

STATE OF MICHIGAN
COURT OF APPEALS

TERRI MOORE,

Plaintiff-Appellant,

v

WALGREEN COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 27, 2012

No. 303768
Wayne Circuit Court
LC No. 09-007931-NO

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Terri Moore, appeals by right, following a bench trial, from a judgment of no cause of action in favor of defendant, Walgreen Company. We affirm.

On April 3, 2009, plaintiff filed a complaint alleging negligence by defendant. Specifically, plaintiff alleged that she suffered injury when “a case of giant sized Frisbees fell from a shelf and struck” her on the head in defendant’s Westland store on April 6, 2006. It was asserted that plaintiff suffered severe and serious personal injuries to such an extent that she was disabled. A bench trial was conducted on March 14, 15, and 16, 2011. However, the transcript of the final trial date, March 16, 2011, could not be produced because of equipment failure. Consequently, a settled statement of facts was filed in the trial court on April 9, 2012, MCR 7.210(2)(B). This statement of facts provided, in relevant part:

5. At the close of Defendant’s case in chief, Plaintiff’s counsel made a motion for directed verdict pursuant to MRE 601(A) [sic], arguing that Defendant’s employees had failed to preserve necessary evidence by failing to preserve the box which struck Plaintiff on the head until the time of trial. The motion was denied. The Court also declined to give an instruction on spoliation of evidence.

6. Plaintiff requested the introduction of rebuttal testimony from Dr. Richard Weiss and Dr. Roderick Claybrook. The Court declined to permit the introduction of the testimony concluding that because Dr. Weiss and Dr. Claybrook could not testify in Plaintiff’s case in chief, they could not testify as rebuttal witnesses.

7. Plaintiff requested the introduction of medical records from Dr. Weiss, Dr. Claybrook, MRI of CMI and Providence Pain Management in rebuttal to the testimony of Dr. Wolff [sic]. The Court declined to permit the introduction of the medical records, concluding that because the records could not be introduced in Plaintiff's case in chief, they could not be introduced as rebuttal evidence.

8. The case was then submitted to the Court for ruling.

9. In reaching her ruling finding in favor of Defendant, Judge Daphne Means Curtis made the following findings of fact and conclusions of law:

A. The Plaintiff was an invitee.

B. Plaintiff went to Walgreens to obtain cash.

C. The Plaintiff and her son went to aisle 5.

D. Plaintiff described the aisle.

E. The instrumentality of injury depends on who you believe. If the court believes Plaintiff, then she was hit by a box. If the court believes Defendant's employees, she was hit by a Frisbee.

F. Walgreen's employees testified that there was only one Frisbee.

G. The issue before the court was credibility.

H. The Plaintiff testified that this incident changed her life and caused her spasms, tremors, daily headaches, speech impediments, problems with depression and sexual impotence.

I. The Frisbee was very lightweight.

J. The court is not a bioengineer; cannot say the box or the Frisbee could have caused her injuries.

K. The court does not believe Plaintiff's story.

L. The court is not a bioengineer and cannot conclude that even if the box hit her in the head that it could have caused her injuries.

M. There was no causation testimony because the Plaintiff failed to file a witness list.

N. Both sides must rely on the information and discovery sent to each other.

O. The Defendant had no way of knowing who Plaintiff was going to call as a witness.

P. The court was not basing her decision on the weight or the box but rather the law and the facts.

Q. The court found that the Plaintiff's [sic] claimed that some five years after the incident she is totally disabled.

R. When Plaintiff was questioned by the Plaintiff's attorney she had slurred speech, tremors, she had to be told multiple times to speak into the microphone, her hands shook, and she trembled, and was soft spoken.

S. When Plaintiff was questioned by the defense, she was more alert, no problems expressing herself and her enunciation was better. Her demeanor was called into question. The court felt that she was putting on a show for the benefit of the court.

T. Even if the court were to find liability, the court finds that there was no medical support for her injuries.

U. The only medical expert testimony came from Dr. Wolf who testified that there was some disc bulging. [H]owever, he said that bulging could be caused by aging or trauma and that he would defer judgment to an orthopedic surgeon. He also said that bulging was not uncommon in people over the age of 30 and the Plaintiff was 52.

V. The court believed Ms. Wendy Hall, the store manager. The court finds her testimony credible and believable.

W. The court finds that the lack of competent medical evidence as to causation leads it to conclude that Plaintiff has not sustained her burden of proof.

X. The lack of causation, the absence of the credibility on Plaintiff's part, leads the court to conclude that there is no liability and no causation. The height of the top shelf being only slightly over five feet, the height of the plaintiff at about five feet, leads the court to conclude that the Frisbee could not have fallen more than a foot prior to the Frisbee hitting her.

Y. The Plaintiff had an opportunity to present evidence and failed to produce it. The court finds that there is no liability and although it could stop there, it also finds that there is no causation.

Plaintiff does not raise an issue with regard to the trial court's ruling regarding the physical cause of the injury, a single Frisbee.¹ She also does not challenge the lack of correlation

¹ The trial court, in the settled record, stated that "the Frisbee" could not have fallen more than a foot before striking plaintiff, finding of fact X. The trial court rejected plaintiff's credibility and her theory that a box of Frisbees caused her serious injury, findings of fact E, G, K, V, and X.

between the single Frisbee and the injury in light of the height of plaintiff in comparison to the shelf height. Rather, plaintiff contends that the trial court erred in excluding medical testimony and medical records from her case in chief as well as medical evidence in rebuttal. Because plaintiff fails to challenge the trial court's rejection of plaintiff's theory of causation and the credibility determinations, she is not entitled to appellate relief.²

Following a bench trial, a trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). We defer to the trial court's assessment of the credibility of the witnesses because of the lower court's superior ability to examine the witnesses who appeared before it. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). Deference is also accorded the trial court's resolution of the issues when it is presented with various theories of the experts and the witnesses and conflicting testimony. See *Buckeye Marketers, Inc v Finishing Servs, Inc*, 213 Mich App 615, 617; 540 NW2d 757 (1995).

"To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). A valid theory of causation must be premised on facts admitted in evidence. *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004).

Proximate cause requires proof of two separate elements: (1) cause in fact, and (2) legal cause, otherwise known as proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Generally, the cause in fact requirement is established by demonstrating that "but for" the defendant's actions, an injury to the plaintiff would not have occurred. *Id.* at 163. Proximate cause addresses the foreseeability of consequences and whether "a defendant should be held legally responsible for such consequences." *Id.* If a plaintiff fails to prove cause in fact, proximate cause does not become a relevant issue. *Id.* The burden of establishing proximate cause belongs to the complaining party, and the mere fact of an accident does not create a presumption of proximate cause. *Id.* at 164 (citation omitted). Causation cannot be established by mere possibilities or speculation. *Meemic Ins Co v DTE Energy Co*, 292 Mich App 278, 281-282; 807 NW2d 407 (2011). When an appellant fails to challenge the basis of the ruling by the trial court, we need not even consider granting the party the relief requested. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

In the present case, plaintiff alleges that the trial court erred in excluding medical evidence regarding her injuries and damages. However, a prima facie case of negligence also

² When the appellant fails to challenge an issue which necessarily must be reached to ultimately obtain the relief requested, he cannot prevail on appeal. *Roberts & Sons Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

requires that plaintiff prove causation by presenting facts in evidence, *Loweke*, 489 Mich at 162; *Craig*, 471 Mich at 87, and the mere evidence of an accident is insufficient to establish causation, *Skinner*, 445 Mich at 164. Because plaintiff³ failed to contest this aspect of the trial court's ruling regarding the prima facie case of negligence, she has failed to demonstrate entitlement to appellate relief. *Derderian*, 263 Mich App at 381.

Affirmed. Defendant, the prevailing party, may tax costs, MCR 7.219.

/s/ Karen M. Fort Hood

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio

³ Plaintiff also alleged that the trial court erred in failing to grant her request for an adverse inference instruction and motion for directed verdict when defendant failed to preserve the box which struck plaintiff. In light of the trial court's factual findings that a single Frisbee, not a box of Frisbees, struck plaintiff, she is not entitled to appellate relief.