STATE OF MICHIGAN

COURT OF APPEALS

GERALD THOMAS MATHIAS, as Personal Representative of the Estate of HAZEL MARIE BEARDSLEY, Deceased,

Plaintiff-Appellant,

v

MURK'S VILLAGE MARKET, INC.,

Defendant-Appellee.

UNPUBLISHED
July 30, 1999

No. 212760
Van Buren Circuit Court
LC No. 97-043158 NO

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Plaintiff, as personal representative of decedent Hazel Beardsley's estate, appeals as of right from the trial court's grant of summary disposition to defendant. We affirm.

At the time of the underlying incident, Beardsley was seventy-four years old, and suffered from various conditions including chronic obstructive pulmonary disease, chronic renal failure, dementia, diabetes and hypertension. Beardsley and her part-time living assistant Vera Gratkowski went to defendant's grocery store. Gratkowski entered through the doors that led from the exterior to the vestibule of the store, and Beardsley followed her. Gratkowski obtained a shopping cart, and Beardsley continued to follow her through the vestibule toward the store's interior. As Gratkowski approached the store's interior through another set of automatic doors, she heard a loud noise. She then looked behind her and saw Beardsley lying on the floor. Gratkowski stated that she also saw that an edge of a store mat was flipped back, and she believed that Beardsley had tripped over the mat. No one witnessed Beardsley's fall. Beardsley struck her face after she fell, resulting in a large bruise near her left eye. Medical assistance was summoned. Between the time of her fall and her arrival at the hospital, Beardsley lost consciousness. Within a month of her fall, she died in a nursing home, never completely regaining consciousness. Her death certificate listed the immediate cause of death as an intracerebral hemorrhage.

Plaintiff brought negligence and nuisance claims on the basis that Beardsley "tripped and fell on folded up door mats sustaining numerous permanent, painful and disabling injuries which lead to her

subsequent death." Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that no genuine issue of material fact existed concerning negligence and proximate cause because plaintiff's fall was caused by a massive stroke, not by defendant's floor mat. The trial court agreed that no disputed factual issue existed regarding proximate cause and granted defendant's motion.

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition because a genuine issue of material fact existed concerning the proximate cause of Beardsley's death. We review de novo a trial court's grant or denial of a motion for summary disposition. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 320-321; 575 NW2d 324 (1998). The trial court granted defendant's motion pursuant to MCR 2.116(C)(10), which tests a claim's factual support. *Marlo*, *supra* at 320.

> The Michigan Court Rules provide a precise description of the respective burdens that litigants must bear when a motion for summary judgment is filed pursuant to MCR 2.116(C)(10). Specifically, MCR 2.116(G)(4) mandates that the party seeking summary judgment must specify the issues for which it claims there is no genuine factual dispute. Provided the moving party's motion is properly supported, MCR 2.116(G)(4) dictates that the opposing party must then respond with affidavits or other evidentiary materials that show the existence of a genuine issue for trial. If the opposing party does not so respond, the rule provides that "judgment, if appropriate, shall be entered against him or her." [*Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).]

Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion must be filed with the motion. Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact, or the lack of it, must be established by admissible evidence. *Marlo*, *supra* at 321. In reviewing a trial court's decision regarding a motion brought under this subrule, we examine all relevant affidavits, depositions, admissions, and other documentary evidence and construe the evidence in favor of the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Id*. at 320.

To establish a prima facie case of negligence, a plaintiff must prove that (1) the defendant owed the plaintiff a duty; (2) the defendant breached or violated that duty; (3) the plaintiff suffered damages; and (4) the breach was a proximate cause of the damages suffered. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Causation requires proof of both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). Normally the issue of causation is for the jury. If there is no material issue of fact, however, and if reasonable minds could not differ about applying the legal concept of proximate cause[1] to those facts, the trial court may decide the issue itself. *Id*. at 480; *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995).

In support of its motion for summary disposition, defendant provided deposition testimony of Dr. Jeffrey Kornblum, a neurological surgeon who treated Beardsley after her fall. Based on his review of a CT scan of Beardsley's brain, Kornblum opined that Beardsley had suffered a large hemorrhagic

stroke, and that the stroke caused Beardsley to fall to the ground. Kornblum noted that while Beardsley's brain

> had some contusion, which is probably from the fall . . . the contusions were not really sizeable [sic], and in looking at that scan, one has to believe she had a stroke, unfortunately fell. Because she had a stroke, hit her head and got a small contusion, and that scenario looks quite plausible, and that's what I believe happened, in my opinion.

Although plaintiff's counsel pressed Kornblum on the issue whether other possible causes of Beardsley's cranial bleeding existed, Kornblum remained of the opinion that Beardsley had suffered a massive stroke and then fallen to the ground.

> *Plaintiff's counsel*: Assuming that she fell and hit her head, and given her medical condition of being diabetic and hypertension and taking blood-thinning medication, that larger bleed could have been a result of striking her head or her chance would be increased given—
>
> * * *
>
> [C]an you be absolutely certain to rule out that scenario?
>
> *Kornblum*: In my mind it's not an issue. Can I say that with 100 degree certainty, that's impossible.
>
> * * *
>
> Looking at that clot, the fall to me is not an issue. The event came before the fall.
>
> * * *
>
> *Plaintiff's counsel*: [I]s it a possibility that because of her condition of suffering from diabetes and taking blood-thinning medication and being hypertensive, suffering from hypertension, that that bleed could have been a result of the fall?
>
> * * *
>
> *Kornblum*: If I made a differential list of what could happen here, that would be on my list.
>
> * * *
>
> *Plaintiff's counsel*: I believe you did not have difficulty in making a diagnosis, but isn't it true you would have difficulty telling us whether or not this

happened because of the trauma or because of the fall, because of the trauma related to the fall or it happened before the fall?

Kornblum: I look at a scan like that and I see a spontaneous hemorrhage. I don't relate it to the fall. I relate the contusions to the fall, not the primary event.

Plaintiff's counsel: But again, it would be on a list of possibilities?

Kornblum: Every patient's presentation, you could make a list of differential, start at the top in evaluating and treating that, because that would be most probable, and so if we want to talk about the list of possible etiology here, your scenario is on the list, his scenario is on the list, and there are others we haven't talked of that are on the list.

* * *

Defense counsel: Okay. And your testimony is that, to reasonable degree of medical certainty, you believe that Ms. Beardsley suffered from a large stroke and that stroke would have been productive of her fall at the store?

Kornblum: Correct.

* * *

Plaintiff's counsel: And are you saying at this time saying that you can rule this injury out, the big bleed, being associated to trauma?

* * *

Kornblum: In my mind it's ruled out.

* * *

Because the bleed that we're all referring to is a characteristic bleed of a hemorrhagic stroke, not of a fall.

Plaintiff relies heavily on Kornblum's failure to definitively rule out the possibility that Beardsley's fall caused her injuries. The mere fact that Kornblum acknowledged the possibility that plaintiff's theory of the case had occurred, however, does not preclude summary disposition for defendant in this case. Kornblum opined that, to a reasonable degree of medical certainty, Beardsley had suffered a stroke that caused her fall. This testimony was sufficient to support defendant's causation theory. *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997) (The subject of scientific testimony need not be known to a certainty; as long as the basic methodology and principles employed by the expert to reach a conclusion are sound and

create a trustworthy foundation for the conclusion reached, the expert testimony is admissible). Because Kornblum's deposition testimony clearly indicates that Beardsley's fall was induced by a stroke, it became plaintiff's burden to produce some evidence that Beardsley's fall caused her injuries and death. *Skinner*, *supra*. To avoid summary disposition, plaintiff may not simply rely on Kornblum's acknowledgment of the possibility of defendant's theory because Kornblum's opinion regarding causation specifically rejected this theory. After the summary disposition hearing, plaintiff also submitted in support of his theory a letter from Dr. David Wendling, Beardsley's family practitioner. The letter, in its entirety, states as follows:

> To Whom It May Concern,
>
> Mrs. Beardsley died from a head injury that caused an inracranial bleed.
>
> Her major medical problems were chronic obstructive pulmonary disease, chronic renal failure, hypertension and osteoarthritis.

We note that no indication exists that Dr. Wendling examined any relevant medical records in reaching his conclusion, and the basis for his diagnosis remains a mystery. Furthermore, Dr. Wendling's letter is likewise insufficient to establish a genuine issue of material fact because unsworn averments do not satisfy the rule that disputed fact must be established by admissible evidence. *Marlo*, *supra* at 321. In light of the fact that no one observed plaintiff's fall, the testimony offered by plaintiff implicating defendant's floor mat in Beardsley's fall represented mere speculation that Beardsley tripped on the mat's corner. Given plaintiff's complete failure to produce any admissible evidence contradicting Kornblum's testimony concerning the cause of Beardsley's injuries and death, the trial court properly granted defendant summary disposition on the basis that, as a matter of law, there was no genuine issue of material fact regarding proximate cause. *Skinner*, *supra*; *Rogalski*, *supra*.

Plaintiff also contends that the trial court erred in weighing Dr. Kornblum's credibility. It is established law that a court may not weigh credibility in deciding a motion for summary disposition. *Skinner*, *supra* at 161. The trial court remarked that Kornblum's testimony was significant for several reasons. The court first noted that Kornblum would be the only expert witness to testify on the issue of causation. The court then stated that due to Kornblum's position as Beardsley's treating physician, his testimony was given without "the incentive to support one theory and refute another." While this statement seems to indicate that the court assessed Kornblum's credibility, it becomes clear when the order is read in context that the trial court was merely commenting on the lack of any genuine issue of material fact. Because the court's remark was gratuitous once the court noted that plaintiff had produced no evidence to counter Kornblum's testimony, we find no error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[1] Proximate cause, or legal cause, normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Reeves*, *supra* at 479.