STATE OF MICHIGAN

COURT OF APPEALS

ALEXANDER HENDERSON,

Plaintiff-Appellant,

v No. 96310

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

BEFORE: M.H. Wahls, P.J., and R.M. Maher and J.T. Kallman*, JJ.

PER CURIAM

Plaintiff appeals by leave granted from the November 4, 1986 order of the Wayne Circuit Court denying his motion for partial summary disposition, pursuant to MCR 2.116(C)(9), on the issue of defendant's liability for no-fault personal injury protection benefits under MCL 500.3105; MSA 24.13105.

Plaintiff's claim for PIP benefits arises out of a pedestrian-car accident on Nine Mile Road in the City of Ferndale on February 19, 1985. Plaintiff, who was 87 years old at the time, was walking across Nine Mile Road on his way to his daughter's home. The automobile was driven by Stuart Fine who was insured by defendant.

Immediately after the accident, plaintiff was taken to Providence Hospital in Southfield. There he was diagnosed as having suffered a number of traumatic injuries, including a contusion of the left eye and a cerebral concussion. Plaintiff was treated at Providence Hospital until February 27, 1985. At that time, he was discharged to a nursing home.

Plaintiff continued to receive nursing home treatment through December 17, 1985. At that time, Dr. Leonard Sahn conducted a neurological examination for the defendant-insurer. Dr. Sahn's examination consisted of a clinical examination and a

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*Circuit Judge, sitting on the Court of Appeals by assignment.

history provided by plaintiff's daughter. Dr. Sahn's clinical examination revealed severe memory deficits, including an inability to remember his age, the day, date and year. Plaintiff was able to perform no more than one-digit addition and exhibited some spatial disorientation as well. Plaintiff was hard of hearing in both ears. His pupils reacted slowly to light. Plaintiff's motor skills were slowed, though he was able to walk both in and out of Dr. Sahn's office.

The history provided by plaintiff's daughter was that plaintiff was experiencing considerable forgetfulness before the February 19 accident, but was able to live by himself with occasional assistance. However, after the accident, plaintiff required constant supervision and assistance with such basic functions as dressing. Before the accident, plaintiff was able to carry on a conversation. After the accident, plaintiff began thoughts, then lost them and was not able to sustain conversation.

Dr. Sahn concluded that plaintiff was suffering from significant senile dementia which was accelerated by the February 19, 1985 accident. Dr. Sahn believed that the accident had contributed to plaintiff's disability. However, Dr. Sahn was of the opinion that plaintiff could not have been expected to live unsupervised for more than another six to twelve months even without the accident. Dr. Sahn was, nevertheless, of the opinion that the accident continued to contribute to plaintiff's disability. Dr. Sahn was unable to separate or quantify the continuing effects of the accident as opposed to plaintiff's preexisting dementia.

In February of 1986, defendant ceased paying PIP benefits to plaintiff based upon Dr. Sahn's examination. On February 11, 1986, plaintiff filed suit under § 3105 of Michigan's No-Fault Automobile Insurance Act, MCL 500.3105; MSA 24.13105. After a period of discovery including the deposition

of Dr. Sahn, plaintiff moved for partial summary judgment on the question of liability for PIP benefits. As noted supra, the trial court denied plaintiff's motion, prompting this appeal.

We first observe that plaintiff's motion before the trial judge was ostensibly based upon MCR 2.116(C)(9), failure to state a valid defense to the claim asserted. However, as defendant concedes, both parties and the trial court treated the motion as one based upon MCR 2.116(C)(10). We will therefore proceed with review of the trial court's ruling on this basis. Bousson v Mitchell, 84 Mich App 98, 99, n 1; 269 NW2d 317 (1978).

Under MCR 2.116(C)(10), summary disposition may be granted if:

> "Except 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."

As we have recently held:

> "Summary judgment pursuant to GCR 1963, 117.2(3), now MCR 2.116(C)(10), is proper only if there is no genuine issue as to any material fact and the party in whose favor judgment is granted is entitled to judgment as a matter of law. A motion based on GCR 1963, 117.2(3) is designed to test the factual support for a claim. Maccabees Mutual Life Ins Co v Dep't of Treasury, 122 Mich App 660, 663; 332 NW2d 561 (1983), lv den 417 Mich 1100.15 (1983). The court must consider the pleadings, affidavits, and other available evidence and be satisfied that the claim or position asserted cannot be supported by evidence at trial because of some deficiency which cannot be overcome. Id. The court must give the benefit of any reasonable doubt to the party opposing the motion and inferences are to be drawn in favor of that party. Id." Hogerl v Auto Club Group Ins Co, ____ Mich App ____; ____ NW2d ____ (No 87245, rel'd 2-17-87).

Here there is no dispute as to defendant's liability for PIP benefits at the time of the accident. This Court has previously held that an aggravation of a preexisting condition is compensable under § 3105 of Michigan's no-fault statute. See, Mollitor v Associated Truck Lines, 140 Mich App 431; 364 NW2d 344 (1985); McKim v Home Ins Co, 133 Mich App 694; 349 NW2d 533 (1984), lv den 422 Mich 893 (1985). However, defendant does dispute whether plaintiff's continuing disability is related to the accident. According to defendant, plaintiff's injuries resulting from the accident have entirely healed and plaintiff's continuing disability is solely due to his preexisting dementia.

There is no factual support for defendant's claim in the record. The only medical evidence submitted at the time of the motion for summary disposition was the deposition of defendant's own consultative examiner, Dr. Sahn. Dr. Sahn never testified that plaintiff's continuing disability is solely due to preexisting dementia.[1] In fact, under cross examination, Dr. Sahn testified the relative extent of plaintiff's preexisting dementia and the accident on plaintiff's continuing disability:

"Q. (plaintiff's counsel) You've admitted that this brain injury sustained in the accident by Mr. Henderson contributed to his current predicament in life. That is, where he's in a nursing home full-time rather than living on his own. You said that that contributed, despite your diagnosis of senile dementia?

"MS. KULIK (defense counsel): Is that a question or a statement? BY MS. CONNOLLY-LEMBERG (plaintiff's counsel):

"Q. In fact, Doctor, you cannot separate the extent to which the head injury brought about the current condition and the extent to which what you've called "pre-senile dementia" contributed to this condition. Isn't that true?

"A. (Dr. Sahn) You can't separate them precisely, obviously. You can make -- I think I've answered that. I've attempted in the best way that I know how to give some indication as to what the relative contribution is of each, but other than that you can't give a percentage based on something. I mean, it's just not possible.

"Q. You personally would not want to quantify the contribution of the brain injury over the alleged dementia?

"A. I think that you could put a range on it, but I don't think that you could say it's twenty-two point four percent.

"Q. Why are you unable to do that?

"A. Because it's just not amenable to that kind of thing. I mean it's not like three people were chipping in and buying a car and you know how much each person puts in. This is a more nebulous thing.

"Q. In layman's terms, it's just unclear how much each injury or disease contributed to the condition. Isn't that right?

"A. I think it's clear to the extent that I stated in my letter. There are obviously some parts of it that are not quantifiable."

Our review of Dr. Sahn's letter to defendant's adjuster indicates that, in fact, no attempt was made therein to differentiate between the effects of plaintiff's preexisting dementia and the accident on his continuing disability.

We are dismayed that the defendant insurer would cease plaintiff's PIP benefits based upon the medical evidence of Dr. Sahn. The basic goal of the personal injury provisions of the no-fault insurance system is to provide assured, adequate and

prompt benefits to individuals injured in automobile accidents. Babbitt v Employer's Ins of Waussau, 136 Mich App 198, 201; 355 NW2d 635 (1984). To that end, the Act was passed in anticipation that it would reduce excessive and frivolous litigation. Williams v Payne, 131 Mich App 403, 406; 346 NW2d 564 (1984). The order of circuit court denying summary judgment to plaintiff on the issue of liability is reversed.

Upon remand, the circuit court shall promptly enter an order of partial summary judgment on the issue of liability in favor of plaintiff. We strongly encourage the parties to resolve any remaining issues without further protracting this litigation.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Costs to plaintiff.

/s/ Myron H. Wahls
/s/ Richard M. Maher
/s/ James T. Kallman

[1] Indeed, the only reliable expertise demonstrated by Dr. Sahn at the deposition was his ability to evade the essential issues of this litigation. Nevertheless, for the purpose of review of a motion under MCR 2.116(C)(10), we are required to credit the doctor's testimony with some reliability. Hagerl, supra.