

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY BARRICK, Next Friend of
ANGELA BARRICK,

Plaintiff-Appellant,

v

PATRICK M. MORSE, M.D.,

Defendant-Appellee,

and

WB ORTHOPEDICS STAFFING, LLC, and JOHN
TOLFREE HEALTH SYSTEM CORPORATION,

Defendants.

UNPUBLISHED
November 18, 2008

No. 282977
Ogemaw Circuit Court
LC No. 06-656088-NH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant, pursuant to MCR 2.116(c)(10), in this medical negligence action. For the reasons set forth herein, we reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant performed surgery to remove a 4.0 mm cannulated screw from the minor plaintiff's right ankle. According to the operative report, the screw stripped when defendant attempted to back it out of the bone. The operative report went on to describe how defendant removed the screw:

The end of the screw was carefully removed with vice grips. The washer was removed and then an EBI easy out was then utilized to remove the screw.

Based on this report, as well as the radiographic appearance of the cored out screw tract, plaintiff's expert, Dr. Goral, opined that after the screw was stripped, defendant's use of the EBI Kwik-Out coring device along the length of the screw to remove it constituted a breach of the duty of care.

After Dr. Goral was deposed, defendant testified in a deposition that he did not actually remove the head of the screw with vice grips, as stated in his operative report. Rather, he flattened it with vise grips and pulled the washer over the flattened head of the screw. Defendant stated that he used the EBI Kwik-Out coring device to core out just a few millimeters of bone in order to get access with the vise grips, and then backed out the screw with the vise grips. Defendant conceded that the operative report he prepared did not specifically reference any subsequent application of vice grips after their initial use.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's expert's opinion was based on assumptions and was not in accord with the undisputed facts. Specifically, defendant asserted that his testimony explained that the method which plaintiff's expert opined was used to remove the screw was in fact not used. The trial court granted summary disposition in favor of defendant, finding that there was no genuine issue as to any material fact regarding the method used by defendant to remove the screw, and that defendant was entitled to judgment as a matter of law. The trial court found that the operative report written by defendant and defendant's subsequent testimony were not conflicting. Therefore, plaintiff's expert's testimony, which is based upon an interpretation of the operative report that is not consistent with defendant's testimony, was not grounded in fact.

In order to grant summary disposition under MCR 2.116(C)(10), there must be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. The party opposing the motion carries the burden of showing, by documentary evidence, that there is a genuine issue of material fact. MCR 2.116(G)(4). Documentary evidence must be viewed in the light most favorable to the non-moving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "This Court is liberal in finding a genuine issue of material fact." *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). "[A] trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition." *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005).

Defendant relies on *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493; 491 NW2d 243 (1992), and *Thornhill v Detroit*, 142 Mich App 656; 369 NW2d 871 (1985). In both cases, the expert formed opinions based on assumptions, and had no factual basis for those opinions. In this case, Dr. Goral had a factual basis for the opinion that he offered. Dr. Goral specifically relied upon radiographic evidence, the operative report, and the fact that the articular surface of plaintiff's ankle joint had a defect that was not present prior to the operation, to come to his conclusion that the screw was removed using the EBI Kwik-Out to core out along the entire length of the screw.

The trial court appears to have made a credibility determination in deciding that Dr. Goral's opinion should be excluded. Essentially, the trial court decided that defendant's deposition testimony was more credible and worth more evidentiary weight than the operative report. Making credibility determinations and weighing evidence is not permissible in deciding a motion for summary disposition. *Handelsman*, supra at 438.

This case is distinguishable from *Green* and *Thornhill*, for the reason that those cases dealt with expert opinions without any facts to support them, i.e. opinions in conflict with undisputed facts. Here, a dispute existed as to a material fact, specifically, what steps were taken to remove the screw. Dr. Goral based his opinion on several evidentiary documents and facts,

and as such, his opinion was not based solely on assumptions. Summary disposition was inappropriate.

Reversed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis