STATE OF MICHIGAN

COURT OF APPEALS

JIMMY LOCK, by PATRICIA LOCK, his Guardian,

Plaintiff-Appellee,

and

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Intervening Plaintiff,

v

TIMOTHY BANKS and JENA GASKILL,

Defendants,

and

CONTINENTAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
July 10, 2003

Nos. 231355, 233832
Wayne Circuit Court
LC No. 98-812682-NI

CONTINENTAL INSURANCE COMPANY, a division of CNA INSURANCE COMPANY,

Plaintiff-Appellant,

v

JEANNA GASKILL, TIMOTHY BANKS, JIMMY M. LOCK, JR., and PATRICIA LOCK, guardian of JIMMY M. LOCK, JR.,

Defendants-Appellees.

No. 233109
Wayne Circuit Court
LC No. 99-931882-NI

Before: Smolenski, P.J., and White and Wilder, JJ.

PER CURIAM.

In Docket No. 233109, Continental Insurance Company (Continental) appeals by delayed leave granted the circuit court's denial of its motion for summary disposition in its action seeking a declaration that it has no duty to defend or indemnify Jimmy Lock in Jeanna Gaskill's third-party no-fault action against him. In Docket No. 231355, Continental appeals as of right the judgment entered in Lock's favor, based on a jury verdict, in his first-party no-fault action. In Docket No. 233832, Continental challenges the award of attorney fees and interest in Lock's first-party case. We reverse in 233109, affirm in 231355, and affirm in part and vacate and remand in part in 233832.

Jeanna Gaskill and Jimmy Lock were injured in a single vehicle accident on June 25, 1997, at about 1:15 a.m., after the 1997 Ford Explorer SUV they were in rolled over multiple times on the Lodge freeway in Detroit. Gaskill, the driver, was a named insured under a no-fault policy issued by Continental. Lock, who had no separate insurance, occupied the front passenger seat. Timothy Banks, Gaskill's boyfriend at one time, was the titled owner of the SUV.

Gaskill and Lock had had a child in 1995, lived together until 1996, and then separated. Gaskill testified at deposition that she ceased all contact with Lock around April 1996, but that around February 1997 she began allowing Lock to visit their child several times a week. Gaskill testified that Lock wanted to reunite with her and their child, despite her telling him there was no chance of reunification. Gaskill testified that several times when Lock visited their child, he had refused to leave, and that she had called the police a few times as a result.

On the evening of June 24, 1997, Gaskill gave a poetry reading at a café in Harmony Park in downtown Detroit. Lock was present at the reading, having taken the bus to the café, but did not interact with Gaskill until after the poetry reading. Gaskill testified at deposition that she left the café around 1:00 a.m. on June 25, Lock followed her in the parking lot, and when she asked him what he was doing, he said he was going to her truck for her to take him home. She refused, told him to take the bus home, and tried to get in the SUV quickly. Although Gaskill tried to prevent Lock from getting in the vehicle by holding the passenger door, Lock, who is about 6'3" tall, managed to pull the door open and get in the front passenger seat; they argued and Lock refused to get out of the SUV despite Gaskill's requests that he do so. Lock took Gaskill's purse, rummaged through it, and took the keys out of the ignition. Gaskill got out of the SUV to call for help, but there were few passersby and they did not stop to help. Then she reentered the SUV, where her keys and purse were and, according to her deposition testimony, "somehow" ended up on the freeway. Gaskill was not sure of the timing, but testified that at one point as she was driving she told Lock that if he did not get out of the SUV, she would drive him to the 10th precinct police station. She testified that Lock reacted by becoming more angry with her and that he started hitting her around the face and head with an open hand. Soon after, Lock grabbed the steering wheel and pulled it to the right; Gaskill attempted to steer the vehicle back, but the SUV went out of control and rolled over multiple times. Lock testified at deposition that he grabbed the wheel so that he could pull the SUV over to the shoulder and jump out of the car, because Gaskill was driving in a crazy fashion. Gaskill's speed at the time of the accident was the subject of varying testimony, ranging between 55-60 mph to 75-80, and up to 100 mph. Lock was ejected during the accident and suffered severe traumatic brain injury and multiple other injuries.

Continental paid Gaskill first-party no-fault benefits. Four suits were filed as a result of the accident. In April 1998, Lock, by his guardian Patricia Lock, filed suit against Continental, Banks and Gaskill seeking first-party no-fault PIP benefits from Continental and third-party damages.[1] *Lock v Continental Ins Co, Banks & Gaskill,* Wayne Circuit Court No. 98-812682-NI. Lock's first amended complaint alleged that Continental was obligated to provide him personal protection benefits under MCL 500.3101, and had unreasonably refused to do so. The third-party claims were resolved.[2] In the meantime, in July 1998 Gaskill filed suit against Continental seeking benefits on the ground that Lock was uninsured. *Gaskill v Continental Ins Co,* Wayne Circuit Court No. 98-823836-CK. That suit was summarily dismissed, apparently on the basis that uninsured coverage under the policy required the involvement of two vehicles. In May 1999, Gaskill filed a third-party suit against Lock, alleging that Lock took over operation of the vehicle when he grabbed the steering wheel, causing the SUV to roll over multiple times and Gaskill to suffer injuries and serious impairment of bodily function. *Gaskill v Lock,* Wayne Circuit Court No. 99-914890-NI. Lock tendered his defense to Continental, arguing that he was entitled to coverage because he was a permissive passenger at the time of the accident.

In October 1999, Continental filed a declaratory action against Gaskill, Banks, Lock and Lock's guardian, alleging that it had no obligation to either defend or indemnify Lock in *Gaskill v Lock, supra*. *Continental Ins Co v Gaskill, Banks, Lock,* Wayne Circuit Court No. 99-931882-NI. In December 1999, Continental moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of fact that Lock was not a permissive user or passenger of the vehicle at the time of the accident and thus was not a "covered person" under the policy's clear language. Continental separately argued that no genuine issue of fact remained that Lock's assault and/or intentional interference with the SUV driver was not an act arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. The circuit court denied Continental's motion on the ground that a question of fact existed whether Lock was occupying or using the vehicle with Gaskill's permission at the time of the accident.

Lock v Continental was tried to a jury in June and early July 2000. The jury awarded Lock $352,807.00. The court entered judgment for $343,946.10, comprised of $253,243.00 for allowable expenses, $30,714.00 for work loss, $1,095.00 for replacement services, $67,755.00 for expenses or losses to which Lock was entitled and were overdue, plus interest, less $8,860.90 Lock received in Social Security benefits between June 24, 1997 and June 24, 2000, with interest, attorney fees and costs to be taxed. The trial court denied Continental's motion for JNOV or new trial.

After the trial concluded in *Lock v Continental, supra,* Continental filed a renewed motion for summary disposition in the DEC action, relying on the facts stated in its original motion, and arguing solely that an unpublished decision of this Court issued since its original motion was denied, *Westfield Ins Co v McClusky & Canever* (Docket No. 209558, issued 5/30/00) involved similar facts, and held, relying on published decisions, that mere grabbing of the steering wheel in a moving vehicle does not constitute operation of a vehicle. Continental

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[1] Lock alleged that Gaskill negligently operated the vehicle, that Gaskill had Banks' consent to operate the vehicle, and that Banks negligently entrusted the vehicle to Gaskill.

[2] Banks and Gaskill were dismissed by stipulation after settling with Lock for $2,500.

argued that this incident therefore did not arise out of the ownership, operation or use of a motor vehicle as a motor vehicle. The circuit court denied the renewed motion.

No. 233109 The DEC Action

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In ruling on such a motion, the trial court considers the pleadings, depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. Summary disposition is appropriate if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Id.*

"An insurance policy must be enforced in accordance with its terms." *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002). Where there is no ambiguity, the contract is enforced as written. *Henderson v State Farm Fire*, 460 Mich 348, 354; 596 NW2d 190 (1999).

The policy defines who is a "covered person":

7. Covered Person(s):

a. Under Personal Liability—Motor Vehicle means:

(1) You or any family member for the ownership, maintenance or use of any covered motor vehicle.

(2) Any other person occupying or using any covered motor vehicle with permission from you or a family member.

Defendant relied below on Gaskill's and Lock's deposition testimony. Gaskill testified that Lock forced his way into her SUV, that she repeatedly asked him to get out before she started driving and he refused, that Lock took her car keys, rummaged through her purse looking for men's phone numbers and calling her a "whore," that he struck her on the head and back as she was driving, and that when he grabbed the wheel and "yanked it" she "went into shock because it wasn't something that I expected him to do."

Lock testified at deposition that he got in the SUV by yanking the passenger door open as Gaskill tried to hold it closed, that Gaskill asked him to get out but he stayed anyway, that on the freeway he told Gaskill to pull the car over because he wanted to get out of the car, and that he grabbed the wheel intentionally as Gaskill was driving going "about a hundred something." Lock testified that he did not grab the steering wheel to avoid another car.

Continental's motion argued that Gaskill's and Lock's deposition testimony established that Lock was an intruder who did not have permission to occupy or use the vehicle.

Gaskill's response agreed with Continental that Lock did not have permission to **enter** the vehicle. However, Gaskill submitted an affidavit stating that once Lock entered, he had her permission to remain until they arrived at the 10th precinct police station, and argued that he was thus a "covered person" under the policy. Lock's response to Continental's motion also asserted

that a question of fact remained whether he was a permissive occupant of the vehicle, and relied on Gaskill's affidavit.

Continental argued below that Gaskill's affidavit directly contradicted her "four hours" of deposition testimony in which she testified that she repeatedly asked Lock to get out of the vehicle. Continental further asserted that the fact that Lock struck Gaskill multiple times contradicted Gaskill's affidavit's assertion that Lock had her permission to be in the vehicle.

The circuit court concluded that Gaskill's affidavit did not directly contradict her deposition testimony, that the behavior was ambiguous given that the parties had a relationship, and that there were questions of fact regarding permission and use of the vehicle. Our review of Gaskill's deposition testimony leads us to conclude that it conclusively established that Lock was not a permissive occupant of the vehicle while en route to the precinct.

Gaskill testified at deposition:

> *Q.* And so what happened after you got out of the car [in the café's parking lot] and started calling for the police and realized that you couldn't handle the situation?
>
> *A.* Well, when several people drove past and didn't do anything I started thinking of what I should do and so I got back in the truck and he had been going through my purse looking for telephone numbers.
>
> *Q.* How did he know what he was looking for?
>
> *A.* Because he was saying a lot of profanity and obscene things about the people that gave me their numbers and the money that I received and how he had been watching me.
>
> He said something when he was going through my purse. He had laid the keys down so I started the car back up and I told him that I was taking him to the police station if he didn't get out.
>
> *Q.* And what was his response to that?
>
> *A.* He became more angry and more vulgar and he just told me that that's not where I was going.
>
> *Q.* Did he say where you were going?
>
> *A.* That I was going to take him home.
>
> *Q.* Would you say that you repeatedly asked Mr. Lock to get out of the vehicle during that time period?
>
> *A.* Yes.
>
> *Q.* What did you do because he apparently refused to get out of the vehicle

despite the fact you had told him that you would take him to the police department, what did you do then?

A. I basically was telling him that he was not going to be able a [sic] follow me around.

He wasn't going to be able to tell me what to do and I guess this made him mad.

Q. And so what happened?

A. Somehow I ended up on the freeway. I was going – trying to get him to the precinct.

Q. Where is that located?

A. That's on Livernois and near 96.

Gaskill also testified at deposition:

Q. Okay, and at some point while you're driving, you don't remember why, but you let it slip out that you were going to take him to the 10th precinct?

A. Right, because normally when I start talking about the police, he usually will do what I ask him to do.

Q. So your thinking is that you told him you were going to take him to the 10th precinct because that intimidated him?

A. Right.

Q. Where were you at that point?

A. I believe I was driving on the freeway at that point.

* * *

Q. So my question is, did you ever attempt to get off the freeway any time before the accident happened?

A. I don't think I ever really had a chance to because he started hitting me once I told him about the police station.

* * *

Q. So you don't have a memory how long it was, how much time elapsed after he got angry and started hitting you and grabbing your purse that the accident happened?

A. Right I don't have any—

MR. WEAVER: She's already said it may have been as many as five to ten minutes, so the question's been asked and answered.

Q. Correct, you have no memory?

A. I have no memory of the time.

Q. Anything else he did?

A. He grabbed the steering wheel and everything was over. He grabbed the steering wheel.

* * *

BY MR. LYNCH: [*counsel for Continental*]

Q. On the night of this car crash, Mr. Jimmy Lock forced his way into your car, correct?

A. Right.

Q. And he refused to leave when you asked him to leave, correct?

A. Correct.

Gaskill's deposition testimony was unequivocal that Lock both entered and remained in the vehicle without her permission. This unequivocal testimony could not be countered by Gaskill's affidavit.

> Deposition testimony damaging to a party's case will not always result in summary judgment. ***However, when a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence.*** [*Gamet v Jenks,* 38 Mich App 719, 726; 197 NW2d 160 (1972). Emphasis added.]

Here, Gaskill gave no reasons for the contradiction between her affidavit and her deposition testimony. Gaskill's affidavit is no more than an attempt to create factual issues to correct her damaging testimony. See *Peterfish v Frantz,* 168 Mich App 43, 54-55; 424 NW2d 25 (1988), where this Court rejected the plaintiff's affidavit because she had failed to provide an explanation regarding the differences between her complaint, affidavit and deposition.

This case is unlike *Atkinson v Detroit,* 222 Mich App 7; 564 NW2d 473 (1997), where this Court reversed the trial court's determination to refuse to consider Atkinson's affidavit because it contradicted his earlier interrogatory answers. In conjunction with his worker's compensation claim, Atkinson claimed in his affidavit that he was "on break" from his assigned duties. In prior interrogatory answers, Atkinson stated that he was "on duty patrol." This Court held that Atkinson's affidavit did not contradict his prior answers because the affidavit provided clarification, not contradiction. The affidavit explained that he was riding the police motor

scooter to pass the time while waiting to be dispatched to his assigned crowd control duties. Although he may have been "on duty" in the sense that he was in uniform, riding a department vehicle in the jurisdiction of his employer during his normal working hours, he may also have been on a "break" from his assigned crowd control duties. Therefore, this Court held that the trial court erred in not considering Atkinson's affidavit. *Id.* at 11-12. In contrast, Gaskill's affidavit here was not an explanation – she merely flatly stated, in contradiction to her deposition, that Lock had her permission to be in the vehicle.

In *Kaufman & Payton v Nikkila*, 200 Mich App 250, 256; 503 NW2d 728 (1993), this Court affirmed the trial court's decision to disregard an affidavit from the defendant's counsel that conflicted with his earlier deposition testimony. In deposition, counsel was asked whether he had told anyone that the defendant had intended to file a grievance against the plaintiffs, and he answered in the negative. In his affidavit, however, counsel states that he advised one of the plaintiff firm's partners that the defendant had so intended. This Court ruled that a party may not contrive factual issues by ruling on an affidavit when unfavorable deposition testimony demonstrates that the assertion in the affidavit is unfounded. *Id.* at 257. Likewise, here Gaskill cannot contrive factual issues where her unfavorable deposition testimony demonstrates that Lock never had her permission to be in the vehicle. Lock was thus not a "covered person" under the policy and is not entitled to defense and indemnity by Continental in *Gaskill v Lock, supra.* We therefore reverse the denial of Continental's motion for summary disposition.

No. 231355 Lock's PIP Case

Continental asserts that the trial court erred in rejecting its argument that Lock was disqualified from first-party (PIP) benefits as a matter of law where he entered the vehicle with force and without permission, assaulted Gaskill while in the vehicle, and grabbed the steering wheel, causing the vehicle to go out of control.

This Court reviews de novo the trial court's denial of a motion for directed verdict. The evidence and inferences therefrom are considered in the light most favorable to the nonmoving party. *Locke v Pachtman,* 446 Mich 216, 223; 521 NW2d 786 (1994). A directed verdict is appropriate only when no factual question exists on which reasonable minds may differ. *Meagher v Wayne State Univ,* 222 Mich App 700, 708; 565 NW2d 401 (1997).

MCL 500.3105 provides in pertinent part:

> (1) Under personal protection insurance an insurer is liable 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.
>
> (2) Personal protection insurance benefits are due under this chapter without regard to fault.
>
> * * *
>
> (4) Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or

suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself.

A

Continental asserts that Lock is not entitled to PIP benefits under MCL 500.3105, because under the "objective" standard of *Frankenmuth Mutual Ins Co v Masters,* 460 Mich 105; 595 NW2d 832 (1999), and *Nabozny v Burkhardt,* 461 Mich 471; 606 NW2d 639 (2000), an injury is intended when the acts are intentional and create a direct risk of harm, and thus, the injuries Lock sustained were not "accidental." However, Continental cites no authority applying the "objective" standard advanced in *Masters and Nabozny* in the no-fault context, and although this case was tried in late June 2000, after both *Masters* and *Nabozny* were decided, Continental did not raise either case at trial or in its post-trial motion.[3] Thus, the trial court was never asked to apply the "objective" standard articulated in *Masters and Nabozny,* and argued applicable on appeal, either when Continental moved for a directed verdict, in the jury instructions, or when Continental moved for JNOV or a new trial. Issues not raised below may be deemed abandoned. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993).

Further, MCL 500.3105 provides its own definition of "accidental" and this Court in cases decided both before and after *Masters* and *Nabozny,* has applied, or approved the application of, the subjective test to the accidental injury requirement for PIP benefits under MCL 500.3105 of the no-fault act. See *Cruz v State Farm,* 241 Mich App 159, 166; 614 NW2d 689 (2000), aff'd 466 Mich 588; 648 NW2d 591 (2002), *Schultz v Auto Owners,* 212 Mich App 199, 201; 536 NW2d 784 (1995), and *Bronson Methodist Hospital v Forshee,* 198 Mich App 617, 629-630; 499 NW2d 423 (1993). We therefore reject any argument based on *Masters* and *Nabozny,* and direct our attention to whether Lock suffered accidental bodily injury as defined by the no-fault act.

Under the act, bodily injury is accidental unless suffered intentionally by the injured person or caused intentionally by the claimant. Lock testified at trial that he did not intend to cause injury either to Gaskill or himself and that he grabbed the steering wheel because he wanted to pull the vehicle over to the shoulder so that he could jump out. Gaskill testified at trial that she had known Lock since 1994 and never knew him to be under any kind of treatment or to be mentally ill, and that previously he had never been physically abusive to her. Gaskill testified that on the evening in question Lock did not sound depressed or suicidal, never said he was going to hurt himself, Gaskill, or damage the vehicle, and that she was not afraid for her safety when she left downtown with him as a passenger. She testified that she did not know what his intent was in grabbing the wheel.

Viewing the evidence and inferences therefrom in a light most favorable to Lock, reasonable minds could differ on the question whether Lock intended to suffer or cause injury. Grabbing the steering wheel from the driver while traveling at high speed is certainly reckless;

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[3] In both *Masters* and *Nabozny*, unlike the instant case, the insured did an intentional act intending damage or injury, but the damage or injury was greater than that originally intended.

nevertheless, it has surely been done by many agitated persons who did not intend to cause themselves or others harm as a result. The trial court properly denied Continental's motion for directed verdict.

B

Continental also contends that Lock is precluded by MCL 500.3113 from recovering PIP benefits because he was using the vehicle unlawfully. We disagree.

MCL 500.3113 provides in part:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if, at the time of the accident any of the following circumstances existed:
>
> (a) the person was using a motor vehicle . . . which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

There is no dispute that Lock was not armed. A reasonable juror could have concluded that Lock did not steal or carjack the vehicle or take it unlawfully. Lock and Gaskill had had a child together, whom Gaskill allowed Lock to visit, at least at times. Lock gave Gaskill back the keys, and Gaskill testified at trial that she was not afraid for her safety when she left downtown. Gaskill remained in control of the vehicle; it was not taken by Lock either by him taking control of it, or by forcing Gaskill to operate it in a particular fashion. Although Lock may have been in the car without permission, that did not establish that he took the vehicle unlawfully. A reasonable juror could conclude that Gaskill chose to leave downtown and drive on the freeway, and that she was operating the vehicle of her own volition. No-fault coverage is purely statutory. The Legislature made policy judgments in determining when a claimant would be disqualified from benefits. Continental did not establish that Lock was disqualified as a matter of law, and it was not entitled to a directed verdict on this basis.

C

Continental next argues that the trial court improperly excluded jury members who expressed a belief that a person is responsible for the likely consequences of his actions, and erroneously instructed the jury regarding the meaning of an intentional act. We disagree.

The examination of prospective jurors may be conducted by the court or, in its discretion, by the attorneys." *People v Harrell*, 398 Mich 384, 388; 247 NW2d 829 (1976). The scope of voir dire examination of jurors is within the trial court's discretion. *Id.* "The trial court's finding that a juror has the ability to render an impartial verdict may only be reversed for clear abuse of discretion." *People v Johnson*, 164 Mich App 634, 637; 418 NW2d 305 (1987), rev'd on other grounds, 432 Mich 931; 442 NW2d 625 (1989).

Jury instructions are reviewed de novo, and examined as a whole to determine whether error requiring reversal occurred. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Even if somewhat imperfect, instructions do not create error requiring reversal if, on

balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id.* Failure to timely and specifically object to jury instructions precludes appellate review absent manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001).

We reject Continental's assertion that the court's conduct of voir dire deprived the jury of the right to draw an inference from the facts; and specifically the inference that Lock intended to injure himself. The trial court during voir dire spoke at length about the requirement under the law that Lock must have intended injury to himself, discussed a number of hypotheticals, and questioned jurors about their ability to be objective if faced with certain testimony. The trial court excused two potential jurors based on their statements that they could not be objective in determining whether Lock intended injury to himself given that he had grabbed the steering wheel intentionally, and could not be objective if it was shown that Lock had marijuana in his system at the time of the accident.

Continental maintains that the two excluded jurors expressed a strong opinion that persons should be responsible for their actions and accept the likely consequences of the act of grabbing a steering wheel of a car moving fast on the freeway, and that the trial court referred to their determinations of intent from a person's actions as "bias," when in fact drawing inferences from a person's actions is what the "natural result" language and the "direct risk of harm" language require a juror to do.

Viewing the voir dire as a whole, we find no error. The trial court excused the two jurors both because they expressed that they could not be objective if it were shown that Lock had marijuana in his system at the time of the incident, and because they stated they could not be objective regarding whether Lock intended to injure himself given Lock's act of grabbing the steering wheel. Continental's counsel objected to the dismissal of the jurors only on the ground involving drugs, not on the ground that they believed that by virtue of plaintiff's actions, including the grabbing of the steering wheel, he should bear the consequences regardless of whether he had intent to injure himself. Further, we do not understand the trial court's voir dire as precluding the jury from making inferences based on Lock's actions in considering whether Lock intended to injure himself. The trial court in voir dire referred several times to the burden being on plaintiff to establish that he did not intend to injure himself, and that his intent could be inferred from his actions, how he did the actions, and what he said.

Continental also asserts that the court incorrectly presented the law during voir dire because, even before *Masters* and *Nabozny*, the "natural result" rule compels an inference of intent to cause a result if the result is the "natural result" of the act. Continental cites no authority to support that such an inference is mandatory regardless of the insured's subjective intent. In *Mattson v Farmers Ins Exchange*, 181 Mich App 419, 424-425; 450 NW2d 54 (1989), on which Continental relies, this Court reversed the trial court's grant of a directed verdict to the defendant insurer. In *Mattson*, twenty-one-year-old Gregory Mattson ran into a street, threw himself in front of several automobiles and was seriously injured. Earlier that day he had been staring into space, talking to furniture and mumbling nonsensically. His psychiatrist recommended that he be committed, his parents took him to the hospital, and during one occasion that he stepped outside to smoke, he ran into the street. *Id.* at 421. The trial court granted the defendant insurer's motion for directed verdict, concluding that the plaintiff's

injuries were the intended result of his intentional act of running in front of moving vehicles. This Court reversed, noting:

> In *Frechen v DAIIE,* 119 Mich App 578; 326 NW2d 566 (1982), this Court held that injuries which are the unintended result of an intentional act are accidental and therefore compensable under the no-fault act. . . . .
>
> The *Frechen* view is consistent with the Supreme Court's recent reference, in connection with some intentional injury exclusions in homeowners' policies, to Michigan authority holding that 'an insured must subjectively intend both his act *and* the resulting injury in order to avoid its [the insured's] duty to defend and indemnify.' *Allstate Ins Co v Freeman,* 432 Mich 656, 672; 443 NW2d 734 (1989). However, even in those cases utilizing a subjective test of intention, '[w]here the injury or resulting death is the natural, anticipated and expected result of an intentional act, courts may presume that both act and result are intended." *Transamerica Ins Co v Anderson,* 159 Mich App 441, 444; 407 NW2d 27 (1987).
>
> In the case now before us, the link between hurling oneself in front of moving cars and injury is obvious and necessary—to the rational mind. But the statute calls upon us to consider only Gregory Mattson's mind, and the evidence is plain that his was not a rational mind on February 20, 1983.
>
> * * *
>
> As these excerpts reveal, *the jury was presented with extensive and conflicting testimony concerning Gregory Mattson's state of mind* on February 20, 1983. The testimony of the three psychiatrists, viewed in a light most favorable to plaintiff, could support a finding by a reasonable juror that Gregory Mattson, on that day, was so profoundly mentally disturbed that he could appreciate neither the nature of his acts nor their probable consequences. That being so, a reasonable juror could have found that Gregory Mattson did not intend to bring about his injuries or death when he threw himself in front of several automobiles. Such a conclusion admittedly would be at war with Gregory's own statements some six months after the fact. However, *the truthfulness and accuracy of those statements was for the jury to determine,* particularly in light of his intervening closed head injury, adjudication of mental incompetency and denial of the pre-accident delusions or hallucinations noted by his treating psychiatrist.
>
> * * *
>
> The question in this case was whether Gregory Mattson intended both the act of hurling himself in harm's way and the resulting injuries or death. The answer turns on the relative weight assigned to the psychiatric testimony and Gregory's admissions. The question should have been answered by a jury because reasonable minds could differ. [*Mattson, supra* at 424-425, 427-428. Emphasis added.]

See also *Schultz v Auto-Owners Ins*, 212 Mich App 199, 201-202; 536 NW2d 784 (1995) (where plaintiff quarreled with girlfriend and then jumped from moving van he was driving, having made statements before jumping that he did so either to elicit girlfriend's sympathy or to make her feel guilty, "plaintiff's intent to cause himself injury can be inferred from the facts," and summary disposition in insurer's favor upheld). Here, the evidence did not compel the conclusion that Lock intended to injure himself. He made no statements to that effect, and injury or death is not necessarily the natural, anticipated and expected result of the intentional act involved here - -grabbing the steering wheel - - as it is from hurling oneself in front of a moving car, or deliberately jumping from a moving vehicle. As in *Mattson*, the evidence could support multiple inferences regarding Lock's intent, and the issue was properly left to the jury.

D

Continental's challenge to the jury instructions is unpreserved, thus our review is for manifest injustice. *Bouverette, supra.* Continental maintains that by the time it came to the formal jury instructions, the jury was "fully indoctrinated in the purely subjective nature of intent." Continental does not challenge the trial court's instruction that "where the injury is a natural, anticipated and expected result of an intentional act, you may presume that both the act and the results are intended," but argues that shortly after giving that instruction, the court confused the jury by giving an instruction that was inconsistent with the natural result instruction, specifically:

> You're further instructed that the question is not whether the injury was reasonably foreseeable, but whether the injury was, in fact, foreseen by the injured party. That – this deals with the question of intent—that is, the intentional injury exclusion under the No-Fault law requires that the injured party must have intended or expected that his conduct would in all probability result in his injuries.

Continental has not shown that the latter instruction is erroneous or contradicts the "natural result" instruction. Nor has Continental shown that the jury was so improperly indoctrinated during voir dire that the final jury instructions were meaningless. We find no manifest injustice in connection with the jury instructions.

No. 233832 Attorney Fees and Interest

Continental asserts that the trial court erred in determining the amount of attorney fees owing as a mediation sanction without holding a hearing, and without specifying which fees were based on which work.

This Court reviews the trial court's award of case evaluation/mediation sanctions de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). The trial court's award of attorney fees is reviewed for an abuse of discretion. *Joerger v Gordon Foods, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). MCR 2.403(O)(6)(b) permits the award of "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation." The factors to be considered when determining what constitutes reasonable attorney fees are listed in Michigan Rule of Professional Conduct 1.5(a). *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 96; 537 NW2d 471 (1995). MRPC 1.5(a) sets forth these factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Lock attached to his motion a list of attorney hours, with a description of service and hours expended, most of which specified a date, and most of which stated the pertinent attorney's initials, totaling $100,055.00 for mediation sanctions (from 4/2/99). Defendant's response to plaintiff's motion for taxation of costs objected to plaintiff's requests on a number of grounds, and requested an evidentiary hearing regarding attorney fees and costs.

On January 11, 2001, the date set for hearing, a hearing was not held. Rather the court met with counsel in chambers and then stated some findings, some of which defense counsel apparently agreed to and are not at issue on appeal. Defense counsel stated on the record:

> MS. TWYDELL: To the extent that you have indicated that it was agreed or it was stipulated to in chambers, these are not necessarily agreements that were made between the parties in chambers, it's simply we are agreeing that that was your rulings [sic] as we were sitting in chambers going over matters, that that is what happened in chambers and is not necessarily a stipulation by either party on the record that, that they are agreeing with the findings of the Court.
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> THE COURT: No. No, the Court, the Court made it's own findings and decision. When I say stipulated and agreed, it was agreed that we were including these things. It was agreed that the other things, these other matters were out such as certain fees and whatever. Obviously, this matter is on appeal and even the Court's decision relative to fees and so forth. . . .

Plaintiff requested $18,045 for 120.3 hours expended by Amy Chayet-Shapiro and Deborah Lapin, at $150.00 an hour. The trial court awarded a joint lump sum of $7,500 for attorneys Amy Chayet Shapiro and Deborah Lapin, without allocation between them, and without determining a reasonable attorney fee for either.

Regarding attorneys Ronald Applebaum and Linda Bobrin, plaintiff's motion requested post-mediation fees for 13.25 hours at $250.00 an hour, or $ 3,312.50. The trial court awarded a flat fee of $1,985.50 for both attorneys, representing an hourly fee of $150.00.

Plaintiff requested $79,397.50 in post-mediation attorney fees for principal counsel, Harvey Chayet, representing 226.85 hours at $350.00 per hour.[4] The trial court concluded that

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[4] In a supplemental memorandum in support of plaintiff's motion for attorney fees, plaintiff's counsel requested $3,300 in additional attorney fees (at $350 an hour for H. Chayet, and $150 an (continued…)

$250.00 was a reasonable hourly fee, and that it would review the list of hours plaintiff's counsel provided and make a determination of allowable hours. The trial court then notified the parties by letter that it would allow 207.4 hours at $250.00 per hour. The letter contained no detail regarding how the court arrived at the number of hours.

We conclude that remand is necessary on the award of post-mediation attorney fees under MCR 2.403(O). On the date set for hearing, the trial court met with counsel in chambers and then placed its "findings" on the record, without holding a hearing. Although plaintiff's motion addressed the factors of his counsels' years of experience, skill, reputation, and the difficulty of the case, the trial court did not make reference to several of those factors when it placed its findings on the record, and on this record it cannot be said that the trial court considered those factors, as required. Further the court's letter did not explain how it arrived at the number of hours allowed for lead counsel. Remand is therefore necessary on the award of post-mediation attorney fees under MCR 2.403(O).

Lastly, Continental asserts that the award of penalty interest under the no-fault statute was improper because whether plaintiff was covered under the policy was disputed. The no-fault act, MCL 500.3142, provides:

> (1) Personal protection insurance benefits are payable as loss accrues.
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> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
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> (3) An overdue payment bears simple interest at the rate of 12% per annum.

MCL 600.6013 of the Revised Judicature Act provides regarding pre-judgment interest:

> (1) Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section. . . .
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> (6) Except as otherwise provided in subsection (5) and subject to subsection (11), for complaints filed on or after January 1, 1987, interest on a money judgment

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(…continued)

hour for Amy Chayet-Shapiro) for responding to defendant's post-trial motion for JNOV and to defendant's response to plaintiff's motion for taxation of costs.

> recovered in a civil action shall be calculated at 6-month intervals from the date of filing of the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section. Interest under this section shall be calculated on the entire amount of the judgment, including attorney fees and other costs. However, the amount of interest attributable to that part of the money judgment from which attorney fees are paid shall be retained by the plaintiff, and not paid to the plaintiff's attorney.

Defendant claims on appeal that penalty interest is not appropriate in this case because Lock's status as a claimant was legitimately disputed where the facts raised an issue whether, as an intruder in the vehicle, he was entitled under MCL 500.3113 and 500.3114 to the protection that applied to that vehicle. Defendant did not preserve this issue below. The verdict form asked: "Was interest for any of the expenses or losses to which the plaintiff was entitled overdue?" The jury responded in the affirmative, and awarded plaintiff PIP penalty interest of $67,755. On appeal, defendant does not argue that it either objected to the verdict form or that it objected to the issue of penalty interest going to the jury. Further, the statute provides that interest is to be paid on overdue benefits; there is no requirement that the insurer act unreasonably in failing to pay the benefits in a timely fashion. Cf. MCL 500.3148, which provides for attorney fees where there has been an *unreasonable* refusal by the insurer.

Defendant further argues that when plaintiff presented the judgment, he included interest again, on the total judgment, which presumably was statutory interest, but that plaintiff calculated this interest from October 24, 1997, six months before filing suit, when MCL 600.6013(6) states that interest is to be calculated at 6-month intervals from the date of filing the complaint. Defendant notes that the starting point for plaintiff's calculation was the verdict amount, which included the penalty interest.

The trial court relied on *Attard v Citizens Ins Co*, 237 Mich App 311, 318-319; 602 NW2d 633 (1999), which held that "the interest allowed under the no-fault act, MCL 500.3142; MSA 24.13142 (the no-fault interest statute) is a "cost" on which he [the plaintiff] can collect prejudgment interest pursuant to MCL 600.6013(6); MSA 27A.6013(6) . . (the prejudgment interest statute)":

> These two statutes at issue in this case serve different purposes. The prejudgment interest statute authorizes a party to collect interest on a money judgment recovered in a civil action, with the interest calculated from the date of filing the complaint "on the entire amount of the money judgment, including attorney fees and other costs." MCL 600.6013(6); MSA 27A.6013(6). In *Phinney v Perlmutter*, 222 Mich App 513, 540-541; 564 NW2d 532 (1997), we stated that the purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages. In addition, the prejudgment interest statute is a remedial statute to be construed liberally in favor of the plaintiff. On the contrary, the no-fault interest statute requires an insurer to pay simple interest of twelve percent for personal protection insurance benefits that are not paid within thirty days "after an insurer receives reasonable proof of the fact and of the amount of

> loss sustained." MCL 500.3142(2); MSA 24.13142(2). Unlike prejudgment interest, which is intended to compensate a party for the delay in receiving its damages, no fault interest is intended to penalize an insurer that is dilatory in paying a claim. . . .
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> Our conclusion is supported by our Supreme Court's decision in *Wood v DAIIE*, 413 Mich 573, 589 & n 17; 321 NW2d 653 (1982), in which the Court stated that the no-fault act's twelve percent interest on wage-loss benefits and the statutory prejudgment interest statute are not mutually exclusive. . .
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> Because the no-fault act's interest provision is intended to penalize the insurer for its misconduct rather than compensate the insured for damages caused by the insurer, we conclude that a prevailing plaintiff may recover no-fault penalty interest under MCL 500.3142 . . . as a cost subject to prejudgment interest under MCL 600.6013. . . [*Attard, supra* at 319-320. Some citations omitted.]

We find no error in the court's awarding no-fault interest and statutory prejudgment interest. Any asserted error in the calculation can be addressed to the court on remand.

We reverse the circuit court's denial of Continental's motion for summary disposition in Docket No. 233109. We affirm the judgment in Lock's favor in Docket No. 231355. In Docket No. 233832, we affirm the award of no-fault interest and statutory prejudgment interest, subject to correction on remand, and vacate the trial court's award of post-mediation attorney fees and remand for further proceedings. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kurtis T. Wilder