STATE OF MICHIGAN

COURT OF APPEALS

MAUREEN TOBIN and PATRICK TOBIN, Plaintiffs-Appellants,	UNPUBLISHED June 13, 2006
v JEFFREY SHILLMAN, CAMERON GETTO, and SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, P.C., Defendants-Appellees.	No. 257445 Oakland Circuit Court LC No. 2004-056966-NM

Before: Owens, PJ, and Kelly and Fort Hood, JJ

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(10), in this action for legal malpractice. We affirm.

Plaintiff Maureen Tobin[1] retained defendants to represent her in a medical malpractice action against Dr. David Law. On September 28, 1999, Dr. Law performed surgery on plaintiff, inserting a pubovaginal sling to alleviate urinary incontinence. Plaintiff believed that, beginning with her post-operative visit on October 27, 1999, Dr. Law failed to recognize the breakdown of the sling and perform the necessary corrective surgery. Defendant Jeffery Shillman filed the required notice of intent to file a medical malpractice action, pursuant to MCL 600.2912b, advising that Dr. Law breached the standard of care by failing to recognize that plaintiff's post-operative complaints were related to complications from the sling and by failing to perform surgery to find or correct the problem. Shillman subsequently transferred the file to defendant Getto, who ultimately terminated representation of plaintiff without filing a complaint.

Plaintiff filed this legal malpractice action alleging that Shillman, Getto, and their law firm committed malpractice by improperly calculating her statute of limitations, failing to contact her treating physicians, failing to file a lawsuit on her behalf, and failing to obtain an expert opinion in her underlying medical malpractice case. The trial court granted defendants'

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[1] The term "plaintiff" when used in this opinion shall refer to plaintiff Maureen Tobin only.

motion for summary disposition under MCR 2.116(C)(10), finding that no question of material fact existed with respect to causation.

A decision on a motion for summary disposition under MCR 2.116(C)(10), is reviewed de novo. *Ormsby v Capital Welding, Inc,* 471 Mich 45, 52; 684 NW2d 320 (2004). Such a motion tests the factual support for the claim, and the court considers the submitted admissible evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists to warrant a trial. *Lockridge v State Farm Mut Automobile Ins Co,* 240 Mich App 507, 511; 618 NW2d 49 (2000). To establish a claim for legal malpractice, a plaintiff must prove the existence of an attorney-client relationship, negligence in the legal representation afforded to the plaintiff, that the negligence proximately caused an injury, and the extent of the injury sustained. *Charles Reinhart Co v Winiemko,* 444 Mich 579, 585-586; 513 NW2d 773 (1994). To prove causation in the legal malpractice action, the plaintiff must show that, but for the attorney's alleged malpractice, she would have prevailed in the underlying suit. *Id.* at 586. The underlying suit in the instant case was medical malpractice.

> To establish medical malpractice, a plaintiff must establish the following elements: (1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury. [*Weymers v Khera,* 454 Mich 639, 655; 563 NW2d 647 (1997), citing *Locke v Pachtman,* 446 Mich 216, 222; 521 NW2d 786 (1994).]

"To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause." *Id.* at 647, citing *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994). The standard necessary to establish cause in fact has been stated as follows:

> "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." [*Weymers, supra* at 648, quoting *Skinner, supra* at 164-165.]

While circumstantial proof may be used to show factual causation, the circumstantial proof must facilitate reasonable inferences of causation rather than mere speculation. *Skinner, supra* at 164. When a plaintiff cannot show a genuine issue of factual causation, the issue of legal causation need not be addressed. *Id.* at 163.

A full and thorough review of plaintiff's expert's deposition reveals inadequate testimony to establish the existence of a question of material fact with respect to causation in the underlying medical malpractice case. The testimony that was favorable for plaintiff with respect to causation was speculative, inconclusive, and insufficient to support even a reasonable inference of causation. *Skinner, supra*. Moreover, plaintiff's expert testified that even if the corrective surgery had been performed, he would be unable to testify that the complications experienced by plaintiff would not have happened. Because plaintiff could not establish that she would have prevailed in the underlying medical malpractice case, she cannot establish the causation element

for her legal malpractice claim. *Charles Reinhart Co, supra.* Defendants were entitled to summary disposition under MCR 2.116(C)(10).

Because we affirm the grant of summary disposition in favor of defendants on the grounds articulated, we decline to address defendants' alternative argument in favor of a partial grant of summary disposition.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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FORT HOOD, J. (*concurring*).

I concur in the conclusion reached by the majority. Review of the deposition testimony of Dr. Edward McGuire revealed that he treated plaintiff after the alleged medical malpractice by Dr. Law. However, when Dr. McGuire's deposition commenced, he stated that, to the best of his knowledge, he was not retained as an expert. Furthermore, Dr. McGuire stated that he was prepared to testify about his own treatment of plaintiff and had not reviewed the notes of Dr. Law for at least six weeks. More importantly, Dr. McGuire expressly stated that he did not have a basis to offer an opinion regarding Dr. Law or any other physician's breach of the standard of care with regard to plaintiff's treatment.

Dr. McGuire concluded that there was a "red flag" in the treatment of plaintiff that was indicative of a complication. Yet, Dr. McGuire could not relate the complications he treated plaintiff for to any lapse by Dr. Law. Although he acknowledged that quicker action might have resulted in fewer complications, he would not definitively conclude that the chance for infection would have decreased. Dr. McGuire would only attribute some of plaintiff's problems or complications to any alleged delay by Dr. Law. Dr. McGuire could not conclude, based on the record available, that Dr. Law should have diagnosed an infection where plaintiff did not complain of pain or bleeding.[1] He opined that discomfort occurs because of the nature of the

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[1] Dr. McGuire indicated that he only had a couple of pages of notes from Dr. Law. There is no indication that Dr. McGuire was provided any deposition testimony or answers to interrogatories in which Dr. Law expanded on his notes or explained his treatment plan.

surgery, which involves removal of a foreign body when sutures are pre-attached to the bone anchor. Therefore, Dr. McGuire could not conclude that, with a quicker response time, none of plaintiff's problems would have occurred. In fact, he acknowledged that many patients enduring sling procedures might never achieve satisfactory results.

Plaintiff alleges that the trial court erred in granting summary disposition because it failed to view the testimony in the light most favorable to plaintiff. On the contrary, review of the deposition testimony revealed that Dr. McGuire was not prepared to render an opinion based on the limited notes he had obtained from Dr. Law. A bad result, in and of itself, is not sufficient to raise an issue for the jury in a professional negligence action. *Woodard v Custer*, 473 Mich 1, 8; 702 NW2d 522 (2005). An expert must present evidence that "but for" the negligence, the result ordinarily would not have occurred when such a determination can not be made by the jury as a matter of common understanding. *Id*. The plaintiff need not prove that an act or omission was the sole catalyst of the injuries, but must present evidence from which the jury could conclude that the act or omission was a cause. *Craig v Oakwood Hosp*, 471 Mich 67, 70-71; 684 NW2d 296 (2004). The factual information provided to Dr. McGuire did not provide a foundation to establish causation in the underlying medical malpractice case. There is no indication that plaintiff requested the opportunity to retain another expert regarding the issue of causation. Because the underlying case could not be established, the trial court properly dismissed the legal malpractice action.

/s/ Karen M. Fort Hood