STATE OF MICHIGAN

COURT OF APPEALS

EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Plaintiff-Appellee,

v

HEARTHSTONE SENIOR SERVICES, L.P., HEARTHSTONE GP, INC., and HEARTHSTONE MANAGEMENT, INC.,

Defendants,

and

LASHANDA SNELL, Personal Representative for the ESTATE OF SUSANNA V. WEST,

Defendant-Appellant.

UNPUBLISHED
March 15, 2016

No. 324776
Kent Circuit Court
LC No. 13-011387-CK

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendant LaShanda Snell, personal representative of the estate of Susanna West, appeals as of right the trial court order granting summary disposition to plaintiff Employers Insurance Company of Wausau under MCR 2.116(C)(10). We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The basic facts are undisputed in this case.[1] West was a resident at a senior assisted

[1] On appeal, plaintiff asserts that some facts are "subject to dispute." However, it accepted the facts as alleged in the underlying negligence and wrongful death complaint as true for the purpose of this appeal. Additionally, no evidence was presented in the trial court that established a factual dispute upon which reasonable minds could differ. Accordingly, it is proper for us to address the question of law presented in this case. See *Latham v Barton Malow Co*, 480 Mich

living facility owned and operated by Hearthstone Senior Services, L.P. In September 2008, West and other residents were transported by bus to a Meijer store. The bus used to transport the residents was owned by Hearthstone and insured under a business automobile insurance policy provided by plaintiff. Later that afternoon, the bus returned with the residents to the assisted living facility. For reasons not apparent from the record, West did not exit the bus with the rest of the residents. The bus was then parked in a parking lot behind the facility, at which time West remained "abandoned" and "locked" inside. She was not discovered by Hearthstone staff until 3:00 a.m., approximately 12 hours after the bus was parked after the return trip from Meijer. When West was found, she was "hypothermic, dehydrated, and in severe distress." She was transported to a hospital and died 10 weeks later.

Defendant Snell subsequently sued Hearthstone Management, Inc., and received a default judgment for $1,650,000. It appears that defendant Snell also secured a second default judgment in a subsequent case. When defendant Snell attempted to collect on the initial default judgment, she was unable to do so because Hearthstone did not have a general liability insurer, and it was going out of business. Defendant Snell then learned that the bus used to transport the residents was insured under an automobile policy provided by plaintiff. With this knowledge, defendant Snell moved to set aside the default judgment in an effort to collect from plaintiff as the automobile's insurer.[2] Additionally, in 2012, defendant Snell filed a third action against defendants Hearthstone Senior Services, LP, Hearthstone GP, Inc., and Hearthstone Management, Inc., alleging negligence and wrongful death claims.

On December 5, 2013, after receiving notice that defendant Snell intended to collect on Hearthstone's automobile insurance policy through plaintiff, plaintiff filed a complaint for declaratory judgment, requesting that the trial court declare that it has no duty to defend or indemnify any insured with regard to the incident involving West and Hearthstone. In particular, plaintiff contended that defendant Snell's claim was not covered by the insurance policy because West's injuries did not arise out of the ownership, maintenance, or use of a covered vehicle. In her answer, defendant Snell contended that this case did involve a claim covered by the insurance policy and requested entry of an order denying plaintiff's request for declaratory judgment and declaring that plaintiff must provide coverage to indemnify West's estate.

In May 2014, plaintiff filed a motion for summary disposition under MCR 2.116(C)(10), arguing that it was entitled to judgment as a matter of law. Defendant Snell opposed plaintiff's motion and requested summary disposition in favor of West's estate, contending that the insurance policy covered her claim because West's injuries and death resulted from the use of an insured vehicle, as they were related to the transportational function and use of the bus. The trial court agreed with plaintiff that West's injuries did not arise out of the use of the insured vehicle and granted plaintiff's motion for summary disposition. It also denied defendant Snell's motion for reconsideration.

105, 111; 746 NW2d 868 (2008); *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 234 n 1; 580 NW2d 424 (1998).

[2] Proceedings regarding the motion to set aside the default judgment were stayed pending the outcome of this case.

II. STANDARD OF REVIEW

We review *de novo* a trial court's grant or denial of summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), we may only consider, in the light most favorable to the party opposing the motion, the evidence that was before the trial court, which consists of "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties.' " *Calhoun Co v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 11; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "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).

III. ANALYSIS

Defendant Snell argues that the trial court erroneously granted summary disposition in favor of plaintiff because the commercial automobile policy provided residual liability coverage to Hearthstone under the circumstances of this case, as West's bodily injuries and death directly resulted from the use and ownership of the bus. We disagree and conclude that the trial court properly granted summary disposition in favor of plaintiff.

A. APPLICABLE LAW

Defendant Snell first contends that plaintiff improperly supported its arguments in the trial court with caselaw concerning personal injury protection ("PIP") benefits, arguing that plaintiff's reliance on that authority was improper because the issues in this case solely pertain to residual liability coverage, not PIP coverage. Defendant Snell's argument is meritless.

As the trial court concluded, the residual liability portion of the insurance policy at issue here[3] is consistent with the applicable provisions of the no-fault act. See MCL 500.3131; MCL

[3] The parties agree that the following language from plaintiff's business automobile insurance policy is applicable to the issue raised on appeal:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

"Accident" is defined by the policy as follows: " 'Accident' includes continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage'. "

500.3135(1). Although the statutory language governing PIP benefits and residual liability coverage differs slightly, compare MCL 500.3105, with MCL 500.3131 (cross-referencing MCL 500.3135(1)), we previously concluded that the same causation standard applies to both types of insurance coverage. *Century Mut Ins Co v League General Ins Co*, 213 Mich App 114, 117-121; 541 NW2d 272 (1995); see also *Wakefield Leasing Corp v Transamerica Ins Co of Mich*, 213 Mich App 123, 127; 539 NW2d 542 (1995). Thus, an injury must "arise out of the use of an automobile" in order for PIP coverage or residual liability coverage to apply. *Century Mut*, 213 Mich App at 117, 120.

Under this causation standard, defendant Snell must demonstrate that "the injury [was] foreseeably identified with the normal use, maintenance, and operation of the vehicle." *Id*. at 120 (quotation marks and citations omitted). As such, "the causal connection with the automobile must be more than incidental, fortuitous, or but for." *Id*. In *Century Mut*, we adopted a three-part test for determining whether an insurer was liable for providing residual automobile liability coverage:

> 1. The accident must have arisen out of the inherent nature of the automobile, as such;
>
> 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading, or unloading must not have terminated;
>
> 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury. [*Id.* at 121, quoting 6B Appleman, Insurance Law & Practice (Buckley ed), § 4317, pp 367-369 (block quote omitted); see also *Wakefield Leasing*, 213 Mich App at 128.]

B. APPLICATION

In applying the three-part test to the facts of this case,[4] we conclude that plaintiff does not have a duty to provide residual liability coverage for West's injuries.

Under the first prong, West's injuries did not arise "out of the inherent nature" of the insured vehicle (*i.e.*, its transportational or motoring function). See *McKenzie v Auto Club Ins Assn*, 458 Mich 214, 220; 580 NW2d 424 (1998); *Thornton v Allstate Ins Co*, 425 Mich 643, 661; 391 NW2d 320 (1986). Instead, West's injuries occurred as a result of the prolonged period of time that she remained inside the bus, *after* it was no longer transporting passengers or being used in a motoring fashion. Stated differently, it is apparent that the bus was no longer being used for a transportation-related purpose during the period of time that West was unable to exit the bus, and that all of her injuries and damages arose from the failure of Hearthstone's staff to (1) ensure that she left the bus and (2) account for her absence during the time that *she was unable to exit* the bus.

[4] It is significant to note that defendant Snell utilizes this same test in her brief on appeal.

Likewise, it is noteworthy that the underlying complaint filed by defendant Snell against Hearthstone did not assert liability based on the use of an automobile. See *Century Mut Ins Co*, 213 Mich App at 121; *Wakefield Leasing Corp*, 213 Mich App at 128 (both cases looking to the allegations in the underlying personal injury complaint). The underlying allegations of negligence and wrongful death only concerned the failure of Hearthstone staff to ensure that West was safely back inside the assisted living facility after returning from the Meijer trip. Because these allegations do not pertain to a transportational or motoring function of the insured vehicle, it is clear that West's injuries did not arise from the "inherent nature" of an automobile. They arose from the negligence of Hearthstone's staff. Thus, the first element of the three-part test does not support a finding of liability coverage in this case.

Under the second prong, the incident occurred within the "natural territorial limits of an automobile," as West was injured while she was inside the bus. *Century Mut Ins Co*, 213 Mich App at 121. However, this element also requires that the "actual use, loading, or unloading [of the vehicle] must not have terminated." *Id.* When West sustained her injuries—while she was trapped in the bus for several hours—the "actual use" of the bus had terminated. The facts, as alleged, indicate that the bus was driven to the rear of the facility and parked, which clearly demonstrates that the bus itself was no longer being used when West developed her injuries. Accordingly, the second prong of the test has not been met.[5]

Finally, no aspect or component of the bus itself produced West's injuries. Rather, it "merely contribute[d] to cause the condition which produce[d] the injury." *Id.* The injuries that West sustained were only incidental to her presence in the vehicle; she could have suffered from hypothermia, dehydration, and severe distress in any number of places. The bus was not moving, nor was West being loaded onto or unloaded off the bus. Accordingly, the bus was the "mere situs of [her] injury," which does not establish a causal connection that triggers liability coverage. *Id.*; see also *Bourne v Farmers Ins Exch*, 449 Mich 193, 198-200; 534 NW2d 491 (1995).

---

[5] Both parties frame their analysis of this issue in terms of whether West's injuries arose from a motor vehicle *accident* arising from the ownership, maintenance, or use of the bus. However, the application of MCL 500.3106 and related caselaw, which provide that coverage is not triggered for injuries arising from a parked vehicle, also supports the trial court's grant of summary disposition in this case. See MCL 500.3106(1). Although an exception to this general rule exists for injuries sustained by an individual while occupying a parked vehicle, MCL 500.3106(1)(c); *McKenzie*, 458 Mich at 215-217, an occupant of a parked vehicle still is required to demonstrate the requisite causation in order to receive coverage, see *McKenzie*, 458 Mich at 217 n 3 (restating the "three-step analysis for coverage regarding injuries relating to a parked motor vehicle," under which a claimant must show, *inter alia*, that "the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle," and "the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for." [Quotation marks and citation omitted.]). For the reasons stated *supra*, defendant Snell has failed to establish the requisite causation in this case.

In sum, West's injuries did not arise out of the use of the bus, see *Century Mut*, 213 Mich App at 117, 120, and they were not "foreseeably identified with the *normal* use, maintenance, and operation of the vehicle," *id*. at 120 (quotation marks and citations omitted; emphasis added). Rather, the causal connection asserted by defendant Snell is solely based on the fact that West's injuries would not have occurred *but for* the fact that she initially entered the bus for a transportation-related purpose. However, this transportation purpose ceased when the bus was parked behind the facility, and this but-for connection with the transportational purpose of the bus is insufficient to establish that West's injuries arose out of the *use* or *operation* of the bus. See *id*. at 120.

Accordingly, the trial court did not err in finding that plaintiff is not required to provide residual liability coverage under the circumstances of this case.

C. APPLICABILITY OF "SCHOOL BUS CASES"

We have considered the "school bus cases" cited by both parties on appeal and find that the trial court did not err in differentiating between these cases and others involving standard no-fault insurance policies. See *Pacific Employers Ins Co v Mich Mut Ins Co*, 452 Mich 218; 549 NW2d 872 (1996); *Indiana Ins Co v Auto-Owners Ins Co*, 260 Mich App 662; 680 NW2d 466 (2004). These cases recognized that there is a distinction between cases involving insurance policies for school buses and cases involving standard no-fault policies, given the nature and purpose of a school bus in assuring that children safely reach their predetermined stops. *Pacific Employers Ins Co*, 452 Mich at 225-227, 229; *Indiana Ins Co*, 260 Mich App at 676. We see no reason to extend the principles set forth in those cases to a situation involving a bus that transports residents of an assisted living facility when, as in the instant case, the policy language covering the bus generally follows the no-fault statute.

Further, it is apparent that the bus at issue in this case is distinct from a school bus, as the driver was not tasked with ensuring that the residents were properly disembarked at a particular stop along a route of multiple stops. The *unique* purpose of *school buses*, in ensuring that students are transported securely between predetermined bus stops, has been expressly recognized by this Court and the Michigan Supreme Court. See *Pac Employers Ins Co*, 452 Mich at 229 ("The purpose of transporting a child by a school bus is to assure that the child reaches the predetermined bus stop under the supervision of the school bus driver."); *Indiana Ins Co*, 260 Mich App at 680. That unique purpose was not served by the Hearthstone bus on which West sustained her injuries.

Finally, contrary to defendant Snell's claims, we discern no "misuse" of the bus by the Hearthstone bus driver in this case. West's injuries did not arise from any sort of incorrect or abusive use of the transportational or motoring function of the bus, which was to transport the residents to and from Meijer. Rather, her injuries arose due to the negligence of the Hearthstone staff after this transportational purpose had ceased and the bus was parked. Compare *Pacific Employers Ins*, 452 Mich at 226 ("A school bus driver is charged both with physically carrying passengers on the bus *and* with assuring that each child is delivered to a predetermined bus stop. When this driver failed to disembark the child at the correct location, she 'misused' the bus. The injuries that followed were foreseeably identifiable with the negligent decision to disembark the child at the wrong bus stop.").

Thus, we decline defendant Snell's invitation to find the principles in the "school bus cases" binding or instructive in this case.

IV. CONCLUSION

The trial court properly granted plaintiff's motion for summary disposition under MCR 2.116(C)(10). West's injuries did not arise out of the operation or use of a vehicle for purposes of the residual liability coverage provided by the insurance policy. As a result, plaintiff has no duty to defend or indemnify any insured in regard to the incident involving West and Hearthstone's negligence.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark T. Boonstra
/s/ Michael J. Riordan