

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH FLUARY, as Personal Representative of the
Estate of GERVASE FLUARY,

UNPUBLISHED
May 8, 1998

Plaintiff-Appellant,

v

No. 195029
Wayne Circuit Court
LC No. 94-409927 NH

ST. JOHN HOSPITAL & MEDICAL CENTER,
LARRY LLOYD, M.D., and LUIS CAMERO, M.D.,

Defendants-Appellees.

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from an order granting a directed verdict in favor of defendants. We affirm.

A grant or denial of a directed verdict is reviewed de novo on appeal. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). On appeal, we consider the evidence in the light most favorable to the nonmoving party and make all reasonable inferences in favor of the nonmoving party. *Id.* A directed verdict is only appropriate when no factual question exists upon which reasonable minds may differ. *Id.*

To establish a medical malpractice claim, a plaintiff must establish: (1) the applicable standard of care, (2) breach of the standard of care, (3) injury, and (4) proximate causation between the alleged breach and the injury. MCL 600.2912a; MSA 27A.2912(1); *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). To survive a motion for a directed verdict, the plaintiff must make a prima facie showing regarding each of these elements. *Locke, supra*, 446 Mich 222.

Here, plaintiff's malpractice claim is premised upon six specific allegations of negligence; we address them individually. In so doing, we address plaintiff's first and third arguments and note that our disposition of them obviates the need to consider plaintiff's second argument regarding the qualifications of plaintiff's expert.

I

Plaintiff first contends that the trial court erred in finding that plaintiff failed to establish that Dr. Camero breached the applicable standard of care by removing the nasogastric (NG) tube on October 8, 1991. However, plaintiff's expert (Dr. Bussey) specifically testified that removing the NG tube did not violate the applicable standard of care. Plaintiff presented no other evidence indicating that the removal of the NG tube on October 8, 1991, violated the standard of care.¹ Therefore, the trial court did not err in directing a verdict in favor of Dr. Camero as to plaintiff's claim relating to the NG tube.

II

Plaintiff next argues that the trial court erred in granting a directed verdict on his claim that Dr. Camero's order that the patient (Fluary) was to receive six small meals per day when he transferred out of the intensive care unit ("ICU") constituted medical malpractice. Dr. Bussey testified that such an order was inappropriate because Fluary was not taking anything by mouth and because Fluary had aspirated gastrographen just prior to the order being given. However, as noted by the trial court, there was no evidence that Fluary ever *received* any of the meals ordered by Dr. Camero. The mere *ordering* of the meals was not proximately related to Fluary's damages. Therefore, because plaintiff failed to establish a prima facie case of medical malpractice based on the ordering of the meals, the trial court properly granted a directed verdict on this claim in favor of Dr. Camero.

III

Plaintiff next complains that the trial court erred in granting a directed verdict on his claim that Dr. Camero breached the applicable standard of care by discontinuing Fluary's antibiotics on October 8, 1991. Dr. Bussey testified that the antibiotics given to Fluary after the surgery were not specific to (and therefore would not have prevented) the type of pneumonia Fluary developed and from which he later died. Because plaintiff failed to establish that the discontinuance of the antibiotics was causally linked to Fluary's death, Dr. Camero was entitled to a directed verdict.

IV

Plaintiff next asserts that the trial court erred in granting a directed verdict on his claim that Dr. Camero negligently failed to prevent Fluary's aspiration of vomit. Plaintiff theorized that Fluary's aspiration of vomit led to development of pneumonia. However, there was no testimony that Fluary ever aspirated vomit, or that Fluary's vomiting incident was caused by the malpractice of Dr. Camero. In fact, Dr. Bussey testified that vomiting and aspiration is a common problem with post-esophageal gastrectomy patients and does not necessarily indicate that the patient's physician has done anything wrong. Furthermore, a bronchoscopy performed on October 9, 1991, revealed no stomach content in Fluary's lungs. Therefore, we find no error in the trial court's grant of a directed verdict on this claim of negligence.

V

Plaintiff next argues that the trial court erred in directing a verdict in favor of Dr. Camero and Dr. Lloyd with respect to plaintiff's claim that Fluary was prematurely transferred out of ICU to a regular surgical floor. Dr. Bussey testified that, considering the fact that Fluary vomited at approximately 5:15 p.m. on October 8, 1991, moving him out of ICU at 6:00 p.m. on October 8, 1991, to a floor with less supervision, breached the applicable standard of care. However, plaintiff failed to establish that this transfer out of ICU was causally related to Fluary's development of pneumonia or his subsequent death from pneumonia. There was no evidence that Fluary aspirated or vomited after he was transferred to the surgical floor. Therefore, because plaintiff failed to establish a prima facie case of malpractice based on the transfer of Fluary out of ICU, the trial court's grant of a directed verdict on this claim was proper.

VI

Finally, plaintiff contends that the trial court erred in granting a directed verdict in favor of Dr. Lloyd and St. John Hospital on plaintiff's claim that they were negligent in allowing Fluary to develop decubitus ulcers (bedsores). Although Dr. Bussey testified that, generally the development of bedsores indicates negligence, he also testified that here, he could not form an opinion as to whether Fluary's bedsores were the result of defendants' negligence. Plaintiff thus failed to present expert testimony that defendants breached the applicable standard of care. However, plaintiff contends that this omission is not fatal because the jury could determine for itself whether defendants' conduct met the standard of care. We disagree. This is not one of those rare cases in which "the lack of professional care is so manifest as to be within the common knowledge and experience of laymen." *Paul, supra*, 455 Mich at 211. This is not a case in which a foreign object was left within a patient, or some similarly patent negligent action. Indeed the fact that the plaintiff's *physician expert* himself was unable to form an opinion on this issue, supports this conclusion. Accordingly, because plaintiff failed to present expert testimony establishing a breach of the standard of care, the trial court properly directed a verdict in favor of Dr. Lloyd and St. John Hospital.²

Because plaintiff's failure of proofs required the circuit court to direct a verdict in favor of all defendants, we affirm in all respects.

Affirmed.

/s/ Henry William Saad

/s/ Myron H. Wahls

/s/ Hilda R. Gage

¹ Plaintiff's third argument on appeal is essentially that it was not necessary for plaintiff to have his *expert* testify that defendants breached the relevant standard of care. We note the recent case of *Paul v Lee*, 455 Mich 204, 211; 568 NW2d 510 (1997), in which the Court stated:

In professional malpractice cases, a plaintiff's assertion that a physician or surgeon breached the applicable standard of care must generally be supported by expert testimony. An exception exists where the lack of professional care is so manifest as to be within the common knowledge and experience of laymen [such as a "foreign object left in the body of a patient"].

While we do not find the exception to be applicable here, even if it were, plaintiff overlooks the fact that he nonetheless bears the burden of establishing *what the relevant standard of care is*, and *that this standard has been breached*. *Locke, supra*, 446 Mich at 222. Plaintiff has wholly failed to present such evidence here.

² We also note a tenuous causal connection between negligent conduct which might have caused bedsores and Fluary's death.