STATE OF MICHIGAN

COURT OF APPEALS

ADVISACARE HEALTHCARE SOLUTIONS, INC., doing business as ADVISACARE, Plaintiff-Appellee,	UNPUBLISHED October 15, 2020
v AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellant.	No. 349756 Kent Circuit Court LC No. 18-000792-NF
ADVISACARE HEALTHCARE SOLUTIONS, INC., doing business as ADVISACARE, Plaintiff-Appellant,	
v AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee.	No. 350221 Kent Circuit Court LC No. 18-000792-NF

Before: MURRAY, C.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right a judgment entered following a jury verdict awarding plaintiff $294,777.01 in allowable expenses and penalty interest, while plaintiff appeals an order denying attorney fees and 12% postjudgment penalty interest. Because we conclude that the trial court erred in denying defendant's motions for summary disposition and directed verdict, we need not address the issues raised in plaintiff's appeal.

This case arises out of the denial of no-fault benefits after a single-vehicle accident. In November 2016, Vivian Mazade lost control of her vehicle and hit a tree. The accident resulted in several injuries, including "bilateral anterior rib fractures, nondisplaced sternal fracture,

multiple skin lacerations, contusions, and a skin tear secondary to all of this trauma." One of the lacerations and skin tears included a "deep penetrating laceration over the left" knee, a 20-centimeter tear over her chest, and an "open and deep" laceration over her right hip area. She also suffered "an open traumatic wound on the lower left leg." Mazade was hospitalized for a number of weeks following the accident. Thereafter, she received some home care services but was discharged by December 27, 2016, after regaining considerable independence.

Mazade's treating physician, Dr. Thomas Watkins, testified that Mazade was different after the accident because "[a]mbulation was much more difficult" and her "[w]ounds were still persistent." This caused her lack of ability to do activities she normally did before the accident. Dr. Watkins stated that he had concerns about Mazade's walking and balance as well as concerns about falling. Shortly after being discharged from home care services, Mazade went to visit some family in the "Mississippi, Alabama area." While there, Mazade sustained a number of falls and suffered more injuries to her left leg. Dr. Watkins testified that he expected those falls were attributable to the accident "because she was not having that difficulty before the accident. She could have done that trip much easier."

In February 2017, Mazade returned to Michigan and appeared at a hospital with an infection in her left leg. She was diagnosed with cellulitis and sepsis, which ultimately led to the amputation of her left lower leg in March 2017. Both Drs. Watkins and Adam Lyon, the doctor who performed the amputation, opined that the accident caused Mazade to suffer from decreased mobility, which in turn caused her to suffer several falls while down South, resulting in injuries to her leg, which in turn caused the infection in her left leg. Drs. Watkins and Lyon attributed the infection and subsequent amputation to the accident because of Mazade's decreased mobility. However, Dr. Maceij Uzieblo, defendant's expert, opined that the cellulitis and sepsis were not related to the accident. On the basis of this opinion, defendant denied plaintiff's claim for reimbursement for attendant care services because defendant believed that the infection and amputation did not arise from the automobile accident. The jury found for plaintiff, and this appeal followed.

Defendant argues that the trial court erred in denying its motions for summary disposition and for a directed verdict on the basis that *McPherson v McPherson*, 493 Mich 294; 831 NW2d 219 (2013), was inapplicable. We agree.

We review de novo a trial court's decisions to deny a motion for summary disposition and a motion for directed verdict. *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015); *Genna v Jackson*, 286 Mich App 413, 416; 781 NW2d 124 (2009). With regard to both motions, the court must consider all "evidence and any reasonable inferences de novo in the light most favorable to the nonmoving party to determine whether there exists a question of fact on which reasonable minds could differ." *Alfieri v Bertorelli*, 295 Mich App 189, 192-193; 813 NW2d 772 (2012).

Under MCL 500.3105(1), "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 . . . ." Importantly, "[i]t 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." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005). Our

Supreme Court has established that, with regard to whether an injury arises out of the use of a motor vehicle as a motor vehicle, "the causal connection between the injury and the use of a motor vehicle as a motor vehicle [must be] more than incidental, fortuitous, or 'but for.' " *McPherson*, 493 Mich at 297, quoting *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986) (quotation marks omitted).

McPherson involved a plaintiff who sustained a neurological disorder as a result of a 2007 motor vehicle accident. *McPherson*, 493 Mich at 295. Then, in 2008, the plaintiff experienced a seizure consistent with that disorder, lost control of his motorcycle, crashed, and sustained a severe spinal cord injury. *Id*. The plaintiff "claimed that he was entitled to no-fault benefits for the spinal cord injury as a result of the *2007* accident, asserting that the spinal cord injury 'ar[ose] out of' the 2007 accident for purposes of MCL 500.3105(1)." *Id*. at 296 (alteration in original). The question before the *McPherson* Court was whether "the *spinal cord injury* plaintiff suffered in the 2008 crash 'ar[ose] out of' the 2007 accident for purposes of MCL 500.3105(1)." *Id*. (alteration in original). Our Supreme Court determined that the plaintiff's spinal cord injury did not satisfy the "arising out of" requirement of MCL 500.3105(1) because "the 2008 injury [was] 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 [was] more than incidental, fortuitous, or 'but for.' " *Id*. at 298 (quotation marks omitted).

Notably, our Supreme Court stated that the 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. [*Id*. at 297-298.]

Further, the Court noted, the facts alleged by the plaintiff were "insufficient to support a finding that the first injury caused the second injury in any direct way." *Id*. at 298. Rather, those facts were only sufficient to "support a finding that the first *injury* directly caused the second *accident*, which in turn caused the second injury." *Id*. at 299. Thus, the Court concluded, "the second injury alleged by plaintiff [was] too attenuated from the first accident to permit a finding that the second injury was directly caused by the first accident." *Id*.

In this case, the trial court should have applied *McPherson* and granted either defendant's motion for summary disposition or motion for directed verdict. There was evidence presented that Mazade sustained a serious left-leg injury as a result of the car accident. Notably, it was Mazade's left leg that ultimately became infected and was amputated. However, there was no evidence to suggest that the injuries that Mazade sustained to her left leg from the car accident caused the infection and subsequent amputation. In other words, the infection and subsequent amputation did not "arise out of" the injuries sustained in the November 2016 automobile accident. See MCL 500.3105(1). While the causal connection that a plaintiff must establish does not rise to the level of proximate causation, there must be "something more than a showing that the causal connection between the injury and the use of the motor vehicle was merely incidental, fortuitous, or 'but for.' " *Kochoian v Allstate Ins Co*, 168 Mich App 1, 8; 423 NW2d 913 (1988), citing *Thornton*, 425 Mich at 659-660. Contrary to plaintiff's bare assertions that Mazade opened the wounds that she suffered from the car accident during one of her numerous falls, there is no evidence in the record

to suggest that those wounds were what became infected or that her falls in Alabama resulted in reinjuring her wounds from the car accident at issue.

Rather, the only evidence presented was that Mazade had several falls while visiting family down South, that at least one of those falls contributed to her infection, and that the infection caused her leg amputation. There was no testimony or evidence presented that one of Mazade's falls resulted in an infection of a wound from the accident. In other words, there was no evidence that "the first *injury* caused the second *injury* in a direct way." See *McPherson*, 493 Mich at 298. Both Drs. Watkins and Lyon testified that they believed the accident caused Mazade to have decreased mobility, which in turn caused Mazade's instability, which in turn caused Mazade to experience a higher risk of falling. Both doctors also opined that it was one of the falls in Alabama that caused her to suffer an infection. Essentially, Drs. Watkins and Lyon opined that, because the accident caused Mazade to suffer instability, it was that instability that led to her falls, with one of those falls resulting in the contraction of the infection.

Similar to *McPherson*, the record reflects that "the first *injury* directly caused the second *accident*, which in turn caused the second injury." *Id*. at 298-299. Mazade did not contract an infection from the accident. Rather, she contracted the infection during one of her falls, which was caused by her decreased mobility, which was caused by her instability, which was caused by her use of a motor vehicle as a motor vehicle in 2016. See *id*. at 297. This type of causation was explicitly rejected, meaning that the falls that Mazade suffered were too remote and too attenuated from the automobile accident to permit a finding that the causal connection between the accident and infection/amputation were "more than incidental, fortuitous, or 'but for.' " *Id*. at 298, quoting *Thornton*, 425 Mich at 659 (quotation marks omitted).

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron