

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT SHAW and SHARON SHAW,

Plaintiffs-Appellants/Cross-
Appellees,

v

JOSEPH W. KAUFMAN, M.D., and
DERMATOLOGY ASSOCIATES OF
MACOMB-OAKLAND, P.C.,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED
September 15, 2009

No. 286440
Oakland Circuit Court
LC No. 07-081874-NH

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Plaintiffs Robert Shaw and Sharon Shaw appeal as of right the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants Joseph W. Kaufman, M.D., and Dermatology Associates of Macomb-Oakland, P.C. We affirm.

Robert Shaw initially became a patient of Dermatology Associates of Macomb-Oakland in 1987. Robert first visited in order to be treated for psoriasis and to have a body scan performed in order to check for skin cancer. Robert had a history of psoriasis on his elbows, knees and beard area. The psoriasis generally appeared to be red and scaly and would sometimes crack and bleed. After his initial visit in 1987, Robert next visited Dermatology Associates of Macomb-Oakland in 1992. He continued to visit over the next several years. During those visits, he was treated for psoriasis and received several biopsies.

In May 1999, during a visit with Dr. Joseph Kaufman, Robert complained about a spot on his eyebrow. The patch of skin in question appeared red and flaky and looked similar to the spots of psoriasis on Robert's body. Dr. Kaufman decided to treat the eyebrow with a prescribed cream or spray. Over the next several years, the spot consistently grew and, according to Robert, eventually changed in appearance. At his deposition, Robert was unable to specify when the eyebrow's appearance changed. Robert had numerous appointments with Dr. Kaufman. At each appointment, Robert allegedly complained about the lack of improvement in the condition of his eyebrow. Dr. Kaufman did not biopsy the eyebrow area. Rather, he continued to treat the eyebrow with the same methods that he was treating the various spots of psoriasis.

Robert last visited Dr. Kaufman in June 2005. Rather than schedule a follow-up appointment with Dr. Kaufman, Robert scheduled an appointment with Dr. Howard David Lipkin in January 2006. Robert's decision to visit Dr. Lipkin was primarily motivated by his desire to seek a second opinion regarding the condition of his eyebrow. At the January 2006 appointment, Dr. Lipkin apparently told Robert that he did not think that the spot on the eyebrow looked like psoriasis and that he wanted to try a different treatment method. At his deposition, Robert recalled Dr. Lipkin using liquid nitrogen on the area. Dr. Lipkin did not perform a biopsy. At Robert's next appointment with Dr. Lipkin, a biopsy was performed and it was discovered that Robert was suffering from squamous cell carcinoma. Consequently, the spot on Richard's eyebrow had to be removed. While Robert is now cancer-free, his eyebrow is now shorter in length and appears to sag.

On appeal, plaintiffs assert that the trial court erred in concluding that plaintiffs' expert witness failed to establish that defendants proximately caused the injuries in question. We disagree.

This Court reviews a trial court's decision regarding summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court's review is limited to the evidence that was presented to the trial court. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Furthermore, this Court must review the evidence in the light most favorable to the non-moving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

In a medical malpractice cause of action, the plaintiff has the burden of establishing that the defendant's negligent action proximately caused the plaintiff's injury. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). Proximate causation is composed of both cause in fact and legal cause. *Id.* In the present case, the trial court determined that plaintiff could not establish factual causation. To establish factual causation, the plaintiff must present evidence that would cause a jury to conclude that it was more probable than not that the defendant's actions were the cause of the injury. *Id.* Furthermore, this cause of action is based on a theory of lost opportunity for a better result. Robert alleges he lost his opportunity to avoid scarring, disfigurement and pain and suffering because defendants failed to perform a biopsy in a timely manner. Pursuant to MCL 600.2912a(2), "[i]n 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%."

The trial court properly granted defendants' motion for summary disposition after Dr. Gerald N. Goldberg's deposition testimony established that plaintiffs could not establish proximate causation. At the beginning of Dr. Goldberg's deposition, the following exchange occurred:

- Q. Dr. Goldberg, when do you believe within a reasonable degree of medical probability that Mr. Shaw had squamous cell carcinoma in his left eyebrow?
- A. That's very difficult to ascertain. I can tell you with certainty at the time of the biopsy that he had squamous cell carcinoma.

Q. And before the biopsy, you can't give us any estimate as to when that condition developed?

A. In retrospect, it may very well have been there quite a while before that and that is kind of the crux of the matter here, but it is very hard to ascertain exactly when the transformation may have occurred.

Q. Is that because of the nature of the disease itself that it can be very slow growing or very quickly growing?

A. That's correct.

Later, when asked whether Robert had squamous cell carcinoma in January 2006, Dr. Goldberg replied, "I'm not certain of that. It certainly is possible that he did. And it certainly was a suspicious area that had been there for a number of years." Dr. Goldberg further testified that once squamous cell carcinoma initially develops, its rate of growth can vary from situation to situation. Finally, Dr. Goldberg testified that the reason such aggressive surgery was performed on Robert was because the carcinoma had invaded the dermis. However, according to Dr. Goldberg, it would be impossible to state whether the dermal invasion occurred prior to 2006 because performing a biopsy is the sole method of discovering that particular condition.

Based upon the above-described testimony, the trial court's grant of summary disposition was proper. Plaintiffs theorize in this cause of action that because Dr. Kaufman failed to perform a biopsy in a timely manner, the squamous cell carcinoma was able to develop to an extent that required aggressive treatment, which consequently led to scarring, disfigurement and pain and suffering. Dr. Goldberg's testimony clearly establishes that it would be purely speculative to conclude that the squamous cell carcinoma existed at any point during Dr. Kaufman's treatment of the eyebrow. Because of the varied nature of the carcinoma involved in this case, it appears no more likely that the carcinoma developed in November 1999 than in January 2006. Furthermore, the aggressive surgery that was performed on Robert was necessary because of the extent to which the carcinoma had grown. Just as Dr. Goldberg could not testify regarding when the carcinoma developed, he could not testify regarding the speed at which the carcinoma grew. Therefore, plaintiffs cannot establish that the same aggressive surgery would not have been necessary if the carcinoma was detected in a 1999 biopsy. Because plaintiffs' cause of action was premised on pure speculation, there was not a question that could be properly presented to a jury. Plaintiffs failed to establish that there was any genuine issue of material fact regarding causation and the trial court properly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

Because this Court concludes that summary disposition was proper pursuant to MCR 2.116(C)(10), it is not necessary to determine whether defendants were also entitled to summary disposition pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Talbor

/s/ Cynthia Diane Stephens