

STATE OF MICHIGAN
COURT OF APPEALS

MOSES TYRONE MARSHALL, Personal
Representative of the Estate of COSETTE D.
MARSHALL, Deceased,

UNPUBLISHED
December 14, 1999

Plaintiff-Appellant,

v

No. 206200
Wayne Circuit Court
LC No. 95-527022 NO

FAIRLANE MEMORIAL CONVALESCENT
HOME, INC., d/b/a FAIRLANE NURSING
CENTRE, WANDA MOON, KATHY KING,
BETTY COGBURN, JANE DOE 1, a/k/a ANNIE
OR ANNA, and JANE DOE 2, a/k/a SYLVIA
LEWIS,

Defendants-Appellees.

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

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

The decedent was admitted to Fairlane Nursing Centre in August or September 1993 for long term care because of a stroke she had recently suffered. Plaintiff, the decedent's son, testified at his deposition that one of defendant's employees told him that another employee dropped the decedent on April 13, 1994, while transferring her from a wheelchair to her bed and that in May 1995, a nurse's aide informed him that decedent had been dropped. Decedent was then taken to Grace Hospital on May 29, 1995, and admitted for a left fractured hip. Her past medical history was positive for a stroke, congestive heart failure, and hypertension. While in the hospital, the decedent developed congestive heart failure and did not recover. She ultimately died on June 21, 1995. Her final diagnosis was closed transcervical fracture of the femur with secondary diagnoses of pneumonitis, hyperpotassemia, subdural hemorrhage, convulsions, congestive heart failure, unspecified external fall, and renal failure.

Plaintiff filed suit against defendants alleging that she had been dropped by an employee or employees which resulted in her hip fracture and subsequent hospitalization at Grace Hospital. This appeal centers around whether plaintiff has presented sufficient evidence that the decedent's hip fracture was indeed the result of being dropped by one of the nursing home employees.

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition because reasonable minds could conclude that decedent's injury was caused by defendants' negligence. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition relying upon MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.*

The prima facie elements of a medical malpractice claim are: (1) the applicable standard of care, (2) breach of that standard by the defendant, (3) injury, and (4) proximate causation between the breach and the injury. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). To establish cause in fact, the plaintiff must present enough evidence that a jury could conclude more likely than not that but for the defendant's conduct the plaintiff's injuries would not have occurred. *Id.* at 647-648. To establish legal cause, the plaintiff must prove that it was foreseeable that the defendant's conduct might create a risk of harm to the victim and that the result of the conduct and intervening causes was foreseeable. *Id.* at 648.

Here, plaintiff has failed to set forth sufficient evidence of cause in fact. Plaintiff's expert witness, Dr. Neal Persky, testified that, based on the decedent's medical records, he could not say with a reasonable degree of medical certainty what caused her hip fracture. Furthermore, Dr. Persky testified that the decedent's hip fracture was consistent with someone when attempting to turn who had entangled herself in side rails that are located on beds. According to Dr. Persky, there was at least one reference in decedent's medical records that, from time to time, she had become entangled in the bed rails. In his affidavit, Dr. Persky averred that while the nursing home records did not indicate whether the decedent was dropped, if any of the injuries resulted from being dropped, it would very likely represent a violation of the standard of care. This testimony fails to provide substantial evidence from which a jury may conclude more likely than not that the decedent's fractured hip would not have occurred but for defendants' conduct.

Moreover, the doctrine of res ipsa loquitur does not apply under the evidence so that plaintiff is not required to proceed without expert testimony. Four factors are necessary to prove res ipsa loquitur:

- (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
- (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff;

(4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Locke, supra* at 230, quoting *Jones v Poretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987).]

“The fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury.” *Locke, supra* at 230-231. Here, plaintiff did not prove the first element of *res ipsa loquitur*. No evidence was provided that a hip fracture does not normally occur in the absence of negligence. In fact, Dr. Persky testified to the contrary, that the hip fracture decedent suffered was consistent with someone getting entangled in the side rails of a bed. Plaintiff did not prove a *prima facie* case of medical malpractice. Accordingly, the trial court properly granted defendants’ motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen
/s/ William Henry Saad
/s/ Hilda R. Gage