

STATE OF MICHIGAN
COURT OF APPEALS

KEITH PHILLIPS,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

January 12, 2012

No. 302438

Kalamazoo Circuit Court

LC No. 10-000069-NF

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

In this first-party no-fault insurance benefits case, plaintiff Keith Phillips appeals as of right the trial court order granting summary disposition in favor of defendant Auto-Owners Insurance Company (Auto-Owners). Because we find that Phillips failed to meet his burden under MCR 2.116(C)(10), we affirm.

Phillips was injured in an accident when his motorcycle and an automobile collided. Auto-Owners was the insurer of the automobile involved in the accident, and since the accident Auto-Owners has paid all the claims Phillips has submitted for his medical expenses. Nevertheless, on January 25, 2010, Phillips filed a complaint against Auto-Owners in which he alleged that Auto-Owners “has refused and neglected to pay a number of [Phillips’] benefits due under the no-fault law including medical and hospital expenses, wage loss benefits, medical mileage, and other benefits.” Auto-Owners answered Phillips’ complaint and maintained that it paid all benefits that Phillips was entitled to receive.

On May 24, 2010, Auto-Owners took the deposition of Phillips. During the deposition, Phillips admitted that Auto-Owners paid every claim that he submitted, and that he had not communicated with any Auto-Owners representatives or employees regarding the claims he maintained were not paid by Auto-Owners. Phillips explicitly admitted that the unpaid benefits that he initiated this lawsuit to recover – prescription medicine costs, medical mileage, attendant care, and replacement services – were never submitted to Auto-Owners for payment. Apparently Phillips had a record of the dates and times of his medical appointments with him at the deposition as documentation for his medical mileage claim; however, he admitted that he had not calculated the actual mileage for each appointment. The document that was referenced during the deposition is not part of the lower court record and was apparently not presented to the trial court. Similarly, Phillips claimed to have some receipts from prescription medications for which

he was not reimbursed; however, he admitted he did not know the total dollar amount that he was claiming was owed to him for reimbursement for the prescriptions. The receipts are not part of the lower court record and apparently were not presented to the trial court. No other evidence was referenced during the deposition or presented to the trial court regarding Phillips' remaining claims.

On August 2, 2010, Auto-Owners moved the trial court for summary disposition pursuant to MCR 2.116(C)(10). Auto-Owners argued that summary disposition was appropriate because Phillips never substantiated or even submitted any claims that were not paid, and accordingly, Auto-Owner's could not be held liable to Phillips for nonpayment of no-fault benefits. The trial court held a hearing on Auto-Owners' motion on September 27, 2010, and granted the motion on the record. A conforming order was entered on October 18, 2010. On November 8, 2010, Phillips moved for clarification of the order. Specifically, Phillips requested that the trial court explain the basis for its opinion. The trial court entered an order clarifying the reasoning behind its original order on January 18, 2011. The trial court's clarified order explained its previous order granting summary disposition to Auto-Owners was based on its finding that Phillips failed to present evidence demonstrating a genuine issue concerning any material fact in regard to whether Auto-Owners met its obligations pursuant to the no-fault act. The trial court noted that Auto-Owners submitted a transcript of the deposition of Phillips to support its claim that it had met its obligations under the no-fault act, and that Phillips failed to present any evidence supporting his position. Accordingly, the trial court granted summary disposition in favor of Auto-Owners. Phillips now appeals the trial court's clarified order.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. The moving party bears the initial burden of supporting its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Then the burden shifts to the nonmoving party to demonstrate that a genuine issue of material fact exists for trial. *Id.* In order to meet this burden, the nonmoving party must present evidence establishing the existence of a material fact. *Id.* "Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered" to the extent that such evidence would be admissible. *Id.* See also *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If the nonmoving party fails to meet its burden, summary disposition is properly granted to the moving party. *AFSCME*, 267 Mich App at 261.

On appeal, Phillips argues that the trial court erred when it granted summary disposition to Auto-Owners because his deposition testimony created a genuine issue of material fact in regard to whether Auto-Owners failed in its obligations to pay allowable expenses pursuant to the no-fault act. We find that the trial court did not err because Phillips failed to meet his burden under MCR 2.116(C)(10). Phillips did not present any evidence to rebut Auto-Owner's deposition evidence demonstrating that Phillips never submitted any claim to Auto-Owners that was not paid. Personal protection insurance (PIP) benefits are payable for "[a]llowable expenses consisting of 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); *Booth v Auto-Owners Ins Co*, 224 Mich App 724, 727; 569 NW2d 903 (1997). "Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). In this case it is clear that Auto-Owners never received reasonable proof of the fact and of the amount of loss sustained because a claim for the benefits was never submitted by Phillips. Accordingly, there is no evidence to support Phillips' representation that Auto-Owners has refused to pay allowable expenses that it is liable for under the no-fault act, and summary disposition in favor of Auto-Owners was appropriate.

In light of our conclusion that summary disposition was proper, we decline to address the parties' arguments regarding the one-year back rule, MCL 500.3145. Further, we decline to address the parties' arguments regarding permissible sanctions for discovery violations because no discovery violation sanctions were requested by either party or imposed in this case.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Stephen L. Borrello