STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED May 19, 2015
v	No. 321539 Kent Circuit Court
FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, Defendant-Appellant.	LC No. 11-005986-NF

Before: BECKERING, P.J., and MARKEY and SHAPIRO, JJ.

PER CURIAM.

In this no-fault action, defendant Farm Bureau General Insurance Company of Michigan appeals by right from a declaratory judgment entered after a jury verdict in favor of plaintiff State Farm Mutual Automobile Insurance Company. Because the trial court did not err in instructing the jury or in denying defendant's motion for judgment notwithstanding the verdict (JNOV), we affirm.

I. FACTS AND PROCEEDINGS

This case arises from an automobile accident that occurred on April 1, 2010 and caused physical injury to Elbert Petree. The accident occurred in the parking lot of Petree's doctor's office, where he had been driven by Anthony Bolton, who owned the subject vehicle. Once the vehicle was parked, it was struck from behind by a vehicle driven by Margo App. It is undisputed that Petree himself, and Bolton's vehicle, were not covered by a Michigan no-fault policy at the time. And, as Petree did not reside with an insured relative, his no-fault claim was assigned to plaintiff through the Assigned Claims Facility. See MCL 500.3172. Plaintiff paid Petree's first-party personal injury protection (PIP) benefits, but brought suit against defendant, App's no-fault insurer, arguing that it was responsible for Petree's benefits under MCL 500.3115. The issue was not whether Petree was entitled to PIP benefits—rather, the question was whether plaintiff or defendant was responsible for payment of those benefits. Plaintiff argued that because Petree had completed the process of alighting from Bolton's vehicle at the time of the accident, he was not an "occupant" of Bolton's vehicle and, therefore, defendant, as App's no-fault insurer, was responsible for payment of Petree's benefits. It is undisputed that the question turns on whether Petree had completed the process of "alighting" from Bolton's vehicle

at the time of the accident. It is also undisputed that if he had, defendant was responsible for his benefits. If he had not, plaintiff was responsible.

Bolton's car was parked at the time it was struck by App's vehicle. Under MCL 500.3106(1), PIP benefits are generally not recoverable for accidental bodily injury arising "out of the ownership, operation, maintenance, or use of a parked vehicle" unless one of three exceptions applies. At issue in this case is MCL 500.3106(1)(c), which provides an exception where "the injury was sustained by a person while . . . alighting from the vehicle."

On May 31, 2012, plaintiff moved for summary disposition under MCR 2.116(C)(10). The trial court denied the motion in a written opinion, ruling "that there is a genuine issue of material fact as to whether Mr. Petree was still alighting from Mr. Bolton's car when he was hit." A jury trial was scheduled on this sole issue.

The jury returned a verdict in the affirmative, i.e., in favor of plaintiff, on the question before it: whether Petree had completed the alighting process at the time of the collision. The trial court entered a declaratory judgment in favor of plaintiff in the amount of $32,818.46, representing Petree's PIP benefits, administrative costs, and prejudgment interest. Following the entry of judgment, defendant moved for JNOV. The trial court denied the motion and this appeal followed.[1]

II. JNOV

Defendant argues that the trial court erred in denying its motion for JNOV, asserting that a reasonable jury could not have concluded that Petree had completed the process of alighting.

> We review de novo a court's decision on a motion for JNOV. When reviewing a motion for JNOV, a court must review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted. [*Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 545-546; 854 NW2d 152 (2014) (quotation marks and citations omitted).]

In *Frazier v Allstate Ins Co*, 490 Mich 381; 808 NW2d 450 (2011), our Supreme Court defined "alighting" as used in MCL 500.3106(1)(c):

> With respect to MCL 500.3106(1)(c), "alight" means "to dismount from a horse, descend from a vehicle, etc." or "to settle or stay after descending; come to rest." *Random House Webster's College Dictionary* (1997). See also *New Shorter Oxford English Dictionary* (defining "alight" as "to descend and settle; come to earth from the air"). Moreover, that the injury must be sustained "while" alighting indicates that "alighting" does not occur in a single movement but occurs as the result of a process. The process begins when a person initiates the

[1] There were other post-verdict proceedings that are not at issue is this appeal.

> descent from a vehicle and is completed when an individual has effectively "descend[ed] from a vehicle" and has "come to rest"—when one has successfully transferred full control of one's movement from reliance upon the vehicle to one's body. This is typically accomplished when "both feet are planted firmly on the ground." *Krueger v Lumberman's Mut Cas & Home Ins Co*, 112 Mich App 511, 515; 316 NW2d 474 (1982). [*Frazier*, 490 Mich at 385-386 (footnotes omitted).]

Thus, we must determine whether, when viewed in the light most favorable to plaintiff, the evidence supported the jury's conclusion that Petree had completed the process of alighting under *Frazier*.

The only evidence before the jury was the testimony of three eyewitnesses to the accident: Petree, whose deposition was read to the jury, Bolton, and James Dickensheets, an uninterested third party.

Petree described the accident as follows:

> *Q*. What happened?
>
> *A*. Anthony Bolton got out of the car and he come around on the passenger side and opened up the door to the front of the car, and when he opened up the door, he got the walker out, brought the walker back to me. *I stood up from the car, and as I put my hand on the handles of the walker and as I went to take a step, I was standing up and my feet were on the ground, and as I was standing up, I went to take a step; when I did, Mr. App's wife hit the car.* And when she hit the car, the car slid. And as it was sliding, it hit me in between the knees where your kneecaps are. And the back of where your knee is, when it hit it, it buckled my legs up and it got pinned underneath the door . . . .
>
> * * *
>
> *Q.* And before you take a step you said, you're in the process of taking your first step is when the car then comes over and hits you?
>
> *A.* I put my hand on the handles of the walker*, got up from the car, and both of my feet was on the parking lot. And when I went to take a step to go towards my appointment, she struck the car*.
>
> *Q.* Okay. I'm just trying to get an idea of the spacing of you to the car. So you had just come out of the seated position; in other words, pulled yourself up on the walker, correct?
>
> *A.* Right.
>
> *Q.* Did Mr. Bolton help you stand up?
>
> *A.* No.

Q. If you were to have simply—before you got hit, if you wanted to, you could have just sat back down in the car, in other words. You were that close to the vehicle still?

A. No. *I went to take a step. I had—I think it was about a foot, maybe a little farther*.

Q. You think the back of your legs would have been about a foot away from the back or the side of the car?

A. Something like that, yeah.

[Emphasis added.]

Bolton testified that, at the time of the collision, Petree "was just standing up in the—say a bent position standing—getting ready to stand up." Upon further questioning, Bolton stated that, to the best of his recollection, Petree may have one of his hands on the walker, and, while he was not seated in the car, was also not standing erect and still had his "back area" inside of the car.

Dickensheets testified that, at the time of the collision, Petree was seated inside the vehicle with his feet on the ground. When questioned further, Dickensheets said: "I felt like he was, in my mind, he was either seated or just starting to stand up. I don't know." Dickensheets did confirm, however, that he did not recall seeing Petree standing at any point.

Defendant argues that all of the testimony "clearly establishes" that Petree was still in the process of alighting when the collision occurred. The testimony of Bolton and Dickensheets appears to support this argument. However, defendant fails to account for the testimony of Petree himself, who testified that at the time of the collision, he had stood up, placed both his hands on his walker, and transferred his weight to his walker sufficient to take a step *away from* (not *out of*) Bolton's vehicle. Petree's testimony was sufficient to allow the jury to conclude that he had completed the process of alighting, i.e., had "effectively descended from a vehicle and has come to rest—when one has successfully transferred full control of one's movement from reliance upon the vehicle to one's body [or in this case, one's walker]." *Frazier*, 490 Mich at 385-386 (quotation marks and brackets omitted).[2] To the extent Bolton's and Dickensheets's

[2] The jury's verdict was also consistent with the caselaw regarding "alighting." See, e.g., *Frazier*, 490 Mich at 386-387 (the plaintiff had completed the process of alighting when she had "stood up, and stepped out of the way of the [passenger] door when she closed the door and fell[,]" and "was entirely in control of her body's movement, and she was in no way reliant upon the vehicle itself"); *Krueger v Lumbermen's Mut Cas & Home Ins Co*, 112 Mich App 511, 513; 316 NW2d 474 (1982) (the plaintiff had not completed the process of alighting when, while climbing down from his van, placed his right foot on the ground and brought his left foot down into a hole in the ground, causing his injuries); *Harkins v State Farm Mut Auto Ins Co*, 149 Mich

testimony contradicted that of Petree, "[i]t is the jury's responsibility to determine the credibility and weight of the trial testimony." *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). Given Petree's testimony, our deference to the jury in evaluating witness credibility, and the requirement to view the evidence in the light most favorable to the nonmoving party, i.e., plaintiff, we conclude that the trial court did not err in denying defendant's motion for JNOV.

III. SUPPLEMENTAL JURY INSTRUCTION

Defendant argues that the trial court erred in delivering a supplemental jury instruction regarding the legal definition of "alighting" under MCL 500.3106(1)(c).

> [W]hen standard jury instruction do not adequately cover an area and a party requests a supplemental instruction, the trial court is obligated to give the instruction if it properly informs the jury of the applicable law and is supported by the evidence. The determination whether a supplemental instruction is applicable and accurate is within the trial court's discretion. [*Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 451; 750 NW2d 615 (2008) (citation omitted).]

There is no model jury instruction concerning the definition of "alighting" as used in MCL 500.3106(1)(c). However, as discussed, the term has a specific legal meaning, as defined in *Frazier*, 490 Mich at 381. The trial court delivered the following supplemental jury instruction:

> Next, I will explain the issue in this case. The sole issue for you to decide is whether Elbert Petree was in the process of alighting from a vehicle, or whether he had finished alighting from the vehicle at the time that the automobile collision occurred.
>
> *"Alighting" does not occur in a single moment but occurs as a result of a process. The process begins when a person initiates the descent from a vehicle and is completed when the person has effectively descended from the vehicle and has come to rest—when he has successfully transferred full control of his movement from reliance upon the vehicle to his body. This is typically accomplished when both feet are planted firmly on the ground.*
>
> If you find that it is more likely than not that Mr. Petree had finished alighting from the vehicle at the time the automobile collision occurred, then your verdict should be for Plaintiff State Farm Automobile Insurance Company.
>
> If you find that it is more likely than not that Mr. Petree was still in the process of alighting from the vehicle at the time the automobile collision occurred, then your verdict should be for Defendant Farm Bureau General Insurance Company. [Emphasis added.]

App 98, 101; 385 NW2d 741 (1986) (the plaintiff had completed the process of alighting where "he had physically left his vehicle and walked to the garage door before the injury occurred").

In the italicized portion above, the trial court read, verbatim, the definition of "alighting" provided in *Frazier*. Defendant objected to the instruction, arguing that the last sentence, i.e., "This is typically accomplished when both feet are planted firmly on the ground[,]" should not be included. Defendant now argues that the court abused its discretion in overruling its objection.

The trial court did not err in directly quoting the definition of "alighting" provided in *Frazier*. This is the applicable legal definition of the only issue that was before the jury. Indeed, it would have conceivably been an abuse of discretion to deliver any instructional definition other than that given by the court. Nonetheless, defendant argues that the inclusion of the final sentence "slanted" the jury's deliberations against defendant in violation of MCR 2.512(D)(4).[3] Defendant argues that because it was undisputed that Petree's feet were on the ground at the time of the collision, the trial court's inclusion of the final sentence improperly framed the issue before the jury. We disagree. First, the word beginning the sentence, "typically," denotes that having one's feet planted on the ground is not the *only* manner in which one may complete the process of alighting from the vehicle. Second, and most important, the instruction contained the definition of alighting itself, which is "completed when the person has effectively descended from the vehicle and has come to rest—when he has successfully transferred full control of his movement from reliance upon the vehicle to his body." The application of this definition encompassed defendant's arguments regarding whether Petree had transferred control of his body to his walker, i.e., away from Bolton's vehicle. Jurors are presumed to follow their instructions, *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013), and, as discussed above, there was sufficient evidence to allow the jury to conclude that Petree had completed the process of alighting under the applicable definition.

Accordingly, the trial court did not abuse its discretion in delivering the supplemental jury instruction regarding "alighting."

Affirmed.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Douglas B. Shapiro

[3] MCR 2.512(D)(4) provides in relevant part that, "[a]dditional instructions, when given, must be patterned after the style of the model instructions and must be concise, understandable, conversational, unslanted, and nonargumentative."