STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF RICHARD EUGENE BRZAK, Plaintiff-Appellee,	UNPUBLISHED April 17, 2003
v	No. 236745 Gratiot Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	LC No. 00-006202-NI

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of $125,073.45, entered after a jury trial, in this automobile no-fault case. We affirm.

Plaintiff's decedent ("Brzak") died when he had an epileptic seizure while driving and crashed his pickup truck into a tree, throwing his body across the seat of the truck and pressing his head against the passenger door. The autopsy identified the cause of death as "positional asphyxia," meaning he had asphyxiated in his truck due to the position of his head, which blocked his airway. He otherwise sustained only minimal injuries from the collision. Although defendant presented experts to testify that Brzak could have died from "sudden unexplained death" (which can occur when the seizure triggers cardiac arrhythmia), and that positional asphyxia can occur in many situations, including when the epileptic turns over while sleeping and smothers against a pillow, the jury found his death arose "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle," as required by MCL 500.3105(1). After trial, the court awarded plaintiff no-fault benefits, penalty interest, pre-judgment interest, actual costs, and no-fault attorney fees.

Defendant first asserts that the trial court erred when it denied defendant's motions for directed verdict, judgment notwithstanding the verdict (JNOV), and new trial. We disagree.

We review the trial court's decisions on these motions de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002); *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). We consider all the evidence presented up to the time of the motion to determine whether a question of fact existed, viewing the evidence in the light most favorable to the defendant, granting the defendant every reasonable inference, and resolving any conflict in the evidence in the defendant's favor.

Kubczak v Chemical Bank & Trust Co, 456 Mich 653, 663; 575 NW2d 745 (1998) (directed verdict); *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998) (JNOV).

Michigan's no-fault act 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, subject to the provisions of this chapter." MCL 500.3105(1). The no-fault act is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 604; 648 NW2d 591 (2002). If the injured person's presence in the automobile is merely fortuitous, or there is no causal nexus between the injury and the ownership, maintenance, or use of the motor vehicle, then recovery is not available. *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986).

Defendant relies on *Denning v Farm Bureau Ins Group*, 130 Mich App 777; 344 NW2d 368 (1983), where the decedent died from inhaling fumes emanating from the toxic chemicals he was transporting. The *Denning* Court set forth a two-pronged test: "(a) Could the injury just as well have occurred elsewhere? If so, there is no recovery. (b) Was the act which immediately precipitated the injury identifiable with the normal use of a motor vehicle? If so, there is recovery." *Id*. at 786. However, in all of the cases examined and analyzed by *Denning*, *supra*, the vehicle was *not* the proximate cause of the injury.

In the present case, Brzak's death was apparently caused by his position in the truck. Had he been elsewhere when he had a seizure, he would not have been in the same position. Defendant's argument is akin to arguing that because a severe cut can occur anywhere, a person cannot recover who slices open a hand while exiting a motor vehicle after an accident. The agent causing the injury in this case was the truck and the accident. There was ample evidence supporting the jury's conclusion that Brzak's position, the cause of his death, was produced by the truck and arose out of his use of the truck as a motor vehicle.

Defendant next argues that the trial court's failure to give part of a requested special instruction requires reversal. Again, we disagree.

A trial court's decision whether to give a special jury instruction is reviewed for an abuse of discretion and it will not be reversed unless failure to do so would be inconsistent with substantial justice. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999); *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997).

Defendant requested the court give, in addition to the standard jury instruction SJI2d 35.02, a special instruction that read:

> In order to find that the death of Plaintiff's decedent arose out of his use of a motor vehicle as a motor vehicle, you must find that the causal connection between the decedent's injury and his use of a motor vehicle as a motor vehicle was more that [sic, than] incidental, fortuitous, or "but for." Involvement of the vehicle in decedent's injury should be directly related to its character as a motor vehicle. In other words, you must determine if the decedent's death was closely

> related to the transportational function of a motor vehicle. If you find that the decedent's injury could just as well have occurred elsewhere there is no recovery.

The court approved all of the instruction except the last sentence. It found the first part of the instruction "clarifies for the jury that there must be a causal connection between the injury resulting in the plaintiff's decedent's death, and the use of a motor vehicle as a motor vehicle in order for plaintiff to recover. The last sentence, however, it found was not "an accurate statement of the law." This conclusion is accurate. Defendant's instruction embodies the test set out by *Denning, supra* at 786. This test does not apply when the vehicle itself is the proximate cause of the injury, as here. Therefore, the last sentence of defendant's requested instruction was not an accurate statement of the law in this case, and the trial court did not abuse its discretion in failing to give that part of the special instruction to the jury.

Finally, defendant argues that the trial court clearly erred by awarding plaintiff attorney fees under MCL 500.3148(1). Specifically, defendant claims that there was a bona fide factual dispute regarding the cause of Brzak's injury so that the benefits were not overdue under the no-fault act. We disagree.

The decision to award or deny attorney fees is reviewed for an abuse of discretion. *Beach v State Farm Mut Auto Ins Co,* 216 Mich App 612, 628; 550 NW2d 580 (1996). Absent clear error, this Court will not reverse a trial court's finding regarding an unreasonable refusal or delay in paying benefits. *Attard v Citizens Ins Co of America,* 237 Mich App 311, 316-317; 602 NW2d 633 (1999).

MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

If the insurer's refusal or delay in payment is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, the refusal or delay will not be found unreasonable under MCL 500.3148(1). *Beach, supra* at 629. However, in such a situation, the insurer must overcome a rebuttable presumption of unreasonableness and justify its delay or refusal of benefits. *Id*.

In the present case, the trial court said, "[D]efendant always ignored the fact that Mr. Brzak was involved in a motor vehicle, that he was using a motor vehicle as a motor vehicle when this accident occurred," and thus found no need to construe the statute. The injury arose out of the use of a motor vehicle as a motor vehicle, and the simple fact that Brzak could have also died in his sleep was not relevant to the facts at hand. Defendant's insistence that there is no recovery because the death could have occurred elsewhere is not an accurate application of law.

Furthermore, the trial court's finding that there was no bona fide question regarding the cause of death was not clearly erroneous. The autopsy listed positional asphyxia as the cause of death, and only defendant's hired experts refuted the likelihood of the truth of that diagnosis. Clear error exists when a reviewing court is left with the definite and firm conviction on the entire record that a mistake was made. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). That cannot be said in this case.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell