STATE OF MICHIGAN

COURT OF APPEALS

ABDUL SALAM RASHID, Personal Representative of the Estate of ABDUL RASHID, Deceased, Plaintiff-Appellee,	UNPUBLISHED March 15, 2005
v	No. 251543 Wayne Circuit Court
FARMERS INSURANCE EXCHANGE, Defendant-Appellant.	LC No. 02-202726-NF

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

In this action for no-fault personal injury protection (PIP) death benefits, the trial court granted summary disposition in favor of plaintiff Abdul Salam Rashid, Personal Representative of the Estate of Abdul Rashid, Deceased, pursuant to MCR 2.116(C)(10). The court concluded that there was no genuine issue of material fact that the decedent's heart failure was precipitated by his pushing his automobile half a mile after it ran out of gas and, therefore, the decedent's death arose from his ownership, operation, maintenance, or use of a motor vehicle. This Court granted defendant's application for leave to appeal. We reverse and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 540.

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). 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, therefore, must be made on a case-by-case basis. *Id.* at 9. If the injured person's presence in the automobile is merely fortuitous, or there is no causal nexus between the injury and the ownership, maintenance, or use of the motor vehicle, then recovery is not available. *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986). Where there is no dispute about the facts, the issue whether an injury arose out of the use of a vehicle is a legal issue for a court to decide, not a factual one for the jury. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 630; 563 NW2d 683 (1997).

Plaintiff alleges that the decedent died of a heart attack triggered by the exertion of pushing his motor vehicle to a gas station. Defendant claims that the cause of death listed on the decedent's death certificate, arteriosclerotic coronary disease, establishes a question of fact whether the decedent died from a preexisting condition, not from the operation or use of a motor vehicle.

In *McKim v Home Ins Co*, 133 Mich App 694; 344 NW2d 368 (1984), a case involving an insured who suffered a heart attack after loading his motor vehicle, this Court observed that "a heart attack may be inevitable because of the victim's prior habits or family history," and held that summary disposition was not warranted because "[w]hether plaintiff's myocardial infarction and the resultant disability are directly traceable to his unloading of the trailer . . . involves a factual question, presumably one to be resolved by the jury." *Id.* at 697-699.

In *Denning v Farm Bureau Ins Group*, 130 Mich App 777; 344 NW2d 368 (1983), the plaintiff's decedent died of heart failure caused by inhalation of toxic fumes emitted by an herbicide that the decedent was transporting in his vehicle. This Court held that there was a question of fact whether the fumes could have killed the decedent if he had been exposed to them elsewhere, or whether being in an enclosed, moving vehicle helped make the exposure fatal. *Id.* at 781.

In this case, we similarly conclude that there is a genuine issue of material fact whether the decedent's death was directly linked to the exertion of pushing his car, so as to establish a sufficient relationship between the injury and the use of a motor vehicle. The decedent's death certificate identified "arteriosclerotic coronary disease" as the cause of the decedent's death. Dr. Mohammad Khan, the decedent's primary care physician, described this disease as the "hardening of the arteries with mostly cholesterol deposits." While the evidence did not preclude a finding that exertion from pushing a car aggravated the decedent's condition and caused death when death was not previously imminent, the evidence attributing the decedent's death to an ongoing disease, rather than an acute event, establishes factual support for defendant's theory that the decedent may have died of a preexisting condition that was only fortuitously linked his using an automobile. Further, while there was evidence that the decedent experienced symptoms consistent with a heart attack after pushing his vehicle, e.g., profuse sweating and shortness of breath, there was also evidence that he vomited blood, which, according to Dr. Khan, was not a symptom of a heart attack. Viewed in a light most favorable to defendant, the evidence raised a question of fact whether there was a sufficient nexus between

the decedent's pushing his car and his subsequent heart failure. Therefore, summary disposition was improperly granted under MCR 2.116(C)(10).

We reverse and remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell