STATE OF MICHIGAN

COURT OF APPEALS

GLENN HEPNER, Guardian and Conservator of the Estate of HENRY HEPNER,

Plaintiff-Appellee,

v

AETNA CASUALTY & SURETY CO.,

Defendant-Appellant.

UNPUBLISHED
January 7, 1997

No. 189083

Macomb Circuit Court
LC No. 92-000513

Before: Fitzgerald, P.J., and Holbrook, Jr., and E.R. Post,* JJ.

PER CURIAM.

Defendant appeals as of right from the judgment entered on a jury verdict for plaintiff in this action for breach of insurance contract under the Michigan No-Fault Insurance Act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq*. On appeal, defendant argues that the trial court erred in denying its motions for summary disposition pursuant to MCR 2.116(C)(10), judgment notwithstanding the verdict, and a new trial. We affirm.

On March 3, 1991, Henry Hepner arrived at the Assembly Line Lounge in Shelby Township at approximately 12:00 p.m., had one drink, and then left. Later that afternoon, Hepner returned to the bar for another drink, consumed it, and left an estimated five minutes later. At approximately 3:00 p.m., the bar owner and others found Hepner unconscious in the parking lot lying on the ground next to the driver's side door of his car, which was open. Hepner was lying partially under his vehicle. Hepner's keys were found lying next to his body. Hepner incurred a closed head injury and a skull fracture from his accident in the parking lot, which rendered him incapacitated.

On February 4, 1992, plaintiff filed this action against defendant, claiming that it failed to honor plaintiff's claim for payment under Hepner's no-fault automobile insurance policy. On July 8, 1994, the jury found that Hepner's injuries arose while he was occupying, entering into, or alighting from his car.

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

Thus, Hepner was entitled to no-fault benefits pursuant to MCL 500.3106(1)(c); MSA 24.13106(1)(c).

On appeal, defendant first advances that the trial court erred in denying its MCR 2.116(C)(10) motion for summary disposition because plaintiff failed to produce evidence to establish a triable issue of fact regarding whether Hepner's injuries arose in the course of occupying, entering into, or alighting from his vehicle. We disagree. Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). When deciding a motion for summary disposition, a court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). This Court reviews de novo a decision regarding a motion for summary disposition pursuant to MCR 2.116(C)(10). *Jackhill, supra*.

The no-fault insurance act provides that "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." MCL 500.3105(1); MSA 24.13105(1); *Gordon v Allstate Ins Co*, 197 Mich App 609, 611; 496 NW2d 357 (1992). Generally, injuries sustained from parked motor vehicles are not compensable under the no-fault act. *Id.* In order to recover no-fault insurance benefits for injuries sustained in connection with a parked vehicle, a party's injuries must fall under one of the categories delineated in § 3106 of the no-fault insurance act, which 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(1)(c); MSA 24.13106(1)(c).]

As a general rule, an injured party is not entitled to benefits under § 3106(1)(c) of the no-fault act where evidence shows that he was merely preparing to enter his vehicle. *Hunt v Citizens Ins Co*, 183 Mich App 660, 664; 455 NW2d 384 (1990); see also *King v Aetna Casualty & Surety Co*, 118 Mich App 648, 651; 325 NW2d 528 (1982). Instead, evidence must show that the claimant was injured while actually in the process of entering into his automobile. *Hunt*, *supra*; see also *Teman v Transamerica Ins Co of Michigan*, 123 Mich App 262, 265; 333 NW2d 244 (1983).

Upon reviewing the evidence and granting plaintiff the benefit of any reasonable doubt, we find that the trial court's decision to deny defendant's MCR 2.116(C)(10) motion for summary disposition was correct because the circumstantial evidence submitted by plaintiff was sufficient to establish the

existence of a triable issue regarding whether Hepner was injured in the process of entering his car. Hepner's body was discovered lying on the ground between his car door and his car. Furthermore, he was found lying partially underneath his car. The driver's side door was found open and Hepner's keys were discovered lying next to him in the snow. Evidence also showed that the parking lot of the Assembly Line Lounge was icy on the day Hepner was injured. Based on this evidence, reasonable minds could conclude that Hepner was injured during the process of entering his car when he was leaving the bar, perhaps by slipping on ice. While it might be possible to extrapolate other causes for Hepner's injuries from the evidence, plaintiff does not have the burden of rebutting every possible theory that the evidence could support. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). It is sufficient that, giving plaintiff the benefit of any reasonable doubt, evidence submitted supported the conclusion that a record might be developed upon which reasonable minds could differ concerning the issue of the cause of Hepner's injuries.

Defendant further argues that the trial court erred in denying its motion for summary disposition because plaintiff ultimately failed to plead or submit evidence to show that Hepner's injuries were causally connected to the use, maintenance, or ownership of his car. See MCL 500.3105(1); MSA 24.13105(1). It is not surprising that defendant would advance this argument, because our past cases have required no-fault claimants desiring compensation for injuries pursuant to § 3106(1)(a)-(c) of the no-fault act to make a dual showing (1) that their injuries fit the parked car exceptions as provided in §3106, and (2) that their injuries were causally connected to the ownership, operation, maintenance, or use of a motor vehicle, as required by §3105(1) of the no-fault act. See *Teman, supra* at 265-266; *King, supra* at 651-652; *Block v Citizens Ins Co of America*, 111 Mich App 106, 109; 314 NW2d 536 (1981). However, this Court has since stated:

> As a threshold matter, we must dispel the notion asserted by defendant that plaintiff must satisfy the provisions of both [§ 3105(1) and § 3106 of the no-fault act] in order to be entitled to benefits . . . . In *Winter v Automobile Club of Michigan*, 433 Mich 446; 446 NW2d 132 (1989), our Supreme Court stated that it is unnecessary to make separate determinations whether §§ 3105(1) and 3106 are fulfilled. *Id.*, p 458, n 10 (overruling the conclusion that the Court previously made requiring satisfaction of both sections as a prerequisite to recovery under § 3106). Thus, where an injury arises from the use of a parked vehicle, if the circumstances under which the accident occurred are such that they implicate one of the enumerated exceptions to the parked vehicle exclusion, recovery may be had without consideration of whether the vehicle was being used "as a motor vehicle" under § 3105(1). [*Gordon, supra* at 612.]

Thus, defendant's argument regarding causation between the use of Hepner's automobile and Hepner's injuries is without merit. Accordingly, we affirm the trial court's order denying defendant's MCR 2.116(C)(10) motion for summary disposition.

Defendant next argues that the trial court abused its discretion in denying its motion for judgment notwithstanding the verdict, or, in the alternative, a new trial. We disagree. Judgment notwithstanding

the verdict should be granted only when there is insufficient evidence to create an issue for the jury. *Wilson v General Motors Corp*, 183 Mich App 21, 36; 454 NW2d 405 (1990). In reviewing a trial court's failure to grant a defendant's motion for judgment notwithstanding the verdict, this Court examines the testimony and all legitimate inferences that may be drawn in the light most favorable to the plaintiff. If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 639; 540 NW2d 777 (1995). The trial court's decision to grant or deny judgment NOV will not be reversed on appeal unless there was a clear abuse of discretion. *Michigan Microtech, Inc v Federated Publications, Inc*, 187 Mich App 178, 186-187; 466 NW2d 717 (1991).

Defendant also moved for a new trial on the basis that the jury's verdict was against the great weight of the evidence. See MCR 2.611(A)(1)(e). A verdict may be overturned on appeal only when it was manifestly against the clear weight of the evidence, and this Court will accord substantial deference to the trial court's determination that a verdict was not against the great weight of the evidence. *Wischmeyer v Schanz*, 449 Mich 469; 536 NW2d 760 (1995); *Arrington v Detroit Osteopathic Hospital*, 196 Mich App 544, 560; 493 NW2d 492 (1992). The evidence in this case amply supported plaintiff's theory that Hepner was in the process of entering his car to leave the bar when the accident occurred, possibly as a result of his slipping on ice as he attempted to take his seat behind the wheel. Although one explanation that may be consistent with the circumstantial evidence is that Hepner opened his car door after his accident, the evidence showed that Hepner was incapacitated as a result of his injuries, thus making it unlikely that he opened the door after falling. We note that some witnesses could not recall whether Hepner's car door was open. However, since issues involving credibility and circumstantial evidence were raised at trial, the jury was properly given the task of deciding what weight to give witness testimony. Accordingly, we conclude that the jury's verdict was not against the great weight of the evidence and that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Edward R. Post