

STATE OF MICHIGAN
COURT OF APPEALS

ALFRED BAILEY, JR., as Independent Personal
Representative of the Estate of LAWRENCE
BAILEY, SR., Deceased,

Plaintiff-Appellant,

v

GORDON R. BLEIL, M.D., and SOUTH HAVEN
FAMILY PHYSICIANS, P.C.,

Defendants-Appellees,

and

ADELBERT STAGGS, M.D., KALAMAZOO
EMERGENCY ASSOCIATES, P.C., and
WATERVLIET COMMUNITY HOSPITAL,

Defendants.

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Plaintiff, as personal representative of the estate of Lawrence Bailey, appeals as of right the trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this medical malpractice action. We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue in respect to any material

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fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Plaintiff first argues that the trial court erred in finding that the decedent had terminated his physician-patient relationship with defendants. Plaintiff is mistaken; the trial court made no such finding. In rendering its decision, the trial court specifically stated that it was “assuming without deciding that a physician-patient relationship existed.” Because this issue was not resolved by the trial court, it is not preserved for appellate review, and we decline to address it. See *Schellenberg v Rochester Michigan, Lodge No 2225 of Benevolent and Protective Order of Elks of the USA*, 228 Mich App 20, 28; 577 NW2d 163 (1998).

Plaintiff next contends that sufficient evidence was presented to raise a genuine issue of material fact as to whether defendant Bleil breached the standard of care and proximately caused the decedent’s death. To establish medical malpractice, a plaintiff must demonstrate the following elements: (1) the applicable standard of care, (2) a breach of that standard of care, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997).

A plaintiff’s assertion that a physician breached the applicable standard of care must generally be supported by expert testimony. *Paul v Lee*, 455 Mich 204, 211; 568 NW2d 510 (1997). In the instant case, plaintiff presented testimony from three medical doctors who opined that defendant Bleil breached the standard of care in various ways, including improperly diagnosing and prescribing medication for the decedent over the telephone, failing to familiarize himself with the decedent’s family history, and neglecting to call the emergency room physician to inform him about the case. Furthermore, one of plaintiff’s experts stated that defendant South Haven Family Physicians, P.C., was negligent for failing to evaluate the decedent for diabetes based on his family history. Viewing the evidence in a light most favorable to plaintiff, we conclude that the expert testimony raises a genuine issue of material fact as to whether defendants breached the applicable standard of care.

Nevertheless, we conclude that the trial court properly granted defendants’ motion for summary disposition because plaintiff failed to establish that any of the alleged breaches of the standard of care were the proximate cause of the decedent’s death. Under Michigan medical malpractice law, as part of its prima facie case, a plaintiff must prove that the defendant’s negligence proximately caused the injuries at issue. MCL 600.2912a; MSA 27A.2912(1); *Weymers*, *supra* at 647. To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). To establish cause in fact, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred. *Id.* at 164-165.

Here, plaintiff failed to present any evidence that defendants’ alleged deviations from the applicable standard of care were a cause in fact of the decedent’s death. Dr. Oakes stated that the decedent was “salvageable” when he went to the emergency room.¹ Dr. Thomson, one of plaintiff’s experts, testified that defendants’ breaches of the standard of care “did not directly cause” the decedent’s death.² With regard to the Compazine prescribed by defendant Bleil, both Dr. Thomson

and Dr. Brodsky testified that it did not contribute to the decedent's death in any physiological way.³ Viewing the evidence in a light most favorable to plaintiff, reasonable minds could not conclude that, more likely than not, but for defendants' conduct, the decedent would not have died. See *Skinner*, *supra* at 164-165. Thus, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Gary R. McDonald

/s/ Mark J. Cavanagh

¹ The decedent's condition was apparently misdiagnosed by the physician who treated him in the emergency room.

² While Dr. Thomson conceded that the deviations from the standard of care did not cause the decedent's death, he charged that they "failed to prevent it." However, the failure to prevent a death does not constitute medical malpractice in the absence of a breach of the standard of care and proximate causation between the alleged breach and the injury. *Weymers*, *supra* at 655.

³ Dr. Oakes speculated that the Compazine, an anti-nausea medication, could have masked the decedent's symptoms, thereby causing the decedent to delay seeking medical attention. However, no evidence was presented indicating that this in fact occurred. The decedent's mother testified that he took only two pills, both of which he was unable to keep down. Furthermore, it is undisputed that the decedent did not notably delay seeking additional medical attention, but went to the emergency room the following day. Plaintiff presented no evidence that the decedent's condition significantly deteriorated in the interim.