STATE OF MICHIGAN

COURT OF APPEALS

TAMIKA WILSON,

Plaintiff-Appellant,

V

TITAN INSURANCE COMPANY,

Defendant-Appellee.

and

DUSHAUN STEWART,

Defendant.

UNPUBLISHED
May 27, 2021

No. 353278
Wayne Circuit Court
LC No. 18-001534-NI

Before: MARKEY, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

In this action claiming no-fault benefits through the Michigan Assigned Claims Plan (MACP), see MCL 500.3171 *et seq*., plaintiff Tamika Wilson appeals by right the trial court's order granting summary disposition in favor of defendant Titan Insurance Company.[1] The trial court agreed with Titan that plaintiff's claim was barred by a statutory fraud exclusion. We affirm.

Plaintiff was injured as a passenger in a motor vehicle accident and applied for no-fault benefits through the MACP for alleged back, neck, and shoulder injuries. In her application for benefits, she disclosed that she was taking a prescription pain medication, but she did not identify back or body pain as a preexisting condition. Plaintiff also did not divulge the fact that she had been in an earlier motor vehicle accident or that she had been injured by a gunshot wound which left buckshot in her body. Plaintiff's medical records showed that she made several visits to her primary care physician in the five months leading up to the accident at issue. At those visits, plaintiff associated her pain, at least to some extent, with her earlier motor vehicle accident and

[1] Defendant Dushaun Stewart was never served with process and is not involved in this appeal.

her gunshot wound. She told the physician that she had a slipped disc and pinched nerve in her back, even though the doctor did not list either a slipped disc or pinched nerve as a diagnosis. Plaintiff also told the physician that her pain was aggravated by standing at work for extended periods during long shifts. Plaintiff's doctor prescribed her the painkiller Norco and referred plaintiff to a pain specialist, with whom she had a scheduled appointment on the day of the accident. Plaintiff, however, did not attend the appointment because of unrelated transportation issues.

After the subject motor vehicle accident, plaintiff received injections, prescriptions, and chiropractic treatment for pain. She also received assistance with daily activities. Plaintiff sued Titan, the assigned insurance company under the MACP, to obtain payment for the treatment and services. Titan moved for summary disposition, arguing that plaintiff's claim for no-fault insurance coverage was precluded by the MACP's fraud exclusion, MCL 500.3173a(2), as amended by 2012 PA 204. The trial court granted Titan's motion.

Plaintiff argues on appeal that summary disposition was inappropriate because there existed a genuine issue of material fact regarding whether the fraud exclusion applied to bar the payment of no-fault benefits. "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). To the extent questions of statutory interpretation must be addressed, they are also reviewed de novo on appeal. *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 777; 910 NW2d 666 (2017).

MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on subrule (C)(10)," MCR 2.116(G)(3)(b), and such evidence, along with the pleadings, must be considered by the court when ruling on the (C)(10) motion, MCR 2.116(G)(5).[2] "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Pioneer State*, 301 Mich App at 377. "A genuine issue of material fact exists when the

[2] MCR 2.116(G)(4) provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. 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.

record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).[3] The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State*, 301 Mich App at 377. "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

The fraud exclusion at the center of this dispute provided:

> A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan automobile insurance placement facility for payment or another benefit *knowing that the statement contains false information concerning a fact or thing material to the claim* commits a fraudulent insurance act under section 4503 that is subject to the penalties imposed under section 4511. A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan. [MCL 500.3173a(2), as amended by 2012 PA 204;[4] emphasis added.]

Interpreting this particular provision, the Court in *Candler*, 321 Mich App at 779-780, explained:

> [A] person commits a fraudulent insurance act under this statute when (1) the person presents or causes to be presented an oral or written statement, (2) the statement is part of or in support of a claim for no-fault benefits, and (3) the claim for benefits was submitted to the MAIPF. Further, (4) the person must have known that the statement contained false information, and (5) the statement concerned a fact or thing material to the claim.

Plaintiff argues that summary disposition was improper under the fourth element because plaintiff's statement was not false, and even if the statement was false, there is a question of fact

[3] "[T]he rule is well established that a moving party may be entitled to summary disposition as a result of the nonmoving party's failure to produce evidence sufficient to demonstrate an essential element of its claim." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 9; 890 NW2d 344 (2016).

[4] The statute was amended pursuant to 2019 PA 21, effective June 11, 2019, which is after the date of the accident in this case. The fraud exclusion, with minor inconsequential changes, is now found in subsection (4) of MCL 500.3173a. We shall refer to the 2012 version of MCL 500.3173a for the remainder of this opinion.

regarding whether plaintiff knew that it was false. Plaintiff also argues that her omission was not material.[5]

The alleged false information in this case came in the form of an omission—plaintiff's failure to report her back and body pain or any associated diagnoses or accident history on her application for no-fault coverage. The application question at issue stated: "Please list any pre-existing conditions that you had before this accident and how long you have been treating for those conditions." Plaintiff solely listed hypertension.[6] Given the evidence that plaintiff was taking a prescription painkiller for her body pain, that she discussed her body pain and its connection to her previous accidents and injuries with her doctor multiple times in the five months preceding this accident and was referred to a pain specialist, and that plaintiff associated a slipped disc, pinched nerve, and buckshot left in her body with the pain, reasonable minds would not disagree that plaintiff should have disclosed at least something related to her long-standing body pain in response to the preexisting-conditions question. By only listing hypertension in answering the question, plaintiff effectively made a statement containing false information, as hypertension was plainly not her *only* preexisting condition. And when plaintiff answered the next question identifying a healthcare provider, it leaves the reader with the impression that she saw the provider for hypertension.

Moreover, plaintiff's omission was certainly material for purposes of MCL 500.3173a(2). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011). Plaintiff argues that her omission was not material because defendant never relied upon it. Plaintiff confuses reliance with materiality. Reading MCL 500.3173a(2) as a whole, the word "material" clearly refers to the *relevance* of the information rather than to whether anyone relied upon it. MCL 500.3172(1) provides coverage for certain individuals under the MACP based on "accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle[.]" Accordingly, there must be a causal connection between an accident and an injury for

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[5] We decline to address plaintiff's argument that Titan failed to adequately plead fraud as an affirmative defense considering that plaintiff raises the issue for the first time on appeal. See *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993) ("This Court has repeatedly declined to consider arguments not presented at a lower level[.]").

[6] We note that the next question on the application form asked whether the applicant had "sought treatment for any prior conditions before this accident?" Plaintiff did not check the "Yes," "No," or "Not Applicable" box in response. But she then proceeded to list the name, address, and phone number of a healthcare provider to the follow-up question asking the name of the provider if the applicant answered "Yes" about treatment for prior conditions. The next question on the application form asked the applicant whether medications were being taken before the accident, and plaintiff checked the "No" box. But she then listed the names of medications, which was only supposed to be answered if the applicant answered "Yes" to taking medications. There were other questions that went unanswered, including whether the applicant had read the fraud warning, whether the applicant had reviewed the application, and whether the applicant attested to its truth and accuracy.

which no-fault coverage is sought. In determining whether there is a causal relationship, the issue of whether a claimant has preexisting conditions unrelated to the accident is certainly relevant and material to assist in distinguishing between treatment for covered injuries and treatment for which coverage is unavailable. Plaintiff's omission of information about her preexisting back and arm pain and associated health issues was clearly material given that she was seeking coverage for injuries to her back, neck, and shoulder allegedly arising out of the motor vehicle accident at issue. The plain meaning of the word "material" in the context of the entire antifraud provision does not require detrimental reliance to satisfy the materiality requirement.

To trigger the fraud exclusion under MCL 500.3173a(2), plaintiff "must have known that the statement contained false information . . . ." *Candler*, 321 Mich App at 780. In the context of this case, the question is whether there exists a genuine issue of material fact regarding whether plaintiff knew that she had a preexisting condition beyond hypertension. In her deposition, on questioning by her own attorney, plaintiff explained that she did not list body pain as a preexisting condition because she thought a preexisting condition related to "ongoing treatment that I go to the doctor for on a daily, monthly basis." Even accepting plaintiff's explanation of what she thought constituted a preexisting condition, one cannot deny that her medical records clearly revealed that her body pain fit her very own definition of a preexisting condition. Thus, she necessarily had knowledge of a preexisting condition but failed to include the information in the coverage application.

Plaintiff's medical records showed that she experienced back, arm, and other body pain, for which she was prescribed medication before the July 2017 motor vehicle accident. Plaintiff had a new patient visit at Concerto Health on February 17, 2017. The visit notes provided, in part:

> 36 year old AAF here today for initial visit. Patient states pain lower back GSW [gunshot wound] 1995 right arm and middle of back and bullet fragments are still in arm and back. MVA [motor vehicle accident] 2007 aggravted [sic] injury to back.[ ] Patient states she has slip disc [sic] and pinched nerves 3 out 10 on pain scale.

The visit notes listed "Muscle Spasm" in plaintiff's past medical history and stated that her current medications included Norco, as needed, alongside Trazodone, Losartan Potassium, Zanaflex, Xanax, and other medications and inhalers. The "Review of Systems" with respect to plaintiff's musculoskeletal system indicated that she reported "muscle spasms bilateral legs and lower back," as well as "back problems, lower back pain from MVA, GSW." The medical plan included refilling plaintiff's Zanaflex, as needed, for muscle spasms, and prescribing her Norco for her back pain.

Plaintiff had another appointment at Concerto Health on April 13, 2017. She primarily reported mental health issues and injuries related to domestic violence but also noted lower back pain. The medical record described the examination of her back as showing "near normal flexion LS spine with no deformity." The medical notes expressed concern regarding the addictive potential of her prescriptions for opioids and muscle relaxants, and she was prescribed a NSAID painkiller. Plaintiff returned to the office a few days later complaining of pain, and she was referred for a "Pain Medicine" consultation connected to her "Chronic pain related to prior MVA & GSW." On May 3, 2017, plaintiff returned for yet another follow-up visit. The medical notes

indicated that she was complaining of back pain, which "began GSW back and arm 1997-MVA 2007," with aggravating factors including "10 hrs work daily in auto parts." The doctor stated that he would be adjusting her medications and monitoring her case closely to reduce the risk of addiction. He continued plaintiff on Norco for the time being for her body pain. On May 17, 2017, the physician again saw plaintiff about body pain, and the referral to the pain clinic was still pending. Coincidentally, plaintiff had her pain referral appointment on the same day as the motor vehicle accident.

The medical records described above, which plaintiff does not contest, established that for approximately five months preceding the motor vehicle accident plaintiff had a condition—various body pain—for which she was receiving ongoing treatment by a doctor on a regular basis. This is exactly how plaintiff herself described a preexisting condition. Accordingly, we conclude as a matter of law that plaintiff knew that she falsely answered the preexisting-conditions question in the application.

We affirm. Titan may tax costs as the prevailing party under MCR 7.219.

/s/ Jane E. Markey
/s/ Michael J. Kelly