STATE OF MICHIGAN

COURT OF APPEALS

STEVEN FONDREN and DIANE FONDREN, Plaintiffs-Appellants, v EDWARD C. LEVY, d/b/a ACE ASPHALT & PAVING CO., and ESPIRIDION VILLAREAL, Defendants-Appellees.	UNPUBLISHED January 12, 2010 No. 287705 Lapeer Circuit Court LC No. 06-037623-NO

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the trial court's order granting defendants' motion for summary disposition in this negligence action. We reverse and remand for proceedings consistent with this opinion.

On October 17, 2003, plaintiff alleged that he was leaning against the driver's side door of his truck when one of defendant's employees unexpectedly and negligently jerked the truck door open. Plaintiff alleged that he fell from the truck and suffered serious and permanent injuries to his back. Plaintiff filed a one-count complaint alleging negligence.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), alleging that plaintiff could not demonstrate a present injury caused by defendants. Rather, defendants asserted that plaintiff's pre-existing back injury that was treated before this accident precluded his claim. Defendants also alleged that an aggravation of plaintiff's back injury in 2004, after the incident asserted in the complaint, was the superseding cause and cause in fact of plaintiff's injury, not the actions of defendants. Lastly, defendants alleged that the no-fault act, MCL 500.3101 *et seq*, barred plaintiff's claim. Plaintiffs opposed the motion for summary disposition, asserting that factual issues precluded summary disposition. The trial court granted

[1] Because Diane Fondren raises only a derivative claim of loss of consortium, *Wilson v Alpena Co Road Comm*, 474 Mich 161, 163 n 1; 713 NW2d 717 (2006), the singular plaintiff in this opinion refers to Steven Fondren.

the motion for summary disposition, but ruled only on the first issue raised by defendants. The court held in relevant part:

> The Court has carefully reviewed the information submitted by the Plaintiff; however, during his deposition he testified that each of these types of pains were symptoms that Plaintiff had complained about for years before the 2003 incident. It is also indicated and confirmed by Plaintiff's physician, Dr. Commet, who testified that Plaintiff's injuries were similar to those he had been experiencing for years. Dr. Commet also admitted in his deposition that Plaintiff suffered no structural changes to his back as a result of the 2003 incident and instead it was only the 2004 incident that resulted in any changes.
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> It is well settled that a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior testimony. That would be deposition testimony. The courts have discussed a reason for such a rule. "When a party makes statements of fact in a clear, intelligent, unequivocal manner, they should be considered and conclusively binding against him in the absence of any explanation or modification, or by the showing of mistake or improvidence." Moreover it is up to the trial court to determine whether a factual issue exists. "The purpose is not well served by allowing parties to create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition." This rule has been extended to circumstances beyond deposition testimony which is contradicted by a later affidavit.
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> This Court has accepted the application of the no-contradiction rule to affidavits that contradict prior interrogatory answers. While most of the cases cited involved an affidavit contradicting prior deposition, by analogy, logic requires that for purposes of summary disposition any sworn statement made in a clear, intelligent, and unequivocal manner should be considered and conclusively binding in the absence of any explanation or modification or the showing of mistake or improvidence. Depositions are different from affidavits in that there was a chance for cross-examination but that difference is not critical. Whether by subsequent affidavit or subsequent deposition, the purpose of summary disposition is to aid the trial court in determining whether a factual issue exists … would not be very well served by allowing parties to create factual issues by merely asserting them in a prior sworn testimony.
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> Therefore, for the reasons [sic] this Court determines the Defendant's [sic] motion for summary disposition in regard to the injuries sustained is considered and granted.

The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id*. Affidavits, depositions, and documentary evidence

offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Appellate review is limited to the record established in the trial court, and it is inappropriate for a party to expand the record on appeal. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). A party's brief must contain all material facts, both favorable and unfavorable. MCR 7.212(C)(6), (D)(1). An issue is not preserved for appellate review unless it is raised, addressed, and decided by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

Generally, the elements of a negligence action are: (1) a duty owed by the defendant to the plaintiff; (2) a breach of the defendant's duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Proximate cause is a legal term signifying both cause in fact and legal cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). In general, an act or omission is a cause in fact of a plaintiff's injury only where the injury would not have occurred without that act or omission. *Id*. at 87. "Under Michigan negligence jurisprudence, it is not necessary to show that a party's conduct was 'the' proximate cause of the injuries-showing that the party's conduct was 'a' proximate cause of the injuries is sufficient." *Orzel v Scott Drug Co*, 449 Mich 550, 566-567; 537 NW2d 208 (1995). The issue of proximate cause normally presents a question to be decided by the trier of fact. *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). However, if the facts underlying the issue of proximate cause are undisputed and reasonable minds could not differ, the issue may be decided by the court. *Id*. The issue of whether an intervening act is a superseding cause relieving a defendant of liability presents a question for the trier of fact. *May v Parke, Davis & Co*, 142 Mich App 404, 419; 370 NW2d 371 (1985). An intervening cause arises when harm occurs to the plaintiff after the negligence of the defendant. *Id*. An intervening cause is not an absolute bar to liability when the intervening event is reasonably foreseeable. *Id*. Generally, a tortfeasor is liable for all injuries arising directly from the commission of a wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 524; 687 NW2d 143 (2004), citing *Sutter v Biggs*, 377 Mich 80, 86-87; 139 NW2d 684 (1966). A torfeasor is liable for aggravation of a pre-existing condition of the plaintiff. *Wilkinson v Lee*, 463 Mich 388, 396-397; 617 NW2d 305 (2000).

Application of the above stated principles reveals that the trial court erred in granting defendants' motion for summary disposition. First, review of the record reveals that plaintiff did not submit an affidavit contradicting his prior deposition testimony. Moreover, plaintiff's acknowledgement of symptoms that existed both before and after the accident in dispute does not entitle defendants to summary disposition. Rather, defendants remain liable for the aggravation of a pre-existing condition.[2] *Wilkinson, supra*.[3] Accordingly, the trial court erred in granting

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[2] See also M Civ JI 50.10 entitled "Defendant Takes the Plaintiff as He/She Finds Him/Her" and provides: "You are instructed that the defendant takes the plaintiff as [he / she] finds [him / her]. If you find that the plaintiff was unusually susceptible to injury, that fact will not relieve the defendant from liability for any and all damages resulting to plaintiff as a proximate result of defendant's negligence."

defendants' motion for summary disposition. In light of the fact that the trial court did not rule on any other issues, we do not address the unpreserved issues. *Miller, supra*.[4]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

(…continued)

[3] Defendants' reliance on *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005) is misplaced. The issue addressed by the *Henry* Court was whether the plaintiffs stated a claim upon which relief could be granted, MCR 2.116(C)(8), when recovery was sought for a medical monitoring program for potentially future dioxin related injuries. *Id*. at 71. In the present case, plaintiff alleged the aggravation of an actual injury, not monitoring for a potential injury.

[4] However, we note that the case law in the area of negligence provides that allegations surrounding the aggravation of injuries and intervening causes generally present questions for the trier of fact. See *Meek*, *supra*; *May*, *supra*. We also note that plaintiff submitted documentation that was not part of the lower court record on appeal, and accordingly, it was not considered. *Sherman*, *supra*. Furthermore, defendants failed to address both the favorable and unfavorable facts contained in the record in violation of MCR 7.212(C)(6), (D)(1). The medical report addressed to defense counsel concludes: "All and any of [plaintiff's prior] incidents may have contributed to his current [health] status." Additionally, defendants cited law addressing contradictory affidavits when there was no contradictory affidavit yet filed or ever filed in the case. Consequently, any outstanding issues may be addressed by the trial court following thorough briefing by the parties.