STATE OF MICHIGAN

COURT OF APPEALS

GORDON FRENCH, Personal Representative of the Estate of LESSIE RUTH FRENCH, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

DR. K.A. GOWDA, MD, DR. K.A. GOWDA, MD, PC, DR. N. GUPTA, MD, and DR. N. GUPTA, MD, PC,

Defendants-Appellees/Cross-Appellants,

and

DR. ARTHUR MORLEY, MD, DR. ARTHUR MORLEY, MD, PC, DR. J.N. CHING, DR. J.N. CHING, MD, PC, OAKWOOD UNITED HOSPITALS, INC., d/b/a SEAWAY HOSPITAL, DR. GEORGE F. HOLMES, MD, and DR. GEORGE F. HOLMES, MD, PC.,

Defendants.

UNPUBLISHED
January 21, 2000

No. 204786
Wayne Circuit
LC No. 95-512176 NH

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants-appellees ("defendants") summary disposition pursuant to MCR 2.116(C)(10) in this medical malpractice action. Defendants cross-appeal raising alternative grounds for affirmance. Additionally, defendant Gowda cross-appeals from the trial court's refusal to award certain expert witness fees as taxable costs or mediation sanctions. We affirm in part, reverse in part and remand for further action.

Plaintiff's decedent, Lessie Ruth French, died after being hospitalized for four days with complaints of chest pains and shortness of breath. Plaintiff filed the instant lawsuit against defendants alleging various theories of negligence. A settlement was reached between plaintiff and Dr. Morley, M.D., Dr. Morley, M.D., P.C., Dr. Ching, M.D., Dr. Ching, M.D., P.C., and Oakwood United Hospitals d/b/a Seaway Hospital, and an order dismissing the cause of action against those defendants was entered. Plaintiff's remaining negligence claims alleged that Dr. Gupta failed to make a proper consult request to Dr. Gowda, a cardiologist who had previously treated plaintiff's decedent, and failed to follow up with the consult request to confirm that the decedent had been examined and/or treated by Dr. Gowda. In addition, plaintiff alleged that Dr. Gowda failed to respond to the consult request for the decedent's care. The trial court granted defendants' motions for summary disposition pursuant to MCR 2.116(C)(10) concluding that plaintiff was unable to produce sufficient evidence that the alleged malpractice was a proximate cause of the decedent's death.

We review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The court must review the entire record to determine if the moving party was entitled to judgment as a matter of law. *Ballard v Ypsilanti Twp*, 216 Mich App 545, 547; 549 NW2d 885 (1996), aff'd 457 Mich 564; 577 NW2d 890 (1998). In determining whether there is a genuine issue of material fact, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted, affording the benefit of all reasonable inferences to the nonmoving party. *Skinner, supra* at 161; MCR 2.116(G)(5).

To sustain a medical malpractice action, a plaintiff must prove: (1) the applicable standard of care; (2) a breach of the standard of care; (3) injury; and (4) proximate causation between the alleged breach and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). The statutory requirements for a claim of medical malpractice are set forth in MCL 600.2912a; MSA 27A.2912(1), which provides, in pertinent part:

> (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
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> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
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> (2) 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.

Here, the disputed issue on appeal concerns the element of proximate cause. Ordinarily, the determination of proximate cause is left to the trier of fact, but if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should rule on the issue as a matter of law. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995).

Establishing proximate cause requires proof of two separate elements: (1) cause in fact; and (2) legal cause, also known as "proximate cause." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997); *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 530; 529 NW2d 318 (1995). To establish cause in fact, the plaintiff must present substantial evidence from which a jury can conclude that, more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Weymers, supra* at 647-648 quoting *Skinner, supra* at 162-163. To satisfy this burden, the plaintiff must introduce evidence which affords a reasonable basis for concluding that it is more likely than not that the conduct of the defendant was a cause in fact of the result. *Id*. "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*.

Legal cause, on the other hand, examines the foreseeability of consequences to determine whether a defendant should be held legally responsible for such consequences. *Skinner, supra* at 163. 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, supra* at 648. A plaintiff must first establish cause in fact in order for legal cause to become a relevant issue. *Skinner, supra* at 163.

Plaintiff contends that the circumstances of this case, particularly the fact that the alleged negligence is a number of omissions rather than affirmative acts of misconduct, make it virtually impossible to prove malpractice without relying to a great extent on assumptions and hypothetical scenarios to prove causation. In this regard, plaintiff contends that the trial court's ruling that the evidence of causation was too speculative and presumptive, and therefore insufficient to defeat summary disposition, was erroneous. We disagree.

Plaintiff first argues that Dr. Gupta was negligent in failing to personally contact Dr. Gowda and inform him of the consult request, and such negligence was a cause in fact of the decedent's death. The record shows that Dr. Gowda's office was contacted by hospital staff and informed of the consult order. In addition, there is evidence that plaintiff personally visited Dr. Gowda's office on September 25, 1991, the day before the decedent's death, and requested that Dr. Gowda examine the decedent. These facts suggest that Dr. Gowda was indeed notified of the consult request, but did not respond. However, plaintiff did not introduce any evidence that had Dr. Gupta personally made the phone call to request the consult Dr. Gowda would have responded any differently. In fact, there is no evidence whatsoever that had Dr. Gowda received a consult request from Dr. Gupta personally, he would have responded in a timely manner and treated the decedent.

