

STATE OF MICHIGAN
COURT OF APPEALS

PAWLO PETRO FICAJ, Personal Representative
for the Estate of JULIA E. FICAJ,

Plaintiff-Appellant,

v

ROBERT PRAY,

Defendant-Appellee.

UNPUBLISHED
December 20, 2012

No. 307818
Roscommon Circuit Court
LC No. 10-728912-NO

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Plaintiff Pawlo Ficaj appeals as of right the trial court's order of summary disposition in favor of defendant Robert Pray. The trial court entered summary disposition under MCR 2.116(C)(10), determining that no reasonable juror could find that the conditions of the house that Pray sold to the Ficaj family caused Julia Ficaj's death. Pawlo Ficaj appeals, arguing that he has provided sufficient circumstantial evidence for a reasonable juror to conclude that Pray's negligence caused Julia Ficaj's death. We affirm.

I. FACTS

A. BACKGROUND FACTS

In July 2003, Pray purchased property on Flint Road in Roscommon. Diane Doherty testified at deposition that she sold the property to Pray after she received it from her father's estate. Doherty testified that when she sold the house, there was extensive water damage to the walls and floor from leaks. Doherty testified that her brother raised the floor around the toilet, but did not alter the plumbing, and she was not aware of any problems with the plumbing when she sold the house. She testified that because of the house's proximity to a lake and swampy area, it tended to be wet underneath.

When Pray purchased the property, it was in disrepair. Pray testified that he significantly improved the property by laying carpet, installing cabinets, putting in a new toilet and new kitchen and bathroom sinks, replacing lighting fixtures, dry-walling the interior of the house, replacing some shingles, and siding the exterior of the house. Pray placed new siding over the old wooden siding, without treating the wood. Pray testified that the house had a crawlspace

underneath, but he never went into the crawlspace and did not do any well or septic work on the property. The house was connected to the Markey Township sewer system.

Philip Ackley, a building inspector for the Houghton Lake Building Agency, testified at deposition that he spoke with Pray because he started working on the house without a building permit. Pray acquired a building permit, but incorrectly believed that he did not need to have the property inspected. Pray also incorrectly believed that he did not need a license to remodel homes for resale.

The Ficajs purchased the home from Pray on a land contract on April 5, 2005, and the family moved into the home.

B. JULIA'S ILLNESS AND DEATH

The entire family became ill shortly after moving into the home, including Julia Ficaj, who was then 13 months old. Pawlo Ficaj testified at deposition that the entire family developed flu-like symptoms, including a sore throat and a headache, and that he thought the children had a cold. He testified that both his son and Julia Ficaj wheezed and coughed, but that his son "coughed it out."

In late May 2005, Margo Ficaj took Julia Ficaj to the Mid-Michigan Urgent Care Center because of what appeared to be an allergic reaction to her insect bites. Pawlo Ficaj testified that her insect bites were a quarter or half-dollar size, and dark purple in color. Margo Ficaj took Julia Ficaj back to the Urgent Care Center on June 1, 2, and 3, 2005, because she remained very ill. She developed a high fever, vomiting, and bloody loose stool. The Urgent Care Center treated and released her each time.

On June 4, 2005, Margo Ficaj took Julia Ficaj to the University of Michigan Children's Hospital. After a biopsy of Julia Ficaj's skin, the University of Michigan Children's Hospital determined that she suffered from necrotizing vasculitis. Vasculitis is an inflammation of the blood vessels. The University of Michigan Children's Hospital found that Julia Ficaj's rash was "consistent with early stage erythema multiform[e]." Erythema multiforme is a skin condition caused by an allergic reaction or infection, in which a person's immune system damages blood vessels in the skin.¹ Severe forms of erythema multiforme have low survival rates.²

While at the University of Michigan Children's Hospital, Julia Ficaj suffered from a seizure. A CT scan revealed that her brain was swollen and had extensive white matter lesions. An MRI showed "abnormalities suggesting viral encephalitis, acute necrotizing encephalitis, or a metabolic disorder[.]" Julia Ficaj died on June 9, 2005.

¹ "Erythema Multiforme," National Institutes of Health, *MedlinePlus Medical Encyclopedia*, <<http://www.nlm.nih.gov/medlineplus/ency/article/000851.htm>> (accessed November 5, 2012).

² *Id.*

C. JULIA'S CAUSE OF DEATH

The Washtenaw County Medical examiner listed Julia Ficaj's cause of death as "acute encephalomyelitis," pending its investigation. An autopsy of her brain showed severe vascular necrosis. The University of Michigan determined that Julia's encephalitis was associated with this vasculitis. In September 2005, Dr. Paul E. McKeever, the Chief of the Section of Neuropathology at the University of Michigan Hospital, determined that the structures in Julia Ficaj's brain "look[ed] like a fungal infection[.]" The Washtenaw County Medical examiner thus concluded that Julia Ficaj "died of acute encephalomyelitis. . . . [Her] necrotizing vasculitis [was] associated with structures resembling fungal infection[.]"

Julia Ficaj's brain tissue was sent to the Centers for Disease Control for further analysis. In November 2005, Dr. Roy Campbell of the Centers for Disease Control informed the Ficajs that "[a]ll tests for specific infectious causes at CDC were negative. . . . I don't believe we're going to find a specific infectious cause in this instance." Dr. Janet Gilsdorf, the pediatric infectious diseases director at the University of Michigan Medical Center, informed the Ficajs that the Centers for Disease Control were ultimately unable to discover a specific cause of death, and that their final diagnosis was "vasculitis of the central nervous system with no evidence of bacterial, viral, or fungal infection."

In May 2006, Margo Ficaj emailed the University of Michigan to express her concern that a tenant's granddaughter developed a rash from insect bites that resembled Julia's rash. Dr. Gilsdorf responded that she still believed that Julia "ha[d] an uncontrolled reaction to something that most likely we will never identify. We continue to think that there was something unique about Julia's immune system that gave her that terrible reaction[.]"

D. THE PROPERTY'S PLUMBING PROBLEMS

The Michigan Department of Consumer and Industry Services, Bureau of Regulatory Services inspected the house's water supply and sewage disposal system on June 28, 2005, to license the home for a child day care. It determined that the house's water and sewer systems were safe, and was only concerned that the water line to the well pump required a well seal.

The Ficajs sold the Flint Road property to Michael and Shirley Dougherty in July 2005. The Doughertys resided at the property until July 2009, when they relinquished the land contract for financial reasons. The Doughertys testified at deposition that the toilet worked on the property, that they never noticed any mold in the house, and that the house did not make them ill.

Richard Tyo, who professionally excavates crawlspaces and basements, testified that Pawlo Ficaj asked him to use a rotor on a clogged toilet drain at the house around Christmas, 2009. Pawlo Ficaj told Tyo that the toilet was flushing, but draining very, very slowly. Tyo testified that he used the rotor in the pipe, and it began draining properly.

In February 2010, Tyo returned because the toilet was again not draining properly. Tyo testified that he discovered that where the interior pipes were supposed to connect to sewer outside the house, the house's footing had shifted and crushed the pipe. Tyo testified that when Pawlo Ficaj flushed the interior toilet, he could see that water was not draining into the sewer. He then located the crawl space entrance inside the house, and looked down into it. He testified

that it appeared that the toilet was draining directly into the crawlspace because there were remnants of toilet paper and feces on the ground. He could see that the area underneath the house was very moldy.

On March 10, 2010, Summit Laboratory, LLC tested air and soil samples from the crawlspace. The crawlspace soil tested positive for e-coli, and the crawlspace air sample tested “very high” for mold spores. But the living space tested “very low” for mold spores.

E. PROCEDURAL HISTORY

On October 6, 2010, the trial court appointed Pawlo Ficaj the personal representative of Julia Ficaj’s estate. Pawlo Ficaj filed this action, alleging that Pray’s negligent remodeling and repairs caused sewage and water to pool under the house, creating an unsafe condition that caused a large quantity of mold to grow, which in turn caused Julia Ficaj’s encephalomyelitis.

In October 2011, Pray moved the trial court for summary disposition under MCR 2.116(C)(10). Pray argued that, even assuming he negligently repaired the home, a jury would have no reasonable basis to conclude that the condition of the home caused or contributed to Julia Ficaj’s death. The Ficajs responded that there was circumstantial evidence that Pray’s negligent remodeling caused the mold, and that the mold had caused Julia Ficaj’s death.

On November 10, 2011, the trial court heard arguments on the motion. The trial court considered that neither Pawlo Ficaj nor Julia Ficaj’s doctors could explain the vasculitis both on her skin and in her brain, or could state a definite cause of death. The trial court noted that while the Washtenaw Medical examiner found structures in Julia Ficaj’s brain that initially resembled a fungal infection, the Center for Disease Control subsequently found no evidence of bacterial, viral, or fungal infection. The trial court also considered that Pawlo Ficaj had proved that there was mold under the residence in 2010, but opined that there were no indications that the mold had been present in 2005, and noted that no one had become seriously ill in the intervening time period.

The trial court determined that Pawlo Ficaj’s theory of causation was too speculative. It ruled that there was no reasonable interpretation of the circumstantial evidence that would allow a juror to conclude that mold in the house in 2005 caused or contributed to Julia Ficaj’s death. The trial court granted Pray’s motion for summary disposition, and dismissed the case.

II. CAUSE IN FACT

A. STANDARD OF REVIEW

This Court reviews de novo the trial court’s determination on a motion for summary disposition.³ A party is entitled to summary disposition under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter

³ *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

of law.”⁴ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁵ A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.⁶ If there is no issue of material fact, whether a plaintiff has shown causation is a matter of law.⁷

B. LEGAL STANDARDS

To prove negligence, a plaintiff must show that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the plaintiff was injured, and (4) the defendant’s breach caused the plaintiff’s injury.⁸ The only element at issue in this case is the fourth element: whether Pray’s breach caused Julia Ficaj’s injury.

To prove causation, the plaintiff must prove both cause in fact and proximate cause.⁹ “The cause in fact element generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.”¹⁰ A plaintiff can prove cause in fact by circumstantial evidence, but the plaintiff’s circumstantial evidence “must facilitate reasonable inferences of causation, not mere speculation.”¹¹ The plaintiff’s theory of causation must have some basis in facts from which the jury could conclude that, more likely than not, the plaintiff’s injuries would not have occurred but for the defendant’s conduct.¹²

C. APPLYING THE STANDARDS

Pawlo Ficaj argues that, viewing the evidence in the light most favorable to him, the following chain of circumstantial evidence establishes that Julia Ficaj died from a fungal infection caused by Pray’s conduct: (1) the family members experienced symptoms consistent with a fungal infection when they moved into the house; (2) the symptoms subsided when the family moved out; (3) mold was later found in the structure; and (4) mold could have caused the injuries to Julia Ficaj’s brain. Pray responds that a variety of issues, including an uncontrolled

⁴ MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁵ MCR 2.116(G)(5); *Maiden*, 461 Mich at 120; *Odom*, 482 Mich at 466-467.

⁶ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

⁷ *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124 (2009); see *McMillan v State Highway Comm*, 426 Mich 46, 63 n 8; 393 NW2d 332 (1986).

⁸ *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005).

⁹ *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994); *Davis v Thornton*, 384 Mich 138, 145; 180 NW2d 11 (1970).

¹⁰ *Skinner*, 445 Mich at 163.

¹¹ *Id.* at 163-164; see *Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976).

¹² *Skinner*, 445 Mich at 164-165.

immune response to the insect bites, could have caused her injuries, and also argues that the Centers for Disease Control ruled out a fungal infection as the cause of death after her autopsy.

We conclude that the trial court correctly determined that, viewing the evidence in the light most favorable to Pawlo Ficaj, the evidence that mold caused Julia Ficaj's death is too speculative. A plaintiff's circumstantial evidence is impermissibly conjectural if there are two or more explanations about how an event happened, and both explanations are equally plausible.¹³ "The evidence need not negate all other possible cause, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty."¹⁴ Here, Julia Ficaj's doctors initially diagnosed her with erythema multiforme, an immune condition. After Julia Ficaj's brain was autopsied and tested, Dr. Gilsdorf maintained that she had a unique immune system and an uncontrolled reaction to an unidentified substance. Pawlo Ficaj has not presented evidence that any of Julia Ficaj's doctors or any witness could testify that Julia Ficaj fell ill because of her exposure to toxic mold. Though Ficaj has presented evidence that toxic mold *could* cause the type of injuries that existed in Julia Ficaj's brain at her death, he has presented no evidence that toxic mold *in fact* caused those injuries.

Pawlo Ficaj primarily argues that this case is analogous to *Genna v Jackson*, a toxic mold case decided by this Court.¹⁵ In *Genna*, the plaintiffs and defendant shared a common wall in a condominium complex.¹⁶ The plaintiffs began experiencing flu-like symptoms, and their health worsened over the next few months, despite antibiotics and breathing treatments.¹⁷ The plaintiffs moved out of their home three months later, and their health began to improve.¹⁸ Four days after the plaintiffs moved out of their home, the defendant returned from an extended vacation and discovered toxic mold infesting her entire condominium.¹⁹

At trial, the plaintiff's mold expert testified that neither condominium would be a healthy environment in which to live because the levels of toxic molds were "unusually high" in both the plaintiffs' and defendant's condominiums.²⁰ An allergy doctor's records indicated that mold exposure was a "probably confounding factor" in one of the plaintiff's symptoms.²¹ On appeal, the defendant argued that the plaintiff did not provide any direct expert testimony of a causal link

¹³ *Skinner*, 445 Mich at 164; *Kaminski v Grand Truck W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).

¹⁴ *Skinner*, 445 Mich at 166, quoting 57A Am Jur 2d, Negligence, § 461.

¹⁵ *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009).

¹⁶ *Id.* at 415.

¹⁷ *Id.*

¹⁸ *Id.* at 415-416.

¹⁹ *Id.*

²⁰ *Id.* at 416.

²¹ *Id.* at 421.

between the mold and the plaintiffs' symptoms.²² This Court rejected that argument, concluding that there was enough circumstantial evidence to facilitate a reasonable inference that the mold caused the plaintiffs' injuries.²³

We conclude that this case is distinguishable from *Genna*. In *Genna*, there was a four day gap between the plaintiffs' illnesses and the mold's discovery. Here, Julia Ficaj died in 2005, the Ficajs discovered the mold under the house in 2010, and there was no evidence that anyone who lived in the structure from 2005 to 2010 became seriously ill. The Ficajs presented evidence that another child developed a rash from insect bites in 2006, but presented no evidence that this led to a serious illness, and presented no evidence that linked the child's rash to mold. In *Genna*, a mold expert testified that there were unusually high quantities of unhealthy mold spores in the air in the living space, but here, the evidence was that the mold spore count in the living space was "very low."

Finally, in *Genna*, there was evidence that a plaintiff's doctor linked his injury to mold. Though there was evidence that mold could have caused the type of pathology in Julia Ficaj's brain and her doctors initially thought that her cause of death may have been a fungal infection, the Centers for Disease Control later determined that there was "no evidence of bacterial, viral, or fungal infection" in Julia Ficaj's brain. The Ficajs have presented no evidence that any doctor would testify Julia Ficaj fell ill because of her exposure to toxic mold. Indeed, all of Julia Ficaj's doctors expressed that the specific cause of Julia Ficaj's illness and death might very well remain a mystery. We conclude that this case is not closely analogous *Genna*.

Thus, we conclude that Pawlo Ficaj's circumstantial evidence of cause in fact is too speculative because he has not established facts from which a reasonable juror could conclude that it is more likely than not that mold caused Julia Ficaj's injuries. Thus, Pawlo Ficaj has not established the causation element of his negligence claim, and the trial court appropriately granted Pray's motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

²² *Id.* at 418.

²³ *Id.* at 421.