STATE OF MICHIGAN

COURT OF APPEALS

SCOTT A. ALDRIDGE,

Plaintiff-Appellant,

v

FAMILY HEALTH AND OCCUPATIONAL CENTERS, P.C., a Michigan Corporation, and DR. KERMIT WHITE, Jointly and Severally

Defendants-Appellees.

UNPUBLISHED
March 20, 2003

No. 236741
Oakland Circuit Court
LC No. 99-011936-NH

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition to defendants, pursuant to MCR 2.116(C)(10), in this medical malpractice action. We affirm.

I. Factual and Procedural Background

On November 19, 1996, plaintiff was working as a carpenter for Vision Construction in Royal Oak. Plaintiff was carrying a steel beam at work when he "felt something pop" in his neck. A co-worker immediately drove him to defendant First Care Medical Centers ("First Care"), now known as Family Health and Occupational Centers.[1] At this initial visit, plaintiff was seen by Dr. Sharon Sneed. According to the medical record, plaintiff complained that he had been experiencing neck and shoulder pain for the past two months but with no recollection of an injury. The record further stated that plaintiff noticed subtle weakness in his right arm and shoulder. However, Dr. Sneed noted in the record that plaintiff used a sledge hammer and continued to have a strong grip. Dr. Sneed ultimately diagnosed plaintiff with right shoulder strain due to overuse, proscribed Motrin, and told plaintiff to return in a week to see if the pain subsided.

When plaintiff returned to First Care on November 26, 1996, he was seen by defendant White. According to the medical record, plaintiff complained of lost strength in his neck and continued pain. Plaintiff also informed defendant White that he was experiencing recurrent

[1] Vision Construction sent its employees to defendant First Care for work-related injuries.

numbness and occasional twitching in his left upper extremity and hand. After examining plaintiff, defendant White determined that he had acute cervical strain and cervical radiculopathy of the left upper extremity. Pursuant to this diagnosis, defendant White recommended that plaintiff attend three sessions of physical therapy and gave him a ten-pound weight restriction. Plaintiff admits that he did not follow the weight restriction and that he only attended one of the physical therapy sessions because of his work schedule. Plaintiff alleged that he continued taking the prescribed painkillers and muscle relaxants.

On January 13, 1997, plaintiff awoke and was unable to move his neck and experienced severe pain and numbing in his right arm. As a result, plaintiff went to the emergency room at William Beaumont Hospital. Plaintiff informed the emergency room physicians that the numbness in his arm began about a week after his injury but that the loss of strength was a recent development. The Beaumont physicians diagnosed plaintiff with a musculoskeletal strain in his right arm with possible radiculopathy. Plaintiff was instructed to stay home from work until he was seen by a physical therapy and rehabilitation specialist.

On February 12, 1997, the physicians at Beaumont conducted an electromyogram ("EMG") due to the continued pain experienced by plaintiff. The results of the EMG were abnormal and plaintiff was consequently scheduled to undergo a magnetic resonance imaging ("MRI"). The MRI taken on March 12, 1997, revealed that plaintiff had an intramedullary tumor in his spine. Plaintiff alleged that Dr. Rick Olson explained to him that the tumor would have to be surgically removed by opening his spinal cord. When Dr. Olson informed plaintiff that there was an eighty percent chance of quadriplegia and a seventy percent chance of being ventilator dependant after such a surgery, plaintiff decided to take a golfing trip to Myrtle Beach before the surgery. Plaintiff testified that he was able to play his "normal game" when he went on vacation.

On April 8, 1997, Dr. Olson performed a biopsy on plaintiff but did not excise the tumor. Rather, plaintiff was referred to Dr. Fred Epstein, a neurosurgeon in New York who specialized in the removal of spinal cord tumors. Dr. Epstein explained that plaintiff had an ependymoma tumor located within the spinal cord. According to Dr. Epstein, these tumors are typically slow growing but cause pressure within the spinal cord that ultimately leads to paralysis. On May 8, 1997, Dr. Epstein performed surgery on plaintiff but was forced to leave about 20 to 30 percent of the tumor behind because plaintiff would have otherwise been rendered a quadriplegic.

Plaintiff stated that he lost the use of his legs for a few weeks after his first surgery and was still dependant upon a walker at the time of his second surgery. However, after Dr. Epstein partially removed the tumor, plaintiff was placed on a ventilator for a few days and completely lost the use of his upper extremities. Plaintiff also lost the use of his legs again for almost a week. Through extensive post-surgery therapy, plaintiff stated that he regained the use of his legs but was unable to walk long distances. At the time of his deposition, plaintiff explained that he still experienced numbness in his legs. Plaintiff also alleged that he had developed some range of movement in his arms since the surgery but was still unable to feel anything from the elbow down.

Dr. Elliot Felman reviewed plaintiff's case and provided an affidavit and expert testimony concerning defendants' breach of the standard of care. Dr. Felman claimed that "on [November] 26th, the standard of care required that [plaintiff] either be referred to a neurologist or other appropriate consultants, or an MRI be ordered." Dr. Felman alleged that the changes in

plaintiff's condition between his first and second visit to defendant First Care were significant and indicative of a neurological problem.

To establish the proximate cause for his injuries, plaintiff appended an affidavit by Dr. Epstein to his complaint. In his affidavit, Dr. Epstein opined that plaintiff "would have had a chance at a better surgical outcome" if his ependymoma had been diagnosed and removed before he developed his physical and functional disabilities. Dr. Epstein also testified in a discovery deposition on September 11, 2000, and in a videotaped deposition on April 6, 2001. In the first deposition, Dr. Epstein essentially agreed with the statements in his affidavit and quantified plaintiff's chance at a better outcome as greater than fifty percent. However, Dr. Epstein admitted that he did not review plaintiff's medical records at Beaumont before the MRI was conducted. During the second deposition, Dr. Epstein testified that "the outlook is always better than when one has a lot of weakness, as [plaintiff] did prior to the operation that I carried out." He further classified plaintiff's weakness prior to the biopsy as trivial. Dr. Epstein stated that while he would rather operate on an individual without weakness, he was unable to quantify the prognosis between no weakness and trivial weakness.

Defendants brought the motion for summary disposition on the day set for trial. The motion was based upon Dr. Epstein's second deposition taken six days earlier. Defendants cited Dr. Epstein's description of plaintiff's weakness prior to the biopsy as trivial and his inability to quantify the difference between operating on a patient with trivial weakness or no weakness. Defendants further noted Dr. Epstein's claim that plaintiff's current arm and hand weakness stemmed from the biopsy conducted by Beaumont. Accordingly, defendants claimed that plaintiff's surgical prognosis was reduced as a result of the biopsy and not any alleged negligence on the part of defendants. Defendants also asserted that Dr. Epstein's earlier discovery deposition, in which he stated that plaintiff had a better than fifty percent chance of being better, was taken before Dr. Epstein had access to plaintiff's medical records between November and April. Thus, defendants contended that plaintiff failed to meet his burden of proof.

Conversely, plaintiff alleged that defendants' negligence in November produced foreseeable bad results. Plaintiff pointed to Dr. Epstein's use of the word "always" as definite proof that the surgical outlook would have been better before plaintiff developed any weakness. Plaintiff further noted Dr. Epstein's testimony that plaintiff's tumor would have been detectable on an MRI in November or December. In its argument, plaintiff noted Dr. Epstein's explanation that had plaintiff been operated on in January, prior to the significant weakness he displayed before the actual surgery, the outlook would most likely have been better. Therefore, plaintiff asserted that he met his burden of proof.

The trial court granted defendants' motion for summary disposition and commented that "[i]t looks like the expert definitely said the probable cause of Plaintiff's problems is the biopsy and the operation and not the delay in diagnosing or non-diagnosing of the Defendant with the rare condition." On May 4, 2001, the trial court issued its written order granting defendants' motion. Plaintiff's subsequent motion for rehearing was denied on August 8, 2001.

II. Legal Analysis

On appeal, plaintiff argues that Dr. Epstein provided sufficient testimony to establish plaintiff's burden of proof under MCL 600.2912a(2). Specifically, plaintiff contends that Dr. Epstein's deposition testimony established that if plaintiff underwent surgery before he experienced muscle weakness, the outcome of his surgery would most likely have been better. Consequently, plaintiff argues that whether the biopsy weakened plaintiff's spine before the second operation is irrelevant. We disagree.

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition under MCR 2.116(C)(10) is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co, supra* at 397.

Pursuant to MCL 600.2912a(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. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

The meaning of MCL 600.2912a(2) was recently interpreted by this Court in *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002). According to *Fulton, supra* at 83, "MCL 600.2912a(2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds fifty percent." Because the plaintiff in *Fulton* failed to show that the extent of her loss of opportunity from the alleged malpractice exceeded fifty percent, this Court determined that the trial court erroneously denied defendants' motion for summary disposition. *Id*. at 84.

After carefully reviewing the record in the instant case, it is apparent that plaintiff failed to establish a genuine issue of material fact regarding causation sufficient to satisfy MCL 600.2912a(2). We note Dr. Epstein's claim that if plaintiff's tumor had been diagnosed and removed before the development of physical and functional disabilities, then it was more likely that the surgical outcome would have been better. Indeed, he explained that "[t]he outlook of surgery is most closely related to the preoperative condition. A patient that has no neurological problem before has much less danger in terms of being permanently worse after surgery than a patient who has significant neurological dysfunction." However, it is important to note that the significant deficiencies plaintiff possessed when he was presented to Dr. Epstein stemmed from the biopsy. It was not until after the biopsy that plaintiff lost the use of his legs for a period of

time. Indeed, Dr. Epstein agreed that the vast majority of plaintiff's deficit before his surgery was from the biopsy. He further alleged that plaintiff's present hand and arm weakness were most likely from the biopsy and that the surgery he performed superimposed on it.

To the extent plaintiff experienced weakness before the biopsy, Dr. Epstein described it as trivial. While Dr. Epstein stated that he would prefer to operate on a patient without any weakness, he was unable to quantify the difference in operating on a person with trivial weakness or no weakness at all. Dr. Epstein agreed with the statement that in this case, "there [was not] any quantification of a better result with earlier surgery . . . ." Thus, it appears that Dr. Epstein's testimony that plaintiff had a better than fifty percent chance of a better outcome was premised on the significant deficits that plaintiff possessed from the biopsy, and not from defendants' alleged malpractice in late November 1996.

Because the statute requires that a loss of opportunity for a better result exceed fifty percent in a medical malpractice action, we find that the trial court properly granted defendants' motion for summary disposition. MCL 600.2912a(2); *Fulton*, *supra* at 83-84.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly