STATE OF MICHIGAN

COURT OF APPEALS

LASHAWNDA GRACE,

Plaintiff-Appellant,

v

PHILLIP HARDY, JR., M.D.,

Defendant,

and

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

Defendants-Appellees.

UNPUBLISHED
April 24, 2007

No. 272726
Genesee Circuit Court
LC No. 04-080441-NH

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants, Board of Hospital Managers for the City of Flint, d/b/a Hurley Medical Center, and Dr. Hernan Gomez, under MCR 2.116(C)(10). We affirm the trial court's August 14, 2006, order granting summary disposition in favor of defendants, but reverse the trial court's August 7, 2006, order awarding sanctions against plaintiff's trial counsel.

This is a medical malpractice case arising out of defendants' alleged failure to properly diagnose and treat plaintiff's ectopic pregnancy, which then ruptured, resulting in the loss of her right fallopian tube.

Plaintiff first argues that summary disposition was improperly granted to defendants because there was a genuine issue of material fact whether Dr. Gomez breached the applicable standard of care. We disagree.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), the court must examine the documentary evidence presented by the parties and,

drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence, *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992), or there is sufficient evidence to allow a reasonable jury to find in the nonmoving party's favor, *Quinto*, *supra* at 367, 371-372.

In a medical malpractice case, the plaintiff bears the burden of proving: "(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). To survive a motion for summary disposition, a plaintiff must make a prima facie showing on each of these elements. See *Locke*, *supra* at 222 (involving motion for directed verdict).

MCL 600.2912a(1)(b) provides that to show a breach of the standard of care, a plaintiff must show that

> [t]he defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

In this case, plaintiff's expert, Dr. Eric Davis, recanted all of his previous opinions concerning whether Dr. Gomez violated the standard of care *except* that he believed there was a factual dispute concerning whether Dr. Gomez properly explained to plaintiff on Friday, January 2, 2004, what she was supposed to do on Monday, January 5. Dr. Gomez testified that he informed plaintiff that she was supposed to see a doctor on Monday and obtain a repeat beta hCG test, which could then confirm or eliminate the possibility of an ectopic pregnancy. Plaintiff disputed Dr. Gomez's version of what she was instructed to do.

Although Dr. Davis properly identified a factual dispute, that dispute is not over a material fact. *Quinto*, *supra* at 361-362. This holds true because it is undisputed that plaintiff's written discharge instructions clearly informed her of the possibility that she may have an ectopic pregnancy and of the need for follow-up care with a physician as directed. Dr. Gomez testified that he instructed plaintiff to see her doctor on Monday and have a repeat beta hCG test. Plaintiff admitted that Dr. Gomez told her to call her primary doctor on Monday and make an appointment, and it is undisputed that plaintiff scheduled an appointment with her own doctor for that Monday, but failed to attend the appointment. Plaintiff was also instructed, orally and in writing, to show her discharge papers to her physician. Dr. Gomez believed that an ectopic pregnancy was a common enough occurrence that, after seeing the discharge papers, a primary care physician would know that a repeat beta hCG test was necessary. Dr. Davis initially disputed the wisdom of referring plaintiff to her primary care physician, rather than an OB/GYN, but later agreed that it was sufficient for Dr. Gomez to refer plaintiff to someone who would know what to do.

Viewed in a light most favorable to plaintiff, the evidence establishes that plaintiff was advised that it was necessary to follow up and see her primary care physician the following Monday. Although plaintiff denied that Dr. Gomez specifically told her to have her doctor do a repeat beta hCG test on Monday, plaintiff was instructed to bring her emergency discharge papers to her follow-up appointment, and it is undisputed that the discharge papers denote the possibility of an ectopic pregnancy. Plaintiff's expert, Dr. Davis, agreed that it was sufficient for Dr. Gomez to refer plaintiff to someone who would know what to do. Plaintiff did not introduce any evidence concerning the skills, knowledge, or expertise of primary care physicians in general, or her own doctor in particular, and Dr. Davis conceded that he had no information concerning whether plaintiff's particular doctor would know to follow up with a repeat beta hCG test. In light of this evidence, plaintiff failed to establish a genuine issue of material fact with regard to whether Dr. Gomez breached the applicable standard of care. Thus, the trial court properly granted Dr. Gomez's motion for summary disposition, and also properly granted summary disposition in favor of Hurley Medical Center with respect to any vicarious liability based on Dr. Gomez's conduct.

The trial court also granted summary disposition to Hurley Medical Center on plaintiff's claim for vicarious liability based on Dr. Anwar Al-Kunani's conduct. The court determined that plaintiff could not establish that any breach of the standard of care by Dr. Al-Kunani proximately caused her injury. Our analysis of the proximate cause issue applies equally to Dr. Gomez and further supports the trial court's decision to grant Dr. Gomez's motion for summary disposition.

Plaintiff provided expert testimony in support of her claim that Dr. Al-Kunani breached the applicable standard of care by failing to examine plaintiff in person. Contrary to what plaintiff argues on appeal, however, the trial court granted summary disposition to Hurley Medical Center on this claim solely on the issue of causation.

"To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). "To establish cause in fact, 'the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.'" *Id*. at 647-648, quoting *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). The "mere possibility that a defendant's negligence may have been the cause" of the plaintiff's damages is insufficient to show proximate cause. *Weymers*, *supra* at 648 n 12, quoting *Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976).

Plaintiff alleged that Dr. Al-Kunani breached the standard of care by failing to personally evaluate her. But even if he had examined her, plaintiff's experts agreed that, where an ectopic pregnancy is suspected, the proper course of treatment is to repeat the beta hCG test in 48 hours. The next step would depend on the results of that second beta hCG test. It is undisputed that plaintiff made an appointment with her primary care physician for the following Monday for a "pregnancy test," and was instructed to bring her emergency discharge papers denoting the possibility of an ectopic pregnancy, but then failed to attend the appointment. Thus, to prove that Dr. Al-Kunani's negligence was the cause in fact of plaintiff's injury, plaintiff would have had to show that, even if she had kept the Monday appointment and shown her discharge papers to her primary care physician, her injury still would have occurred. No such evidence was presented. We conclude that the trial court properly found that plaintiff could not establish that any negligence by Dr. Al-Kunani proximately caused her injury.

Plaintiff's experts agreed that even if Dr. Al-Kunani had personally examined plaintiff on Friday, it would have been appropriate for him to instruct plaintiff to obtain follow-up care on Monday, which is what plaintiff was also instructed to do by Dr. Gomez. Plaintiff in fact scheduled an appointment for that Monday, but then failed to attend. Because plaintiff failed to obtain the follow-up care as instructed, she cannot establish the element of proximate cause. Thus, the trial court properly granted Hurley Medical Center's motion for summary disposition with respect to plaintiff's claim for vicarious liability based on Dr. Al-Kunani's conduct.

Plaintiff also challenges the trial court's order awarding defendants sanctions of $1,000. A trial court's findings with regard to whether particular conduct violates MCR 2.114(D) will not be disturbed unless clearly erroneous. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 91; 592 NW2d 112 (1999). This same standard applies to a determination whether a claim or defense is frivolous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

MCR 2.114(D)(2) provides:

> The *signature of an attorney* or party . . . constitutes a certification by the signer that . . . to the best of his or her knowledge, information and belief formed after reasonable inquiry, *the document* is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law . . . . [Emphasis added.]

MCR 2.114(E) provides:

> If a document *is signed* in violation of this rule, the court, on the motion of a party or on its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. [Emphasis added.]

MCR 2.114(F) provides that, in addition to sanctions, "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." See also MCL 600.2591.

MCR 2.114(D) and (E) apply to "all pleadings, motions, affidavits, and other papers provided for by these rules." MCR 2.114(A). Conversely, the rules for taxation of costs apply only to frivolous "action[s] or defense[s]." See MCR 2.625(A)(2) and MCL 600.2591(1); see also MCR 2.114(F).

In the present case, the trial court did not find that plaintiff's *claim* was frivolous, and accordingly did not conduct a determination of costs per MCR 2.615. Rather, the court awarded sanctions based on its finding that counsel violated MCR 2.114(D)(2) by improperly procuring and filing an affidavit that was not well grounded in fact. The trial court specifically found that "there was no reasonable basis to believe the facts underlying that affidavit of merit were true based on the documents."

Here, it is undisputed that plaintiff's counsel did not sign the affidavit in question. Therefore, regardless of whether the trial court properly found that the questioned affidavit was not well grounded in fact, the plain language of MCR 2.114 does not support an award of sanctions because an award can only be based on the attorney's signature on the frivolous document. Accordingly, the trial court's finding that counsel's aforementioned actions violated MCR 2.114(D) was clearly erroneous. We therefore reverse the trial court's order awarding sanctions.[1]

Affirmed in part, and reversed in part.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

[1]Plaintiff also argues that the trial court erred in striking Dr. Davis's affidavit of merit. The court struck the affidavit after it granted summary disposition to defendants. Because we conclude that summary disposition was properly granted, it is unnecessary to consider this issue.