STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM JAMES SEELEY, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED February 14, 2003
v	No. 238626 Grand Traverse City Circuit Court
CHRISTOPHER P. HOWARD, Defendant-Appellee/Cross-Appellant.	LC No. 00-020966-NI

Before: Neff, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff appeals of right the trial court's order granting summary disposition to defendant finding his ankle injury was not caused by the accident. Defendant cross-appeals the trial court's order granting summary disposition to plaintiff on the issues whether defendant negligently caused the accident and whether plaintiff's ankle injury amounted to serious impairment of a body function. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

Plaintiff filed a complaint alleging that, in February 1999, a motor vehicle accident occurred when defendant's motor vehicle collided head-on with plaintiff's motor vehicle. Plaintiff alleged that defendant negligently caused the accident and injured plaintiff. Plaintiff did not specifically enumerate any injuries in the complaint, but merely used boilerplate language.[1]

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant first argued that plaintiff's "fractured sternum and bruised right knee" did not meet the serious impairment standard required by MCL 500.3135. Discovery revealed that the sternum fracture was non-displaced and required no treatment. Plaintiff testified that it took six

[1] In a pretrial statement, plaintiff listed his injuries as "sternum, right knee, tongue, teeth, back, and ankle." In his brief on appeal, plaintiff states, "As a result of the accident, Plaintiff has sustained injuries including a fracture sternum, an injury to his foot and ankle that required subtalar fusion, and a fractured hip that required open reduction internal fixation surgery."

weeks to heal. Plaintiff's knee sustained a bruise that lasted a few weeks. Defendant also argued that plaintiff's ankle injury was not caused by the accident. Defendant based this argument on medical records that did not mention an ankle injury until several months after the accident. The records also indicated that plaintiff suffered from many other ailments, including hepatitis B, cirrhosis of the liver, other gastrointestinal disorders, and back problems. Defendant filed a supplement to his motion for summary disposition, based on the recent testimony of Norman J. Licht, M.D. arguing that Licht, who saw plaintiff one year and eight months after the accident, testified only that the ankle injury could or may have been caused by the accident.

Plaintiff also filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff first argued that there was no genuine issue of fact as to whether defendant's negligence caused the accident. Plaintiff argued that traffic citations issued to defendant created a rebuttable presumption of negligence. Plaintiff, preempting defendant's response of "sudden emergency," argued that the road conditions had been poor for some time and did not constitute a sudden emergency. Plaintiff also argued that his injury constituted a serious impairment of a bodily function. Plaintiff specifically argued that both an ankle injury and a hip injury were caused by the accident even though the ankle injury was not diagnosed until August 2000. Plaintiff argued that his November 2000 hip injury was related to the accident in that he fell while walking on crutches required by ankle surgery. Plaintiff also argued that Licht's testimony established that his ankle and hip injury substantially impaired his ability to lead a normal life.

Defendant responded to plaintiff's motion for summary disposition arguing that the sudden emergency doctrine should be applied because the weather was "horrible" at the time of the accident. Defendant also argued that plaintiff's preexisting injuries, which were many, prevented him from living a normal life and that the injuries resulting from the accident did not.

The trial court granted plaintiff's motion on the issue of defendant's negligence in causing the accident. The trial court also granted summary disposition to plaintiff finding plaintiff's ankle and hip injuries, but not the sternum and knee injury, met the serious impairment standard. The trial court granted defendant's motion on the issue of proximate cause finding there was no evidence that the ankle injury, and thus the hip injury, were caused by the accident. The sum total of the trial court's rulings amounted to dismissal of plaintiff's case.

II. Standard of Review

"We review the grant or denial of a motion for summary disposition de novo." *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must consider the affidavits, pleadings, depositions, admissions and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 302. "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

III. Causation

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because plaintiff presented sufficient evidence to establish a genuine issue as to whether the ankle injury resulted from the accident. We disagree.

Generally, proximate cause is a factual issue to be decided by the trier of fact. *Dep't of Transp v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). However, the trial court may dismiss a claim for lack of proximate cause when there is no issue of material fact. *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999).

"Liability for negligence does not attach unless the plaintiff establishes that the injury in question was proximately caused by the defendant's actions." *Id.* at 255. "Proving proximate cause actually entails proof of two separate elements: (1) cause in fact and (2) legal cause, also known as "proximate cause." *Id.*, citing *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct. *Skinner, supra* at 162-163. Proximate cause includes an evaluation of the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences. *Id.* at 163. While causation may be established by circumstantial evidence, such proof must be subject to reasonable inferences and must not be mere speculation. *Id.* at 163-164. "'The burden of establishing proximate cause . . . always rests with the complaining party, and no presumption of it is created by the mere fact of an accident.'" *Id.* at 164, quoting *Howe v Michigan C R Co*, 236 Mich 577, 583-584; 211 NW 111 (1926).

In this case, the EMS report and the police report, taken on the day of the accident, indicate that plaintiff did not complain of ankle pain. A physical examination at the hospital on the day of the accident also failed to reveal an ankle injury. In the following month, plaintiff presented three times to the hospital without complaints of ankle pain. An examination in April 1999, revealed cervical strain, fractured sternum, and right knee contusion. Similarly, plaintiff did not complain of ankle pain in several more visits to health care facilities between May and July of 1999. A Munson Medical Pain Center report dated July 15, 1999, indicates "recent onset of left ankle pain." However, an X-ray revealed no abnormality. Several doctor visits after this date also lack reference to ankle pain. In August 2000, plaintiff presented to Great Lakes Orthopedics Center complaining of left ankle pain. An X-ray revealed arthritis and sclerosis. Licht eventually diagnosed degenerative subtalar joint disease and subtalar arthroditis for which he performed surgery. Licht did not attribute the ankle injury to the accident. Bruce Abrams, M.D. who performed an independent medical examination, also did not relate the ankle injury to the accident. Additionally, plaintiff's claim for first-party benefits from his insurance company did not include a description of ankle pain or injury.

In support of his argument, plaintiff cites only to his own testimony and that of Licht. In an answer to defendant's interrogatory, plaintiff stated, "At the time of the accident, I slammed both feet into the floorboard of my automobile that, I believe aggravated my left ankle problem." This coincides with a portion of his deposition wherein he stated:

> I believe, when I was thrown forward, my feet hit the floorboard underneath and my left foot might have caught on the clutch before it hit. And I think it came down a little sideways hitting the ankle bone – you know, hitting the side of my foot on the floorboard – just slammed it into the floorboard.

However, in direct contradiction to the interrogatory answer, plaintiff testified that he did not have any ankle problems before the accident:

> *Q*. You didn't have any left ankle problems before this accident?

A. Not beforehand, no.

Q. Okay.

A. Unh-uhn (negative)

Q. So it's not your contention that this accident in any way contributed or caused a preexisting injury to become worse?

A. Nope; no.

Licht testified:

> My opinion is that, yes, a motor vehicle accident can cause this type of problem. . . . It is exceedingly rare and unusual for someone his age to have this type of problem. And if you use the retrospective scope and go back and try and find a cause, I think the most likely cause would be his motor vehicle accident unless you can find some other cause of that type of trauma, that type of velocity and that type of possible injury to the subtalar joint because it's rare.

We find this insufficient to create a genuine issue of material fact. "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner, supra* at 164. Here, Licht only testified that a motor vehicle accident "*can* cause *this type* of problem." This testimony does not specifically address plaintiff's injury, but more generally, the type of injury that plaintiff claims to have suffered. Licht also stated that the accident would be the most likely cause "unless you can find some other cause." "[A] basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id.* This portion of Licht's testimony merely indicates that this theory is just as possible as another. Plaintiff's own testimony provides no support for his theory because it, at once, indicates that a pre-existing injury was exacerbated by the accident and also indicates that no pre-existing injury existed. To the extent that plaintiff's testimony indicates the cause of his injury, it too amounts to speculation.

Even taken in the light most favorable to plaintiff, we find that plaintiff failed to create an issue of fact as to whether his ankle injury was caused by the accident. Therefore, the trial court did not err in granting summary disposition to defendant on this basis.[2]

[2] Because our resolution of this issue is dispositive of the case, we need not address the issues raised by defendant on cross-appeal.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly