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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-1814**

Nancy Bach,  
Respondent,

vs.

Liberty Mutual Fire Insurance Company,  
Appellant.

**Filed June 11, 2018  
Affirmed  
Bratvold, Judge**

Hennepin County District Court  
File No. 27-CV-16-18427

Matthew Brenengen, Brenengen Law Offices, St. Louis Park, Minnesota (for respondent)

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Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,  
Judge.

**UNPUBLISHED OPINION**

**BRATVOLD**, Judge

Appellant Liberty Mutual Fire Insurance Company (Liberty Mutual) challenges the district court's decision to grant summary judgment in favor of respondent Nancy Bach, granting relief on her declaratory judgment action for no-fault benefits. We affirm for four reasons: (1) Bach has a covered claim for no-fault benefits under Minn. Stat. § 65B.43,

subd. 3 (2016), because her fall in a parking lot arose from the maintenance or use of a motor vehicle; (2) Liberty Mutual failed to prove any actual prejudice was caused by Bach's delay in giving written notice of the accident; (3) Bach is not precluded from recovering no-fault benefits under Minn. Stat. § 62Q.75, subd. 3 (2016), even though her health-care provider submitted charges to Liberty Mutual more than six months after date of service and failed to comply with electronic submission requirements; and (4) Bach's recovery in a separate civil suit against the parking lot owner does not prevent her recovery of no-fault benefits.

## **FACTS**

In May 2013, Bach left a restaurant and walked to a car that was parked in a lot across the street. Bach's husband was waiting in the car; he drove forward and opened the car door for Bach. Bach put her hand on the car door frame and attempted to enter the car, but tripped and fell into a trench in the parking lot.

Bach fractured the fibula in her left leg as a result of the fall. She incurred medical expenses in excess of \$20,000 and was unable to work 18 weeks and 3 days. Initially, Bach's health insurer paid her medical expenses. Bach sued the parking lot owner and settled for \$67,500. Her health insurer exercised its subrogation rights and recovered some of the medical expenses it had paid from Bach's settlement with the parking lot owner.

At the time of the accident, Bach had no-fault coverage through her automobile insurance policy with Liberty Mutual. In September 2014, Bach applied for no-fault benefits related to her injury, and Liberty Mutual denied the claim.

In October 2016, Bach sued Liberty Mutual seeking a declaration that she was entitled to no-fault benefits under her policy. The parties filed cross-motions for summary judgment; the district court granted Bach's motion and denied Liberty Mutual's motion, eventually awarding Bach \$39,626.50. Liberty Mutual appeals.

## DECISION

We review summary judgment decisions de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). When we do so, we determine “whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Id.* The court reviews the evidence in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

### **I. Bach has a covered claim for no-fault benefits.**

Minnesota's No-Fault Act requires “reimbursement for all loss suffered through injury arising out of the maintenance or use of a motor vehicle.” Minn. Stat. § 65B.44, subd. 1(a) (2016). The statute defines “[m]aintenance or use of a motor vehicle” as

maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it. Maintenance or use of a motor vehicle does not include (1) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or (2) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it.

Minn. Stat. § 65B.43, subd. 3.

The supreme court has articulated a three-step test to determine if an injury arose out of the maintenance or use of a motor vehicle, noting that each case will turn on its own particular facts. *See Cont'l W. Ins. Co. v. Klug*, 415 N.W.2d 876, 877-78 (Minn. 1987). First, we must evaluate “the extent of causation between the automobile and the injury.” *Id.* at 878. This standard is “something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury.” *Id.* (quotation omitted). “The connection is established if the injury is a natural and reasonable incident or consequence of the use of the vehicle” and the vehicle “must be an active accessory to the injury sustained.” *North River Ins. Co. v. Dairyland Ins. Co.*, 346 N.W.2d 109, 114 (Minn. 1984). Second, if the court finds the required causation, then it determines “whether an act of independent significance occurred, breaking the causal link between ‘use’ of the vehicle and the injuries inflicted.” *Klug*, 415 N.W.2d at 878. Third, the court must determine if the “injuries result[ed] from use of an automobile for transportation purposes.” *Id.* The party claiming no-fault benefits bears the burden of showing the injury arose out of the maintenance or use of a vehicle. *LaValley v. Nat'l Family Ins. Corp.*, 517 N.W.2d 602, 605 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). Liberty Mutual argues that Bach has not satisfied the first and second steps. We address each argument in turn.

First, caselaw supports Bach’s position that she has established a sufficient causal connection between the use of a motor vehicle and her injury. In *Haagenson v. National Farmers Union Property and Casualty Co.*, a man drove his car into a ditch and collided with a power pole. 277 N.W.2d 648, 650 (Minn. 1979). Three power lines fell across the top of the car. *Id.* The plaintiff was alerted to the accident and went to assist the driver. *Id.*

He attempted to enter the vehicle and was electrocuted. *Id.* at 650-51. The supreme court concluded the plaintiff's injury was covered under the no-fault policy and held: "While the finding that a person is entering a motor vehicle will not establish in every case that an injury has arisen out of the use of a motor vehicle, such a finding does establish the requisite causal connection in this case." *Id.* at 652. It reasoned that a sufficient causal connection existed because the plaintiff was entering the vehicle for purposes of transportation and that the injury was a "natural and reasonable incident or consequence of us[ing] the vehicle." *Id.*

Bach has a similar causal connection between her injury and the vehicle. She was entering the vehicle for transportation purposes at the time she fell and tripping was a "natural and reasonable" consequence of using the motor vehicle. *See id.* Liberty Mutual argues that *Haagenson* is distinguishable because, in that case, the vehicle caused the powerlines to fall. But the vehicle does not need to be the cause of the injury, only an "active accessory." *See North River Ins. Co.* 346 N.W.2d at 114. Bach tripped and fell into the trench—in a parking lot—because she was entering the car.

Liberty Mutual argues we should follow the supreme court's decision in *Marklund v. Farm Bureau Mutual Insurance Co.*, 400 N.W.2d 337, 341 (Minn. 1987). There, the plaintiff refilled his gas tank, finished, replaced the gas hose to the pump, and walked towards the passenger side of the vehicle. *Marklund*, 400 N.W.2d at 338. As he passed the right rear of the vehicle, he slipped on a patch of ice and was injured. *Id.* We are not persuaded that *Marklund* applies here because, as discussed in the opinion, the plaintiff did not "come into any physical contact with his automobile" as he fell. *Id.*

Moreover, *Marklund* juxtaposed its facts to those discussed in *Brehm v. Illinois Farmers Insurance Co.*, where this court held a claim was covered under a no-fault policy when a plaintiff was injured while washing his car at a service station after he slipped on a patch of motor oil. 390 N.W.2d 475, 476 (Minn. App. 1986). *Marklund* stated that a “nexus” existed between the injury and the maintenance of the car in *Brehm* but did not exist in *Marklund*. 400 N.W.2d at 340. In Bach’s case, she was physically in contact with the vehicle and attempting to enter it when she sustained her injuries, demonstrating her claim is in line with *Haagenson* and *Brehm* and unlike *Marklund*.<sup>1</sup>

Second, we consider whether an intervening act broke the causal link between Bach’s use of the motor vehicle and her injuries. Liberty Mutual argues that the trench was an intervening act. But the trench played the same role as the power lines in *Haagenson* and the oil puddle in *Brehm*. Indeed, *Klug* determined there was no intervening act where a person driving one vehicle shot a firearm at the plaintiff who was driving a separate vehicle. 415 N.W.2d at 877-79. Additionally, other courts have held an intervening act breaks the causal link only when the act was not closely linked to the automobile. *See, e.g., Wieneke v. Home Mut. Ins. Co.*, 397 N.W.2d 597, 600 (Minn. App. 1986) (intervening act where a person who, while sitting in an unmoving car, was punched as a part of a road rage incident), *review denied* (Minn. Jan. 21, 1987); *Edwards v. State Farm Mut. Auto. Ins. Co.*,

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<sup>1</sup> Liberty Mutual also argues that Bach fails the first *Klug* step because, during her deposition, she and her family members said the car did not cause her fall. This argument lacks merit. Under applicable law, a motor vehicle does not need to be the “but for” cause of the accident, only an “active accessory.” *North River Ins. Co.*, 346 N.W.2d at 114.

399 N.W.2d 95, 98-99 (Minn. App. 1986) (intervening act where victim was forced into vehicle, driven to another location, and murdered), *review denied* (Minn. Mar. 13, 1987).

Bach satisfies the third step of the *Klug* test because she was using the vehicle for transportation. Liberty Mutual does not appear to dispute this point. We conclude the district court correctly determined that Bach's claim was covered as an injury arising out of the use of a motor vehicle under the No-Fault Act.

**II. Liberty Mutual failed to offer any evidence of actual prejudice as a result of Bach's delay in giving written notice of her claim.**

Bach did not submit a claim to Liberty Mutual for her injury until September 2014, 16 months after her injury. Her insurance policy provided,

*A person seeking Personal Injury Protection Coverage must give us or our authorized agents, written notice of an accident within 6 months from the date of the accident . . . . Failure to provide such notice shall not cause the "insured" to become ineligible to receive personal injury protection benefits unless we show actual prejudice. In this event the insured will be ineligible to receive benefits only to the extent of the prejudice.*

(Emphasis added). Minnesota law authorizes such a provision.

*A plan of reparation security may prescribe a period of not less than six months after the date of accident within which an insured or any other person entitled to claim basic economic loss benefits, or anyone acting on their behalf, must notify the reparation obligor or its agent, of the accident and the possibility of a claim for economic loss benefits. Failure to provide notice will not render a person ineligible to receive benefits unless actual prejudice is shown by the reparation obligor, and then only to the extent of the prejudice. The notice may be given in any reasonable fashion.*

Minn. Stat. § 65B.55, subd. 1 (2016) (emphasis added).

Liberty Mutual argues its lack of “opportunity to investigate, conduct an independent medical exam, or defend the claim at or near the time of the accident” caused it prejudice, and so Bach is ineligible to receive no-fault benefits. More specifically, it argues it was unable to take photographs, obtain witness statements, preserve evidence, analyze medical bills and treatment, and question Bach under oath.

The district court rejected this argument because Liberty Mutual did not “produce[] any admissible evidence that describes specifically the nature of any alleged actual prejudice. At most, the record supports a general assertion that the delay prevented Liberty Mutual from conducting an immediate investigation of the claim including the physical conditions of the parking lot where the injury occurred.”

The district court’s reasoning is correct. In *Dairyland Insurance Co. v. Clementson*, the insured did not file a no-fault claim for six years following an injury. 431 N.W.2d 895, 898 (Minn. App. 1998). The insurer argued it was prejudiced by its inability to investigate. *Id.* This court rejected that argument, stating that the insurer failed to allege any facts suggesting events occurred other than as the insured had alleged. *Id.* The insurer also alleged prejudice based on its inability to obtain an independent medical examination, which this court rejected because the insurer stipulated that the medical expenses were reasonable. *Id.*

Similarly, in Bach’s case, Liberty Mutual fails to establish that it experienced actual prejudice. It does not allege any facts suggesting a different version of events; and it does not allege that any of Bach’s medical costs were unreasonable or unconnected to her injury. Further, Bach’s family took photos of the trench and Liberty Mutual does not claim that

the parking lot has changed. Additionally, Liberty Mutual obtained statements from Bach and her family, and offered no reason it could not obtain an examination of Bach under oath. Lastly, Liberty Mutual has not identified any evidence that was not preserved.

Liberty Mutual relies on *Noon Realty, Inc. v. Aetna Insurance Co.*, in which this court concluded an insurer was prejudiced by a seven-year delay in receiving notice. 387 N.W.2d 465, 467-68 (Minn. App. 1986). A 16-month delay is far less, and *Noon Realty* noted another case that held a delay of 18 months did not cause prejudice.<sup>2</sup> *Id.* (citing *Reliance Ins. Co. v. St. Paul Ins. Cos.*, 307 Minn. 338, 343, 239 N.W.2d 922, 925 (1976)). Moreover, the injury in *Noon Realty* took place at a construction site, and the insurer reasonably asserted it was unable to interview the other workers because it could not assemble them seven years later. 387 N.W.2d at 466-67. In Bach's case, Liberty Mutual does not point to any witnesses it cannot now interview.

Accordingly, the district court correctly determined that Liberty Mutual failed to offer any evidence that Bach's 16-month delay in providing notice resulted in actual prejudice.

**III. Bach's health-care provider's failure to submit charges to Liberty Mutual within six months of treating Bach and its failure to do so in the required manner do not preclude Bach's recovery of no-fault benefits.**

Under Minnesota law, health-care providers

*must submit their charges to a health plan company or third-party administrator within six months from the date of service or the date the health care provider knew or was informed of*

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<sup>2</sup> Liberty Mutual also cites an unpublished decision to support its position but unpublished cases are not precedential. Minn. Stat. § 480A.08, subd. 3 (2016); *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004).

the correct name and address of the responsible health plan company or third-party administrator, *whichever is later*. A health care provider or facility that does not make an initial submission of charges within the six-month period shall not be reimbursed for the charge and may not collect the charge from the recipient of the service or any other payer.

Minn. Stat. § 62Q.75, subd. 3 (emphasis added). We will refer to this provision as “subdivision 3” and note that it applies to no-fault insurance contracts. *See id.* (“This subdivision also applies . . . to reparation obligors for treatment of an injury compensable under chapter 65B.”).

Bach’s health-care provider submitted charges to Bach’s health insurer for medical care related to her injury. Liberty Mutual argues that, under subdivision 3, it is not obligated to provide no-fault benefits for medical costs because Bach’s health-care provider failed to submit charges to Liberty Mutual within six months of the date of service. The district court rejected this argument. We agree with the district court (1) because Bach’s health-care provider submitted charges to her health insurer and Bach incurred a loss under the no-fault act as a result, and (2) because there is no evidence in the record that Bach’s health-care provider had been informed that Liberty Mutual was the responsible insurer.

Our analysis is guided by this court’s opinion in *Western National Insurance Co. v. Nguyen*, 902 N.W.2d 645, 649-50 (Minn. App. 2017), *aff’d mem.*, 909 N.W.2d 341 (Minn. 2018).<sup>3</sup> There, Nguyen sustained injuries in a motor-vehicle accident and workers’

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<sup>3</sup> The supreme court granted review of *Nguyen*, but was evenly divided, and as a result, dismissed the appeal and affirmed this court’s opinion. Accordingly, *Nguyen* is binding precedent.

compensation paid for his initial treatment. *Id.* at 647. After Nguyen’s workers’ compensation ended, Western National paid no-fault benefits to Nguyen, but requested an independent medical examination. *Id.* The independent medical examiner determined that no further medical treatment was necessary. *Id.* Later on, Nguyen received medical treatment related to his injury from a new health-care provider. *Id.* at 648. The new health-care provider submitted one charge to Western National, but did not submit any other charges within the six-month time frame, despite Nguyen receiving more treatment. *Id.* Nguyen submitted the other charges to Western National, which denied his claim. *Id.* A no-fault arbitrator awarded payment for Nguyen’s treatment with the new health-care provider. *Id.* A district court vacated the award, and this court affirmed. *Id.* at 648-51.

Initially, this court recognized that the No-Fault Act provides benefits for “economic-loss” and a party incurs such loss when “medical expenses are incurred” and “he or she receives bills for medical treatment.” *Id.* at 649 (quoting *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108, 113 (Minn. 2002)). But our reasoning turned on the explicit language of subdivision 3. Because the health-care provider did not submit most of its charges to Western National within the six-month window, the health-care provider was not entitled to reimbursement for charges not submitted, nor could the provider collect those charges from Nguyen. *Nguyen*, 902 N.W.2d at 649-51. As a result, Nguyen did not experience a loss and could not recover no-fault benefits. *Id.*

*Nguyen*’s reasoning guides our analysis. In *Nguyen*, the insured was not entitled to no-fault benefits because he did not incur a loss, since his health-care provider did not timely submit charges and therefore could not be reimbursed or collect charges for

Nguyen’s treatment under the terms of subdivision 3. *Id.* Further, we recognized that subdivision 3 sets out requirements for health-care providers, not insured parties. *Id.* at 650 (recognizing subdivision 3 “is silent about insured claimants and unambiguously” requires only health-care providers and facilities to comport with its provisions).

In contrast to *Nguyen*, Bach incurred a loss when she incurred medical expenses and received bills. Also, Bach’s health-care provider submitted charges to Bach’s health insurer. More fundamentally, Liberty Mutual failed to establish that Bach’s health-care provider violated subdivision 3’s timing provisions. Bach concedes that her health-care provider failed to submit charges to Liberty Mutual within six months of service. But subdivision 3 states that health-care providers must submit their charges within six months from the date of service *or* from the date it was “informed of the correct name and address of the responsible health plan company or third-party administrator, *whichever is later.*” Minn. Stat. § 62Q.75, subd. 3 (emphasis added). Accordingly, subdivision 3 implies that a health-care provider is under no obligation to submit charges to an insurer until it has been furnished with the pertinent information to do so.

Because nothing in the record establishes that Bach’s health-care provider was informed that Liberty Mutual was the responsible party, we conclude that subdivision 3’s timelines were not triggered. In its reply brief, Liberty Mutual cites to law requiring health-care providers to bill insurers “sequentially according to the priority of benefits.” *See* Minn. Stat. § 65B.61 (2016). Accordingly, Liberty Mutual argues that “[w]e can assume that [Bach] was asked by her medical providers whether her injuries were related to a work-related incident and whether they were related to a motor vehicle.” Even so, Liberty Mutual

points to no evidence that Bach's health-care provider was informed that Liberty Mutual was the responsible insurer.

Liberty Mutual also argues that Bach's health-care provider failed to submit charges in the electronic format required by Minn. Stat. § 65B.54, subd. 1 (2016), therefore, it is not required to reimburse medical expenses. The applicable provision states:

Medical or funeral expense benefits may be paid by the reparation obligor directly to persons supplying products, services, or accommodations to the claimant. Claims by a health provider defined in section 62J.03, subdivision 8, for medical expense benefits covered by this chapter shall be *submitted to the reparation obligor pursuant to the uniform electronic transaction standards required by section 62J.536 and the rules promulgated under that section. Payment of benefits for such claims for medical expense benefits are not due if the claim is not received by the reparation obligor pursuant to those electronic transaction standards and rules.*

Minn. Stat. § 65B.54, subd. 1 (emphasis added). This argument is unavailing. The relevant statutory language explicitly regulates only how "health provider[s]" must submit claims. *See id.* Liberty Mutual does not allege that Bach is a health provider, and it cannot deny her claim on this basis as a result. *See* Minn. Stat. § 62J.03, subd. 8 (2016) (defining health provider as "a person or organization . . . that provides health care or medical care services within Minnesota").

We agree with the district court's determination that Liberty Mutual failed to establish that Bach's health-care provider's submission of charges precluded Bach's recovery of no-fault benefits.

#### **IV. Bach may recover no-fault insurance benefits in addition to her tort settlement.**

Liberty Mutual argues that Bach “should not be able to recover twice for the same incident.” It relies on the purpose of Minnesota’s No-Fault Act, which is, in part, to prevent overcompensation and provide offsets to avoid duplicate recovery. Minn. Stat. § 65B.42 (2016). But the supreme court has specifically held that parties with no-fault insurance may recover losses under their policies after recovering in a tort action. *State Farm Mut. Auto. Ins. Co. v. Lennartson*, 872 N.W.2d 524, 532 (Minn. 2015) (“[T]he No-Fault Act does not relieve a no-fault insurer from its obligation to pay basic economic benefits even when the insured already has recovered the cost of medical expenses in a negligence action.”). In reaching this conclusion, *Lennartson* considered and rejected Liberty Mutual’s argument. *See id.* at 532.

Liberty Mutual argues that *Lennartson* is distinguishable, because unlike the insured in *Lennartson*, Bach “denied that her fall and subsequent injuries had anything to do with a motor vehicle until after commencing a negligence suit against the parking-lot trench owner.” Liberty Mutual seems to assume that Bach had to choose between the car and the trench as the “but for” cause of her injuries. But in her suit against Liberty Mutual, as we have already stated, Bach is not required to allege or prove that the car was the “but for” cause of her accident. Rather, Minnesota law requires only that Bach’s car was an “active accessory” to her injury. *See North River Ins. Co.* 346 N.W.2d at 114.

Liberty Mutual also appears to allege that Bach’s “reversal of positions” warrants applying the doctrine of judicial estoppel. Liberty Mutual did not make this argument in the district court and it cannot do so for the first time on appeal. *See Thiele v. Stich*,

425 N.W.2d 580, 583 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” (quotation omitted)).

**Affirmed.**