STATE OF MICHIGAN

COURT OF APPEALS

CHARLES JONES,

Plaintiff-Appellee,

v

AMOS WILEY,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 177828
LC No. 93-316307-NI

Before: Michael J. Kelly, P.J., and Markman and J. L. Martlew,* JJ.

PER CURIAM.

Plaintiff appeals by right an order of the trial court denying plaintiff's motion for reconsideration of the court's grant of summary disposition for defendant pursuant to MCR 2.116(C)(10) in this automobile negligence case. We affirm.

Plaintiff was injured while riding his bicycle when he was struck from behind by a motor vehicle. He brought suit against defendant alleging that defendant was the owner or operator of the vehicle which was involved in the accident. After the close of discovery, defendant filed a motion for summary disposition supported by affidavits and deposition testimony indicating that neither he nor his wife operated defendant's car on the day of the accident nor gave anyone else permission to operate the car. Defendant also referred to the deposition testimony of plaintiff wherein plaintiff indicated that he never saw any vehicle coming from any direction, never saw anyone who may have been involved in the accident, had no idea or personal knowledge as to who was driving the vehicle which hit him and did not have any documents to show or prove who was driving the vehicle.

In response to defendant's motion, plaintiff filed a brief in which he indicated that two eyewitnesses to the accident had identified defendant's vehicle by license plate number. These witnesses, plaintiff stated, saw defendant's vehicle strike plaintiff and gave a description of the driver which was consistent with defendant's son. Plaintiff did not, however, attach any evidence, such as affidavits or deposition testimony, to support this assertion. In fact, plaintiff attached no exhibits of any kind.

* Circuit judge, sitting on the Court of Appeals by assignment.

The trial court granted defendant's motion on the grounds that plaintiff had failed to produce sufficient evidence to show that there was a genuine issue for trial. Plaintiff then filed a motion for reconsideration in which he submitted various documents but again failed to supply any affidavits or deposition testimony from the alleged eyewitnesses.[1] The trial court denied plaintiff's motion for reconsideration. [2]

This Court reviews de novo a trial court's determination regarding motions for summary disposition. *Parcher v Detroit Edison*, 209 Mich App 495, 497; 531 NW2d 724 (1995). This Court's task is to review the record evidence, including all reasonable inferences drawn from such evidence, and determine whether a genuine issue of material fact exists to warrant a trial. All legitimate inferences must be drawn in favor of the non-moving party, in this case the plaintiff. *Skinner v Square D Co*, 445 Mich 153, 161-62; 516 NW2d 475 (1994). Motions for reconsideration are reviewed for abuse of discretion. *Charbeneau v Wayne County Hospital*, 158 Mich App 730; 405 NW2d 151 (1987).

There apparently is little question that a factual dispute exists in this case.[3] However, plaintiff failed to present documentary evidence of such a dispute either in response to the motion for summary disposition or in support of its own motion for reconsideration. Therefore, the trial court did not err in granting summary disposition and it did not err in denying the motion for reconsideration. For plaintiff merely to assert that there are eyewitnesses who would connect defendant's vehicle and his son to the accident, without providing evidence to support this assertion, is insufficient under MCR 2.116(C)(10) to establish a genuine issue of material fact. *Parpart v City of Detroit*, 194 Mich App 561, 563; 487 NW2d 506 (1992). Indeed, on appeal, plaintiff does not contest the court's initial decision but only claims that the court should have granted his motion for reconsideration.

It is inexplicable that plaintiff's counsel failed to submit evidence sufficient to defeat defendant's summary disposition motion when it was apparently available to him. Counsel has provided utterly no explanation for his failure to procure the affidavits of the eyewitnesses under MCR 2.116(H)(1)(a) and states in his own affidavit only that "a subpoena could have been issued, but that the Court Rules impose no such duty to do so." While it is correct that the rules impose no such duty, they *do* impose a duty to demonstrate to the court, through appropriate evidence, that a genuine issue of material fact exists. Despite the fact that affidavits or deposition testimony from eyewitnesses would have been the obvious means of satisfying this duty, counsel failed to do this not only in response to the motion for summary judgment but also in support of plaintiff's own motion for reconsideration. Plaintiff cannot rest upon mere allegations in his pleadings but must establish the existence of a material fact through documentary or other valid evidence. MCR 2.116(G)(4). Under these circumstances, we have no alternative but to affirm the order of the trial court. We do so in the recognition that a serious injustice may occur as a result. While we may "know" that a question of fact genuinely exists in the present case, we cannot create an exception to the evidentiary requirements of MCR 2.116(C)(10) for situations in which we "know" that evidence really exists despite it not having been offered to the court. Plaintiff's counsel did not abide by the clear procedures required to establish a question of fact under the rules and simply never got around to contacting or deposing the eyewitnesses to the accident. Tragically, as a result, plaintiff is precluded from obtaining compensation through this action.

Defendant argues that he is entitled to an award of expenses or damages under MCR 7.216(C) and costs under MCR 7.219. Because we find that plaintiff's appeal was not taken for purposes of hindrance or delay, and because we find that there was a reasonable basis for belief that there was a meritorious issue to be determined on appeal, sanctions under MCR 7.216(C) are denied. *Cardinal Mooney High v MHSAA*, 437 Mich 75, 79; 467 NW2d 21 (1991). Further, in the exercise of our discretion under MCR 7.219, we direct that no costs are to be awarded to either party.

Affirmed.

/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew

I concur in result only.

/s/ Michael J. Kelly

[1] None of plaintiff's documents establish a question of fact concerning defendant's liability for plaintiff's accident. The medical records submitted merely document plaintiff's injuries but do not connect defendant with the accident; the police report and the plaintiff's private investigative report submitted contain inadmissible hearsay, *Skinner*, supra at 160-61; S*CC Associates v General Retirement System of Detroit*, 192 Mich App 360, 363-65; 480 NW2d 275 (1991); and the affidavit of plaintiff's attorney submitted is the affidavit of a person with no personal knowledge of the facts concerning the accident. *North River Ins Co v Endicott*, 151 Mich App 707, 714; 391 NW2d 454 (1986). Rather, this affidavit is nothing more than an assertion by plaintiff's counsel that eyewitnesses exist and that, if they testified, their testimony would raise a question of fact. *SCC Associates*, supra at 364. Other documents, including plaintiff's mediation summary and copies of the party's pleadings, are equally unsatisfactory to establish an issue of fact. Specifically, we do not believe that defendant's answers to plaintiff's interrogatories in which they give the names of the eyewitnesses whom they expect to testify raises a question of fact. MCR 2.116(G)(5). There is no indication that defendant has personal knowledge that these people were, in fact, eyewitnesses. Instead, his answer was based on information and belief and, therefore, not enough to defeat a motion for summary disposition. *Skinner*, supra at 160-61.

[2] Although here we review the denial of the motion for reconsideration by evaluating the evidence supplied by plaintiff with his motion, there is reasonable argument that in reviewing the motion, we are limited to a determination of whether or not the trial court erred in granting the original motion for summary disposition. See *Charbeneau v Wayne County Hospital*, 158 Mich App 730; 405 NW2d 151 (1987). Under *Charbeneau*, the trial court was under no obligation to consider the additional evidence submitted by plaintiff to accompany his motion for reconsideration.

[3] The report of plaintiff's private investigator indicates that he contacted the two eyewitnesses both of whom saw defendant's license plate number of the vehicle involved in the accident and provided a description of the driver. Further, defendant's answers to plaintiff's interrogatories confirm that

defendant was aware of the identity of these two witnesses and the substance of their testimony. The question of appeal, however, is not the existence of these witnesses but whether plaintiff presented sufficient evidence to defeat defendant's motion for summary disposition.