STATE OF MICHIGAN

COURT OF APPEALS

STEPHANIE HELMAN and STEVEN HELMAN,

Plaintiffs-Appellants/
Cross-Appellees,

v

UNIVERSITY OF MICHIGAN BOARD OF REGENTS,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
March 10, 1998

No. 194026
Court of Claims
LC No. 92-014092-CM

Before: Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiff, Stephanie Helman, became a paraplegic following a thoracic laminectomy performed at defendant's neurosurgical facility. She subsequently filed suit alleging medical malpractice against defendant's staff for improper post-operative care[1]. Defendant prevailed at trial, obtaining a judgment of no cause of action. The trial court found that although there was malpractice by one of defendant's nurses, the malpractice was not the proximate cause of the permanent paralysis. Plaintiff appeals as of right from the judgment, claiming that the trial court erred by failing to apply the "lost opportunity" doctrine to the case and by not finding that the malpractice was a proximate cause of her injuries. Defendant cross-appeals from the trial court's judgment, claiming that the trial court erred by finding malpractice and by considering evidence of the nursing care plan. We affirm.

Plaintiffs first argued that the trial court erred by refusing to apply the "lost opportunity" doctrine announced in *Weymers v Khera*, 210 Mich App 231; 533 NW2d 334 (1995). This argument, as plaintiffs conceded at oral argument, has no merit. In *Falcon v Memorial Hospital*, 436 Mich 443; 462 NW2d 44 (1990), the Court recognized that in a wrongful death case, a party could recover for the loss of an opportunity to survive. In *Weymers, supra* at 236-237, this Court expanded the "lost opportunity" doctrine to non-death cases, holding that a medical malpractice plaintiff could recover for the loss of an opportunity to avoid lesser physical harm. This Court's decision in *Weymers, supra* has been overruled. *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997). We also note

that, subsequent to *Falcon, supra,* our Legislature rejected the loss of opportunity doctrines. MCL 600.2912a(2); MSA 27A.2912(1)(2).

Plaintiff next argues that the trial court's release of its opinion and judgment in this case was prejudicial because judgment was not rendered for 2 1/2 years after the trial and because the trial was fragmented over several days. "[T]he conduct of a trial is within the control of the presiding judge and does not result in error warranting reversal unless there is some proof of prejudice." *Schutte v Celotex Corp,* 196 Mich App 135, 142; 492 NW2d 773 (1992). In this case, plaintiff never objected to the trial procedure or the delay in the rendering of the verdict. Moreover, plaintiff has not shown that there was any prejudice from the delay[2].

We disagree that prejudice is evident from the opinion, which plaintiff also characterizes as fragmented. Plaintiff complains that the opinion enumerated "certain important evidence, while emphasizing other testimony of much less relevance." We also disagree that the trial court improperly represented Dr. Pawl's testimony and failed to take into account other important testimony with regard to proximate cause. The eleven page opinion of the trial court satisfies the requirements of MCR 2.517(A), which states that a trial court's findings and conclusions are sufficient if they are "brief, definite, and pertinent." The trial court is not required to engage in an "overelaboration of detail" or "particularization of facts." MCR 2.517(A)(2)[3].

Moreover, upon thorough review of the entire record, we do not find that the trial court's findings were clearly erroneous.

> A trial judge's findings of fact in a bench trial will not be set aside unless clearly erroneous. Where a party claims that the evidence does not support the court's findings, the appellate court will not reverse unless, on the entire record, the appellate court is left with a definite and firm conviction that a mistake has been committed. The credibility of witnesses is a question for the trier of fact, and in a bench trial special regard is given to the findings of the trial court. [*Sweetman v State Highway Dept,* 137 Mich App 14, 20; 357 NW2d 783 (1984).]

The trial court found that Nurse Dietz committed malpractice when she failed to report plaintiff's loss of neurological function around 10:00 p.m. on the night of the surgery. It found that no other malpractice had been committed. There was ample evidence to support the finding that only Dietz committed malpractice, and that Dr. Clarke, the chief resident, had not. Significantly, plaintiff's own expert Dr. Pawls testified that Dr. Clarke had not breached the standard of care by failing to obtain a CT scan at 9:00 p.m.:

> Q. Since the examination, neurological examination was normal at 9:00 o'clock and pain by itself is not an indication for a CT scan, isn't it true the standard of practice did not require Dr. Clarke to order a CT scan at 9:00 o'clock p.m.?
>
> A. Yes.

Defendant's experts also testified that pain itself is not an indication that a CT or other diagnostic scan is necessary. There was testimony that Dr. Clarke did not breach the standard of care by failing to take any action, other than attempting to manage plaintiff's pain with medication, prior to being informed of her decline in neurological function. According to the records and testimony, the first noted loss of neurological function occurred around 10:00 p.m. Therefore, the trial court's determination that malpractice had not occurred prior to that time was not clearly erroneous.

While the court found malpractice because Dietz failed to report plaintiff's neurological decline to a physician at 10:00 p.m., it also determined that Dietz's malpractice was not a proximate cause of the paralysis. It stated:

> Although Nurse Dietz malpracticed (sic), as found above, the proofs do not establish that this malpractice was the proximate cause of plaintiff's paralysis. If the nurse had reported the 4/4 at 10:00 p.m., it is apparent to the Court that the physician would have ordered a CT scan to find out the cause of the deficit; to simply re-open the surgical site without having any idea what was going on inside would risk making the problem worse. Further no evidence was presented that the CT scan would have been performed any faster than it was in this case (when the patient was in extreme emergency). The scan was started approximately 35 minutes after the 11:15 summoning of the resident and was completed 20 minutes later. Total elapsed time at the point was 55 minutes.
>
> We know that Plaintiff went from "4/4" to "0/0" (total loss of motor function) in no more than 75 minutes (from 10:00 to 11:15). We also know that the total loss of function turned out to be irreversible in spite of decompression within no more than three hours of the first neurological deficit.
>
> In order to conclude that the nurse's malpractice was a proximate cause of plaintiff's paralysis, the evidence would have to show that the total loss would have been reversible if the decompression surgery would have been performed 75 minutes earlier, i.e. a little less than two hours after the first neurological deficit.
>
> The difficulty is that we have no evidence what ever on this point. Without evidence on this point, the Court can only speculate as to whether plaintiff would have recovered any function.

These findings by the trial court are supported by the record. All of the expert physicians testified that plaintiff went from functioning to complete paralysis sometime between 10:00 and 11:15. No expert could pinpoint the exact timing of the paralysis. The records indicated how long the course of events took after 11:15 p.m., when the first physician was called after paralysis was discovered. It took more than seventy five minutes to perform the CT scan, determine surgery was necessary, and begin the procedure. There was evidence to support that the sequence of events, a CT scan followed by surgery, was a proper course of treatment after 11:15 p.m. There was no evidence that if Dietz had

reported the 4/4 at 10:00 p.m., a different course of events would have followed and plaintiff would not suffered irreversible paralysis as of 11:15 p.m.

In addition to determining that there was no evidence that paralysis would have been, more likely than not, avoided if Dietz had reported the neurological change at 10:00 p.m., the court found that, based on the expert testimony presented, the exact cause of the paralysis was not clear. It determined that plaintiff had failed to prove that more likely than not a compressing hematoma was the direct cause of the irreversible loss of motor function. It found that the evidence demonstrated that it was equally plausible that an infarct caused the devastating results. It was not contradicted that *if* an infarct caused the paralysis, it was irreversible no matter how rapidly decompression was performed[4].

These findings of fact are also not erroneous. Defendant's experts testified that the cause of paralysis was an infarct. Dr. Pawls testified that it was a gradual compression hematoma. Based on the record, it was as likely that plaintiff's paralysis was the result of a gradual compression hematoma, which may have been reversible if Dietz had reported it sooner, as it was that there was infarction, in which case the paralysis was irreversible. Given that there were two equally plausible theories based on the evidence and given the absence of testimony that if Dietz had acted appropriately a different outcome was more likely than not, it was not error for the trial court to find that there was no proximate causation between Nurse Dietz's malpractice and the injury. *Skinner v Square D. Co*, 445 Mich 153, 166-167; 516 NW2d 475 (1994).

In order to prevail, plaintiff was required to present substantial evidence from which the trier of fact could conclude that more likely than not, but for the defendant's conduct, the injury would not have occurred. *Id.* at 164-165. Plaintiff did not do so. The trial court was not bound to accept plaintiff's theory. In fact, issues of credibility, including the credibility of Dr. Pawls, were for the trial court. *Sweetman, supra*. On appeal, plaintiff is asking us to substitute our judgment for that of the trier of fact. After a full review of the lower court record, we are not left with a definite and firm conviction that the trial court erred in finding that although Dietz committed malpractice, it was not a proximate cause of plaintiff's paralysis. The trial court's findings were not clearly erroneous and we will not substitute our judgment for that of the trial court.

Given our disposition on the above issues, we need not address those issues raised by defendant on cross-appeal.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] Plaintiff Steven Helman, Stephanie Helman's husband, filed suit for loss of consortium. For purposes of this opinion, the term plaintiff will refer to Stephanie Helman only.

[2] We also note that the final briefs of the parties were not filed until September of 1994 and thus, the delay between the submission of final arguments and the verdict was not 2 1/2 years.

[3] Plaintiff makes much of the fact that the trial court's opinion does not specifically mention Dr. Clarke. It is clear, however, that the trial court was aware of all of the testimony and evidence in the case and accorded this case careful consideration. Moreover, we note that the trial court actively participated in this case at trial, questioning witnesses and taking notes.

[4] In her brief on appeal, plaintiff claims that "the trial court erroneously stated that there was no evidence to refute the testimony of Defendant's expert, Dr. Sonntag, that Stephanie's paralysis was caused by immediate infarct, not the gradual accumulation of a blood clot. . . " Plaintiff also emphasized this claim at oral argument. This claim misreads the opinion. The trial court found that there was no evidence to contradict that *if* there was an infarct, the paralysis was irreversible, no matter how rapidly decompression was performed.