STATE OF MICHIGAN

COURT OF APPEALS

JAMES J. BROWN, Plaintiff-Appellant,	UNPUBLISHED March 21, 2013
v	No. 307137 Macomb Circuit Court
ALLSTATE INSURANCE COMPANY and AMY M. KROL, Defendant-Appellees.	LC No. 2010-003672-NI

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

After his vehicle was rear-ended, plaintiff James J. Brown filed a lawsuit seeking payment of no-fault benefits and tort-liability damages. Brown's benefit and damage claims centered on the contention that the accident caused a back injury and exacerbated pre-existing disabilities. The circuit court summarily dismissed both the first and third-party actions, finding that Brown failed to demonstrate a connection between the accident and his alleged injuries. We reverse as to both Brown's first- and third-party claims and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

On September 2, 2009, defendant Amy M. Krol's vehicle struck the car in front of her, propelling that vehicle into the back of Brown's Ford Focus. Krol subsequently admitted that traffic was heavy on the day of the accident, she "wasn't paying attention," and that no one else bore any fault for the chain collision. Brown testified that immediately after the accident his "back was hurting" and his big toe was bleeding. He declined medical attention at the scene.

Brown consulted his personal physician, Dr. Gladstone Payton, two days later. Dr. Payton's medical records indicate that Brown complained of "low back problems" and "difficult walking and experiencing pain from the traumatic area[.]" Payton observed the toe injury and noted "spasming involving the lumbar, lumbosacral regions, muscle involvement in the thoracic, and minor amount [in the] cervical regions." He diagnosed: "1) Acute lumbar, [lumbosacral]

myositis[1] due to auto accident – rear-ended, 2) Superficial laceration involving the [right] great toe secondary to auto accident of 9-2-09 3) [Rule-out] possible [fracture] of the distal bone structure."

Six days later, Brown returned to Payton's office complaining of "[p]ain involving the lumbar and thoracic regions secondary to auto accident." Payton again noted spasms in Brown's lumbar and lumbosacral regions and recorded that Brown "is having difficulty with standing or sitting for any length of time, some difficulty sleeping." Payton attributed these problems to the accident, setting forth as his diagnosis: "Traumatic thoracic, lumbar myositis secondary to auto accident."

On October 19, 2009, Brown visited Payton due to "[e]xquisite pain in the lumbar region on the [right] with more severe spasms involving the [right] gluteal area, some more difficulty standing at this time[.]" Payton administered a nerve block injection. His diagnosis states: "1) [Chronic] low back syndrome, 2) [Rule-out] herniated disc disease." A subsequent MRI revealed no acute disc herniation.

On April 23, 2010, Payton signed a "Disability Certificate" attesting that as a result of the injuries Brown sustained in the September 2, 2009 accident or the "aggravation of the patient's pre-existing conditions," Brown was "disabled and/or restricted" from working, performing housework, and driving. The form described "housework or replacement services" to include "bending, lifting, twisting and prolonged standing, i.e. vacuuming, making beds, washing floors, sinks, bathtubs, toilets, moving furniture, picking up objects off floors, child care, carrying garbage or groceries, lawn work and/or snow removal[.]"

On August 26, 2010, Brown filed a first-party no-fault benefit action against defendant Allstate Insurance Company, a tort claim against Krol, and a separate claim for uninsured/underinsured motorist benefits.[2] The complaint averred that as a result of the accident, Brown "sustained serious and traumatic injuries to his back, shoulders, right foot, and right leg as well as other injuries not yet manifested, which resulted in serous impairment of body function[.]" Paragraph 16 asserted:

> In the event it should be determined that Plaintiff, James J. Brown, was suffering from any pre-existing conditions on the date of the incident set forth in this Complaint, then, and in such event, it is averred that the negligence of the Defendant . . . exacerbated, precipitated and aggravated such pre-existing conditions.

As to Allstate, the complaint set forth a claim for "[r]easonable and necessary expenses for medical care, recovery and rehabilitation," as well as for "[o]ther personal protection benefits in

[1] Payton testified that "[m]yositis means that there is evidence of insult to a muscle, and ligaments and tendons. And subsequently you have limitations of pain."

[2] Allstate insured Krol's vehicle as well as Brown's.

accordance with the applicable no-fault provisions." According to the complaint, Allstate refused to pay any personal injury protection (PIP) benefits "since September 2, 2009[.]"

Brown testified at deposition that he was "partially" disabled before the accident due to surgeries performed on his knees and ankles resulting from injuries he sustained while in the United States Army. He described his disability as preventing him from crawling on his knees, standing for "severely long periods of time," and walking up a "regular ladder." Despite these restrictions, Brown claimed that at the time of the accident he worked for Schultz Homes as a "groundskeeper and handyman" and was paid "under the table." According to Brown, his job duties primarily involved overseeing the work of others and performing "light painting," "light drywall repair," and fixing electrical and plumbing problems. Brown asserted that he was not able to work after the accident. He described his accident-related injuries as involving his "lower back, upper butt and the nerve that goes down his [right] leg."

Payton first examined Brown in June 2008 when Brown sought referral to a rehabilitation program. Payton recalled that Brown had "difficulty with range of motion to both ankles" and "evidence of trauma involving both lower extremities." Payton also noted spasms in Brown's "lumbar, thoracic, and cervical regions." Payton explained that Brown's physical problems involved Brown's "lower extremities" and were "service related." At Brown's request, Payton signed two forms attesting to Brown's partial disability due to knee and ankle injuries. In the first, a SMART application for "ADA Paratransit Certification," Payton confirmed that Brown had sustained knee and ankle injuries, used an "ortho cane," was able to walk for one block, and that Brown's "ankles and knees give out." No back injuries or back pain complaints were noted. The second form, a template provided by the Michigan Department of Labor and Economic Growth, provided that Brown was incapable of performing "heavy lifting" due to "multiple trauma to lower extremities" and could not "squat, crawl [or] kneel." This form also omitted any mention of a back injury.

Payton admitted that due to the disabilities described in the forms, Brown could not perform any "heavy manual labor" or "any kind of demanding work." He further conceded that the "disability certificate" he signed in 2009, after the auto accident, limited Brown from performing "many . . . activities" from which Brown had been disabled before the accident. Notably, Payton specifically denied that Brown had previously complained of back pain:

> *Q.* We're looking, Doctor, at the medical record dated 9/23/09.
>
> What symptoms does Mr. Brown chiefly present with at that evaluation; at that appointment?
>
> *A.* Okay. He was complaining of low back pain, specifically the right area, or the right side, with pain radiating down the right gluteal area, to below the knee on the same side.
>
> *Q.* Now, Doctor, is this the first time that Mr. Brown has presented with this type of pain, meaning the right side pain which radiates down to the gluteal area just below the knee?
>
> *A.* Yes.

Q. And this is approximately 21 days, or three weeks, following the motor vehicle accident, correct?

A. That's right.

When asked whether "the conditions that Mr. Brown suffered from prior to the automobile accident" could have been "exacerbated by an acute trauma, such as an automobile accident," Payton answered in the affirmative.

On May 31, 2011, Allstate moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Allstate's motion asserted that Brown suffered from pre-existing conditions that were not "exacerbated and/or aggravated" by the accident. Allstate's motion continued: "Plaintiff's pre-existing conditions are not injuries that arose out of the September 2, 2009 motor vehicle accident. Therefore, Plaintiff's injuries are not related and/or do not arise out of a motor vehicle accident[.]" Although Allstate's motion alleged that Brown "cannot meet the threshold standard for a 'serious impairment of body function,'" Allstate premised this argument solely on the contention that Brown's claimed injuries did not arise from the accident. Allstate's brief in support of summary disposition neither cited *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), nor set forth an argument regarding whether Brown had suffered a serious impairment of body function.[3]

Rather, in its summary disposition brief, Allstate highlighted Brown's Army injuries and resulting disability, and pointed out that he had failed to provide any verification of his 2008 and 2009 employment. In support of its motion, Allstate presented the two disability forms signed by Payton in 2008 as well as Payton's deposition testimony. Allstate contended, "Plaintiff cannot prove a threshold 'serious impairment of body function' and Plaintiff clearly had pre-existing conditions, and it was those pre-existing conditions that caused Plaintiff to be disabled by his Primary Care Physician prior to September 2nd, 2009." (Emphasis in original). Krol filed a "concurrence with defendant Allstate's motion for summary disposition" asserting that "Plaintiff cannot meet the threshold standard for a 'serious impairment of body function' arising out of a motor vehicle accident based on the facts and arguments brought forth by codefendant . . . in its Motion for Summary Disposition." Krol failed to submit any evidence in support of her motion, and did not identify any evidence filed by Allstate upon which she intended to rely.

Brown responded to Allstate's motion by submitting the portions of Payton's medical records attributing his complaints to the accident, the disability certificate signed in 2010, his own deposition testimony, and copies of paychecks signed by Thomas Schultz. He pointed out that his Army-related injuries had not prevented him from maintaining gainful employment and argued that the evidence created a genuine issue of material fact regarding whether the accident "caused, aggravated or exacerbated" his injuries.

[3] At oral argument, Allstate's counsel conceded that the *McCormick* issue was not briefed in the circuit court.

The circuit court granted summary disposition for Allstate and Krol, reasoning in a bench opinion:

> [E]ven though *McCormick* [*v Carrier*, 487 Mich 180; 795 NW2d 517 (2010),] has changed the test on this, I don't think that as I read through the pleadings in this matter, as well as the recitation of the deposition testimony, that your client in this case has reached that level of *McCormick*[.]"

Plaintiff moved for reconsideration, contending that the circuit court erred in dismissing plaintiff's third-party negligence claim against Krol because Krol had merely concurred with Allstate's motion. The circuit court denied plaintiff's motion for reconsideration in a written opinion and order stating in relevant part:

> The evidence failed to show that plaintiff's injuries were caused by the subject accident or that the accident exacerbated any pre-existing injuries. It therefore follows that plaintiff is not entitled to uninsured/underinsured benefits. Further, plaintiff's failure to establish a causal connection also meant that he could not demonstrate that he sustained a serious impairment of body function as a result of the accident, which was required for recovery against Krol. MCL 500.3135.

II. ANALYSIS

Brown challenges the circuit court's summary disposition rulings, which we review de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

A. The No-Fault Benefit Case

We first address Brown's claim for first-party no-fault benefits. An injured claimant's entitlement to personal protection benefits arises from MCL 500.3105(1), which states: "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." In *Mollitor v Associated Truck Lines*, 140 Mich App 431, 438; 364 NW2d 344 (1985), this Court held that a first-party no-fault claimant "may recover if he can demonstrate that the accident aggravated a pre-existing condition." The plaintiff in *Mollitor* claimed that he injured his wrists while opening the rear door of a trailer. *Id.*

at 434. His physician subsequently diagnosed "bilateral carpal tunnel syndrome" and performed surgery. *Id.* Trial testimony indicated that carpal tunnel syndrome is usually a chronic condition and rarely results from traumatic injury. *Id.* at 434-435. A jury decided that the plaintiff had not suffered an accidental bodily injury. In affirming, this Court explained:

> [S]ummary judgment for either defendant or plaintiff would have been improper in the instant case since a question of fact was presented as to whether plaintiff's disability was the result of what occurred on October 17 when plaintiff attempted to open the door of his semitrailer or was due to years of repetitive use of plaintiff's hands and wrists while loading, unloading and driving his truck. That question was properly presented to the jury which, based on the testimony presented, decided in favor of defendant. [*Id.* at 437.]

Viewed in the light most favorable to Brown, the evidence supports that the September 2009 auto accident either exacerbated an underlying condition or caused a new back injury. Payton's medical records attest to the accident's causal role in aggravating or producing Brown's back pain and claimed disability, as did the disability certificate Payton signed in 2010. Although Payton testified that Brown had back problems before the accident, he also asserted that those problems had never resulted in pain. Furthermore, the disabilities reflected in the certifications signed by Payton before the accident relate exclusively to ankle and knee injuries rather than back problems.[4] Thus, the record contains evidence that, if credited by the fact-finder, could support that the accident caused back problems resulting in reasonable and necessary medical expenses.

We readily acknowledge that some evidence supports that Brown had developed chronic degenerative disc disease before his auto accident, and that Brown's pre-existing ankle and knee injuries limited his ability to engage in numerous activities. Nevertheless, Payton's records substantiate that the accident triggered Brown's 2009 physician visits and that Payton regarded the accident as having caused some measure of disability. And on summary disposition analysis, the nonmoving party receives the benefit of all reasonable inferences. Based on Brown's testimony and the paychecks he submitted to verify his employment, a fact question exists concerning whether his back injury or the exacerbation of his chronic back problem prevents him from performing the job duties he maintained at Schultz Homes. Accordingly, the circuit court improperly granted summary disposition of Brown's first-party no-fault claims.

B. The Tort Case

Brown asserts that the circuit court violated his right to due process of law by granting summary disposition to Krol absent a motion filed by Krol seeking dismissal of Brown's tort claims. Krol did not file a separate summary disposition motion; she merely concurred with the motion filed by Allstate. Her concurrence included an allegation that Brown could not meet the serious impairment threshold.

[4] In its brief on appeal, Allstate admits as much: "Appellant's medical disability stemmed from Appellant falling into a ditch while running formation and injuring his ankles and knees."

Had Allstate's summary disposition brief specifically addressed whether Brown's claimed injuries constituted a "serious impairment of body function" under MCL 500.3135(1), we would reject Brown's due process argument. But because Allstate's summary disposition motion and brief included no argument whatsoever regarding Brown's third-party claims, we agree that the circuit court improperly granted summary disposition.

When pursuing a motion under MCR 2.116(C)(10), the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). MCR 2.116(G)(4) continues:

> When a motion under subrule (C)(10) is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [Emphasis added.]

"The level of specificity required under MCR 2.116(G)(4) is that which would place the nonmoving party on notice of the need to respond to the motion made under MCR 2.116(C)(10)." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Furthermore, a motion for summary disposition brought under MCR 2.116(C)(10) must be supported with documentary evidence. *Meyer v Centerline*, 242 Mich App 560, 574; 619 NW2d 182 (2000).

Allstate's summary disposition motion and brief (and Krol's barebones concurrence) failed to identify any specific challenge to Brown's third-party claim. Allstate's brief included no citations to evidence supporting that there existed no genuine issue of material fact with respect to whether Brown's injuries met the *McCormick* threshold. Because neither Allstate nor Krol filed a properly supported summary disposition motion addressing whether Brown sustained a serious impairment of body function, Brown had no duty to respond. Accordingly, the circuit court erred by granting summary disposition of the third-party claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood