STATE OF MICHIGAN

COURT OF APPEALS

ANNETTE D. HARRY, Plaintiff-Appellee,	UNPUBLISHED July 13, 2006
v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant.	No. 257539 Wayne Circuit Court LC No. 01-124871-NF

Before: Sawyer, P.J., and Wilder and Hood*, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment in plaintiff's favor in this action for first-party no-fault coverage as well as uninsured motorist coverage. We reverse.

Defendant argues that the trial court erred in denying its motion for a directed verdict based on lack of proof of causation in fact for plaintiff's foot injury. "This Court reviews de novo a trial court's decision to grant or deny a motion for a directed verdict." *Tobin v Providence Hosp*, 244 Mich App 626, 642; 624 NW2d 548 (2001). "This Court evaluates a motion for a directed verdict by considering the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Tobin, supra*, p 643 (internal quotation marks and citation omitted). "Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

For first-party coverage, "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 . . . ." MCL 500.5105(1). The first-party insurer's liability is conditioned upon plaintiff's showing that the injury or loss would not have occurred but-for the accident. *Lockridge v State Farm Ins*, 240 Mich App 507, 512; 618 NW2d 49 (2000) Similarly, for first-party wage loss benefits, another component of first-party benefits, an insurer is liable to pay benefits for "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 months after the date of the accident *if he or she had not been injured*." MCL 500.3107(1)(a) (emphasis added).

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

For a third-party claim, a "plaintiff must prove that the [other] driver's conduct was both a cause in fact and a legal cause of [her] injuries." *Wilkinson, supra*, p 391. Causation in fact required a but-for standard, while legal cause tests the foreseeability of harm in light of the circumstances, *Wilkinson, supra*, pp 396-397. The Court must correctly identify the injury at issue. If an accident aggravated a preexisting injury, it is error to regard the preexisting condition as the injury in question. *Wilkinson, supra*, pp 393, 395. "Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition." *Wilkinson, supra*, p 395.[1] In *Wilkinson*, a third-party automobile accident action, there was evidence from the plaintiff's expert that the accident precipitated the symptoms from aggravation of the brain tumor, and the defendant's expert conceded that the accident trauma "probably contributed to those symptoms . . . ." *Wilkinson, supra*, p 396.

"Proof of causation requires both cause in fact and proximate cause." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). Cause in fact requires a showing that but for the negligent conduct, the injury would not have occurred. *Wiley, supra*, p 496. Legal or proximate cause normally involves examining the foreseeability of consequences. *Craig v Oakwood Hosp* 471 Mich 67, 86; 684 NW2d 296 (2004). Michigan law prohibits speculation in proving causation. "Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences, not mere speculation." *Wiley, supra*, p 496. "An explanation that is consistent with known facts but not deducible from them is impermissible conjecture." *Wiley, supra*, p 496.

A mere possibility of causation is not enough:

> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. A valid theory of causation, therefore, must be based on facts in evidence. And *while the evidence need not negate all other possible causes, [it must] exclude other reasonable hypotheses with a fair amount of certainty*. [*Craig, supra*, pp 87-88 (internal quotation marks, brackets and footnotes omitted; italics added).]

Although the foregoing decisions are from the medical malpractice context, no legal authority restricts these causation principles to medical malpractice claims. See, e.g., *Skinner v Square D Co*, 445 Mich 153, 164-165, 174; 516 NW2d 475 (1994). In *Karbel v Comerica Bank*, 247 Mich

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[1] Regarding which injury is at issue here, defendant states: "Plaintiff agreed to remove any request for consideration of future damages relative to the low back or the other soft tissue injuries that were complained of prior to August 3, 2001." On appeal, plaintiff exclusively argues regarding her foot injury. Therefore, we will consider plaintiff's claim to relate only to her foot injury.

App 90, 98; 635 NW2d 69 (2001), this Court discussed the broader application of the anti-speculation rule for proof of causation, stating that it was not restricted to negligence cases, and that "we cannot permit the jury to guess." (Internal brackets, quotation marks and citations omitted.) Here, as illustrated below, plaintiff relies essentially on guesswork to try to establish that the alleged accident in fact caused her foot injury.

This case is unlike *Wilkinson*. While plaintiff cites *Wilkinson*, she does not analyze it nor establish that its reasoning should be applied here. Here, there is no concession from a defense expert regarding causation, and no evidence from a doctor presented by plaintiff to support causation. Overall, there is almost no evidence that plaintiff's foot injury resulted from the alleged automobile accident. Chronological proximity is present, as plaintiff's first complaint to the doctor about problems with her foot was a couple weeks after the accident. Although plaintiff testified at trial that she went to the emergency room in the early morning hours of the night after the accident, her complaints at the emergency room were of headaches and neck pain, not foot or ankle pain.

Plaintiff's surgeon, Dr. Pike, testified that he could only offer supposition on the causation question. Dr. Pike testified that it would be "pure supposition" to conclude that the alleged accident caused plaintiff's foot injury:

> *Q*. And I want you to assume, Doctor, that [plaintiff's] first ankle complaint was made on May 15, 2002 . . . .
>
> *A*. Okay.
>
> *Q*. Assuming that to be true, that being more than 16 months after the automobile accident, wouldn't you have difficulty relating the ankle complaints to the accident . . . ?
>
> ***
>
> *THE WITNESS*: It would make it more difficult to directly correlate the two. . . . .
>
> So *it is certainly possible* that, for instance, *and this is a complete supposition*, that Ms. Harry sprained her foot, as most lay people would consider somewhere in the arch, and that improved. And then over time she developed symptoms in the tendon. . . .
>
> So that is a scenario where *it would be very plausible* that what you described could still be related to the actual motor vehicle accident. *But this is pure supposition*. [Emphases added.]

In light of Dr. Pike's opinion failing to support causation, and the absence of other proofs supporting causation, the trial court erroneously denied defendant's motion for a directed verdict with respect to the uninsured motorist coverage claim.

The injury claimed by plaintiff for her PIP claim was the same; therefore, the causation analysis remains the same. There is no known authority that the causation standard for a PIP

claim is lower than that for other automobile accident claims. Causation in fact must be proven, without speculation. *Lockridge, supra,* p 512. Therefore, the speculative nature of plaintiff's causation theory also bars her PIP claim.

Taking the evidence in a light favorable to plaintiff, the evidence is too tenuous to overcome the prohibition against using speculation in a theory of causation. The trial court erred in denying defendant's motion for a directed verdict. In light of our resolution of the foregoing issue, defendant's other arguments on appeal are moot. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

Reversed and remanded for entry of a directed verdict of no cause for action. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood