STATE OF MICHIGAN

COURT OF APPEALS

KRISTIN BELOTE,

Plaintiff-Appellant,

v

KEITH STRANGE,

Defendant-Appellee.

UNPUBLISHED
October 25, 2005

No. 262591
Oakland Circuit Court
LC No. 2004-057964-NI

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

I. Facts and Procedural History

On April 26, 2003, plaintiff and defendant were involved in an automobile accident. On April 29, 2004, plaintiff filed a complaint against defendant alleging that defendant proximately caused the accident of April 26, 2003 and that during the accident plaintiff suffered head, neck, back and muscle-skeletal system injuries, which injuries constitute a serious impairment of body function. On February 14, 2005, defendant filed a motion under MCR 2.116(C)(10) claiming that he was entitled to summary disposition because plaintiff's injuries were not caused by the accident, were not aggravated by the accident and did not rise to the level of a serious impairment of body function as required by MCL 500.3135.[1]

In support of its motion, defendant presented evidence that plaintiff had been seeing a chiropractor, David T. Mitchell, D.C., since 1998 for back problems and that a CT scan taken just eight days before the accident revealed identical abnormalities to one taken after the accident. In addition, defendant claimed that plaintiff had misled the physicians who treated her by stating that her symptoms arose after the automobile accident. In support of this assertion, defendant attached the affidavits of the surgeon who performed plaintiff's back surgery, Steven

[1] We note that plaintiff erroneously states that defendant's motion was brought pursuant to MCR 2.116(C)(8) and (C)(10).

M. Rapp, M.D., and Clifford M. Buchman, D.O.,[2] who performed an independent medical examination of plaintiff after the accident. In his affidavit, Rapp retracted his earlier opinion that the accident caused plaintiff's "clinical presentation." Instead, he averred,

> I have most recently thoroughly examined Ms. Belote's reported symptomatology which existed prior to her involvement in a motor vehicle accident occurring on April 26, 2003. In doing so, it is apparent that Ms. Belote was experiencing and complaining of low back pain which radiated to her right hip and down her right leg prior to her involvement in a car accident. In particular, Ms. Belote informed me at the time of her first office visit that she had been experiencing pain in her right hip and leg for a period of approximately two months prior to her initial office visit of May 1, 2003. In addition, I have personally reviewed the CT of the lumbosacral spine taken on April 18, 2003 wherein the particular herniation at L4-L5 was identified. I have also examined the CT of May 6, 2003, which I now know was taken approximately one week after Ms. Belote's involvement in an automobile accident. In comparison, there was absolutely no change noted between the CT scan taken before the accident and the CT scan taken after the accident.

Based on this, Rapp stated that he did not believe the automobile accident caused plaintiff to sustain "any form of anatomical injury" and did not cause the herniation at the L4-L5 level. Indeed, Rapp stated that there was no evidence that the automobile accident even aggravated the pre-existing condition. Therefore, he concluded, his treatment of plaintiff, including her surgery, was not caused by the accident. Like Rapp, Buchman had originally stated that plaintiff's complaints were likely caused by the automobile accident. However, in his affidavit, Buchman also stated that on further review of plaintiff's complete medical records, he was of the opinion that plaintiff's herniated disc was a condition that pre-existed the accident. He also noted that the CT scans taken before and after plaintiff's accident reveal no change in her condition.

On March 16, 2005, the trial court heard arguments on defendant's motion for summary disposition. Before either party had begun its arguments, the trial court stated,

> I know what the briefs said, I know what you said in the briefs, I know what she says on the history that was taken prior to the accident, after the accident. This case would go directly to the purpose of [MCR] 2.114. It bothers me somewhat that we have an individual here who apparently lied to the medical people who are trying to treat her. That, to me, flies in the face of what we're supposed to do in the litigative process.
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> Our jurisprudence is put in contempt by such activities and I'm very concerned about that.

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[2] Defendant also supplied a letter from Phillip Friedman, M.D., who was retained by defendant to make an independent assessment of plaintiff's case. Friedman opined that there did not appear to be any significant anatomical alteration as a result of the April 2003 automobile accident.

Plaintiff responded that his client was in fact truthful with her physicians. Plaintiff's counsel also argued that a fact question regarding causation was created by the opinion of plaintiff's chiropractor and the earlier opinions of Rapp and Buchman, whose subsequent affidavits merely established a credibility issue. Plaintiff's counsel further contended that defendant's counsel violated the law by having an ex parte meeting with Rapp. Because defendant's ex parte contact with Rapp violated the law, plaintiff's counsel asked the court to disregard the affidavit illegally obtained from Rapp and levy sanctions against defendant.

After hearing the arguments, the trial court stated that it was "satisfied that Plaintiff has failed to establish that the accident proximately caused her to sustain some form of additional injury, which required the surgery." The court then described the contents of the affidavits by Rapp and Buchman as well as the letter by Friedman. The Court concluded,

> The only testimony that Plaintiff has to refute all these experts is a letter from her chiropractor and the Court finds that is not admissible evidence . . . .
>
> Thus, the Court is satisfied that Plaintiff has failed to provide this Court with any proper evidence to meet her burden of proof that the motor vehicle accident at issue proximately caused her to sustain a threshold injury. Therefore, Defendant's Motion for Summary Disposition is granted. . . .

An order granting defendant's motion was entered on March 16, 2005.

On March 29, 2005, plaintiff filed a for reconsideration of the trial court's grant of defendant's motion for summary disposition. With her motion for reconsideration, plaintiff attached an affidavit by her chiropractor. In the affidavit, Mitchell averred that it was his professional opinion that plaintiff's herniated disc was aggravated by the automobile accident of April 26, 2003, and that this accident caused plaintiff to sustain a serious impairment of body function. In her motion, plaintiff argued that Rapp's affidavit should have been struck because it was illegally obtained and, even considering the affidavit, plaintiff presented sufficient evidence to create a fact question on the issue of causation. Specifically, plaintiff contended that plaintiff's deposition testimony, wherein she states that her herniated disc became symptomatic after the accident, coupled with the affidavit of Mitchell, created a fact question. For these reasons, plaintiff argued, the trial court committed palpable error by granting defendant's motion.

On April 22, 2005, the trial court denied plaintiff's motion for reconsideration because there were no new material facts and plaintiff merely presented the same issues already ruled on by the court. Plaintiff then appealed as of right.

II. Summary Disposition

Plaintiff first argues that she presented sufficient evidence to create an issue of fact for the jury concerning whether her injuries were caused by the accident. For this reason, she contends, the trial court erred when it granted defendant's motion for summary disposition on the grounds that she had not presented a fact question on the causation issue. We disagree.

A. Standards of Review

This Court reviews de novo the grant or denial of a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In addition, this Court reviews de novo the proper interpretation of a statute. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 157; 627 NW2d 247 (2001).

B. HIPAA Violation

While plaintiff argues that she presented sufficient evidence to create a fact question on the issue of causation even if the Rapp's affidavit is considered, she initially argues that the trial court erred when it considered Rapp's affidavit, which was obtained in violation of the Health Insurance Portability and Accountability Act (HIPPA). See 42 USC 1320d *et seq*. Therefore, we shall address that argument first.

Under HIPAA, the Secretary of Health and Human Services (Secretary) is charged with promulgating rules and regulations for the safeguarding of health information. *Bayne v Provost*, 359 F Supp 2d 234, 236 (ND NY, 2005); 42 USC 1320d-2. Health information is defined as "any information, whether oral or recorded in any form or medium, that – (A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual." 42 USC 1320d(4). An ex parte meeting between a plaintiff's physician and defendant's counsel to discuss the plaintiff's medical history or condition clearly falls within the definition of health information that is subject to the standards promulgated by the Secretary.

Pursuant to the rules governing the transmission of health information, plaintiff's physician could not "use or disclose protected health information, except as permitted or required by this subpart . . . ." 45 CFR 164.502(a). Under subpart 502(a), plaintiff's physician could disclose protected health information to defendant's counsel pursuant to and in compliance with a valid authorization under 45 CFR 164.508, or pursuant to an agreement under, or as otherwise permitted by 45 CFR 164.510, or as permitted by and in compliance with 45 CFR 164.512, or 45 CFR 164.514(e), (f), or (g). 45 CFR 164.502(a)(1)(iv)-(vi). It is undisputed that defendant's ex parte communication with plaintiff's physician was not done in compliance with any of these provisions. That notwithstanding, defendant contends that the meeting between plaintiff's physician and his trial counsel was expressly permitted under our Supreme Court's decision in *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991). Therefore, defendant concludes, there "can be no question that the meeting was entirely appropriate . . . ." We disagree.

This Court is bound to respect the supremacy of federal law. US Const, art VI, § 2. HIPAA expressly provides that "[e]xcept as provided in paragraph (2), a provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall supersede any contrary provision of State law . . . ." 42 USC 1320d-7(a)(1). Under paragraph (2), a provision, requirement or standard adopted pursuant to HIPAA shall not supersede a contrary provision of state law if, subject to section 264(c)(2), the state law relates to the privacy of individually identifiable health information. 42 USC 1320d-7(a)(2)(B). Under Section 264(c)(2) of PL 104-191; 110 Stat 1936,

Congress provided that, "[a] regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation." See Notes to 42 USC 1320d-2; 45 CFR 160.203(b) (implementing section 264(c)(2) of PL 104-191; 110 Stat 1936). Consequently, unless Michigan law imposes stricter requirements on the disclosure of health information, HIPAA will control.

In Michigan, a party may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." MCR 2.302. Likewise, when, as is the case here, a party places his or her mental or physical condition in controversy, "medical information about the condition is subject to discovery under these rules to the extent that . . . (b) the party does not assert that the information is subject to a valid privilege." MCR 2.314(A)(1). In Michigan, the relevant privilege is provided by MCL 600.2157, which states that,

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

However, this privilege may be informally waived by the patient by either failing to timely assert the privilege after certain discovery requests, MCR 2.314(B)(1), or by bringing an action against any defendant to recover for any personal injuries where the patient produces a treating physician as a witness, MCL 600.2157. Once the physician-patient privilege has been waived, a defendant's counsel may properly conduct an ex parte interview with a plaintiff's treating physician. *Davis v Dow Corning Corp*, 209 Mich App 287, 292; 530 NW2d 178 (1995), citing *Domako*, *supra*.

In stark contrast to Michigan law, under HIPAA the plaintiff's physician may only disclose protected health information without the written consent of the patient pursuant to 45 CFR 164.508 or an agreement entered into pursuant to 45 CFR 164.510, if the disclosure is in response to a court order, subpoena, discovery request, or other lawful process. 45 CFR 164.512(e)(1)(i) and (ii). Furthermore, if the physician's response is to a discovery request, the physician may still only respond if he or she "receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request;"[3] or "receives satisfactory assurance . . . from the party seeking the

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[3] Under 45 CFR 164.512(e)(iii), a physician receives adequate assurances for purposes of 45 CFR 164.512(e)(ii)(A) if the party seeking protected health information provides the physician with a written statement and accompanying documentation, which demonstrates that the party requesting the information has made a good faith attempt to provide written notice of the request to the individual and that notice provided sufficient information to permit the party to raise an

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information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section." 45 CFR 164.512(e)(ii)(A) & (B).

From these provisions, it is clear that a patient may not informally waive the protections afforded by HIPAA. Indeed, the detailed requirements imposed by HIPAA on health information disclosures give the patient extensive control over the dissemination of his or her health information. Even in the discovery context, HIPAA prevents a physician from disclosing health information absent a court order, written permission from the patient, or assurances that the patient has been informed of the request and given an opportunity to object. "If state law can force disclosure without a court order, or the patient's consent, it is not 'more stringent' than the HIPAA regulations." *Law v Zuckerman*, 307 F Supp 2d 705, 711 (D MD, 2004). Because the requirements and standards imposed by HIPAA are stricter and afford more protection for a patient's health information than MCL 600.2157 and the Michigan Court Rules, HIPAA controls. 42 USC 1320d-7(a)(1). Therefore, defendant was required to obtain plaintiff's written consent pursuant to 45 CFR 164.508 or to comply with the discovery procedures detailed under 45 CFR 164.512(e), before conducting an ex parte interview with plaintiff's treating physician. Because defendant's trial counsel did not comply with those requirements, Rapp's disclosures, including his affidavit, were obtained in violation of HIPAA.

Having determined that HIPAA applies, we must now determine the applicable remedy. The remedies for failure to comply with the requirements and standards of HIPAA are found under 42 USC 1320d-5. However, these remedies do not address how court's should treat health information obtained in violation of its provisions. Although there is no remedy specified under HIPAA for violations made in the discovery context, this Court "has repeatedly recognized that a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney." *Persichini v Beaumont Hosp*, 238 Mich App 626, 639; 607 NW2d 100 (1999). Consistent with this inherent authority, we hold that trial courts may treat discovery obtained in violation of HIPAA as a discovery violation under MCR 2.313(B).[4] As with every discovery violation, whether and in what manner the violation should be sanctioned is a matter committed to the sound discretion of the court. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697; 662 NW2d 804 (2003); MCR 2.313(B)(2).

At the March 16, 2005 summary disposition hearing, plaintiff argued that Rapp's affidavit was illegally obtained and asked the trial court to "not only completely disregard the Affidavit of Dr. Steven Rapp, but [assess] sanctions against [defendant's counsel] to prevent this . . . type of conduct in the future." After hearing defendant's response, the trial court proceeded to consider Rapp's affidavit and concluded that plaintiff had failed to present sufficient evidence to establish that her injuries were caused by the accident. While the trial court did not explicitly

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objection before the court.

[4] This holding is consistent with the decision in *Law*, *supra* at 712, where the court held that "[s]ince HIPAA does not include any reference to how a court should treat such a violation during discovery or at trial, the type of remedy to be applied is within the discretion of the Court under [FRE 37]."

state the basis for refusing defendant's request to disregard the affidavit and impose sanctions, at the start of the hearing, the trial court indicated that it was concerned about plaintiff's conduct. Indeed, the trial court stated that "we have an individual here who apparently lied to the medical people . . ." and indicated that it thought that MCR 2.114, which in part deals with sanctions for frivolous claims, might apply. Given this record, we cannot conclude that the trial court's refusal to disregard the affidavit, which directly addressed and arose out of the conduct noted by the trial court, was without justification or excuse. Therefore, the trial court did not abuse its discretion by refusing to disregard Rapp's affidavit and levy sanctions against defendant's trial counsel.

B. Causation

Plaintiff next argues that, even if the trial court properly considered Rapp's affidavit, the attempts by Rapp and Buchman to retract their earlier opinions do not negate the earlier opinions, but rather go to the credibility of the witnesses. Plaintiff further contends that her deposition testimony and the affidavit of her chiropractor are sufficient to create a fact question regarding causation. Therefore, plaintiff argues, the trial court erred when it granted defendant's motion for summary disposition under MCR 2.116(C)(10). We disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel*, *supra* at 561. Summary disposition is appropriate under MCR 2.116(C)(10), if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003), citing *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997); *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996). When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto*, *supra* at 362-363.

In order to establish a prima facie case of negligence, "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 his motion for summary disposition, defendant attacked the causation element of plaintiff's claim. In presenting its motion, defendant had the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto*, *supra* at 362. To support his claim that plaintiff's injuries were not caused by the accident in question, defendant submitted some of plaintiff's medical records, as well as the affidavits of Rapp and Buchman and the statement of Friedman. This evidence tended to establish that plaintiff's injuries were not proximately caused or aggravated by the accident, but rather were preexisting. Because defendant properly supported his motion for summary disposition, the burden to present evidence shifted to plaintiff, who had to establish that a genuine issue of disputed fact existed in order to avoid summary disposition. *Id.*

It is undisputed that, other than attempting to discredit the affidavits of Rapp and Buchman,[5] plaintiff only presented the February 3, 2005 letter of her Chiropractor to rebut the evidence defendant proffered in support of his motion for summary disposition.[6] However, in order to be considered for purposes of a motion for summary disposition under MCR 2.116(C)(10), the proffered evidence must be substantively admissible. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Plaintiff does not dispute on appeal that the letter was not properly sworn as required by MCR 2.119(B) and was otherwise inadmissible hearsay. See MRE 801; MRE 802. Therefore, the trial court properly refused to consider it.

Plaintiff further contends that the trial court erred, because her deposition testimony alone establishes the existence of a fact question regarding causation. At her deposition, plaintiff testified that, while she had a herniated disc before the accident, "it didn't prohibit me in any way whatsoever." Plaintiff's argument is essentially that, although she had a preexisting herniated disc, because she did not begin to suffer from the herniated disc until after the car accident, the car accident must have been the cause of all her subsequent suffering, including her need for surgery. We disagree that this testimony is sufficient to establish causation. While it is true that a plaintiff may present circumstantial evidence to establish a fact question regarding causation, "at a minimum, a causation theory must have some basis in established fact." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).

> However, 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. Rather, the plaintiff must 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. [*Id.* at 164-165.]

Given the evidence that plaintiff had a preexisting herniated disc and that the subsequent surgery was performed to correct that same herniated disc, we do not believe plaintiff's assertion that her preexisting condition did not prohibit her "in any way whatsoever" before the accident is sufficient to establish that, but for the accident, plaintiff would not have undergone the surgery or otherwise suffered from the same ailments. It is equally plausible that plaintiff's herniated disc would have required surgery even without the accident. Therefore, plaintiff's proffered testimony is legally insufficient to afford a reliable basis from which reasonable minds could infer that more probably not, but for the accident, plaintiff would not have suffered the same impairments. *Id.* at 171.

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[5] We note that merely attacking the credibility of the moving party's affidavits is insufficient to establish the existence of a genuine issue of material fact. Once the burden shifted, plaintiff had an affirmative duty to set forth facts showing that a genuine issue of material fact exists. MCR 2.116(G)(4); *Quinto*, *supra* at 362.

[6] In the letter, Mitchell states, "I was treating her before the auto accident for the herniated disc and she was responding very well to treatment[;] she had minimal pain and discomfort. After the accident she had severe pain in the low back as well as severe pain radiating into her right leg. I have no doubt that her condition is a direct result of the automobile accident on 04/26/2003."

Finally, plaintiff argues that Mitchell's affidavit, which plaintiff attached to her motion to reconsider, is sufficient to create a genuine issue of fact on the issue of causation. We disagree. Plaintiff first submitted this affidavit with her motion for reconsideration. Hence, it was not considered by the trial court in making its determination and, therefore, is not now properly before this Court. *Maiden*, *supra* at 126 n 9.[7]

Plaintiff failed to present evidence sufficient to establish the existence of a fact question on the issue of causation. Therefore, the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(10).

III. Conclusion

Because we have determined that the trial court properly granted summary disposition to defendant on the causation element of plaintiff's negligence claim, we need not address plaintiff's argument that her injuries constitute a serious impairment of body function under MCL 500.3135(1) & (7) or her argument that her economic loss damages are not subject to the serious impairment of body function threshold.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski

I concur in result only.

/s/ Brian K. Zahra

[7] Plaintiff did not appeal the trial court's decision to deny her motion for reconsideration.