

STATE OF MICHIGAN
COURT OF APPEALS

FRANK WOJCIK,

Plaintiff-Appellee,

v

AUTOMOBILE CLUB INSURANCE
COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 10, 2016

No. 325328
Wayne Circuit Court
LC No. 13-014048-NF

Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ an order granting plaintiff's motion for summary disposition in this action for benefits under the No-Fault Act, MCL 500.3101 *et seq.* Because the trial court erred by evaluating witness credibility and concluding as a matter of law that a motor vehicle was involved in plaintiff's accident, we reverse.

This case arises from a motorcycle accident on July 28, 2013, in which both plaintiff and his passenger, Tiffany Clarke, sustained injury. Plaintiff has no memory of the accident, and Clarke gave inconsistent accounts, first telling police that the motorcycle fishtailed on the gravel road as plaintiff rounded a corner and then later claiming that a car passed plaintiff in such a way as to cause plaintiff to brake and lose control. After the accident, plaintiff sought no-fault benefits from defendant. However, defendant denied plaintiff's claim based on its determination that the accident did not involve a "motor vehicle" as required to receive benefits under the no-fault act. Plaintiff then filed the present lawsuit and later moved for summary disposition under MCR 2.116(C)(10), which the trial court granted based on its conclusion that no material question of fact remained and a motor vehicle had been involved in plaintiff's accident. Defendant now appeals by leave granted.

On appeal, defendant contends that the trial court erred by granting summary disposition to plaintiff under MCR 2.116(C)(10) because a material question of fact remains with respect to

¹ *Wojcik v Auto Club Ins Co*, unpublished order of the Court of Appeals, entered June 5, 2015 (Docket No. 325328).

whether a motor vehicle was involved in the accident. Defendant challenges the trial court's acceptance of Clarke's version of events and its implicit evaluation of her credibility, emphasizing the inconsistent statements made by Clarke and her motive to lie in order to obtain benefits in her own no-fault lawsuit against defendant. In addition, defendant contends that the trial court failed to view the evidence in a light most favorable to defendant by, for example, ignoring eyewitness testimony and testimony from an expert in accident reconstruction to suggest that there was not another vehicle on the road at the time of the accident.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted if no genuine issue of material fact exists. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). In determining whether a genuine issue of material fact exists, the court must consider all documentary evidence in a light most favorable to the nonmoving party. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

When ruling on a motion for summary disposition, a court may not make factual findings, weigh the evidence, or decide issues of witness credibility. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). However, although a court may not decide an issue of witness credibility, a court cannot ignore inconsistencies in a witness's statements. See *White v Taylor Distrib Co, Inc*, 482 Mich 136, 143; 753 NW2d 591 (2008). A court may consider whether a material fact "cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility." *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 628; 739 NW2d 132 (2007), *aff'd* 482 Mich 136 (2008) (quotation omitted). Indeed, summary disposition is considered suspect "where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135; 701 NW2d 167 (2005). Ultimately, "when the truth of a material factual assertion depends on the credibility of a witness, a genuine factual issue exists and summary disposition may not be granted." *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 335-336; 671 NW2d 132 (2003).

In this case, plaintiff's entitlement to benefits hinges on whether or not the accident in question involved a "motor vehicle." In particular, the no-fault act provides coverage for "accidental bodily injury 'arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . .,'" *McPherson v McPherson*, 493 Mich 294, 297; 831 NW2d 219 (2013), quoting MCL 500.3105(1). A plaintiff seeking benefits under the no-fault act bears the burden of demonstrating his entitlement to benefits and, in particular, a plaintiff must show that the injury arose out of the use of a motor vehicle as a motor vehicle. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 632; 552 NW2d 671 (1996). Under the no-fault act, a motorcycle is not a "motor vehicle." MCL 500.3101(2)(h)(i). Nonetheless, a motorcyclist may obtain no-fault benefits if the motorcyclist is "involved in an accident which arises out of the ownership, operation, maintenance, or use of a motor vehicle." *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392, 395; 838 NW2d 910 (2013) (citation omitted). To obtain benefits, there must be "a causal connection between the injury sustained and the ownership, maintenance or use of the automobile." *Id.* (citation omitted). Thus, to establish a right to benefits in the instant

case, plaintiff needs to establish the involvement of a motor vehicle in his accident. See *id.* at 395-398.

In moving for summary disposition, plaintiff contended that Clarke's version of events—as set forth in an affidavit and her deposition testimony—was uncontroverted and thus no question of fact remained with respect to the existence of a car on the road, which caused the accident. In this regard, about a month after the accident, Clarke described the accident in her affidavit as follows:

[Plaintiff] was proceeding northbound on Nolet Road, it was dark and rainy. The road was under construction, and we were proceeding well below the posted speed limit due to the gravel conditions on the roadway. A car rapidly pulled up behind [plaintiff's] motorcycle and then attempted to pass us by pulling around to our left. The car cut back in front of us causing [plaintiff] to brake to avoid contact, which resulted in [plaintiff] sliding on the gravel and losing control of the motorcycle.

Clarke averred that the car did not stop and that she did not see the car's license plate. Clarke provided the same description of events in her deposition testimony, and specified that plaintiff had been travelling about 35 mph at the time of the accident.

The trial court accepted Clarke's version of events as set forth in these documents and therefore concluded that no material question of fact remained. However, in doing so, the trial court impermissibly made factual findings, assessed Clarke's credibility, ignored her prior inconsistent statements, and failed to view the evidence in a light most favorable to the nonmoving party. This was erroneous. See *Pioneer State Mut Ins Co*, 301 Mich App at 377.

To begin with, Clarke's description of events as set forth in her affidavit and deposition testimony conflicted with her statements to police, and these inconsistencies cannot be ignored. See *White*, 482 Mich at 142. In particular, Clarke spoke with police at the scene of the accident and by telephone a few days later. She failed to mention a car during either conversation. Instead, Clarke described the accident to police as follows:

[Plaintiff] was traveling at approximately 45 mph on a loose gravel road, and as [we] came around a curve, the back end of the bike began to fish tail. [Plaintiff] did everything he could to regain control of the motorcycle, but he was unsuccessful. As a result, [we] ran off the roadway, and collided with a ditch.

Given Clarke's inconsistent descriptions of the accident, it is for a jury to assess her credibility and the trial court thus erred by crediting Clarke's description of events as set forth in her affidavit and deposition testimony. See *White*, 275 Mich App at 623-625. See also *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). This is particularly true given that Clarke has a motive to lie insofar as she has filed her own no-fault suit, plaintiff is Clarke's "very good friend," and whether she and plaintiff obtain benefits from defendant will depend on the involvement of a motor vehicle in the accident. See *Foreman*, 266 Mich App at 135.

Moreover, Clarke's credibility in this case is crucial to determining whether a motor vehicle was involved and, because the truth of a material factual assertion depends on Clarke's

credibility, summary disposition should not have been granted. See *Auto Club Ins Ass'n*, 258 Mich App at 335-336. In particular, aside from Clarke's description of events, there was no evidence of a car on the roadway and there was evidence from which reasonable minds could conclude that plaintiff simply lost control of his motorcycle. That is, plaintiff had no memory of the accident and could not corroborate Clarke's version of events. Michael Elliot, a witness at the scene, stated that he did not see a car on the road and that he did not see "how there could have been" a car. Likewise, the responding police officer saw no indication of a car on the road. An expert in accident reconstruction examined the scene, and he found no signs of a car on the roadway. Witnesses, including Clarke, indicated that the road conditions were poor for motorcycle travel: it was dark, there was loose gravel, and it was raining. The accident occurred on the curve of a road, which Elliot in particular described as "a real bad corner" that "makes a bad curve." Elliot explained that plaintiff "didn't even come close to making the corner, just went straight." Finally, the evidence showed that plaintiff had a blood alcohol content of .16 at the time of the accident. Viewing this evidence in a light most favorable to defendant, a material question of fact remains regarding the cause of the accident and the involvement of a "motor vehicle."

In sum, bearing in mind that Clarke's credibility poses an issue for the jury, the conflicting evidence regarding the circumstances surrounding the accident created a question of fact as to whether a motor vehicle was involved in plaintiff's crash. Because a material question of fact remains regarding the involvement of a "motor vehicle" in plaintiff's accident, the trial court erred by granting summary disposition to plaintiff. See *White*, 482 Mich at 143; *Auto Club Ins Ass'n*, 258 Mich App at 335-336.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Defendant being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Joel P. Hoekstra