

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARGARET MCINTYRE, as Next Friend of  
INDAGO MCINTYRE, a Minor,

UNPUBLISHED  
May17, 2007

Plaintiff-Appellant,

v

SHROYER AUTO PARTS and JOHN  
PELLETIER, JR.,

No. 274283  
Ingham Circuit Court  
LC No. 05-001086-NI

Defendants-Appellees.

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Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff Margaret McIntyre, as next friend of Indago McIntyre, a minor, appeals as of right from the trial court's order granting summary disposition for defendants Shroyer Auto Parts and John Pelletier, Jr. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Indago McIntyre (DOB 8-31-96) accompanied several family members to Shroyer Auto Parts. An employee took the family to a back lot to search for a specific part. Pelletier, a Shroyer employee, drove a van to the back lot to give a radio to the employee who was assisting Indago's family. Pelletier backed up the van to leave the area, and in doing so backed over Indago, who had been playing in a mud puddle behind the van. Indago was taken by ambulance to the hospital, where she was diagnosed with a left pneumothorax, bilateral pulmonary contusions, and multiple abrasions. Indago was hospitalized for two days.

Plaintiff filed suit alleging that defendants' negligence resulted in Indago's injuries. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), asserting both that plaintiff could not establish that Indago's physical difficulties were proximately caused by the accident, and that Indago's injuries did not constitute a serious impairment of body function.

In response, plaintiff argued that an issue of fact existed as to whether Indago's injuries were proximately caused by the accident. Plaintiff asserted that the emergency room report demonstrated that Indago had no breathing problems when she was admitted to the hospital, and showed that she suffered various injuries, including a left pneumothorax, bilateral pulmonary contusions, multiple abrasions, and multiple contusions as a result of the accident. In an affidavit

submitted pursuant to MCR 2.116(H), plaintiff's counsel stated that plaintiff could not provide documentary evidence to support her assertion that Indago's injuries were proximately caused by the accident because Dr. Clos, Indago's treating physician, refused to provide an affidavit or to testify by deposition.

The trial court granted defendants' motion for summary disposition. Plaintiff's counsel conceded that Dr. Clos had not yet provided an affidavit or deposition testimony regarding causation, but contended that Dr. Clos would testify at trial that the sort of trauma Indago suffered in the accident, i.e., a crush-type injury to the chest, could cause asthma. The trial court granted the motion on the ground that plaintiff failed to demonstrate that an issue of fact existed regarding causation.

Pursuant to MCR 2.116(C)(10), summary disposition of all or part of a claim may be granted when "[e]xcept as to the amount of damages, 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." The moving party must identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b), (G)(4); *AFSCME Mich Council 25 v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). The party opposing the motion then has the burden of showing by documentary evidence that a genuine issue of material fact exists. *Id.* When the burden of proof at trial would rest on the nonmoving party, the nonmoving party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that a genuine issue of fact exists for trial. *Id.* We review the trial court's decision on a motion for summary disposition de novo. *Id.*

We affirm the trial court's order granting defendants' motion for summary disposition. In the complaint, plaintiff asserted that Indago's "physical problems and pain" were proximately caused by the injuries she sustained in the accident. In support of their motion for summary disposition, defendants provided documentary evidence that Indago had allergies (apparently to bees), gastroesophageal reflux, and asthma, that Dr. Clos's records attributed the asthma to Indago's exposure to second-hand smoke in the household, and that Indago's condition was exacerbated by the fact that she did not take her medication as directed. Defendants carried their initial burden of supporting their position by documentary evidence. MCR 2.116(G)(3)(b), (G)(4). Thereafter, plaintiff was required to demonstrate by documentary evidence that a genuine issue of fact existed for trial. *AFSCME Council 25, supra*. Plaintiff did not do so. Plaintiff asserted that the requisite factual support would be offered at trial; however, a mere promise to offer factual support at trial is insufficient to establish that a genuine issue of fact exists. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 305; 701 NW2d 756 (2005).

Plaintiff's counsel submitted an affidavit in which he stated that Dr. Clos had thus far refused to provide an affidavit or deposition testimony. Counsel stated that he believed that if the trial court ordered Dr. Clos to testify by deposition, the physician would provide testimony that established that Indago's asthma and gastroesophageal reflux problems were caused by the accident. Counsel also stated that Dr. Clos's assistant indicated that Dr. Clos would testify that Indago's asthma and gastroesophageal reflux problems, if not caused by the accident, were exacerbated by the accident. This affidavit did not comply with MCR 2.116(H)(1)(b) in that it

did not state why counsel believed that Dr. Clos would testify as indicated. The trial court properly granted defendants' motion.

Affirmed.

/s/ Jessica R. Cooper  
/s/ William B. Murphy  
/s/ Janet T. Neff