STATE OF MICHIGAN

COURT OF APPEALS

MARGARET ANN HERRMANN, Individually and as Personal Representative of the Estate of MICHAEL GLENN HERRMANN, Deceased, and GLENN C. HERRMANN,

Plaintiffs-Appellants

v

PINKUS DERMATOPATHOLOGY LABORATORIES, P.C., AMIR H. MEHREGAN, M.D., WILLIAM BEAUMONT HOSPITAL, STEVEN G. RUBY, M.D., EDWARD G. BERNACKI, JR., M.D., GEOFFREY GOTTLIEB, M.D. and THOMAS ROBBINS, M.D.,

Defendants-Appellees,

and

A. BERNARD ACKERMAN, ROSALYN WEINTRAUB M.D., P.C., ROSALYN WEINTRAUB, M.D., HOMAYOON RAHBARI, M.D. and UNIVERSITY HOSPITAL,

Defendants.

UNPUBLISHED
March 20, 1998

No. 198380
Oakland Circuit Court
LC No. 89-378853-NH

Before: Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiffs filed a medical malpractice action against defendants following the tragic death of Michael Herrmann, a minor, from cancer. Plaintiffs alleged that defendant Mehregan from Pinkus Laboratories was negligent because he failed to indicate that the portion of a lesion remaining after a

biopsy on decedent's shoulder was potentially dangerous and because he failed to demand an immediate, complete excision of that remaining portion[1]. Plaintiffs also alleged that Beaumont Hospital and its pathologists, specifically defendants Ruby, Bernacki, Gottlieb and Robbins, were negligent in failing to diagnose the lesion as a malignant melanoma after a second biopsy[2]. The trial court granted summary disposition in favor of all defendants, finding that there was no evidence that defendants Mehregan and Pinkus Laboratories breached the standard of care and there was no evidence that the conduct of any of the defendants was a proximate cause of decedent's death. We affirm.

Plaintiffs first argue that the trial court erred in requiring them to set forth evidence of proximate causation consistent with the standard set forth in *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994)[3]. They argue that *Skinner*, a products liability case, is not applicable in medical malpractice actions, but rather that the causation requirements, as set out in *Falcon v Memorial Hospital*, 436 Mich 443; 462 NW2d 44 (1990), apply. They claim that pursuant to *Falcon* they need not demonstrate "but for" causation, but rather that they only need to demonstrate that there was a substantial possibility that defendants caused the injury. Substantial possibility does not have to be more than fifty percent. We disagree with plaintiffs' proposition.

First, the Supreme Court recently confirmed that the proximate cause standard set out in *Skinner, supra* applies in medical malpractice actions. *Weymers v Khera*, 454 Mich 639, 649; 563 NW2d 647 (1997). Second, the rule of law set out in *Falcon, supra* is not applicable to this case. Contrary to plaintiffs' arguments, *Falcon* recognized a new cause of action in Michigan, one for recovery of the loss of an opportunity to survive. It did not merely change the proximate causation requirement in a medical malpractice action. *Falcon, supra* at 469. In *Weymers, supra*, the Court confirmed that *Falcon* had created a *cause of action*. It refused to extend *Falcon* by refusing to recognize that a "*cause of action* exists for the loss of an opportunity to avoid physical harm less than death" even though a cause of action existed for the loss of an opportunity to avoid death[4]. *Id.* at 649.

Because *Falcon* created a new cause of action, it did not apply to the case at hand. See *Hicks v Agney*, 413 Mich 556, 559; 321 NW2d 383 (1982). In *Hicks*, the Court ruled that when a new cause of action is recognized, the new rule applies only to the case being decided and "to causes of action which accrue after the decisional date of the case announcing the new rule." The cause of action in this case accrued, at the latest, in 1986. *Falcon* was decided by this Court in 1989[5] and was affirmed by the Supreme Court in 1990. This action accrued prior to the decision in *Falcon* and therefore, its rule of law, creating a new action, is inapplicable. The trial court was correct in finding that *Skinner, supra*, was controlling as to the element of proximate cause in a negligence action.

Plaintiffs next argue that the trial court erred in granting summary disposition where there were questions of fact, which needed to be resolved by the trier of fact. We disagree, finding that no questions of fact existed in this case. In order to sustain a claim for medical malpractice, plaintiff had the burden of proving four elements: (1) the applicable standard of care; (2) a breach of that standard by defendant; (3) injury; and (4) that the injury was proximately caused by the negligence of defendant in breaching the standard of care. *Weymers, supra* at 655; *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). With regard to the element of proximate cause, plaintiffs were required to present evidence to establish cause in fact. *Skinner, supra* at 162-163. Specifically, they needed to

present substantial evidence that "more likely than not, but for the defendant's conduct", the injury would not have occurred. *Id.* 164-165; *Weymers, supra* at 647-648. A mere possibility of causation is insufficient and if the evidence is pure speculation or conjecture, summary disposition is appropriate. *Skinner, supra* at 165.

In a medical malpractice action, expert testimony is usually required to establish the existence of causation because the scientific knowledge necessary to determine whether an injury is truly attributable to something a medical professional did or failed to do is generally not within the common understanding of a reasonable jury. See *Locke, supra*, 223, 231-233; *Ghezzi v Holly*, 22 Mich App 157, 163; 177 NW2d 247 (1970).

Plaintiffs engaged two expert witnesses, neither of whom offered evidence that the conduct of any of the defendants was a proximate cause of decedent's death. Dr. Sagebiel testified that it was not possible to determine when the melanoma metastasized. He also testified that to offer an opinion as to when it had metastasized would amount to speculation. Similarly, Dr. Indianer testified that he did not know when the metastasis occurred but that it probably had occurred by November 1985, which is before defendants Ruby, Bernacki, Gottlieb and Robbins were even involved in the case. Indianer and Sagebiel testified that decedent was terminal once the metastasis took place. Since plaintiffs' experts could do no more than speculate as to when metastasis occurred and whether it occurred before or after any of the defendants treated decedent, there was no evidence from which a determination as to proximate cause between the conduct and death could be made. Summary disposition was therefore appropriate. In so holding, we note that, in their brief on appeal, plaintiffs completely fail to draw our attention to any testimony or evidence that would sustain a finding that there was sufficient evidence to create a question of fact as to proximate cause. Our review of the record reveals no evidence sufficient to survive summary disposition.

Plaintiffs' experts also offered no testimony that defendants Mehregan and Pinkus Laboratories breached the standard of care. Therefore, even if there had been evidence of proximate cause as to these two defendants, there was no evidence that they breached the standard of care. Dr. Indianer testified that he did not disagree with Mehregan's diagnosis at all. Dr. Sagebiel's testimony with regard to Mehregan's conduct was inconsistent. He criticized Mehregan, inferring that his conduct breached the standard of care but later, he testified that Mehregan's actions were within the standard of practice. Plaintiffs argue that Sagebiel's inconsistent testimony creates a question of fact as to whether the standard of care was breached. This argument is disingenuous. A party may not create a genuine issue of material fact by offering contradictory statements from one person. *Schultz v Auto Owners Ins Co*, 212 Mich App 199, 202; 536 NW2d 784 (1995).

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] Decedent underwent a shave biopsy of a mole on his right shoulder in June 1985. The specimen was sent to Mehregan at Pinkus Laboratories for examination. Mehregan diagnosed a benign growth but recommended a larger excision of the portion remaining on the shoulder.

[2] In November 1985, after the lesion grew again, it was excised and submitted to Beaumont's pathologists who diagnosed it as a benign growth after consulting with Dr. A. Bernard Ackerman, an international authority in dermatopathology.

[3] In *Skinner*, the Court stated:

> We have previously explained that proving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as "proximate cause."
>
> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. 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. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. [*Skinner, supra* at 162-163 (citations omitted).]

The Court further elaborated on the requisite evidence necessary to prove cause in fact:

> The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Id.* at 165 (citations omitted).]

[4] Our Legislature immediately rejected the lost opportunity cause of action, which was set forth in *Falcon, supra*. The Legislature enacted MCL 600.2912a(2); MSA 27A.2912(1)(2) to prohibit the result reached by the *Falcon* Court. The cause of action was only viable between the decision in *Falcon, supra* and October 1, 1993, the effective date of the amendment. See *Weymers, supra* at 649 and *Hicks v Agney*, 413 Mich 556, 559; 321 NW2d 383 (1982).

[5] 178 Mich App 17; 443 NW2d 431 (1989).