

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS C. GRANT and JASON J. GRANT,

Plaintiffs-Appellants,

UNPUBLISHED
March 10, 2011

v

No. 295517
Macomb Circuit Court
LC No. 2008-004805-NI

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN, TERESA DAWN
NILSSON, and RONALD DUANE
LESZCZYNSKI,

Defendants-Appellees.

Before: MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ.

PER CURIAM.

In this suit arising out of an automobile accident, plaintiffs Thomas C. Grant and Jason J. Grant appeal as of right the trial court's opinion and order granting summary disposition in favor of defendant Farm Bureau General Insurance Company of Michigan (Farm Bureau) under MCR 2.116(C)(10). On appeal, Thomas and Jason Grant argue that the trial court erred when it dismissed their claims against Farm Bureau for failing to pay first party personal protection (PIP) benefits. We conclude that Farm Bureau failed to properly support its motion for summary disposition and, as such, the trial court should have denied the motions as to the PIP claims. For this reason, we reverse the trial court's opinion and order and remand this matter to the trial court.

I. BASIC FACTS AND PROCEDURAL HISTORY

In July 2007, Jason Grant was driving with his father, Thomas Grant, in his father's pickup truck along 22 Mile Road in Macomb County. They stopped and waited to turn left into a business. Leszczynski was driving a truck owned by his girlfriend, Nilsson, along the same road. He testified at his deposition that he was driving behind a car that suddenly swerved around a truck stopped in the road. Leszczynski could not stop in time and crashed into the truck's rear end.

Emergency responders took Thomas Grant to the hospital and the hospital treated him for some minor injuries and released him the same day. Jason Grant did not seek treatment on the day of the accident. Thomas, who had seen a chiropractor before the accident, sought treatment for back and neck pain from his chiropractor. About two weeks after the accident, Jason Grant

went to the emergency room for back pain that he thought originated with the accident. He later sought treatment with his father's chiropractor.

In October 2008, Thomas and Jason Grant sued Leszczynski and Nilsson—as the owner of the truck involved in the accident—for damages arising out of Leszczynski's negligent driving. They also sued Farm Bureau for underinsured motorist benefits and for failing to pay PIP benefits.

In September 2009, Leszczynski and Nilsson moved for summary disposition under MCR 2.116(C)(10). They argued that Thomas and Jason Grant could not sue them for damages arising from the accident because neither suffered a serious impairment of body function. Specifically, they presented evidence that Thomas and Jason Grant only had degenerative changes to their backs and that those changes did not show evidence of impingement that could account for their pain. Likewise, they argued that Thomas and Jason's injuries did not affect their ability to lead their normal lives.

Farm Bureau also asked the trial court to dismiss Thomas and Jason Grant's claims in separate motions filed in September 2009. Farm Bureau argued that neither Thomas nor Jason suffered a serious impairment of body function and, for that reason, could not establish a claim for underinsured motorist benefits. Farm Bureau also argued that Thomas and Jason failed to demonstrate that any claims that they may have for PIP benefits were reasonable and necessary and, accordingly, that they were entitled to have the Grants' claims dismissed.

In November 2009, the trial court entered an opinion and order granting the motions and dismissing all of Thomas and Jason Grants' claims. With regard to Thomas, the trial court seemed to state that there might be a factual dispute about the nature and extent of Thomas' injuries, but nevertheless concluded that he did not suffer a serious impairment of body function because there was no evidence that any injury affected his general ability to lead his normal life. The trial court also noted that Thomas did not claim that Farm Bureau failed to pay benefits for household services or for nursing or attendant care. Further, because "he testified that he had been fired, he has failed to prove that, but for the accident, he would have been employed." For these reasons, the trial court dismissed all Thomas Grant's claims.

The trial court similarly concluded that Jason Grant had not established that he suffered a serious impairment of body function because there was no evidence that any injuries that he may have suffered affected his general ability to lead his normal life. Likewise, the trial court dismissed Jason Grant's claim for unpaid PIP benefits on the ground that Jason was not seeking household, attendant or nursing care services and did not present evidence that "his present unemployed status" was occasioned by the accident.

Thomas Grant appealed the trial court's order in whole and Jason Grant appealed the trial court's decision to dismiss his claim for unpaid PIP benefits. Subsequent to the filing of the appeal, the parties represented that they had resolved all issues pertaining to the third-party negligence and underinsured motorist claims, leaving this Court to decide only whether the trial court properly granted summary disposition with regard to the PIP issues.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes. *Granger Land Dev Corp v Dept of Treasury*, 286 Mich App 601, 608; 780 NW2d 611(2009).

