Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-056

SEPTEMBER TERM, 2020

Osmo Mahmutovic* v. Salvation Army	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 315-5-18 Wncv
		Trial Judge: Timothy B. Tomasi

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the court's order granting summary judgment to defendant in this personal-injury action. On appeal, plaintiff argues that summary judgment was not appropriate because there were disputes of material fact and the court incorrectly concluded that expert testimony was required. We affirm.

This case stems from an incident that occurred on June 2, 2015. Plaintiff was in a gas station parking lot and walked in front of a stopped truck operated by an agent of defendant.[1] As plaintiff walked, the truck moved in plaintiff's direction and plaintiff moved to avoid it. Plaintiff filed suit, claiming that when he took evasive action to avoid being hit by the truck, he injured his right hip.[2] He alleged that the incident caused him physical injury, pain and suffering, and permanent injury.

Defendant filed a motion in limine asking the court to preclude plaintiff from presenting expert testimony at trial due to plaintiff's failure to properly disclose an expert witness in compliance with Vermont Rule of Civil Procedure 26(b)(5) and the trial court's scheduling order. The court granted the motion, finding that plaintiff failed to comply with the disclosure requirements and was thus precluded from presenting expert testimony at trial.

Defendant then filed a motion for summary judgment, alleging that plaintiff could not support a prima facie case for negligence without expert testimony. Defendant's statement of undisputed material facts stated as follows. Surveillance video from the incident showed that

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[1] In a summary judgment appeal, "we review the record evidence in the light most favorable to the nonmoving party," here plaintiff. Morisseau v. Hannaford Bros., 2016 VT 17, ¶ 2, 201 Vt. 313.

[2] Plaintiff's complaint stated that his left hip was injured. He later changed this to his right hip.

plaintiff walked in front of the truck and the truck did not strike plaintiff in any way. Plaintiff declined medical assistance at the scene. Plaintiff fell at work in 2012 and had constant, continuing right hip problems from 2012 through 2015. Plaintiff had previously filed claims for worker's compensation and social security disability benefits related to his right leg and hip injuries. Plaintiff had cortisone shots in his right hip before and after the June 2015 incident. Prior to June 2015, plaintiff had arthritis and cartilage injuries to his right hip. Each of defendant's facts were supported by citations to the record evidence.

Plaintiff also submitted a statement of undisputed facts.[3] Plaintiff's facts differed in that he stated that as he moved away from the truck he made contact with his right hand but agreed that the truck did not hit his leg. As to defendant's statements regarding plaintiff's prior medical history, plaintiff agreed that prior to June 2015, he had been treated for low back pain and leg pain. Plaintiff stated that after the incident he visited the emergency room and described severe pain from a twisting injury to his right hip. Plaintiff argued that he did not require expert testimony to demonstrate that the incident caused him injury and pain.

The trial court granted defendant summary judgment. The court recognized that there may be cases where expert testimony was not required to establish causation and damages in a negligence action where the injury is common and not contingent or speculative but that plaintiff's claims in this case were complex and required expert medical testimony. Given plaintiff's prior hip injuries and the unusual nature of the incident, the court concluded that "it is not within the ken of a common person to be able to divine whether any claimed pain from the June 2 incident was due to Plaintiff's attempt to avoid Defendant's truck as opposed to his pre-existing conditions." Plaintiff appeals.

On appeal from a decision granting summary judgment, this Court reviews the motion de novo under the same standard applied by the trial court. Provost v. Fletcher Allen Health Care, Inc., 2005 VT 115, ¶ 10, 179 Vt. 545 (mem.). Summary judgment will be granted when there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law. V.R.C.P. 56(a). "Where a genuine issue of material fact exists, summary judgment may not serve as a substitute for a determination on the merits." Provost, 2005 VT 115, ¶ 10. We construe facts in the light most favorable to the nonmoving party but "the nonmovant bears the burden of submitting credible documentary evidence or affidavits sufficient to rebut the evidence of the moving party." Ziniti v. New England Cent. R.R., Inc., 2019 VT 9, ¶ 14, 209 Vt. 433 (quotation omitted). In a negligence action, the plaintiff has the burden of proving a legal duty owed by defendant to plaintiff, breach of the duty, an actual injury, and "a causal link between the breach and the injury." Id. ¶ 15 (quotation omitted).

[3] Plaintiff filed a response to defendant's statement of undisputed facts as well as a separate statement of undisputed facts. Before the trial court, defendant moved to strike plaintiff's statement of undisputed material facts on the ground that Vermont Rule of Civil Procedure 56 does not permit the nonmoving party to file its own statement of undisputed facts. The trial court denied the motion. On appeal, defendant argues that this ruling was in error. We do not reach the argument because we conclude that even considering plaintiff's statement, summary judgment in favor of defendant was properly granted.

We first address plaintiff's argument that his own testimony regarding the location and amount of his pain after the incident is sufficient to support a prima facie case and survive summary judgment. In support, plaintiff cites Merrill v. University of Vermont, 133 Vt. 101 (1974), a worker's compensation case in which there was agreement as to the mode of injury and the resulting harm and the employer sought to show that claimant was no longer suffering from those injuries. This Court stated where "injury and resultant disability are unquestioned," the employer had the burden of proof to show that the disability had ceased, and the finding of permanent disability might be proven by the claimant's testimony alone. Id. at 105. We emphasized that the case did not "deal with an abstruse or obscure condition requiring expert medical opinion." Id. at 106.

This case is distinguishable from Merrill. In this negligence case, the parties did not agree on the cause or extent of plaintiff's injuries. Moreover, plaintiff bore the burden of proving that defendant's actions caused plaintiff's injuries and the extent of the injuries.

In addition, in this case, the cause and extent of plaintiff's injuries were not simple matters that could be shown through plaintiff's testimony alone. Although plaintiff could testify to the fact that he was in pain (or even increased pain) following the incident, he was not qualified to identify the medical injury that he incurred or the medical cause of that pain. Expert testimony was needed to establish whether plaintiff's pain was caused by the incident, the scope of the injury, and whether plaintiff's preexisting conditions contributed to plaintiff's injury. "When the facts to be proved are such that any layman of average intelligence would know from his own knowledge and experience that the accident was the cause of the injury, no expert testimony is needed to establish the causal connection; however, where the causal connection is obscure, expert testimony is required." Egbert v. Book Press, 144 Vt. 367, 369, 477 A.2d 968, 969 (1984) (per curiam); see Taylor v. Fletcher Allen Health Care, 2012 VT 86, ¶ 12, 192 Vt. 418 (noting that expert testimony was required to show medical causation because "[p]roving proximate causation in medical negligence cases is notoriously difficult"). Given the lack of contact between the truck and plaintiff's leg or hip and plaintiff's prior injuries to his hip, causation was not straightforward enough to be proven without expert testimony. Sweet v. St. Pierre, 2018 VT 122, ¶ 26, 209 Vt. 1 (noting that "expert testimony is ordinarily required to prove medical causation"). Therefore, summary judgment was appropriate since plaintiff was unable to provide an expert.

Plaintiff also argues that the court erred in granting summary judgment to defendant because there were disputes of material fact and the trial court improperly made assessments of weight and credibility. Among other things, plaintiff alleges that the court credited defendant's description of plaintiff's prior medical history and improperly credited defendant's suggestion that plaintiff's pain after the incident was caused by the fact that the effects of plaintiff's most-recent cortisone shot had worn off.

We conclude that there was no error. The material facts were not disputed by the parties. Plaintiff did not dispute that the truck did not come into contact with his leg or hip, that he had previously injured his right hip in 2012, that he received medical treatment for the pain in his right hip, including cortisone shots, both before and after the incident, and that although

alleviated by the cortisone shots, he continued to have some pain in his hip prior to the incident.[4] Given these undisputed facts, without expert testimony, plaintiff could not establish a prima facie case.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

[4] For purposes of this appeal, we accept plaintiff's statement that the cortisone shots helped with plaintiff's pain and that the pain "was almost gone" at the time of the incident.