching the vehicle with his right hand, he held onto the driver's side mirror with his left hand. The vehicle was initially stationary, but it moved forward as he was holding onto the mirror. Lowell testified that the moving vehicle pulled him off his feet and caused him to fall:

> *Q*. Did you fall because the vehicle was in motion, or did you fall because that mirror unit broke off?

> *A*. I fell because they took—they drove off with me holding on to the mirror.
>
> *Q*. Did it pull you forward?
>
> *A*. Pulled me forward, caused me to more or less tumble into the street.

Lowell testified that the fall injured his left hand and ribs.

Lowell filed this action for first-party no-fault benefits. Progressive moved for summary disposition under MCR 2.116(C)(10). Progressive argued that Lowell's injuries did not arise out of the operation or use of a motor vehicle as a motor vehicle under MCL 500.3105(1).

The trial court granted Progressive's motion. The trial court reasoned that the injury to Lowell's right hand arose from him punching the vehicle while it was stationary, not while it was in use. Regarding Lowell's other injuries, the trial court reasoned that they were merely incidental to the vehicle's use:

> The Court is convinced that [Lowell]'s injuries did not arise from the "use of a motor vehicle as a motor vehicle," but was merely incidental to such use. [Lowell] acknowledged that the vehicle itself had not hit him. His act of holding onto the mirror constituted part of his attack on the vehicle, which had nothing to do with its normal transportational function.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden*, 461 Mich at 120. A genuine issue of material fact exists if, viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. OPERATION OF A MOTOR VEHICLE

MCL 500.3105(1) requires an insurer to pay benefits to an insured "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle[.]" The insurer is only liable for benefits that are caused by the operation or use of the vehicle. *Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012). Thus, the insurer is only liable if the injury has a casual connection to the use of a motor vehicle that is "more than incidental, fortuitous, or 'but for.' " *McPherson v McPherson*, 493 Mich 294, 297; 831 NW2d 219 (2013) (quotation marks and citation omitted).

An injury arises out of the use of a motor vehicle as a motor vehicle when "the injury is closely related to the transportational function of automobiles." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 215; 580 NW2d 424 (1998). It is not enough for the vehicle to be merely

present at the scene of the injury. *Bourne v Farmers Ins Exch*, 449 Mich 193, 200; 534 NW2d 491 (1995). Rather, courts must focus on "the relation between the injury and the use of a motor vehicle as a motor vehicle[.]" *Id*. at 201 (quotation marks and citation omitted).

Progressive contends that Lowell's injuries were merely incidental to the operation of the vehicle in this case. Regarding the injuries to Lowell's right hand, we agree, but regarding the injuries to Lowell's left hand and ribs, we disagree.

We conclude that the trial court correctly determined that the injury to Lowell's hand when he punched the stationary vehicle did not arise out of the operation or use of a motor vehicle. Lowell's intent to stop the vehicle is irrelevant to whether it was being operated or used as a motor vehicle. See *Id*. In this case, it is undisputed that the vehicle was stationary when Lowell struck it. The fact that Lowell punched a vehicle—as opposed to one of the assailants or anything else the assailants might have taken shelter behind—does not mean that his injury arose out of the *operation or use* of that vehicle. The vehicle was not being operated or used. We conclude that the trial court properly granted summary disposition on this portion of Lowell's claims.

However, we conclude that the trial court erred when it determined that the injuries to Lowell's left hand and ribs did not arise out of the operation and use of the motor vehicle.

"[M]oving motor vehicles are quite obviously engaged in a transportational function." *McKenzie*, 458 Mich at 221. In *Univ Rehab Alliance, Inc*, the plaintiff fell or was pushed out of a moving motor vehicle. *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 693; 760 NW2d 574 (2008). This Court emphasized that, regardless of the reason the plaintiff fell from the vehicle, her injures "directly resulted from her falling out of the motor vehicle while it was in motion and being used for transportation." *Id*. at 696. Accordingly, the insurer had no reasonable basis for denying the plaintiff's request for no-fault benefits because the motion of the vehicle was "the direct, active cause" of her injuries. *Id*. at 697.

In this case, the trial court focused on Lowell's reason for holding onto the mirror. But the reason that Lowell was holding onto the mirror is irrelevant. The question is whether there was a relationship between Lowell's injury and the use of the vehicle. See *Bourne*, 449 Mich at 201. According to Lowell, he was holding onto the vehicle's mirror as it started to drive away, and the vehicle's motion pulled him forward, snapped off the mirror, and caused him to fall. As in *Univ Rehab Alliance, Inc*, Lowell's injuries were directly related to the facts that the vehicle was in motion and was being used for transportation. Therefore, viewing Lowell's testimony in the light most favorable to Lowell, a reasonable juror could conclude that the operation of the vehicle caused him to fall and sustain injuries to his left hand and ribs. We conclude that the trial court erred when it granted summary disposition on this portion of Lowell's claims.

IV. CONCLUSION

No reasonable minds could conclude that Lowell's act of punching a stationary vehicle arose out of the operation or use of that vehicle, and the trial court properly granted summary disposition under MCR 2.116(C)(10) on that portion of Lowell's claims. However, because

reasonable minds could conclude that the vehicle pulled Lowell over while it drove away, and thus that its operation as a motor vehicle caused him to sustain injuries to his left hand and ribs, the trial court erred when it granted summary disposition on those portions of Lowell's claims.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction. No costs, because neither party has prevailed in full. MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell