STATE OF MICHIGAN

COURT OF APPEALS

DEBBIE FERGUSON, Personal Representative of the Estate of TINA M. WILSON, Deceased,

Plaintiff-Appellant,

v

PORT HURON HOSPITAL and DR. S. A. MAKKI,

Defendants-Appellees,

and

ESTATE OF SUSAN WINE and BLUE WATER MENTAL HEALTH CLINIC,

Defendants.

UNPUBLISHED
April 10, 2007

No. 263141
St. Clair Circuit Court
LC No. 96-003351-NH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right the trial court's directed verdict of no cause of action. Because plaintiff failed to introduce or proffer sufficient evidence of causation during any stage of the proceedings below, we affirm.

I. Facts

On March 27, 1994, Tina M. Wilson (Wilson) committed suicide by carbon monoxide inhalation at the home of her former therapist Susan Wine (Wine). Wilson had a history of depression and several suicide attempts.

Wilson had sporadically treated with her personal psychiatrist, defendant Makki, since 1989.[1] In January 1994, Makki was informed that Wilson had attempted suicide, determined that

[1] Makki is a board-certified psychiatrist. Makki was not an employee of Port Huron Hospital, (continued…)

it was necessary to hospitalize her, and admitted her to defendant Port Huron Hospital. Makki testified, "I couldn't take any chances, she had to be hospitalized."

Wilson[2] was hospitalized in the Port Huron Hospital from January 6, 1994, until January 21, 1994. During that period, Wine was assigned as Wilson's primary therapist and was in charge of leading Wilson's therapy sessions. Also during the hospitalization, Wilson informed the hospital staff that she had not been getting along with her mother. Wilson apparently told Makki on or about January 20, 1994, that she did not want to move back in with her mother following her discharge, and that she had "a backup plan."

After Wilson's discharge, Makki did not see her again until February 10, 1994. At that time, Wilson told Makki that she had become involved "in a love triangle," and that she was "living with another woman." Makki did not inquire regarding the details of these statements, and did not ask Wilson who the woman was. Makki did not see Wilson again until February 28, 1994.

Wilson was again hospitalized at Port Huron Hospital from February 27, 1994, until March 14, 1994. Soon after Wilson was readmitted, Hospital staff was notified that Wine was behaving inappropriately with a patient, that Wine had apparently removed the patient's restraints, and that Wine was "in bed with the patient petting and caressing her." The patient was Tina Wilson. Wine maintained that her interaction with Wilson was not inappropriate.

Wine was asked to go home and not to return to the hospital until her supervisors had a chance to speak with her. However Wine thereafter returned during visiting hours and was seen with Wilson again. Wine was again told to leave. Makki testified that he did not realize until February 28, 1994, that Wine was the woman about whom Wilson had been talking. He testified, "[T]hat's when I put the two together." Makki suspected that Wilson might be the victim of a "boundary violation" by Wine, but never confronted Wine about her relationship with Wilson.

Hospital staff met with Wine on March 1, 1994, for the purpose of "clarify[ing] with [Wine] the expectations for professional conduct on the unit." Wine was instructed that, although she could continue working, she was to have no contact with Wilson and "was not to be on the unit other than [during] her scheduled hours and in a professional capacity only."

Also on March 1, 1994, hospital staff was notified that Wilson had attempted to slash her wrist with a broken light bulb. Although Wine was not present at the time of this apparent suicide attempt, a staff member had seen another individual relaying information between Wine and Wilson that day. Hospital staff apprised Makki of the situation. Wine was then informed that she could no longer work on the unit.

(…continued)

but had medical staff privileges there.

[2] At the time of the events in question, Wilson was married. However, Wilson was estranged from her husband.

Hospital staff agreed to permit Wine to work off the unit so long as she had no contact with Wilson. However, at about that time, Wilson filed a formal complaint with Port Huron Hosptal, asserting that the hospital was wrongly denying her visitors. After this complaint was filed, Makki decided that Wine should be allowed to visit Wilson during normal visiting hours for "therapeutic" reasons. Makki believed that it would be better to keep Wilson in the hospital and to permit Wine to visit, than to fully prevent Wine's visits and run the risk that Wilson would leave the facility against medical advice.

On March 4, 1994, Wine told a hospital employee that she was experiencing thoughts of suicide. Wine was told not to come in to work due to her "emotional instability." Nonetheless, Wine came back to the hospital on about March 5, 1994, and told a hospital employee that she was not sleeping or eating, had gotten a gun permit, and had bought some rope. Hospital staff called Wine's mother, and Wine was seen "weeping and out of control." Wine's family arrived at the hospital and took her to a private treatment facility where she, herself, was hospitalized.

Makki left for vacation on about March 7, 1994. Wine was discharged from hospitalization on about March 9, 1994. Wilson was then discharged from Port Huron Hospital on March 14, 1994, before Makki returned from vacation. Although it is not entirely clear from the record, Wilson was apparently discharged into the custody of Wine. Makki admitted that when he returned from his vacation, he did not attempt to call or otherwise contact Wilson.

Wilson's childhood friend testified that she saw Wilson on March 17, 2004. At that time, Wilson told her friend that "she had decided that she was going to break off her relationship with Susan [Wine]," and that she "had intentions of getting back together with her husband." The record contains little or no information concerning Wilson's activities over the course of the next ten days. On March 27, 1994, Wilson and Wine committed suicide together at Wine's home.

II. Procedural History

In March 1996, plaintiff filed a complaint against Makki, Port Huron Hospital, and the Estate of Susan Wine in St. Clair Circuit Court. The action was assigned Case No. 96-001094-NH. Among other things, the original complaint in Case No. 96-001094-NH alleged claims of "Professional Negligence" against Port Huron Hospital and Makki, a claim of "Ordinary Negligence" against Port Huron Hospital, a claim of "Professional Negligence" against the Estate of Susan Wine, and various intentional tort claims against the Estate of Susan Wine.

In August 1996, the trial court determined that the complaint sounded in medical malpractice. Because plaintiff had not filed a notice of intent and an affidavit of merit, the trial court dismissed the action.

Plaintiff appealed the dismissal. In addition to filing a claim of appeal with this Court, plaintiff also re-filed the same complaint that had been dismissed. The new action was assigned Case No. 96-003351-NH. Plaintiff filed an affidavit of merit with the new complaint, signed by board-certified psychiatrist Richard Feldstein, M.D. Plaintiff also named Blue Water Mental Health Clinic as an additional defendant in the re-filed action. Otherwise, the allegations in Case No. 96-003351-NH were essentially identical to those in Case No. 96-001094-NH.

On May 15, 1998, this Court affirmed the dismissal of Case No. 96-001094-NH. *Ferguson v Port Huron Hospital*, unpublished memorandum decision of the Court of Appeals, issued May 15, 1998 (Docket No. 197784). This Court ruled that plaintiff's claims in Case No. 96-001094-NH had sounded in medical malpractice: "We reject the assertion that plaintiff's complaint alleges ordinary negligence and, to that extent, is not subject to MCL 600.2912b . . . . Regardless of the form, the claim is one of malpractice." *Id*., slip op at 1. Because plaintiff had not properly filed a notice of intent in Case No. 96-001094-NH, this Court concluded that the entire complaint had been properly dismissed. *Id*.

Case No. 96-003351-NH then proceeded. The claims against the Estate of Susan Wine and Blue Water Mental Health Clinic were eventually dismissed by stipulation of the parties. After substantial discovery and several pretrial motions, trial began in February 2005. Feldstein testified that he believed Makki had breached the applicable standard of care in several ways. Defense counsel objected to Feldstein's testimony on the ground that it differed from that given by Feldstein in his pretrial deposition. The trial court ruled that Feldstein could only testify regarding those alleged instances of malpractice that he had identified in his pretrial deposition. Feldstein did not testify regarding any specific alleged instances of malpractice or negligence by Port Huron Hospital.

Plaintiff's counsel noted that Feldstein was her only expert witness on the element of proximate causation—both with respect to the claims against Port Huron Hospital, and with respect to the claims against Makki. Before Feldstein had completed his testimony, defendants moved for a directed verdict of no cause of action, asserting that Feldstein would not be able to establish proximate causation. The trial court granted the motion. Plaintiff's counsel conceded that Feldstein would not be able to establish proximate causation at trial. However, she argued that Feldstein could not do so only because the trial court had excluded much of the testimony that he intended to give. In an effort to establish a record, plaintiff's counsel requested to make an offer of proof concerning the testimony that Feldstein would have given had he received an opportunity to do so. Plaintiff's counsel submitted the offer of proof in writing.

III. Law of the Case

Underlying plaintiff's theory of this case is her notion that certain claims set forth in the complaint sound in ordinary negligence rather than in medical malpractice. In contrast, defendants assert that all of plaintiff's claims sound in medical malpractice, and that this issue was already decided in a previous appeal. We review de novo whether the law of the case doctrine applies in a given matter. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

Under the law of the case doctrine, an appellate court's decision on a particular issue binds both the lower courts and other appellate panels in subsequent appeals of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law of the case doctrine applies to questions actually decided in the prior appeal and to those questions necessary to the court's prior determination. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). The doctrine is applied when the prior appeal involved the "same set of facts, the same parties, and the same question of law" as the subsequent appeal. *Manistee v Manistee Fire Fighters Ass'n*, 174 Mich App 118, 125; 435 NW2d 778 (1989).

This Court determined in *Ferguson*, *supra* (Docket No. 197784), that because plaintiff's claims in Case No. 96-001094-NH sounded in medical malpractice, plaintiff was required to file a notice of intent and affidavit of merit in that case. After classifying the nature of plaintiff's case as a "medical malpractice action," the *Ferguson* panel specifically stated, "We reject the assertion that plaintiff's complaint alleges ordinary negligence and, to that extent, is not subject to MCL 600.2912b . . . . Regardless of the form, the claim is one of malpractice." *Id*., slip op at 1.

Although Case No. 96-001094-NH and the present case were numbered as two separate and distinct actions by the St. Clair Circuit Court, the claims set forth against defendants Makki and Port Huron Hospital in Case No. 96-001094-NH were identical to those set forth in the present matter. Because both actions involved the same facts, the same parties, and the same questions of law, we are required by the law of the case doctrine to follow the decision in *Ferguson*, *supra*. *Manistee*, *supra* at 125. Because we are bound to follow the holding of *Ferguson* in this case, we must conclude that all of plaintiff's present claims sound in medical malpractice.[3]

IV. Proximate Causation

Plaintiff argues that the trial court erred in finding insufficient evidence of proximate causation and in directing a verdict of no cause of action. We disagree. We review de novo the trial court's decision on a motion for a directed verdict. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). The appellate court reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in a light most favorable to the nonmoving party, and determines whether a question of fact existed. *Id.* at 679.

To establish a cause of action for medical malpractice, a 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 order to properly support her medical malpractice claims, plaintiff was required to establish that Wilson's suicide was proximately caused by defendants' breaches of the applicable standards of care. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).

The issue of proximate cause is generally a question of fact. *Meek v Dep't of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000). If, however, "the facts bearing

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[3] Plaintiff suggests that certain of her claims sound in ordinary negligence, and that this Court's prior decision was thus incorrect in classifying the entire complaint as one for medical malpractice. However, the law of the case doctrine applies "without regard to the correctness of the prior determination, so that a conclusion that a prior appellate decision was erroneous is not sufficient in itself to justify ignoring the law of the case doctrine." *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002).

upon proximate cause are not in dispute and reasonable persons could not differ about the application of the legal concept of proximate cause to those facts," the issue is a question of law for the court. *Paddock v Tuscola & Saginaw Bay R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997).

Here, plaintiff specifically admitted that Dr. Feldstein was her only expert witness on causation. Expert testimony is generally required in medical malpractice cases. *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005); *Locke v Pachtman*, 446 Mich 216, 222, 231-233; 521 NW2d 786 (1994). This Court has specifically held that expert testimony is required to establish causation in an action for medical malpractice. *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705; 400 NW2d 629 (1986).

To establish proximate causation in a medical malpractice case, the evidence "must draw a causal connection between the defendant's breach of the applicable standard of care and the plaintiff's injuries." *Craig*, *supra* at 90. Testimony that only establishes a correlation between conduct and injury is not sufficient to establish cause in fact, as "[i]t is axiomatic in logic and in science that correlation is not causation." *Id.* at 93. Where the connection between the defendant's negligent conduct and the plaintiff's injuries is speculative or merely a possibility, the plaintiff cannot establish causation. *Id.* Further, an "expert opinion based upon only hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury." *Skinner v Square D Co*, 445 Mich 153, 173; 516 NW2d 475 (1994). "'[T]here must be facts in evidence to support the opinion testimony of an expert.'" *Id*. (citation omitted). "The evidence need not negate all other possible causes," but the evidence of causation "must exclude other reasonable hypotheses with a fair amount of certainty." *Id*. at 166.

Turning to the case at bar, we find that plaintiff failed to establish proximate causation with respect to her claims against both Makki and Port Huron Hospital. Feldstein did not offer testimony on the element of proximate causation at trial. Even plaintiff admits this, having conceded in open court that Feldstein's testimony did not prove that Wilson's suicide was proximately caused by Makki's or Port Huron Hospital's negligence. However, plaintiff argues that Feldstein *would have been* able to establish proximate causation had he been permitted to give certain testimony before the jury. Plaintiff made an offer of proof, identifying the substance of this testimony that Feldstein would have given.

The fundamental problem with plaintiff's argument is that the offer of proof is itself insufficient to support a reasonable finding of proximate cause with respect to any of the claims. Plaintiff's offer of proof states that, "[a]s an offer of proof, plaintiff incorporates Dr. Feldstein's Affidavit of Merit . . . ." The offer of proof also states that, "as plaintiff's offer of proof in this regard, plaintiff offers and incorporates herein, Dr. Feldstein's entire deposition . . . ." In addition, plaintiff's offer of proof describes certain specific items about which Feldstein purportedly would have testified at trial.

First, we note that any reliance on the affidavit of merit to create an issue of fact with respect to proximate causation is misplaced. Concerning the element of proximate causation, the

affidavit of merit stated only, "It is my professional opinion within a reasonable degree of medical certainty that the above-described breaches of the standard of care proximately caused Wilson's death by suicide."[4] A conclusory affidavit that is unsupported by specific, factual averments is not sufficient to create a genuine issue of fact for trial. *Bowerman v Malloy Lithographing, Inc*, 171 Mich App 110, 115-116; 430 NW2d 742 (1988); *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987).

Nor was Feldstein's deposition sufficient to create a jury-submissible question of fact on the issue of proximate causation. We have carefully reviewed Feldstein's pretrial deposition. Feldstein testified regarding the standards of care applicable in this case and the manner in which he believed Makki and Port Huron Hospital had breached those standards. However, he did not address or even mention the issue of proximate causation during the deposition, and at no time actually linked defendants' alleged negligence to Wilson's eventual suicide. Therefore, plaintiff's reliance on Feldstein's deposition to create a question of fact for trial concerning proximate causation is unavailing.

Finally, even the offer of proof, itself, fails to support plaintiff's theory of causation. After reviewing the offer of proof, we conclude that even if Feldstein had received a full opportunity to testify before the jury, his testimony would not been sufficient to allow a rational trier of fact to conclude that the actions of Makki or Port Huron Hospital proximately caused Wilson's suicide.

In regard to the claims against Port Huron Hospital, plaintiff's offer of proof provided the following on the issue of proximate causation:

> If [Feldstein] had been permitted to testify, he would have testified that it was reasonably foreseeable that the boundary violation [by] Susan Wine, herself a suicidal and homicidal, mentally unstable individual, when put in a position by [Port Huron Hospital] to exploit a vulnerable, impulsive patient such as Tina Wilson—would result in suicide.
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> * * *
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> Because of the imbalance of power in a relationship that arises as a result of a boundary violation, suicide is predictable if your suicide counselor (in a specific therapeutic trust relationship with you) agrees to join you. Of course it is the answer to your . . . problems because your own counselor says so.

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[4] Because the affidavit of merit did not state "[t]he *manner* in which it alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice," MCL 600.2912b(4)(e) (emphasis added), we question whether it was even sufficient to support this medical malpractice action in the first instance, see *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 699-700 n 16; 684 NW2d 711 (2004).

Plaintiff's offer of proof also provided that if certain Port Huron Hospital records had been admitted, they would have established in conjunction with Feldstein's testimony that Wine was mentally unstable, that she likely had plans to commit suicide at the time of her relationship with Wilson, and that

> [t]he hospital had placed [Susan Wine] in a position where she could seduce Tina [Wilson]. The evidence of [Wine's] mental state up to the deaths, when combined with other evidence, are important links in the proximate cause chain from the formation of the relationship . . . to the suicides as a foreseeable consequence of the initial boundary violation.

With respect to the claims against Makki, the offer of proof merely "offer[ed] and incorporat[ed]" Feldstein's deposition testimony on the issue of causation. Otherwise, the offer of proof omitted any mention of proximate causation and did not identify the manner in which Feldstein's trial testimony would have causally linked Makki's actions to Wilson's suicide.

