STATE OF MICHIGAN

COURT OF APPEALS

ROBERT F. CAMPBELL, Plaintiff-Appellee,	UNPUBLISHED May 19, 2015
v	No. 320775 Washtenaw Circuit Court
HOME-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 13-000213-NF

Before: BOONSTRA, P.J., and SAAD and MURRAY, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted[1] from the trial court's order denying its motion for partial summary disposition in this first-party no-fault action to recover personal protection insurance (PIP) benefits. We reverse and remand for entry of an order granting defendant's motion for partial summary disposition.

I. BACKGROUND

Plaintiff suffered several injuries, including back injuries, as the result of an automobile accident in 2009. Defendant, as plaintiff's first party no-fault PIP carrier, paid plaintiff's allowable expenses for his back condition through February 2010. Plaintiff brought suit against defendant in February 2012 as a result of a dispute over his continued entitlement to receive PIP benefits. The parties settled the suit and defendant agreed to pay $175,000 to release it from all claims for PIP benefits up through and including February 16, 2012.

In August 2012, plaintiff received an epidural steroid injection in his back as part of his pain management program. The steroid, which was manufactured by a third party, was contaminated and, as a result, plaintiff contracted fungal meningitis. On October 6, 2012, plaintiff underwent an emergency laminectomy for an epidural abscess. He also received additional treatment related to the meningitis infection, including long-term antifungal therapy. Plaintiff filed the present action seeking to recover PIP benefits related to the treatment of his

[1] *Campbell v Home-Owners Ins Co*, unpublished order of the Court of Appeals, entered August 7, 2014 (Docket No. 320775).

meningitis infection. Defendant moved for partial summary disposition on the ground that the infection and resulting treatment did not "arise out of" the use of his motor vehicle and, therefore, was not covered under § 500.3105(1) of the no-fault act, MCL 500.3101 *et seq*. Defendant argued that under *McPherson v McPherson*, 493 Mich 294; 831 NW2d 219 (2013), the meningitis infection constituted a new injury, the cause of which was the negligent manufacture of the steroid, and not the 2009 motor vehicle accident. The trial court disagreed and denied defendant's motion.

II. ANALYSIS

We review de novo the trial court's ruling on a motion for summary disposition. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008). A motion under MCR 2.116(C)(10) should only be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Id*. at 56.

MCL 500.3105(1) requires an insurer to pay benefits to an insured "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." The insurer is only liable for injuries that are caused by the operation or use of the vehicle. *Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012). In *McPherson*, 493 Mich at 297, the Court observed:

> In *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005), this Court explained this causal requirement:
>
> > [A]n insurer is liable to pay benefits for accidental bodily injury only if those injuries "aris[e] out of" or are caused by "the ownership, operation, maintenance or use of a motor vehicle . . . . " It is not *any* bodily injury that triggers an insurer's liability under the no-fault act. Rather, it is only those injuries that are caused by the insured's use of a motor vehicle.
> >
> > Regarding the degree of causation between the injury and the use of the motor vehicle that must be shown, this Court has established that an injury arises out of the use of a motor vehicle as a motor vehicle when "the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' " *Thornton Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986). [Alterations and emphasis by *McPherson* Court.]

In *McPherson* the plaintiff developed a neurological disorder as a consequence of injuries suffered in a 2007 motorcycle accident. *Id*. at 295. In 2008, while riding his motorcycle, the plaintiff suffered a seizure consistent with his disorder, lost control of his motorcycle, collided with a parked vehicle, and sustained a severe spinal cord injury that left him a quadriplegic. *Id*.

The plaintiff sought to recover no-fault personal protection insurance (PIP) benefits for the spinal cord injury on the theory that the injury arose out of the 2007 accident, and not the 2008 accident, for purposes of MCL 500.3105(1). *Id*. at 296. The trial court denied the insurer's motion for partial summary disposition and this Court affirmed. *Id*. The Supreme Court peremptorily reversed this Court's decision and remanded the matter to the trial court for entry of an order granting summary disposition in favor of the insurer. *Id*. at 299. The Court explained:

> In this case, the causal connection between the 2008 spinal cord injury and the 2007 accident is insufficient to satisfy the "arising out of" requirement of MCL 500.3105(1). Plaintiff did not injure his spinal cord while using the vehicle in 2007. Rather, he injured it in the 2008 motorcycle crash, which was caused by his seizure, which was caused by his neurological disorder, which was caused by his use of a motor vehicle as a motor vehicle in 2007. Under these circumstances, we believe that the 2008 injury is simply too remote and too attenuated from the earlier use of a motor vehicle to permit a finding that the causal connection between the 2008 injury and the 2007 accident "is more than incidental, fortuitous, or 'but for.' " *Thornton*, 425 Mich at 659.
>
> We reject plaintiff's argument that *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578; 751 NW2d 51 (2008), is relevant to this case. The Court of Appeals held in *Scott* that summary disposition was premature because the plaintiff had raised a genuine issue of material fact whether her hyperlipidemia occurred as a direct result of an injury she had received in an automobile accident or was attributable to other factors. That is, the issue was whether the evidence was sufficient to support a finding that the first *injury* caused the second *injury* in a direct way. In this case, plaintiff claims as fact that his spinal cord injury occurred as a result of the neurological disorder from the first accident in combination with the intervening motorcycle accident. The facts alleged by plaintiff are insufficient to support a finding that the first injury caused the second injury in any direct way. Rather, the facts alleged by plaintiff only support a finding that the first *injury* directly caused the second *accident*, which in turn caused the second injury. Thus, the second injury alleged by plaintiff is too attenuated from the first accident to permit a finding that the second injury was directly caused by the first accident. Though we are troubled by *Scott*'*s* use of a causal-connection standard this Court has never recognized—that "[a]lmost any causal connection will do," *id.* at 586—is nonetheless clearly distinguishable from this case because plaintiff admits that, absent the intervening motorcycle accident, his spinal cord injury would not have occurred as a direct result of the neurological disorder. [*McPherson*, 493 Mich at 297-299 (emphasis in original).]

Considered in a light most favorable to plaintiff, the evidence shows that he suffered a back injury while using his motor vehicle as a motor vehicle. However, the injury for which he now seeks benefits, i.e., the fungal meningitis infection, was not the result of the accident or the injuries it caused. Rather, the infection is the direct result of the intervening negligence of the third-party manufacturer of the steroid. The injury would not have occurred had the steroid not been contaminated when plaintiff received the injection.

The infection is too remote and too attenuated from the use of the motor vehicle as a motor vehicle to permit a finding that the causal connection between the accident and the fungal meningitis infection was anything but incidental, fortuitous, or but for. *Id.* at 299. The trial court erred when it reached the contrary conclusion.

Plaintiff's reliance on *Scott*, 278 Mich App at 578, though understandable, is misplaced. The Supreme Court has noted with disapproval that the *Scott* Court used a standard that had never before been recognized, which the Court declared it was "troubled by." *McPherson*, 493 Mich at 299. Although the *McPherson* Court did not need to overrule *Scott* because it was distinguishable, the Court's clear disfavor towards the standard used in *Scott*—along with stare decisis—causes us to follow the dictates within *McPherson*.

Reversed and remanded for entry of an order granting partial summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Christopher M. Murray