8 STATE OF MICHIGAN

COURT OF APPEALS

JANE M. KEUSCH, Personal Representative of the Estate of DAVID J. KEUSCH, Deceased, Plaintiff-Appellee, v FARM BUREAU INSURANCE CO, Defendant-Appellant.	UNPUBLISHED August 30, 2011 No. 297642 Washtenaw Circuit Court LC No. 06-000639-NF

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

In this action for survivor's loss benefits[1] under of the no-fault insurance act,[2] defendant Farm Bureau Insurance Company appeals the trial court order entering a judgment for plaintiff Jane Keusch, personal representative of the estate of her husband, David Keusch (the decedent). We reverse.

I. FACTS

In early January 2005, the decedent was unloading a large window from a truck when "something popped out of place in [his] neck." The decedent immediately felt pain in his left shoulder and left arm. However, this was not decedent's first accidental injury. As a child, the decedent fell from a tree and broke his neck. And, as an adult, the decedent, a self-employed building contractor, ruptured a disc in his back during an accident at work in 1996. Because of these injuries, the decedent suffered from a history of chronic pain.

Dr. Richard Kustasz became the decedent's primary care physician in September 2000. During their first meeting, Dr. Kustasz concluded that the decedent had, among other things, chronic back and neck pain, anxiety, depression, and insomnia. Dr. Kustasz continued to treat

[1] MCL 500.3108.

[2] MCL 500.3101 *et seq.*

the decedent over the next several years, prescribing the decedent various medications, including, but not limited to, Vicodin, Norco,[3] Neurontin,[4] Trazadone,[5] Lidoderm,[6] and Flexeril.[7]

In April 2004, the decedent told Dr. Kustasz that his pain was so severe that he could hardly move. At the end of 2004, the decedent's back and neck pain were worse than in previous years. The range of motion of the decedent's neck was significantly restricted.

According to Dr. Kustasz, the decedent's neck and shoulder pain became even worse because of the window accident in January 2005. The decedent did not work after the window accident because of the pain. According to Keusch, the decedent complained about the unrelenting pain every day. Keusch also claimed that the decedent could not sleep at night and that he would often lie in a bathtub filled with hot water to relieve his pain.

On January 21, 2005, Dr. Kustasz substituted the decedent's Norco prescription with Percocet.[8] Even though Percocet was stronger than Norco, according to Dr. Kustasz, the Percocet did not work, and the decedent was "desperate." The decedent's neck and shoulder felt like they were "on fire." Therefore, on January 24, 2005, Dr. Kustasz prescribed the decedent a Duragesic[9] patch, also known as a fentanyl patch. However, Dr. Kustasz instructed the decedent

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[3] Vicodin and Norco are both brand names for the combination of hydrocodone and acetaminophen, which is used to relieve moderate to moderately severe pain. *Hydrocodone and Acetaminophen (Oral Route)* <http://www.mayoclinic.com/health/drug-information/DR603225> (accessed May 18, 2011).

[4] Neurontin is the brand name for gabapentin, which is used to relieve pain for certain conditions in the nervous system. *Gabapentin (Oral Route)* <http://www.mayoclinic.com/health/drug-information/DR600709> (accessed May 18, 2011).

[5] Trazodone is an antidepressant, which is used to relieve mental depression. *Trazodone (Oral Route)* <http://www.mayoclinic.com/health/drug-information/DR601375> (accessed April 18, 2011).

[6] Lidoderm is a brand name for lidocaine patches, which is a local anesthetic. *Lidocaine (Topical Application Route)* < http://www.mayoclinic.com/health/drug-information/DR602925 > (accessed May 18, 2011).

[7] Flexeril is a brand name for cyclobenzaprine, which is a muscle relaxant used to relieve muscular pain, stiffness, and discomfort. *Cyclobenzaprine (Oral Route)* <http://www.mayoclinic.com/health/drug-information/DR600491> (accessed May 18, 2011).

[8] Percocet is a brand name for the combination of oxycodone and acetaminophen, which is used to relieve moderate to moderately severe pain. *Oxycodone and Acetaminophen (Oral Route)* <http://www.mayoclinic.com/health/drug-information/DR603201> (accessed May 18, 2011).

[9] Duragesic is a brand name for fentanyl, which is a narcotic analgesic that acts on the central nervous system to relieve pain. The skin patch form of fentanyl is used to treat chronic pain. *Fentanyl (Transdermal Route)* <http://www.mayoclinic.com/health/drug-information/DR601815> (accessed May 18, 2011).

that he could not take Percocet while using the fentanyl patches. Dr. Kustasz later learned that the decedent was using both Percocet and the fentanyl patches against his medical advice. Keusch testified that the decedent smoked marijuana, and she admitted that she had caught him using cocaine.

In February 2005, the decedent submitted a claim to Farm Bureau for no-fault insurance benefits with respect to the window accident.

On the morning of March 17, 2005, Jane Keusch purchased a box of five fentanyl patches, returned home, and gave the box to the decedent. The decedent started to run the bathtub water. Keusch said goodbye to the decedent and went to the gym. Keusch returned home one hour and twenty minutes later. Keusch found the decedent lying dead on the bed, wearing a fentanyl patch. The decedent was cold to the touch. There was water in the bathtub. The decedent's hair was dry. There were only three patches remaining in the box of fentanyl patches.

Dr. James Banner, the pathologist who performed the decedent's autopsy, averred that the decedent's body contained, among other things, cocaine and fentanyl at the time of his death. Dr. Banner concluded that the cause of the decedent's death was a mixed drug overdose because he could not decipher which particular drug (cocaine or fentanyl) killed the decedent. Dr. Banner found that the decedent had used cocaine recently before his death. Dr. Banner opined that "the cocaine and the Fentanyl [were] the two agents . . . that [were] most suspect for being responsible" for the decedent's death. Dr. Banner found that the fentanyl in the decedent's system was within the "lethal range" but opined that whether fentanyl is lethal to a particular person depends on the person and how long the person has been using fentanyl. Dr. Banner stated that he does not speak of cocaine in terms of a "lethal range" because cocaine is a "very erratic" drug that can cause adverse reactions at nonlethal levels and mix poorly with other drugs. Dr. Banner also opined that the cocaine found in the decedent "could be sufficient" to cause the decedent's death even if the decedent had not used fentanyl.

According to Dr. Kustasz, he learned that the decedent was using "street drugs" when he read the decedent's autopsy report. Dr. Kustasz opined that the drugs he prescribed to the decedent would not have caused the decedent's death if the decedent had taken them as prescribed. However, Dr. Kustasz also opined that the window accident was the "triggering event" for the stronger medication that he prescribed to the decedent, the decedent's desire for medication, and the decedent's self medicating.

On March 24, 2005, Farm Bureau was notified of the decedent's death. In May 2005, Farm Bureau decided to provide coverage to Keusch for medical and wage loss. According to claims adjuster Christie Ann Russell, Farm Bureau paid medical benefits to Keusch. In December 2005, Farm Bureau closed the decedent's claim because it did not receive information from Keusch with respect to wage loss and replacement services.

Keusch then filed a complaint against Farm Bureau, seeking survivor's benefits and alleging breach of contract for Farm Bureau's refusal to pay personal protection insurance benefits. Keusch's complaint alleged that, if not for the window accident, the decedent would not have consumed drugs and would not have died.

Farm Bureau moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that there was no genuine issue of material fact that the decedent's death was the product of the decedent's voluntary use of controlled substances in excessive quantities.[10] Thus, Farm Bureau argued that the decedent's death was not accidental. Farm Bureau asserted that Keusch's cause of action was barred because the decedent's death was proximately caused by his own wrongful conduct—his use of illegal drugs.

The trial court denied Farm Bureau's motion. The trial court opined that "there [were] disputed issues of fact regarding whether the injuries and ultimate death were the product of [the decedent's] voluntary or intentional ingestion of controlled substances . . . and whether they were . . . closely associated from a proximate cause standpoint to the automobile accident."

In October 2009, the trial court held a bench trial. Keusch, Russell, and medical toxicologist Dr. Bryan Judge were the only witnesses at trial. The trial court received the depositions of Dr. Kustasz and Dr. Banner.

Dr. Judge testified that the decedent had numerous toxins in his body at the time of his death, including benzoylecgonine (metabolite of cocaine) and fentanyl. Dr. Judge opined that the decedent had recently used cocaine before his death. Although he could not conclude with certainty which drugs killed the decedent, Dr. Judge opined that the decedent died of a substance overdose. Dr. Judge testified that the amount of the cocaine found in the decedent was enough to cause the decedent's death, noting that cocaine can cause sudden and unexplained death. Dr. Judge also testified that while cocaine will cause euphoria in the user, it is not a pain killer. Therefore, he opined that if the decedent died from the cocaine, then his death would be completely unrelated to the window accident. Further, although Dr. Judge testified that he could not rule out a fentanyl overdose as the cause of death, he opined that the decedent's fentanyl level was not within the "toxic range." Dr. Judge opined that he did not believe that the decedent died of a fentanyl overdose because he would expect the decedent to have a higher level of fentanyl in his bloodstream. Also, there was no evidence of pulmonary edema associated with the decedent's death to support a finding of a fentanyl overdose. Dr. Judge concluded to a reasonable degree of medical certainty that the decedent would have died "with or without the Fentanyl."

In January 2010, the trial court issued an opinion and order, granting judgment for Keusch. With respect to the causation requirement in this case, the trial court quoted and relied upon Chief Justice KELLY's concurring opinion in *Scott v State Farm Mut Auto Ins Co*,[11] stating that "evidence establishing almost any causal connection will suffice when it is more than incidental, fortuitous or but for." The trial court concluded that the required causal relationship between the decedent's accident and death had been established by Dr. Kustasz's and Dr. Banner's testimony. Specifically, the trial court opined: "Although the Court finds not much

[10] Farm Bureau also filed two other motions for summary disposition; however, those motions are not relevant to the issues that we address in this opinion.

[11] *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032, 1035; 766 NW2d 273 (2009).

more than 'almost any connection or relationship,' under applicable law, the submitted proofs suffice. The Court finds no merit in [Farm Bureau's] remaining argument concerning 'wrongful conduct.'"

In April 2010, the trial court entered a judgment for Keusch. Farm Bureau now appeals the trial court's judgment.

II. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Farm Bureau claims that the trial court erred when it denied its motion for summary disposition. Where, as here, the trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the court looked beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)," which "tests whether there is factual support for a claim."[12]

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial.[13] The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.[14] The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.[15] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[16] "'[T]he court is not permitted to assess credibility, or to determine facts on a motion for summary judgment.'"[17] We review de novo a trial court's summary disposition ruling.[18]

B. WRONGFUL-CONDUCT RULE

Farm Bureau argues that it was entitled to summary disposition under the wrongful-conduct rule because the decedent used cocaine shortly before his death. Farm Bureau asserts that the decedent would have died from a drug overdose even if the automobile accident had not

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[12] *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[13] *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006).

[14] MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

[15] *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

[16] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[17] *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 265; 632 NW2d 126 (2001), quoting *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[18] *Maiden*, 461 Mich at 118.

occurred. Farm Bureau also argues that the decedent's drug overdose was a superseding cause of his death, preventing Keusch from establishing causation as a matter of law.

1. LEGAL STANDARDS

Under MCL 500.3108(1), payable personal protection insurance benefits include survivor's benefits paid to dependants of a beneficiary. A survivor's loss includes:

> a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of the deceased's death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death and expenses, not exceeding $20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if the deceased had not suffered the injury causing death.[19]

As MCL 500.3108(1) indicates, "survivors may recover only what they '*would have received* for support . . . from the deceased *if the deceased had not suffered the accidental bodily injury causing death*.'"[20]

A plaintiff looking to recover personal protection insurance benefits must meet the causation requirements in MCL 500.3105(1).[21] Specifically, a plaintiff must show an "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle . . . ."[22] An "'automobile need not be the proximate cause of the injury.'"[23] However, a plaintiff must show that the relationship between the use of the vehicle and the injury must be "'more than incidental, fortuitous, or "but for,"'"[24]

Under the wrongful-conduct rule, "'[a] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or

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[19] MCL 500.3108(1).

[20] *Cole v Detroit Auto Inter-Ins Exch*, 137 Mich App 603, 608; 357 NW2d 898 (1984), quoting MCL 500.3108(1) (emphasis added by *Cole*).

[21] *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 530-531; 697 NW2d 895 (2005).

[22] *Id.* at 531, quoting MCL 500.3105(1) (emphasis omitted).

[23] *Thornton v Allstate Ins Co*, 425 Mich 643, 650; 391 NW2d 320 (1986), quoting *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975).

[24] *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 32; 528 NW2d 681 (1995), quoting *Thornton*, 425 Mich at 659.

transaction to which he is a party.'"[25] "[A] sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages."[26] That is, the plaintiff's illegal act must have "'a causative connection with the particular transaction out of which the alleged cause of action asserted arose.'"[27] Specifically, there must be "a showing that the plaintiff's illegal conduct was a proximate cause of the plaintiff's injuries[.]"[28]

2. APPLYING THE STANDARDS

We find that, at the time the trial court decided the summary disposition motion, there was a genuine issue of material fact with respect to causation (whether the decedent's death arose out of the automobile accident), which prevented the trial court from concluding as a matter of law (1) that the wrongful-conduct rule precluded Keusch's claim and (2) that the decedent's drug overdose was a superseding cause of his death.

In ruling on the motion for summary disposition, the trial court considered the testimony of two medical experts with respect to the cause of the decedent's death. Dr. Banner concluded that the cause of the decedent's death was a mixed drug overdose because he could not conclude which drug killed the decedent. But he also stated that "the cocaine and the Fentanyl [were] the two agents . . . that [were] most suspect for being responsible" for the decedent's death. Dr. Banner opined that the decedent's fentanyl level was within the lethal range at the time of his death. But Dr. Banner also opined that the decedent's use of cocaine shortly before his death could have caused the decedent's death by itself due to its erratic nature and tendency to mix poorly with other drugs. And Dr. Kustasz opined that the window accident was the "triggering event" for the stronger medication that he prescribed to the decedent, the decedent's desire for medication, and the decedent's self medicating.

Viewing this testimony in a light most favorable to Keusch, reasonable minds could differ regarding whether the cocaine usage was a proximate cause of the decedent's death. The decedent's fentanyl level was within lethal range, and if the fentanyl alone caused the decedent's death, the wrongful-conduct rule would not preclude Keusch's claim because she would not be relying on the decedent's illegal use of cocaine to establish her claim.[29] Moreover, in such a case, the decedent arguably would not have died had the automobile accident not occurred: there

[25] *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995), quoting 1A CJS, Actions, § 29, p 386. See also *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 88 n 10; 697 NW2d 558 (2005) (stating that a personal representative of a deceased party "stands in the latter's shoes" when applying the wrongful-conduct rule).

[26] *Orzel*, 449 Mich at 564.

[27] *Id.*, quoting 1A CJS, Actions, § 30, pp 388-389.

[28] *Id.* at 565.

[29] *Id.* at 558; MCL 333.7404(1); MCL 333.7214(a)(iv).

would be no superseding event (cocaine use) preventing Keusch from recovering survivor's benefits.[30]

Accordingly, we conclude that the trial court did not err when it denied Farm Bureau's motion for summary disposition.

III. BENCH TRIAL RULING

A. STANDARD OF REVIEW

Farm Bureau argues that the trial court erred when it relied on Chief Justice KELLY's concurring opinion in *Scott*,[31] to find that Keusch established causation. Farm Bureau argues that the trial court would have found that Keusch failed to establish causation had it applied the proper causation test. We review a trial court's findings of fact in a bench trial for clear error and the trial court's conclusions of law de novo.[32]

B. ANALYSIS

We reject Farm Bureau's claim that the trial court erred when it relied on Chief Justice KELLY's concurring opinion. In that opinion, Chief Justice KELLY stated, "evidence establishing almost any causal connection will suffice [to show the causal nexus required in a no-fault case] when it is more than merely fortuitous, incidental, or but for."[33] While we acknowledge that a concurring opinion is not binding authority,[34] the portion of the opinion upon which the trial court relied correctly stated the legal test for causation applicable in the present case. Case law establishes that "the relationship between the use of the vehicle as a motor vehicle and the injury must be 'more than incidental, fortuitous, or "but for[.]"'"[35] Thus, the trial court decided the issue of causation under the appropriate legal standard—the "more than incidental, fortuitous, or but for" standard.

However, we agree with Farm Bureau that Keusch failed to establish causation at trial. The evidence presented at trial did not provide a sufficient basis for the trial court to conclude

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[30] *Cole*, 137 Mich App at 608; see also *MacDonald v State Farm Mut Ins Co*, 419 Mich 146; 350 NW2d 233 (1984) (disabling heart attack unrelated to earlier disabling automobile accident found to be a superseding cause precluding work-loss benefits where the plaintiff would not have earned wages after heart attack even if automobile accident had not occurred).

[31] *Scott*, 483 Mich 1032.

[32] *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010).

[33] *Scott*, 483 Mich at 1035.

[34] See *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 248-249; 570 NW2d 304 (1997).

[35] *Turner*, 448 Mich at 32, quoting *Thornton*, 425 Mich at 659.

that the fentanyl was more than merely fortuitous, incidental, or but for cause of the decedent's death. The evidence at trial indicated that the decedent's death could have arisen from one of three causes: (1) the fentanyl; (2) the cocaine; or (3) a combination of fentanyl and cocaine.

Dr. Banner opined in his deposition that the decedent's fentanyl level was within the lethal range at the time of his death, but he opined that whether fentanyl is lethal to a particular person depends on the person and how long the person has been using fentanyl. Dr. Banner also stated that cocaine is a "very erratic" drug that can cause adverse reactions at nonlethal levels and mix poorly with other drugs. Dr. Banner opined that the cocaine found in the decedent "could be sufficient" to cause the decedent's death even if the decedent had not used fentanyl. Moreover, Dr. Judge opined that the decedent's fentanyl level was not within the "toxic range" and accounted for the specific fentanyl level as being caused by redistribution after death. Although he could not rule it out, Dr. Judge did not believe that the decedent died of a fentanyl overdose. Dr. Judge testified that some of the common markers of opioid-related deaths were not present in the decedent: there was no evidence of pulmonary edema or respiratory depression. Dr. Judge concluded to a reasonable degree of medical certainty that the decedent would have died "with or without the Fentanyl." Similarly, Dr. Kustasz opined that the drugs he prescribed to the decedent would not have caused his death if he had taken them as prescribed.

The requirement that the fentanyl was a cause of the decedent's death was a threshold requirement for Keusch to establish causation on the particular facts of this case. And such a finding on this record is speculative at best. The record in this case was insufficient for the trial court to conclude that the decedent's death arose out of the automobile accident. Accordingly, we conclude that the trial court clearly erred in finding that the record established the required causal relationship between the decedent's accident and his death.

Because our resolution of this issue is dispositive, we need not address Farm Bureau's remaining arguments on appeal.

We reverse.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly