

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN ELAINE AL-MALIKI,
Plaintiff-Appellant,

v

GLORIA JEAN LAGRANT,
Defendant-Appellee.

FOR PUBLICATION
December 22, 2009
9:00 a.m.

No. 287641
Wayne Circuit Court
LC No. 07-720249-NI

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

In this action predicated on the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Because the basic requirements of notice and a meaningful opportunity to be heard have not been satisfied in this case, we reverse and remand.

This case arose out of an October 7, 2006 car accident in Livonia, MI, where plaintiff's vehicle was struck from the rear by a vehicle driven by defendant while plaintiff was waiting at a red light. Plaintiff filed a complaint alleging that she suffered serious impairment of body function including neck pain, muscle spasms, and reduced range of motion in her neck as a result of defendant's negligent driving. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing solely that plaintiff's injuries did not satisfy the serious impairment threshold.¹ At oral argument on the motion, the trial court sua sponte raised the issue of causation and ultimately granted summary disposition on the ground that plaintiff had not presented evidence that the auto accident caused her claimed injury without reaching the merits of whether plaintiff's injuries constituted a serious impairment of body function.

On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. A trial court's decision whether to grant a motion for summary disposition

¹ Defendant actually filed two motions for summary disposition. One motion alleged plaintiff was the possessory owner of the uninsured car at the time of the accident, and is therefore bared from benefits by MCL 500.3113. The trial court denied this motion and it is not at issue on appeal.

is a question of law that is reviewed de novo on appeal. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). If the motion is brought under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 551-552. Where, as here, “the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material facts exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A motion based on MCR 2.116(C)(10) is properly granted when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Brown, supra* at 552.

Further, when a court reviews a motion for summary disposition, MCR 2.116(I)(1) provides that “[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.” Under this rule, a trial court has authority to sua sponte grant summary disposition, so long as one of the two conditions in the rule is satisfied. *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006).

In this case, plaintiff’s claim of error is, in essence, a claim of procedural due process error. Whether a party has been afforded due process is a question of law. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). Due process is a flexible concept, the essence of which requires fundamental fairness. *Id.* at 159. The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard. *Id.* Where a court sua sponte considers an issue, due process can be satisfied by affording a party with an opportunity for rehearing. *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 706; 499 NW2d 453 (1993), rev’d on other grounds 445 Mich 502 (1994).

Under MCR 2.119(F), a trial court has discretion to grant rehearing or reconsideration of a decision on a motion. “The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties.” *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). The trial court may even give a party a second chance on a previously decided motion. *Id.* Additionally, in *Boulton, supra* at 463-464, this Court determined that any error by a court in sua sponte granting summary disposition without affording a party an adequate opportunity to brief an issue and present it to the court may be harmless under MCR 2.613(A), if the party fully briefed and presented the argument in a motion for reconsideration.

Here, the causation issue on which the trial court relied to grant defendant’s motion for summary disposition was indeed considered sua sponte by the trial court, because the issue of causation was not included in defendant’s motion. The sole argument in defendant’s brief in support of his motion was that plaintiff’s neck injuries did not amount to a serious impairment of body function and did not satisfy the *Kreiner* threshold injury standard. In fact, a careful reading of defendant’s motion shows that defendant even conceded the issue of causation for purposes of his motion for summary disposition. The motion states as follows:

The factual dispute concerning the nature and extent of the Plaintiff’s injuries in this case is not material to the determination of whether the plaintiff has suffered a serious impairment of the body function, for purposes of this

argument. Even if the Defendant considers the worst-case scenario, assuming for purposes of this part of the motion that the Plaintiff's complaints are objectively manifested and related to this automobile accident, her general ability to lead her normal life **has still not been affected**.

Thus, the record clearly reveals that plaintiff had no notice that the causation issue would be raised at the summary disposition motion and rightly should have been surprised by the trial court's inquiry at the motion hearing regarding causation.

Despite the facts that defendant conceded causation for purposes of his *Kreiner* motion and plaintiff's lack of notice, during oral argument on the motion, the trial court posed the question of whether plaintiff's injuries were caused by the car accident. Defense counsel stated, "There's nothing that we have to show this Court that there's any relationship to her diagnosed condition eight months post accident." Defense counsel also argued that plaintiff "hasn't shown the approximate [sic] causal relationship of the condition diagnosed and found eight months later as being related to the date of the accident." Plaintiff's counsel responded to the causation issue by quoting the following from a report prepared by Steve Geiringer, MD after plaintiff reported to his office for an independent medical examination:

"It would appear that the primary musculoskeletal problem still causing symptoms is residual muscle tightness in the neck, although it is very possible that the MVA [motor vehicle accident] led to or exacerbated a cervical disc condition in the earlier 'stages.'"

The trial court immediately granted defendant's motion stating, "No, sir. . . . Sir, it's not there, just not." Plaintiff's counsel responded by asking the trial court if he could "produce to you a report from Dr. Sabana Khan." The trial court answered, "Well, you should have done that, sir. It's too late now." Plaintiff's counsel again pleaded with the court stating, "There is in fact a report, Judge. I can get that. This issue is not original." The trial court did not allow plaintiff's counsel the opportunity he requested to present more evidence and instead granted defendant's motion for summary disposition and entered an order dismissing plaintiff's claim. The order stated, in part, "IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition pursuant to the *Kreiner* decision, be, and is hereby granted for the reasons set forth by the Court on the record." The language on the order that the trial court granted the motion based on *Kreiner* is suspect because the trial court never evaluated the *Kreiner* factors at oral argument and based its decision to grant defendant's motion only on the causation issue. We note that a substitute trial judge signed the order in the stead of the trial judge who actually heard the oral argument and granted defendant's motion.

Shortly thereafter, plaintiff filed a motion for reconsideration. Plaintiff included with the motion a letter from Dr. Nicholas S. Griffiths, plaintiff's chiropractor, stating, "Mrs. Al-Maliki's condition and injuries are directly related to the automobile collision she was in." The trial court denied plaintiff's motion for reconsideration without explanation.

Our review of the record reveals that the basic requirements of notice and a meaningful opportunity to be heard have not been satisfied in this case. *Reed, supra* at 157. The trial court decided the matter on an issue not before the court at that juncture because defendant clearly

conceded causation for purposes of his *Kreiner* motion. We are mindful of the fact that the trial court has the authority to sua sponte grant summary disposition under MCR 2.116(I)(1). However, the trial court may not do so in contravention of a party's due process rights. *Boulton, supra* at 462-463. When the trial court decided to bring up the issue of causation at the motion, the trial court then had the responsibility to provide plaintiff with the opportunity to be heard on the issue. The record reveals that the trial court was dismissive of plaintiff's counsel and did not consider evidence plaintiff attempted to provide orally regarding causation in an attempt to avoid summary disposition. Also, plaintiff's counsel sought time to present documentary evidence establishing causation since causation had now become an issue in the summary disposition stage of litigation. The trial court denied plaintiff time to present the evidence stating only that it was "too late now" without further explanation. And when plaintiff provided new evidence regarding causation at the time she moved for reconsideration, the trial court did not credit the evidence, finding that the motion for reconsideration merely presented the same issue ruled on by the court when granting summary disposition. For these reasons we conclude that procedural error occurred because the basic requirements of notice and a meaningful opportunity to be heard have not been satisfied in this case.²

Reversed and remanded. We do not retain jurisdiction. Costs to plaintiff.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens

² We offer no opinion regarding the merits of plaintiff's no-fault claim.