

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UNPUBLISHED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.

WHITBECK, J. (*concurring in part and dissenting in part*).

Cassandra Grays was burned when a radiator hose burst and sprayed her with hot fluid. Grays then filed a claim to collect wage loss benefits under the no-fault insurance act¹ against Dairyland Insurance and Sentry Insurance Companies. Grays also filed a claim of negligence against the owner of the vehicle, Ismael Ellabib. Dairyland Insurance and Sentry Insurance moved for summary disposition pursuant to MCR 2.116(C)(10), which the trial court granted. Ellabib also moved for summary disposition pursuant to MCR 2.116(C)(8), which the trial court also granted.

I agree with the majority's conclusion that the circuit court correctly granted summary disposition of Grays's negligence claim in favor of Ellabib on the basis of Grays's failure to put forth any evidence that Ellabib was aware of a defect in his radiator hose. However, I respectfully disagree with the majority's conclusion that the circuit court incorrectly granted summary disposition of Grays's work loss claim. Contrary to the majority, I believe that Grays failed to put forth direct evidence linking her injuries to her inability to work in the aftermath of the accident. Accordingly, on that issue, I would affirm.

I. FACTS

On July 31, 2008, Carney Williams called his estranged wife, Cassandra Grays, and asked her to pick up a Jeep Grand Cherokee from Ismael Ellabib. Williams and Ellabib had

¹ MCL 500.3101 *et seq.*

agreed that Williams, for a fee, would give the Jeep a tune-up. Grays agreed to pick up the Jeep, so she drove to a store that Ellabib worked at to pick up the vehicle. After she picked up the Jeep, she drove it to a house where Williams was working. Williams was at an acquaintance's house, assisting him with building an addition to his home. The home was approximately two or three miles from the store where Grays picked up Ellabib's Jeep.

When Grays arrived at the home, she parked the Jeep on a strip of grass in the right-of-way in front of the home. After she parked the Jeep, Grays wanted some shade, so she went to stand under a "little tree" that was "[m]aybe three to five feet" from the front of the vehicle. Williams indicated that Grays was seven to eight feet away from the vehicle at the time of the incident.

Approximately 45 minutes after Grays parked the Jeep, Williams took the keys from her and popped the hood to begin inspecting the engine. Williams momentarily glanced over the engine to assess the work that would be needed for the tune-up. He then walked towards a fence where his tools were laying. As Williams was approaching the fence, the radiator hose ruptured, spraying hot radiator fluid into the air. The fluid sprayed on Grays' right arm, causing second-degree burns, and it sprayed on her right torso, causing first-degree burns. Records indicate that the fluid burned approximately 11 percent of her body. Some fluid also landed on Williams, but he was not burned. When the fluid hit Grays, she "threw [herself] on the ground." One of the men working on the construction at the home approached Grays and put water on her face and rinsed her eyes out.

Grays went to Bronson Methodist Hospital for treatment of her burns. Medical staff treated the burns and released her approximately four hours after she arrived. The outpatient instructions instructed Grays to take pain medication, as needed, and to consult with the Burn and Wound Clinic (part of Bronson Methodist Hospital). On August 5, 2008, Grays followed up with Dr. Steven M. Nitsch of the Burn and Wound Clinic. After Dr. Nitsch evaluated Grays, he reported, in part, "At this point I see no particular difficulties or problems and I think she should progress on well." The next day, August 6, 2008, Grays again visited Dr. Nitsch for a dressing change. His report stated, "I see no particular problems or difficulties and would anticipate continuing with her daily dressing changes" At a visit on August 14, 2008, Dr. Nitsch reported, "[S]he is completely healed with just a minimal amount of weepiness I have discussed with her that there is no reason to actually keep a dressing on" On September 2, 2008, Dr. Nitsch reported, "Cassandra is seen today and is completely healed. I don't see any particular problems with the process." And following her visit to Dr. Nitsch on October 14, 2008, he reported,

Cassandra is seen and she is really progressing well since her last visit. . . . I see no particular difficulties or problems. She continues to complain of pain as well as weakness in the arm with the arm giving out. I have discussed with her that the burn would not cause any muscle or nerve damage deep in the arm and that any weakness that is experienced is from disuse and should return completely.

Around Labor Day of 2009, Grays experienced numbness in her arm, and Dr. Nitsch referred her to Dr. David L. Gerstner to do some nerve testing. On November 3, 2009, Dr. Gerstner's record indicated, in relevant part, "Ms. Grays underwent nerve conduction studies and

apparently refused the full EMG testing. The nerve conduction studies did not identify any median ulnar or neuropathy in the right upper extremity. . . . I have recommended that she check back with Dr. Nitsch's office."

Notably, two years before the burn incident, on December 17, 2006, Grays had gone to Bronson Methodist Hospital complaining of muscle spasms and numbness in both hands that caused her fingers to lock up. The clinical impression of that visit stated that Grays suffered from carpal tunnel syndrome. Grays did not mention her carpal tunnel syndrome to Dr. Nitsch when he examined her for the burns from the radiator fluid.

The vehicle involved in the incident was a 1994 Jeep Cherokee. The owner, Ellabib, purchased it in 2007 from a mechanic in Allegan, Michigan. Ellabib stated that, at the end of 2007, he had a friend at Lake Auto change the tires and work on a new head gasket and seal for the Jeep. Ellabib stated that he had no problems with the radiator leaking before the incident occurred.

After the incident, Williams stated that the hose carrying the radiator fluid was "dry rotted out." He described the hose as being black, and, regarding the visibility of the dry rot, "you probably couldn't see it on the outside, but maybe in the inside." He stated that there was a "pretty big hole [in the hose] after it exploded." Williams replaced the damaged hose after the incident. Ellabib went to the house to pick up his Jeep, and Williams told him that the radiator hose had "busted." Williams showed Ellabib the damaged hose, and Ellabib described it as having a "slit" that was approximately one and one-half inches long and less than one-half of one inch wide.

Pursuant to the incident, Grays filed two claims in the circuit court. One claim was to collect wage loss benefits under the no-fault insurance act² from Dairyland Insurance Company and Sentry Insurance Company (the insurance companies), the insurers of the Jeep. The second claim was against the owner of the Jeep, Ellabib, for negligence. Grays claimed that Ellabib failed to maintain the Jeep, failed to have the Jeep inspected for defects, and failed to warn her of the hazards associated with the Jeep.

Regarding the wage loss claim, the insurance companies moved for summary disposition pursuant to MCR 2.116(C)(10), claiming that Grays' complaint did not contain a genuine issue of material fact and that the insurance companies were entitled to judgment as a matter of law. The insurance companies contended that Grays failed to carry her burdens of proving her wage loss or proving that she required household replacement services or attendant care.

Regarding the negligence claim, Ellabib moved for summary disposition pursuant to MCR 2.116(C)(8), claiming that Grays' complaint failed to state a claim for which relief could be granted. Ellabib asserted that Grays did not properly plead her negligence claim because she never mentioned a duty that Ellabib owed Grays. Furthermore, Ellabib asserted that, even if Grays properly pleaded the allegation, he did not owe her a duty because their relationship was

² MCL 500.3107(1)(b).

too attenuated, the foreseeability of the harm was too remote, and the burden imposed on Ellabib to protect Grays from the harm would be enormous.

In response to the insurance companies' motion for summary disposition, Grays asserted that the records from the Family Dollar store where she worked clearly showed that she missed work from August 1, 2008, to August 11, 2008. Grays asserted that the injury to her right arm prevented her from performing daily activities. And Grays stated that this Court has specifically held that a passerby "who is injured as [a] direct result of maintenance performed by someone else" is eligible for no-fault benefits. Furthermore, Grays asserted that the only basis for the insurance companies' motion for summary disposition was derived from Dr. Nitsch not properly filling out the forms: Dr. Nitsch did not prescribe any work restrictions upon her return, nor did he ever prescribe attendant care or household care to Grays. Moreover, Dairyland Insurance Company (Dairyland) sent a Wage/Employment verification form that both Grays and the Family Dollar store were to fill out but which neither did. Essentially, the insurance companies claimed that Grays did not establish her wage loss, while Grays claimed that her wage records and the facts and circumstances were sufficient evidence to prove her wage loss.

In response to Ellabib's motion for summary disposition, Grays contended that there was a question of fact for the jury to determine "whether [Ellabib's] conduct was reasonable" regarding his maintenance of the Jeep. She asserted that her pleadings stating Ellabib's failure to maintain the Jeep, coupled with the no-fault act's reference to tort liability, clearly showed that she adequately pleaded her claim of negligence. In response to Ellabib's assertion that he owed her no duty because 1) their relationship was attenuated, 2) the foreseeability of the harm was too remote, and 3) the burden on the Ellabib to prevent the harm to Grays would be excessive, Grays stated that the no-fault act does apply to injured bystanders. Furthermore, she attempted to distinguish Ellabib's reference to an asbestos case that stated the aforementioned three factors because, in that case, the injured spouse did not work for the company herself, but instead she was injured from contact with her husband's laundry.

The trial court granted both motions for summary disposition. On the motion for summary disposition under MCR 2.116(C)(10), the trial court held that Grays had not carried her burden to show that she incurred the wage losses. But the trial court stated that the holding was not solely based on a lack of a doctor's form, but rather on Grays failing to demonstrate, through other evidence, that she had incurred the loss.

The trial court also granted Ellabib's motion for summary disposition pursuant to MCR 2.116(C)(8). The trial court found that the relationship between the parties was "just too remote to impose a duty upon this defendant." It found the relationship to be too remote because the parties did not have a contract; there was nothing that proved Grays was going to benefit from the mechanic work; and because Grays was not injured while she was operating the Jeep, but rather 45 minutes after she delivered the Jeep. The trial court said that the injury was not foreseeable because Grays was standing three to eight feet from the Jeep, and it had been parked for 45 minutes before the incident occurred. Lastly, the trial court stated that the consequences of imposing a duty on Ellabib would be greater than the unique nature of the incident. The trial court also pointed out that it was not finding that there was not a duty to maintain the Jeep under certain circumstances, only that there was not a duty under these circumstances.

II. WAGE LOSS BENEFITS

A. STANDARD OF REVIEW

Grays argues that she sufficiently demonstrated her wage loss through work records, photographs of the injury, and her testimony. “A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.”³ A trial court’s decision to grant summary disposition is a question of law which this Court reviews de novo.⁴

B. LEGAL STANDARDS

Grays contends that she presented sufficient evidence to qualify for wage loss under personal injury protection (PIP). I disagree. Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁵ “The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence.”⁶ Then the burden shifts to the non-moving party to establish that an issue of disputed fact exists.⁷ The non-moving party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts that show there is a genuine issue for trial.⁸ If the non-moving party fails to establish a genuine issue as to a material fact, then the moving party is entitled to judgment.⁹

C. APPLYING THE LEGAL STANDARDS

PIP benefits are payable 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.”¹⁰ To recover under the no-fault act, a plaintiff must show that the work was lost as a direct consequence of the injury.¹¹ “[T]he issue is whether claimed work loss is justly attributable to the injury.”¹² That is, “[w]ork-loss benefits are payable for the loss of

³ *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).

⁴ *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

⁵ MCR 2.116(C)(10); *West v Gen Motors*, 469 Mich 177, 183; 665 NW2d 468 (2003).

⁶ *Zeiler Excavating, Inc v Valenti, Trobec & Chandler, Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006).

⁷ *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

⁸ MCR 2.116(G)(4); *McCormic v Auto Club Ins Ass’n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

⁹ *Peña*, 255 Mich App at 310.

¹⁰ MCL 500.3107(1)(b).

¹¹ *Nawrocki v Hawkeye Sec Ins Co*, 83 Mich App 135, 144; 268 NW2d 317 (1978).

¹² *Coates v Mich Mut Ins Co*, 105 Mich App 290, 295; 306 NW2d 484 (1981) (citation omitted).

income an ‘injured person’ would have received, but for the ‘injury’, and not, as plaintiff argues, but for the ‘accident.’”¹³

In this case, Grays bore the burden to show, by more than merely alleging, that she incurred a wage loss. She contends that the medical records, her testimony, and the photographs of the injury are sufficient to infer that she incurred wage losses. However, in my opinion, the evidence that Grays proffered shows nothing more than she sustained an injury and that she did not return to work immediately thereafter. To infer that her claimed work loss was a *direct consequence* of the injury, absent some sort of evidentiary support, is at best speculation.

Neither party disputes that Grays was seriously burned or that she missed approximately 10 days of work after the injury. However, she has not demonstrated that *the injury*, as opposed to the accident, *caused* her to miss work. That is, 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.

Even though a statement from a physician is not necessary to support a claim for work loss, its absence does not make whatever other evidence a claimant presents inherently sufficient. Grays still must establish that she incurred wage losses as a direct consequence of the injury. In the absence of a “Statement of Attending Physician,” the burden is still on Grays to establish her wage loss through other evidence. That is, while a party seeking wage loss benefits may not be required to have a doctor’s diagnosis to prove the losses, the party still has the burden to show that she would not have suffered the claimed work loss but for the injury.

I believe that Grays has not carried her burden to establish that she missed work *because* of her injury simply because she provides hospital records documenting the injury and work records documenting her absence from work. In order to find that Grays suffered wage losses through that documentation alone, one would have to connect Grays’ hospital visit and her work loss with an inference that her documented injury was the exclusive cause of her missing work. Granting wage loss recovery in the absence of evidence of causation would allow injured parties to claim wage loss benefits if they were injured and merely chose not to immediately return to work.

In summary, I would conclude that Grays has not carried her burden to show that an issue of material fact exists regarding her wage loss claim, and the trial court correctly granted summary disposition.

I would affirm.

/s/ William C. Whitbeck

¹³ *Id.* at 298.