STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY VENTIMIGLIA,

Plaintiff-Appellee,

v

UNITED STATES FIDELITY & GUARANTY COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 5, 1997

No. 185378
Macomb Circuit Court
LC No. 92-3380-NF

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

In this action seeking no-fault personal injury protection benefits, defendant appeals as of right from a judgment rendered in favor of plaintiff following a bench trial. We reverse.

In August 1990, plaintiff and her husband were driving on East Jefferson Avenue in Detroit when they noticed that they were being followed by another motorist. When they stopped for a light, the other motorist attempted to block their car, but plaintiff, who was driving, took evasive action and fled down a side street. Plaintiff then contacted the police using her car telephone and eventually rendezvoused with Grosse Pointe police officers who took her pursuer into custody. When plaintiff arrived home, she was very tired and felt a burning sensation in her throat. Four days later, plaintiff suffered a heart attack. Plaintiff testified that she had no history of hypertension.

Plaintiff sought no-fault personal injury protection benefits for treatment of her heart attack and when defendant denied the benefits, plaintiff filed suit. In his deposition, Dr. John Somogyi, plaintiff's cardiologist, testified that plaintiff's heart attack was caused by a vasospasm, which can result from stress or emotional upset. A heart attack caused by a coronary vasospasm could occur four days after a very traumatic event. He was not certain, but he believed that the criminal episode plaintiff encountered triggered her coronary vasospasm that led to her heart attack. While plaintiff had no cardiac risk factors, certain individuals are more prone to vasospasms due to genetic predisposition and environmental influences.

In his deposition, cardiologist Pierre C. Atallah, testified that stress can cause a heart attack. Plaintiff did not have any of the heart attack risk factors. In his opinion, plaintiff's heart attack was not caused by plaque caused by cholesterol, but by a vasospasm that is caused by stress. Even if the assault at issue occurred two or three weeks before plaintiff's heart attack, he still would believe that the criminal episode caused plaintiff's heart attack.

The trial court, sitting as trier of fact, rendered judgment in favor of plaintiff:

> The Court finds plaintiff's August 24, 1990, heart attack and resulting personal injuries were directly related to the operation of her motor vehicle as a motor vehicle on August 20, 1990, and, consequently, plaintiff's no-fault insurer, defendant USF&G, is liable to pay plaintiff no-fault personal protection insurance benefits consistent with the no-fault act. Plaintiff's heart attack was caused by stress generated from operating her vehicle in a manner that allowed her to flee her pursuer and to secure safe haven with Grosse Pointe police officers consistent with their instructions of vehicle operation, i.e., run red lights. As with carjackings, vehicle pursuit by a stranger under circumstances giving rise to a reasonable fear for one's person or property is, unfortunately, foreseeably identifiable with the use of a motor vehicle. Unlike personal assault cases where the motor vehicle simply serves as the fortuitous site of personal injury, plaintiff's heart attack was directly related to the reasonable operation of her vehicle under foreseeable and stressful circumstances. The direct causal relationship between plaintiff's operation of her vehicle under the circumstances and her heart attack, as attested to by Drs. Somogyi and Atallah, is not attenuated by the absence of physical contact with her car nor the absence of an armed aggressor.

In this appeal, defendant asserts that, as a matter of law, plaintiff was not entitled to no-fault PIP benefits because her heart attack did not arise out of the operation or use of her automobile as a motor vehicle. We agree and reverse.

This Court reviews a trial court's findings of fact in a bench trial under the clearly erroneous standard. MCR 2.613(C); *Hofmann v ACIA*, 211 Mich App 55, 98; 535 NW2d 529 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 99. Deference is given to the special opportunity of the trial court to assess the credibility of the witnesses who appear before it. *Id.* Questions of law are reviewed de novo. *In re Lafayette Towers*, 200 Mich App 269, 272; 503 NW2d 740 (1993).

Michigan's no-fault insurance act requires a no-fault insurer to pay benefits "for accidental 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). The term "arising out of" requires less than a showing of proximate cause, but 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." *Kochoian v Allstate Ins Co*, 168 Mich App 1, 8; 423 NW2d 913 (1988). The determination of whether an injury may be characterized as "arising out of" the use of a motor vehicle for purposes of obtaining personal protection benefits

under the no-fault act depends on the facts of each case and must therefore be made on a case-by-case basis. *Id.* at 9.

In rendering judgment for plaintiff in this case, the trial court relied on *Bourne v Farmers Ins Exchange*, 203 Mich App 341; 512 NW2d 80 (1994), in which this Court held that physical injuries sustained in a carjacking are foreseeably identifiable with the use of a motor vehicle. *Id.* at 343-344. However, on leave to appeal, the Michigan Supreme Court modified that decision and held that in determining whether there is the requisite nexus between the injury and the use of the motor vehicle the proper focus is upon the relation between the injury and the use of a motor vehicle as a motor vehicle, not on the intent of the assailant. *Bourne v Farmers Ins Exchange*, 449 Mich 193, 201; 534 NW2d 491 (1995). The Court found that the plaintiff's injuries resulted from being struck by the carjacker and therefore arose out of a physical attack rather than the plaintiff's use of his vehicle as a motor vehicle. *Id.* at 200, 203. The Court stated that the vehicle was merely the situs of the injury which is not a sufficient condition to establish the requisite causal connection between the injury and the vehicle. *Id.* at 200. Thus, the Court held that summary disposition in favor of the defendant insurer was proper.[1] The Court explained in a footnote:

> Although plaintiff cites *Saunders v DAIIE*, 123 Mich App 570; 332 NW2d 613 (1983), and *Mann v DAIIE*, 111 Mich App 637; 314 NW2d 719 (1981), for support, we are unpersuaded. We recognize that our citing of these cases in *Thornton* has created some confusion, however, we do not agree that assaults are part of the "normal risk" of motoring. Nevertheless, we are prepared to examine cases employing this methodology if and when we are presented with a case that raises the issue squarely. [449 Mich 200 n 3.]

We do not believe that our facts squarely raise the issue of assaults as a normal risk of motoring. Indeed, if assaults are not a normal risk of motoring and injuries resulting from a physical assault may not be characterized as arising out of the use of a vehicle as a motor vehicle, then injuries such as a heart attack resulting from the stress of the possibility of a physical assault may not be so characterized. The bottom line is that if plaintiff here had been struck, stabbed or shot by her pursuer(s), she clearly would not have been entitled to PIP benefits under *Bourne* because her injury would not have been found to have arisen out of her use of a motor vehicle as a motor vehicle and the vehicle would have been found to merely be the situs of the injury. This is insufficient to establish the requisite causal connection between the injury and the vehicle. *Bourne, supra* at 200. Similarly, plaintiff's injuries in eluding an attempted carjacking did not arise out of a "normal activity associated with the use of a vehicle as a motor vehicle." *Id.* at 201; *Morosini v Citizens Ins Co of America*, ___ Mich App ___ (Docket No. 186760, released 6/6/97), slip op at 7. Nor was her vehicle the instrumentality of her injury. *Kennedy* v *ACIA*, 215 Mich App 264, 267; 544 NW2d 750 (1996). As the *Bourne* Court noted, assaults are not a normal risk of motoring.

Plaintiff argues, however, that the personal assault cases such as *Bourne* and *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), are inapplicable and that her case is analogous to a "line of heart attack cases," citing *McKim v Home Ins Co*, 133 Mich App 694; 349 NW2d 533 (1984), and *Kochoian v Allstate Ins Co*, 168 Mich App 1; 423 NW2d 913 (1988). In

McKim, this Court addressed whether the plaintiff truck driver who suffered a heart attack while unloading his truck suffered an "accidental bodily injury" under § 3105 of the no-fault act. This Court found that, given the widely accepted premise that cardiovascular disabilities can be caused by physical strain, the case was not one properly resolved by summary judgment and was a question for the jury. *Id.* at 699. Accord, *Denning v Farm Bureau Ins Group*, 130 Mich App 777; 344 NW2d 368 (1983). In *Kochoian*, the plaintiff truck driver was injured when his truck jackknifed on an icy highway and rolled down an embankment. Nearly three months later, after receiving therapy for injuries suffered in the accident, plaintiff suffered a heart attack. This Court found that the plaintiff had failed to prove by a preponderance of the evidence that the heart attack arose out of the use of his truck where the facts revealed that both of his parents died of heart-related disease, he had suffered from angina and high blood pressure for several years, he was overweight, and a heavy smoker for thirty years. *Id.* at 9.

We find *McKim* and *Kochoian* to be clearly distinguishable. First, Kochoian failed to recover because the court found that he had failed to establish that his injuries arose out of the use of his truck in light of his, and his family's, medical history. Further, his heart attack allegedly arose out of an accident he had with his truck. Moreover, McKim's heart attack arose when he was unloading his truck. The heart attacks suffered in *McKim* and *Kochoian* are more closely connected with the use of the motor vehicle as a motor vehicle. In the present case, plaintiff's heart attack arose out of the stress she suffered from an attempted carjacking. There was an intervening factor—a carjacker. Thus, we are not persuaded by plaintiff's attempt to rely on this "line of heart attack cases."

Accordingly, we conclude as a matter of law that plaintiff's heart attack did not arise out of her operation or use of a motor vehicle as a motor vehicle so as to entitle her to PIP benefits under the no-fault act.

Reversed.

/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski

[1] Accordingly, the trial court's reliance in this case on this Court's decision in *Bourne*, as viewed with hindsight, was misplaced.