

STATE OF MICHIGAN
COURT OF APPEALS

MOUSTAFA NASSER,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 2, 2020

No. 347431

Macomb Circuit Court

LC No. 2018-002491-NF

Before: GLEICHER, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

Plaintiff appeals from the decision of the Macomb Circuit Court denying his motion for reconsideration of its decision granting defendant summary disposition. Specifically, plaintiff challenges the trial court’s application of the res judicata doctrine in favor of defendant. We affirm.

I. STATEMENT OF FACTS

On or about February 1, 2015, plaintiff sustained multiple injuries as a result of an automobile accident. Defendant insured plaintiff through a no-fault automobile insurance policy. Plaintiff first filed a complaint in the Wayne Circuit Court alleging that the insurance policy terms, as well as the Michigan No Fault Insurance Act, MCL 300.3101 *et seq.*, required defendant to pay certain medical expenses incurred by plaintiff as a result of the accident. Plaintiff further alleged that while defendant paid for some expenses, it refused to pay for additional compensation in violation of MCL 500.3148.

During discovery, defendant unsuccessfully attempted to schedule plaintiff’s deposition. Defendant filed a motion to compel, which the trial court granted, setting a deadline for plaintiff’s compliance. After plaintiff failed to comply with the motion to compel defendant moved to dismiss the action. The Wayne Circuit Court ultimately granted defendant’s motion and dismissed plaintiff’s complaint with prejudice on October 25, 2017.

Plaintiff then filed a nearly identical complaint in the Macomb Circuit Court. In response, defendant moved for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10).

Defendant's motion alleged that pursuant to the doctrine of res judicata, the Wayne Circuit Court's dismissal of the first action barred plaintiff's claims in this action. The trial court held a hearing on defendant's motion and required both parties to file supplemental briefing addressing whether the Wayne Circuit Court disposition constituted a dismissal on the merits that included claims for future benefits. Defendant timely filed a supplemental brief; plaintiff never filed one.

The trial court granted defendant's summary disposition motion pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10) based on res judicata and plaintiff's lack of compliance with its order requiring supplemental briefing. Plaintiff sought reconsideration, which the trial court denied. Plaintiff now appeals to this Court.

II. ANALYSIS

Plaintiff argues that the trial court erred when it held that the doctrine of res judicata applied to his claim for future personal injury protection (PIP) benefits. Citing the Michigan No-Fault Act and two unpublished decisions of this Court, plaintiff disputes that the Wayne Circuit Court resolved his claim for PIP benefits accruing after October 25, 2017. Plaintiff also argues that a claimant may only waive unaccrued future PIP benefits through language in a court order specifically referencing a waiver or release. For these reasons, plaintiff contends that the trial court erred when it granted defendant's motion for summary disposition, and denied his motion for reconsideration.

A. PRESERVATION

"Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal." *General Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Here, in its motion for summary disposition, defendant challenged plaintiff's claims on res judicata grounds. The trial court concluded that the res judicata doctrine applied to plaintiff's claims and granted defendant's motion for summary disposition on that basis. As a result, the issue whether res judicata applies to plaintiff's claims is preserved.

B. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). In so doing, we evaluate the entire record to determine whether the trial court properly granted summary disposition to the moving party. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). For instance, under MCR 2.116(C)(7), summary disposition is appropriate when based on a prior judgment. To determine the merit of a motion filed pursuant to MCR 2.116(C)(7), "a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 271; 792 NW2d 798 (2010).

Alternatively, MCR 2.116(C)(10) states that a moving party is entitled to judgment or partial judgment as a matter of law when there is no genuine issue as to any material fact. When reviewing an order granted under this subrule, we consider all documentary evidence submitted

by the parties in the light most favorable to the nonmoving party. *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 520; 895 NW2d 188 (2016).

C. RES JUDICATA

This Court reviews de novo whether res judicata bars a subsequent action. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). “The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action.” *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). “A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.” *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001) (quotation marks and citations omitted). Our Supreme Court “has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Adair*, 470 Mich at 121.

Plaintiff’s sole challenge on appeal disputes the trial court’s determination that his future PIP benefits claim was, or could have been, resolved in the Wayne Circuit Court case. However, the plain language of plaintiff’s complaint filed in Wayne Circuit Court sought “compensatory damages, including Plaintiff’s damages incurred after the filing of this Complaint.” Such an explicit request contradicts plaintiff’s assertion that the Wayne Circuit Court case did not include a claim for future damages.

Moreover, a court may determine future liability under the no-fault act, and preclude payment until an expense is actually incurred. *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 295; 732 NW2d 160 (2006); see also *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003), quoting *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 157; 388 NW2d 216 (1986) (“A trial court may enter ‘a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed[, but s]uch a declaration does not oblige a no-fault insurer to pay for an expense until it is actually incurred.’”) (alteration in original). The no-fault act’s requirement that charges must be incurred to be payable “does not preclude the possibility of awarding future benefits payments, but rather allows insurers to be free from the responsibility to make payments until the charges have actually been incurred.” *Rose*, 274 Mich App at 295.

Here, Michigan law afforded the Wayne Circuit Court the authority to address plaintiff’s claim for future PIP benefits, accrued before, during, or after October 25, 2017. Plaintiff sought an award of future benefits in his complaint. Plaintiff’s first complaint was dismissed with prejudice on the basis of discovery violations. Because the Wayne Circuit Court dismissal operated as one on the merits,¹ the trial court in this action correctly concluded that plaintiff’s claim for future PIP benefits was resolved in the first action.

¹ MCR 2.504(B)(3) states: “[u]nless the court otherwise specifies in its order for a dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for

Plaintiff relies on *Lewis v Aetna Cas Co*, 109 Mich App 136; 311 NW2d 317 (1981), to argue that future PIP benefits can be waived only by a specific waiver included in a release or settlement document. Plaintiff further argues that future claims in no-fault personal injury cases are waived only when a court order specifically references such a waiver. In *Lewis*, the plaintiff, an insured who incurred medical expenses and wage losses as a result of injuries sustained in an automobile accident, commenced an action against her insurer due to discontinued PIP benefits. *Id.* at 137-138. A jury awarded \$7,400 to the plaintiff. *Id.* at 138.

Subsequently, the *Lewis* plaintiff incurred additional medical expenses and wage losses not honored by her insurer. *Id.* As a result, she filed a second action against the insurer and settled for \$20,000, and also signed a release for past, present and future claims arising out of the automobile accident. *Id.* Plaintiff then filed a *third* action against her insurer, which this court held was barred by the plaintiff's release. *Id.* at 138-140.

Lewis does not extend to or support plaintiff's assertion that future PIP benefits in a no-fault personal injury benefits case can *only* be waived by a court order specifically referencing a waiver or release. Furthermore, *Lewis* never touches upon the doctrine of res judicata, which was the basis for the dismissal of plaintiff's claim in this case. As previously discussed, plaintiff sought future PIP benefits in his first complaint filed in Wayne Circuit Court, the dismissal of which operated as one on the merits.

In sum, the trial court properly granted summary disposition in favor of the defendant on the basis of res judicata, and committed no error when it denied plaintiff's motion for reconsideration.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Michael F. Gadola
/s/ Anica Letica

lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits.”