COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

KEVIN DUNFORD, ET AL.	:	
Plaintiffs	:	**CASE NO. 2017 CVH 01228**
vs.	:	**Judge McBride**
	:	**DECISION/ENTRY**
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ET AL.	:	
Defendants	:	

The Moore Law Firm, Daniel N. Moore, Donald C. Moore, and Kelly W. Thye, counsel for the plaintiffs Kevin Dunford and Joshua Dunford, 1060 Nimitzview Drive, Suite 200, Cincinnati, Ohio 45230.

Garver, Shearer, Nordstrom, PSC, John E. Garvey, III and Jason E. Abeln, counsel for the defendant Traa Dameron, 2400 Commerce Center Drive, Suite 210, Fort Mitchell, Kentucky 41017.

Gallagher Sharp, John T. Murphy and Rema A. Ina, counsel for the defendant Travelers Property Casualty Company of America, 1501 Euclid Avenue, 6th Floor, Cleveland, Ohio 44115.

This cause is before the court for consideration of the motions for summary judgment filed by the plaintiffs Kevin Dunford and Joshua Dunford on November 14, 2018 against the defendants Traa Dameron and Travelers Property Casualty Company. Dameron initially requested an oral hearing on the motions but later withdrew that request. The court took the motions under advisement on December 9, 2018.

Upon consideration of the motions, the written arguments of counsel, the record of the proceedings, the evidence submitted, and the applicable law, the court renders this written decision.

UNDISPUTED FACTS

The plaintiffs are Kevin Dunford and his minor son Joshua.[1] On October 10, 2015, Kevin Dunford was driving to his son's baseball game.[2] The defendant Traa Dameron rear ended the plaintiff while he was stopped at a red light.[3] EMS and police came to the scene of the accident.[4] EMS examined Dunford and told him to use ibuprofen and ice when he returned home.[5] Dunford did not want to go to the ER at the time of the accident.[6] Before the accident, Dunford did not have back pain or problems.[7]

For the next 20 days after the accident, Dunford continued to work.[8] He went for a routine physical on October 28, 2015.[9] Dunford did not mention that he was in an accident or that he had any pain.[10] On November 2nd, Dunford returned to the same practice with complaints of neck pain, lower back pain, and thumb pain.[11] An MRI was performed on Dunford's neck and spine, which showed that he had degenerative disc disease at L4-5 and L5-S1.[12]

Dunford had physical therapy for his back and neck, which he found to be unhelpful and stopped in January 2016.[13] Dunford began radiofrequency treatments and received steroid injections in February 2016, which helped his pain to a certain degree.[14]

In October 2016, Dunford also began treating for shooting pains in his elbows.[15] He began wearing compression sleeves for his elbows and still suffers from elbow pain today.[16]

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[1] K. Dunford Dep., pg. 9.
[2] K. Dunford Dep., pgs. 29, 31.
[3] K. Dunford Dep., pg. 30.
[4] K. Dunford Dep., pg. 31.
[5] K. Dunford Dep., pg. 31.
[6] K. Dunford Dep., pg. 38.
[7] K. Dunford Dep., pgs. 80-81.
[8] K. Dunford Dep., pg. 14.
[9] K. Dunford Dep., pg. 38.
[10] K. Dunford Dep., pg. 40.
[11] K. Dunford Dep., pg. 41.
[12] K. Dunford Dep., pgs. 43-44.
[13] K. Dunford Dep., pg. 44.
[14] K. Dunford Dep., pg. 47.
[15] K. Dunford Dep., pg. 49.
[16] K. Dunford Dep., pg. 50.

Dunford underwent a back surgery in March 2017.[17] However, the surgery did not improve his pain.[18] Dunford therefore underwent a second back surgery in February 2018.[19] The second surgery improved his mobility, but he still suffers from back pain.[20] Dunford still suffers from neck pain as well.[21]

At the time of the accident, Dunford worked for Fire King Security.[22] When he was involved in the accident with Dameron, he was driving a company vehicle.[23] Dunford avers that he was insured with Travelers Property Casualty Company of America (hereinafter referred to as "Travelers") through his employer at the time of the crash.[24] He claims that the policy included $1,000,000 in underinsured coverage.[25] He also avers that Dameron had $300,000 in insurance coverage available to compensate for his damages.[26] Presently, Dunford claims to have over $80,000 in medical bills and $50,000 in lost wages as a result of the accident.[27] Travelers has not made an offer to resolve this case with Dunford.[28]

PROCEDURAL BACKGROUND

On September 28, 2017, the plaintiffs filed a complaint against Dameron and against Travelers. The complaint sets forth five causes of action. The plaintiffs filed a claim for negligence against Dameron. The claims filed against Travelers include claims for breach of contract, failure to act in good faith/bad faith/breach of fiduciary duties, and

[17] K. Dunford Dep., pg. 15.
[18] K. Dunford Dep., pg. 52.
[19] K. Dunford Dep., pg. 17.
[20] K. Dunford Dep., pg. 53.
[21] K. Dunford Dep., pg. 48.
[22] K. Dunford Dep., pg. 11.
[23] K. Dunford Dep., pg. 32.
[24] K. Dunford Aff., ¶ 2.
[25] K. Dunford Aff., ¶ 2.
[26] K. Dunford Aff., ¶ 3.
[27] K. Dunford Aff., ¶ 5.
[28] K. Dunford Aff., ¶ 6.

underinsured/uninsured motorist coverage. Kevin Dunford also has a claim for loss of consortium.

On February 20, 2018, the court issued a decision bifurcating the plaintiffs' claims for bad faith and punitive damages and staying discovery on those claims. On November 13th, the court filed an agreed entry permitting the plaintiffs leave to file an amended complaint. On November 15th, the plaintiffs filed an amended complaint that included the same claims as in the original complaint and added subrogation claims against Humana Insurance Company, Cigna Health and Life Insurance Company, and Community Insurance Company. Since the filing of the amended complaint, there are now several cross claims and counterclaims that are not at issue in the present motions.

On November 14, 2018, the plaintiffs filed two motions for summary judgment, one against Dameron for liability on their negligence claim, and one against Travelers for liability on their breach of contract and uninsured/underinsured motorists claim. Travelers filed a response in opposition on November 27th. On November 29th, Dameron filed a response and a request for Civ.R. 56(F) relief in the event the court was going to grant summary judgment. The plaintiffs filed Exhibits 1 through 7 to Dunford's deposition on November 30th, followed by their replies in support of their motions on December 14th.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[29]

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[29] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

The court must view the evidence in a light most favorable to the nonmoving party.[30] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[31] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[32]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[33] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[34]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[35] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[36] "To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment."[37] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[38]

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[30] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[31] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[32] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[33] Id. at 251-52.
[34] Id. at 250.
[35] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[36] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[37] *Heard v. Dayton View Commons Homes*, 2d Dist. No. 27706, 2018-Ohio-606, 106 N.E.3d 327, ¶ 7, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).
[38] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[39] The duty of the nonmoving party is more than that of resisting the motion's allegations.[40] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[41] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[42] It may not rely on the pleadings or unsupported allegations.[43]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[44] The trial court maintains the sound discretion to admit or exclude relevant evidence.[45] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[46]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[47] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does

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[39] *Dresher*, 75 Ohio St.3d at 293.
[40] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[41] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[42] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[43] Id.
[44] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[45] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[46] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[47] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

not depend on information or hearsay."[48] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[49] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[50]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[51] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[52]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[53] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[54]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[55] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[56]

PRELIMINARY EVIDENTIARY ISSUES

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[48] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[49] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[50] Id.
[51] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[52] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[53] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[54] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Famo*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[55] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[56] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

There are two documents that the plaintiffs submitted for summary judgment purposes that the court needs to address, for they cannot be properly considered on summary judgment.

First, as discussed, under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." In support of their motion for summary judgment against Travelers, the plaintiff submitted what appears to be the insurance policy that his company had with Travelers as Plaintiffs' Exhibit 4. As mentioned, if a document falls outside the enumerated categories in Civ.R. 56(C), such as this policy, the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[57] However, as Travelers alludes to in its reply, that did not occur here. As such, the court is unable to consider the plaintiffs' Exhibit 4 for summary judgment purposes.[58]

Second, with regard to their reply in support of their motion for summary judgment against Dameron, the plaintiffs submitted a document from the Milford Community Fire Department, dated October 10, 2016, which is Plaintiffs' Exhibit 2. The plaintiffs did not submit Exhibit 4 with their summary judgment motion. Exhibit 2 appears to have been an exhibit to Kevin Dunford's deposition, and the plaintiffs did file the deposition at the time they filed their summary judgment motion. However, the plaintiffs did not file the exhibits with the deposition. Therefore, the first time the plaintiffs submitted Exhibit 2 was November 30th, which was after they filed their motion and after the defendants' filed their responses.

When ruling on a motion for summary judgment, a trial court is limited to reviewing the pleadings and evidentiary materials submitted in support of and in opposition to the motion.[59]

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[57] *Martin*, 70 Ohio App.3d at 89.

[58] The plaintiffs also submitted the policy declarations for what appears to have been the vehicle Dameron drove, although he is not the named insured on the policy. *See* Pls. Ex. 3. However, Travelers has not objected to the court's consideration of this document.

[59] *Pruszynski v. Reeves*, 117 Ohio St.3d 92, 2008-Ohio-510, 881 N.E.2d 1230, ¶ 10 (2008).

Further, courts do not consider untimely filed summary judgment evidence.[60] ."[61] In its Civil Pre-Trial Order, the court required as follows: "Any evidence to be submitted by the movant must be served and filed with the motion and no additional evidence may be submitted by the movant after the time of filing of the motion without the agreement of all opposing counsel."[62] Thus, the plaintiffs filed Exhibit 2 untimely under the Civil Rules and the court's scheduling order, and the court will not consider it for summary judgment purposes.

LEGAL ANALYSIS

I. PLAINTIFFS' SUMMARY JUDGMENT MOTION AGAINST DAMERON

At common law, it is axiomatic that to establish a negligence claim a plaintiff "must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured."[63] Dameron admits liability for the accident, but contests proximate cause.[64]

As to the third element of negligence, proximate cause, "* * * the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act."[65] "In order to

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[60] *See* Burton *v. Triplett*, 10th Dist. Franklin No. 01AP-357, 2002-Ohio-580 at *4 (Feb. 14, 2002) (affirming the trial court's decision not to consider belatedly filed summary judgment materials).
[61] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau*, 2011-Ohio-3904 at ¶ 7; *State ex rel. Baran v. Fuerst*, 65 Ohio St.3d 413, 416, 604 N.E.2d 750 (1992) (finding it was not error for the trial court not to consider untimely filed evidence).
[62] Civil Pre-Trial Order, pg., 4 (Apr. 5, 2018).
[63] *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 10, citing *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21. *See McLoughlin v. Williams*, 12th Dist. Clermont No. CA2015-02-020, 2015-Ohio-3287, ¶ 8, citing *Johnston v. Filson*, 12th Dist. Clinton No. CA2014-04-007, 2014-Ohio-4758, ¶ 9 (the plaintiff "must demonstrate a duty owed by the defendant to the plaintiff, a breach of that duty, and that the plaintiff's injury proximately resulted from the defendant's breach of duty.").
[64] Dameron's Resp., pg. 2.
[65] *Jeffers*, 43 Ohio St.3d at 143, quoting *Ross v. Nutt*, 177 Ohio St. 113, 114, 203 N.E.2d 118, 120 (1964).

establish proximate cause, there must be evidence that a direct or proximate causal relationship existed between the accident and the injury or disability complained of."[66] "The issue of proximate cause is not open to speculation; as a matter of law, conjecture as to whether the breach of duty caused the particular damage is not sufficient."[67]

"Except as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and *must* be established by the opinion of medical witnesses competent to express such opinion."[68] This is especially true of neck and back injuries "because they are injuries that are 'internal and elusive, and are not sufficiently observable, understandable, and comprehensible' to be matters of common knowledge."[69]

In examining the case at bar, the injuries at issue include back and neck injuries. The record reflects that Dunford had not previously injured these areas or had pain in them, but he also suffers from degenerative disk disease. Given the nature of these injuries and the defendant's preexisting condition, an expert opinion is needed to establish proximate cause. Because there is no such opinion in the summary judgment record, the court concludes that the plaintiffs have not satisfied their initial burden of showing that they are entitled to judgment as a matter of law.

II. PLAINTIFFS' SUMMARY JUDGMENT MOTION AGAINST TRAVELERS

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[66] *Jacobs v. Gateway Property Mgt.*, 8th Dist. Cuyahoga No. 84973, 2005-Ohio-1983, ¶ 12, citing *Buckeye Union Ins. Co. v. Vassar*, 1st Dist. Hamilton No. C–800007 (Feb. 18, 1981).

[67] *Heard*, 2018-Ohio-606 at ¶ 12, citing *Vicek v. Brogee*, 2d Dist. Montgomery No. 25499, 2013-Ohio-4250, ¶ 24.

[68] (Emphasis original.) *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶ 16 (2007), quoting *Darnell v. Eastman*, 23 Ohio St.2d 13, 261 N.E.2d 114 (1970). *See Heard*, 2018-Ohio-606 at ¶ 13, quoting *Lane v. Bur. of Workers' Comp.*, 2d Dist. Montgomery No. 24618, 2012-Ohio-209, ¶ 60 (holding same).

[69] *Heard*, 2018-Ohio-606 at ¶ 13, quoting *Lane*, 2012-Ohio-209 at ¶ 60. *See Wright v. City of Columbus*, 10th Dist. Franklin No. 05AP-432, 2006-Ohio-759, ¶ 19; *Jacobs*, 2005-Ohio-1983 at ¶ 13 (finding that it was not error for the trial court to grant summary judgment for the defendant on a plaintiff's negligence claim where the plaintiff suffered a slip and fall and injured his back, but failed to provide expert testimony, noting that such evidence was "especially crucial" to establishing a direct and proximate relationship between the fall and injury because the plaintiff had a preexisting back injury).

To prevail on a breach of contract claim, a plaintiff must prove: "(1) the existence of a contract, (2) that the plaintiff fulfilled its contractual obligations, (3) that the defendant failed to fulfill its contractual obligations, and (4) that the plaintiff incurred damages as a result."[70] A plaintiff proves that a party has breached a contract by showing the party "did not perform one or more of the terms of the contract."[71]

"An insurer's obligations to its insured are governed by the coverage stated in the policy."[72] That insurance policy is a contract.[73] The construction of contracts is a matter of law.[74] When undertaking contractual interpretation, the court's role is "to give effect to the intent of the parties to the agreement."[75] Courts examine "the insurance contract as a whole and presume that the intent of the parties is reflected in the language of the policy."[76] Unless a different meaning "is clearly apparent from the contents of the policy," the court relies on the plain and ordinary meaning of the policy's language.[77] When the insurance policy's language is clear, the "court may look no further than the writing itself to find the intent of the parties."[78] In such a case, the court "cannot create a new contract by finding an intent not expressed in the clear and

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[70] *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 25, citing *S & G Invests., L.L.C. v. United Cos. L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12.
[71] *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 117 Ohio App.3d 7, 2008-Ohio-148, 893 N.E.2d 855, ¶ 24 (10th Dist.), quoting *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 771 N.E.2d 874 (10th Dist. 2002).
[72] *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 7, citing *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 36, 665 N.E.2d 1115 (1996).
[73] *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 9. *See Cox v. Grubb*, 12th Dist. Madison No. CA2010-09-020, 2011-Ohio-1635, ¶ 15, citing *Westfield*, 2003-Ohio-5849 at ¶ 9 ("An insurance policy is a contract.").
[74] *Nationwide Ins. Co. v. Johnson*, 84 Ohio App.3d 106, 108, 616 N.E.2d 525 (12th Dist. 1992), citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 245-246, 374 N.E.2d 146 (1978).
[75] *Westfield Ins. Co.*, 2003-Ohio-1829 at ¶ 11, citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). *See Kelly v. Med Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987), citing *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974) ("The purpose of contract construction is to effectuate the intent of the parties.").
[76] *Westfield Ins. Co.*, 2003-Ohio-1829 at ¶ 11, citing *Kelly*, 31 Ohio St.3d at paragraph one of the syllabus. *See Cox*, 2011-Ohio-1635 at ¶ 15, citing *Kelly*, 31 Ohio St.3d at paragraph one of the syllabus ("An insurance contract must be examined as a whole and presume that the intent of the parties is reflected in the language used in the policy.").
[77] *Westfield Ins. Co.*, 2003-Ohio-1829 at ¶ 11, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus.
[78] *Westfield Ins. Co.*, 2003-Ohio-1829 at ¶ 11, citing *Alexander*, 53 Ohio St.2d at paragraph two of the syllabus.

unambiguous language of the contract."[79] Nor can the court "alter the clear and unambiguous language" in order to reach a "particular result that was not intended by the parties to the contract."[80]

In the present case, the insurance contract with Travelers is not part of the summary judgment record, and it had not been submitted with the original or amended complaints. The plaintiffs submitted Exhibit 4 with their motion for summary judgment against Travelers, which appears to be the Travelers insurance policy. The court cannot consider it, as explained above.

Even so, the plaintiffs have argued that Kevin Dunford's affidavit testimony is sufficient evidence for the court to conclude that Travelers breached its insurance contract and Dunford is entitled to coverage. However, the court simply cannot grant summary judgment in favor of the plaintiffs without having examined and considered the contract on which the plaintiffs' claims are based. The case law above illustrates the central role the contractual language occupies in a breach of insurance contract claim. As such, summary judgment cannot be granted in favor of the plaintiffs.

Moreover, the plaintiffs' claims against Travelers also presuppose that Dameron proximately caused Dunford's injuries. As discussed in the prior section though, the court is not able to draw that conclusion based on the record before it. This too prevents summary judgment in favor of the plaintiffs. Accordingly, the court concludes that the plaintiffs have not satisfied their initial burden of showing that they are entitled to judgment as a matter of law on their claims against Travelers.

CONCLUSION

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[79] *Hamilton*, 86 Ohio St.3d at 273.
[80] *Cox*, 2011-Ohio-1635 at ¶ 15, citing *Gomolka v. State Automobile Ins. Co.*, 70 Ohio St.2d 166, 168, 436 N.E.2d 1347 (1982).

For the foregoing reasons, the court finds that the plaintiffs' motion for summary judgment as to Travelers is not well-taken and is hereby denied.

The court further finds that the plaintiffs' summary judgment motion as to Dameron is granted in part and is denied in part. It is granted on the issue of duty and breach for negligence but denied as to proximate cause.

IT IS SO ORDERED.

DATED: 2-7-19

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of this Decision/Entry were sent on this 7th day of February 2019 by e-mail to Daniel N. Moore, Attorney for the Plaintiff, at danmoore@moorelaw.com, to John T. Murphy, at jmurphy@gallaghersharp.com, and Rema A. Ina, at rina@gallaghersharp.com, Attorneys for the Defendant Travelers Property Casualty Company, to John J. Garvey, Attorney for the Defendant Traa Dameron, at jgarvey@garveyshearer.com, and to Lance K. Oliver, Attorney for the Defendant Community Insurance Company, at lanceo@russelloliverlaw.com.

Judicial Assistant to Judge McBride