STATE OF MICHIGAN

COURT OF APPEALS

SIMONE BROWN,

Plaintiff-Appellant,

v

BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT, d/b/a HURLEY MEDICAL CENTER, and LARRY J. YOUNG, M.D.,

Defendants-Appellees,

and

WOMENS HEALTH CARE ASSOCIATES, REDA ALAMI-HASSANI, M.D., and JOHN HEBERT, M.D.,

Defendants.

UNPUBLISHED
January 13, 2011

No. 294769
Genesee Circuit Court
LC No. 08-087809-NH

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff, Simone Brown, appeals by right orders granting summary disposition for defendants, Board of Hospital Managers of the City of Flint, d/b/a Hurley Medical Center (Hurley Medical Center), and Larry J. Young, M.D. (Dr. Young).[1] We reverse and remand.

I. BASIC FACTS

At the end of January 2007, plaintiff took a home pregnancy test that indicated she was pregnant. On January 26th, plaintiff experienced cramps and bleeding and she visited her primary care doctor. Her doctor told her she was three weeks pregnant and diagnosed her with a

[1] In this opinion, "defendants" refers to both Hurley Medical Center and Dr. Young.

probable spontaneous abortion. Plaintiff followed up several days later and was scheduled for a transvaginal ultrasound to be performed on February 6, 2007.

However, on February 5, 2007, plaintiff experienced more bleeding and went to the emergency room at Hurley Medical Center around four p.m. A physical pelvic exam was completed. There were no indications of active bleeding, blood or clots in the vaginal vault, tissue present in the cervix or vagina, or cervical dilation. A pelvic ultrasound indicated "complex fluid [in the] cul de sac[2] concerning for ectopic [pregnancy]."[3] A radiologist read the ultrasound and made the following conclusions: (1) a normal sized uterus with no demonstrable intrauterine pregnancy and (2) minimal hyperdense fluid in the cul de sac. The report also stated, "Ectopic pregnancy is not ruled out. Please correlate clinically."

Later that evening, the chief obstetrics resident, Dr. Reda Alami-Hassani, filled out a consultation sheet. Dr. Alami-Hassani's supervising attending was Dr. Young, with whom he consulted regarding plaintiff's case. Dr. Alami-Hassani noted that there was no blood in the vaginal vault, that the uterus was a nonpregnant size, and that complex fluid in the cul de sac raised concerns of ectopic pregnancy. Dr. Alami-Hassani also listed ectopic pregnancy as a diagnosis, but indicated that it was "clinically unlikely." Plaintiff was released just after midnight on February 6th with instructions to follow up at the Hurley Medical Center's obstetrics and gynecological clinic on February 8, 2007. Her discharge papers indicated a final diagnosis of vaginal bleeding with pregnancy and an additional diagnosis of possible ectopic pregnancy.

Plaintiff returned to the Hurley Medical Center's Women's Health Care Clinic on February 9th. Plaintiff was seen by Dr. Alami-Hassani and told him that she was seen in the emergency room on February 6th for vaginal bleeding and ectopic pregnancy, but that the vaginal bleeding had stopped on the 6th. Dr. Alami-Hassani's physical exam of plaintiff revealed a nonpregnant sized uterus and no blood in the vaginal vault. In plaintiff's chart, he noted that plaintiff should be put on "strict ectopic precautions." Plaintiff was advised to return on February 11, 2007, for further tests and was again released. Later that day, plaintiff experienced extreme abdominal cramping on her right side. She returned to the Hurley Medical Center's emergency room and informed the staff that "she was preg[nant] in her tube." The staff there allegedly diagnosed her with a muscle strain and discharged her.

Plaintiff did not return to the Hurley Medical Center on February 11th. On February 15, 2007, plaintiff experienced severe abdominal pain and went to the McLaren Hospital emergency room. It was discovered that that her fallopian tube had ruptured as a result of an ectopic pregnancy and she underwent surgery to remove the damaged reproductive organs.

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[2] The cul de sac is the area between a female's rectum and back wall of the uterus.

[3] Ectopic pregnancy occurs when a pregnancy implants outside the uterine cavity, typically in the fallopian tube.

Subsequently, a medical malpractice action was properly commenced against defendants, alleging that defendants were negligent in their care.[4] Plaintiff deposed four different experts, each of whom testified that defendants breached the standard of care by failing to diagnose and treat the ectopic pregnancy. Dr. Ronald Zack indicated that it was indisputable by February 7th that plaintiff did not have a viable pregnancy and that although ectopic pregnancy was always on defendants' differential diagnosis, it was nonetheless not timely diagnosed and treated. He also testified that plaintiff was an excellent candidate for treatment on February 9th and had she been treated by or before that date it was more likely than not that the tube would have been saved. Dr. Robert Dock similarly testified that the diagnosis should have been made on February 5th. He indicated that had plaintiff's condition been treated before the 15th, other means of treating the condition could have been undertaken, including administration of the drug methotrexate.[5] Dr. Roger Kushner also opined that the ectopic pregnancy should have been diagnosed on the 5th. He suggested that plaintiff should have been observed for a 23-hour period until the ectopic pregnancy was ruled out. According to Dr. Kushner, had plaintiff been treated on the 9th or before, the treatment would likely have been successful. Lastly, Dr. Michael Berke testified that plaintiff's symptoms on the 5th, including the closed cervix, lack of any debris in the uterus, and complex fluid in the cul-de-sac, should have prompted defendants to perform further tests to determine whether plaintiff had an ectopic pregnancy. Dr. Berke further indicated that by the 9th, it was clear that plaintiff had a non-viable pregnancy and she should have been offered a dose of methotrexate.

After discovery, defendant Dr. Young moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff was unable to show proximate cause. Hurley Medical Center filed a "joinder" in support of the motion. The trial court granted the motion in defendants' favors, finding that plaintiff had failed to establish causation.

II. ANALYSIS

The sole issue on appeal is whether the trial court erred by finding no genuine issue of material fact regarding causation and by granting defendants' summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "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." *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007) (citations

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[4] Dr. Alami-Hassani was initially included as a defendant, but by stipulation of the parties was dismissed. In its order, the court noted that Hurley Medical Center, as Dr. Alami-Hassani's employer, would be legally responsible under a theory of respondeat superior for any negligent treatment rendered by Dr. Alami-Hassani to plaintiff.

[5] Methotrexate stops the growth of a developing embryo and is commonly used to treat ectopic pregnancies. It causes the embryo to either pass out of, or be absorbed into, the woman's body, thereby avoiding a rupture of the reproductive organs.

omitted). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *Id*. at 56. In determining whether a question of fact precludes summary disposition, we must view all the admissible documentary evidence submitted in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 119-120. The party opposing summary disposition may not rely on 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. *The Healing Place at North Oakland Med Ctr*, 277 Mich App at 56.

"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); see also MCL 600.2912a(2). Failure to establish one of these elements is fatal. *Teal v Prasad*, 283 Mich App 384, 391; 772 NW2d 57 (2009).

As noted, plaintiff argues that the trial court erred by finding that she did not establish a genuine issue of material fact that defendants' failure to timely diagnose and treat her ectopic pregnancy caused her fallopian tube to rupture. Proximate cause is a legal term of art that has two components: (1) cause-in-fact, and (2) legal (or proximate) cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004); *Velez v Tuma*, 283 Mich App 396, 398; 770 NW2d 89 (2009). Cause-in-fact requires plaintiff to show through substantial evidence that it is more likely than not, *but for* defendants' actions or omissions, the injury in question would not have occurred. *Craig*, 471 Mich at 86-87; *Weymers*, 454 Mich at 647-648. Cause-in-fact may be established by circumstantial evidence, *Ykimoff v W A Foote Memorial Hosp*, 285 Mich App 80, 87; 776 NW2d 114 (2009), but "testimony that only establishes a correlation between conduct and injury is [speculative and is] not sufficient to establish cause in fact," *Teal*, 283 Mich App at 392. Further, "while the evidence need not negate all other possible causes . . . [it must] exclude other reasonable hypotheses with a fair amount of certainty." *Craig*, 471 Mich at 87-88 (quotation marks and footnotes omitted).

Legal or proximate cause, on the other hand, normally involves examining the foreseeability of consequences. *Velez*, 283 Mich App at 398. "To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable." *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009) (citation and quotation marks omitted.). A claimant need only show that a defendant's negligence was "a" proximate cause of the harm, not necessarily "the" proximate cause. *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 497; ___ NW2d ___ (2010). In other words, there can be more than one proximate cause contributing to a single injury. *Id*.

In the present case, the relationship between defendants' breach and plaintiff's injury is not a tenuous one. When viewed in a light most favorable to plaintiff, it is plain that plaintiff has proffered evidence showing that defendants' failure to diagnose and treat the ectopic pregnancy

was the cause of her injury, which is sufficient to create a question of fact for the jury.[6] All four of plaintiff's experts testified that defendants failed to timely diagnose and treat the ectopic pregnancy on February 5th, 6th, and 9th, despite their knowledge on those days that plaintiff's symptoms indicated an ectopic pregnancy. In fact, it was unequivocal by February 9th at the latest that plaintiff's pregnancy was not intrauterine and was not viable. As a result of defendants' failure to timely diagnose and treat the condition, plaintiff's fallopian tube ruptured four days later and she underwent surgery removing a portion of her reproductive organs. According to Drs. Kushner and Zack, had plaintiff been treated on the 9th or before, the treatment would have been successful and plaintiff would have avoided the injury and loss of her reproductive organs. Plaintiff's other experts testified similarly, i.e., that had plaintiff been timely diagnosed, she could more likely than not have been successfully treated with a dose of methotrexate. The logical conclusion to be drawn from this sequence of events is that but for defendants' failure to properly diagnose and treat plaintiff's condition, plaintiff would not have suffered the injury. Further, defendants' failure to act had reasonably foreseeable consequences, mainly the complications that naturally arise when an ectopic pregnancy is misdiagnosed and untreated. Here, there is no serious question that plaintiff's injuries "qualify as a natural and probable result of' [defendants'] negligent conduct." *Lockridge*, 285 Mich App at 689 (citation omitted). Plaintiff proffered evidence establishing both components of proximate cause sufficient to create a question of fact for the jury.

Further, there is no merit to Hurley Medical Center's argument that plaintiff's failure to return on February 11, 2007, was the sole cause of her injury. Comparative negligence is for the jury to decide. See *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998) (suggesting comparative negligence is usually a question of fact). Defendants present no argument, and cite no authority, indicating that a "last clear chance" principle should be applied, or that such a principle exists under Michigan law. Indeed, if this theory were accepted, we would essentially revive, *sub silentio*, contributory negligence. Since it is not the law that any causative negligence by plaintiff precludes her recovery entirely, then the questions of to what degree plaintiff was at fault, and to what degree her own fault caused her injury, are for the jury. See *Placek v City of Sterling Hts*, 405 Mich 638; 275 NW2d 511 (1979) (abolishing common-law contributory negligence as a bar to recovery and adopting a comparative negligence approach).

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[6] We note that Dr. Young argues that the breach in the standard of care occurred after his involvement in plaintiff's treatment concluded and, therefore, causation cannot be established as to him. We reject this argument because plaintiff's experts testified that Dr. Young, who was the supervising attending physician on February 5, 2007, should have ruled out the ectopic pregnancy on that date, given the information then available, and should have otherwise followed up with plaintiff's care. Accordingly, the causation analysis applies equally to both Hurley Medical Center and Dr. Young.

The trial court erred by concluding that plaintiff failed to meet her burden of proof with respect to causation. Plaintiff presented sufficient evidence with respect to the element of causation. Summary disposition was improperly granted for defendants.[7]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens

[7] Because plaintiff established a genuine issue of material fact with regard to causation, we do not address plaintiff's argument that summary disposition was prematurely granted since plaintiff had not yet deposed Dr. Alami-Hassani.