STATE OF MICHIGAN

COURT OF APPEALS

SANDRA MCCARTHY, Plaintiff-Appellant,	UNPUBLISHED August 11, 2016
v	No. 326715 St. Clair Circuit Court
DEBORAH LIPPS-CARBONE, Defendant-Appellee.	LC No. 2014-000131-NI

Before: RIORDAN, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

In this negligence action for the recovery of damages resulting from an automobile accident, plaintiff appeals the trial court's order that granted summary disposition in favor of defendant. The trial court granted defendant's motion for summary disposition because it determined that there was no question of fact that plaintiff's injuries were not caused by defendant's negligence. For the reasons provided below, we affirm.

This case arises from a 2013 automobile accident when defendant rear-ended plaintiff while plaintiff sat in a line of traffic at a stop sign. Plaintiff filed a complaint against defendant in which she alleged that the accident exacerbated and aggravated her preexisting physical and psychological injuries sustained in a prior 2003 automobile accident. Defendant moved for summary disposition on the basis that plaintiff had not established that defendant's negligence caused her injuries and, had she established causation, plaintiff did not show that she suffered a serious impairment of body function under MCL 500.3135 of Michigan's no-fault act. After a hearing on defendant's motion for summary disposition, the trial court ruled that plaintiff failed to present any evidence that she sustained any physical injuries as a result of the 2013 accident and granted defendant's motion.

Plaintiff contends that the trial court erred when it granted defendant's motion for summary disposition because a genuine issue of material fact existed with respect to proximate cause. We disagree.

We review a trial court's grant or denial of a summary disposition motion de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Although defendant sought summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), the trial court did not expressly identify the legal grounds on which it found summary disposition appropriate. However, because it is clear that the trial court considered evidence beyond the pleadings, we

review the decision under the standard of MCR 2.116(C)(10). See *Besic v Citizens Ins Co of Midwest*, 290 Mich App 19, 23; 800 NW2d 93 (2010).

A motion under MCR 2.116(C)(10) tests the factual support for a claim, *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004), and should only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing a motion under this subrule, "this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621.

"To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). At issue in this case is the causation element. Causation includes two separate elements: "(1) cause in fact and (2) legal or proximate cause." *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009). "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injuries would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). And "legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Id*.

Plaintiff bears the burden of setting forth specific facts that defendant caused plaintiff's injuries—mere speculation is insufficient to support a finding of causation. *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004); *Skinner*, 445 Mich at 173. Here, plaintiff failed to present specific factual evidence that establishes "but for" defendant's actions, plaintiff would not have been injured. It is undisputed that plaintiff suffered from preexisting physical and psychological conditions stemming from a 2003 automobile accident. Specifically, these conditions included neck, back, and psychiatric problems. A review of plaintiff's medical records—prior to the June 2, 2013, accident with defendant—reveals that following her 2003 accident, on November 25, 2003, plaintiff was diagnosed with degenerative disc disease at "L4-5 and L5-S1 levels," and on September 17, 2009, plaintiff was diagnosed with a "mild disc disease at C5/6 and C6/7." On March 21, 2012, plaintiff's treating spine surgeon, Dr. Andres Munk, noted that plaintiff had a C5-6 small disc protrusion in her neck and chronic discogenic changes at L4-5 and L5-S1. Further Dr. Munk noted that steroid treatment "did not help much," and he prescribed a back brace for plaintiff.

On April 25, 2012, Dr. Munk noted that plaintiff's updated x-rays showed a collapse between C5-6 and C6-7, but otherwise she was "pretty much asymptomatic." Dr. Munk also noted that plaintiff's MRI of her lumbar spine showed "discogenic changes between L4-5 and L5-S1." A couple months before the accident with defendant, on April 3, 2013, Dr. Munk noted that plaintiff was experiencing acute flare-up of her symptoms. Plaintiff complained that she was experiencing pain in her back because she had to do a lot of bending and twisting at work. Dr. Munk's impression was "L4-L5 and L5-S1 changes, Grade I spondylolisthesis, L5-S1, and Sacroiliitis."

Three days after the accident, on June 5, 2013, plaintiff visited Dr. Munk once again. This time, Dr. Munk took x-rays of plaintiff's neck, prescribed a steroid pack, and ordered an MRI. Dr. Munk noted that there were "no acute changes" in plaintiff's neck and that, although there was narrowing between C5-6 and C6-7, there were no obvious changes when compared to her previous x-rays. Dr. Munk's impression was "[c]ervical strain with some exacerbation of discogenic of both the cervical and lumbar spine." On June 14, 2013, plaintiff saw Dr. Munk to go over the results of her June 7 MRI. Again, Dr. Munk noted that when he compared her results to her prior MRI, he did not see any significant changes.

In reviewing plaintiff's medical history before and after accident, it appears that plaintiff suffered from the same symptoms as she did before the accident. It is true that "[r]egardless of the preexisting condition, recovery is allowed *if the trauma caused by the accident triggered symptoms from that condition*." *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000) (emphasis added). However, plaintiff suffered from disc changes in her cervical and lumbar spine before the accident occurred, and the severity of plaintiff's pain symptoms changed visit to visit. There is no evidence that the pain plaintiff experienced after the accident was actually caused by defendant's actions. And there is no evidence that any of plaintiff's treating physicians concluded that her problems were caused by the June 2, 2013, accident. Indeed, plaintiff failed to introduce any affidavits from her treating physicians that stated that, in their professional opinion, the accident exacerbated or aggravated her existing symptoms. Instead, Dr. Stanley Lee, an independent medical examiner, concluded that any treatment plaintiff received above and beyond a soft tissue strain could not be related to or caused by defendant's actions in the June 2 accident. Importantly, plaintiff failed to introduce any supporting evidence indicating that her treating physicians disagreed with Dr. Lee's conclusion. Thus, we hold that plaintiff failed to present sufficient evidence that defendant's actions were a cause in fact of her injuries. Additionally, because plaintiff did not establish that defendant was the cause in fact of her injuries, she also cannot demonstrate how defendant's actions were the proximate or legal cause of those injuries. *See Craig*, 471 Mich at 87 ("[This Court] must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that defendant's negligence was the proximate or legal cause of those injuries.").

We note that plaintiff's reliance on *Wilkinson* is misplaced. The issue in *Wilkinson* was whether the evidence sufficiently established that the accident was the proximate cause of the plaintiff's injuries. *Wilkinson*, 463 Mich at 389. The plaintiff in *Wilkinson* was involved in a rear-end collision that caused him to be thrown forward and then backward with enough force to break the seat. *Id*. The plaintiff was initially diagnosed with a neck strain after the accident and missed two days of work. *Id*. at 389-390. The plaintiff's symptoms worsened following the accident and included nausea, severe headaches, dizziness, double vision, and accelerating memory loss. *Id*. at 390. Later, the plaintiff was diagnosed with a brain tumor. *Id.* The *Wilkinson* Court found that the medical evidence clearly permitted the jury to find causation because two witnesses, a surgeon who removed the tumor and the defense medical expert, testified that the trauma to the plaintiff's head from the accident could have precipitated or accelerated the plaintiff's symptoms. *Id*. at 395-396. *Wilkinson* is distinguishable from this case. Unlike the plaintiff in *Wilkinson*, plaintiff herein was never diagnosed with a new injury, and plaintiff never presented *any* medical evidence establishing that her physicians opined that the June 2, 2013, accident caused or aggravated her preexisting injuries.

In sum, plaintiff failed to establish a genuine issue of material fact as to whether defendant's conduct caused her injuries. As a result, the trial court properly granted defendant's motion for summary disposition.[1]

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Henry William Saad

[1] Defendant also alternatively argues that we should affirm the grant of summary disposition based on her contention that plaintiff's suit nonetheless is barred because plaintiff failed to present evidence that she met the requirement under the no-fault act that she suffered a "serious impairment of body function." See MCL 500.3135(1) ("A person remains subject to tort liability for noneconomic loss . . . *only* if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.") (emphasis added). Of course, if defendant's conduct was not the cause in fact of plaintiff's injuries, *a fortiori*, the accident did not cause plaintiff to suffer a "serious impairment of body function."

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M. J. KELLY, J. (*dissenting*).

After having examined the briefs and evidentiary support submitted by the parties, I conclude that the trial court erred when it granted the motion for summary disposition by defendant, Deborah Lipps-Carbone. For that reason, I respectfully dissent.

The trial court considered the evidence submitted by the parties and ultimately dismissed the claims by plaintiff, Sandra McCarthy, under MCR 2.116(C)(10). This Court's review of a decision on a motion for summary disposition is de novo. *Barnard Mfg Co, Inc v Gates Performance Eng, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). The fact that our review is de novo, however, does not give this Court authority to expand the record by considering evidence that was not properly before the trial court. *Id.* at 380-381. Rather, this Court must review the motion for summary disposition in the same way that the trial court was obligated to review it. *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 440; 814 NW2d 670 (2012).

The trial court must first determine whether the moving party properly asserted a ground for relief by specifically identifying "the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The level of specificity is that which would place the nonmoving party on notice of the need to respond. *Barnard Mfg*, 285 Mich App at 369, citing *Quinto v Cross & Peters Co*, 451 Mich 358, 370; 547 NW2d 314 (1996). If the moving party fails to identify its ground for relief with the requisite specificity, the nonmoving party cannot be faulted for failing to respond, and the trial court should deny the motion. *Lowrey v LMPS & LMPJ, Inc*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 323049); slip op at 3.

If the trial court determines that the moving party adequately asserted his or her motion under MCR 2.116(C)(10), it must next examine whether the moving party supported its motion with evidence, as required by MCR 2.116(G)(3). When the moving party fails to properly support its motion with evidence establishing that there was no genuine issue of fact, the burden of production does not shift to the nonmoving party and the trial court must deny the motion. *Grandberry-Lovette v Garascia*, 303 Mich App 566, 581; 844 NW2d 178 (2014). If the trial court determines that the moving party adequately asserted and supported his or her motion, it must then examine all the evidence properly cited by the parties and determine whether the evidence establishes a question of fact for the fact-finder. In doing so, the trial court is not permitted to assess the weight or credibility of the evidence; it must, instead, view the evidence in the light most favorable to the nonmoving party. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court should only grant a motion under MCR 2.116(C)(10) when the evidence properly before the trial court—even when viewed in the light most favorable to the nonmoving party—shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

In this case, Lipps-Carbone moved for summary disposition, in relevant part, on the ground that the undisputed evidence demonstrated that the automobile accident did not cause McCarthy any injuries. Lipps-Carbone identified the issues as to which she believed that there was no material fact with the requisite specificity; however, she did not adequately support her motion on this ground.

Lipps-Carbone relied on medical reports made by McCarthy's treating physicians, which established that McCarthy had significant preexisting problems with her neck and back. Further, while there was evidence that the images taken of McCarthy's neck and back immediately after the accident did not show any significant changes to the structures in her neck and back, the reports concerning these images standing alone did not establish that the accident did not cause any injury. In order to establish this point, Lipps-Carbone would have had to present testimony that any injury to McCarthy's neck or back that might have been caused by the accident would have shown up on the images. But she did not present any admissible evidence to establish this point. She did rely on a report by a so-called "independent medical examiner," but that report was not plausibly admissible, see *Barnard Mfg*, 285 Mich App at 373-374, because it amounted to hearsay within hearsay that was not subject to an exception. 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).

Although she did not clearly raise this issue in her motion for summary disposition, one might argue that Lipps-Carbone did not have to present evidence to negate the proposition that the accident caused an aggravation to McCarthy's back and neck conditions because she could properly support her motion by asserting that McCarthy would be unable to prove causation at trial. Our Supreme Court has stated that the moving party may meet its burden of production on a motion for summary disposition under MCR 2.116(C)(10) by demonstrating to the trial court that the nonmoving party's evidence is insufficient to establish an essential element of his or her claim. See *Quinto*, 451 Mich at 362, quoting Justice Brennan's dissent in *Celotex v Catrett*, 477

US 317, 331; 106 S Ct 2548; 91 L Ed 2d 265 (1986).[1] However, as this Court has recognized, the moving party cannot support a motion on this ground by asserting his or her mere *belief* that the nonmoving party will be unable to prove an element at trial. *Granberry-Lovette*, 303 Mich App at 581 n 3; see also *Celotex*, 477 US at 332 (BRENNAN, J., *dissenting*) (stating that a conclusory assertion that the nonmoving party has no evidence is insufficient to meet the burden of production because such a burden "is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment"). Instead, the moving party must *demonstrate* that the nonmoving party does not have evidence to support the claim by examining all the evidence that is available to the nonmoving party and showing that the evidence does not establish an essential element of the nonmoving party's claim:

> [A]s the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of the documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party. [*Celotex*, 477 US at 332 (BRENNAN, J., *dissenting*).]

Lipps-Carbone did not depose or otherwise address the potential testimony by the numerous medical professionals listed on McCarthy's witness list; thus, she did not properly support her motion on causation in this alternate manner. *Id.* at 332-333.

Because Lipps-Carbone did not properly support her motion for summary disposition on the ground that there was no evidence that the accident caused McCarthy to suffer an injury, the trial court erred when it granted Lipps-Carbone's motion on that basis. *Barnard Mfg*, 285 Mich App at 370. Even setting aside the deficiencies in Lipps-Carbone's motion, after reviewing the record evidence I conclude that McCarthy presented and identified evidence that, when viewed in the light most favorable to her, established a question of fact on the issue of causation.

McCarthy cited numerous medical reports—which were plausibly admissible—to establish causation. In a report dated June 5, 2013, which was days after the accident at issue, McCarthy's treating physician, Andres Munk, M.D., noted that McCarthy had been a restrained driver in a rear-end automobile collision. He wrote that there were no acute changes shown on an x-ray, but that older MRI studies showed that she had some problems with her neck and lumbar spine; he then opined that McCarthy had suffered some exacerbation of these preexisting conditions: "IMPRESSION: Cervical strain with some exacerbation of discogenic of both cervical and lumbar spine." In a report dated July 18, 2013, another physician at Munk's

[1] Our Supreme Court opined that Justice Brennan's recitation of the burden of production for summary disposition was "harmonized" with the majority's recitation of the law. See *Quinto*, 451 Mich at 361 n 3.

practice, Giuseppe Paese, D.O., assessed McCarthy with cervical radiculopathy and discogenic syndrome, cervical. And in a report dated October 25, 2013, Munk stated that he reviewed x-rays and observed "discogenic changes and disc herniations" and stated that it was his impression that McCarthy had cervical radiculopathy and cervical discogenic type pain. He then stated that she should consider surgical intervention to help with the neck pain. Considering these reports together and in the light most favorable to McCarthy, a reasonable fact-finder could find that the accident exacerbated McCarthy's preexisting conditions, which caused her increased pain, and either caused her to need surgery to correct the problems or hastened the need for surgical intervention. See *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000). There was also record evidence that the purported aggravation affected McCarthy's general ability to lead her normal life. See *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010). As such, Lipps-Carbone failed to establish any grounds for summary disposition.

I would reverse and remand for further proceedings.

/s/ Michael J. Kelly