To adequately show proximate cause, a plaintiff's proofs must facilitate reasonable inferences of causation, not mere speculation. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475;

NW2d (1995). In this case, plaintiff's argument rests entirely on speculation without any evidentiary support as to what Dr. Gowda might have done had Dr. Gupta personally contacted him for a consult. In the absence of particular evidence linking Dr. Gupta's failure to personally make the consult request to Dr. Gowda's decision not to respond to the consult, and in the absence of any evidence connecting both of these factors to the decedent's death, plaintiff's attenuated theory of causation cannot reasonably support a conclusion that Dr. Gupta's conduct more likely than not caused the decedent's death. Because the record lacks any evidence to create a factual dispute as to whether Dr. Gupta's failure to personally contact Dr. Gupta contributed to the decedent's death, summary disposition was proper.

We likewise find that plaintiff did not present sufficient evidence to create a factual dispute regarding whether Dr. Gupta's failure to follow up on his consult request was a cause in fact of the decedent's death. Plaintiff's expert, Dr. Grimes, opined that had Dr. Gupta followed up with the consult request, he would have realized that Dr. Gowda did not respond. This realization, Dr. Grimes asserted, would have prompted Dr. Gupta to take further action (precisely what action would have been taken was not established), making it more likely than not that the decedent would have been diagnosed and treated in a timely manner. We find that this conclusion is based on assumptions that have no factual support in the record. In particular, there is no evidence to support Dr. Grimes' opinion that Dr. Gupta would have assumed responsibility for the deceased upon realizing that Dr. Gowda did not respond to the consult, or that he would have done anything other than reissue another consult order, in which case, the deceased may have still gone untreated. In fact, the assumption that Dr. Gupta would have taken further action entirely ignores the deceased's unequivocal request to be treated by Dr. Gowda, not Dr. Gupta. On the existing record, we find no reasonable basis for inferring a logical and substantial nexus between Dr. Gupta's alleged negligence and the decedent's death.

We turn next to the negligence claim directed at Dr. Gowda. Plaintiff alleges that Dr. Gowda failed to appropriately respond to Dr. Gupta's consult request for treatment in the decedent's care and that such misconduct directly caused the decedent's death. We disagree.

Dr. Grimes testified that had Dr. Gowda become involved in the decedent's care on either September 23rd (the date the consult was requested) or September 24th, it was more likely than not that the decedent's death would have been averted. Dr. Grimes further testified that had Dr. Gowda timely initiated treatment, it was more likely than not that he would have come up with the correct diagnosis, initiated therapy, and successfully treated the problem. We conclude that Dr. Grimes' testimony pertaining to the decedent's likelihood of survival was insufficient to establish the requisite causality against Dr. Gowda. Dr. Grimes' testimony regarding causation was entirely speculative and was not supported by facts in the record. Moreover, plaintiff did not present any evidence to rebut the assertion that the decedent may have died of something other than a pulmonary embolism. In fact, Dr. Grimes conceded that the decedent may have suffered from another illness, such as an arrhythmia or congestive heart failure, at the time of her death. Since the decedent's past conditions and symptoms were similar to those documented at the time she was admitted to the hospital in this case, one can only speculate as to whether Dr. Gowda would even have included pulmonary embolism in his differential diagnosis.

Further, plaintiff failed to establish that the standard of care would have required Dr. Gowda to diagnose a pulmonary embolism. As noted, Dr. Grimes admitted that there were other possible causes for the decedent's death, and he agreed it was conceivable that Dr. Gowda may not have included pulmonary embolism in his differential diagnosis. Furthermore, when deposed, Dr. Gowda was not asked what his diagnosis would have likely been under the conditions presented and how he would have proceeded in treatment in the event that he had examined the patient. On this record, we find that plaintiff's attenuated theory of causation does not reasonably establish that it is more likely than not that Dr. Gowda's conduct was a cause in fact of plaintiff's death. *Weymers, supra* at 647-648; *Skinner, supra* at 164-165; *Garabedian, supra* at 476.

In sum, we are not convinced that the record before us presents a logical sequence of cause and effect. *Skinner, supra* at 167-168. To the contrary, we believe that Dr. Grimes' testimony concerning causation was based merely on a series of actions that Dr. Gowda *may* have taken had he seen the decedent. Therefore, viewing the evidence in the light most favorable to plaintiff, we find the record inadequate to create a genuine issue of material fact on the element of causation. Accordingly, summary disposition pursuant to MCR 2.116(C)(10) was appropriate.

In light of our conclusion that the trial court properly granted summary disposition to defendants, we need not address defendants' alternative grounds for affirmance advanced in their cross-appeals.

Finally, we address defendant Gowda's claim on cross-appeal that the trial court erred in refusing to award certain expert witness fees as taxable costs or mediation sanctions because the experts had not yet testified at trial and were only engaged in preparation for testifying at trial. We agree.

MCL 600.2164(1); MSA 27A.2164(1), the statutory authority for awarding costs or sanctions for expert witness fees, provides in pertinent part:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as part of the taxable costs in the case.

As this Court noted in *Herrera v Levine*, 176 Mich App 350, 357; 439 NW2d 378 (1989), "[t]he language 'is to appear' in § 2164 applies to the situation at bar in which the case was dismissed before defendant had a chance to call its proposed expert witnesses at trial." Thus, contrary to the trial court's interpretation, § 2164 does not make the commencement of trial a prerequisite for an award of expert witness fees. Rather, we find the statute authorizes an award of expert witness fees, which includes preparation fees, even if an expert does not testify at trial. *Id.* at 357-358. See *Miller Bros v Dep't of Natural Resources*, 203 Mich App 674, 691; 513 NW2d 217 (1994). Accordingly, we reverse the trial court's ruling denying expert witness fees to defendant, and remand for an order awarding the appropriate fees to defendant.

Affirmed in part, reversed in part, and remanded for action consistent with this opinion.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder