STATE OF MICHIGAN

COURT OF APPEALS

LEE DAVIS and MARY ANN DAVIS,

Plaintiffs-Appellants,

and

MICHIGAN SPINE & BRAIN SURGEONS, LLC,

Intervening-Plaintiff/Cross-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant,

and

HOME OWNERS INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellee,

and

TESHONB DAMIAN FORE, and RENAISSANCE REAL ESTATE VENTURES,

Defendants-Appellees.

UNPUBLISHED
April 22, 2021

No. 353315
Oakland Circuit Court
LC No. 2019-171271-NI

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

Plaintiff Lee Davis was involved in a car accident. He brought a third-party no-fault action against defendants Teshonb Damian Fore and Renaissance Real Estate Ventures, and a first-party

claim against defendant Home-Owners Insurance Company. Michigan Spine & Brain Surgeons LLC (MSBS) intervened as a plaintiff in the first-party action. The circuit court granted summary disposition to defendants under MCR 2.116(C)(10), finding that Davis failed to present "reliable" evidence that the accident caused his injuries. Whether Davis's causation evidence was "reliable" under MRE 702 was neither raised nor briefed in the trial court, and the court provided no explanation for its determination. Despite that the causation ruling ended the case, the court also expressed its views regarding several evidentiary and legal questions which the parties have presented to us on appeal.

We affirm the trial court's ruling on the "mend-the-hold" doctrine. However, we reverse the court's causation ruling and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

While stopped at a light, Davis was rear-ended by a GMC truck driven by Fore and owned by Renaissance.[1] He was able to drive himself home, but soon developed pain and aching "everywhere." That same day his wife brought him to a hospital emergency room where Davis reported neck pain that radiated down his left arm. A subsequent MRI scan revealed disc space narrowing with "cord abutment" at C6-C7, and "severe left foraminal narrowing" at C7-T1.

Conservative treatment and physical therapy did not relieve Davis's pain. He consulted Dr. Teck Soo, a neurosurgeon employed by MSBS, a few months after the accident. Davis reported to Dr. Soo that he had no neck or arm symptoms before the accident and only minimal improvement after a course of physical therapy. Dr. Soo reviewed Davis's MRI and concluded that Davis had a "traumatic" disc herniation at C7-T1, requiring a cervical fusion and a laminectomy. Davis underwent surgery but unfortunately suffered a small stroke after the procedure. Davis continued to have pain and weakness in his left hand. Eventually, Dr. Paul Shapiro operatively decompressed Davis's left ulnar nerve.

Home-Owners denied Davis's claim for personal protection insurance (PIP) benefits. Davis then filed suit in the circuit court alleging breach of contract against Home-Owners and advancing a third-party negligence claim against Fore and Renaissance. MSBS intervened with a complaint against Home-Owners seeking reimbursement for Dr. Soo's services.

Home-Owners moved for summary disposition under MCR 2.116(C)(10), arguing that the evidence did not establish that Davis had sustained any injuries that were causally related to the accident. In support of its motion, Home-Owners presented an expert report explaining that the collision was a low-speed event so "minor [in] nature" that it could not have caused the disc herniation or the ulnar nerve entrapment. Additionally, Home-Owners proffered a medical evaluation report authored by Dr. Donald Garver, an orthopedic surgeon, who examined Davis at Home-Owners' request. Dr. Garver opined that Davis's neck and hand problems were of long-standing duration and had not been caused by the accident. He reached this conclusion despite

[1] We recite the facts in the light most favorable to Davis, acknowledging that Fore and Renaissance deny any fault for the accident and have presented expert opinion testimony that the accident did not cause Davis's injuries.

that Davis never before reported problems with his neck or hand, and had not previously received treatment for neck, back, or hand complaints. Notably, defendants Fore and Renaissance did not join in Home-Owners' summary disposition motion.

In response to Home-Owners' motion, Davis and MSBS filed an affidavit signed by Dr. Soo averring that the neck surgery he performed was "directly related to Mr. Davis's automobile accident." Davis "had no symptoms of any pain prior to the motor vehicle collision," Dr. Soo explained, and on examination "exhibited classic neurological symptoms of radiculopathy into his left arm and hand, which means that he was suffering pain caused by an entrapped nerve in the cervical region." An MRI confirmed the entrapment and showed spinal stenosis at two levels. The stenosis, however, "did not correlate with the symptoms suffered by this patient." In Dr. Soo's estimation, Davis had sustained "what is generally referred to as a 'double-crush' injury, which refers to a cervical impingement that presents radiculopathy lower in the arm, such as the elbow." Dr. Soo also took aim at Dr. Garver's report, stating:

> 12. I have reviewed the IME report of Dr. Garver. This report reaches incorrect conclusions as to the surgery performed and the source of the pain and radiculopathy suffered by this patient and focuses incorrectly on the ulnar nerve; the fact is that Mr. Davis suffered a traumatic spondylopathy of the injury at C7-Tl.
>
> 13. While Dr. Garver notes that "it is difficult to tell whether the source of the injury is the ulnar (elbow) nerve or cervical impingement, he incorrectly concludes it is the ulnar nerve; cervical radiculopathy causes pain in the extremities; while damage to the ulnar nerve alone generally does not cause pain. The elbow as the source of injury cannot be correlated with these medical facts.

In opposition to summary disposition, Davis additionally submitted a letter "verified and attested to" by Dr. Shapiro, asserting that Davis's "cubital tunnel syndrome . . . was a direct result of the motor vehicle accident . . . ." The report continued:

> He had no prior history of issues involving this upper extremity, and his symptoms began shortly after the accident occurred. It is common for [c]ubital [t]unnel to occur after an accident such as this from either a direct blow at the time of the accident or from swelling and resultant scare tissue that can compress the ulnar nerve.

Additionally, Davis filed a report written by an engineer, Brian R. Smith, Ph.D., who concluded that Davis's symptoms were consistent with a "whiplash event" caused by the accident. The trial court struck Smith's report from the record because Davis had not timely named Smith as an expert. Davis submitted an affidavit signed by Sammie Hall, a traffic accident reconstruction expert,[2] stating in pertinent part:

[2] The trial court ruled that Hall's affidavit could be considered only to the extent that his opinions were not based on the report of Smith.

> 19. It is my opinion that Mr. Davis was stopped in the southbound lane of [N]ine [M]ile [R]oad and Teshonb Fore's foot slipped off the break onto the gas, and as a reaction to the acceleration Mr. Fore attempted to avoid contact and veered to the left to avoid contact striking the rear left of Mr. Davis['s] vehicle.
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> 20. It is my opinion that based upon the report of [Smith], the location of the damage to Lee Davis['s] vehicle, and the opinions of Dr. Soo and Dr. Shapiro, an offset collision would increase shear, flexion and extension of the cervical spine putting more load on one facet joint versus the other increasing the probability of injury.

Hall further opined "that the impact caused the injuries reported by Dr. Soo and Dr. Shapiro."

MSBS filed a separate response in opposition to summary disposition contending that Dr. Garver did not meet the statutory criteria to qualify as an independent medical expert under the no-fault act because he is not credentialed "in minimally invasive spine surgery technique" or neurosurgery, as is Dr. Soo. MSBS also claimed that Dr. Garver's opinion was not supported by Davis's medical records and was therefore inadmissible under MRE 702. MSBS pointed out that Dr. Soo's affidavit provided factual support for Davis's claim, established that Davis did not have a history of a preexisting injury, and linked the need for the surgeries to the accident. And, MSBS added, the mend-the-hold doctrine prevented Home-Owners from challenging causation because Home-Owners did not mention causation in its correspondence denying Davis's claim.

The trial court issued a written opinion and order granting Home-Owners' motion for summary disposition on causation grounds. In a confusing passage introducing its ruling, the trial court seemed to struggle with the difference between proving causation in a first-party no-fault case and proving causation in a negligence claim:

> MSBS argues that the degree of causation required was established in *Thornton v Allstate*, 425 Mich 643[; 391 NW2d 320 (1986),] and *McPherson v McPherson*, 493 Mich 294[; 831 NW2d 219] (2013). However, those cases address MCL 500.3105(1) and that statute is not disputed here. If Plaintiff's injuries were caused by the motor vehicle accident, they would "arise out of" the motor vehicle accident pursuant [to] MCL 500.3105(1). The causal connection required by *McPherson* exists, but Home-Owners is arguing that the causation requirement in a negligence claim (although negligence has not been pled against Home-Owners) has not been met. Therefore, Home-Owners argues that it is not liable because without causation, the Plaintiffs and MSBS cannot show that the expenses were reasonably necessary.[3]

The court then pivoted to an entirely different question: whether Davis's evidence of causation satisfied MRE 702, despite that Home-Owners had not made an argument rooted in

[3] MCL 500.3105(1) provides: "Under [PIP] 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."

MRE 702 in any of its summary disposition filings. On its own initiative, the court hinged its decision to grant summary disposition on a finding that the opinions of Drs. Soo and Shapiro were unreliable under MRE 702, reasoning as follows:

> The Court has considered the legal arguments of the parties and all of the documentary evidence in the light most favorable to MSBS and the Plaintiffs. The Court concludes that the Plaintiffs and MSBS have failed to meet their burden to show that the motor vehicle accident was the cause in fact of Plaintiff's alleged injuries. The affidavits of Dr. Soo and Sammie Hall are insufficient to show causation. Their opinions that the motor vehicle accident caused Plaintiff's alleged injuries are unreliable. Because the Plaintiff and MSBS cannot show that the motor vehicle accident caused his alleged injuries, they cannot show that the services provided were reasonably necessary. Therefore, the Plaintiffs and MSBS cannot show that Home-Owners breached its contract to provide PIP benefits.

Apparently based on that conclusion (and despite that none of the parties had raised a question regarding causation in the negligence case), the trial court also dismissed Davis's negligence claims. And although it dismissed Davis's claims in their entirety, the trial court nevertheless addressed MSBS's claim that Dr. Garver was unqualified to testify at trial, stating "some of Dr. Garver's testimony may be excluded but he is qualified under MCL 500.3151 to treat some of plaintiff's alleged conditions." The court also rejected MSBS's mend-the-hold argument.

Davis now appeals as of right, and MSBS cross-appeals the trial court's order.

II. SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Summary disposition on causation grounds was improper for two reasons. First, no evidence supported that the opinions of Drs. Soo and Shapiro were unreliable or inadmissible under MRE 702, and the trial court failed to offer any reasoning in support of its ruling. Second, the trial court erred by granting summary disposition based on a legal theory that had not been raised or briefed by any of the parties. Before deciding the case on "reliability" grounds, basic due process principles compelled the court to afford Davis and MSBS notice and an opportunity to be heard regarding this issue. See *Al-Maliki v LaGrant*, 286 Mich App 483; 781 NW2d 853 (2009).

We review de novo a trial court's ruling on a motion for summary disposition. *TCF Nat'l Bank v Dep't of Treasury*, 330 Mich App 596, 604; 950 NW2d 469 (2019). When considering a motion brought under MCR 2.116(C)(10), we review the evidence in the light most favorable to the party opposing the motion. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). We emphasize another rule that is particularly apt here. MCR 2.116(G)(5) mandates that a court consider "affidavits" filed with any additional documentary evidence when considering a motion filed under subsection (C)(10).

A. EVIDENCE OF CAUSATION, VIEWED IN THE LIGHT MOST FAVORABLE TO THE NONMOVANT

The evidence submitted by Davis and MSBS established the existence of genuine issues of material fact regarding whether Davis's injuries were causally related to the motor vehicle

accident, rendering summary disposition under MCR 2.116(C)(10) improper. The physicians' affidavits, standing alone, satisfied the "arising under" causation requirement contained in MCL 500.3105(1).

In *McPherson*, 493 Mich at 297, our Supreme Court described the contours of causation in a first-party no-fault case as follows:

> An insurer is liable to pay benefits for accidental bodily injury only if those injuries "arise 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. [Quoting *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005) (cleaned up).]

To meet the requirements of MCL 500.3105(1), the causal link between the alleged injuries and the use of the motor vehicle must be more than coincidental, fortuitous, or "but for," the Court explained. *McPherson*, 493 Mich at 297. Although *McPherson* did not affirmatively define the term "arising out of," the phrase certainly embraces injuries qualifying as the direct consequences of an accident.[4]

The affidavits of Davis's physicians easily satisfy the *McPherson* standard. Both physicians unequivocally averred that Davis sustained injuries as a result of the auto accident and that the accident-related injuries necessitated his surgeries. Both attested that Davis had no pain or other symptoms before the accident. Dr. Shapiro could not have been more straightforward—"It is my opinion that the cubital tunnel syndrome . . . this patient developed was a direct result of the motor vehicle accident . . . ." And Dr. Soo explained in detail that the evidence of chronic degeneration in Davis's spine "did not correlate with the symptoms suffered by this patient"; rather, Dr. Soo explained, the evidence supported that Davis had sustained a "flexion-extension injury" during the accident which "was more likely than not the cause of the herniation at C7-T1." Combined with the fact that the surgery alleviated Davis's postaccident pain, Dr. Soo attested that the surgery he performed was "directly related" to the accident. This evidence met the "arising under" standard set forth in MCL 500.3105(1).

Turning to Davis's negligence claim, the trial court did not address causation in a way we can readily comprehend. The court made no findings regarding the causation standards applicable

[4] A leading treatise states: "Courts have split on where 'arising out of' falls on the causation scheme with some courts finding it equivalent to 'but for' causation and others finding it somewhere between 'but for' causation and proximate causation." 7 Couch, Insurance § 101:52 (citations omitted). Our Supreme Court has rejected a standard equivalent to "but for," explaining in *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986), that "the first consideration under MCL 500.3105(1), must be the relationship between the injury and the vehicular use of a motor vehicle. Without a relation that is more than 'but for,' incidental, or fortuitous, there can be no recovery of PIP benefits." Here, the evidence Davis submitted in response to Home-Owners' motion for summary disposition supports that Davis's injuries are directly related to the use of a motor vehicle as a motor vehicle.

in a negligence action and Fore and Renaissance did not even file a summary disposition motion, yet its order dismissed Davis's case in its entirety. And the record supplies no basis whatsoever for concluding that Davis failed to establish a genuine issue of material fact concerning cause in fact or proximate cause in a negligence context.

In a negligence action, the issue of causation is generally reserved for the factfinder unless there is no dispute of material fact. *Patrick v Turkelson*, 322 Mich App 595, 616; 913 NW2d 369 (2018).

> Establishing cause in fact requires the plaintiff to present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. Although causation cannot be established by mere speculation, *a plaintiff's evidence of causation is sufficient at the summary disposition stage to create a question of fact for the jury if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support.* [*Id*. at 617 (quotation marks and citations omitted, emphasis added).]

So too with proximate cause. "Proximate causation is a required element of a negligence claim" and "is typically reserved for the trier of fact unless there is no dispute of material fact." *Id*. at 616.

Davis testified that he began to experience pain soon after he was rear-ended by Fore. The physicians' affidavits set forth substantial evidence that the accident caused nerve entrapment necessitating surgery. The medical records demonstrate that Davis's symptoms emerged only after his accident. And even if a negligence victim has a "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).

Home-Owners insists that the reports of Dr. Garver and its retained accident reconstruction expert refute that Davis's injuries were caused by the accident. This argument ignores that when entertaining a summary disposition motion under subrule (C)(10), we must view the evidence in the light most favoring the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). Assuming that a contested issue has been identified and supported with proof, a court must focus on the *nonmovant's* evidence and discount conflicting evidence. In *Reeves v Sanderson Plumbing Prods, Inc*, 530 US 133, 151; 120 S Ct 2097; 147 L Ed 2d 105 (2000), the United States Supreme Court described as follows the process a federal court employs when ruling on a motion for summary judgment focused on alleged absence of relevant factual issues:[5]

[5] Although the United States Supreme Court's discussion occurred in the context of a motion for summary judgment under FR Civ P 56, the same logic applies to a court's review of a motion for summary disposition under MCR 2.116(C)(10).

> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. [Quotation marks and citations omitted.]

Michigan's summary disposition jurisprudence is similar. "A court reviewing . . . a motion [under MCR 2.116(C)(10)] . . . must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Viewed in the light most favorable to Davis and MSBS, the evidence established genuine issues of material fact regarding how the accident occurred and whether Davis's injuries resulted from his operation or use of a motor vehicle, MCL 500.3105(1), that was more than simply fortuitous, coincidental, or "but for." *McPherson*, 493 Mich at 297. Likewise, the evidence established genuine issues of material fact regarding whether Fore's conduct was the cause in fact of Davis's injuries and the treatment provided by Drs. Soo and Shapiro, and whether it was foreseeable that Fore's conduct would have harmed plaintiff. See *Ray v Swager*, 501 Mich 52, 65; 903 NW2d 366 (2017).[6]

B. DUE PROCESS

The court rules require that the party moving for summary disposition "specifically identify the issues" about which it believes no genuine issue of material fact exits. MCR 2.116(G)(4). Before granting summary disposition based on MRE 702's reliability standards, the court was obligated to provide Davis and MSBS an opportunity to submit evidence and argument on that subject.

In *Al-Maliki*, 286 Mich App at 486, we highlighted that due process principles compel courts to warn a party in advance when an otherwise unraised issue is on the table for decision. In that case we noted that the record "clearly reveal[ed] that plaintiff had no notice that the causation issue would be raised at the summary disposition motion hearing and rightly should have been surprised by the trial court's inquiry at the motion hearing regarding causation." *Id*. at 487. We concluded that "the basic requirements of notice and a meaningful opportunity to be heard" were unsatisfied and reversed the grant of summary disposition. *Id*. at 488.

This case is analogous. In *Al-Maliki* as here, the plaintiffs had no notice that the court contemplated summary disposition on "reliability" grounds. Unlike in *Al-Maliki*, the trial court in

[6] When moving for summary disposition under MCR 2.116(C)(10), Home-Owners was required to identify "the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). Home-Owners did not raise the issue whether Davis's surgeries were reasonably necessary under MCL 500.3107(1)(a), apart from whether the injuries treated were causally related to the motor vehicle accident. Plaintiffs had no obligation to respond to that issue, and we do not address it.

this case did not permit oral argument on the summary disposition motion and therefore did not express its concerns regarding whether plaintiff's evidence was admissible under MRE 702. But that distinction does not alter the due process principle that the trial court was required to permit the nonmoving parties to weigh in on "reliability" before granting summary disposition on that ground.

III. SUMMARY DISPOSITION UNDER MRE 702

Our review of the record reveals no evidence that the opinions of Drs. Soo and Shapiro, or that of accident reconstructionist Hall, were unreliable under MRE 702. We recognize, however, that this is a determination that must be made in the first instance by the trial court.

MRE 702, which governs the admission of expert testimony, provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 incorporates the standards of reliability set forth in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). Similarly, MCL 600.2955 provides:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert

community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in [MCL 600.2169].

Our Supreme Court has instructed that trial courts must act as as "gatekeepers" under MRE 702 and MCL 600.2169 to ensure that proposed expert testimony is reliable. *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1068; 729 NW2d 221 (2007).

The trial court offered no explanation for its sua sponte determination that plaintiffs' causation evidence was unreliable under either MRE 702 or MCL 600.2955. The trial court's ruling does not reflect any analysis of the application of the factors in MRE 702 or MCL 600.2955(1). We do not know whether the trial court found Drs. Soo and Shapiro unqualified, or instead utilized unreliable methods when reaching their opinions. Because the trial court's ruling does not indicate that it considered any aspect of MRE 702 or "the range of indices of reliability listed in MCL 600.2955," we have no basis for deciding that the trial court properly performed its gatekeeping role.

We assume without deciding that a trial court is not always required to hold a full-blown *Daubert* hearing before concluding that a party's proffered evidence is unreliable. Nevertheless, a court *is* required to make some reviewable assessment of the considerations and evidence it entertained in reaching a reliability conclusion. We find nothing in the record now before us supporting that the physicians or Hall were unqualified as experts, or that their opinions lacked a firm scientific foundation. But because only the trial court is empowered to act as a gatekeeper, we draw no final conclusions regarding the adequacy or inadequacy of plaintiffs' scientific evidence under MRE 702 and MCL 600.2955. Rather, we hold that the trial court's reliability ruling was premature and based on an inadequate record. See *Jahn v Equine Servs, PSC*, 233 F3d 382, 393 (CA 6, 2000).[7] Accordingly, we vacate the trial court's reliability ruling and remand for proceedings consistent with this opinion.

[7] The trial court did not address MSBS's contention that Dr. Garver's expert testimony was inadmissible under MRE 702. On remand and if requested to do so, the trial court shall consider the admissibility of Dr. Garver's proposed expert testimony under MRE 702 and MCL 600.2955.

IV. MISCELLANEOUS ISSUES

A. DR. GARVER'S QUALIFICATIONS AND REPORT

Citing MCL 500.3151(2), the trial court noted that Drs. Soo and Garver are board certified in different specialties, and therefore concluded that "some of Dr. Garver's testimony may be excluded." The court provided no further details. MSBS now argues that Dr. Garver was not qualified to perform an independent medical examination (IME) under MCL 500.3151.

MCL 500.3151(2), as amended by 2019 PA 22, took effect on June 11, 2019. As amended, that statute provides that a physician performing an IME must "specialize in the same specialty as the physician providing the care, and if the physician providing the care is board-certified in the specialty, the examining physician must be board-certified in that specialty." Davis commenced this action before the effective date of the amendment. This Court has held that cases commenced before the effective date of the 2019 no-fault amendments are "controlled by the former provisions of the no-fault act." *George v Allstate Ins Co*, 329 Mich App 448, 451 n 3; 942 NW2d 628 (2019). At the time this action was filed, MCL 500.3151 provided:

> When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians. A personal protection insurer may include reasonable provisions in a personal protection insurance policy for mental and physical examination of persons claiming personal protection insurance benefits.

Dr. Garver was not disqualified from performing an IME under this earlier version of MCL 500.3151. Thus, the trial court erred to the extent that it relied on the amended statute and held that some of Dr. Garver's testimony was required to be excluded under that statute.

MSBS additionally contends that Dr. Garver's report qualifies as inadmissible hearsay. MSBS did not preserve this issue in the trial court, and we find it meritless.

MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." We agree that Dr. Garver's IME report is hearsay and that the report itself does not qualify for admission under the hearsay exception for records of regularly conducted business activity, MRE 803(6), because it was prepared for the purpose of litigation. See *People v Huyser*, 221 Mich App 293, 297; 561 NW2d 481 (1997). However, documentary evidence offered in support of or opposition to summary disposition may be considered "to the extent that the content or substance would be admissible." MCR 2.116(G)(6). Dr. Garver's opinion would be substantively admissible to the extent that it meets the requirements of MRE 702 and MCL 600.2955(1). Accordingly, MSBS has not demonstrated any error with respect to its allegation that the trial court improperly considered Dr. Garver's IME report.

B. THE "MEND-THE-HOLD" DOCTRINE

MSBS next contends that the trial court erred by rejecting its "mend-the-hold" argument that Home-Owners should be estopped from contesting whether the motor vehicle accident caused plaintiff's injuries. This argument, too, lacks merit.

In *CE Tackels, Inc v Fantin*, 341 Mich 119, 124; 67 NW2d 71 (1954), quoting *Railway Co v McCarthy*, 96 US 258, 267-268; 24 L Ed 693 (1877), our Supreme Court explained the "mend-the-hold" doctrine as follows:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

See also *Bartlett Investments, Inc v Certain Underwriters at Lloyd's London*, 319 Mich App 54, 58; 899 NW2d 761 (2017).

In this case, as the trial court observed, MSBS did not submit any documentary support in support of its allegation that Home-Owners attempted to mend-the-hold and raise defenses that were not asserted when Davis's claim was first denied. MSBS could not simply rely on the allegations in its pleading, and a "mere pledge" to introduce evidence later was insufficient. MCR 2.116(G)(4). Therefore, the trial court did not err by rejecting this argument.

V. CONCLUSION

Evidence of record established genuine issues of material fact regarding causation with respect to Davis's first-party and third-party claims, and MSBS's first-party claim. The trial court erred by rejecting the proposed testimony of Dr. Soo and Hall as unreliable without properly applying MRE 702 and MCL 600.2955(1), and without affording the parties and opportunity to brief this issue. The court also erred by concluding that Dr. Garver was not qualified to perform an IME under MCL 500.3151.

MSBS has not demonstrated that Dr. Garver's IME report constituted inadmissible hearsay, or that the trial court erred by failing to apply the mend-the-hold doctrine. If the issue remains relevant, we remand for further consideration of the admissibility of the proposed expert testimony of Dr. Garver, Dr. Soo, and Hall under a proper application of MRE 702 and MCL 600.2955(1).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Brock A. Swartzle