

STATE OF MICHIGAN
COURT OF APPEALS

ROBERTO LOPEZ and CARMEN LOPEZ,

Plaintiffs-Appellants,

v

STEVEN L. JENSEN, M.D., and TRI-CITY
UROLOGY ASSOCIATES, P.C.,

Defendants-Appellees.

UNPUBLISHED

March 25, 2004

No. 245243

Saginaw Circuit Court

LC No. 01-039630-NH

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Roberto Lopez presented to defendant Dr. Jensen complaining of incontinence, urgency, and frequency. Dr. Jensen performed a transurethral resection of the prostate, known as a TURP procedure, which is designed to remove excess prostate tissue and increase urinary flow. Following surgery Lopez continued to experience incontinence, urgency, and frequency.

Plaintiffs filed suit alleging medical malpractice. Their expert witness, Dr. Copeland, alleged that Dr. Jensen damaged Lopez's sphincter during surgery. Defendants sought summary disposition pursuant to MCR 2.116(C)(10), arguing that no evidence showed that Lopez's continuing urinary problems were proximately caused by any malpractice. The trial court granted the motion, concluding that Dr. Copeland's statements were insufficient to establish a deviation from the standard of care.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

In a medical malpractice case the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); MCL 600.2912a(2). Expert testimony is required to establish the applicable standard of care and to demonstrate that the defendant breached the standard. *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994). Proof of causation

requires both cause in fact and proximate cause. Cause in fact requires that the injury would not have occurred but for the negligent conduct. *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences and cannot consist of mere speculation. An explanation that is consistent with known facts but not deducible from them constitutes impermissible conjecture. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985).

The record established that Lopez had a longstanding history of urinary problems. Incontinence was a known risk of the TURP surgery. Dr. Jensen's post-operative note, his deposition testimony, and the pathology report established that the sphincter was not resected during surgery. Dr. Copeland opined that the sphincter must have been damaged during surgery; however, he could not specify where or in what manner the damage occurred. This opinion was insufficient under the circumstances. *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 288-289; 602 NW2d 854 (1999). That damage to Lopez's sphincter occurred during surgery was an explanation consistent with known facts; however, it was not deducible from those facts, and thus could constitute only impermissible speculation. *Skinner, supra*. Plaintiffs did not make out a prima facie case of medical malpractice. MCL 600.2912a(2); *Wischmeyer, supra*.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette