STATE OF MICHIGAN

COURT OF APPEALS

TERRI SCHICHTEL, JAMIE SCHICHTEL, and HEATHER SCHICHTEL,

Plaintiffs-Appellees,

V

HASTINGS MUTUAL INSURANCE,

Defendant-Appellant.

UNPUBLISHED
August 3, 2001

No. 220798
Wexford Circuit Court
LC No. 96-012496-NF

Before: Markey, P.J., and Talbot and Owens, JJ.

PER CURIAM.

This case arises from the asphyxiation death of James ("Jim") Schichtel as a result of the inhalation of vehicle exhaust fumes in a closed garage. Plaintiffs brought this action seeking no-fault survivor benefits from defendant, Jim's no-fault insurer. Following a jury trial, the trial court entered judgment in favor of plaintiffs. Defendant appeals as of right. We affirm.

On an evening in November 1995, Jim and his fifteen-year-old son, plaintiff Jamie Schichtel, attended a party to celebrate the beginning of the hunting season. Jim consumed alcoholic beverages at the party. They returned home late that night. Jamie drove the family Blazer, and Jim rode in the passenger seat. Jamie backed the Blazer into the garage, closed the garage door, and turned off the engine. At Jim's instruction, Jamie left the keys in the ignition. Jamie went into the house and went to bed. Jamie expected his father to be coming into the house behind him. Jim's wife, plaintiff Terri Schichtel, found Jim in the garage the following morning. The garage door was closed, the truck was running, and the garage was filled with fumes. Jim was not breathing. Efforts to revive Jim were unsuccessful, and Jim died from asphyxiation.

Plaintiffs sought no-fault survivor benefits from defendant. Defendant denied benefits on the basis of the parked vehicle exclusion, MCL 500.3106, and also on the basis that Jim's injury did not arise from the operation or use of a motor vehicle as a motor vehicle, MCL 500.3105(1). Defendant contended that at the time of his injury, Jim was using the truck to listen to the radio, to operate the truck's heater, or as a place to sleep off the effects of his intoxication.

Plaintiffs brought this action to collect no-fault benefits. The trial court denied defendant's motion for summary disposition, and the matter proceeded to trial. At the close of proofs, the trial court denied defendant's motion for a directed verdict. The jury returned a

verdict in favor of plaintiffs. The trial court also denied defendant's post-trial motions for judgment notwithstanding the verdict (JNOV) or a new trial.

On appeal, defendant first argues that the trial court erroneously denied its motion for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews decisions regarding motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Lockridge v State Farm Mut Auto Ins Co*, 240 Mich App 507, 511; 618 NW2d 49 (2000). Motions brought pursuant to MCR 2.116(C)(10) test the factual support for the plaintiff's claim. *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id*. Both this Court and the trial court must resolve all reasonable inferences in the nonmoving party's favor. *Id.* "Statutory interpretation is a question of law that is also reviewed de novo on appeal." *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 176; 617 NW2d 735 (2000).

MCL 500.3105(1) provides the general requirement for a no-fault insurer's liability:

> 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, subject to the provisions of this chapter.

The instant case involves injuries related to a parked vehicle. The no-fault statute generally excludes coverage for such injuries, subject to certain exceptions. MCL 500.3106. The statute provides in relevant part:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> * * *
>
> (c) . . . [T]he injury was sustained by a person while occupying, entering into, or alighting from the vehicle. [MCL 500.3106.]

See *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 632; 563 NW2d 683 (1997). In order to recover no-fault benefits for injuries involving a parked vehicle:

> [A claimant] must demonstrate that (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle; and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for. [*McKenzie v Auto Club Ins Association*, 458 Mich 214, 217 n 3; 580 NW2d 424 (1998), quoting *Putkamer*, *supra* at 635-636.]

In *McKenzie, supra,* our Supreme Court held that "whether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles." *McKenzie*, *supra* at 225-226.

Defendant relies upon *McKenzie* and argues that there is no genuine issue of material fact that Jim's injury did not arise out of the use of a motor vehicle as a motor vehicle, as required by § 3105(1). Defendant cites the *McKenzie* Court's reference to *Putkamer* for the proposition that an injury incurred while entering a vehicle with the intent to travel is covered under the no-fault act.[1] Conversely, defendant argues, by implication "entering a vehicle without the intent to travel or being in the vehicle for some purpose other than that closely related to the transportational function of the vehicle would not be covered under the no-fault act." Defendant maintains that Jim was using the truck for any one of several possible purposes, none of which qualified as a transportational function.

We conclude that genuine issues of material fact existed regarding whether Jim's injury was closely related to the transportational function of the vehicle. Jamie's deposition testimony suggests that Jim intended to spend some time in the garage before following Jamie into the house. Jamie testified that when he left the garage, the vehicle was turned off and was not functioning in any capacity. At some point, Jim started the engine. Despite the speculative nature of the affidavits of Terri and Jamie submitted in opposition to summary disposition, factual questions remained apart from their speculation regarding Jim's intent on the night in question. Jim instructed Jamie to leave the keys in the ignition, and the vehicle was not operating when Jamie left the garage. The evidence suggesting that Jim intended to follow Jamie into the house must be balanced against the evidence that Jim turned the ignition and started the engine for some reason. The act of turning the ignition and starting the engine is consistent with the use of a vehicle for its transportational function. See *Gajewski v Auto Owners Ins Co*, 414 Mich 968; 326 NW2d 825 (1982), adopting dissenting opinion of Cynar, J., *Gajewski v Auto Owners Ins Co*, 112 Mich App 59, 63; 314 NW2d 799 (1982) (Cynar, J., dissenting) ("[T]turning the ignition key must be identified with the normal manner of starting a vehicle.") Although defendant plausibly argues that Jim started the engine for reasons other than driving the car, such as for heat or entertainment, Jamie stated that there was a radio in the garage which was playing, as well as a heater which could have been activated. In light of the conflicting evidence on the question of Jim's intention as it relates to whether Jim's death arose out of the use of the vehicle as a motor vehicle, the trial court correctly denied defendant's motion for summary disposition.

Defendant next argues that the trial court erred in denying its motion for a directed verdict on the question whether Jim's injury arose out of the use of a motor vehicle as a motor vehicle. We review a trial court's ruling on a motion for a directed verdict de novo. *Spiek*, *supra* at 337; *Gauntlett*, *supra* at 176. This Court considers the evidence presented at trial in a light most favorable to the nonmoving party to determine whether the plaintiff established a prima facie case. *Braun v York Properties, Inc*, 230 Mich App 138, 141; 583 NW2d 503 (1998). A

[1] The *McKenzie* Court noted:

> Of course, as § 3106 indicates, a vehicle need not be moving at the time of an injury for the injury to arise out of the use of a motor vehicle as a motor vehicle, i.e., out of its transportational function. See, e.g., *Putkamer*, n 1 *supra* at 636-637 (the plaintiff's injury, incurred when she slipped on ice while entering her vehicle with the intention of traveling to her brother's home, was held to have arisen out of the use of a motor vehicle as a motor vehicle). [*McKenzie*, *supra* at 219 n 6.]

directed verdict should be granted only if reasonable jurors could not reach different conclusions. *Id.* In determining whether a factual question existed, this Court views the evidence in the light most favorable to the nonmoving party and grants the nonmoving party every reasonable inference, resolving any conflict in the evidence in the nonmoving party's favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). This Court may not substitute its judgment for that of the jury and must defer to the trier of fact's ability to observe witnesses, determine credibility, and weigh testimony. *Id.*

In addition to the issues of material fact at the summary disposition phase of the proceedings, the evidence adduced at trial left questions of fact upon which reasonable minds could differ regarding whether Jim's injury resulted from the use of a motor vehicle as a motor vehicle under § 3105(1). Although defendant presented evidence that Jim's intention was to follow his son into the house after spending some time in the garage, the evidence also supported a finding that Jim intended to drive or move the vehicle. Defendant posited that Jim started the engine to use the car for heat and/or music while he relaxed or slept off his intoxication. Considering the testimony that a radio tuned to Jim's favorite station was playing in the garage, and there was a heater in the garage that could have been activated, reasonable jurors could reject these purposes. Viewing the evidence in the light most favorable to plaintiffs, reasonable jurors could find that Jim intended to move the vehicle. Although defendant presented evidence that the vehicle was not being used in its transportational function, plaintiffs also presented evidence which cast doubt on the defense's theory. Because reasonable minds could differ on this question, the trial court properly denied defendant's motion for a directed verdict.

Next, defendant argues that the trial court improperly instructed the jury by substituting an instruction which did not accurately state the law and prejudiced defendant because it was given after defendant's closing argument. Jury instructions are reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Mull v Equitable Life Assur Soc of US*, 196 Mich App 411, 423; 493 NW2d 447 (1992), aff'd 444 Mich 508 (1994). There is no error requiring reversal, if on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. *Id.* The trial court's decision regarding supplemental instructions will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. *Id.*

The trial court is permitted to give additional jury instructions on applicable law not covered by the standard jury instructions. MCR 2.516(D)(4); *Meyer v City of Center Line*, 242 Mich App 560, 567; 619 NW2d 182 (2000). Supplemental instructions "must be modeled as nearly as practicable after the style of the SJI, and must be concise, understandable, conversational, unslanted, and nonargumentative." *Id.*, quoting MCR 2.516(D)(4).

Defendant's closing argument prompted a request by plaintiffs for a curative instruction regarding the question of intent to drive as it relates to the transportational function of the vehicle. Defendant argued to the jury as follows:

> Was there any evidence, ladies and gentlemen of the jury, presented to you, any proof that Mr. Schichtel intended to use that vehicle that night for a transportational purpose[?] . . . Is there any evidence that Mr. Schichtel was going to use that Blazer, that motor vehicle in its transportational function and then,

> further, did his injury arise from the use of that vehicle as a motor vehicle in its transportational function?

Plaintiff requested a curative instruction, arguing that *McKenzie* does not require proof of an intent to transport, only that the injury is closely related to the transportational function of the vehicle.

The trial court had previously indicated that it would give a special instruction to comport with *McKenzie*. In response to plaintiffs' request for a curative instruction to clarify § 3105(1), the court modified the special instruction, and instructed the jury in pertinent part as follows:

> Now a plaintiff's injury is not covered by the no fault act where it does not arise out of the use of a motor vehicle as a motor vehicle. A vehicle need not be moving at the time of an injury for the injury to arise out of the use of a motor vehicle as a motor vehicle; that is, out of its transportational function. Although whether an injury arises out of the use of a motor vehicle as a motor vehicle depends on whether the injury is closely related to the transportational function of the motor vehicle, there need not necessarily be an immediate intent to use the vehicle as transport. Now whether an injury arises out of the use of a motor vehicle as a motor vehicle and whether the injury is closely related to the transportational function of the motor vehicle is for you to decide.

Defendant argues that the supplemental instruction was improper in two respects: (1) the statement that the vehicle "need not be moving" was taken from footnote six of the *McKenzie* opinion, but ignores the § 3106 context in which the statement was made; and (2) the statement that there need not be an immediate intent to use the vehicle as transport ignores the holding of *Putkamer*, as cited with favor in *McKenzie*. The *McKenzie* Court's citation to *Putkamer* explained that "the plaintiff's injury, incurred when she slipped on ice while entering her vehicle with the intention of traveling to her brother's home, was held to have arisen out of the use of a motor vehicle as a motor vehicle." *McKenzie*, *supra* at 219 n 6, citing *Putkamer*, *supra* at 636-637 n 1. Defendant argues that the trial court's supplemental instruction to the jury in this case negates the intent element which was paramount in *Putkamer*.

The statement that the vehicle need not be moving at the time of injury is an accurate statement of law. The trial court took part of the jury instruction almost verbatim from footnote six of the *McKenzie* opinion. See footnote 1, *supra*. Further, the supplemental instruction was not given out of context because the parked vehicle exclusion was relevant here. The issue for the jury to decide was whether the injury arose from the use of a motor vehicle as a motor vehicle, as interpreted by *McKenzie* to be closely related to the transportational function of the vehicle. Also at issue in this case was the parked vehicle exclusion, § 3106, which provides that the injury does not arise out of the use of a motor vehicle as a motor vehicle unless one of the listed exceptions applies. Both parties presented evidence regarding the location of Jim's body when Terri discovered him as relevant to the determination whether Jim's injury resulted from occupying or alighting from the vehicle, thus coming within an exception to the parked vehicle exclusion, § 3106(1)(c).

An intent to transport is not found in § 3105(1) or § 3106 of the no-fault statute, nor is it explicitly imposed by the holding of *McKenzie*. The *McKenzie* decision stands for the

proposition that in order for the injury to arise out of the use of a motor vehicle as a motor vehicle, the injury must be closely related to the transportational function of the vehicle. When an injury involves a parked vehicle, intent to transport may be relevant to this inquiry. *Putkamer, supra* at 636. However, defendant's closing argument suggested that the jury must find that Jim intended to drive the vehicle that night in addition to finding that his injury was closely related to the transportation function of the vehicle. The *McKenzie* footnote implies that in *Putkamer*, intent was an important factor in determining whether the plaintiff's injury arose out of the use of a motor vehicle as a motor vehicle. Although the *McKenzie* Court cited *Putkamer* with favor, the factual distinctions between *Putkamer* and the case at bar are meaningful.[2]

Moreover, the trial court did not instruct the jury to disregard Jim's intent, nor did it say that intent was not a factor. The court instructed the jury that there need not necessarily be an "immediate" intent to use the vehicle as transport. In light of the evidence and defendant's closing argument, this qualification was proper. Defendant contended that because Jim was not behind the wheel or at the driver's side, he did not have the intent to drive. The trial court's qualification that intent to drive need not be immediate admits the possibility that Jim started the motor from the passenger side and was getting out of the vehicle to move to the driver's seat when he was overcome by exhaust fumes. Such an inference is supported by the evidence.

Further, we do not find that the trial court's supplemental instruction prejudiced defendant because it was given after closing argument. It was defendant's closing argument which necessitated the clarification. When viewed in their entirety, the jury instructions adequately and fairly presented the parties' theories of the case and the applicable law.

Defendant also argues that the trial court abused its discretion in denying its motion for a new trial. Defendant's argument is premised in part on its claim of error and prejudice from the jury instructions, which we have addressed and rejected. Defendant's remaining claims of error are that the jury's verdict was against the great weight of the evidence on the issues of the use of a motor vehicle as a motor vehicle and the exception to the parked vehicle exclusion.

This Court reviews for an abuse of discretion the grant or denial of a new trial. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 511; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1998). "Where a party's substantial rights are at stake, a trial court may grant a new trial for several reasons, including an excessive award of damages, jury misconduct, an irregularity or

[2] In *Putkamer*, the plaintiff was injured when she slipped as she entered her parked car. *Putkamer, supra* at 628. The plaintiff argued that § 3106(1)(c) applied because she was injured as she was entering her vehicle. *Id.* at 634. In that case, it was undisputed that the plaintiff entered the car with the intention of traveling, *Id.* at 636, and the Supreme Court held that the plaintiff's injury fell within the exception to the parked vehicle exclusion, § 3106(1)(c). *Id.* The *McKenzie* Court implied that the *Putkamer* plaintiff's intent was an important factor in determining whether her injury was closely related to her use of the motor vehicle as a motor vehicle. Importantly, though, in *Putkamer* there is no indication that the engine was running at the time of the plaintiff's injury, whereas in the instant case, the engine was running and in fact it was the fumes produced by the running engine that directly caused Jim's death.

error of law in the proceedings, and a verdict against the great weight of the evidence." *Klinke, supra* at 511, quoting *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 410-411; 516 NW2d 502 (1994). See MCR 2.611(A)(1). The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). "Substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence." *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

The parties presented conflicting evidence regarding whether Jim's injury was closely related to the transportational function of the vehicle such that it arose from the use of a motor vehicle as a motor vehicle. The evidence was largely circumstantial. Jim was in the passenger seat when Jamie left him in the garage. As set forth above, defendant offered evidence that Jim started the engine in order to operate the heater or the radio. However, the testimony of Jamie and Terri established that the garage contained a heater that could have been activated, and the garage radio was playing when Jim and Jamie arrived home. Further, the engine was turned off when Jamie left the garage. Jim's act of starting the engine suggests that he intended to engage the vehicle in its transportational function. We find no error in the trial court's conclusion that the jury's verdict was not against the great weight of the evidence.

Defendant also argues that the jury verdict was against the great weight of the evidence on the issue of the parked vehicle exclusion, § 3106. Defendant maintains that coverage is excluded because Jim's injury did not arise out of his occupying or alighting from the vehicle. MCL 500.3106(1)(c). The evidence was conflicting on this point. Sergeant Gerald Leavell's report indicates that Terri told him she found Jim's body "outside of the vehicle and on the garage floor" and "on the floor near the open passenger door." At other times Terri said it appeared that Jim tried to get out of the truck and get to the door and "didn't make it." In a statement to Jane Blake, defendant's insurance adjuster, Terri described Jim's position as "half in and half out . . . not on the passenger seat, but more in the floorboard." Terri also said, "he was more like his right arm was leaning in against where the seat is, like he was trying to stand up or something." Terri also described Jim's posture as "wedged in between the door and the truck, leaning into the truck." Terri stated that Jim's arms "were on the floor leaning into the seat." In her claim form submitted to defendant Terri stated that she found Jim lying in the passenger side of the vehicle against the running board. At trial Terri stated that Jim was "wedged between the door with his head towards the floor of the truck" and "kind of half lying in and out." It was the province of the jury to evaluate Terri's credibility and make findings in light of the differing statements she gave and considering the times she gave them. *Heshelman v Lombardi*, 183 Mich App 72, 77; 454 NW2d 603 (1990). Although there are discrepancies in Terri's statements regarding how she found Jim, they are not entirely inconsistent as some accounts are more detailed and specific regarding the posture in which she found her husband.

We conclude that the jury's verdict was not contrary to the great weight of the evidence. Nor did the trial court err in its supplemental instruction to the jury. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Finally, defendant argues that the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV) on the issues of use of a motor vehicle as a motor vehicle and the parked vehicle exclusion. The standard of review for JNOV motions requires review of

the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). Only if the evidence so viewed fails to establish a claim as a matter of law, should JNOV be granted. *Id.*

Based upon our foregoing analysis, although the evidence was conflicting, when it is viewed in the light most favorable to plaintiffs, reasonable jurors could conclude that Jim was occupying or alighting from his vehicle at the time of his injury, and also that his injury was closely related to the transportational function of the vehicle. The evidence created questions of fact upon which reasonable minds could differ and plaintiffs did not fail to state a claim as a matter of law. Accordingly, the trial court properly denied defendant's motion for JNOV.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Donald S. Owens