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STATE OF MICHIGAN

COURT OF APPEALS

LOTUS SMITH,

Plaintiff-Appellee,

UNPUBLISHED
December 28, 2021

v

No. 354223
Wayne Circuit Court
LC No. 15-013846-NH

HENRY FORD HEALTH SYSTEM, MASSAR BEYDOUN, M.D., and GINA FUNDARO, M.D.,

Defendants,

and

KARMANOS CANCER CENTER and ZEYNEP YILMAZ-SAAB, M.D.,

Defendants-Appellants.

Before: BOONSTRA, P.J., and GLEICHER and LETICA, JJ.

PER CURIAM.

Defendants, Karmanos Cancer Center (Karmanos) and Zeynep Yilmaz-Saab, M.D., appeal by leave granted[1] the trial court's order denying their motion for summary disposition. We affirm.

[1] *Smith v Henry Ford Health Sys*, unpublished order of the Court of Appeals, entered October 29, 2020 (Docket No. 354223). The remaining defendants have not joined this appeal. Except as otherwise indicated, this opinion's use of "defendants" refers to Karmanos and Dr. Yilmaz-Saab, collectively.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff filed a medical malpractice action alleging that defendants had failed to recognize signs of breast cancer when Dr. Yilmaz-Saab reviewed the results of her mammogram study performed in February 2013 at Karmanos.[2] Dr. Yilmaz-Saab reported finding only benign calcifications in plaintiff's breasts. On the basis of this finding, Dr. Yilmaz-Saab recommended that plaintiff return for a routine follow-up in a year, and did not order any further testing. Plaintiff returned for another mammogram on April 1, 2014, at which time Dr. Yilmaz-Saab observed "a developing focal asymmetry in the upper outer quadrant of [plaintiff's] left breast with possible associated calcifications, for which additional diagnostic imaging [would be] required." Plaintiff returned on April 8, 2014 for a diagnostic mammogram, and on April 11, 2014 for an ultrasound-guided core needle biopsy, and was then diagnosed with breast cancer, specifically, "invasive ductal carcinoma grade III, focal ductal carcinoma in situ high-grade," a form of what is commonly referred to as "DCIS." Three masses were identified in plaintiff's left breast, the largest measuring 1.5 x 3.3 x 2.4 cm.

After she was diagnosed, plaintiff consulted with a Karmanos surgeon on May 16, 2014, who discussed plaintiff's surgical and chemotherapy options. In June 2014, Plaintiff underwent additional diagnostic testing at Henry Ford Health System (HFHS), which confirmed the diagnosis, and which recorded somewhat larger mass sizes, including the largest at 4.1 x 1.3 x 2.7 cm. Plaintiff briefly pursued "holistic" remedies, and then consulted with a Karmanos oncologist on July 15, 2014. On clinical examination, the largest mass was then assessed as "about 5 cm." Plaintiff began chemotherapy treatments on August 5, 2014, and subsequently underwent several rounds of surgery (including a mastectomy), as well as chemotherapy and radiation therapy, over the next several years.

Plaintiff alleged in her complaint that Dr. Yilmaz-Saab was negligent in "fail[ing] to assess and describe the increased micro calcifications with crisscrossing lines, which is highly suspicious of multi-centric breast cancer," and that as a result of this negligence, "the cancer potentially grew in size and spread to the lymph nodes and metastasized." Plaintiff also claimed that the alleged negligence caused her to undergo "extensive surgeries, physical mutilation, scarring, and the knowledge that because of delay, her life will be prematurely ended."

Along with her complaint, plaintiff submitted an affidavit of merit from Robert S. Hurwitz, M.D., her standard-of-care expert. Dr. Hurwitz opined that Dr. Yilmaz-Saab had "breached the standards of care by failing to access [sic], categorize, describe, and interpret findings of increased micro-calcifications with crisscrossing parenchymal lines, both of which are highly suspicious of multi-centric breast cancer." In a later deposition, Dr. Hurwitz withdrew the assertion of crisscrossing parenchymal lines, but indicated that, in reviewing plaintiff's 2010-2013 mammogram results, he observed a cluster of pleomorphic (i.e., of variable size, shape, and density) microcalcifications, which he explained are "suspicious for cancer," with "an intermediate possibility of cancer." For this reason, Dr. Hurwitz opined that plaintiff had developed DCIS by December 29, 2010. Dr. Hurwitz explained that DCIS has a "95 percent cure rate when resected

[2] Plaintiffs' earlier mammograms were performed or interpreted by the other defendants who are not parties to this appeal.

with breast-conserving surgery." He also noted that DCIS was a "stage zero" cancer. By failing to report these pleomorphic microcalcifications in February 2013, Dr. Hurwitz opined, Dr. Yilmaz-Saab breached the standard of care.