B. ANALYSIS

In the no-fault act, the Legislature provided that insurers must provide certain PIP benefits. See MCL 500.3107. The PIP benefits include "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). The benefits also include compensation for loss of income from work and for expenses incurred in obtaining ordinary and necessary services. See MCL 500.3107(1)(b) and (c); MCL 500.3107a.

In this case, Thomas and Jason Grant sued Farm Bureau for failing to pay PIP benefits. However, they did not specifically identify the benefits that Farm Bureau failed to pay. Farm Bureau later moved for summary disposition of Thomas and Jason Grant's PIP claims and argued that dismissal was appropriate because there was no evidence that Farm Bureau failed to pay a reasonable or necessary expense for care, recovery, or rehabilitation and there was no evidence that either Thomas or Jason incurred loss of income from work or incurred expenses for the replacement of home services. The trial court agreed and dismissed their claims.

On appeal, Thomas and Jason Grant argue that Farm Bureau failed to support its motions for summary disposition with admissible evidence. Specifically, they argue that Farm Bureau only supported its motions for summary disposition of the PIP claims with reports from independent medical examinations that were inadmissible. As such, the trial court should have denied the motions as improperly supported.

In making its motions, Farm Bureau had to specifically identify the issues that it believed were not at issue and had to support the motions with affidavits, depositions, admissions, or other documentary evidence. *Barnard Mfg*, 285 Mich App at 369, citing MCR 2.116(G)(3) and (4). If Farm Bureau failed to properly support its motions, Thomas and Jason would have had no duty to respond and the trial court should have denied them. *Id.* at 370.

In its brief in support of its motion for summary disposition of Thomas' PIP claims, Farm Bureau argued that the PIP claim should be dismissed because it was not "viable." The analysis, which occupied one-half page of double-spaced type, was as follows:

The Plaintiff has no viable claims for PIP benefits in this action as all benefits that are either reasonable or necessary have been paid. The Plaintiff simply did not suffer any injuries in the accident at issue except for some possible minor sprain.

As to wage loss, the Plaintiff was not working for sometime prior to the accident at issue but has returned to work since the accident. Consequently, there simply is no basis for any claims in this regard.

As to replacement services, the Plaintiff has acknowledged that he does not have any restrictions and does not even take medications.

As to medical costs, the only actual treatment the Plaintiff has received is chiropractic care, care that he admitted [he] was receiving prior to the accident.

As can be seen, Farm Bureau did not cite any of the exhibits attached to its brief in support of its motion. It also did not cite—let alone discuss—a single relevant legal authority. Although this argument might minimally place Thomas Grant on notice that Farm Bureau believed that he would be unable to support his claims, it utterly failed to comply with the minimum requirements of MCR 2.116(G)(3). Farm Bureau had to support its motion for summary disposition with substantively admissible evidence. See *Barnard Mfg*, 285 Mich App at 369-370. In the absence of such support, Thomas did not have to reply at all and the trial court should have dismissed Farm Bureau's motion as to this claim. *Id.* at 370.

Further, even considering this perfunctory argument in light of its factual recitation, Farm Bureau still failed to identify evidence that—if left un rebutted—would establish that there was no question of fact that Thomas was not entitled to PIP benefits. Farm Bureau stated in its brief that all the reasonable or necessary benefits have been paid, but did not present any evidence concerning the benefits that it has paid or that Thomas submitted, but that it denied. Further, although Farm Bureau discussed the independent medical examinations in its factual recitation, as Thomas correctly noted before the trial court, the letters from the examiners were inadmissible.

In support of its motion for summary disposition, Farm Bureau submitted letters that reported the findings of medical examiners who examined Thomas on behalf of Farm Bureau. The letters indicated that Thomas did not require any further services for his recovery or care. That is, the letters suggest that Thomas did not have any compensable expenses under MCL 500.3107(1)(a). However, the trial court could only consider substantively admissible evidence when considering Farm Bureau's motion. *Barnard Mfg*, 285 Mich App at 373. And these letters are clearly hearsay and do not fall under any exception to the general prohibition against the admission of hearsay. See MRE 801; MRE 802; MRE 803; MRE 804; see also *Attorney General v John A Biewer Co, Inc*, 140 Mich App 1, 17; 363 NW2d 712 (1985) (noting that documents that are prepared in preparation for litigation are not inherently trustworthy and, for that reason, are generally inadmissible under the hearsay exceptions). Moreover, the fact that the examining professionals might have been able to testify as to their opinions at trial does not alter the admissibility of the letters. Statements in a written report are completely different from a statement offered as proposed testimony and the fact that the two different types of evidence might ultimately contain the same statements does not transform an otherwise inadmissible document into admissible evidence for purposes of summary disposition. Rather, the substance of the proposed evidence must *itself* be plausibly admissible. See *Barnard Mfg*, 285 Mich App at 373-374. With a medical report there are two levels of hearsay: the document is offered to show that the medical professional actually made the statements contained in the report and then

the statements are proffered for their truth. See *Merrow v Bofferding*, 458 Mich 617, 625-626; 581 NW2d 696 (1998). Although the substance of the statements might plausibly be admissible, the letters cannot be used to show that the statements were actually made because there is no plausible basis for admitting the letters themselves. Because the letters from the independent medical examinations cannot be used to show what the authors might state if called to testify, we cannot conclude that the statements within the letters are plausibly admissible.¹ As such, the trial court could not properly consider these reports in deciding the motion for summary disposition and we will not consider them now. *Barnard Mfg*, 285 Mich App at 373.

Farm Bureau did attach Thomas' deposition to its motion and cited that deposition in its factual recitation. However, the cited testimony did not support an inference that Thomas was not entitled to any PIP benefits. Farm Bureau stated that Thomas admitted that he was not working at the time of the accident. But that alone does not preclude him from obtaining lost wages. It is well settled that a person who is temporarily unemployed at the time of an accident can still obtain lost wages by showing that, but for the accident, he or she would have secured new employment. See MCL 500.3107a (providing for work loss for injured persons who were temporarily unemployed at the time of the accident); see also *Szabo v Detroit Auto Inter-Ins Exchange*, 136 Mich App 9, 11-14; 355 NW2d 619 (1984) (noting that persons who are temporarily unemployed may still be entitled to wage loss benefits). Thus, Thomas' testimony that he was unemployed did not—by itself—establish that there was no question of fact that he was not entitled to wage loss benefits. Farm Bureau needed to show that Thomas was unemployed and that his unemployment was permanent—that is, that he was not seeking employment, or that the injuries he sustained did not preclude him from being gainfully employed. Likewise, Thomas' testimony that he had received chiropractic services before the accident does not permit an inference that the chiropractic services he received after the accident were unrelated to the accident. Finally, the evidence that Thomas did not have any restrictions and did not take any medications at the time of his deposition did not establish that he did not previously have restrictions or take medications and did not establish that he will not have restrictions or require medication in the future.

Farm Bureau's motion for summary disposition of Jason's PIP claims was similarly deficient. Farm Bureau's argument with regard to Jason was substantially similar to the one stated in its motion for summary disposition of Thomas' PIP claims. Farm Bureau again asserted—without any citation to exhibits or authorities—that Jason's PIP claims were not viable because all “benefits that are either reasonable or necessary have been paid.” It further stated that his work history had been spotty and that he was able to return to employment, but did not explain how his spotty work history demonstrated that the accident was not the cause of Jason's wage losses and failed to identify any evidence that he could return to work if he so chose. Farm

¹ We do not preclude the possibility that a statement contained in an otherwise inadmissible report could be incorporated by reference into an affidavit. Had the authors of the letters averred that they would testify at trial, if called, and would testify consistent with the opinions expressed in their letters, the trial court could properly consider the statements.

Bureau also stated in conclusory fashion that Jason was unemployed because of the Michigan economy without citing any evidence that this was so.

Farm Bureau did state that Jason admitted that he can “cook, do laundry, go shopping, drive and do other chores”—again without any citation to an exhibit—and suggested that this was evidence that Jason did not need replacement services. But Jason stated that he was not seeking replacement services under his current claim and this evidence does not preclude the possibility that Jason might eventually need such services. Likewise, Farm Bureau again noted that Jason was only receiving chiropractic treatment, which he already received prior to the accident. But that statement, even if supported by record evidence, was not evidence that Jason did not incur chiropractic expenses as a result of the accident.

Likewise, even when considering its recitation of facts and the evidence cited there, Farm Bureau’s motion with regard to Jason’s PIP claims was still deficient. Farm Bureau again cites inadmissible letters from independent medical examiners. And there is no other evidence that tended to show that Jason would not be entitled to wage loss or medical expenses under MCL 500.3107a.

Even when read as a whole, Farm Bureau’s motions for summary disposition plainly failed to comply with the requirements of MCR 2.116(G)(3). And because Farm Bureau did not properly support its motions, the trial court should have dismissed the motions. See *Barnard Mfg*, 285 Mich App at 370.

III. CONCLUSION

Because Farm Bureau failed to properly support its motions for summary disposition of Thomas and Jason Grant’s claims for PIP benefits, the trial court erred when it granted those motions. Therefore, we reverse the trial court’s opinion and order to the extent that it dismissed Thomas and Jason Grant’s PIP claims against Farm Bureau.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing parties, Thomas and Jason Grant may tax costs. See MCR 7.219(A).

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly