STATE OF MICHIGAN

COURT OF APPEALS

MELODY HATTERY, personal representative of the ESTATE OF TIMOTHY HATTERY, deceased, Plaintiff-Appellant,	UNPUBLISHED July 15, 2004
v	No. 246755 Gratiot Circuit Court
PAUL GRUCA, M.D., and ALMA FAMILY PRACTICE, P.C. Defendants-Appellees.	LC No. 246755

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

In this wrongful death case alleging medical malpractice, plaintiff appeals by right the trial court's order granting defendants' motion for directed verdict. We reverse.

I. Facts and Proceedings

Plaintiff's decedent, Timothy Hattery (Timothy), died on January 17, 2000, at age thirty-nine, after suffering from testicular cancer. Plaintiff, Timothy's wife, Melody Hattery, as personal representative of his estate, filed suit against defendants, Dr. Paul Gruca, Timothy's family doctor, and Dr. Gruca's professional corporation, Alma Family Practice, in January 2001, for negligently failing to review medical reports and perform follow-up tests to timely diagnose Timothy's cancer, ultimately causing his death.[1] Trial testimony revealed that Timothy visited the emergency room of Gratiot Community Hospital on July 6, 1998, complaining of scrotal and testicular pain. Upon examination, the emergency room physician noted that Timothy's right testicle was enlarged, diagnosed him with epididymitis (an infection of the epididymis), prescribed an antibiotic, recommended a follow-up examination by defendant, and forwarded the report of Timothy's visit to defendant's office. Defendant testified that he reviewed the report but did not contact Timothy to schedule a follow-up examination. In the interim between his

[1] Throughout the remainder of this opinion, "defendant," when used in the singular, refers to Dr. Paul Gruca.

emergency room visit and October 1999, Timothy visited defendant's office and was examined by a physician's assistant, Kathy Frake, for other medical conditions. No mention was made of his prior testicular problem.

Defendant also testified that on October 1, 1999, Timothy returned to defendant's office, presenting with a lump on his neck, just above his collarbone. Upon examining the mass on Timothy's neck and detecting retroperitoneal adenopathy on further examination, defendant suspected the mass was a lymphoma and referred Timothy to another physician. A subsequent biopsy and radiological review confirmed that the lump was metastatic seminoma and that the primary location of the cancer was Timothy's right testicle. Timothy's right testicle was removed later that month, and an oncologist prescribed six cycles of chemotherapy to treat Timothy's cancer.

According to trial testimony, Timothy was hospitalized for five days for each chemotherapy cycle. The cycles began on November 1, 1999, and repeated periodically through January 2000. On January 17, 2000, three days after discharge from his fourth cycle, Timothy collapsed in his home. Plaintiff testified that a friend who was visiting Timothy when he collapsed called the emergency medical service, which took Timothy to the hospital. Timothy died at the hospital soon thereafter. His death certificate listed the cause of death as myocardial infarction, although no tests or autopsy was performed to confirm the cause of death. Testicular cancer was listed on his death certificate as a contributing cause of death.

Plaintiff's standard of care expert, Dr. Sanford Lax, testified that defendant, or the physician's assistant under his supervision, should have given Timothy a complete physical examination in 1997, after a fourteen-year gap between visits to defendant's office. Additionally, in Dr. Lax's opinion, defendant and his physician's assistant violated the standard of care by failing to schedule a follow-up examination, perform a testicular examination, order an ultrasound, and have a urologist evaluate Timothy after receiving the report from Timothy's emergency room visit in 1998, even if the suspected diagnosis was only epididymitis.

Additionally, Dr. Lax testified that in August 1999 when defendants prescribed an antibiotic to treat Timothy after he complained of pain during urination, the standard of care required an examination of the urinary system, including the testicles, given the rarity of urinary tract infections in men Timothy's age. Dr. Lax believed that the pain Timothy was experiencing at that time was related to his cancer. Moreover, Dr. Lax believed that Timothy's complaints in July 1998 were secondary to cancer. He also opined that, to a reasonable degree of medical certainty, Timothy "suffered a sudden cardiac arrest as the result of complications from his testicular cancer and chemotherapy." If Timothy in fact suffered a myocardial infarction, Dr. Lax opined that the advanced stage of his disease and aggressive chemotherapy contributed to his sudden death.

Plaintiff presented the expert testimony of Dr. John Shaw, a medical oncologist, on the issue of causation. Dr. Shaw testified that physicians classify the extent of testicular cancer in one of three stages based on the patient's prognosis and the cancer's likelihood of responding to certain treatment. At stage one, the cancer is limited to the testicle. At stage two, the cancer has spread to the nearest group of lymph nodes. At stage three, the cancer has spread to more remote groups of lymph nodes, such as those near the collarbone, and possibly to organs such as the lungs and liver. When Timothy was diagnosed, Dr. Shaw stated, his cancer was classified in

stage three. Dr. Shaw opined that when Timothy visited the emergency room in July 1998, he more likely than not had stage one cancer at that time and his symptoms were related to his ultimate diagnosis. Timothy's death, Dr. Shaw said, "was a result of a complication associated with his testicular cancer."

Dr. Shaw also testified that if Timothy's cancer had been diagnosed at stage one, he would have been treated by removing the affected testicle and the spermatic duct, followed by radiation therapy. At stage three, however, chemotherapy is necessary. Most chemotherapy drugs, Dr. Shaw testified, work by "killing or poisoning cells." Their effectiveness, however, is not limited to killing cancerous cells; they kill normal cells as well. Chemotherapy carries risks of many complications, which can lead to death.

Dr. Shaw stated that "sudden death syndrome" occurs when a chemotherapy patient with no obvious life threatening condition suddenly stops breathing and his heart stops beating. This syndrome, Dr. Shaw continued, is most commonly precipitated by a pulmonary embolism, in which a blood clot in the retroperitoneal or pelvic area breaks loose and travels to the heart and lungs, causing the heart to stop. Other mechanisms of sudden death syndrome include heart arrhythmias, infection, acute bleeding, and myocardial infarction.

In Dr. Shaw's opinion, Timothy undoubtedly had sudden death syndrome. He opined that more likely than not, a pulmonary embolism, rather than a myocardial infarction, caused Timothy's sudden death. However, either cause of death, he stated, was caused by his cancer and retroperitoneal adenopathy. If Timothy had been treated at stage one of his disease, Dr. Shaw stated, more likely than not, he would not have suffered from sudden death syndrome.

After plaintiff completed her proofs, defendants moved for a directed verdict.[2] Defendants asserted that Dr. Shaw's testimony was speculative and based on conjecture, as they had claimed earlier in their motion in limine to exclude his testimony, which the trial court had denied. Defendants also claimed that Dr. Shaw based his opinions on a "more likely than not" standard, rather than stating his opinions to "a reasonable degree of medical certainty." Defendants asserted that plaintiffs had not presented sufficient evidence of causation to let the jury consider the case.

Although plaintiff opposed defendants' motion, the trial court agreed with defendants and directed a verdict in their favor. The trial court stated that although MCL 600.2912a(2) requires a plaintiff in a medical malpractice action to prove that the actions of the defendant "more probably than not" caused the plaintiff's injury, "in order to opine on causation, there must be some level of reasonable medical certainty." Examining the theories of causation presented in this case, the trial court stated that Dr. Shaw's primary theory, that cancer caused retroperitoneal adenopathy and a pulmonary embolism, was not supported by pathological evidence concerning the cause of death, statistical evidence concerning the relationship between cancer or chemotherapy and pulmonary embolism, or pharmacological evidence concerning the side

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[2] Defendants presented one of their witnesses before plaintiff completed her proofs for the convenience of the witness.

effects of chemotherapy. In the trial court's view, Dr. Shaw's alternate theory, which Dr. Lax also espoused, that the treatment for Timothy's cancer caused debilitation leading to a myocardial infarction or cardiac arrhythmia, also lacked support of statistical, epidemiological, or pharmacological evidence, particularly in light of Dr. Shaw's statement that he did not believe that the three chemotherapy drugs Timothy received were likely to increase the likelihood of myocardial infarction.

The trial court further stated that defendants' theory of the case, that Timothy suffered from coronary artery disease, which superceded his cancer in causing a myocardial infarction, also lacked evidentiary support, given that no evidence existed indicating a history of coronary artery disease, symptoms prior to death commonly associated with heart attack, such as chest pain or shortness of breath, or problematic findings from tests such as EKGs or catheterizations. Moreover, no pathological evidence supported the conclusion that Timothy in fact suffered a myocardial infarction.

In the trial court's opinion, deciding which of the three theories was accurate was "a shot in the dark," and, therefore, plaintiff had not presented a jury submissible question on the issue of causation. In anticipation of appeal, the trial court stated: "And one of the questions I hope they'll help us answer is whether more probable than not means reasonable medical certainty. I think not . . . ." In the trial court's opinion, a forty-nine percent chance that a condition does not exist is too high to determine that, to a reasonable degree of medical certainty, the condition does exist.[3]

Plaintiff now appeals.

II. Standard of Review

We review de novo a trial court's grant or denial of a motion for directed verdict. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). We examine the evidence presented in the light most favorable to the nonmoving party, granting the nonmoving party every legitimate inference arising from the evidence and resolving conflicts in the evidence in favor of the nonmoving party to determine whether a question of fact existed. *Id.* at 701-702. Granting a motion for a directed verdict is appropriate only if no question of fact exists on which reasonable jurors could differ. *Id.* at 702.

III. Analysis

Plaintiff contends that the trial court erred by granting defendants' motion for directed verdict because a question of fact existed on the issue of causation. We agree.

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[3] Plaintiff states that after deciding defendant's motion, the trial court, in proceedings taken off the record, had the jury deliberate and return a "verdict." These curious proceedings, apparently taken in the absence of defense counsel, play no part in our decision in this case.

"In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." MCL 600.2912a(2). Demonstrating proximate cause entails demonstrating both cause in fact and legal, or proximate, cause. *Wiley v Henry Ford Cottage Hospital*, 257 Mich App 488, 496; 668 NW2d 402 (2003). A plaintiff may establish cause in fact by circumstantial evidence, but, in order to be adequate, circumstantial evidence must support reasonable inferences of causation, not mere speculation. *Id.*, citing *Skinner v Square D*, 445 Mich 153, 163-164; 51 NW2d 475 (1994).

> "All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established." [*Skinner, supra* at 166-167, quoting 57A Am Jur 2d, Negligence, § 461, p 442.]

"Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury." *Wiley, supra* at 496. The trial court may decide the issue of causation only when no issue of fact exists. *Reeves v Kmart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998). A genuine issue of material fact exists if the plaintiff offers "evidence that is more likely than not that but for [the] defendant's conduct, a different result would have obtained." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479 n 7; 633 NW2d 440 (2001).

In the present case, plaintiff theorized that defendants' failure to timely diagnose Timothy's testicular cancer caused him to undergo harmful chemotherapy treatments to treat the metastasized cancer and that the treatments ultimately precipitated his death. Contrary to defendants' assertions and the trial court's conclusion, plaintiff presented evidence that demonstrated an issue of fact that defendants' actions caused plaintiff's harm. Both Dr. Shaw and Dr. Lax testified that it was more probable than not that Timothy died because defendant did not diagnose his cancer early enough to avoid chemotherapy. Plaintiff need not present conclusive evidence resolving whether a pulmonary embolism or myocardial infarction was the immediate cause of Timothy's death, given that plaintiff presented evidence indicating that either occurrence was more probably than not caused by defendant's failure to diagnose Timothy's cancer before it reached an advanced stage. Consequently, plaintiff's evidence did not give "equal support to inconsistent conclusions" and was not "equally consistent with contradictory hypotheses," *Skinner, supra* at 166-167.

To the extent that plaintiff's evidence conflicted with defendants' theory of the case, the trial court should have resolved the conflict in plaintiff's favor for purposes of defendants' motion. *Derbabian, supra* at 702. It is not for the trial court to judge the credibility of medical experts or determine the weight of their testimony. *Bilicki v WT Grant Co*, 382 Mich 319, 325; 170 NW2d 30 (1969); see also *Wiley, supra* at 491, citing *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). By basing its decision, in part,

on the lack of statistical, pharmacological, and epidemiological evidence supporting plaintiff's experts' testimony, the trial court exceeded the scope of its review and considered issues that the factfinder would consider in weighing the experts' testimony. These alleged deficiencies in plaintiff's evidence do not render the evidence impermissibly speculative.[4]

Finally, we note that the trial court improperly discounted plaintiff's evidence on the basis that the doctors did not state their opinions "to a reasonable degree of medical certainty." Medical experts are not required to state their opinions in such a manner. *Knoper v Burton*, 12 Mich App 644, 650-651; 163 NW2d 453 (1968), rev'd on other grounds 383 Mich 62; 173 NW2d 202 (1970). As stated above, a plaintiff's burden in a medical malpractice case is to establish that his injury was "more probably than not" proximately caused by the defendant's negligence. MCL 600.2912a(2). Plaintiff's evidence in this case was sufficient to present a question of fact on this issue such that a directed verdict was improper.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

[4] This case is distinguishable from *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999), in which this Court reiterated that "an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts." In that case, the Court concluded that the plaintiff could not sustain his claim of medical malpractice based on a physician's failure to diagnose cardiogenic shock when the only expert to testify that the plaintiff in fact experienced cardiogenic shock based his opinion solely on his "skepticism" of another physician's findings on a specific test and rendered an opinion that conflicted with the established evidence in the case. *Id.* at 286-289. In the present case, both Dr. Lax and Dr. Shaw based their opinions on their review of plaintiff's medical records and did not provide opinions that contradicted established facts.