Feldstein's affidavit, deposition, and proffered trial testimony were all deficient on the matter of proximate causation "because each lacked a basis in established fact." *Skinner*, *supra* at 174. While the evidence in this case may well have supported plaintiff's contention that Makki and Port Huron Hospital breached their respective standards of care, it did not causally link Makki's and Port Huron Hospital's alleged negligence to Wilson's ultimate suicide. "Michigan law does not permit us to infer causation simply because a tragedy occurred[.]" *Id*. Plaintiffs were "required to set forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." *Id*. Instead, plaintiff posited a theory of proximate causation premised on mere possibilities and not adequately supported by Feldstein's proffered testimony.

The proffered expert testimony and other evidence in this case was not supported by specific, enumerated facts sufficient to tie defendant's alleged negligence to Wilson's ultimate death. Of course, the jury could have hypothesized that the conduct of Makki and Port Huron Hospital more probably than not proximately caused Wilson's suicide. However, such a hypothesis would not have been sufficiently based on the expert testimony and the other facts in evidence. Although there were undoubtedly *some* facts to support plaintiff's theory of causation, "a basis in only slight evidence is not enough." *Skinner*, *supra* at 164.

Further, we cannot omit mention of the fact that Wilson's and Wine's concurrent suicides occurred on March 27, 1994—thirteen days after Wilson's discharge from hospitalization on March 14, 1994. Courts in other jurisdictions have held that any negligence attributable to medical personnel and institutions is not the proximate cause of a later suicide that occurs too remotely in time from the decedent's discharge from hospitalization. See, e.g., *Garby v George Washington Univ Hosp*, 886 A2d 510 (DC App, 2005) (holding that the plaintiff failed as a matter of law to prove that the defendants' negligence proximately caused the decedent's death when the decedent committed suicide six hours after being discharged); see also *Scheidt v Denney*, 644 So2d 813 (La App, 1994) (affirming jury verdict of no cause of action when, although the defendant doctor breached the appropriate standards of care, the breach was not substantially related to the decedent's suicide, which occurred after the decedent's mental state had apparently improved and the decedent had been discharged from hospitalization); see also *Farwell v Un*, 902 F2d 282 (CA 4, 1990) (holding that even if the care rendered by the

decedent's doctor was negligent, the physician's care could not have been the proximate cause of the decedent's suicide ten days later because the link between the care and the suicide was too tenuous). Indeed, as the New York Court of Appeals has observed, "[T]here may be and undoubtedly have been cases where the causal nexus becomes too tenuous to permit a jury to 'speculate' as to the proximate cause of the suicide. And the tenuous link is not strengthened or made more real by however strong a verbalization of cause." *Fuller v Preis*, 35 NY2d 425, 434; 322 NE2d 263; 363 NYS2d 568 (1974).

In the present case, although a friend testified that she saw Wilson on March 17, 1994, there was little or no other evidence concerning Wilson's activities between the date of her discharge and the date of her death. Without sufficient evidence of Wilson's activities during this 13-day, post-hospitalization period, a jury would have been at best able to speculate regarding the existence or nonexistence of intervening or superceding causes. It is not sufficient "to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, 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." *Skinner*, *supra* at 164-165. With precious little evidence concerning what happened during the thirteen days following Wilson's discharge, it would have been presumptuous for any jury to exclude the possibility of other, more direct theories of causation in this case. Any finding that defendants' conduct more probably than not proximately caused Wilson's suicide would have amounted to impermissible speculation. '''The law is well settled that a case should not be submitted to the jury where a verdict must rest upon a conjecture or guess.'" *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998), quoting *Scott v Boyne City, G & A R Co*, 169 Mich 265, 272; 135 NW 110 (1912).

We sympathize with plaintiff in this tragic case. It is clear from the record that Susan Wine committed critical errors of judgment and that certain aspects of Wilson's treatment indeed may have been mismanaged. However, without sufficient legal proof of causation, neither Makki nor Port Huron Hospital may be held liable for malpractice. As noted above, plaintiffs in medical malpractice actions must establish proximate causation, *Craig*, *supra* at 86, and they must generally do so through the use of expert witnesses, *Woodard*, *supra* at 6. Here, neither the evidence actually introduced nor the expert testimony put forth in the offer of proof was sufficient to allow a rational jury to conclude that defendants' negligence more probably than not proximately caused Wilson's suicide. Because rational jurors could not have concluded on the basis of the evidence in this case that defendants' actions proximately caused Wilson's death, the trial court properly removed plaintiff's claims from the jury. *Cacevic*, *supra* at 679-680. We must affirm the directed verdict of no cause of action. *Id*.

In light of our resolution of this issue, we decline to consider the remaining issues raised by plaintiff on appeal.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper