STATE OF MICHIGAN

COURT OF APPEALS

ROBERT TROYAN and CAROL TROYAN,

Plaintiffs-Appellants,

v

LIBERTY MUTUAL INSURANCE GROUP, a Massachusetts corporation,

Defendant-Appellee.

UNPUBLISHED
November 26, 1996

No. 181941
LC No. 92-225882-NO

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PER CURIAM.

Plaintiffs, Robert and Carol Troyan, appeal by right the trial court's judgment of no cause of action for defendant, Liberty Mutual Insurance Group (Liberty) in this no-fault insurance dispute. Plaintiffs brought this cause of action against defendant seeking personal injury protection (PIP) benefits pursuant to MCL 500.3105(1); MSA 24.13105(1) for injuries plaintiff Robert Troyan allegedly sustained when he was struck by a van owned by defendant's insured, Provolar and Associates, Inc. in December, 1991. Following a two day trial, the jury found that plaintiff Robert Troyan's injuries did not arise out of the operation or use of a motor vehicle as a motor vehicle, and the trial court entered a judgment of no cause of action in favor of defendant. We affirm.

Plaintiffs raise three arguments on appeal. First, plaintiffs argue that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict. We disagree. Motions for directed verdict or for judgment notwithstanding the verdict are properly granted only when no factual question exists upon which reasonable minds could differ. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 524; 529 NW2d 318 (1995). Pursuant to MCL 500.3105(1); MSA 24.13105(1), an insurer is liable to pay PIP benefits only for accidental bodily injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle."

Whether an injury arose out of the use of a motor vehicle as a motor vehicle depends on the individual facts of each case. *Smith v Community Service Ins Co*, 114 Mich App 431, 433; 319

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

NW2d 358 (1982). This Court has interpreted MCL 500.3105(1); MSA 24.13105(1) as requiring that there be some causal connection between the injury sustained and the ownership, maintenance, or use of a motor vehicle. See *Shaw v Allstate Ins Co*, 141 Mich App 331, 333; 367 NW2d 388 (1985). While the required causal nexus does not rise to the level of proximate causation, see *Smith, supra* at 433, the causal connection between the injury and the normal use of a motor vehicle must be "more than incidental, fortuitous, or 'but for.'" *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986). Moreover, "the injury must be foreseeably identifiable with the normal ownership, maintenance, or use of the vehicle." *Mann v DAIIE*, 111 Mich App 637, 639; 314 NW2d 719 (1981), overruled on other grounds *Kennedy v Auto Club,* 215 Mich App 264; 544 NW2d 750 (1996) (citing *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 [1975]).

In the case at bar, reasonable minds could differ as to whether Robert Troyan's injuries arose out of the operation or use of a motor vehicle. Although Dr. Montgomery's testimony that Robert Troyan's injuries arose out of the whole series of events which occurred on December 23, 1991, was not directly refuted by any defense witness, there was other evidence presented at trial which called into question the reasonableness of his testimony. Robert Troyan's own testimony indicated that the van merely nudged him in the back of the leg. A video tape of the incident in question was shown to the jury during defendant's cross-examination of Robert Troyan. Plaintiffs' counsel himself stated during closing argument that "it doesn't look like a whole heck of a lot happened to Mr. Troyan in the video." Even Dr. Montgomery conceded that, in his opinion, the nudging by the van was minimal and that the throwing by the security guards was the more serious event. The evidence presented, therefore, does create a question as to whether Robert Troyan's injuries were caused by being nudged by the vehicle as plaintiffs allege or by being thrown by the guard.

If Robert Troyan's injuries were caused by having been thrown by the guard, then they did not arise out of the normal use or operation of a motor vehicle. First, if Robert Troyan's injuries resulted from being thrown by the guards, then the injuries arose out of a personal physical attack which is independent of the operation or use of the motor vehicle and generally not compensable. See *Bourne v Farmers Ins Exchange*, 449 Mich 193, 200; 534 NW2d 491 (1995). Second, being intentionally thrown by a guard out of the path of a moving vehicle is not a foreseeably identifiable part of the normal risks of motoring, and for this reason, is also not compensable. See *Mann, supra* at 639.

Plaintiffs, however, argue that even if Robert Troyan's injuries arose out of being thrown by the guards, there was still a sufficient causal nexus between the use of the van and the injuries sustained because Robert Troyan would not have been thrown by the guards had the van not proceeded through the picket line. This argument, however, is nothing more than a "but for" causation argument which is insufficient to establish that an injury arose out of the use or operation of a motor vehicle. See *Thornton, supra* at 659.

Next, plaintiffs argue that defense counsel's comments during his opening statement were improper because they incorrectly suggest that contact with the vehicle was required to establish that the injuries arose from the operation and use of a motor vehicle. Thus, the statements evidence a deliberate

course of conduct on the part of defense counsel designed to confuse the jury by suggesting, contrary to Michigan law, that proximate causation is required thereby denying plaintiffs a fair trial. We disagree.

Although contact with a vehicle is not necessarily required to establish a causal nexus sufficient prove that an injury arose out of the operation or use of a motor vehicle, *Bromley v Citizens Ins Co*, 113 Mich App 131, 135; 317 NW2d 318 (1982), defense counsel's comments were not deliberately designed to mislead the jury and to deny plaintiffs a fair trial. Plaintiffs' theory in this case was that Robert Troyan was injured as a result of the van entering the picket sight and striking him. Thus, defense counsel's statement that Robert Troyan's injuries resulted from being thrown by the guards and not from his contact with the vehicle was designed to dispute plaintiffs' theory of recovery. Defense counsel, therefore, acted appropriately by telling the jury that he intended to show that Robert Troyan's injuries did not arise from the use or operation of a motor vehicle by establishing that the injuries in question did not result from being nudged by the van but from being thrown by the guard. See MCR 2.507(A); *Guide v Smith*, 157 Mich App 101,102; 403 NW2d 505 (1987). Moreover, even if defense counsel's statement were improper, because the trial court instructed the jury to disregard statements of law made by the attorneys and follow only the law as provided by the court, it would be harmless error for which reversal is not required. See *Guider, supra* at 102.

Lastly, plaintiffs argue that the trial court abused its discretion in excluding portions of Dr. Montgomery's videotaped deposition testimony. Again we disagree. Because a deposition must be admissible under the rules of evidence, the trial court has the discretion to exclude the deposition or portions thereof if the testimony is irrelevant. See MRE 402; *Kueppers v Chrysler Corp*, 108 Mich App 192, 205; 310 NW2d 237 (1981). In an action to recover PIP benefits pursuant to MCL 500.3105(1); MSA 24.13105(1), plaintiffs bear the burden of proving that the injury in question constitutes an accidental bodily injury which arose out of the ownership, operation, maintenance, or use of a motor vehicle. See *Belcher v Aetna Casualty*, 409 Mich 231; 409 Mich 231; 293 NW2d 594 (1980); SJI2d 35.02. As previously discussed, to the extent that Robert Troyan's injuries were the result of being thrown by the guard, they did not arise from the operation or use of a motor vehicle. Because a no-fault insurer is liable to pay for injuries which arise from the operation and use of a motor vehicle, only the injuries Robert Troyan sustained as a result of being nudged by the van are relevant in this matter.

The questions and answers excluded by the trial court related generally to Robert Troyan's injuries or the events of December 23, 1991. The excluded questions and answers did not distinguish the trauma and injuries resulting from being struck by the vehicle from the trauma and injuries resulting from being thrown by the guard. Because these questions failed to distinguish between the two events which occurred on December 23, 1991, any response made to these questions would contain both relevant information regarding injuries sustained as a result of being nudged and irrelevant testimony regarding injuries resulting from being thrown by the guard. In addition to eliciting irrelevant testimony, the responses to these questions were likely to confuse or mislead the jury regarding what injuries arose from the operation or use of the motor vehicle. Therefore, the trial court did not abuse its discretion in excluding the aforementioned portions of Dr. Montgomery's videotaped deposition.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Timothy P. Pickard