

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF CONNOR TYSZKA, by his
Conservator, JACQUELINE TYSZKA,

Plaintiff-Appellee,

v

WOMEN TO WOMEN HEALTH CENTER, P.C.,
and ANNE MARIE MCCARREN, M.D.,

Defendants-Appellants.

UNPUBLISHED
November 18, 2008

No. 281166
Wayne Circuit Court
LC No. 06-603308-NH

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant Anne Marie McCarren, M.D.,¹ appeals by leave granted from an order denying her motion for summary disposition. We reverse.

On February 2, 2006, plaintiff filed a complaint alleging that defendant was negligent in her delivery of Connor Tyszka on July 24, 1999. Plaintiff alleged, among other things, that during labor, there were “non-reassuring fetal heart tones,” and defendant “did not seek reassurance and/or institute the proper measures to improve fetal oxygenation and placental perfusion.” She alleged that at 9:20 a.m., the non-reassuring tones were worse and mandated that defendant “proceed with immediate delivery.” She stated that Connor was delivered at 1:44 p.m., with the aid of a vacuum extractor, and that “molding, a bruised scalp and [an] abrasion” were on Connor’s head after delivery. Plaintiff indicated that Connor has delayed motor and speech skills and has been certified as a special education student. She alleged that defendant was negligent in, among other things, “failing to timely and properly perform a cesarean section delivery when it became apparent that the baby was in distress, rather than subjecting the baby to a traumatic vaginal delivery.”

On July 14, 2006, defendant moved for summary disposition under MCR 2.116(C)(10), arguing, in part, that there was no reliable scientific basis for concluding that the use of the

¹ Women to Women Health Center, P.C., is Dr. McCarren’s professional corporation. For simplicity, this opinion will refer to the singular “defendant.”

vacuum extractor damaged Connor. She also argued that there was no adequate evidence of proximate cause because, although some witnesses indicated that the fetal monitoring strips “were not reassuring, revealing hypoxia or ischemia,” “[t]he causation expert says hypoxia or ischemia did not cause damages.” Defendant emphasized that the proximate cause expert opined that the vacuum extractor caused brain trauma, but no witness could say that the extractor was used improperly.

Defendant attached excerpts from several depositions to her summary disposition motion.

Roger Kushner, D.O., testified that he had no opinion regarding whether any damage to Connor resulted from the use of the extractor. He answered “I didn’t find that” when asked whether he found “any physical manifestation or change in the head shape or anything else that would suggest to you that there was damage to this boy as a result of the extractor.” He stated that he saw “no evidence” that defendant improperly used the extractor.

Ronald Zack, M.D., testified that defendant breached the standard of care in her “[f]ailure to do a timely C-section or get reassurance with a fetal monitor pattern that was non-reassuring.” However, he emphasized that he would not provide “any causation testimony.” Dr. Zack stated that, “based on the records I reviewed, I didn’t see anything that would lead me to believe that [the extractor] was used in an abnormal manner.” The following, somewhat ambiguous exchange also occurred:

Q. So if I understand your opinion, you don’t have any opinions as to whether the mechanical use of the extractor caused damage, but you don’t have any criticisms based on what you’ve reviewed that the technique was improper?

A. Based on the records I reviewed, unless additional information becomes available or a pediatric neurologist feels that the damage that he sees was caused by the vacuum extractor – the assumption may be that it was not done in a correct manner. There’s no way I can tell by reading the records.

Ronald Gabriel, M.D., testified that the vacuum extractor damaged the child’s brain. However, he indicated that he had no opinion regarding whether the vacuum extractor was used properly. When asked whether “we can rule out hypoxia or anoxia,” he answered in the affirmative. He stated, “I found no evidence that there was any irreversible damage” when asked if he found “any evidence on the fetal heart monitoring strips that you believe is related to this boy’s problems today.”

Michael Berke, M.D., testified as follows when asked if he believed “there was any standard-of-practice violation associated with the technique in which [defendant] used the vacuum extractor”:

Not that I could interpret from the records that I reviewed. I do not have a copy of the newborn records. I don’t recall whether I saw them or not. But nothing I saw in any of the records or from any of the testimony led me to believe that there was an improper use of the vacuum. There were no popoffs.

Basim Asmar, M.D., testified that he was called to evaluate Connor shortly after he was born. He stated that Connor had been “bulb suctioned, stimulated and bagged three times and then given . . . oxygen,” but he stated that these actions were not unusual and are done “for babies who need some assistance shortly after delivery just to stimulate the baby” He testified that Connor was pink in color, had no respiratory distress, and was otherwise normal. He stated that he “didn’t see anything to suggest there was brain injury in the baby.” Dr. Asmar did notice some “molding of the scalp in the posterior aspect of the back of the head,” but he stated that this was a normal circumstance because a vacuum extractor had been used. He also agreed that the notation of “bruised scalp and abrasion” on the baby’s chart is a normal circumstance when a vacuum extractor is used.

In plaintiff’s responsive brief, she argued, in part, that “a genuine issue of material fact exists as to whether Connor Tyszka’s brain injury was the natural and probable consequence of the breach of the standard of care specified by Dr. Zack and Dr. Kushner.” Plaintiff attached several deposition transcripts to her brief in which certain additional testimony, beyond the testimony supplied by defendant in her attachments, was put forth.

Dr. Gabriel testified that there were some abnormalities in Connor’s brain MRI. He stated that Connor “has cognitive and language retardation, psychosocial retardation, [and] impaired gross and fine motor coordination to a limited extent” When asked how the vacuum extractor caused the damage, Dr. Gabriel stated:

The papers that I’ve given you describe different ways in which it can happen, excessive compression, excessive traction, excessive torsion, excessive rotation, excessive application, repeated applications. So there are different ways it can occur. We will never know for sure in this case how it happened because the description of the application is not sufficient to make that determination.

He stated:

[W]e had a child who was molded and bruised and abraded in the newborn nursery who had to be resuscitated at delivery with bag and mask who was floppy at delivery who had early feeding difficulties.

So we do know that there was a bruised and abraded scalp with molding. We do know he had to be resuscitated. And we do know there was a vacuum extractor that was applied. And we do know the high risks that are entailed with a vacuum extractor. As outlined in the references that I gave you.

He indicated that he could not say whether the extractor was used improperly because the “standard-of-care issue” was “outside [his] expertise.”

Dr. Zack stated that the standard of care required an earlier delivery, around 10:00 or 10:30 a.m.

Dr. Kushner testified as follows when asked how defendant violated the standard of care:

A failure . . . to ascertain fetal well-being, including but not limited to biophysical profiles; owing a duty to timely and proper [sic] diagnose fetal distress. Three, failure to properly interpret the fetal heart rate, monitoring patterns which would have indicated to her a reasonable degree of probability that the fetus was suffering fetal distress. Failure to inform the patient of her options early on in her labor and what remedies were available to her. Failure to timely respond to the decelerations with appropriate measures including which included [sic] amnio infusion, oxygen therapy and fetal scalp massage, and failure to perform a cesarean section delivery when it became apparent that the fetus was in distress.

After brief oral arguments on September 6, 2007, the trial court denied defendant's motion, providing only the following brief statement as a rationale: "Okay. The plaintiff's experts have to testify that there's a breach of the standard of care, there's a question of fact, the [c]ourt will deny the motion."

On appeal, defendant argues that the trial court should have granted her motion for summary disposition because "plaintiff cannot establish by the requisite expert testimony that the alleged breach of the standard of care [was] the proximate cause of the alleged harm." We review de novo a trial court's decision regarding a motion for summary disposition. *Gyarmati v Bielfield*, 245 Mich App 602, 604; 629 NW2d 93 (2001). In evaluating a summary disposition motion brought under MCR 2.116(C)(10), a court considers the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in the light most favorable to the opposing party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

In order to establish a cause of action for medical malpractice, a plaintiff must establish four elements: (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care. [*Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004); see also MCL 600.2912a.]

The proffered evidence in this case failed to demonstrate that any injury to Connor was the "proximate result" of defendant's breach of the standard of care. There was testimony that defendant breached the standard of care by failing to deliver Connor earlier in the day on July 24, 1999, because there were signs of fetal distress. However, there was no evidence that this earlier "distress" was the cause of Connor's problems. Instead, the "causation" expert, Dr. Gabriel, testified that Connor's problems resulted from the use of the vacuum extractor. Yet he could not indicate whether the extractor had been used improperly. He stated that the "standard-of-care issue" was "outside [his] expertise." Nor did any other witness indicate that the extractor had been used improperly. While plaintiff emphasizes Dr. Zack's testimony, Dr. Zack's testimony did not, in fact, establish that the extractor had been used improperly. A plaintiff's proof

concerning causation must go beyond mere speculation. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).²

To the extent plaintiff is arguing that her proffered evidence was sufficient to survive defendant's motion because, if Connor had been delivered earlier by way of a cesarean section, then a vacuum extractor would not have been used, this argument is unavailing. As noted in *Craig, supra* at 87, "legal cause or 'proximate' cause normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences" (citation and quotation marks omitted). There is no basis in the evidence from which to conclude that it was foreseeable that failing to deliver Connor earlier by way of a cesarean section would result in the harmful use of a vacuum extractor.

Because plaintiff's evidence did not establish that Connor's problems "were the proximate result of the defendant's breach of the applicable standard of care," *Craig, supra* at 86, the trial court erred in failing to grant defendant's motion for summary disposition.

Given our conclusion, we need not address defendant's arguments concerning the alleged unreliability of Dr. Gabriel's opinions.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

² We reject plaintiff's attempt to supplement Dr. Zack's testimony by expanding the record on appeal. See *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).