STATE OF MICHIGAN

COURT OF APPEALS

DARTON JOHNSON,

Plaintiff-Appellant/Cross-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 22, 2022

No. 355137
Wayne Circuit Court
LC No. 18-013283-NF

Before: BOONSTRA, P.J., and GADOLA and HOOD, JJ.

PER CURIAM.

In this first-party no-fault case, plaintiff appeals by leave granted the order granting partial summary disposition to defendant. *Johnson v State Farm Auto Ins Co*, unpublished order of the Court of Appeals, entered December 10, 2020 (Docket No. 355137). Defendant cross-appeals the trial court's order denying defendant's motion to strike Dr. Louis N. Radden and Dr. Michael Bagley (the doctors) as witnesses. On appeal, plaintiff argues the trial court erred when it granted summary disposition to defendant, because plaintiff and the doctors, despite the trial court's order limiting the doctors' testimony, provided sufficient evidence to create a genuine issue of material fact regarding whether plaintiff's injuries were causally related to the motor vehicle accident. On cross-appeal, defendant argues the trial court abused its discretion when it refused to strike the doctors as witnesses because of their uncooperativeness. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a motor vehicle accident involving plaintiff that occurred in December 2017. Plaintiff was driving his vehicle when an oncoming vehicle crossed over the yellow center line and struck plaintiff's vehicle. Plaintiff was taken to the hospital by ambulance, complaining of "mid-back pain and neck pain rated 10/10 in severity," and indicated no other problems at the time. A CT Scan revealed "no acute fracture or traumatic subluxation of the cervical spine," and "multilevel degenerative disc disease, joint hypertrophy, and facet arthropathy."

Plaintiff underwent magnetic resonance imaging (MRI) in January 2018, which identified disc herniations in plaintiff's cervical, lumbar, and thoracic spine, in addition to disc bulges and other degenerative problems. Plaintiff followed up with Spine Specialists of Michigan, PC (SSOM), seeing Dr. Bagley for his left shoulder and right knee pain, and Dr. Radden for his back and neck pain. The first report from SSOM, in March 2018, indicated plaintiff had a disc bulge before the accident, but disc herniations after the accident, and a partial tear in his left shoulder. Plaintiff received a series of injections, which he testified did not help his pain. Plaintiff underwent surgery on his shoulder for rotator cuff repair in July 2018.

Plaintiff sought no-fault benefits from defendant, and, after defendant allegedly refused to pay, filed suit. Defendant sought to depose the doctors to determine the cause of plaintiff's injuries and whether plaintiff's medical expenses from SSOM were reasonable. However, the doctors each sought expert witness fees of $5,000 for three hours of testimony. Defendant moved for a reasonable witness fee, arguing the fees requested by the doctors were excessive, and the doctors were not entitled to expert witness fees. Defendant argued the doctors were not expert witnesses because, under *Spine Specialists of Mich, PC v State Farm Mut Auto Ins Co*, 317 Mich App 497, 503; 894 NW2d 749 (2016), treating physicians in no-fault cases do not qualify as experts, and are not entitled to expert witness fees. At the hearing on defendant's motion, the trial court determined the doctors were not experts, but treating doctors, and granted defendant's motion. The trial court's order stated: "Dr. Louis Radden and Dr. Michael Bagley shall be deposed as fact witnesses, and are not entitled to any expert witness fee, unless asked for their expert opinion."

At his deposition, plaintiff testified he had no injuries before the accident, but did have medical conditions, such as degenerative disc disease in his lower back, and problems with his right knee, causing him pain, before the accident. Plaintiff was receiving treatment for these problems before the accident. Plaintiff recalled his doctors informed him surgery was unnecessary. After his January 2018 MRI, plaintiff was informed he may need surgery. Plaintiff explained his lower back pain became worse after the accident. Plaintiff apprised his doctors at SSOM of his preexisting medical issues, and received injections for the pain. After seeing no improvement, SSOM recommended lower back surgery. Plaintiff testified that while he received in-home care before the accident, he was able to do basic household chores pre-accident, but no longer could. Plaintiff denied any new injuries or incidents after the accident.

At his deposition, Dr. Radden testified he provided injection therapy to plaintiff for his neck and back pain, and Dr. Bagley operated on plaintiff's shoulder. Dr. Radden testified he believed plaintiff's injuries were caused by the accident. However, when defendant's counsel attempted to delve deeper by asking for the basis of Dr. Radden's conclusion, the questions were frequently met with objections by plaintiff's counsel followed by Dr. Radden's refusal to answer, because the testimony sought was, in their opinion, expert testimony for which Dr. Radden was not being paid. Dr. Radden similarly refused to answer questions regarding potential alternative causes of plaintiff's injuries, such as degenerative disc disease or arthritis. Defendant's counsel was met with similar causation testimony from Dr. Bagley concerning plaintiff's other injuries, followed by objections and refusals to answer follow-up questions regarding his conclusions.

Defendant moved to strike the doctors as witnesses and preclude the use of any of plaintiff's medical bills from his treatment with the doctors. At the hearing on defendant's motion, the trial court concluded: "I don't know why he would think that he doesn't have to answer a

question that deals with an expert opinion. Of course, he does, he has a financial stake in the case." Plaintiff asserted *Spine Specialists* was distinguishable, because it concerned a doctor charging an expert witness fee when he was a party to the case, but the trial court responded that did not matter, because the doctors had a financial interest in plaintiff's case. The trial court denied defendant's motion to strike, instructed defendant to pose questions to the doctors in the form of interrogatories, and ordered the doctors to answer the questions "without objection."

Defendant served written questions on the doctors, and plaintiff objected, arguing the depositions already occurred, and requiring the doctors to answer the questions again would waste their time. In response to defendant's questions, the doctors provided almost no answers, either objecting to the question as exceeding the limits of discoverable information, or, more frequently, asserting the question called for an expert opinion for which the doctors had not been paid.

Defendant renewed its motion to strike the doctors as witnesses, arguing, despite the trial court's order, the doctors refused to answer the majority of the written questions defendant submitted because of their determination the questions called for expert opinions. Plaintiff denied the doctors violated the trial court's order, and alleged defendant was trying to harass the doctors. Plaintiff contended the trial court did not order the doctors to answer interrogatories that called for an expert opinion. The trial court again denied defendant's motion to strike, recommending defendant move for summary disposition if it believed the answers given by the doctors did not support plaintiff's claims.

Defendant moved for summary disposition, asserting that because of the doctors' refusal to testify regarding anything they deemed to be expert opinion, plaintiff lacked sufficient evidence to establish a causal connection between his treatment at SSOM and the accident. Defendant argued plaintiff was obligated to prove causation to recover no-fault benefits, and, because the doctors continued to erroneously refuse to answer questions, plaintiff was unable to prove causation. Plaintiff asserted he submitted ample evidence to create a genuine issue of material fact regarding the reasonable necessity of plaintiff's treatment and the causal relationship between plaintiff's injuries and the accident through his medical records and the doctors' testimonies.

At the summary disposition hearing, the trial court confirmed the doctors were not expert witnesses and not entitled to expert witness fees because of their financial stake in the outcome of the case. The trial court noted plaintiff appeared to be arguing the doctors were unable to answer defendant's questions because of the trial court's order, and plaintiff's counsel asserted he could not control what the doctors did. The trial court reasoned, however, that plaintiff's counsel repeatedly reminded the doctors at their depositions they were not required to or should not answer questions that counsel determined called for expert opinion testimony, which "came up every time the defense attorney tried to go in a little deeper about what the doctors made–why the doctors made the diagnosis [sic] and conclusions on their records." The trial court reviewed the testimony and granted defendant's summary disposition motion. This appeal followed.

II. ANALYSIS

Plaintiff argues the trial court erred by granting summary disposition to defendant, and defendant argues the trial court abused its discretion by denying its motions to strike the doctors as witnesses.

A. SUMMARY DISPOSITION

The trial court erred by granting summary disposition to defendant. While defendant appeared to seek summary disposition under MCR 2.116(C)(10), the trial court did not indicate a subrule when granting defendant's motion. When a trial court does not indicate the subrule it applied when ruling on a motion for summary disposition, but considered documentary evidence outside the pleadings, this Court evaluates the motion as if it was granted under MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). The trial court considered plaintiff's medical records and the doctors' testimony when it granted summary disposition. We therefore presume summary disposition was granted under MCR 2.116(C)(10).

"A motion under [MCR 2.116(C)(10)] tests the factual sufficiency of the complaint." *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 777; 910 NW2d 666 (2017) (quotation marks and citation omitted). A trial court, in evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* (Quotation marks and citation omitted).

> Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).]

"[A] trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion 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).

"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." MCL 500.3105(1).

> Accordingly, MCL 500.3105(1) imposes two threshold causation requirements for PIP benefits:
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> > 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.
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> [*Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012) (citation omitted; alterations in original).]

"[W]hile the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for." *Thornton v Allstate Ins Co*, 425 Mich 643, 650; 391 NW2d 320 (1986) (quotation marks and citation omitted). Additionally, "an injured party may recover if he can demonstrate that the accident aggravated a pre-existing condition." *Mollitor v Associated Truck Lines*, 140 Mich App 431, 438; 364 NW2d 344 (1985).

The trial court concluded plaintiff presented no evidence of a causal relationship between the accident and his injuries. However, even with the doctors' consistent refusals to testify absent expert witness fees, plaintiff submitted sufficient evidence of causation which, while minimal, sufficed to defeat defendant's motion for summary disposition. Plaintiff's medical records from SSOM explicitly state plaintiff's injuries were causally related to the accident:

> Since the motor vehicle accident he had an aggravation, exacerbation of a pre-existing [sic] condition the discs are now herniated as a result [of the] motor vehicle accident at L4-5 and L5-S1. . . . He also has a rotator cuff tear of his left shoulder which is also causally related to the motor vehicle accident. . . . Thus far, his treatment has been reasonable, necessary, and causally related to the motor vehicle accident. . . . The injuries are related to the motor vehicle accident. . . .

Furthermore, while the doctors frequently refused to answer questions, both doctors concluded, on the record, plaintiff's injuries were caused by the accident. While the minimal reasoning they were willing to provide absent a fee was lackluster (that the injuries were caused by the accident because they were not there before the accident), whether this reasoning is sufficient to establish causation is for the finder of fact. Plaintiff's evidence, while minimal, was sufficient to survive summary disposition.

B. MOTION TO STRIKE

We further conclude the trial court abused its discretion by failing to sanction plaintiff's discovery violations.

"Whether to impose discovery sanctions is entrusted to the discretion of the trial court." *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). "We review a trial court's imposition of discovery sanctions for an abuse of discretion." *Hardrick v Auto Club*

Ins Ass'n, 294 Mich App 651, 659; 819 NW2d 28 (2011). "An abuse of discretion occurs when the decision is outside the range of principled outcomes." *Id.* at 659-660.

In accordance with MCR 2.313, a trial court may order sanctions for discovery violations:

> **(B) Failure to Comply With Order.**
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> (1) *Sanctions by Court Where Deposition Is Taken*. If a deponent fails . . . to answer a question after being directed to do so by a court in the county or district in which the deposition is being taken, the failure may be considered a contempt of that court.
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> (2) *Sanctions by Court in Which Action Is Pending*. If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
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> * * *
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> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party[.] [MCR 2.313(B).]

This Court has addressed the sanctions permitted under MCR 2.313(B)(2)(c):

> The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery. The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. [*Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000), quoting *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled in part on other grounds *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008) (quotation marks and citations omitted).]

"Ultimately, the court's chosen discovery sanction must be proportionate and just[.]" *Hardrick*, 294 Mich App at 662 (quotation marks and citation omitted).

While plaintiff is correct that MCR 2.313(B)(2) considers parties, and the doctors were not parties, this does not preclude the rule's applicability. MCR 2.313(A)(6) provides a trial court

may order "such sanctions as are just" when a deponent fails or refuses to answer questions on written deposition or interrogatories, including taking "an action authorized under subrule (B)(2)(a), (b), and (c)." While plaintiff asserts neither he nor his counsel could control the doctors and force them to testify, the excessive number of unfounded objections by plaintiff's counsel, and the doctors' subsequent unwillingness to answer questions, indicates plaintiff's counsel acted to hinder discovery. "Objections are limited to . . . those necessary to preserve a privilege or other legal protection or to enforce a limitation ordered by the court." MCR 2.306(C)(4)(c)(ii). Plaintiff's counsel never asserted privilege as the basis for any of his objections. The court rules contemplate that in the absence of an objection based on privilege, the evidence "shall be taken subject to the objection[]." MCR 2.306(C)(4)(a)(iv). In other words, the objection is to be noted in the record and the answer provided subject to the objection, leaving open the possibility of a later ruling by the trial court on the admissibility of the evidence.[1]

Additionally, while plaintiff asserts his counsel and the doctors were merely trying to comply with the trial court's order not to provide expert testimony, this reasoning lacks merit. While this argument, although weak, may be able to support counsel's and the doctors' behavior at the depositions, the doctors' continued refusal to answer defendant's written questions, and plaintiff's continued assertion they were forbidden from doing so, is directly contrary to the trial court's determination. At the hearing on defendant's first motion to strike, the trial court stated: "I don't know why he would think that he doesn't have to answer a question that deals with an expert opinion. Of course, he does, he has a financial stake in the case." The doctors' subsequent refusal to answer the written questions, and plaintiff's continued assertion the doctors were not required to do so, is contrary to the trial court's order, as it explained at the hearing. The trial court had the authority to sanction plaintiff for his discovery violations, despite plaintiff's attempt to shift blame to the doctors.

While the trial court's grant of summary disposition was improper, plaintiff's and the doctors' recurring discovery violations warrant some form of sanction. Defendant twice requested the doctors be struck as witnesses, and as a less drastic sanction than outright dismissal, this would be an appropriate option for the trial court to impose under the circumstances of this case. However, the form of discovery sanction to impose is a matter of discretion for the trial court. This Court has provided a list of factors to consider when determining what form of sanction to impose on a party:

> Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the

[1] While MCR 2.306 applies to oral depositions of parties, these same principles apply to depositions of non-party fact witnesses, which the trial court properly concluded the doctors were in this instance.

> court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Plaintiff's and the doctors' violations were clear, and the trial court's refusal to sanction their behavior was an abuse of discretion. The trial court should consider the factors in *Dean* on remand, and fashion an appropriate discovery sanction for plaintiff.

III. CONCLUSION

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Michael F. Gadola
/s/ Noah P. Hood