STATE OF MICHIGAN

COURT OF APPEALS

MARILYN CHIRILUT and NICOLAE CHIRILUT,

Plaintiffs-Appellants/Cross-Appellees,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee/Cross-Appellant,

and

ERIN KITCHENMASTER and JENNIFER KNIESTEADT,

Defendants.

UNPUBLISHED
November 23, 2010

No. 293750
Oakland Circuit Court
LC No. 2007-087744-NH

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in defendants' favor pursuant to MCR 2.116(C)(10). Because plaintiff failed to provide reliable expert testimony to support her position, we affirm.

On June 27, 2005, plaintiff, Marilyn Chirilut, was admitted to William Beaumont Hospital ("Beaumont") to undergo surgery for the clipping of a brain aneurysm. According to plaintiff, while being prepped for the surgery, plaintiff's[1] right arm was pulled over her head by a Beaumont employee in such a manner as to cause her shoulder to be injured. Plaintiff felt an immediate pain during the positioning of her arm and continued to feel significant pain in her

[1] "Plaintiff" shall hereafter refer to Marilyn Chirilut only, as Nicolae Chirilut's claims are derivative in nature.

shoulder after the surgery. Plaintiff was discharged from Beaumont after the surgery with instructions to follow up with physical therapy.

Plaintiff underwent several courses of physical therapy over the next 16 months, without experiencing relief. An MRI performed on plaintiff's shoulder in October, 2006 revealed a partial tear in her right rotator cuff, for which plaintiff underwent surgery in January 2007. Plaintiff thereafter filed the instant medical malpractice complaint, alleging the defendants were negligent in her treatment and care and caused the shoulder injury at issue.

Beaumont moved for summary disposition[2], alleging that plaintiff failed to provide an expert to establish either the applicable standard of care or the proximate cause of plaintiff's injury. The trial court agreed that plaintiff's purported expert failed to provide reliable expert testimony as to proximate cause, and granted summary disposition in Beaumont's favor. This appeal followed.

On appeal, plaintiff contends that the trial court erred in its summary disposition determination, given that plaintiff provided an affidavit and deposition testimony of a qualified expert in orthopedic surgery concerning the proximate cause of plaintiff's injury. We disagree.

We review summary disposition rulings de novo. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 567; 702 NW2d 539 (2005). Summary disposition is appropriate pursuant to MCR 2.116(C)(10) when there is no issue of material fact such that the moving party is entitled to judgment as a matter of law. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When considering a motion under MCR 2.116(C)(10), a court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. *Id.*

To establish a claim of medical malpractice, a plaintiff must show: (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 standard of care. MCL 600.2912a; *Craig v Oakwood Hosp,* 471 Mich 67, 86; 684 NW2d 296 (2004). MCL 600.2912a(2), defines the applicable causation standard for medical malpractice as follows: "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." Our Supreme Court has further explained that in order to be a proximate cause, the negligent conduct:

> must have been a cause of the plaintiff's injury and the plaintiff's injury must have been a natural and probable result of the negligent conduct. These two

---

[2] Plaintiff voluntarily dismissed defendants Kitchenmaster and Kniesteadt from this matter prior to Beaumont's motion for summary disposition.

> prongs are respectively described as 'cause-in-fact' and 'legal causation.' While legal causation relates to the foreseeability of the consequences of the defendant's conduct, the cause-in-fact prong generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred. It is equally well-settled that proximate causation in a malpractice claim is treated no differently than in an ordinary negligence claim, and it is well-established that there can be more than one proximate cause contributing to an injury. *O'Neal v St. John Hosp & Medical Center*, 487 Mich 485, 490; ___ NW2d ___ (2010)(internal citations omitted).

Notably, the evidence "need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty." *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994), quoting 57A Am Jur 2d, Negligence, § 461, p. 442. And, "if circumstantial evidence is relied on to establish proximate cause, the evidence must lead to a reasonable inference of causation and not mere speculation. In addition, the causation theory must demonstrate some basis in established fact." *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 87-88; 776 NW2d 114 (2009).

Expert testimony is essential to establish a causal link between the alleged negligence and the alleged injury in a medical malpractice case. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 478; 633 NW2d 440 (2001); *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705; 400 NW2d 629 (1986). The proponent of expert testimony in a medical malpractice case has the burden of establishing that the expert is qualified and that the expert's opinion is reliable. *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067-1068, 729 NW2d 221 (2007).

The trial court, under MRE 702, has an obligation to ensure that any expert testimony admitted at trial is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). MCL 600.2955 further directs, in part:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.

> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

In response to Beaumont's motion for summary disposition, plaintiff provided the affidavit and deposition testimony of its proposed expert, Dr. Brandt. In the affidavit, Dr. Brandt swore that he was a practicing, board certified orthopedic surgeon and that when plaintiff came to see him on January 12, 2007, she reported that she had begun having a problem with a painful right shoulder as of June 27, 2006. According to Dr. Brandt, plaintiff advised him that on that date, her arm was placed in an overhead position prior to a surgical procedure and she felt a "pop" and a good deal of pain in her shoulder. Dr. Brandt indicated that his physical examination of plaintiff revealed discomfort and an impingement upon rotation of the right shoulder. Dr. Brandt also indicated that he reviewed plaintiff's radiological studies, including an October 25, 2006 MRI which showed a partial rotator cuff tear. Dr. Brandt opined that plaintiff's history, physical examination, and radiological studies suggest that instability in her right shoulder occurred as a result of her arm being placed in an overhead position on June 27, 2005. The affidavit concludes with the statement that in Dr. Brandt's opinion, "more likely than not, the articular side partial thickness rotator cuff tear of the right shoulder that [plaintiff] suffered occurred as a result of the right arm being taken in an abducted and overhead type position on June 27, 2005." Notably, however, Dr. Brandt crossed out the words "articular side partial thickness rotator cuff tear" in the above sentence and wrote "instability" above them. This suggests a lack of conviction on Dr. Brandt's part that the positioning of plaintiff's arm prior to surgery caused the specific injury of a rotator cuff tear. There is, however, a more troubling aspect to the affidavit.

At deposition, Dr. Brandt testified that he was led to believe he had to sign the affidavit prepared by plaintiff's counsel because he had been told "this could be done easily if I sign it, or it could be done with a subpoena and make me come to court. . . if it comes down to the two of those things, I'm going to sign this thing." There is some uncertainty, then, as to whether the affidavit was voluntarily signed, and whether, as a result, the affidavit was valid. See *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000) (to constitute a valid affidavit, the document must be a written statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making the statement).

True, Dr. Brandt testified that the affidavit mirrors the comments he made in his own office records and reports, and that his opinion is indeed that it is more likely than not that plaintiff's injury occurred as a result of her arm being abducted in an overhead position on June 27, 2005. Dr. Brandt also stated that he has not seen anything that is inconsistent with the history plaintiff gave him. Importantly, however, Dr. Brandt also testified that he did not look at defendant's charts or records concerning the surgery at issue. Dr. Brandt additionally testified

that he was not made aware of plaintiff's medical history concerning degenerative or arthritic changes in her shoulders, was not made aware of what plaintiff's physical therapy entailed, or that she had been treating with several other doctors and, in fact, had reviewed almost nothing but his own records. When asked whether he would defer to another orthopedic surgeon who had reviewed all of the records and deposition as to the causal relationship between the position of plaintiff prior to the surgery at issue and her injured shoulder, Dr. Brandt replied that if there was more information that would shed some light on the issue, he would "certainly defer to that person."

It appears from the above testimony that the sum whole forming the basis for Dr. Brandt's causation opinion were his examination of plaintiff a year and a half after her aneurysm surgery, review of an MRI of plaintiff's right shoulder taken by another doctor 14 months after the surgery, and plaintiff's self-report of how she believed her rotator cuff was torn. Having admitted to not reviewing any of plaintiff's relevant medical records, particularly those concerning the surgery, and not being aware of all of her relevant medical history and treatment, Dr. Brandt has shown no foundation for an opinion regarding the causal link between the claimed surgery incident and plaintiff's shoulder injury. Indeed, Dr. Brandt unequivocally testified that he would defer to another orthopedic surgeon who had reviewed all of the pertinent records and information, thereby suggesting Dr. Brandt's acknowledgment of a lack of information and uncertainty concerning causation.

This is not a situation where the credibility of witnesses is at issue, thus requiring submission to a factfinder. No one has challenged Dr. Brandt's credibility. Instead, it is abundantly clear that Dr. Brandt simply did not review the relevant records and information necessary to form a reliable, rather than speculative, opinion. As our Supreme Court has explained, speculation "is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Given the limited information upon which Dr. Brandt relied in rendering his opinion, his opinion is, while perhaps consistent with the explanation provided him by plaintiff, not deducible strictly from her explanation.

Finally, Dr. Brandt testified that he does not consider himself an expert. Dr. Brandt further testified that he had never served as an expert witness in a medical malpractice lawsuit, that he had not been asked to testify at trial in the instant matter, and that his understanding of his role was simply "to give my knowledge of what [plaintiff] told me and what I did and what the findings were." Given that Dr. Brandt does not consider himself an expert and, even assuming he would be qualified to testify as an expert, the basis for his opinion concerning causation is unreliable, the trial court did not err in granting summary disposition in Beaumont's favor. Dr. Brandt was plaintiff's only provided expert witness, and the evidence he provided did not establish "but for" causation.

On cross appeal, Beaumont contends that plaintiff failed to present a qualified expert as to the applicable standard of care, such that summary disposition was appropriate in its favor on this basis. According to Beaumont, while it raised this argument in the trial court, the trial court did not address this issue, but instead focused on Beaumont's alternative basis for summary disposition. Because we find that the trial court appropriately granted summary disposition in

defendant's favor based upon a lack of reliable expert testimony as to causation, we need not consider the issue presented in defendant's cross-appeal.

Affirmed.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio