STATE OF MICHIGAN

COURT OF APPEALS

JEANNETTE BUTCHER,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

April 23, 1993

No. 133528

Before: Connor, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

In this action for personal injury protection (PIP) benefits under an automobile insurance policy, the defendant appeals as of right from a September 14, 1990 order of judgment for the plaintiff. We affirm.

In her complaint, the plaintiff alleged that she was injured in an automobile accident on July 11, 1986, that she submitted a claim for benefits to the defendant and that the defendant paid one year of wage loss benefits but refused to pay for two additional years of benefits plus replacement services. In support of her motion for summary disposition, the plaintiff averred that she was employed by Michigan Party Supplies, Inc., at the time of the accident and that she did not work for them or any other employer after the accident. Plaintiff also admitted that Michigan Party Supplies, Inc., did pay her gratuitous wages while she was off work in 1986, 1987, and 1988. At the hearing on the motion for summary disposition, defendant claimed there were two genuine issues of material fact: (1) whether the plaintiff was disabled from employment after the accident, and (2) whether there was a wage loss. In granting the plaintiff's motion pursuant to MCR 2.116(C)(10), the circuit court adopted the plaintiff's argument that gratuitous payments do not bar work-loss benefits.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. Mascarenas v Union Carbide Corp, 196 Mich App 240, 243; 492 NW2d 512 (1992). The party opposing the motion has the burden of showing that a genuine issue of disputed fact exists. Pantely v Garris, Garris & Garris, PC, 180 Mich App 768, 773; 447 NW2d 864 (1989). The nonmoving party may not rest upon mere allegations or denials in the pleadings but must, by documentary or other proofs, set forth specific facts showing a genuine issue for trial. McCart v J Walter Thompson USA, Inc, 437 Mich 109, 115; 469 NW2d 284 (1991). Giving the benefit of reasonable doubt to the nonmoving party, the court must determine if a record might be developed which will leave open an issue upon which reasonable minds could differ. Amorello v Monsanto Corp, 186 Mich App 324, 330; 463 NW2d 487 (1990). This Court is liberal in finding that a genuine issue of material fact exists. Pantely, supra.

Defendant argues that summary disposition was premature because discovery was incomplete. Unfortunately, the circuit court did not address this issue despite the fact that it was raised by the defendant. Generally, this Court declines to consider issues not ruled on below absent a miscarriage of justice. Kamalnath v Mercy Memorial Hospital Corp, 194 Mich App 543, 551; 487 NW2d 499 (1992), lv pending. Reviewing this issue for a miscarriage of justice, we note the general rule that summary disposition is premature if granted before discovery is complete. See Dep't of Social Services v Aetna Casualty & Surety Co, 177 Mich App 440, 446; 443 NW2d 420 (1989). Defendant did not provide factual support for its allegation that the plaintiff was actually working. McCart, supra. Nothing in the record indicates that further discovery stands a fair chance of uncovering factual support for the defendant's claim. Aetna Casualty, supra. We find no miscarriage of justice.

Defendant also claims that it raised the factual issue whether the plaintiff actually sustained an automobile-related disabling injury. Again, the circuit court failed to rule on this issue. Kamalnath, supra. Plaintiff presented evidence that she did not work due to the back injury sustained in the accident. Defendant has failed to show the existence of a disputed fact with admissible evidence. Amorello, supra at 329. We find no miscarriage of justice.

We find there was no genuine issue of material fact concerning wage loss because the gratuitous payments of the plaintiff's former employer do not bar work-loss benefits as defined in MCL 500.3107(b); MSA 24.13107(b). See Brashear v DAIIE, 144 Mich App 667; 375 NW2d 785 (1985) and Spencer v Hartford Accident & Indemnity Co, 179 Mich App 389; 445 NW2d 520 (1989). Defendant's reliance upon Coates v Michigan Mutual Ins Co, 105 Mich App 290; 306 NW2d 484 (1981), and Adams v Auto Club Ins Ass'n, 154 Mich App 186; 397 NW2d 262 (1986), is misplaced. In Coates, supra at 297-298, this Court determined that the self-employed plaintiff was not entitled to work-loss benefits under § 3107(b) for the period he was unable to return to work due to the unavailability of his truck because those benefits are payable for the loss of income an injured person would have earned but for the injury and not but for the accident. In Adams, supra at 193-194, this Court held that loss of income under § 3107(b) must be set off by business expenses from gross income where the claimant is self-employed. Even when giving the benefit of the doubt to the defendant in this case that the plaintiff was self-employed, we find the money she received from the corporation is irrelevant regardless of her ownership interest in the corporation because there was no genuine issue concerning the fact that the plaintiff was not working and generating an income due to personal injury.

Finally, the defendant contends that summary disposition was inappropriate in light of the no-fault act's statute of limitations and the one-year back rule. Although the defendant raised the statute of limitations as an affirmative defense when filing its answer to the complaint, it failed to raise it at the hearing for the plaintiff's motion for summary disposition. Instead, the record shows that the defendant raised this issue when answering the plaintiff's motion for entry of judgment. Defendant treats this issue in its appellate brief as another disputed question of fact. However, we decline to consider the issue because the defendant has failed to include it in the statement of questions presented in its brief and has given it only cursory treatment. Williams v City of Cadillac, 148 Mich App 786, 790; 384 NW2d 792 (1985); Community National Bank of Pontiac v Michigan Basic Property Ins Ass'n, 159 Mich App 510, 520-521; 407 NW2d 31 (1987).

Affirmed.

/s/ Michael J. Connor
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald