

STATE OF MICHIGAN
COURT OF APPEALS

DAMON ROBINSON,

Plaintiff-Appellant,

v

ANIK MAHMOOD and ASU GROUP,

Defendants,

and

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION,

Defendant-Appellee.

UNPUBLISHED

June 18, 2020

No. 347840

Wayne Circuit Court

LC No. 17-001577-NF

Before: GADOLA, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant, Suburban Mobility Authority for Regional Transportation (SMART), in this first-party no-fault insurance action, MCL 500.3101 *et seq.* We affirm.

On August 4, 2016, plaintiff was riding in a SMART bus when it collided with a vehicle being driven by Anik Mahmood. Plaintiff allegedly sustained personal injuries as a result of the collision. Plaintiff sought first-party personal protection no-fault insurance (PIP) benefits from ASU Group, which were denied on the ground that ASU Group was not an insurance company and did not insure the SMART bus.

On January 20, 2017, plaintiff sued ASU Group and Anik Mahmood. ASU Group moved to dismiss the complaint against it on the ground that it was not an insurance company and did not insure the SMART bus. Subsequently, on April 24, 2017, a stipulated order dismissing ASU Group was entered. Plaintiff then moved to file an amended complaint naming SMART as a defendant and the party responsible for denying him PIP benefits. The motion was granted and,

on July 6, 2017, plaintiff filed his first amended complaint. Subsequently, on May 18, 2018, the trial court entered a stipulated order of dismissal as to defendant Mahmood.

On December 27, 2018, defendant SMART filed a motion for summary disposition under MCR 2.116(C)(10), arguing that plaintiff—who was sitting in the last row of the 40-foot bus when the front of the bus collided with Mahmood’s vehicle—could not establish that his purported injuries were causally connected to the accident. SMART argued that plaintiff had significant preexisting medical problems that he did not reveal to his post-accident medical providers and these preexisting medical problems were the same as the injuries he attributed to this accident. SMART argued that its expert in physical medicine and rehabilitation, Dr. Mary Kneiser, examined plaintiff as well as his voluminous pre-accident and post-accident medical records (about 15,000 pages), and set forth her conclusions in her attached report and affidavit, including as follows: (1) the only injury plaintiff sustained in the accident was soft tissue swelling in his left elbow which did not require treatment; and (2) the only treatment medically related and justified included six specific treatment dates before and on November 2, 2016. Plaintiff reached maximum medical improvement by November 2, 2016; thus, no medical care provided after that date was medically necessary or reasonably related to the accident. Dr. Kneiser’s affidavit, 62-page report, and supporting documents were provided to the trial court. SMART argued that there was no genuine issue of material fact that plaintiff could not establish causation, and thus, could not carry his burden of proof to show that he was entitled to additional PIP benefits. Almost all of his alleged injuries were not caused by the bus accident and all proper claims were already paid. Accordingly, SMART argued, plaintiff’s complaint should be dismissed.

Plaintiff responded to SMART’s motion for summary disposition, arguing that plaintiff’s medical providers concluded that their treatment was necessary for injuries he sustained in the accident. Plaintiff recounted that he was taken to the emergency room after the accident where he indicated that he hit his head and also hurt his left shoulder, left elbow, left wrist, and left hip. Thereafter, plaintiff saw several medical providers, including Dr. Todd Best, a physical medicine and rehabilitation physician. Dr. Best noted that plaintiff had left shoulder pain, neck pain, a traumatic brain injury, left hip pain, and lower back pain after the bus accident. Dr. Best prescribed physical therapy, neuropsychological testing, replacement services, transportation services, and attendant care, as well as a walker and cane. He also ordered MRIs of the cervical and lumbar spine, left shoulder, and brain, as well as an EEG. Plaintiff’s test results showed herniated and bulging discs in his back, and he was diagnosed with a torn rotator cuff. Plaintiff argued that his medical records from Dr. Best established that there were questions of fact as to the issues of causation and whether the claimed treatment and services were reasonably necessary for his care, recovery, and rehabilitation. Therefore, defendant SMART’s motion for summary disposition must be denied. Plaintiff attached to his response a copy of the police report, his emergency room medical records, his deposition testimony, and medical records authored by Dr. Best.¹

¹ The medical records included: (A) a letter dated 10/26/16, as well as prescriptions for (1) attendant care services, (2) case management, transportation, and replacement services, (3) a quad cane, (4) neuropsychological testing, (5) an EEG, and (6) MRIs of the brain, left shoulder, and cervical spine; (B) a letter dated 11/22/16, as well as prescriptions for (1) case management,

Defendant SMART filed a reply to plaintiff's response, arguing that Dr. Kneiser is the only physician who examined plaintiff, reviewed all of his medical records, and reviewed the video of the bus accident; therefore, she is the only doctor qualified to give expert opinions as to plaintiff's condition in relation to the bus accident. Further, it is well established that a no-fault insurer is only liable to pay benefits if those benefits are causally connected to the accidental bodily injury sustained in the motor vehicle accident. In this case, plaintiff failed to provide sufficient evidence to establish that his medical conditions are causally connected to the bus accident and that the treatment and services he received were reasonable, necessary, and related to the accident. Thus, SMART argued, it was entitled to summary disposition under MCR 2.116(C)(10).

Following oral arguments on February 7, 2019, the trial court granted defendant SMART's motion for summary disposition. The court referenced its review of all of the exhibits presented by the parties. The court noted that expert causation testimony cannot be premised on mere speculation; rather, there must be facts and evidence to support the opinion testimony of an expert. In this case, plaintiff relies on the expert opinion of Dr. Best to establish that plaintiff's medical conditions were caused by the bus accident. But other than Dr. Best's mere notations in plaintiff's medical records that plaintiff's injuries resulted from the accident, there was no basis or support for that opinion. Therefore, plaintiff failed to provide the court with any evidence of causation and SMART was entitled to summary disposition. The court concluded that all PIP benefits had been paid. Thereafter, the trial court entered an order consistent with its ruling. This appeal followed.

Plaintiff argues that the trial court erred in concluding that defendant SMART was entitled to summary disposition. We disagree.

We review de novo a trial court's decision to grant a motion for summary disposition. *Sheridan v Forest Hills Pub Sch*, 247 Mich App 611, 620; 637 NW2d 536 (2001). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Spiek v Dept of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party must identify the matters that have no disputed factual issues, and has the initial burden of supporting its position with documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The party opposing the motion must then establish by admissible evidentiary materials that a genuine issue of disputed fact exists. *Id.*; *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008). After considering the documentary evidence submitted in the light most favorable to the nonmoving party, the court determines whether a genuine issue of material fact exists to warrant a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts asserted by the movant." *Opdyke Invest Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982); see also *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

MCL 500.3105 governs liability for no-fault PIP benefits. *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392, 394; 838 NW2d 910 (2013). MCL 500.3105(1) provides:

transportation, and replacement services, (2) physical therapy, and (3) attendant care services; and (C) a prescription dated 01/02/17 for a rollator walker.

Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

Thus, allowable expenses must be causally connected to a person's injury. In *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005), our Supreme Court explained that there are two causation requirements for no-fault benefits:

First, an insurer is liable only if benefits are “for accidental bodily injury” “[F]or” implies a causal connection. “[A]ccidental bodily injury” therefore triggers an insurer’s liability and defines the scope of that liability. Accordingly, a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident.

Second, an insurer is liable to pay benefits for accidental bodily injury only if those injuries “aris[e] out of” or are caused by “the ownership, operation, maintenance or use of a motor vehicle” It is not any bodily injury that triggers an insurer’s liability under the no-fault act. Rather, it is only those injuries that are caused by the insured’s use of a motor vehicle.

It is the first causal requirement that is at issue in this case, i.e., the extent to which plaintiff suffered accidental bodily injury in the bus accident.

Defendant SMART argued in the trial court that plaintiff only suffered a soft tissue swelling of his left elbow as a consequence of this bus accident; therefore, only six specific treatment dates before and on November 2, 2016 were compensable as PIP benefits. To the contrary, plaintiff claimed to have suffered: a herniated disc in his neck; head and neck trauma; left shoulder and rotator cuff damage; left knee damage; a closed head injury and post-traumatic stress; as well as a left hip and back injury. Defendant SMART argued that plaintiff could not establish causation with respect to these purported injuries because he relied on the medical reports of Dr. Best and they were insufficient to establish causation. On appeal, plaintiff argues that defendant merely attacked the credibility of plaintiff’s treating physician, Dr. Best. That is, defendant SMART presented testimony from its paid expert who had an opinion that conflicted with plaintiff’s treating physician. However, plaintiff argues, the trial court was not permitted to weigh the evidence or make credibility determinations in deciding the motion for summary disposition.

The primary focus of inquiry is whether defendant SMART is liable to pay any additional PIP benefits to plaintiff which, in turn, requires a determination as to what accidental bodily injuries plaintiff suffered in the bus accident. SMART is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injuries sustained in the bus accident. To determine what injuries were caused—or preexisting conditions aggravated—by the bus accident, we must rely on medical expert opinions. Because this is an issue of medical causation, i.e., whether there is a causal link between the accident and alleged injuries, lay testimony from plaintiff alone that he suffered such injuries is insufficient. See, e.g., *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980). Defendant SMART challenged plaintiff’s

ability to prove that causal link with regard to almost all of plaintiff's claimed injuries. In response to SMART's challenge, plaintiff relied on two medical reports from Dr. Best, as well as several prescriptions written by Dr. Best. Plaintiff claimed that these medical records—alone—established that a genuine issue of material fact existed on the issue whether he suffered accidental bodily injuries in the bus accident that required the treatment and services he received.

One of the medical reports relied upon by plaintiff was a report by Dr. Best dated October 26, 2016. It was actually a letter written to Dr. Kenneth Chun, who was plaintiff's primary care physician. The letter indicated that plaintiff's chief complaint was "MVA injuries 08-04-16." The history section of the letter recounted that plaintiff had a history of low back pain that was manageable and, immediately after the bus accident he had left shoulder, hip, elbow, and knee pain. The letter indicated that plaintiff continued to have a number of problems and that Dr. Chun had seen plaintiff but did not order any testing. The letter further indicated that plaintiff complained of headaches, balance issues, memory issues, and pain in the neck, left shoulder, low back, left hip, and right lower leg. Under the heading labeled "Assessment," Dr. Best listed several problems as being "secondary to" or "due to" the accident, including: left shoulder pain, neck pain, adjustment disorder, and left hip pain. He also noted to "rule out" minor traumatic brain injury and back seizures "due to" the accident. And Dr. Best indicated that plaintiff's low back pain was aggravated by the accident. Dr. Best's plan of care included prescriptions for diagnostic testing, as well as for replacement services, case management services, transportation services, and attendant care services through December 31, 2016.

The second medical report relied upon by plaintiff was dated November 22, 2016, and was also a letter from Dr. Best to Dr. Chun. The letter again indicated that plaintiff's chief complaint was "MVA injuries 08-04-16." The history section indicated that plaintiff continued to have memory issues and headaches, as well as pain in his neck, left shoulder, low back, and left hip. Under the heading labeled "Assessment," Dr. Best again listed several problems as being "secondary to" or "due to" the accident, including: left shoulder pain, neck pain, adjustment disorder, and left hip pain. He also noted to "rule out" minor traumatic brain injury and post traumatic seizures "due to" the accident. And Dr. Best indicated that plaintiff's low back pain was aggravated by the accident. Dr. Best's plan of care included prescriptions for physical therapy and neuropsychological testing, as well as for replacement services, case management services, transportation services, and attendant care services through January 31, 2017.

As the trial court noted, however, these two medical reports and associated prescriptions for additional services do not give rise to a genuine issue of material fact on the issue whether plaintiff suffered accidental bodily injuries in the bus accident. They simply do not establish a definite causal link between the bus accident and plaintiff's claimed injuries. While the medical reports indicate that plaintiff was *self-reporting* that he suffered injuries in the bus accident and that he had pain in various parts of his body, Dr. Best does not present any definitive opinion on medical causation. Again, plaintiff's opinion that he suffered injuries in the bus accident is wholly insufficient. See *Howard*, 100 Mich App at 273. And plaintiff failed to present an affidavit or deposition testimony from Dr. Best that specifically attributed plaintiff's impairments—including any found on physical examination—to the bus accident. That Dr. Best repeated plaintiff's claims of injury and pain to Dr. Chun in his letters does not equate to an expert medical opinion on the issue of causation. While plaintiff is correct that a trial court may not make credibility determinations or weigh the evidence in deciding motions for summary disposition under MCR

2.116(C)(10), *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), that is not what the trial court did in this case. Defendant brought a motion for summary disposition, arguing that plaintiff could not establish that his purported injuries were causally connected to the accident and provided evidence in support of that motion. Plaintiff responded with two medical reports and some prescriptions from Dr. Best—evidence that simply did not “permit inferences contrary to the facts asserted” by defendant. See *Opdyke Invest Co*, 413 Mich at 360. Therefore, as the trial court concluded, defendant SMART was entitled to summary disposition; all PIP benefits to which plaintiff was entitled had been paid.

Affirmed.

/s/ Michael F. Gadola
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly