STATE OF MICHIGAN

COURT OF APPEALS

CHARLES CATES,

Plaintiff-Appellant,

v

FITWELL PHYSICAL THERAPY, SUSAN HAUBENSTRICKER, P.T., APRIL THOMAS, P.T.A., and RACHEL FRY,

Defendants-Appellees.

UNPUBLISHED
November 23, 2021

No. 354136
Monroe Circuit Court
LC No. 19-141998-NH

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendants' motion for summary disposition. We affirm.

I. BACKGROUND FACTS

This medical malpractice case arises from a shoulder reinjury plaintiff alleges was caused while he was receiving physical therapy treatment at defendant, Fitwell Physical Therapy. Plaintiff originally injured his shoulder after moving a television in January 2014. In January 2016, Jerome Ciullo, M.D., performed surgery to repair the injury. After the January 2016 surgery, plaintiff was prescribed physical therapy.

Plaintiff attended several physical therapy sessions at Fitwell, where he worked on stretching and strengthening his shoulder. On May 23, 2016, defendant, Susan Haubenstricker, P.T., was performing therapy services with plaintiff, when she was drawn to an adjacent area to work with another patient. Haubenstricker instructed defendant, Rachel Fry, an unlicensed rehabilitation technician, to continue plaintiff's exercises. Fry told plaintiff to lay on his stomach with his hands pointed toward his feet. Fry placed a one-pound weight in each of plaintiff's hands, and told him to lift his hands toward the ceiling. Plaintiff was unable to lift the weights, and suddenly became nauseous and overcome with pain. Plaintiff sat a few minutes before continuing his exercises. At the end of plaintiff's therapy session, Fry gave plaintiff an icepack for his shoulder before plaintiff drove himself home.

After the May 23, 2016 therapy session, plaintiff said his shoulder became worse. He eventually needed a second shoulder surgery performed, again, by Dr. Ciullo. In November 2018, plaintiff filed the complaint in this case. Defendants moved for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d *et seq.*, which the trial court granted. Before the close of discovery, plaintiff sought the deposition testimony of Dr. Ciullo; however, the deposition was cancelled on the day it was scheduled. Defendants later obtained an affidavit from Dr. Ciullo, which stated, "[i]t is my professional opinion that [plaintiff] did not suffer a recurrence of his left shoulder labrum tear as a result of the exercises he was engaging in at Fitwell Physical Therapy on May 23, 2016." Soon after defendants moved for summary disposition, plaintiff moved to adjourn to obtain expert testimony. The trial court granted defendants' motion for summary disposition, in part, because plaintiff failed to present expert testimony showing defendants proximately caused the reinjury to his shoulder.[1] The trial court did not address plaintiff's motion to adjourn. This appeal followed.

II. EXPERT TESTIMONY

Plaintiff makes three arguments supporting his contention that the trial court erroneously granted defendants' motion for summary disposition. Plaintiff argues that the trial court prematurely granted summary disposition where the purpose of plaintiff's motion to adjourn was so plaintiff could seek an expert witness to support his case. Plaintiff also contends the trial court engaged in an inappropriate analysis when it concluded that plaintiff's claims were properly classified as medical malpractice. Finally, plaintiff asserts the trial court made an evidentiary error when it considered Dr. Ciullo's affidavit. According to plaintiff, the affidavit was not "protected health information," and therefore, should not have factored into the trial court's decision to grant summary disposition. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

Most of plaintiff's arguments are preserved for our review. However, plaintiff's argument regarding the propriety of Dr. Ciullo's affidavit is not preserved. "To preserve an evidentiary error for appeal, a party must object at trial on the same ground that it presents on appeal." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 709-710; 922 NW2d 662 (2018). Plaintiff argues on appeal that the trial court should not have relied on Dr. Ciullo's affidavit because the information contained in the affidavit was not "protected health information." Plaintiff did not present this argument to the trial court; therefore, it is unpreserved. Unpreserved claims of evidentiary error are reviewed for plain error affecting substantial rights. *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

Plaintiff also contests the trial court's decision to disregard his motion to adjourn to extend discovery. "A trial court's decision on [a] discovery motion is reviewed for an abuse of

[1] The trial court also dismissed the claims against defendant, April Thomas, finding that Thomas was not present at the clinic on May 23, 2016.

discretion." *Szpak v Inyang*, 290 Mich App 711, 713; 803 NW2d 904 (2010). "The decision whether to allow a party to add an expert witness is within the discretion of the trial court." *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Cadwell v Highland Park*, 324 Mich App 642, 649; 922 NW2d 639 (2018) (quotation marks and citation omitted).

Further, "[t]his Court reviews de novo whether a trial court properly granted a motion for summary disposition." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Though defendants' motion for summary disposition was brought under MCR 2.116(C)(8) and (10), the trial court granted summary disposition as to the medical malpractice claim under MCR 2.116(C)(10). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. [*Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).]

"Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (quotation marks and citations omitted). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id*. (quotation marks and citations omitted).

Finally, "[w]hen interpreting court rules, we apply principles of statutory interpretation." *Richards v McNamee*, 240 Mich App 444, 451; 613 NW2d 366 (2000) (quotation marks and citation omitted).

> [W]e look to the plain language of the court rule in order to ascertain its meaning and the intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole. If the rule's language is plain and unambiguous, then judicial construction is not permitted and the rule must be applied as written. [*Sanders v McLaren-Macomb*, 323 Mich App 254, 266-267; 916 NW2d 305 (2018) (quotation marks and citations omitted).]

B. LAW AND ANALYSIS

1. MEDICAL MALPRACTICE

Plaintiff's brief on appeal notes, "[t]he trial court and the parties agree, this is a medical malpractice claim." On the basis of this statement, plaintiff does not contest the trial court's ultimate conclusion that this is a medical malpractice case. Yet, plaintiff also states that the trial court should have considered the factors under *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 422; 684 NW2d 864 (2004), in determining whether this was a medical malpractice case. From this statement, while plaintiff does not contest the trial court's ultimate conclusion classifying this case as medical malpractice, plaintiff disagrees with the analytical process the trial court followed to reach this conclusion. However, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). Therefore, even if we were inclined to consider plaintiff's argument that the trial court followed the wrong analysis, ultimately, it would not matter because plaintiff *agrees* with the conclusion that this is a medical malpractice case. Thus, there is no merit to plaintiff's arguments regarding the trial court's analytical processes.

2. PROXIMATE CAUSE

We next consider whether the trial court correctly granted summary disposition.

> 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. [*Kalaj v Khan*, 295 Mich App 420, 429; 820 NW2d 223 (2012).]

"Generally, expert testimony is required in medical malpractice cases." *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005). This includes expert testimony to prove proximate causation. *Kalaj*, 295 Mich App at 429.

Again, a trial court properly grants summary disposition where "affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto*, 451 Mich at 362. Here, defendants satisfied this requirement by presenting Dr. Ciullo's affidavit in which the doctor opined that plaintiff "did not suffer a recurrence of his left shoulder labrum tear as a result of the exercises he was engaging in at Fitwell Physical Therapy on May 23, 2016."

Because defendants presented this affidavit, the burden then shifted to plaintiff to "go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Lowrey*, 500 Mich at 7 (quotation marks and citations omitted). Yet, as acknowledged by the trial court, plaintiff failed in that regard. Other than his own assertions, plaintiff failed to present any expert testimony showing that defendants caused the reinjury to plaintiff's shoulder. Thus, the trial court did not err in granting defendants'

motion where plaintiff failed to produce any evidence from an expert showing defendants proximately caused his injuries.

3. PLAINTIFF'S CLAIMS OF ERROR

On appeal, plaintiff makes two arguments in an attempt to show that the trial court erroneously granted summary disposition—each of which lack merit. First, plaintiff claims the trial court abused its discretion when it effectively denied plaintiff's motion to adjourn. On February 19, 2020, defendants moved for summary disposition, in part, because "plaintiff does not have an expert witness to establish proximate cause." Soon after, on March 5, 2020, plaintiff moved to adjourn to extend discovery so plaintiff could obtain "the deposition of treating physicians and both parties' expert witnesses." According to plaintiff, adjournment was essential "[t]o ensure all parties are able to sufficiently conduct a meaningful discovery." Both motions were originally scheduled to be heard on March 13, 2020. Defendants renoticed the hearing on the motion for summary disposition to June 19, 2020. Plaintiff's motion, however, was not renoticed. It is unclear from the record why plaintiff's motion to adjourn was not heard on March 13, 2020, or why it was never rescheduled. In any case, "[i]f a motion cannot be heard on the day it is noticed, the court may schedule a new hearing or the moving party may renotice the hearing." MCR 2.119(E)(1).

On this basis, the trial court did not abuse its discretion in declining to consider plaintiff's motion to adjourn. Indeed, plaintiff's motion was brought after defendants moved for summary disposition, which suggests plaintiff's action was not actually "[t]o ensure all parties are able to sufficiently conduct a meaningful discovery," but rather to repair a serious flaw in his case—plaintiff's failure to obtain expert testimony establishing proximate cause. Moreover, the trial court noted plaintiff's cancellation of Dr. Ciullo's testimony before the close of discovery, which shows that plaintiff did have an opportunity to "conduct a meaningful discovery," but chose not to.

In deciding whether it should grant a motion to extend discovery, a trial court should consider, "[f]actors such as the timeliness of the request, the duration of the litigation and the possible prejudice to the parties[.]" *McDonald Ford Sales, Inc v Ford Motor Co*, 165 Mich App 321, 330; 418 NW2d 716 (1987). Moreover, a party may not contribute to an error and then assert it as a basis to recover on appeal. *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003) ("It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence."). Because plaintiff failed to reschedule the hearing on his motion, and the motion to adjourn appears premised on a fatal flaw which could have been remedied before the close of discovery, the trial court did not abuse its discretion in declining to consider plaintiff's motion to adjourn.

Further, it is worth recalling that this case was extended in large part because of plaintiff's actions. Indeed, plaintiff failed to file the case in the correct venue. This extended time period offered plaintiff plenty of time to secure an expert favorable to his case, yet he chose not to. It is not a decision "fall[ing] outside the range of reasonable and principled outcomes," *Cadwell*, 324 Mich App at 649 (quotation marks and citation omitted), for the trial court to decline to consider plaintiff's motion to adjourn where plaintiff failed to ensure his identified expert would testify favorably.

Plaintiff's second argument appears to contest how defendants obtained Dr. Ciullo's affidavit, and the contents of the affidavit. Plaintiff states "defense counsel still met with Dr. Ciullo and underhandedly obtained a signed affidavit on the same day [d]efendants cancelled the deposition." In making this argument, plaintiff makes the erroneous suggestion that the trial court improperly considered the affidavit despite "underhandedness" by defense counsel. With respect to medical malpractice actions, defendants and their counsel are permitted to speak with plaintiff's health care professionals "in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action." MCL 600.2912f(2); see also MCL 600.5838a(1)(b) (definition of "licensed health care professional"). Furthermore:

> An ex parte interview may be conducted and a covered entity may disclose protected health information during the interview in a manner that is consistent with HIPAA, as long as "[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(*v*)]." [*Holman v Rasak*, 486 Mich 429, 446; 785 NW2d 98 (2010), quoting 45 CFR 164.512(e)(1)(*ii*)(B).]

In this case, defendants sought and received a protective order from the trial court allowing them to speak with plaintiff's healthcare providers to "obtain other health information with [plaintiff's] treating health care providers/physicians . . . ." It is unquestionable that Dr. Ciullo, as the doctor who performed plaintiff's two shoulder surgeries, was one of plaintiff's "treating health care providers/physicians." Moreover, Dr. Ciullo's affidavit describing his impressions of plaintiff's shoulder condition cannot seriously be described as anything other than "health information." Thus, we see no merit to plaintiff's disingenuous argument that defendants engaged in impropriety in seeking Dr. Ciullo's affidavit.

There is equally no merit to plaintiff's position contesting the contents of the affidavit. Specifically, plaintiff avers the trial court erroneously considered the affidavit because, "[d]efendant[s] elicited testimony, an expert witness's opinion about the claim, not protected health information." Plaintiff believes the affidavit did not contain protected health information, and was therefore unreviewable by the trial court. This is incorrect. Protected health information is defined as: "[H]ealth information that identifies an individual who is the subject of the information or with respect to which there is a reasonable basis to believe that the information could be used to identify an individual." MCL 550.1903(bb). In other words, protected health information is information that simply links a person's identity with their health information. Dr. Ciullo's affidavit made various statements to this effect—for example:

> 1. On February 10, 2016, I performed a post superior labral reattachment, subacromial decompression, Mumford procedure on Plaintiff Charles Cates'[s] left shoulder.
>
> * * *
>
> 10. It is my professional opinion that [plaintiff's] symptoms correlated with a neck problem etiology until January 2018. Shoulder symptoms developed

at that point that led to a reassessment MRI which resulted in a diagnosis of a partial re-detachment of the labrum.

* * *

12. It is my professional opinion that [plaintiff] did not suffer a recurrence of his left shoulder labrum tear as a result of the exercises he was engaging in at Fitwell Physical Therapy on May 23, 2016.

From the context of these statements, plaintiff cannot seriously dispute that Dr. Ciullo's affidavit included "health information that identifies an individual." Indeed, each of these statements was protected health information because they identified plaintiff and an associated health condition.

Further, MCR 2.116(G)(5) states "[t]he affidavits . . . must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)." And, "[a]ffidavits . . . offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). Under the plain language of these court rules, there is no *requirement* that the affidavit disclose protected health information. Thus, it does not matter whether the affidavit concerned protected health information so long as "the content or substance would be admissible as evidence." *Id.* Nevertheless, the affidavit was in line with the trial court's HIPAA qualified protective order stating, "The Defendants and/or their Counsel are prohibited from using or disclosing any protected health information obtained for any purpose other than this litigation." There is no evidence on the record to support plaintiff's assertion that the affidavit was "ill-gotten." Indeed, plaintiff does not present any evidence showing that the affidavit was invalid. Under these circumstances there was no plain error affecting plaintiff's substantial rights when the trial court considered Dr. Ciullo's affidavit in its decision to grant summary disposition. *Meagher*, 222 Mich App at 724.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Mark T. Boonstra