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STATE OF MICHIGAN
COURT OF APPEALS

KEVIN DAVIS,

Plaintiff-Appellee,

and

SONCIRAY DAVIS,

Plaintiff,

v

NATIONWIDE PROPERTY & CASUALTY
INSURANCE COMPANY,

Defendant,

and

BEVERLY YOUNG,

Defendant-Appellant.

UNPUBLISHED

December 2, 2021

No. 355516

Wayne Circuit Court

LC No. 18-013099-NI

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

BORRELLO, P.J. (*dissenting*).

I respectfully dissent from the majority’s opinion in this case because I believe the majority does not employ the proper nature of our appellate standard of review for motions under MCR 2.116(C)(10). On review of such a motion, we are to consider the evidence “in the light most favorable to the nonmoving party,” and “[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “A genuine issue of material fact exists when the 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).

Here, the majority's discussion and analysis make evident the disputed issues of material fact from which reasonable minds could legitimately draw different conclusions. Yet, the majority proceeds to resolve these factual disputes, making its own findings of fact, based on its assessment of the relative strength and credibility of the conflicting evidence. On a motion for summary disposition, a court may not weigh the evidence, determine credibility, or make factual findings. *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). Summary disposition is improper if there is conflicting evidence. *Id.* Because the majority reverses the trial court on the basis of improperly making determinations regarding the relative strength and credibility of conflicting evidence, I dissent from their reasoning.

However, I am not inclined at this juncture to affirm the trial court because the trial court did not make a legally sufficient record from which this Court could engage in any meaningful review. Rather, the trial court dispensed with oral argument when denying defendant's motion for summary judgment and the sum total of its reasoning for denying the motion was as follows:

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Based on the lack of a reviewable record by the trial court, defendant correctly argues that the trial court failed to properly analyze the elements necessary to meet the no-fault threshold, particularly by failing to make any findings as to whether plaintiff established an objectively manifested impairment attributable to the November 13, 2017 accident that affected plaintiff's ability to lead his normal life. See, *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010).

In *McCormick*, Our Supreme Court laid out a three-pronged test for establishing a serious impairment of a body function: (1) an objectively manifested impairment (2) of an important body function (3) that affects the person's general ability to lead his or her normal life. *Id.* at 190. Whether a person has suffered serious impairment of a body function or permanent serious disfigurement are questions of law for the court if the court finds either (1) that "there is no factual dispute concerning the nature and extent of the person's injuries" or (2) "there is a factual dispute concerning the nature and extent of the person's injuries" that is not material to the determination of whether the person has suffered a serious impairment or serious disfigurement. *Patrick v Turkelson*, 322 Mich App 595, 607-608; 913 NW2d 369 (2018), quoting MCL 500.3135(2)(a).

Based on the trial court's failure to consider defendant's motion within the framework of *McCormick*, and its failure to make a reviewable record of its findings, I would remand this matter to the trial court with directions that the trial court consider whether plaintiff suffered an objectively manifested impairment and whether that impairment affected his ability to lead his normal life by employing the first and third prongs of the no-fault analysis set forth by our Supreme Court in *McCormick*. I would further instruct the trial court to make a complete record of its findings and state its full reasoning for granting or denying defendant's motion for summary judgment.

/s/ Stephen L. Borrello