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STATE OF MICHIGAN
COURT OF APPEALS

JEANA MILTON, as personal representative of the
Estate of Thirza Bagley,

UNPUBLISHED
October 19, 2023

Plaintiff-Appellant,

v

No. 361998
Kent Circuit Court
LC No. 19-06685-NH

PINE REST CHRISTIAN MENTAL HEALTH
SERVICES; GRAND RIVER EMERGENCY
MEDICAL GROUP, PLC; JACK MAHDASIAN,
MD; LOUIS NYKAMP, MD; AMBER BISHOP,
DO; JOEL ROBINSON, DO; and TERESA
BARANOWSKI-BIRKMEIER, DO,

Defendants-Appellees.

Before: RICK, P.J., and SHAPIRO and YATES, JJ.

PER CURIAM.

In this medical-malpractice action, plaintiff, Jeana Milton, as personal representative of the Estate of Thirza Bagley, appeals by delayed leave granted¹ an order awarding summary disposition under MCR 2.116(C)(10) to defendants. Plaintiff contends that the trial court erred in determining that no genuine issue of material exists as to the causation element of plaintiff’s claim for medical malpractice. We agree with plaintiff, so we shall reverse and remand for further proceedings.

I. FACTUAL BACKGROUND

On July 23, 2015, 83-year-old Thirza Bagley² went to the emergency department at Mercy Health Saint Mary’s (Saint Mary’s) with complaints of confusion, anxiety, and paranoid and visual

¹ *Estate of Thirza Bagley v Trinity Health Mich*, unpublished order of the Court of Appeals, entered January 26, 2023 (Docket No. 361998).

² We shall refer to Thirza Bagley, the decedent in this case, as the “plaintiff.”

hallucinations.³ Plaintiff's daughter advised the treating doctors that plaintiff had experienced two similar episodes within the last four months and they were related to a change in her antidepressant medication. Plaintiff's daughter explained that plaintiff had been declining over the previous few weeks and exhibiting increasing signs of confusion. Defendants Dr. Amber Bishop and Dr. Joel Robinson examined plaintiff. Plaintiff underwent laboratory work, a head CT, and a chest x-ray, which yielded results that were "unremarkable for any acute metabolic disease process." At the request of plaintiff's family, plaintiff was then transferred to defendant Pine Rest Christian Mental Health Services (Pine Rest) for psychiatric evaluation.

Plaintiff remained at Pine Rest from July 24 to 27, 2015. On July 24, defendant Dr. Teresa Baranowski-Birkmeier evaluated plaintiff for the purpose of assessing any underlying illnesses or conditions. Dr. Baranowski-Birkmeier reported that plaintiff was still experiencing hallucinations, but she was stable. On July 25, defendant Dr. Louis Nykamp conducted a psychiatric evaluation of plaintiff, who reported she was "not doing too bad." Dr. Nykamp's notes suggest that plaintiff's condition had improved, but she was still symptomatic and required more treatment. Dr. Nykamp evaluated plaintiff again on July 26. Plaintiff said that she was "feeling pretty good" and was no longer experiencing hallucinations, although she was still confused. On July 27, Dr. Baranowski-Birkmeier evaluated plaintiff, who had a fever of 100.2 degrees. Dr. Baranowski-Birkmeier also noted that plaintiff had lab abnormalities, so plaintiff was transferred to the Metro Health Hospital emergency department for additional evaluation. After that evaluation, plaintiff was transferred to Saint Mary's, where she was described as having "mental status changes from her baseline, and abnormal movements concerning for seizure activity."

At Saint Mary's, plaintiff underwent a brain MRI on July 28 that was suggestive of herpes simplex virus encephalitis (HSVE) and a lumbar puncture with a spinal-fluid test that was positive for herpes simplex. Plaintiff was administered a 21-day course of IV acyclovir to treat the HSVE. Plaintiff stayed at Saint Mary's until she was discharged on August 25, 2015. HSVE was listed as one of several discharge diagnoses. Plaintiff was discharged to the Great Lakes Specialty Hospital in Grand Rapids. The court file contains a dearth of information about what happened to plaintiff between when she was discharged from Saint Mary's on August 25 and her eventual death.

Plaintiff died on December 20, 2015. The causes of her death listed on the death certificate include cardiorespiratory arrest, severe brain injury from HSVE, recurrent seizures, urinary tract infection, and "severe generalized deconditioning." The death certificate lists "DMII, Respiratory Failure (chronic)" under the category of other significant conditions. On August 1, 2019, plaintiff filed a complaint, which she amended 12 days later. Plaintiff alleged that the failures to diagnosis plaintiff with HSVE and the delay in treatment were causes of her death. On November 19, 2021,

³ Trinity Health-Michigan d/b/a/ Mercy Health Saint Mary's and Sara VanBronkhorst, M.D., were initially named as defendants in this action, but VanBronkhorst was dismissed by stipulation and Saint Mary's obtained summary disposition in an order issued on October 5, 2021. The trial court's award of summary disposition to Saint Mary's is not at issue in this appeal.

the Pine Rest Defendants moved for summary disposition pursuant to MCR 2.116(C)(10).⁴ They argued that plaintiff could not establish factual causation, i.e., that any delay in plaintiff's treatment was a cause of her death. The Pine Rest Defendants asserted that the deposition testimony of Dr. Michael Bradshaw, plaintiff's causation expert, failed to establish that it was more likely than not that earlier treatment of plaintiff's HSVE would have made a difference in the ultimate outcome. Plaintiff opposed the Pine Rest Defendants' motion, arguing that at the very least, Dr. Bradshaw's testimony created a question of fact concerning the element of causation. Plaintiff challenged the argument that Dr. Bradshaw's testimony was speculative, and alleged that the testimony consisted of Dr. Bradshaw's well-informed opinions, based upon his experience, knowledge, the underlying literature, and the facts of the case, which "is exactly what expert testimony is supposed to be." In addition, Plaintiff contended that Dr. Bradshaw testified that an MRI more than likely would have shown that plaintiff had HSVE, which would have led to earlier treatment and a better prognosis. Plaintiff characterized that testimony as sufficient to show that the Pine Rest Defendants breached the standard of care and that that breach caused plaintiff's death.

The GREMG Defendants also moved for summary disposition under MCR 2.116(C)(10) on November 19, 2021. They argued that plaintiff had not provided expert testimony to establish it was more likely than not that testing on July 23, 2015, would have yielded an HSVE diagnosis or that beginning treatment on July 23 would have made a difference in the outcome. The GREMG Defendants insisted that plaintiff had failed to meet her burden on the element of proximate cause because plaintiff's causation theory was based on pure speculation. Plaintiff opposed the GREMG Defendants' motion, asserting that Dr. Bradshaw's testimony created a question of fact concerning the causation of plaintiff's death.

On December 17, 2021, the trial court held a hearing on defendants' motions for summary disposition. Plaintiff argued that Dr. Bradshaw's expert testimony established that it is a "truism" that an earlier treatment would have resulted in a better prognosis. The Pine Rest Defendants took the position that it is not sufficient in a medical-malpractice action simply to allege that an earlier diagnosis and treatment would have led to a better outcome. They insisted that plaintiff bore the burden of offering evidence that it was more likely than not that plaintiff would have had a different outcome. The trial court ruled from the bench, granting all the defendants' motions for summary disposition. The trial court concluded that plaintiff had failed to produce sufficient evidence that defendants' failure to diagnose plaintiff's condition on July 23, 2015, caused her death. The trial court memorialized its ruling in a written order issued on December 29, 2021. Plaintiff moved for reconsideration, but the trial court denied that motion. This appeal by plaintiff followed.

II. LEGAL ANALYSIS

On appeal, plaintiff contests the trial court's award of summary disposition to the Pine Rest Defendants and the GREMG Defendants under MCR 2.116(C)(10). We review de novo the trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504

⁴ Defendants comprise two separate groups. One group, identified as "the Pine Rest Defendants," includes Pine Rest itself, Jack Mahdasian, M.D., Lewis Nykamp, M.D., and Teresa Baranowski-Birkmeier, D.O. The other group, "the GREMG Defendants," includes Amber Bishop, D.O., Joel Robinson, D.O., and Grand River Emergency Medical Group, P.L.C.

Mich 152, 159; 934 NW2d 665 (2019). A summary disposition motion under MCR 2.116(C)(10) “tests the *factual sufficiency* of a claim.” *Id.* at 160. In addressing that motion, “a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Id.* A motion under MCR 2.116(C)(10) may be granted only if “there is no genuine issue of material fact.” *Id.* “ ‘A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.’ ” *Id.* With these standards in mind, we must consider the trial court’s ruling that no genuine issue exists on the element of causation.

Medical malpractice claims are governed by MCL 600.2912a, which defines the elements that a plaintiff must establish to prevail on such a claim. Among those elements, a plaintiff has to prove “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). “ ‘Proximate cause’ is a legal term of art that incorporates both cause in fact and legal (or ‘proximate’) cause.” *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). To establish that a particular action was the cause in fact of an injury, the plaintiff must show that “but for” the defendant’s actions, the plaintiff’s injury would not have occurred. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 511; 780 NW2d 900 (2009). “On the other hand, legal cause or ‘proximate cause’ normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.” *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994).

A trial court “must find that the defendant’s negligence was a cause in fact of the plaintiff’s injuries before it can hold that the defendant’s negligence was the proximate or legal cause of those injuries.” *Craig*, 471 Mich at 87. “Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or ‘but for’) that act or omission.” *Id.* “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.” *Id.* It is insufficient to show that the defendant may have caused the plaintiff’s injuries, or that the causation was a “mere possibility or a plausible explanation.” *Id.* Instead, a plaintiff must “set forth specific facts that would support a reasonable inference of a logical sequence of cause and effect.” *Skinner*, 445 Mich at 163. Hence, a valid theory of causation “must be based on facts in evidence.” *Craig*, 471 Mich at 87. “However, any doubts about the connections between the causes and the effects, should be resolved by the jury.” *Davis v Thornton*, 384 Mich 138, 145; 180 NW2d 11 (1970).

Here, plaintiff’s theory of factual causation is straightforward: if defendants had conducted a timely MRI of plaintiff on July 23, 2015, they would have discovered that she was suffering from HSVE and, consequently, they would have promptly treated that condition, thereby preventing the death that flowed from plaintiff’s HSVE. To be sure, plaintiff underwent a brain MRI on July 28, 2015, at Saint Mary’s that was suggestive of HSVE and a lumbar puncture with a spinal-fluid test that was positive for herpes simplex. As a result, plaintiff was administered a 21-day course of IV acyclovir to treat the HSVE. But plaintiff insists that the delay in administering IV acyclovir, as a matter of fact, caused her death.

The trial court chose to award summary disposition to defendants based on the conclusion that plaintiff failed to establish the causation element of her medical-malpractice claim.⁵ The trial court focused on the deposition testimony of Dr. Bradshaw, plaintiff's causation expert. Plaintiff correctly notes that Dr. Bradshaw offered testimony supporting the causation element of plaintiff's claim. As an initial matter, Dr. Bradshaw explained that when plaintiff arrived at Saint Mary's on July 23, 2015, exhibiting the symptoms she had, "I probably would have ordered an MRI and I'm not sure that I would feel comfortable with her transferring to a psychiatric hospital at that time." Then, turning to the consequences of the delay in performing an MRI, Dr. Bradshaw testified that the "data support delay in the administration of acyclovir has one of the factors associated with the worst prognosis." Finally, closing the loop on his analysis, Dr. Bradshaw observed that he would "assume that had she been treated with acyclovir on the 27th [of July 2015] the overall outcome may have been slightly better than it was; likewise, had acyclovir been started yet earlier, it likely would have been—the outcome likely would have been better than it was as well." In response to a follow-up question about the impact of plaintiff's age and her comorbidities, Dr. Bradshaw said that "the data would suggest the earlier the treatment is started the better." Expanding on that idea, Dr. Bradshaw reasoned that, at the time of plaintiff's "initial presentation" on July 23, 2015, her HSVE "was relatively mild which makes the diagnosis challenging but perhaps provides a window of opportunity for an improved outcome from a treatment standpoint."

Dr. Bradshaw readily conceded that "this is all speculative." But in context, that comment merely reflected the fact that no MRI was ordered or conducted on July 23, 2015, before plaintiff was transferred from Saint Mary's to Pine Rest, so that measure to determine whether plaintiff had HSVE could not yield any results at that time. Indeed, when Dr. Bradshaw was questioned further on the role of speculation in his analysis, he made clear that his central thesis necessarily rested on some amount of speculation:

Q. Other than starting acyclovir earlier is always better you can't say what the outcome would have been if the acyclovir would have been started on [July] 24th, 25th, 26th, 27th, true?

A. True. I think it would be speculation. The literature shows the outcomes are better the earlier acyclovir is started.

By framing his opinions in those terms, Dr. Bradshaw left no doubt that the earlier administration of acyclovir produces better outcomes, as a subsequent exchange on that point illustrates:

Q. And is it your opinion that more likely than not that had [plaintiff] been commonly diagnosed with HSV encephalitis earlier and would have been treated with acyclovir earlier, her prognosis would have been better than what it was?

⁵ Although the parties' briefs discuss the alleged breach of the standard of care, that matter has no bearing on our review of the trial court's summary disposition award. Similarly, the briefs to some extent frame the dispute as a contest about loss of the opportunity to survive, but that issue has no bearing on our resolution of this appeal.

* * *

A. I think the literature would suggest that the sooner a patient is treated, the better the prognosis.

In rendering its decision from the bench awarding summary disposition to defendants, the trial court picked up on Dr. Bradshaw's general observation that "the sooner the patient is treated, the better the prognosis." Discussing that testimony, the trial court stated:

Literature shows that if you administer this drug earlier, the earlier you administrator – administrate it, the better the prognosis.

Ergo, had we administered it earlier to [plaintiff], she would have had a better prognosis. And I'm not sure moving from the general to the specific is sufficient causation that a reasonable jury could conclude that therefore she would have had a better prognosis. She would have lived, or she would not have suffered, or something.

The trial court went on to explain its findings and conclusions, including its skepticism that merely proving that plaintiff would have had a better prognosis with earlier treatment would be sufficient to establish causation:

So, in this particular case, and with the – the admonition of *Craig* in mind, the causation expert, Dr. Bradshaw, testified again that as a general matter, people generally improve by taking this drug earlier. I think that's sort of a truism, I'm assuming, and – and – in this area of medicine, and that therefore, generally had she received this medicine in an earlier fashion, generally, she would have – her prognosis would have improved.

The problem again is you're moving from the general to the specific. There's little evidence to show that this particular [plaintiff], this particular victim, this patient, she herself would – her prognosis would have been better, or quite frankly, even what that means.

The trial court erred in its analysis of factual causation by essentially faulting plaintiff for the gap in the evidence resulting from defendants' failure to order or perform an MRI on July 23, 2015. That gap in the evidence left Dr. Bradshaw no alternative but to apply general principles of treatment for HSVE to plaintiff's specific circumstances. In that respect, this case differs from our decisions in cases such as *Dykes v William Beaumont Hosp*, 246 Mich App 471; 633 NW2d 440 (2001), where the plaintiff's expert witness "acknowledged that it was not possible to state within a reasonable degree of medical certainty whether a [specific medical procedure] would have made any difference in the outcome or prolonged [the decedent's] life." *Id.* at 479. Moreover, the *Dykes* case differs markedly from the instant case because, in *Dykes*, the expert witness's testimony at a deposition contradicted the statements he provided in an affidavit. See *id.* at 478-479.

Here, the proper resolution of defendants' motions for summary disposition is dictated not by *Dykes*, but instead by our Supreme Court's admonition that "any doubts about the connections between the causes and the effects, should be resolved by the jury." *Davis*, 384 Mich at 145. The

record in this case provides ample support for two important components of factual causation: (1) defendants did not order or perform an MRI on July 23, 2015, even though plaintiff arrived at Saint Mary's with symptoms that suggested she had HSVE; and (2) administration of acyclovir at that early stage of plaintiff's HSVE would have produced a significantly better result than application of acyclovir after plaintiff returned to Saint Mary's on July 27, 2015. Of course, a jury could very well reach a contrary finding on each of those matters, but summary disposition is not the stage of the case where those decisions may be made. Therefore, we must reverse the awards of summary disposition to defendants and remand the case for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michelle M. Rick
/s/ Douglas B. Shapiro
/s/ Christopher P. Yates