# STATE OF MICHIGAN

# COURT OF APPEALS

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ALYCE VAHLBUSCH, Personal Representative of the Estate of BRYAN VAHLBUSCH, Deceased,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 19, 1997

No. 188240
Genesee Circuit
LC No. 93-025417-CK

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Before: Holbrook, Jr., P.J. and White and R.J. Danhof,* JJ.

PER CURIAM.

Defendant appeals by leave granted from an order denying its motion for summary disposition of plaintiff's claim for no-fault benefits. We reverse.

While sleeping in the bed of his pickup truck, which was covered with a top, plaintiff's decedent, Bryan Vahlbusch, and a hunting companion both died of asphyxiation from the use of a portable propane heater. Vahlbusch and the companion were sleeping in sleeping bags on foam mattresses, which they had placed in the bed of the pickup truck. Vahlbusch had placed the propane heater into the truck bed earlier in the day, rigging it up using a milk crate. When the men were discovered the following morning, the one window at the rear of the truck bed, which had been propped open the night before, was closed.

Defendant moved for summary disposition on the basis that the pickup truck was not being used as a motor vehicle at the time of Vahlbusch's death. The trial court denied the motion, ruling that there were questions of fact for the jury. On appeal, defendant argues that the trial court erred in failing to grant its motion. We agree.

Defendant moved for summary disposition under MCR 2.116(C)(10). A trial court's decision on a motion for summary disposition is reviewed de novo. *Tranker v Figgie Int'l, Inc*, 221 Mich App 7, 11; ___ NW2d ___ (1997). A motion for summary disposition under MCR 2.116(C)(10) tests the

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

factual basis of a claim. *Id.* In reviewing such a motion, all relevant affidavits, depositions, admissions and documentary evidence submitted by the parties is considered in a light most favorable to the party opposing the motion. MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This Court must determine whether there exists a genuine issue of material fact upon which reasonable minds could differ or whether the party making the motion is entitled to judgment as a matter of law. *Quinto, supra*.

The no-fault act, MCL 500.3105(1); MSA 24.13105(1), provides:

> 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 . . . .

Generally, there is no coverage for injuries that arise from the ownership, operation, maintenance or use of a parked vehicle. MCL 500.3106(1); MSA 24.13106(1). However, an exception to this general rule provides coverage when the person is injured while occupying the parked vehicle. MCL 500.3106(1)(c); MSA 24.13106(1)(c). Nonetheless, mere occupancy is insufficient to qualify a claimant for no-fault benefits under subsection 31061(c). *Engwis v Michigan Mutual Ins Co*, 181 Mich App 16, 20; 448 NW2d 731 (1989). Rather, a claimant must still establish that his injuries arose out of the use of a motor vehicle "as a motor vehicle." *Id.*

The causation required in a case for no-fault benefits is more than "but for." *Pacific Employers Ins Co v Michigan Mutual Ins Co*, 452 Mich 218, 224; 549 NW2d 872 (1996). The causation standard adopted by our Supreme Court in *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), directs that,

> while the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. [*Id.*, 650-651, quoting *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975).]

Thus, the courts must consider "the relationship between the injury and the vehicular use of the motor vehicle." *McKenzie v Auto Club Ins Ass'n*, 211 Mich App 659, 662; 536 NW2d 301 (1995).

In analyzing this case, we are guided by this Court's reasoning in four similar cases. In *Koole v Michigan Mutual Ins Co*, 126 Mich App 483; 337 NW2d 369 (1983), the insured was injured after lighting a match and igniting gas that had escaped from the furnace pilot of a camper attached to his pickup truck. This Court found that the insured was entitled to no-fault benefits, reasoning:

> [T]he injuries sustained by the plaintiff here are foreseeably identifiable with the normal use of this motor vehicle—a pickup truck with attached camper—as a motor vehicle. . . . [U]se of *this* vehicle for camping or sleeping constituted a normal and

> foreseeable use as a motor vehicle and . . . such use properly encompassed operation of the gas-fueled heater or furnace. . . . [T]he required causal nexus between the use of this motor vehicle as a motor vehicle and plaintiff's injuries has been established. [*Id.* at 485; emphasis supplied.]

In *Engwis, supra*, the insured was fatally asphyxiated when the portable propane heater in his van malfunctioned, filling the van with propane while he was sleeping. *Id.* at 18. The van was equipped with a couch and also had a built-in electrical rear heater. The plaintiff presented deposition testimony indicating that the decedent purchased the van believing that it had been converted into a recreational vehicle by the dealership. There was also testimony that the decedent regularly used the van on overnight camping and fishing trips, and that the decedent's wife had slept in the vehicle about two weekends a month during the summer. After noting that "it is reasonably foreseeable that a person owning a recreational vehicle and who camps overnight and sleeps in that vehicle would acquire a portable heater/stove for use in the vehicle[,]" this Court held that the defendant insurer was not entitled to summary disposition as a matter of law because a question of fact existed as to whether the van had been converted into a recreational vehicle. *Id.* at 23.

In *McKenzie, supra*, the plaintiff was injured when the propane furnace in his twenty-eight-foot trailer, which was attached to his pickup truck, malfunctioned. This Court rejected the defendant's argument that the use of the camper-trailer for sleeping did not constitute the use of a motor vehicle as a motor vehicle. *McKenzie, supra* at 661. This Court noted that, as in *Koole*, the camper attached to the pickup truck was intended for sleeping and therefore constituted use of a motor vehicle as a motor vehicle under the no-fault act. *Id.* at 664.

Finally, in *Yost v League General Ins Co*, 213 Mich App 183; 539 NW2d 568 (1995), the plaintiff sustained severe burns when he dropped a lit cigarette on combustible material inside the car in which he was sleeping. *Id.* at 184. This Court concluded that, as a matter of law, the plaintiff had failed to establish that the car was being used as a motor vehicle when the accident occurred. It found that the plaintiff was using the car as a bed and there was nothing about the car to suggest that it was intended to be used in such a manner. The Court found no causal nexus between the plaintiff's injuries and the use of the car as a motor vehicle. *Id.* at 185.

We find the instant case more akin to *Yost* than the other cases. The fact that Vahlbusch placed sleeping bags and foam mattresses in the covered bed of his truck establishes that his vehicle was being used as a bed when asphyxiation occurred, but does not establish that use of his vehicle as a bed was a normal and foreseeable use of that vehicle as a motor vehicle. Unlike the vehicles in *Koole, Engis and McKenzie*, there was nothing distinctive about Vahlbusch's vehicle that invited its use as a bed as a normal and foreseeable use of that vehicle as a motor vehicle. The mere installation of a top on the bed of the pickup did not convert it for such use. Nor did plaintiff present any evidence suggesting that Vahlbusch's intended use of his pickup truck as a motor vehicle properly encompassed operation of a portable propane heater, or that Vahlbusch equipped his truck with a cap with the intent of using the truck bed for sleeping purposes as a normal and foreseeable use of that vehicle as a motor vehicle. Indeed, defendant submitted deposition testimony indicating that the pickup truck had never before

been used for camping or sleeping, and that Vahlbusch was never known to have slept in the bed of the pickup truck before.

Accordingly, because the undisputed facts failed to establish a connection between the death of plaintiff's decedent and the use of the pickup truck as a motor vehicle, the trial court erred in denying defendant's motion for summary disposition.

Reversed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert J. Danhof