STATE OF MICHIGAN

COURT OF APPEALS

LEDDREW RENARD SMITH, JR., and KERRY SMITH, Plaintiffs-Appellants, v RUSSELL ALLEN BENJAMIN, CORBIDGE AUTOMOTIVE, and STATE FARM INSURANCE CO, Defendants-Appellees.	UNPUBLISHED October 4, 2005 No. 262445 Cass Circuit Court LC No. 04-000093-NI

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiffs Leddrew Renard Smith, Jr., and Kerry Smith[1] appeal as of right from orders granting defendants' motions for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On February 9, 2001, Leddrew Renard Smith, Jr. (Smith) was involved in an automobile accident with defendant Russell Benjamin. Smith complained of neck and right shoulder discomfort and low back pain. Relying upon representations made by Smith and his treating physician, Dr. Peter Yu, defendant State Farm Insurance Company paid Personal Injury Protection (PIP) benefits for approximately three years. However, after an independent medical examination, State Farm discontinued further PIP benefits effective May 30, 2003.

Plaintiffs brought suit seeking compensation from defendants Benjamin and Corbidge Automotive for noneconomic damages pursuant to MCL 500.3135, and to compel State Farm to pay PIP benefits. During the course of discovery, a question arose concerning whether Smith's injuries were actually caused by the accident. In January 2002, Dr. Yu indicated that Smith did not have any preexisting medical problems that may have been aggravated by the automobile accident. During his initial deposition on January 7, 2003, before his PIP benefits were terminated, Smith stated that he "could not recall" whether he had suffered a previous injury to

[1] Plaintiff Kerry Smith is the spouse of Leddrew Smith.

his back or shoulder. However, a medical record revealed that Smith had seen a chiropractor before his 2001 accident.

Smith subsequently disclosed that he had seen Dr. Cheryl Broderick-Lieurance, a chiropractor. She testified that when she first saw Smith on April 1, 1997, he complained of headaches; a tight, stiff and sore neck; and constant tightness in his entire back. He indicated that he had been in a car accident in 1986, had gotten whiplash, and had been sore since the accident. X-rays at that time revealed that Smith had arthritic changes in his C5-C6 spinal region in the neck above the shoulders, and inflammation of his lower back. Dr. Broderick-Lieurance began treating Smith, and he gained some relief. However, Smith returned to Dr. Broderick-Lieurance's office on May 13, 1999 complaining of shoulder pain, lower back pain, right leg numbness, and soreness of at least a month's duration. An x-ray revealed abnormalities in his L4-L5 spinal region. Smith returned on June 19, 2000, complaining of neck, left shoulder, low back, and left leg difficulties. Dr. Broderick-Lieurance testified that she treated Smith's neck, shoulder and low back complaints more than fifteen times between April 1997 and August 2000.

Dr. Yu's deposition was taken on February 3, 2005. During direct examination, Dr. Yu was asked whether he thought that Smith's back and shoulder pain were a result of the 2001 car accident. He provided equivocal responses, stating that, if there were no other evidence of pain, Smith's symptoms could be considered to be accident-related. In one response, Dr. Yu testified that Smith's back and shoulder pains were caused by the accident. On cross-examination, however, Dr. Yu stated that Smith had consistently told him that he had not had any problems with his neck, back, legs, or shoulder before the accident, and that he had since discovered that Smith had given him an inaccurate medical history. Dr. Yu was then asked the following:

> *Q*. Given what you now know to be the fact, that he had complaints and treatment in these areas for four years before this accident, would it be fair to say that you cannot say with a reasonable degree of medical certainty what the cause of these complaints are?
>
> *A*. Since there was no MRI taken before this, yes, the answer is yes.

Dr. Yu now questioned his own diagnosis regarding the origin of Smith's injuries:

> *Q*. The fact that he had seen a chiropractor for sinus problems and he saw a chiropractor because he had a stiff neck and he saw a chiropractor because he had some other minor injuries, does that in your opinion have a bearing on whether or not the injuries he's complaining of today to you did not occur - - occurred in the auto accident?
>
> *A*. It may have bearing - -
>
> * * *

A. It may have bearing because if I had known he had prior injuries, I would have screened for it more deeply and asked him whether an MRI was done at that point, whether anything - - any EMGs were done and any more in depth examination was done on him rather than just rely on a chiropractic examination. So I feel that if a patient comes to my clinic, what comes in to me is what comes out.

Q. Well, you've reviewed the records from the chiropractor?

A. Yes.

Q. And you know that there was no serious injury.

A. I don't know that.

Q. You don't.

A. I don't.

Q. So the point is that you're saying that the fact he didn't tell you about this affects your opinion in this case.

A. It could. It makes - - it gives me a cloud. I can't see straight because there are some other circumstances that he's telling me now that he did not tell me before he came to me.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that Smith's injuries did not meet the threshold definition of a serious impairment of body function and that Smith had failed to provide evidentiary support that his injuries were caused by the accident. The trial court held that plaintiffs had failed to carry their burdens of proof with respect to causation and the existence of a threshold injury.

We review the trial court's decision on a motion for summary disposition de novo. In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), we review the record evidence and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party, to decide whether a genuine issue of material fact exists. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002). The moving party must specifically identify the undisputed factual issues, MCR 2.116(G)(4), *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and support its position with affidavits, depositions, admissions, or documentary evidence. MCR 2.116(G)(3)(b); *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

If the moving party carries its initial burden, the party opposing the motion must then demonstrate with admissible evidence that a genuine and material issue of disputed fact exists, otherwise summary disposition is properly granted. MCR 2.116(G)(4); *Smith*, *supra* at 455 n 2. We evaluate the trial court's decision on the motion "by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a

standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden*, *supra* at 121.

Under Michigan's no-fault automobile insurance act, an insurer is liable for all reasonable charges incurred for reasonably necessary products, services, and accommodations related to the care, recovery, or rehabilitation of an insured who was injured in an automobile accident. MCL 500.3107(a). The insured has the burden of proving that the incurred medical expenses were reasonably necessary to recover from injuries caused by the automobile accident. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990). To show causation here, plaintiffs were required to prove by a preponderance of the evidence that Smith's neck, shoulder and back conditions arose out of the injuries he sustained in the 2001 accident. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 6-7; 423 NW2d 913 (1988); *Shinabarger v Citizens Ins Co*, 90 Mich App 307, 314; 282 NW2d 301 (1979).

We hold that the trial court did not err by granting summary disposition in favor of defendants. Defendants presented substantive evidence in support of the claim that Smith's injuries and medical complaints predated the accident. Plaintiffs failed to present any substantive evidence, other than the accident itself, from which to find that Smith's injuries were caused or exacerbated by the 2001 accident. It is clear that, while Dr. Wu initially may have thought that the accident caused the injuries, Smith's deception caused him to reevaluate this earlier opinion. Dr. Wu could not opine that any of Smith's injuries were caused by the accident. To the extent that some of Dr. Wu's initial statements could be said to establish a causal connection, we find that plaintiffs' attempt to rely on these statements is unpersuasive. A party may not create a genuine issue of material fact by offering contradictory statements of the same witness. *Schultz v Auto Owners Ins Co*, 212 Mich App 199, 202; 536 NW2d 784 (1995). Because plaintiffs failed to meet their burden concerning causation, the trial court did not err when it granted summary disposition to defendants.

Because we agree with the trial court that plaintiffs failed to establish causation here, we need not reach the issue of whether Smith's injuries met the threshold requirement of MCL 500.3135. However, we note our general agreement with the trial court's conclusion on this issue.

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio