

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF ADELINDA O'DONNELL, by IRIS
DIAZ, Personal Representative,

UNPUBLISHED
January 2, 2014

Plaintiff-Appellant,

v

No. 311671
Macomb Circuit Court
LC No. 10-005432-NH

SHELBY NURSING CENTER, PINEHURST
EAST, INC., WILLIAM BEAUMONT
HOSPITAL, PREMIER HEALTHCARE
MANAGEMENT, INC., STUART R. STOLLER,
D.O., TRI-COUNTY MEDICAL CLINIC, P.C.,
NURSE M. MCDONALD, L.P.N., NURSE
DARLA HUNTER-DETROYER, NURSE
RHONDA DOWNING, and NURSE PAULA
GREER,

Defendants-Appellees.

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Plaintiff, Iris Diaz, as personal representative of the estate of Adelinda O'Donnell, sued defendants for medical malpractice arising out of the injury to and subsequent death of O'Donnell. Plaintiff appeals as of right the trial court's grant of summary disposition dismissing the case. Specifically, plaintiff appeals the trial court's dismissal of defendants Shelby Nursing Center, Pinehurst East, Inc., Tri-County Medical Clinic, P.C., and the defendants who are nurses. Because we find that the trial court did not err by dismissing the case against the subject defendants, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Adelinda O'Donnell was 82 years old when she was admitted to Shelby Nursing Center on January 23, 2009. At the time of her admission, the Shelby nursing staff performed a fall-risk assessment and determined that O'Donnell was not at a high risk of falling. At approximately 4:00 a.m. on January 27, 2009, a nurse assistant notified Nurse Lee Merrick that O'Donnell had fallen. Nurse Merrick proceeded to O'Donnell's room, where she observed O'Donnell on the floor of her room with what appeared to be a fractured left arm. Nurse Merrick asked O'Donnell

how she fell, but O'Donnell's answer was garbled and Merrick could not understand what she said. Nurse Merrick called an ambulance and notified O'Donnell's family of her fall. The ambulance and O'Donnell's two daughters, Iris and Delia Vasquez, both arrived at Shelby a short time later. At approximately 4:35 a.m., O'Donnell was transferred from Shelby to William Beaumont Hospital. The physicians at Beaumont Hospital repaired O'Donnell's fractured arm and later diagnosed her with clostridium difficile ("c. difficile"). The surgeons at Beaumont Hospital recommended that she undergo surgery to treat her c. difficile, but O'Donnell and her family opted not to have the recommended surgery. O'Donnell ultimately developed sepsis from her c. difficile infection and died at Beaumont Hospital on February 7, 2009. O'Donnell's death certificate stated that she died from sepsis, with c. difficile and a urinary tract infection as contributing causes.

On December 27, 2010, plaintiff filed the complaint in this action, alleging, in relevant part, that the Shelby nursing staff breached its standard of care by failing to exercise the necessary fall-risk preventive measures, failing to safely transfer O'Donnell from her bed on January 27, 2009, and failing "to provide a clean environment" and "follow standard sanitary protocol and/or infection control guidelines to prevent" O'Donnell's contraction of c. difficile. The parties thereafter stipulated to the dismissal of Beaumont Hospital, Premier Healthcare Management, and Dr. Stuart Stoller. Meanwhile, defendants deposed plaintiff's nursing expert, Rosemary Kalair, and plaintiff's two physician experts, Dr. Howard Dubin and Dr. Madhu Gupta. On April 23, 2012, the remaining defendants moved for summary disposition under MCR 2.116(C)(10). On May 24, 2012, the trial court granted defendants' motion for summary disposition and dismissed plaintiff's action, except as to plaintiff's vicarious liability claim against Shelby for the conduct of Dr. Stoller. Thereafter, Shelby moved for summary disposition of plaintiff's remaining vicarious liability claim. On July 23, 2012, the trial court granted Shelby's motion and dismissed plaintiff's remaining claim.

II. ANALYSIS

On appeal, plaintiff challenges the trial court's May 24, 2012, grant of summary disposition dismissing plaintiff's claims of nursing malpractice against Shelby and its nurses. "We review summary dispositions de novo." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. But again, such evidence is only considered to the extent that it is admissible. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. [*Id.* at 61-62 (citations omitted).]

"In a medical malpractice case, the plaintiff 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.” *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005), quoting *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). “Generally, expert testimony is required in medical malpractice cases.” *Id.*

A. EXPERT TESTIMONY AND FACTUAL SUPPORT OF CLAIMS

At their respective depositions, Dr. Dubin and Dr. Gupta both indicated that they would not offer any standard of care testimony regarding Shelby and its nurses. At the April 23, 2012, summary disposition hearing, plaintiff stated that Nurse Kalair was its nursing expert. At her deposition, Nurse Kalair opined that the Shelby nursing staff breached its standard of care in either one of two ways: (1) O’Donnell fell while being assisted in a negligent manner by Shelby’s nursing staff or (2) O’Donnell independently fell as the result of Shelby’s inadequate precautionary measures. Significantly, Nurse Kalair did not provide testimony to support that the Shelby nursing staff breached its standard of care regarding sanitation, nor did she offer any testimony regarding O’Donnell’s contraction of *c. difficile*. Plaintiff did not present any evidence—nor did it argue at the April 23, 2012 hearing—that the nursing staff failed to provide a clean environment or follow sanitation protocol. “When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial.” *Nuculovic*, 287 Mich App at 61-62; see also *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999) (“A litigant’s mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.”). Plaintiff failed to provide the requisite evidence to support the facts alleged in its complaint regarding the nursing staff’s sanitation measures. As such, it did not establish the existence of a material question of fact related to the standard of care or breach of that standard of care regarding issues with sanitation. Summary disposition was appropriate as to all claims related to that issue.¹

Turning to Nurse Kalair’s two alternative theories of nursing malpractice, Kalair first opined that the nursing staff may have caused O’Donnell to fall by transferring her from her bed in a hurried and unfriendly manner and without first giving O’Donnell her corrective left shoe.² However, Nurse Kalair acknowledged that the medical records did not provide any evidence to support this theory; Kalair’s opinion on the matter was based solely on O’Donnell’s daughters’ deposition testimony that O’Donnell told them she fell when a member of the nursing staff transferred her without her corrective shoe. The trial court correctly determined that

¹ In reaching our conclusion, we disagree that the affidavit of Andreana Johnson created a question of material fact as to the breach of the standard of care related to sanitation. Her affidavit was conclusory and failed to offer any factual support for the claim that there was a breach of the standard of care.

² O’Donnell was born with a physical deformity that caused her left leg to be shorter than her right leg, which required her to wear a special corrective shoe to balance the differing leg lengths.

O'Donnell's purported statements to her daughters regarding the cause of her fall was inadmissible hearsay. "MRE 801(c) defines 'hearsay' as 'a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Hearsay is inadmissible except as delineated within the rules of evidence. MRE 802." *Ykimoff v W.A. Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009).

On appeal, plaintiff asserts that O'Donnell's statement was admissible under the excited-utterance hearsay exception articulated in MRE 803(2). MRE 803(2) provides that the rule against hearsay does not exclude "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

To be admissible under MRE 803(2), the statement must arise out of an occasion sufficiently startling to produce nervous excitement and render the statement spontaneous and unreflecting; it must be made while the declarant is still under the influence of the nervous excitement, before there is any time to contrive or misrepresent [*Berryman v K Mart Corp*, 193 Mich App 88, 100-101; 483 NW2d 642 (1992).]

In this case, both of O'Donnell's daughters testified that when they first arrived at Shelby on the morning of January 27, 2009, they asked their mother how she fell. According to the daughters, O'Donnell indicated that she would tell them "later," and she waited until they arrived at Beaumont Hospital before telling her daughters how she fell. Neither daughter testified regarding O'Donnell's mental or emotional state at the time she purportedly made her relevant hearsay statement. The record before us does not indicate that O'Donnell made her purported statement spontaneously and without reflection or while she was under stress or nervous excitement, as required to come under MRE 803(2)'s hearsay exception. See *id.*; MRE 803(2).

Plaintiff does not assert any other hearsay exception under which O'Donnell's statement would be admissible, and we find that none exists. Thus, we do not find that the trial court abused its discretion by determining that O'Donnell's purported statement was inadmissible hearsay. See, generally, *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004) ("We review a trial court's decision to admit or exclude evidence for an abuse of discretion."). Accordingly, the trial court did not abuse its discretion by concluding that Nurse Kalair's opinion that the Shelby nursing staff caused O'Donnell's fall by negligently assisting her was speculative and did not establish a genuine issue of material fact. See *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995) ("A trial court's decision to admit expert testimony under MRE 702 or to exclude it as speculative is reviewed for an abuse of discretion. . . . Where such testimony is purely speculative, it should be excluded or stricken pursuant to MRE 403."); *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992) ("Inadmissible hearsay does not create a genuine issue of fact."). Summary disposition was proper on this speculative theory.

Regarding Nurse Kalair's alternative theory that O'Donnell independently fell out of her bed, Kalair testified that the Shelby nursing staff breached its standard of care by failing to monitor O'Donnell every two hours and failing to use a bed alarm. With regard to the claim of failing to monitor, Nurse Merrick testified at her deposition that she observed O'Donnell "numerous times doing room checks" between 9:00 p.m. on January 26, 2009, and 4:00 a.m. on

January 27, 2009. Plaintiff never offered any evidence contradicting Nurse Merrick's testimony. The only factual basis for Nurse Kalair's testimony that the nursing staff did not monitor O'Donnell every two hours was the fact that the nurses did not document checking in on O'Donnell every two hours. Significantly, Kalair did not testify that a nurse is required to document every check-in with a patient. Without such testimony, it would be speculative to find that the absence of a documented check-in evidences that a check-in never occurred. Thus, on the record before us, Nurse Kalair's opinion that the nursing staff did not adequately monitor O'Donnell was speculative and did not establish a genuine question of fact. See, generally, *Maiden*, 461 Mich at 121; *Nuculovic*, 287 Mich App at 61-62.

With respect to the nursing staff's use of a bed alarm, Nurse Merrick testified that O'Donnell did not have a bed alarm because her fall-risk assessment indicated that she was not at a high risk of falling. Nurse Kalair testified that a bed alarm would sound when O'Donnell's "weight [was] lifted off the" mattress and she believed "someone could have gotten into the room prior to [O'Donnell] landing on the floor if a bed alarm was used." However, the trial court found that there was no genuine issue of material fact regarding whether the absence of a bed alarm proximately caused O'Donnell's fall and fractured arm. "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." *Craig*, 471 Mich at 87. "If circumstantial evidence is relied on to establish proximate cause, the evidence must lead to a reasonable inference of causation and not mere speculation." *Ykimoff*, 285 Mich App at 87. Here, as the trial court noted, there was no evidence of record regarding the facts and circumstances of O'Donnell's fall. Essentially, without any facts regarding how O'Donnell fell, Nurse Kalair speculated that *if* in fact O'Donnell's fall was unassisted, a bed alarm—which would not sound until O'Donnell's weight was lifted off the mattress—*could* have enabled the nursing staff to respond to her room and prevent her from falling. On the record before us, the circumstantial evidence on which plaintiff relied was mere speculation and did not lead to a reasonable inference that but for the absence of a bed alarm, O'Donnell would not have fallen and, in turn, would not have ultimately died from sepsis brought on by *c. difficile*. See *id.*; *Craig*, 471 Mich at 87.

In sum, even when "drawing all reasonable inferences in favor of" plaintiff, plaintiff failed to offer admissible documentary evidence setting "forth specific facts showing that there" was a genuine issue of material fact regarding whether O'Donnell's fall and subsequent death was proximately caused by a breach of the Shelby defendants' standard of care in failing to use a bed alarm. *Nuculovic*, 287 Mich App at 61-62; see also *Woodard*, 473 Mich at 6.

B. RES IPSA LOQUITUR

On appeal, plaintiff argues for the first time that under the doctrine of *res ipsa loquitur*, the jury could have "conclude[d] that decedent's injuries were the result of defendants' negligence." Plaintiff contends that it "adduced sufficient evidence of proximate causation, whether on the basis of circumstantial evidence or *res ipsa loquitur*, to create a jury-submissible issue of fact as to nursing malpractice, as there is no plausible explanation of decedent's broken arm that does not involve nursing negligence." Although expert testimony is generally required to establish the requisite elements of a medical malpractice case, a plaintiff may proceed to the jury without expert testimony where the plaintiff "satisfies the requirements of the doctrine of *res ipsa loquitur*." *Woodard*, 473 Mich at 6. "In a proper *res ipsa loquitur* medical case, a jury is

permitted to infer negligence from a result which they conclude would not have been reached unless someone was negligent.” *Jones v Porretta*, 428 Mich 132, 155-156; 405 NW2d 863 (1987). “In the medical malpractice context, the crucial element, and that most difficult to establish, will often be . . . that the event is of a kind that does not ordinarily occur in the absence of negligence. A bad result will not *itself* be sufficient to satisfy that condition.” *Locke*, 446 Mich at 230-231 (emphasis in original).

In the present case, the evidence did not support that O’Donnell’s fall—which plaintiff argues contributed to her ultimate death—was “of a kind which ordinarily does not occur in the absence of someone’s negligence.” *Woodard*, 473 Mich at 7. Common understanding dictates that people can fall and injure themselves absent negligence on the part of another party.³ Thus, we do not find that the trial court plainly erred by not denying summary disposition and permitting a jury to infer negligence on the part of the Shelby defendants merely from the fact that O’Donnell fell while she was a resident at Shelby. See *id.*; *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149-150; 792 NW2d 749 (2010) (holding that we review for plain error a plaintiff’s unpreserved claim of error).

C. FRACTURED ARM AND CAUSE OF DEATH

On appeal, plaintiff argues that the trial court erred to the extent that it adopted the defendants’ argument that O’Donnell’s fall was not the proximate cause of her death and, thus, could not be pursued in a wrongful death action. Plaintiff contends that the evidence supports a finding that O’Donnell’s arm injury further compromised her overall health, making her less able to fend off the *c. difficile* infection, and that even assuming the fall-related injury in no way contributed to her death from infection, plaintiff can still pursue the malpractice claim under the survival statute, MCL 600.2921.⁴ Plaintiff has not established that material questions of fact exist as to Shelby and the nursing defendants’ malpractice related to the fall. Thus, the argument that plaintiff can recover for damages limited to the fall under the survival statute lacks merit.

Affirmed.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering

³ Plaintiff argues that no other reasonable scenario exists for O’Donnell’s fall other than the two versions offered, absent a far-fetched and unrealistic one such as her being “levitated by a gravitational anomaly, or space aliens,” attacked by the “‘one armed man’ from ‘The Fugitive’” and other farfetched speculations. However, other plausible and non-negligent scenarios do exist, including the possibility that O’Donnell chose to get up on her own to go to the bathroom without calling for assistance in-between timely monitoring visits by the nursing staff.

⁴ MCL 600.2921 states, in relevant part, “All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to [MCL 600.2922].”