STATE OF MICHIGAN

COURT OF APPEALS

JOHN ZAINEA and MARIE ZAINEA,

Plaintiffs-Appellants,

and

BLUE CARE NETWORK,

Intervening-Plaintiff,

v

ANDREW SHINAR, M.D., and ASSOCIATED ORTHOPEDISTS OF DETROIT,

Defendants-Appellees,

and

HENRY FORD HOSPITAL, COTTAGE HOSPITAL DIVISION, and RANDAL JAMES AMIS,

Defendants.

UNPUBLISHED
December 1, 2005

No. 256262
Wayne Circuit Court
LC No. 00-034063-NH

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a *nunc pro tunc* order granting defendants' motion for partial summary disposition and denying plaintiffs' motions to reopen or reinstate their case against defendants Andrew Shinar, M.D. and Associated Orthopedists of Detroit ("Associated").[1] We affirm.

[1] Because the remaining defendants are not parties to this appeal, the term "defendants" refers to Dr. Shinar and Associated only.

Plaintiffs first allege that the trial court erred by granting defendants' motion for summary disposition. We disagree. We review the trial court's grant of summary disposition de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

The trial court held that summary disposition was proper because plaintiffs failed to present evidence of proximate causation.[2] "In order to establish a cause of action for medical malpractice, a plaintiff must establish four elements: (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care." *Craig v Oakwood Hospital*, 471 Mich 67, 86; 684 NW2d 296 (2004). Additionally, MCL 600.2912a(2) provides, in relevant part:

> 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).]

Thus, in a medical malpractice action, a plaintiff must show that, "but for" the defendant's breach of the standard of care, the "injury would not have occurred," and that the resulting injury was a foreseeable result of the defendant's breach. *Craig, supra* at 86-87, quoting *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). "While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Craig, supra* at 87 (emphasis in original). Further, the plaintiff must prove "specific facts that will support a reasonable inference of a logical sequence of cause and effect." *Id*., quoting *Skinner, supra* at 174. Plaintiffs "need not negate all other possible causes," but must "exclude other reasonable hypotheses with a fair amount of certainty." *Craig, supra* at 87-88, quoting *Skinner, supra* at 166. "Where the connection between the defendant's negligent conduct and the plaintiff's injuries is entirely speculative, the plaintiff cannot establish a prima facie case of negligence." *Craig, supra* at 93.

With respect to plaintiffs' claim against Dr. Shinar, the trial court held:

> But Plaintiffs still have an evidentiary problem: they have produced no evidence that Dr. Shinar violated [his duty to ensure the correct anesthetic was used]. Indeed, the evidence shows otherwise: that is, the evidence shows that the anesthesiologist for the surgery in question knew that plaintiff wanted a general anesthetic. See Deposition of John Zainea at 34 (describing pre-operative visit in which Plaintiff told anesthesiologist that he preferred general anesthetic: "I specifically said that I wanted a general."). Since the pertinent personnel already knew of Plaintiff's preference, it is hard to see how any message from Dr. Shinar

[2] We note that the trial court characterized this holding as an "evidentiary problem." However, the trial court further stated that there was no evidence that defendant doctor violated any duty. Consequently, the ruling was based on lack of evidence of proximate cause.

> would have made a difference. Cf. Nichols v. Clare Comm. Hosp., 190 Mich App 679, 684[; 476 NW2d 493] (1991) (added warnings would have been useless where doctor already knew of dangers posed by drugs).

In this respect, plaintiffs' claim, that Dr. Shinar failed to obtain informed consent, is analogous to a products liability claim for failure to warn of a product's dangers. Plaintiffs' affidavit of merit alleges that Dr. Shinar was liable for "failing to obtain informed consent for the administration of a regional anesthesia." Dr. Karl L. Manders criticized the attending physicians because plaintiff John's "decision was made after he was given premedication and that he was not ***informed of the side effects or the possible side effects of spinal anesthesia***, and I felt that that certainly was not appropriate." (emphasis added.) Dr. Amis agreed that one of the primary purposes of meeting with the patient to decide which type of anesthesia to use is to ensure the patient is aware of the risks associated with each of the respective options. Thus, the record indicates that plaintiffs' informed consent theory of liability is founded on the attending physicians' alleged failures to warn John of the potential side effects of changing to a spinal anesthetic.

In deciding the issue before it, the trial court correctly looked to analogous products liability case law to determine that Dr. Shinar's failure to ensure informed consent was obtained was not the proximate cause of John's injuries where Dr. Amis knew of John's preference for a general anesthetic. See *Nichols, supra* at 684 (additional warnings about the drug would have had no effect because the doctor knew of the dangers already); *Mowery v Crittendon Hosp*, 155 Mich App 711, 721; 400 NW2d 633 (1986) (even if additional warnings had been given, the doctor still would have prescribed the drug). Here, the record indicates that Dr. Amis used a spinal anesthesia notwithstanding John's alleged request for a general. Without potential for evidence of proximate causation, summary disposition of plaintiffs' claims against Dr. Shinar and Associated was proper as a matter of a law. MCR 2.116(C)(10). Discovery did not stand a fair chance of producing evidence that Dr. Shinar's alleged violations proximately caused plaintiffs' damages. See *Crawford v State of Michigan*, 208 Mich App 117, 122-123; 527 NW2d 30 (1994). Because summary disposition in defendants' favor was appropriate as a matter law, the issue of whether the trial court erred by refusing the "reopen" or "reinstate" plaintiffs' case under MCL 600.2912c is rendered moot and requires no further discussion.

Plaintiffs next argues that the trial court abused its discretion by entering a *nunc pro tunc* order consistent with its September 24, 2001, opinion granting summary disposition. We disagree. MCL 600.611 provides, "Circuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Further, the trial court has inherent power to control the movement of cases on its docket. *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963). This Court will not disturb a trial court's exercise of its inherent power unless a clear abuse of discretion is shown. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 642; 607 NW2d 100 (1999). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Plaintiffs cite Michigan case law in support of their assertion that the trial court erred. The first case, *Freeman v Wayne Probate Judge*, 230 Mich 455, 460; 203 NW 158 (1925), defines the order as follows:

> A *nunc pro tunc* entry, in practice, is an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake. [Emphasis in original.]

The language plaintiffs cite from *Freeman*, however, actually supports the trial court's use of the nunc pro tunc order in this case. The trial court's September 24, 2001, opinion provides, "[a]ccordingly, we [sic] grant the motion for summary brought by Dr. Shinar and Associated Orthopedics," was signed by the trial court judge, and dated "September 24, 2001" on the front page of the opinion. In this respect, the trial court's opinion arguably qualifies as a written order under MCR 2.602(A)(1) and (2) that was never entered.

Although the opinion instructed defendants to submit an order within ten days, by plaintiffs' own admission the order of dismissal was never entered because of inadvertence. Here, the court clearly granted defendants' motion, but through inadvertence, an order was not entered. In this regard, the *Freeman* Court held:

> The power of courts to adopt the practice of entering orders, judgments, and decrees, *nunc pro tunc*, is recognized in all jurisdictions. It is many times necessary for the attainment of justice, and, when properly exercised, should be favored. . . . According to some authorities, in all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry, but other courts hold that in entering an order *nunc pro tunc* the court is not confined to an examination of the judge's minutes, or written evidence, but may proceed on any satisfactory evidence, including parol testimony. [*Freeman, supra* at 460-461.]

In the present matter, the entry of the trial court's order *nunc pro tunc* was a favorable resolution that was necessary for the attainment of justice. *Freeman, supra* at 460-461. The record shows the trial court granted defendants' motion, but through inadvertence, an order was not entered. Plaintiffs were in no way prejudiced by the trial court's order, regardless of whether the court's order backdated the order to November 11, 2002, instead of September 24, 2001. Plaintiffs did not pursue their claims against defendants following the court's opinion, nor were plaintiffs denied their right to appellate review of the issue regarding the trial court's grant of summary disposition.[3]

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[3] Plaintiffs' reliance on two other cases, *In re Garlow's Estate*, 313 Mich 402; 21 NW2d 178 (1946), and *Haray v Haray*, 274 Mich 568; 265 NW 466 (1936) is misplaced because those cases are factually inapposite and unpersuasive.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood