STATE OF MICHIGAN

COURT OF APPEALS

CLARENCE BARNES,

Plaintiff-Appellee,

and

FRANK J. KELLEY, Attorney General, and the MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Intervening Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

No. 106212

Before: Maher, P.J., and Holbrook, Jr. and R. E. Noble,* JJ.

PER CURIAM.

In this case, plaintiff Clarence Barnes asserts a no-fault claim for recovery of personal protection insurance benefits against defendant Auto-Owners Insurance Company, the insurer defending the claim by assignment from the assigned claims facility. Intervening plaintiff-appellant, the Michigan Department of Social Services, is plaintiff's statutory subrogee pursuant to MCL 400.106; MSA 16.490(16). The circuit court denied plaintiff Barnes' motion for summary disposition and granted defendant's request for summary disposition instead. We reverse and remand for entry of summary disposition in favor of plaintiffs.

Entitlement to personal protection insurance benefits is governed by MCL 500.3105; MSA 24.13105, which obligates the insurer to pay benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1); MSA 24.13105(1). Plaintiff's complaint alleges defendant's liability arising from an injury sustained as plaintiff was maintaining a motor vehicle.

The circuit court premised summary disposition on MCR 2.116(C)(8), specifically ruling:

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

"[T]he fact remains that Plaintiff has failed to state a cause of action on which relief can be granted. As admitted by Plaintiff's counsel at oral argument, the wheel which Plaintiff was attempting to lift at the time he sustained his injury was not attached to the motor vehicle in question, nor had it been for some period of time. It was further admitted that Plaintiff was preparing to transport the wheel to a service station so the tire could be filled with air. It was not at all certain that the wheel was to be reattached to the automobile as soon as the tire was repaired. These circumstances lead the Court to conclude as a matter of law that, in viewing the facts in the best possible light for Plaintiff, the most that can be said is that Plaintiff's injury was sustained during the course of his performance of maintenance on the wheel, not on the motor vehicle. This does not constitute sufficient grounds upon which to base a claim for benefits under the No-Fault Act. The Court therefore finds that Plaintiff has failed to state a claim on which relief can be granted. Summary Disposition pursuant to MCR 2.116(C)(8) is thus appropriate and is hereby GRANTED. Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is DENIED."

It was improper for the court to ground summary disposition on subrule (C)(8). A motion for failure to state a claim upon which relief may be granted tests the legal sufficiency of the pleadings without reference to the evidence or matters outside the pleadings. Smith v City of Westland, 158 Mich App 132, 135; 404 NW2d 214 (1986). It would appear that the factual allegations in the complaint that plaintiff sustained injury arising out of maintenance of a motor vehicle and that he was working on the vehicle states a claim of entitlement to personal protection insurance benefits. Although the factual allegations are conclusory and perhaps inadequate on that count, defendant never argued this point below. In any event, the ruling of the circuit court took into account facts established outside the complaint. Under these circumstances, the summary disposition was not justified under subrule (C)(8), but the ruling should instead be reviewed under MCR 2.116(C)(10). The parties framed arguments below and on appeal with a recognition that subrule (C)(10) was controlling, thereby creating a record suitable for appellate review. See Hoffman v Genesee County, 158 Mich App 1, 9; 403 NW2d 485 (1987), lv den 428 Mich 902 (1987).

A motion pursuant to MCR 2.116(C)(10) tests whether there is any factual support for the plaintiff's claim. In

deciding whether summary disposition is warranted on this ground, the court must consider pleadings, affidavits, depositions, admissions, and other documentary evidence, giving the party opposing summary disposition the benefit of every reasonable doubt. The motion should not be granted unless it is impossible to support the claim at trial because of some deficiency that cannot be overcome. NuVision v Dunscombe, 163 Mich App 674, 683; 415 NW2d 232 (1987), lv den 430 Mich 875 (1988).

The facts, as established by the deposition of Chuck Schilz, the owner of the automobile used to invoke no-fault coverage, was that Schilz purchased the automobile in July of 1986. The automobile was not operative, and Schilz intended to repair it for resale purposes. The automobile, still not working, was in the backyard of Schilz's residence on October 16, 1986, and one tire had been removed because it was flat. On that day, plaintiff, a long-time friend and frequent visitor, stopped by at a time when Schilz was working on the motor of the vehicle. Schilz left on a errand, and, upon his return, plaintiff told him that plaintiff hurt his back as he attempted to lift a tire. Although Schilz did not recall why plaintiff was lifting the tire, Schilz knew that the tire was lying on the ground near the vehicle and was in fact a component of that vehicle. Although Schilz did not remember asking plaintiff to perform any work, he stated that it was usual for plaintiff to voluntarily help Schilz, and that plaintiff takes the initiative to help out all the time.

Plaintiff's deposition provided a substantially similar version of the incident, except that plaintiff recalled Schilz specifically asking whether plaintiff had time to help him fix the motor of the vehicle and indicating that it would be necessary to move the vehicle. The car's flat tire was lying beside the car. Before Schilz left, he asked plaintiff to take the tire to a gasoline station, fill it with air, and mount it on the automobile. After Schilz left, plaintiff, intending to comply with the request, bent down and began to pick up the tire when he injured himself.

Plaintiff bases his claim for benefits on the argument that he was engaged in vehicle maintenance within the meaning of MCL 500.3105(1); MSA 24.13105(1) when he was injured. Maintenance is broadly defined and should be construed liberally in order to advance the purposes of the no-fault act. Yates v Hawkeye-Security Ins Co, 157 Mich App 711, 713-714; 403 NW2d 208 (1987). It has been construed to include not only repairs, but more mundane servicing functions associated with upkeep of a vehicle. Michigan Bell Telephone Co v Short, 153 Mich App 431, 435; 395 NW2d 70 (1986)(waxing and cleaning a truck held to be maintenance). The act of mounting a tire would clearly satisfy the "maintenance" requirement for entitlement to PIP benefits.

Essentially, the circuit court decided that the detachment of the tire from the automobile required the conclusion that plaintiff was not repairing the vehicle, but rather the maintenance was confined to the tire itself. The case of Wagner v Michigan Mutual Liability Ins Co, 135 Mich App 767; 356 NW2d 262 (1984), is instructive and compels a different conclusion of law. In that case, this Court reversed summary judgment for the insurers. The plaintiff, in an effort to jump-start the engine of a truck on a cold night, made a small charcoal fire in a tire rim and placed the fire under the oil pan of the truck. When it was later discovered that the fire had extinguished itself, the plaintiff removed the rim from underneath the truck and squirted lantern fluid into the rim, somehow causing the can of fluid to ignite and burn the plaintiff severely. In holding that the plaintiff's efforts to start the truck, including the lighting of the charcoal fire, were maintenance, the Court implicitly rejected the notion that the accident must occur when the plaintiff is working directly on the vehicle itself. In this case, plaintiff was attempting to lift a tire sold as part of the vehicle in close spatial proximity to the vehicle with the intent to mount it onto the vehicle. This should be deemed enough to amount to a maintenance function.

The Court in Wagner also addressed the "arising out of" standard for causation of the injury, finding an appropriate causal connection because the vehicle "was not merely the place at which the explosion causing the injury took place," the fire was a "direct result" of the attempted maintenance, and there was "more than a fortuitous or incidental relationship" between the maintenance and the injury. Id., 775. The requisite causal connection exists if the injury is foreseeably identifiable with the maintenance function. Id. This writer believes that facts established in the instant case present an appropriate causal connection under this standard.

Thus, the facts, viewed most favorably to plaintiff, compel the conclusion that summary disposition on the ground of lack of a maintenance function was erroneous. It next becomes appropriate to address whether the circuit court erred by denying summary disposition to plaintiff pursuant to MCR 2.116(C)(10). For this purpose, the same facts should be viewed in a light most favorable to defendant. Since plaintiff's own deposition supported its motion, it became incumbent upon defendant to demonstrate a genuine issue of matrial fact by submitting documentary evidence showing a specific factual controversy. MCR 2.116(G)(4). Defendant failed to meet this burden. Schilz's deposition, for the most part, does not contradict pertinent facts testified to by plaintiff, but only indicates Schilz's lack of recollection. Furthermore, Schilz's deposition, viewed most favorably to defendant, suggests, at most, that Schilz did not recollect any specific direction to mount the tire; it does indicate circumstantially that plaintiff was engaged in fixing the tire. In our view, Schilz's express authorization to plaintiff for the repair of the tire is irrelevant once it is established that plaintiff was in fact engaged in repairs. The circuit court should have granted summary disposition in favor of plaintiff.

We reverse summary disposition for defendant and remand for entry of summary disposition in favor of plaintiff and for trial limited solely to issues of damages.

Reversed and remanded.

/s/ Richard M. Maher
/s/ Donald E. Holbrook, Jr.
/s/ Russell E. Noble