Plaintiff also retained Gerald Sokol, M.D. as her causation expert. During his deposition, Dr. Sokol opined that plaintiff's cancer would have been stage 2[3] in both February 2013 and April 2014, although he also stated that he could not say that it "would've been the exact same stage," adding that because of a lack of information, "I can't tell you that it didn't go from 2A to 2B, but it would've been a Stage 2 still."[4] He also testified that plaintiff would have had a "ninety percent plus" chance of surviving ten years (ten-year survival rate) if she had begun receiving appropriate treatment in December 2010, and that this rate "might've dropped ten, possibly 15 percent" if her treatment had begun in January 2012. He opined that plaintiff's ten-year survival rate would have been "maybe 70 percent plus or minus 10 percent" if her treatment had begun in February 2013, and similarly would have been "[s]eventy [percent] plus or minus ten percent" in April 2014. However, between 2012 and 2014 there was a "decrement" in plaintiff's "potential survivability." Dr. Sokol also stated that "if the tumor was diagnosed earlier, survivability would have been better." He opined that plaintiff would have needed essentially the same treatments regardless of whether her cancer was diagnosed in February 2013 or April 2014. Finally, Dr. Sokol testified that plaintiff had "increased her chance of dying by 20, 30, 40 percent" by seeking holistic treatment rather than the recommended medical care.[5]

Defendants moved for summary disposition, arguing that Dr. Sokol's testimony had failed to show that defendants' alleged negligence had caused plaintiff's injuries. In responding to defendants' motion, plaintiff provided a supplemental affidavit from Dr. Sokol. In the affidavit, Dr. Sokol stated that because he was deposed before Dr. Hurwitz, he was unaware of Dr. Hurwitz's testimony at the time he was deposed. Dr. Sokol averred that he had subsequently reviewed Dr. Hurwitz's deposition testimony opining that plaintiff's DCIS was present as of February of 2013 (indeed, as of December 29, 2010), and on the basis of that testimony, he suggested, contrary to his deposition testimony, that plaintiff would have had a 90 percent chance of being cured and

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[3] Dr. Sokol testified at his deposition that breast cancer categorized as stage 2 could be further grouped into two substages, 2A and 2B, based on severity.

[4] Dr. Sokol also testified that, had plaintiff received "definitive treatment, surgery, staging and pathological review" in February 2013, those records would have likely contained enough information to determine the precise stage of plaintiff's cancer at that time.

[5] We note that Dr. Sokol testified that he did not remember exactly how long plaintiff had delayed treatment, and that his testimony was premised on his "probably remember[ing]" that the delay was "about seven months," the factual premise for which is unclear. Plaintiff testified that she pursued alternative remedies after meeting a surgeon on May 16, 2014, but after consulting further with HFHS ultimately sought treatment from a Karmanos oncologist on July 15, 2014. The record also shows that there were some issues with plaintiff's health insurance during this time. At best, it appears from the record that the longest delay in treatment that could be attributed to plaintiff's decision to seek alternative treatment is approximately two months, assuming insurance issues played no role.

been subject to less invasive treatments had her DCIS been diagnosed in February 2013. Specifically, he noted that (1) based on Dr. Hurwitz's testimony, "radiological findings suggestive of DCIS were present without change from 2010 through 2013"; (2) DCIS is considered a stage zero cancer and is a highly curable disease; (3) DCIS is treated by lumpectomy and radiation therapy plus or minus hormonal therapy; and (4) DCIS has a 90%+ cure rate with little, if any, chance of recurrence. He then opined, with respect to plaintiff, that "[h]ad diagnosis of DCIS been established and treated prior to invasion, the treatment, complications of treatment and prognosis, more likely than not, would have been substantially different." Citing Dr. Sokol's affidavit and Dr. Hurwitz's and Dr. Sokol's deposition testimony, plaintiff argued that there was a genuine issue of material fact as to causation and that summary disposition was therefore inappropriate.

In reply, defendants argued that the trial court should disregard Dr. Hurwitz's opinion about plaintiff's February 2013 mammogram being indicative of DCIS, and also disregard Dr. Sokol's postdeposition affidavit. Defendants argued in part that plaintiff could not contrive a factual issue by having Dr. Sokol contradict his deposition testimony in a later affidavit. Defendants also argued that Dr. Hurwitz's testimony would be inadmissible under MRE 702 and MCL 600.2955 because it was the "product of junk science."

After the parties presented their arguments, the trial court denied defendants' motion for summary disposition, stating:

> Okay. I read everything[.] I think that there is a cause of action that remains for the invasiveness of the treatment that the Plaintiff had to undergo. With respect to the reduction in survival rate I don't think that that's the cause of action, I think that that's a claim for damages that they're not entitled to get, so that's something that we will parse out at trial if it becomes an issue.

This appeal followed, limited to the issue of whether the trial court erred by determining that a genuine issue of material fact existed regarding causation.

II. STANDARD OF REVIEW

We review de novo a trial court's decision whether to grant a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). In this case, defendants moved for summary disposition under MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a plaintiff's claim. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). When reviewing a motion under MCR 2.116(C)(10), we consider the evidence in the light most favorable to the nonmoving party. *Gorman*, 302 Mich App at 115. Summary disposition is proper 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.' " *Gorman*, 302 Mich App at 116 (citation omitted). There is a genuine issue of material fact " 'when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.' " *Id*. (citation omitted).

III. ANALYSIS

Defendants argue that the trial court erred by concluding that plaintiff had demonstrated a genuine issue of material fact regarding causation. We disagree. A medical malpractice claim is one that arises during a professional medical relationship and hinges on a question of medical judgment. *Lockwood v Mobile Med Response, Inc*, 293 Mich App 17, 23; 809 NW2d 403 (2011). "A plaintiff in a medical malpractice action must establish '(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury.' " *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016), quoting *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). At issue here is whether plaintiff has offered sufficient evidence of proximate causation.

" 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). A court must first determine whether a defendant's negligence was a cause in fact of the plaintiff's injuries before determining whether the defendant's negligence was the legal cause of those injuries. *Ray v Swager*, 501 Mich 52, 64; 903 NW2d 366 (2017). To establish cause in fact, a plaintiff must present substantial evidence from which a jury could conclude that, more likely than not, the plaintiff's injuries would not have occurred but for the defendant's conduct. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). A plaintiff establishes cause in fact sufficient to create a genuine issue of material fact if the plaintiff establishes "a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support." *Patrick v Turkelson*, 322 Mich App 595, 617; 913 NW2d 369 (2018) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). In a medical malpractice action, expert testimony is generally required to prove causation. *Kalaj v Kahn*, 295 Mich App 420, 429; 820 NW2d 223 (2012).

In this case, Dr. Sokol testified that between 2012 and 2014 there was a decrement in plaintiff's potential survivability. Regarding the period from February 2013 to April 2014 specifically, he opined that plaintiff's cancer was at stage 2 during the entire period, but that it may have progressed from stage 2A to stage 2B. As noted, he further opined that a subsequent delay in treatment had significantly worsened plaintiff's long-term chances of survival. But he noted that early diagnosis and treatment would have resulted in a better prognosis for plaintiff. Although he testified that plaintiff's treatment options in April 2014 were the same treatment options she would have had in February 2013, he clarified:

> A. Well, yes, but with different degrees of benefit. I mean, the cancer progressed, so this tumor would've been bigger. There likely would've been more lymph nodes, and those are all things that would've impacted negatively on her prognosis and ability to survive, so there would've been progression. And as you know, as we discussed, not all Stage 2s are alike. There's a big area of variability within Stage 2s.

And when asked if the treatment "likely would have been exactly the same," he testified:

A. Well, when you say "exactly the same," that's not necessarily the case.

Q. Well, what would have been different –

A. Well, because –

Q. – with the treatment?

A. Well, it would've been the size of the lumpectomy, the cosmetic result, the size of the field, the size of the boost field therapy. If there are a lot of lymph nodes, she might have gotten more aggressive chemotherapy. She – so things do change. There are subtle variabilities that impact clinical judgment.

Viewed in the light most favorable to the plaintiff, *Gorman*, 302 Mich App at 115, this testimony is sufficient to establish a genuine issue of material fact regarding causation. Although Dr. Sokol testified that, between February 2013 and April 2014, plaintiff's cancer had not changed its stage, he further testified that, because of the lack of available information, he could not rule out the possibility that it had worsened to the point of changing its substage, that plaintiff's survivability rate declined as a result of going without treatment, that earlier diagnosis and treatment would have resulted in a better prognosis for plaintiff, and that because of the progression of the cancer, there likely would have been variations in treatment and in degree of benefit. At this stage of the proceedings, this testimony was sufficient to leave open an issue upon which reasonable minds might differ. *Gorman*, 302 Mich App at 116. Dr. Sokol's deposition testimony sufficiently established a causal nexus between defendants' alleged negligence and plaintiff's alleged injuries to survive summary disposition. *McNeill-Marks*, 316 Mich App at 16.

As stated, after defendants pointed out the deficiency in Dr. Sokol's testimony, plaintiff submitted a supplemental affidavit from Dr. Sokol. In this affidavit, Dr. Sokol suggested that plaintiff's cancer in February 2013 would have been stage zero, that she would not have needed chemotherapy, and that she would have had more than a 90% chance of survival at that time. We note that a party or witness may not create a factual dispute by submitting an affidavit that contradicts his or her own sworn testimony or prior conduct. See *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006); *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001). This Court has stated that "when a party makes statements of fact in a clear, intelligent, unequivocal manner, [the party's] statements should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence." *Dykes*, 246 Mich App at 480, quoting *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991). If it were otherwise, "the utility of summary disposition would be diminished," for "a party could defeat summary disposition by filing an affidavit after testifying unfavorably at a deposition." *Dykes*, 246 Mich App at 482, citing *Barlow*, 191 Mich App at 250. Therefore, to the extent Dr. Sokol testified in a clear, intelligent, unequivocal manner, and to the extent his subsequent affidavit contradicted his deposition testimony, the trial court would have erred by considering those aspects of the affidavit. *Id.*

Nonetheless, without reference to Dr. Sokol's subsequent affidavit, we conclude that plaintiff met her burden of establishing genuine issues of material fact as to causation, and that the

trial court did not err by denying defendant's motion for summary disposition. *Barnard Mfg Co*, 285 Mich App at 369.

Affirmed.

/s/ Mark T. Boonstra
/s/ Anica Letica