Court of Appeals of Michigan.
Mesroh KOCHOIAN, Plaintiff-Appellant,
v.
ALLSTATE INSURANCE COMPANY, Defendant-Appellee.

Docket No. 93950.
Submitted Feb. 2, 1988.
Decided April 18, 1988.
Released for Publication June 8, 1988.

Truck driver brought action to recover no-fault work-loss benefits for heart attack which allegedly arose out of accident almost three months earlier. The Wayne Circuit Court, Richard C. Kaufman, J., entered judgment for no cause of action and denied driver's postverdict motions. Driver appealed. The Court of Appeals, Wahls, P.J., held that: (1) any error with respect to burden of proof imposed upon driver to establish causal connection between accident and heart attack was not reversible; (2) trial court could consider nearly three-month gap between accident and heart attack in determining whether heart attack "arose out of" accident; (3) even if trial court found that heart attack was caused by medication, such did not establish driver's entitlement to no-fault work-loss benefits; and (4) written report of defendant's medical expert was not admissible as nonhearsay admission by person authorized by defendant to make statement and offered against defendant.

Affirmed.

West Headnotes

[1] Appeal and Error 30 1064.1(9)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1064 Prejudicial Effect
30k1064.1 In General
30k1064.1(9) k. Evidence and Witnesses, Instructions Relating To. Most Cited Cases

Although plaintiff seeking to recover no-fault work-loss benefits was only required to show by preponderance of evidence that heart attack "arose out of" earlier accident, rather than that heart attack was "directly traceable" to accident as instructed by trial court, such error was harmless inasmuch as, even under "arising out of" standard, plaintiff failed to prove his case by preponderance of evidence; heart attack occurred three months after accident, and plaintiff admitted to health problems in his family, that he smoked two packs of cigarettes per day, that he was approximately 60 pounds overweight, and that, prior to accident he drank liquor, sometimes as much as fifth of gallon in one day. M.C.L.A. § 500.3105(1).

[2] Insurance 217 2854

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(E) No-Fault Coverage; Medical Payments
217k2850 Evidence
217k2854 k. Admissibility. Most Cited Cases
(Formerly 217k532.20)

In considering claim of entitlement to no-fault work-loss benefits, trial court properly considered nearly three-month gap between claimant's accident and heart attack which claimant alleged arose out of accident. M.C.L.A. § 500.3107(b).

[3] New Trial 275 72(9)

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k67 Verdict Contrary to Evidence
275k72 Weight of Evidence
275k72(7) Particular Actions or Issues
275k72(9) k. Negligence and Torts in General. Most Cited Cases

Even if trial court's own findings of fact established that plaintiff's heart attack was caused by injection of cortisone he received before attack, such did not entitle plaintiff to new trial on his claim for no-fault work-loss benefits inasmuch as there was nothing to support plaintiff's added contention that injection was administered due to pain he was experiencing as result of previous accident. M.C.L.A. § 500.3107(b).

[4] Evidence 157 264

157 Evidence
157VII Admissions
157VII(E) Proof and Effect
157k264 k. Construction. Most Cited Cases

Even if defendant's medical expert was person authorized by defendant to make statement regarding plaintiff's physical health, statement he made as embodied in written report was not admissible as nonhearsay because report did not constitute admission; expert stated in report that his examination of plaintiff revealed no indication of plaintiff's having suffered injury he claimed, which would foreclose plaintiff's demand for no-fault work-loss benefits. MRE 801(d)(2)(C).

****914 *2** O'Bryan Law Center, Inc. by D. Michael O'Bryan, Birmingham, for plaintiff-appellant.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. by John J. Hoffman and Robert D. Goldstein, Detroit, for defendant-appellee.

***3** Before WAHLS, P.J., and SULLIVAN and BALKWILL,[FN*] JJ.

FN* Frederick D. Balkwill, 16th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const.1963, Art. 6, Sec. 23, as amended 1968.

WAHLS, Presiding Judge.

After a bench trial in the Wayne Circuit Court conducted on March 17 and 18, 1986, the court, on May 9, 1986, entered a judgment of no cause of action in this no-fault insurance work-loss case. On June 27, 1986, plaintiff's motion for new trial or judgment notwithstanding the verdict was denied. We affirm.

The record reveals that plaintiff, Mesroh Kochoian, filed suit on November 16, 1982, against defendant, Allstate Insurance Company, for payment of no-fault insurance work-loss benefits as provided under M.C.L. § 500.3107(b); M.S.A. § 24.13107(b). At trial, plaintiff testified and the deposition testimony of four expert medical witnesses was admitted into evidence.

Plaintiff, a truck driver for Signal Delivery for nearly thirty years, testified that on March 2, 1982, while hauling a load of freight from Livonia, Michigan, to Columbus, Ohio, over highways which were covered with ice, his truck jackknifed and rolled down a twenty-foot embankment. As a result, he sustained broken bones in his right arm and left ankle, injury to his left knee, and pain in his left shoulder, left arm, neck and back. He was treated at a hospital and was released the following day. Plaintiff stated that prior to

the accident, in 1977, he had been diagnosed as having high blood pressure, and he acknowledged that prior to the accident he had experienced pain in his left shoulder and "some mild angina."

After the accident, plaintiff's employer sent plaintiff to the Detroit Industrial Clinic, where he was treated approximately twice a week until May 27, 1982. On that day, he received heat and electronic***4** massage therapy and was given an injection of cortisone in his left shoulder. That afternoon, plaintiff felt an unusual pressure in his chest, and at about 9:00 p.m. he went to Oakwood Hospital, where he was diagnosed as having suffered a heart attack. On cross-examination, plaintiff conceded that in 1970 he had had back problems which caused him to miss work and allowed him to collect workers' compensation benefits, and that his angina started in 1980. Moreover, he acknowledged that he had smoked two packs of cigarettes per day, quitting only upon his doctor's orders, that in 1982 he was approximately sixty pounds overweight, that both of his parents died of causes related to heart disease, and that prior to the accident he drank liquor, sometimes as much as a fifth of a gallon in one day.

The deposition testimony of four medical doctors was admitted into evidence. First, Donald Newman, M.D., a physician specializing in family medicine and disability evaluation, testified for plaintiff. Dr. Newman said that on April 7, 1984, he examined plaintiff and determined that he suffered some limitation in the range of motion of his neck, left shoulder, left triceps muscle ****915** and back, and that plaintiff's abnormal heart sounds and electrocardiogram results indicated that he had sustained damage to his heart as may have occurred from a heart attack or myocardial infarction. Moreover, x-rays revealed that abnormalities in plaintiff's neck showed degenerative disc disease or osteoarthritis, also known as wear-and-tear arthritis, causing the nerve going down plaintiff's left arm to be pinched. The extensive arthritis in plaintiff's neck, in Dr. Newman's opinion, had not been caused by the accident, but rather was a preexisting condition which was aggravated by the accident. Dr. Newman also opined that plaintiff's heart attack was ***5** likely the result of his family history of heart problems, high blood pressure, smoking, and stress associated with the physical pain and the emotional upset from being unemployed after the accident.

Norman E. Clark, M.D., a physician specializing in internal medicine with a concentration in cardiology, testified for defendant. Dr. Clark said that on October 10, 1983, he examined plaintiff and evaluated his condition on the basis of his family history, physical condition and electrocardiogram results, concluding that plaintiff's heart attack was unrelated to plaintiff's accident and instead was caused by his family history, cigarette smoking, being overweight, and age (sixty-one at the time of the accident). Dr. Clark asserted that the kind of stress accompanying pain from physical injury or arthritis, or from emotional upset caused by worries over unemployment, would not play a part in the causation of a heart attack, and expressed the view that plaintiff's accident would have been related to his heart attack only if the attack had been suffered "right at the time of the ... accident or within say an hour of the ... accident when [Mr. Kochoian] was in a lot of pain-under considerable stress from the accident."

James Horvath, M.D., an orthopedic surgeon who examined plaintiff in August, 1983, testified for defendant and concluded that, in general, plaintiff had a normal range of motion in his neck, back, and left shoulder. Finally, Adel Elmagrabi, M.D., a rheumatologist, testified for defendant and also concluded that, although plaintiff complained of discomfort at the extremes of range of motion testing, he nevertheless was able to perform the tests within the normal ranges.

On appeal, plaintiff first argues that the trial court erred in requiring him to show that, in order ***6** to prove entitlement to no-fault work-loss benefits, his

May 27, 1982, heart attack was "directly traceable" to the March 2, 1982, truck accident. Plaintiff asserts that he should have been required to show by a preponderance of the evidence only that his injury "arose out of" the accident.

Work-loss benefits are included in the personal protection benefits payable under Michigan no-fault law. M.C.L. § 500.3107(b); M.S.A. § 24.13107(b). However, a no-fault insurer is liable to pay personal protection benefits "for accidental bodily injury *arising out of* the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." M.C.L. § 500.3105(1); M.S.A. § 24.13105(1). (Emphasis added.) The trial court in this case, in rendering its opinion from the bench, did not, however, examine whether plaintiff's injury arose out of his use of a motor vehicle at the time of his March 2, 1982, accident, but rather examined "whether or not plaintiff has proven by a preponderance of the evidence that an accidental bodily injury [was] *directly traceable* to [the] motor vehicle accident," and concluded that "the Court does not find the plaintiff has shown by a preponderance of the evidence that the heart attack and the permanent disability because of the heart attack is [*sic*] *directly traceable* to [the] accidental bodily injuries arising from the motor vehicle accident on March 2nd, 1982." (Emphasis added.)

Apparently, the trial court gleaned this "directly traceable" language from cases concerning, or commenting on, coverage for injuries arising out of the use of a parked motor vehicle. See, e.g, *Ritchie v. Federal Ins. Co.*, 132 Mich.App. 372, 347 N.W.2d 478 (1984); *McKim v. Home Ins. Co.*, 133 Mich.App. 694, 349 N.W.2d 533 (1984), lv. den. 422 Mich. 853 (1985), and ****916*** *Mollitor v. Associated Truck Lines*, 140 Mich.App. 431, 364 N.W.2d 344 (1985). Under M.C.L.***7** § 500.3106(1)(b); M.S.A. § 24.13106(1)(b), it is provided that accidental bodily injury does not arise out of the use of a parked vehicle unless, among other exceptions, "the injury was a direct result of physical contact with the equipment permanently mounted on the vehicle, while the equipment was being operated, or used...."

In the present case, plaintiff is not claiming entitlement to personal injury benefits under the parked-vehicle provision and, therefore, need not specifically demonstrate that his heart attack was the "direct result" or, as the trial court stated, was "directly traceable," to the use of his truck. Instead, he is required to demonstrate only that his heart attack constituted an injury "arising out of" the use of his truck. We recognize that the terms represent differences in degree and not in kind: *i.e.*, while they both require a measure of causation between the injury suffered and the use of a motor vehicle as a motor vehicle, those measures are unequal. The word "directly" in the phrase "directly traceable" seems to demand a higher degree of causation than does the term "arising out of."

[1] We detect no error requiring reversal in this case, despite the trial court's reliance on the higher degree of causation, however, because we are convinced-after an assiduous perusal of the record-that even under the "arising out of" standard plaintiff failed to prove his case by a preponderance of the evidence. MCR 2.613(A). Indeed, our review of the evidence convinces us that the trial court was correct in concluding that plaintiff's heart attack, far from being caused by his accident, instead constituted "an independent disabling injury that prevented him from working." Thus, since plaintiff would be entitled to work-loss benefits to compensate only for that amount he ***8** would have received had the accident-related injury not occurred, M.C.L. § 500.3107(b); M.S.A. § 24.13107(b), *Luberda v. Farm Bureau General Ins. Co.*, 163 Mich.App. 457, 460-461, 415 N.W.2d 245 (1987), the trial court reached the right result in declaring plaintiff excluded from work-loss coverage.

We reach this conclusion while well aware that the term "arising out of" does not require a showing of proximate causation, but rather something more than a

showing that the causal connection between the injury and the use of the motor vehicle was merely incidental, fortuitous, or "but for." *Thorton v. Allstate Ins. Co.*, 425 Mich. 643, 391 N.W.2d 320 (1986); *Krause v. Citizens Ins. Co. of America*, 156 Mich.App. 438, 440, 402 N.W.2d 37 (1986); see also *Shinabarger v. Citizens Mutual Ins. Co.*, 90 Mich.App. 307, 313-314, 282 N.W.2d 301 (1979), lv. den. 407 Mich. 895 (1979). In *Thornton, supra*, 425 Mich. pp. 659-660, 391 N.W.2d 320, the Supreme Court stated:

> "In drafting MCL 500.3105(1); MSA 24.13105(1), the Legislature limited no-fault PIP benefits to injuries arising out of the 'use of a motor vehicle *as a motor vehicle.*' In our view, this language shows that the Legislature was aware of the causation dispute and chose to provide coverage only where the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' The involvement of the car in the injury should be 'directly related to its character as a motor vehicle.' ... Therefore, the first consideration under MCL 500.3105(1); MSA 24.13105(1), must be the relationship between the injury and the vehicular use of a motor vehicle. Without a relation that is more than 'but for,' incidental, or fortuitous, there can be no recovery of PIP benefits." (Emphasis in original; footnote omitted.)

Whether an injury may be characterized as "arising out of" the use of a motor vehicle for purposes of no-fault personal protection benefits, and thus based on a relationship with the use of the motor vehicle which is more than merely incidental, fortuitous or "but for" with that use-or, put differently, is not so remote or attenuated as to preclude a finding that it arose out of the use of a motor vehicle-is a determination which depends on the unique ****917** facts of each case and, thus, must be made on a case-by-case basis. In the present case, the facts reveal that plaintiff's parentage, habits and preexisting physical condition clearly predisposed him to the heart attack which occurred almost three months after his truck accident. He acknowledged, among other things, being overweight, having smoked heavily for thirty years, having parents who died of causes related to heart disease, having suffered from angina since 1980, and having high blood pressure since 1977. In view of these circumstances, we find little indeed to support plaintiff's assertion that his heart attack was caused by his use of the truck during his March 2, 1982, accident.

[2] Plaintiff also argues on appeal that the trial court erred in concluding that the nearly three-month period between the accident and the heart attack made it less likely that the former caused the latter. In support of this assertion, plaintiff cites *Wheeler v. Tucker Freight Lines Co., Inc.*, 125 Mich.App. 123, 336 N.W.2d 14 (1983), lv. den. 418 Mich. 867 (1983). In that case, the plaintiff, a truck driver, was denied personal protection benefits for a claimed accidental back injury which was sustained due not to an accident at any one moment but rather to a series of events spanning a nineteen-year period. This Court affirmed, stating that the Legislature intended to authorize the payment of personal protection insurance benefits under ***10** M.C.L. § 500.3105(4); M.S.A. § 24.13105(4) only "for an injury sustained in a single accident, having a temporal and spatial location." 125 Mich.App. 128, 336 N.W.2d 14. We fail to discern the significance of *Wheeler* to the present case, however, since plaintiff herein-although he was a seasoned truck driver-was, in fact, involved in a single accident at a specific time and in a specific place. Moreover, we have been presented with no persuasive reason-nor do we independently perceive one-for prohibiting a trial court from considering the length of time, in cases such as this, between the accident and the injury when faced with the often complex issue of apprehending the causative link, if any, between two such events. It is only logical to conclude that, as the period of time between accident and injury increases, so likewise may increase the number of possible other causes for the injury sustained. Therefore, the trial court's consideration of the time period between plaintiff's acci-

dent and his heart attack, such period being almost three months, was not erroneous, particularly in view of the expert medical testimony that plaintiff's heart attack would probably have been related to his accident only if the attack had been suffered within an hour or so of the accident.

Next, plaintiff contends that the trial court's denial of his motion for a new trial was improvident because the trial court's own findings of fact establish that plaintiff's heart attack on May 27, 1982, was caused by the injection of cortisone he received a few hours before the attack and that the injection was itself administered due to pain he was experiencing in his left shoulder as a result of the March 2, 1982, truck incident.

It is within a trial court's sound discretion to grant or deny a motion for new trial. ***11***Murphy v. Muskegon County*, 162 Mich.App. 609, 615-616, 413 N.W.2d 73 (1987). Absent an abuse of such discretion, the trial court's decision cannot be interfered with on appeal. *Kailimai v. The Firestone Tire & Rubber Co.*, 398 Mich. 230, 247 N.W.2d 295 (1976). This Court, in reviewing a trial court's denial of such a motion, affords deference to that denial because the lower court heard the witnesses and thus was uniquely qualified to assess their credibility. *May v. Parke, Davis & Co.*, 142 Mich.App. 404, 410-411, 370 N.W.2d 371 (1985), lv. den. 424 Mich. 878 (1986). In the present case, we find no abuse of discretion in the trial court's denial of plaintiff's motion for new trial.

[3] Initially we note that plaintiff's assertion on appeal that the trial court found that "Plaintiff's heart attack was caused by the injection [of cortisone] he received for treatment to orthopedic injuries sustained in the motor vehicle accident" is not exactly an accurate restatement of the court's finding. Our review of the court's ****918** findings reveals that, after identifying numerous factors as having caused plaintiff's heart attack, including family history, smoking, and high blood pressure, the court concluded that the injection of cortisone administered to plaintiff shortly before his heart attack-in combination with these other factors-was likely to have precipitated the heart attack. However, even if we accept plaintiff's mischaracterization of the court's finding on this issue, we cannot accept his conclusion that he is entitled to no-fault work-loss benefits. For, agreeing with the trial court, we find that plaintiff has not shown that the injection was administered due to pain he was experiencing as a result of the March 2, 1982, truck accident. Plaintiff's own testimony, and the expert medical testimony that plaintiff suffered from wear-and-tear arthritis, showed that plaintiff's shoulder condition long predated his truck ***12** accident. Thus, we cannot assume that, without the truck accident, plaintiff would not have been given the cortisone injection on May 27, 1982, for his shoulder condition.

Finally, plaintiff contends that the trial court improperly excluded from evidence a written report of one of defendant's medical experts. At trial, plaintiff's request for admission into evidence of a report of Dr. Norman E. Clark on the ground that it was not-hearsay under MRE 801(d)(2)(C)-admission by a person authorized by a party to make a statement and offered against the party-was denied by the trial court.

A trial court's decision whether to admit certain evidence is within the court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion. *Guider v. Smith*, 157 Mich.App. 92, 103-104, 403 N.W.2d 505 (1987) (opinion of C.W. Simon, J). In this case, we find no abuse of discretion.

[4] Plaintiff asserts that Dr. Clark was a person authorized by defendant to make a statement regarding plaintiff's physical health and that the statement which he made-as embodied in a report written on October 11, 1983-constitutes an admission against defendant. We fail to discern, however, any basis for plaintiff's declaration that the substance of Dr. Clark's report, even assuming that Dr. Clark was authorized by defendant to make a statement on this subject,

constitutes an admission. In his report, Dr. Clark stated that his examination of plaintiff revealed no indication of plaintiff's having suffered a heart attack or heart disease. During his direct examination, Dr. Clark initially restated almost verbatim what his report had indicated about plaintiff based on a physical examination and an electrocardiogram test. If ***13** plaintiff had in fact suffered no heart attack, however, his claim of injury due to a heart attack as a basis for work-loss benefits would be unsupportable. Thus, no admission occurred. Moreover, we note that Dr. Clark himself effectively rebutted his own report by conceding during cross-examination that, at the time he examined plaintiff, he "didn't have sufficient information to know [plaintiff] had a heart attack," that subsequent to his examination of plaintiff, he was shown a portion of plaintiff's medical records showing that plaintiff had suffered a heart attack of a type that "could leave him with a perfectly normal electrocardiogram later on," and that he did not dispute the diagnosis of physicians at Oakwood Hospital that plaintiff had in fact suffered a heart attack on May 27, 1982.

Affirmed.

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