STATE OF MICHIGAN

COURT OF APPEALS

CAROLYN HOUSE,

Plaintiff/Counter-Defendant-Appellant,

v

FARM BUREAU MUTUAL INSURANCE COMPANY,

Defendant/Counter-Plaintiff-Appellee,

and

CITY OF BATTLE CREEK,

Defendant-Appellee.

UNPUBLISHED
February 5, 2013

No. 301152
Calhoun Circuit Court
LC No. 2008-003295-NF

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's order granting summary disposition for the city of Battle Creek based on governmental immunity. Plaintiff also challenges the trial court's order granting Farm Bureau Mutual Insurance Company's motion in limine to exclude claims for expenses incurred after plaintiff filed her complaint. Further, plaintiff challenges the trial court's order denying plaintiff's motion for a mistrial based on juror misconduct. Finally, plaintiff challenges the trial court's order denying partial judgment notwithstanding the verdict (JNOV) for an ambulance-bill expense. We affirm the trial court's orders.

This case arises from an accident that occurred when plaintiff's vehicle struck a John Deere 710D front-end loader owned by the city of Battle Creek and operated by a city employee. Following the accident, plaintiff sought no-fault personal protection insurance (PIP) benefits from her insurer, Farm Bureau, which denied plaintiff's claim on the basis that her injuries were unrelated to the accident. Plaintiff subsequently brought this action, asserting a claim for negligence against the city of Battle Creek under the motor-vehicle exception to governmental immunity, MCL 691.1405, and seeking recovery of PIP benefits from Farm Bureau.

The trial court granted the city's motion for summary disposition under MCR 2.116(C)(7), agreeing that the John Deere 710D was not a motor vehicle for purposes of the motor-vehicle exception to governmental immunity. The case proceeded to trial against Farm Bureau. Before trial, the trial court granted Farm Bureau's motion in limine to preclude plaintiff from presenting evidence of any claims or expenses arising after the date that plaintiff filed her complaint. Both during and after trial, plaintiff moved for a mistrial, asserting that two jurors had conducted surveillance of plaintiff and their conduct denied plaintiff a fair trial. However, the trial court denied these motions. The jury returned a verdict of no cause of action, finding that plaintiff did not sustain an accidental bodily injury in the accident. Subsequently, plaintiff filed a motion for partial JNOV with respect to an ambulance expense related to her transportation to the hospital after the accident. The trial court also denied this motion, and this appeal followed.

First, plaintiff argues that the trial court erred in determining that the city was entitled to summary disposition under MCR 2.116(C)(7) because the John Deere 710D was not a motor vehicle for purposes of the motor-vehicle exception to governmental immunity. We disagree.

"An order granting summary disposition under MCR 2.116(C)(7) is reviewed de novo on appeal." *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003). If the parties provide affidavits, depositions, and admissions, we must review this documentary evidence to determine whether the nonmoving party proved that there is an exception to governmental immunity. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994), reh den 448 Mich 1202 (1995). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen*, 256 Mich App at 354. Questions of statutory interpretation are also reviewed de novo. *Stanton v City of Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002).

"The governmental tort liability act, MCL 691.1401 *et seq*., provides immunity from tort liability to governmental agencies engaged in a governmental function." *Stanton*, 466 Mich at 614-615. However, as *Stanton* noted, governmental immunity is subject to five narrowly drawn statutory exceptions, including the motor-vehicle exception, MCL 691.1405, which provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in [MCL 257.1 to 257.923].

"[I]t is a basic principle of our state's jurisprudence that the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and that the statutory exceptions are to be narrowly construed." *Stanton*, 466 Mich at 618.

At issue in this case is whether the John Deere 710D is a "motor vehicle" within the meaning of MCL 691.1405. In *Stanton*, our Supreme Court observed that the statute does not define "motor vehicle." *Stanton*, 466 Mich at 616. The Court explained that because statutory exceptions to governmental immunity must be narrowly construed, a court must apply a narrow definition to the term "motor vehicle." *Id*. at 618. The definition of "motor vehicle" employed by our Supreme Court in *Stanton* is "'an automobile, truck, bus, or similar motor-driven

conveyance.'" *Id*. at 617-618, quoting *Random House Webster's College Dictionary* (2001). In *Stanton*, the Supreme Court determined that "[a] forklift—which is a piece of industrial construction *equipment*—is not similar to an automobile, truck, or bus" and concluded that "the motor vehicle exception should not be construed to remove the broad veil of governmental immunity for the negligent operation of a forklift." *Id*. at 618 (emphasis in original).

In *Regan v Washtenaw Co Bd of Co Rd Comm'rs* (*On Remand*), 257 Mich App 39, 41-42, 47; 667 NW2d 57 (2003), this Court, applying the *Stanton* definition of "motor vehicle," concluded that a broom tractor and a tractor mower were motor vehicles under MCL 691.1405. This Court explained that "[b]oth vehicles are clearly motor-driven conveyances, in that they are motorized and carry or transport operators over the road, or alongside the road, while the operators are performing governmental duties." *Id*. at 47. This Court further explained that "the broom tractor and tractor mower are comparable to an automobile, bus, or truck" because they were driven and intended to be operated on the roadway.[1] *Id.* at 48. Thus, they were "invariably connected to the roadways." *Id*. This Court differentiated the forklift in *Stanton* because there was "no similar connection or relationship between the road and a forklift." *Id*. This Court stated that "[f]or purposes of [MCL 691.1405], a tractor owned and operated by a governmental agency being negligently driven on the roadway or alongside the roadway is no different from a utility truck owned and operated by the government being driven in a similar manner on or alongside the road." *Id*.

Adhering to the mandate that courts must narrowly construe statutory exceptions to governmental immunity and applying the narrow definition of the term "motor vehicle" as set out in *Stanton*, the submitted evidence in this case indicates that the John Deere 710D is not "an automobile, truck, bus, or similar motor-driven conveyance." Unlike the broom tractor and tractor mower at issue in *Regan*, the John Deere 710D is not "invariably connected" to the roadway. The John Deere 710D in this case is more like the forklift in *Stanton*, which as this Court observed in *Regan*, had no similar connection or relationship to the road. Although the John Deere 710D can be driven on the road and instructions exist concerning how to do so, it is not intended to be operated on the road, as the broom tractor and tractor mower were. The John Deere 710D is a backhoe to be used for excavation, which happens to be operable on the road. However, its main purpose is to excavate the ground. It is not intended for a purpose associated with a road, such as brushing loose dirt and gravel off the road or mowing grass along the edge of the road, like the broom tractor and tractor mower. Treating the John Deere 710D as a "motor vehicle" will not serve the purpose of MCL 691.1405 to make roadways safe for travel, nor will it comport with the narrow definition of the term "motor vehicle." *Stanton*, 466 Mich at 618;

[1] "The broom tractor is a tractor mounted with a broom designed to brush loose dirt and gravel off the road. The operator testified at his deposition that the broom tractor is driven on the pavement, and on the day of the incident, his job was to 'sweep the gravel off the road.'" *Regan*, 257 Mich App at 48, n 9. "The mower is attached to the side of the tractor." *Id.* at 48, n 10. "The operator of the tractor mower stated in his deposition that at the time of the incident giving rise to the lawsuit, he was 'driving down the paved shoulder of the road.'" *Id.* at 48, n 11.

Regan, 257 Mich App at 48-49. Accordingly, the trial court did not err in granting the city's motion for summary disposition under MCR 2.116(C)(7).

Second, plaintiff argues that the trial court erred in granting Farm Bureau's motion in limine to exclude claims for expenses incurred after the date plaintiff filed her complaint. We find that appellate relief is not warranted on this claim, because whether the trial court erred in granting Farm Bureau's motion in limine was harmless. The excluded evidence was relevant only to the extent of plaintiff's damages. The jury determined that plaintiff's injuries did not arise out of the motor-vehicle accident and, therefore, never reached the issue of damages. Thus, the excluded evidence could not have affected the question settled by the jury's verdict, and it would be "mere speculative reasoning" for this Court to assume that it would have. *Mazzolini v Co of Kalamazoo*, 228 Mich 59, 63; 199 NW 648 (1924). Under these circumstances, any error in excluding the evidence of post-complaint damages was harmless. *Id.* (an error is harmless if it relates to a subject that was never reached by the jury); see also MCR 2.613(A) ("an error in the . . . exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice"). Accordingly, this issue does not warrant appellate relief.

Third, plaintiff argues that the trial court abused its discretion in denying her motions for a mistrial based on juror misconduct. We disagree. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). "A mistrial should be granted only when the error prejudices one of the parties to the extent that the fundamental goals of accuracy and fairness are threatened." *In re Flury Estate*, 249 Mich App 222, 229; 641 NW2d 863 (2002).

"A person sitting on a jury panel is presumed to be qualified and competent to serve, and the burden is on the challenging party to make out a prima facie case to the contrary." *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 64; 454 NW2d 188 (1990). "A moving party must present actual proof of prejudice on the part of that juror . . . ." *Id.*

Plaintiff asserts that two jurors committed misconduct by placing her under surveillance during a lunch break. The trial court investigated this claim by questioning the two jurors on the second day of trial about their observations of plaintiff during the lunch break on the previous day. The record supports the trial court's finding that there was no evidence that the jurors were "stalking" plaintiff. The record indicates that their observations of plaintiff were serendipitous and occurred in the course of the trial participants—including the jurors and plaintiff—innocuously leaving the courthouse for lunch. The trial court appropriately excused one juror after it became apparent that he had formed opinions about the case based on his observations of plaintiff outside the courthouse, and appropriately determined that it was not necessary to excuse the other juror who did not similarly indicate or suggest that he had reached any conclusions or formed any opinions with respect to the case based on his brief observation of plaintiff in the courthouse. Because the other juror testified that he did not share the same observations and opinions as the excused juror, we fail to see how there was actual proof of prejudice on the part of that juror.

Plaintiff also asserts that the excused juror improperly spoke to three other jurors in the parking lot after being dismissed from the case. However, aside from mere allegations, there was no evidence that the excused juror had discussed the case with the other jurors. In fact, when questioned on another matter, one juror attested that the excused juror never discussed the case with him. Further, plaintiff asserts that the trial court improperly refused to voir dire the three jurors with whom the excused juror allegedly spoke. Contrary to what plaintiff asserts on appeal, the record does not disclose that plaintiff ever asked the court to voir dire those other jurors. Plaintiff only requested that the court voir dire her attorney's assistant, who allegedly observed the excused juror talking to the other jurors. In examining plaintiff's mere allegations and the assistant's alleged observations, there was no basis to conclude that the excused juror had discussed the case or communicated his opinions about the case to the other jurors. The record does not reflect an error that prejudiced plaintiff to the extent that the fundamental goals of accuracy and fairness were threatened. *In re Flury Estate*, 249 Mich App at 229. Therefore, the trial court's decision not to grant a mistrial falls within the range of principled outcomes and does not constitute an abuse of discretion resulting in a miscarriage of justice.

Lastly, plaintiff argues that the trial court erred in denying her motion for JNOV with respect to the ambulance bill. We disagree. We review de novo a trial court's decision regarding a motion for JNOV. *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005). "In reviewing the decision on a motion for JNOV, this Court views the testimony and all legitimate inferences drawn from the testimony in the light most favorable to the nonmoving party." *Id*. at 682.

An insurer is liable under the no-fault act "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). Thus, there are two threshold causation requirements that must be established for an insured to receive PIP benefits. *Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012). First, there must be an accidental bodily injury, and second, the injury incurred must be caused by the insured's use of a motor vehicle. *Griffith ex rel Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005). "[A]n insurer is liable only if benefits are 'for accidental bodily injury . . . .'" *Id.* "Accordingly, a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident." *Id.*

Whether an alleged injury is an accidental bodily injury within the meaning of MCL 500.3105 is a factual question to be resolved by the jury. *McKim v Home Ins Co*, 133 Mich App 694, 699; 349 NW2d 533 (1984). At trial, plaintiff and Farm Bureau presented conflicting evidence regarding whether plaintiff suffered injuries as a result of the accident. Plaintiff argues that "[t]here was no evidence presented to the jury from which it could conclude that this ambulance service was not reasonably necessary for [her] care and treatment arising out of her motor vehicle accident." As the trial court observed, however, "the fundamental issue upon which the jury was unanimous is that [plaintiff] was not injured in the course of this accident" and "[t]he fact that she was taken by ambulance doesn't necessarily assume that she was injured." Plaintiff must have sustained an accidental bodily injury, which is a jury determination, for Farm Bureau to be liable for any expenses, and the jury determined that plaintiff did not sustain accidental bodily injury under MCL 500.3105. Thus, because the jury

determined that plaintiff did not sustain an accidental bodily injury, it was not necessary for the jury to reach the issue whether the accidental bodily injury arose out of the ownership, maintenance, or use of a motor vehicle. Likewise, it was not necessary for the jury to reach the issue whether allowable expenses were incurred by plaintiff or on her behalf or whether payment for any of the expenses or losses was overdue. Therefore, the trial court properly viewed the evidence in a light most favorable to Farm Bureau, the nonmoving party, and it did not err in finding no basis to grant plaintiff's motion for JNOV.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan