STATE OF MICHIGAN

COURT OF APPEALS

INVESTMENT VENTURES, INC., Plaintiff-Appellant, v HERTZ, SCHRAM & SARETSKY, Defendant-Appellee.	UNPUBLISHED July 10, 2007 No. 274933 Oakland Circuit Court LC No. 05-527322-NM

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Investment Ventures, Inc. appeals as of right the trial court's summary disposition in Hertz Schram's favor. This action concerns alleged legal malpractice in drafting a land contract mortgage. Because we hold that Investment Ventures failed to raise a genuine issue of material fact regarding causation-in-fact, we affirm.

I

A

The underlying case was a dispute over real property located in Northville Township. Investment Ventures purchased the property on land contract. Years later, Investment Ventures decided to sell the property, and, in February 2000, hired the Hertz Schram law firm to assist . Major Tooley's Development, Inc. emerged as a buyer. Hertz Schram, through one of its lawyers, prepared the transaction documents.

On August 10, 2000, a quit claim deed to the property was executed by Investment Ventures to Major Tooley's Development. On August 15, 2000, Major Tooley's Development executed two promissory notes.

The key document in this appeal was also allegedly executed on August 15, 2000. The "assignment of purchaser's interest in land contract as security and mortgage" (a.k.a., the land contract mortgage) states that it "is *made this 15th day of March, 2000*, by and between Major Tooley's Development . . . and Investment Ventures . . . ." (Emphasis added.) However, the notarization is dated August 15, 2000. On October 10, 2000, the quit claim deed and the land contract mortgage were recorded.

On or about September 10, 2001, counsel for Investment Ventures obtained a title search certificate for the property. The certificate reflected the land contract mortgage "dated March 15, 2000 and recorded October 10, 2000 . . . ." In October 2001, Equity Funding (which was considering making a loan to Major Tooley's) obtained a title insurance commitment for the property. This title insurance commitment does not mention the land contract mortgage.

In November 2001, Investment Ventures began nonjudicial foreclosure by advertisement against Major Tooley's Development. On January 10, 2002, the sheriff's sale occurred at 1:00 p.m. The high bidder was Investment Ventures, which obtained a sheriff's deed.

Also on January 10, 2002, Major Tooley's, Inc., granted a mortgage on the property to Equity Funding in exchange for a loan. On January 25, 2002, Investment Ventures' sheriff's deed was recorded. On January 31, 2002, Equity Funding's mortgage from Major Tooley's was recorded.

Major Tooley's promptly defaulted on the loan from Equity Funding. In February 2002, Equity Funding began nonjudicial foreclosure by publication. In March 2002, the sheriff's sale was held foreclosing the mortgage held by Equity Funding. Equity Funding was the high bidder. In May 2002, the sheriff's deed to Equity Funding was recorded.

B

In or around June 2002, Equity Funding filed a notice lis pendens against the property, and filed the underlying litigation against Investment Ventures and Major Tooley's. Essentially, Equity Funding's action was an action to quiet title. Equity Funding alleged that Investment Ventures' land contract mortgage was extinguished by the quit claim deed. Equity Funding pleaded, alternatively, that the mortgage given to Equity Funding was a purchase money mortgage with priority over any interest of Investment Ventures.

Equity Funding moved for summary disposition, but the trial court granted summary disposition to Investment Ventures, rejecting the extinguishment argument. This Court affirmed. *Equity Funding, Inc v Investment Ventures, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2004 (Docket No. 244540). While not considering the extinguishment argument, we rejected the purchase money mortgage argument, stating: "Because plaintiff's mortgage is not a purchase money mortgage, it does not have priority over defendant's land contract mortgage because defendant's land contract mortgage was recorded first." *Id*. at 1. The Supreme Court denied leave to appeal. *Equity Funding, Inc v Investment Ventures, Inc*, 472 Mich 937; 698 NW2d 391 (2005).

C

On September 16, 2005, Investment Ventures sued Hertz Schram, alleging that as a direct and proximate result of Hertz Schram's dating error in the land contract mortgage, (1) its security interest was alleged by Equity Funding to have been extinguished, (2) it was required to litigate, during which time it was unable to sell or rent the property, (3) it later sold the property at a price lower than could have been obtained earlier, and (4) it sustained attorney fees and costs.

Hertz Schram moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that (1) plaintiff cannot raise a genuine issue of fact regarding causation, citing, inter alia, *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997), and (2) costs of litigation are not recoverable in a legal malpractice action absent proof of a heightened degree of wrongful conduct. In response, Investment Ventures argued, inter alia, that (1) proximate causation requires only a logical connection between the breach of duty and the damages, and (2) it is entitled to seek the damages proximately caused by the clouded title caused by Villarruel's error.

The trial court granted summary disposition to Hertz Schram under MCR 2.116(C)(8) and (10). The trial court held that the dating error was neither a cause in fact nor a proximate cause of the harm at issue.

II

"Summary disposition under either MCR 2.116(C)(8) or (C)(10) presents an issue of law for [the Court's] determination and, thus, [the Court] review[s] a trial court's ruling on a motion for summary disposition de novo." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004) (internal quotation marks and citation omitted). Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10). *Krass v Tri-County Security, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). But such materials "shall only be considered to the extent that [they] would be admissible as evidence . . . ." MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Campbell v Kovich*, 273 Mich App 227, 230; 731 NW2d 112 (2006).

III

Investment Ventures argues that the trial court erred in granting summary disposition to Hertz Schram, because it erroneously concluded that Hertz Schram's negligence did not proximately cause the harm at issue. We disagree.

The elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship (i.e., duty), (2) negligence in the legal representation of the plaintiff (i.e., breach of duty), (3) that the alleged injury was a natural and direct result of the negligence (i.e., proximate causation), and (4) the fact and the extent of the injury. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586, 513 NW2d 773 (1994); *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006). While here Hertz Schram admits that there was an attorney-client relationship, and that there was an error in dating the land contract mortgage, Hertz Schram contends that causation is lacking. We agree with Hertz Schram that Investment Ventures' theory of causation savors too much of speculation and conjecture.

In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. *Coble v Green*, 271 Mich App 382, 387; 722 NW2d 898 (2006); *Pontiac Sch Dist*, *supra* at 616-617, 621-622. To establish causation in fact, the plaintiff must show that but-for the malpractice, the injury would not have occurred. *Charles Reinhart Co*, *supra* at 592; *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004); *Colbert v Conybeare Law Office*, 239 Mich App 608; 609 NW2d 208 (2000).

"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); see also *Manzo*, *supra* at 712. Cause in fact requires a showing that but-for the negligent conduct, the injury would not have occurred. *Wiley*, *supra* at 496; see also *Manzo*, *supra* at 712. Legal or proximate cause normally involves examining the foreseeability of consequences, *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004); *Teodorescu v Bushnell, Gage, Reizen & Byington* (*On Remand*), 201 Mich App 260, 266; 506 NW2d 275 (1993), and whether the defendant should be held legally responsible for the consequences, *Skinner v Square D Co*, 445 Mich 153, 163; 174; 516 NW2d 475 (1994). A plaintiff must adequately establish cause in fact in order for proximate cause to become a relevant issue. *Helmus v Michigan Dep't of Transportation*, 238 Mich App 250, 255-256; 604 NW2d 793 (1999).

Michigan law prohibits speculation in proving factual causation. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 524-525; 687 NW2d 143 (2004); *Colbert*, *supra* at 215. "Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences, not mere speculation." *Wiley*, *supra* at 496. "An explanation that is consistent with known facts but not deducible from them is impermissible conjecture." *Id*. To establish cause in fact, a plaintiff must present *substantial evidence* from which a jury could conclude that, *more likely than not*, the plaintiff's injuries would not have occurred but for the defendant's conduct. *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997).

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* at 87-88 (internal quotation marks, brackets and footnotes omitted; 2nd, 3rd and 4th italics added).[1]]

Proof of causation-in-fact must "'amount to a reasonable likelihood . . . rather than a possibility. The evidence need not negate all other possible causes, but . . . must exclude other reasonable hypotheses with a fair amount of certainty.'" *Skinner*, *supra* at 166 (citation omitted). In other words, "[t]here may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only." *Id*. at 164.

Causation-in-fact is sometimes a question of fact. In *Winkler v Carey*, 474 Mich 1118; 712 NW2d 451 (2006), a legal malpractice case, our Supreme Court reversed this Court's decision which affirmed (based on a lack of factual causation) the trial court's grant of summary disposition to the defendant. The Supreme Court adopted the dissenting opinion of Judge O'Connell. Judge O'Connell argued that the plaintiff paid the defendant "to draft a binding antenuptial agreement, and the agreement later failed because it lacked a basic and fundamental component." *Winkler v Carey*, unpublished opinion of the Court of Appeals, issued December 1, 2005 (Docket No. 255193), at 3 (O'Connell, J., dissenting). Judge O'Connell argued that "Attorneys are legal professionals who are hired to forge binding agreements and are best equipped to detect any fatal flaws." *Id*. Judge O'Connell concluded that "plaintiff presented a material question of fact whether the agreement failed because defendant negligently handled the legal task he accepted. MCR 2.116(C)(10). Therefore, the factually sensitive issue of causation should go to a jury . . . ." *Id*. at 3-4. Accordingly, *Winkler* stands for the proposition that the causation question can be a question of fact for the jury. But when the facts bearing upon causation are not in dispute, and reasonable persons could not differ about the application of legal concepts of causation to those facts, the court determines the issue. See *Paddock v Tuscola & Saginaw Bay R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997).

Here, the facts bearing upon causation in fact are not substantially in dispute. The injury consists of the Equity Funding lawsuit (including the costs and fees involved, and the resulting alleged temporary inability to rent or sell the property). Thus, in order to establish causation-in-fact, Investment Ventures must show that but-for the error in the date on the land contract mortgage, Equity Funding would not have sued Investment Ventures.

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[1] Although *Ensink*, *Wiley*, and *Craig* are from the medical malpractice context, these causation principles are not restricted to medical malpractice claims. See, e.g., *Skinner*, *supra* at 164-165, 174 (product liability); *Colbert*, *supra* at 215 (legal malpractice). In *Karbel*, *supra* at 98, this Court discussed the broader application of the anti-speculation rule for proof of causation, stating that it was not restricted to negligence claims, and that "we cannot permit the jury to guess." (Internal brackets, quotation marks and citations omitted.) Indeed, the anti-speculation rule in proving causation applies even outside the tort context. *McManamon v Redford Charter Twp*, 273 Mich App 131, 139; 730 NW2d 757 (2006) (anti-speculation rule applied to claim under the Employee Right to Know Act).

Equity Funding based the underlying lawsuit on two theories: (1) that Investment Ventures' land contract mortgage was extinguished by the subsequent quit claim deed, and (2) that Equity Funding's mortgage had priority because it was a purchase-money mortgage. Only the extinguishment theory was based on the error in the dating of the land contract mortgage. The purchase-money priority theory was independent of the dating error. Therefore, *even if* Hertz Schram *had not erred in dating the land contract mortgage, Equity Funding could still have brought its action to quiet title based on its purchase-money mortgage theory*. Thus, it cannot be said that but-for the dating error, the underlying lawsuit would not have been possible.

We conclude that Investment Ventures' position is mere speculation, as it has presented no evidence that absent the dating error, Equity Funding would not have brought its action. For instance, Investment Ventures presented no affidavit or deposition testimony from an Equity Funding representative stating that, in the absence of the ability to argue the extinguishment theory, Equity Funding would not have still filed its lis pendens, and its quiet title action, based only on the purchase-money mortgage theory.

We acknowledge, as Investment Ventures argues, that it is possible that Equity Funding would not have brought its underlying action in the absence of the dating error. But a possible or even plausible causation theory is not enough. *Craig*, *supra* at 87-88; *Skinner*, *supra* at 164. A *chance* that the harm would not have occurred is not enough. *Weymers*, *supra* at 647-648. That Equity Funding might not have brought its action, without the dating error, is consistent with the evidence; but it is not necessarily deducible from it, and therefore, is not enough to raise a genuine issue of material fact. *Wiley*, *supra* at 496. To allow Investment Ventures' theory of factual causation to go to a jury, would essentially be inviting the jury to guess, which is not allowed. *Karbel*, *supra* at 98.

In sum, although a good argument could be made that under *Winkler*, there is a question of fact regarding whether Hertz Schram's negligence in fact caused the harms complained-of, we conclude that Investment Ventures has presented insufficient evidence that but-for the dating error in the mortgage, Equity Funding would not have brought its action. Although it is plausible that Equity Funding would not have brought the underlying action in the absence of the dating error, the evidence is "without selective application" to that particular hypothetical, and therefore, Investment Ventures fails to raise a genuine issue of material fact. *Skinner*, *supra* at 164.

Next, Investment Ventures argues that the trial court erroneously concluded that Hertz Schram's negligence was not a proximate, or legal, cause of the harm at issue. In light of our conclusion regarding causation-in-fact, this issue is moot. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992). Investment Ventures also argues that the trial court erroneously concluded that attorney fees expended in the underlying litigation are not recoverable as an element of damages. This issue is also moot. *Id.* at 104.

IV

The trial court correctly concluded that Investment Ventures failed to raise a genuine issue of material fact in support of its theory that Hertz Schram's error in dating the land contract mortgage was a cause-in-fact of the injury. Therefore, the trial court correctly granted summary disposition to Hertz Schram under MCR 2.116(C)(10).

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder