STATE OF MICHIGAN

COURT OF APPEALS

AMELIA HOSEY, Plaintiff-Appellant,	UNPUBLISHED April 6, 2006
v	No. 257709 Oakland Circuit Court
CHANTAY STARGHILL BERRY, Defendant-Appellee.	LC No. 2003-050311-NI

Before: Owens, P.J., and Kelly and Hood, JJ.

PER CURIAM.

In this third-party automobile negligence case, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse and remand.

I. Facts

This case arises from an October 7, 2000, automobile accident in which defendant allegedly disregarded a stop sign and struck plaintiff's vehicle. Plaintiff alleged that, as a result of the accident, she suffered

> severe and serious cuts, bruises, abrasions and contusions in and about her body; that she sustained injuries to her neck, back, and spine as well as the muscles, cords, nerves, tendons and other fibers contained therein; that she sustained injuries to of [sic] her neck, back, and spine, with pain which radiates and/or protrudes into her extremities and other parties of her body; that she sustained an aggravation, precipitation, lighting and flaring up of underlying, quiescent and dormant conditions so as to precipitate total disability; that all of the injuries . . . are permanent and incurable in character and constitute severe and serious impairment of bodily functions and/or permanent, serious disfigurement as a matter of law.

Defendant filed a motion for summary disposition contending that plaintiff failed to demonstrate that she suffered a serious impairment of an important body function. Defendant cited medical records indicating that, on the date of the accident, plaintiff suffered a cervical sprain and a chest contusion (bruise). Defendant also cited medical records indicating that plaintiff was diagnosed with lumbar-sacral disc bulge after a subsequent work-related accident.

Defendant argued that plaintiff did not suffer an objectively manifested injury that affected her ability to lead her normal life as a result of the alleged accident.

Plaintiff filed a response arguing that, after the accident, her treating physician diagnosed her with multiple bruises and disabled her from working. She also cited medical records replete with references to plaintiff's complaints of pain. Plaintiff also cited a 2003 MRI revealing disc collapse, disc bulge, disc protrusion, and other degenerative changes. Plaintiff's further complaints of pain led to a referral for three epidural steroid injections. When plaintiff reported no improvement, Peter Bono, M.D. scheduled her for a lumbar laminectomy and spinal fusion. Even after recovering from surgery, plaintiff reported that she has problems with her back and legs, cannot walk or jog for exercise, cannot pick up her son, and cannot go up and down stairs normally. Notably, plaintiff cited to no medical records, affidavits, or deposition testimony linking her alleged injuries to the accident. In this regard, plaintiff attached a "physician's report" completed and signed by Dr. Bono. On that form, after "History of Occurrence as Described by Patient," Dr. Bono indicated the alleged accident and added "since then low back pain."[1] He identified his diagnosis as lumbar sacral stenosis. Next to the question "Are Symptoms and Diagnosis a Result of the Accident?", he checked "Yes." Plaintiff also submitted another "physician's report," in the exact same format, on which Virender Mendiratta indicated that plaintiff suffered from radiculopathy related to the accident.

In reply to plaintiff's response, defendant argued that, on the day of the accident, plaintiff's back was not tender, but she suffered a cervical sprain and chest contusion while X-rays revealed degenerative changes at the C5 and C6 vertebrae. Defendant pointed out that plaintiff did not mention low back pain until November 21, 2000. It was not until 2003 that plaintiff was diagnosed with lower back disc degeneration in the lumbar sacral region. In a supplemental brief, defendant cited independent medical examination results indicating that the degenerative changes in the lumbar sacral region were not traumatically induced, but rather, developed as a result of a degenerative process.

Plaintiff filed a supplemental response to defendant's motion to which she attached a physician's report completed and signed by Arthur Powell, M.D. This report, in the same form as those discussed above, Dr. Powell identified the alleged accident and identified his diagnosis as "degenerative disc disease L5-S1, with disc bulge requiring lumbar laminectomy and fusion L-5-S1." Next to the question "Are Symptoms and Diagnosis a Result of the Accident?", Dr. Powell checked "Yes."

The trial court granted defendant's motion for summary disposition, ruling that there was no genuine issue of fact as to whether the alleged injuries were caused by the accident. The trial court characterized the physicians' reports as "written on preprinted standardized forms." The trial court noted that the doctors "simply" or "merely" checked "Yes" for the question "Are symptoms and diagnosis a result of the accident?" The trial court concluded that this was

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[1] Actually, Dr. Bono wrote "MVA Oct. 2001", which we presume is simply an error because the accident was actually in October 2000 and there is no record of another motor vehicle accident occurring in October 2001.

insufficient to establish objective manifestation of plaintiff's impairment. The trial court ruled that "Plaintiff has failed to establish a medically identifiable condition that is an objective manifestation of an injury that is a result of the accident." The trial court granted defendant's motion.

Plaintiff filed a motion for reconsideration. In support of this motion, plaintiff attached what she identified as an affidavit (although it was not notarized) signed by Dr. Powell, in which he reiterated his opinion that, as a result of the accident, plaintiff suffered traumatic injuries to the lumbar sacral region that required surgery. Dr. Powell also stated that the accident caused or significantly aggravated degenerative conditions in plaintiff's lumbar spine. Dr. Powell additionally stated that his physician's report was "a medical record, kept within my file in the normal course of business." The trial court denied plaintiff's motion.

II. Analysis

Plaintiff contends that the trial court erred in ruling that there was no genuine issue of material fact in regard to causation. We agree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club,* 466 Mich 155, 164; 645 NW2d 643 (2002).

In a third-party automobile negligence action, the plaintiff must demonstrate that the injury was caused by the alleged incident. MCL 500.3135(1) provides:

> A person remains subject to tort liability for noneconomic loss *caused by* his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. [Emphasis added.]

Further, it is well established that in all negligence claims, "a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co,* 463 Mich 1, 6; 615 NW2d 17 (2000).

In support of her argument that there is a genuine issue of fact regarding causation, plaintiff relies solely on the physicians' reports. Defendant contends that these reports are inadmissible because they are hearsay, MRE 801, and were completed for the purposes of litigation rather than in the course of regularly conducted business, MRE 803(6). "A physician's report is hearsay unless it falls into an exception or exclusion to the hearsay rules." *People v Huyser,* 221 Mich App 293, 297; 561 NW2d 481 (1997), quoting *Carlisle v General Motors Corp,* 126 Mich App 127, 129; 337 NW2d 4 (1983). "MRE 803(6) provides that records regularly generated by a 'business' in the course of its activities are not excluded by the rule barring hearsay unless the circumstances surrounding the preparation of the records indicate a lack of trustworthiness." *Huyser, supra* at 297. "In general, a record 'prepared for the purpose

of litigation' lacks the trustworthiness that is the hallmark of a document properly admitted pursuant to MCR 803(6)." *Id.*

There is no dispute that the physicians' reports in this case were completed for the purpose of litigation. Although Dr. Powell's "affidavit" indicates that his report was also "a medical record, kept within my file in the normal course of business," the "affidavit" was not notarized and, thus is not a valid affidavit. MCR 2.113(A). Further, the purported affidavit was submitted only on reconsideration and thus may not be considered by this Court when it is reviewing the trial court's summary disposition ruling. *Quinto v Cross & Peters Co*, 451 Mich 358, 366-367 n 5; 547 NW2d 314 91996). Finally, even if the affidavit was valid and subject to our review, the fact that Powell's report was "a medical record, kept within [his] file in the normal course of business," would not render it admissible under MRE 803(6). As noted above, MRE 803(6) provides an exception to records of regularly conducted activity "unless the circumstances of preparation indicate lack of trustworthiness." In this case, it is undisputed that the physicians' reports were prepared for the purpose of litigation. Documents prepared for use in litigation lack trustworthiness and are not admissible under MRE 803(6). *Huyser*, *supra* at 297-298.

Nonetheless, plaintiff suggests that, pursuant to MCR 2.116(G)(6), the *content* of the physicians' reports, i.e., the doctors' opinions are admissible. We agree. Although the reports themselves are inadmissible, the doctors' opinions would be admissible in the form of opinion testimony at trial. To withstand a motion under MCR 2.116(C)(10), "[a]ffidavits, depositions, admissions, and documentary evidence . . . shall only be considered to extent that the *content* or substance *would be admissible* as evidence to establish or deny the grounds stated in the motion." MRE 2.116(G)(6) (emphasis added). Because the doctors' opinion testimony would be admissible at trial, their opinions, contained in the inadmissible reports, suffice to support plaintiff's response to defendant's motion for summary disposition. In their opinions, the doctors state that plaintiff's injuries were caused by the accident. Therefore, the trial court erred in granting summary disposition on the basis that there was no genuine issue of fact with regard to causation.

Plaintiff also contends that there are "genuine issues of material factual dispute as to whether [she] suffered injuries that may meet the 'serious impairment of body function' threshold under Michigan law[.]" Because this issue was not addressed by the trial court, it is not preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Therefore, we decline to address it. Instead, we remand for the trial court to consider this matter in light of *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004).

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

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood