STATE OF MICHIGAN

COURT OF APPEALS

ALFRED BAILEY, JR., as Independent personal Representative of the Estate of LAWRENCE BAILEY, SR., Deceased,

Plaintiff-Appellant,

v

GORDON R. BLEIL, M.D., and SOUTH HAVEN FAMILY PHYSICIANS, P.C.,

Defendants-Appellees,

and

ADELBERT STAGGS, M.D., KALAMAZOO EMERGENCY ASSOCIATES, P.C., and WATERVLIET COMMUNITY HOSPITAL,

Defendants.

UNPUBLISHED
November 30, 1999

No. 211892
Van Buren Circuit Court
LC No. 97-042421 NM

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

KELLY, J. (dissenting).

I respectfully dissent.

I agree with the majority's conclusion that plaintiff's evidence raised a genuine issue of material fact as to whether defendants breached the applicable standard of care. However, I disagree with the majority's conclusion that defendants' motion for summary disposition was properly granted because plaintiff failed to present any evidence from which a reasonable jury could conclude that defendants' breach of the standard of care was a proximate cause of the decedent's death.

Under Michigan medical malpractice law, a plaintiff must prove as part of his prima facie case that the defendant's negligence proximately caused the plaintiff's injuries. MCL 600.2912a; MSA 27A.2912(1); *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). To establish

proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). To establish cause in fact, the plaintiff must present substantial evidence from which a jury may conclude that, more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id.* at 164-165. To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct "may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable." *Weymers v Khera*, 454 Mich 639, 563 NW2d 647 (1997), quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).

Dr. Thomson testified at his deposition that the decedent's family history of diabetes, which was clearly indicated on his medical chart, was a "red flag" that his illness was much more likely related to diabetes than to influenza. Dr. Thomson also testified that, without an accurate and very strong preliminary diagnosis, "catastrophic results" would occur from prescribing Compazine over the telephone. The violations of the standard of care, in Dr. Thomson's opinion, contributed to the tragic outcome of this patient's case.

For a proper grant of summary disposition for defendants pursuant to MCR 2.116(C)(10), the trial court had to find that, viewing the evidence in a light most favorable to plaintiff, no question of material fact existed regarding defendants' negligence or whether defendants' actions were a proximate cause of plaintiff's injury. *Auto-Owners Ins Co v Johnson*, 209 Mich App 61, 63-64; 530 NW2d 485 (1995). Negligence and proximate cause are factual issues to be determined by the jury and not by summary disposition. *Fiser v City of Ann Arbor*, 417 Mich 461, 471-476; 339 NW2d 413 (1983); *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 537; 529 NW2d 318 (1995). I believe that the evidence created a question for the jury whether defendants' breach of the standard of care was a substantial factor in producing the decedent's death. A sufficient factual controversy exists to warrant a reversal of the trial court's order granting summary disposition in favor of defendants.[1]

I would reverse.

/s/ Michael J. Kelly

[1] This Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins*, 227 Mich App 309, 321; 575 NW2d 324 (1998).