STATE OF MICHIGAN

COURT OF APPEALS

RACHEL SHAFFER,

Plaintiff-Appellee,

v

ST. JOSEPH'S MERCY HOSPITALS OF MACOMB, ST. JOSEPH'S MERCY OF MACOMB a/k/a MERCY MOUNT CLEMENS CORPORATION, and ST. JOSEPH MERCY HEALTH SYSTEM a/k/a TRINITY HEALTH-MICHIGAN,

Defendants-Appellants,

and

PAUL MOCZARSKI, D.O. and MACOMB EMERGENCY CARE PHYSICIANS, P.C.,

Defendants.

UNPUBLISHED
December 27, 2007

No. 275299
Macomb Circuit Court
LC No. 04-002993-NH

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's denial of their motion for summary disposition premised on the ground that plaintiff failed to present sufficient expert evidence regarding proximate cause in this medical malpractice action.[1] We affirm.

On July 23, 2002, plaintiff went to defendants' emergency room complaining of fever, neck stiffness, chills, and weakness in her arms and legs. She was sent home after a few hours,

[1] Defendants' interlocutory application for leave to appeal was initially denied. *Shaffer v St Joseph Mercy Hosp of Macomb*, unpublished order of the Court of Appeals, entered October 12, 2006 (Docket No 270884). Defendants then filed an application for leave to appeal with our Supreme Court. In lieu of granting leave to appeal, the matter was remanded for consideration as on leave granted. *Shaffer v St Joseph Mercy Hosp of Macomb*, 477 Mich 976; 725 NW2d 51 (2006).

and her condition worsened over the course of the next four days. She returned to defendants' emergency room on July 27, 2002. Defendants transferred her to the University of Michigan Medical Center. Plaintiff was eventually diagnosed with heart failure and mitral valve endocarditis. She subsequently underwent mitral valve replacement surgery.

In this medical malpractice action, plaintiff claims that defendants are vicariously liable for the conduct of their physicians whose failure to properly diagnose and treat her conditions on July 23, 2002, caused her to require mitral valve replacement surgery.[2] Defendants sought summary dismissal of plaintiff's case under MCR 2.116(C)(10), on the ground that she could not establish the requisite proximate cause. The trial court disagreed and, after de novo review of this decision, considering the evidence in the light most favorable to plaintiff, we agree that defendants are not entitled to judgment as a matter of law. See *Costa v Community Emergency Medical Servs, Inc*, 475 Mich 403, 408; 716 NW2d 236 (2006); *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161, 166; 713 NW2d 717 (2006).

To prevail on a medical malpractice claim, the plaintiff must establish:

> (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 Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).]

With regard to the proximate cause element, MCL 600.2912a(2) provides:

> 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. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

Defendants argue that plaintiff failed to present sufficient evidence to satisfy her burden of demonstrating (1) that she suffered an injury that more probably than not was proximately caused by defendants' negligence or (2) that defendants' negligence resulted in the loss of an opportunity to avoid the heart surgery that was greater than fifty percent. Plaintiff relies on the testimony of Dr. Stanton G. Axline to establish proximate cause. It is his deposition testimony that defendants assert is deficient. During his deposition, Dr. Axline was asked what opinions he held relative to the issue of causation and he answered: "I think the fundamental concern is that [plaintiff] suffered an infection due to a staphylococcus that involved her heart and resulted in generalized sepsis necessitating valve replacement and vigorous and appropriate antibiotic therapy." In Dr. Axline's opinion, plaintiff "had evidence of sepsis when she visited the emergency room on July 23 of 2002 and probably had been septic for several days . . . ." He

[2] The claims against Paul Moczarski, D.O., Macomb Emergency Care Physicians, P.C., and St. Joseph Mercy Health System, an assumed name for Trinity Health-Michigan, were previously dismissed.

believed that plaintiff became bacteremic and developed endocarditis on or before July 23, 2002, and that the conditions continued to exist "at least until the time of surgery in which she had her mitral valve replaced."

The following exchange occurred between defense counsel and Dr. Axline:

Q. It's impossible to state that antibiotic treatment beginning on July 23, 2002, or July 24, 2002, would have avoided the need for valve replacement surgery; is that correct?

* * *

A. Well, what I would say is that with endocarditis, the greatest opportunity for preventing damage is to start—is to make the diagnosis as early as you can and to treat vigorously and appropriately with antibiotics. That decreases the risk of subsequent complications.

* * *

Q. . . . My question is whether antibiotic treatment, appropriate antibiotic treatment begun on July 23, 2002, would have avoided the need for valve replacement surgery.

* * *

A. Yeah, the chances of avoiding—the opportunity to avoid the valve surgery is achieved by starting therapy as soon as possible. So the starting on July 23 certainly would have been an opportunity to decrease the risk of having to subsequently replace the valve.

Q. By what degree would the risk have been improved or reduced, whichever way you want to look at it?

A. It's difficult to quantitate, but we know that it's a progressive infection with progressive deterioration. What you can't quantitate is the magnitude of deterioration of the valve or surrounding structures as a function of time.

Q. . . . What you're telling me, Dr. Axline, is that the risk of incurring the need for valve replacement surgery is diminished in some degree by treatment beginning at an earlier point in time; is that correct?

A. That is correct.

Q. How much that risk is diminished, as you said, you can't quantitate.

A. Right, with precision.

Q. With precision. Why can't it be quantitated with precision?

A. That's a good question, and I wish I could give you the answer.

Q. Even though it is your opinion that earlier treatment with appropriate antibiotics would decrease the risk of developing valve disease which would in turn require valve replacement surgery, you can't testify that treatment given on July 23, 2002, or begun on July 23, 2002, would have avoided valve injury and the need for valve replacement; correct?

* * *

A. . . . [I]t's not a precise science and—but we do know that the earlier you treat with appropriate therapy, the greater the chance of avoiding complications, including the need for a valve replacement surgery decreases, and I wish I could tell you precisely what the magnitude of that decreased risk is and as a function of time, but we've not one number that would apply to all patients.

* * *

Q. . . . And what you're telling me is that it's not an issue that's capable of precision in looking at one patient at a time.

A. Correct.

* * *

Q. . . . Dr. Axline, we know that when treatment began on July 27, 2002, it was not successful at avoiding valve damage and the need for valve replacement surgery and all the consequences of that treatment; correct?

A. Yes, and all the consequences of the underlying disease, yeah.

Q. . . . What is unable to be stated with precision, however, is whether the treatment that was begun on July 27, 2002, if it had been initiated at some specific earlier point in time, that [plaintiff] would have avoided valve damage and the need for valve replacement surgery.

* * *

A. I think the odds of a favorable outcome are improved by earlier therapy.

* * *

Q. . . . [I]t's not possible to quantitate the improvement of those odds; is that correct?

A. There's not one number that will accurately describe that.

Defendants claim, as they did in their motion for summary disposition, that Dr. Axline's testimony neither establishes (1) that more likely than not plaintiff's injury was caused by the

alleged negligence nor (2) that the loss of opportunity to achieve a better result was greater than fifty percent as required by MCL 600.2912a(2).

In response to defendants' motion for summary disposition, plaintiff submitted an affidavit prepared by Dr. Axline. In that affidavit Dr. Axline stated:

> 1. . . . [D]uring my deposition, I was never asked the precise question of whether the negligence of Defendant in failing to diagnose and immediately treat [plaintiff] more likely than not caused her need for mitral valve replacement surgery.
>
> 2. . . . [H]ad I been asked what the likelihood was for [plaintiff] to avoid subsequent surgery and heart valve replacement, I would have said greater than 50%.

At the hearing on defendants' motion for summary disposition, the trial court considered Dr. Axline's deposition testimony that had antibiotic therapy been started on July 23, 2002, the risk of heart valve replacement would have been decreased. The court noted that at his deposition, Dr. Axline could not quantitate precisely the degree to which the risk would have been improved or reduced. But, the court also considered Dr. Axline's affidavit, finding that it was not directly contrary to his deposition testimony. In his affidavit, Dr. Axline stated that the opportunity to achieve a better result would have been greater than fifty percent. The trial court determined that, at a minimum, plaintiff presented a genuine issue of material fact as to the issue of proximate cause; accordingly, the motion for summary disposition was denied. We agree with the trial court's analysis and conclusion.

"Proximate cause" requires proof of both cause in fact and legal, or proximate, cause. *Craig, supra* at 86. To establish cause in fact, the plaintiff must show that "but for" the defendant's conduct, she would not have suffered an injury. *Id*. at 86-87, quoting *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). If the plaintiff establishes cause in fact, a determination of whether the conduct is a legal or proximate cause of the injuries follows. *Id*. at 87. Legal or proximate cause involves examining forseeability and whether the defendant should be held legally responsible for the consequences of his conduct. *Id*. at 86-87, quoting *Skinner, supra*. A defendant is not entitled to summary disposition if the plaintiff presents evidence showing "that it 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).

We conclude that Dr. Axline's testimony was sufficient to establish a genuine issue of material fact regarding the issues (1) whether plaintiff's mitral valve replacement surgery more probably than not was proximately caused by defendants' failure to make an early diagnosis and properly treat her conditions on July 23, 2002, and (2) whether such negligence resulted in the loss of an opportunity to avoid the heart surgery that was greater than fifty percent. See MCL 600.2912a(2).

Dr. Axline testified that, while he could not precisely quantify the possible reduction in risk of future surgery resulting from untreated sepsis, bacteremia, and endocarditis, the earlier that the conditions are treated, the more likely it is that the valve replacement surgery will not be

needed. While this evidence alone does not adequately satisfy plaintiff's burden under MCL 600.2912a(2), the opinions expressed in Dr. Axline's affidavit bolster plaintiff's case. Dr. Axline stated in his affidavit that had defendants diagnosed and immediately treated plaintiff, the likelihood that she would have avoided subsequent surgery and heart valve replacement would have been more than fifty percent. Considering Dr. Axline's deposition testimony and the opinion stated in his affidavit in a light most favorable to plaintiff, we conclude that this evidence is sufficient to create a question of material fact as to the issue of proximate cause. See MCL 600.2912a(2).

Defendants assert that Dr. Axline's affidavit cannot be used to contradict his deposition testimony. This assertion is correct. A party may not create an issue of fact by asserting contrary facts after giving damaging testimony in a deposition. *Dykes*, *supra* at 480. The Court explained: "'If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.'" *Id*. at 481, quoting *Perma Research & Development Co v Singer Co*, 410 F2d 572, 578 (CA 2, 1969).

However, Dr. Axline's affidavit does not contradict his deposition testimony. Contrary to defendants' argument, Dr. Axline did not "repeatedly refuse[] to quantify his theory." At Dr. Axline's deposition, defense counsel asked him "by what degree would the risk [of avoiding valve surgery] have been improved or reduced," and Dr. Axline responded that it was difficult to quantitate with precision. That is, he could not put a precise number or one number on the degree to which the risk of surgery would have been reduced by earlier treatment. Dr. Axline was not asked at his deposition whether the risk of avoiding the surgery was greater or less than fifty percent. And, in his affidavit, Dr. Axline did not attempt to precisely quantify the reduction in risk. He simply explained that the likelihood of avoiding the surgery would have been greater than fifty percent. We conclude that Dr. Axline's affidavit was properly considered by the trial court and that the opinion expressed in that affidavit, read together with his deposition testimony, provides sufficient evidence to support plaintiff's claim and survive summary disposition. Therefore, the trial court properly denied defendants' motion for summary disposition on this basis.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh