

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

CASSANDRA GRAYS,

Plaintiff-Appellant,

v

DAIRYLAND INSURANCE COMPANY,  
SENTRY INSURANCE and ISMAEL ELLABIB,

Defendants-Appellees.

---

UNPUBLISHED

August 2, 2011

No. 297242

Kalamazoo Circuit Court

LC No. 2009-000288-NF

Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Plaintiff Cassandra Grays sustained a second-degree burn to her right arm and a first-degree burn on her back when hot radiator fluid spewed onto Grays from a nearby vehicle owned by defendant Ismael Ellabib. Grays filed a complaint that alleged negligence against Ellabib, and sought recovery of work loss benefits pursuant to the no-fault insurance act, MCL 500.3101 *et seq.* The circuit court granted summary disposition of Grays's first-and third-party no-fault claims to defendants, Ellabib, Dairyland Insurance Company and Sentry Insurance, under MCR 2.116(C)(10). Grays appeals as of right. We affirm in part, reverse in part and remand for further proceedings.

**I. WAGE LOSS BENEFIT CLAIM**

Grays's complaint sets forth a no-fault insurance claim seeking benefits for "loss of wages." The no-fault act entitles claimants to personal protection insurance benefits for "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." MCL 500.3107(1)(b). Grays sought no-fault reimbursement for 10 days' work, beginning on the day after she sustained a burn to 11% of her body surface. Defendants moved for summary disposition of Grays's work loss claim under MCR 2.116(C)(10), asserting that she had presented "no medical documentation supporting" the claim. Notably, defendants failed to present documentary evidence suggesting that Grays had not sustained a burn injury, or had not missed work. Rather, defendants attached to their motion medical records describing the burn and the treatment prescribed, Grays's work record demonstrating that she had missed work for 10 days following the burn, and Grays's deposition testimony substantiating that she could not work for 10 days due to burn pain and the need for daily dressing changes.

Grays responded to defendants' summary disposition motion by submitting proof that she had missed 10 days of work after her July 31, 2008 accident. Grays also provided the court with a copy of the same medical records filed by defendants, which documented an emergency room visit and subsequent treatment at a burn clinic. Dr. Steven Nitsch, who examined Grays on August 5, 2008, summarized:

Physical examination of the right arm reveals partial thickness burn with a blister which has ruptured along the extensor aspect of the arm from the wrist across the elbow and onto the posterior aspect of the brachium. There is a second area of partial thickness burn on the lateral aspect of the lower chest.

Impression: 11% total body surface area partial thickness burn.

Dr. Nitsch's office visit summary reflected that he advised Grays to change her dressings daily and gave Grays instruction concerning the use of her pain medication. Grays's summary disposition response included her deposition testimony that at the time of the accident, she worked as an assistant manager at a Family Dollar store. Grays asserted that the burn prevented her from using her "whole right arm," and that the arm remained "big and swollen and I was in pain" until shortly before she returned to work.

When considering a motion for summary disposition under MCR 2.116(C)(10), a court must view the evidence submitted in the light most favorable to the party opposing the motion. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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." *Id.* A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts as asserted by the movant." *Opdyke Inv Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). When a court affords "the benefit of reasonable doubt to the opposing party" and identifies an issue about which "reasonable minds might differ," summary disposition cannot be granted. *West*, 469 Mich at 183. "[I]f reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

The statute authorizing an injured party's recovery of work loss benefits, MCL 500.3107(1)(b), reads in relevant part:

. . . [P]ersonal protection insurance benefits are payable for the following:

\* \* \*

(b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. . . .

"In order to be entitled to benefits under this section, a plaintiff must suffer a loss of income." *Ross v Auto Club Group*, 481 Mich 1, 12; 748 NW2d 552 (2008). Claimants have the burden of proving the amount they would have earned had they not been injured in an automobile accident. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 472-473; 521 NW2d 831 (1994). "The legislative

purpose in providing work-loss benefits to an injured person ... is to compensate him (and his dependents) by providing protection from the economic hardship caused by the loss of the wage earner's income as a result of an automobile accident." *Perez v State Farm Mut Auto Ins Co*, 418 Mich 634, 640 (lead opinion by Levin, J.); 344 NW2d 773 (1984). "[A]n employed person who loses time from work he would have performed had he not been injured has suffered work loss." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 151; 350 NW2d 233 (1984) (internal quotation omitted). "[W]ork-loss benefits compensate the injured person for income he would have received but for the accident." *Id.* at 152.

In seeking summary disposition of Grays's claim, defendants bore the burden of demonstrating that Grays either missed no work, or that she missed work for reasons unrelated to her burn. When filing a summary disposition motion under MCR 2.116(C)(10), the moving party must support the motion with "[a]ffidavits, depositions, admissions, or other documentary evidence." MCR 2.116(G)(3)(b). Therefore, the court rules placed squarely on defendants, as the moving parties, an obligation to present *evidence* that Grays either worked when she claimed she had not, or skipped work for a reason unrelated to her burn. But instead of producing evidence contradicting Grays's claim, defendants submitted documentation of Grays's burn injury and wage loss, as well as Grays's deposition testimony connecting the two. Defendants failed to support their summary disposition motion with any *evidence* refuting Grays's wage loss claim.

Defendants' argument in favor of summary disposition equates to an assertion of disbelief that the burn injury rendered Grays unable to work for 10 days. But under MCR 2.116(C)(10), a party's mere skepticism about an opposing party's veracity does not give rise to a summary disposition challenge. More is required—specifically, documentation undercutting the nonmovant's claim. MCR 2.116(G)(3)(b). Only when "the moving party properly supports its motion" does "the burden then shift[] to the opposing party to establish that a genuine issue of disputed fact exists. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009) (internal quotation and citation omitted). Because defendants submitted no "[a]ffidavits, depositions, admissions, or other documentary evidence" calling into question Grays's claim, the trial court should have denied summary disposition on that basis alone. MCR 2.116(G)(3)(b).

But even assuming that defendants had carried their initial burden under MCR 2.116(C)(10), Grays's submissions amply support the existence of a genuine issue of material fact precluding summary disposition. Uncontradicted documentary evidence established that Grays suffered a serious injury to her dominant right arm, and missed approximately 10 days of work.<sup>1</sup> Grays testified that during this 10-day period after the accident, she could not use her arm because of pain and disability attributable to the burn. The governing summary disposition

---

<sup>1</sup> Dr. Nitsch's records document that Grays visited his office on two of the dates that Grays did not work, August 5, 2008 and August 6, 2008.

standards mandated that the circuit court examine all the admissible evidence submitted, give credence to the facts and all reasonable inferences supporting the nonmovant's version of the truth, and refrain from weighing the evidence presented. See *de Sanchez v Dep't of Mental Health*, 455 Mich 83, 89; 565 NW2d 358 (1997) (explaining that a court deciding a motion for summary disposition under MCR 2.116(C)(10) should "draw[] all reasonable inferences in the nonmovant's favor."); *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010) ("When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists.").

Because Grays's testimony,<sup>2</sup> combined with direct evidence including medical records and photographs of her burns, establishes the severity of the burns and the dates Grays missed work, a reasonable factfinder could readily conclude that the burn impaired Grays's ability to perform her job and caused her absence from work. And because Grays put forth direct, admissible evidence linking her severe burn injury to her inability to work for 10 days, the circuit court incorrectly granted summary disposition of her work loss claim under MCR 2.116(C)(10).<sup>3</sup>

## II. NEGLIGENCE

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Here, no evidence suggests Ellabib's awareness of a defect in his radiator hose. Grays has failed to put forward any evidence that Ellabib knew, or in the exercise of reasonable care should have known, that the radiator hose had rotted or that it posed a danger to anyone who came near it. Because no evidence exists that Ellabib breached a duty of due care, the circuit court correctly granted summary disposition of Grays's negligence claim under MCR 2.116(C)(10).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Donald S. Owens

---

<sup>2</sup> "Plaintiff's testimony as to the extent of disability resulting from the injury was admissible and entitled to such weight as the jury might choose to accord it." *Rypstra v Western Union Tel Co*, 374 Mich 166, 168; 132 NW2d 140 (1965).

<sup>3</sup> We respectfully disagree with the dissent's assertion that "Grays has not submitted any evidence supporting a reasonable inference that the nature of the injury, rather than a mere disinclination to return to work, prevented her from returning to work and performing her job duties." *Post* at 9. Grays testified that her injury rendered her unable to work. Whether this testimony is credible presents a question for a jury to decide.