STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER CLIFTON,

Plaintiff-Appellant,

v

ANTON BAHU, D.O., and FAMILY PRACTICE CENTRE OF LIVONIA, P.C., doing business as FAMILY PRACTICE CENTRE OF LIVONIA,

Defendants-Appellees.

UNPUBLISHED
August 13, 2020

No. 348794
Wayne Circuit Court
LC No. 17-008315-NH

Before: MARKEY, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff, Jennifer Clifton, appeals by right the trial court order granting summary disposition in favor of defendants Family Practice Centre of Livonia, P.C. and Dr. Anton Bahu. Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

On May 13, 2015, Clifton took two home pregnancy tests, both of which suggested that she was pregnant. The next day, May 14, 2015, she was seen by Dr. Bahu, her primary care doctor, at his office at Family Practice Centre of Livonia. Dr. Bahu, a licensed family practice physician, told Clifton that he did not deliver babies.[1] He did however order laboratory testing, which showed that Clifton's beta human chorionic gonadotropin (hCG) was 544.13. Beta hCG is a hormone produced during pregnancy. Although Clifton did not have an obstetrician-gynecologist (OB/GYN) at the time, she quickly settled on Dr. Timothy Johnson based on a recommendation from either her friends or from Dr. Bahu.

[1] In his deposition, Dr. Bahu testified that he also told Clifton that he did not "follow pregnancies." Clifton, however, only recalled being told that he did not deliver babies.

Later that evening, Clifton had vaginal spotting, which continued into the morning of May 15, 2015. Clifton called Dr. Bahu's office regarding the spotting, and, although he initially planned to see her for an afternoon appointment, he decided against it and directed her to the emergency room (ER). Consequently, in the late afternoon on May 15, 2015, Clifton went to the emergency room at St. Mary's Hospital.

The ER records state that Clifton complained that she had experienced lower abdominal cramping and "very light" vaginal spotting. However, the spotting had "improved significantly" and she was not currently having any pain or cramping. Laboratory testing showed that her beta hCG level was 611. In addition, an ultrasound was performed on Clifton. The "impression" from the ultrasound was: "No intrauterine gestation seen. Ectopic pregnancy not excluded."[2] The ER notes explained that the ultrasound "could not reliably rule in an intrauterine pregnancy," and stated that Clifton was told "that she must followup with her OB/GYN for repeat labs and possible repeat ultrasound." It was also explained to Clifton that the possibility of an ectopic pregnancy "cannot be ruled out and she must return to the [emergency department] immediately for any worsening abdominal pain[,] fever[,] nausea[,] vomiting[,] or for any concerns any time." The ER records indicate that Clifton was to follow-up with Dr. Johnson, her OB/GYN, in two days on May 17, 2015, and with Dr. Bahu "as needed."[3] The discharge diagnosis was "[t]hreatened abortion," and the discharge instructions directed Clifton to stop smoking and stated that there was a "threatened miscarriage." She was given educational materials explaining what was meant by the phrase "threatened miscarriage" and about the risks of continued smoking. Clifton testified that the phrase "ectopic pregnancy" was not explained to her at the ER.

On Monday, May 18, 2015—three days after her ER visit—Clifton scheduled an appointment with Dr. Johnson for June 9, 2015. Clifton did not tell Dr. Johnson that she had been to the ER due to vaginal spotting and abdominal cramping, nor did she tell him that the ultrasound at the hospital could not rule out an ectopic pregnancy. She testified that her June 9 appointment was because she had to be six to eight weeks pregnant before Dr. Johnson would see her.[4] Clifton

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[2] An ectopic pregnancy is a pregnancy in which the fertilized ovum has implanted outside the intrauterine cavity, i.e., in a fallopian tube.

[3] Because the ER notes specifically reference Dr. Johnson as Clifton's OB/GYN, it is evident that she identified him as her OB/GYN when she was at the hospital. Nevertheless, she testified that she did not recall seeing the discharge instruction to follow-up with her OB/GYN on May 17, 2015. She only remembered being told to follow-up with "her doctor." Considering that the ER notes incorrectly state that Clifton was referred to the ER by her OB/GYN, it is conceivable that when speaking to her the ER staff did, in fact, only tell her to follow-up with "her doctor" rather than specifically telling her to follow up with Dr. Johnson, her OB/GYN. This factual dispute, however, is not appropriate for resolution at the summary-disposition stage.

[4] We note that, although Clifton was directed to follow-up with "Dr. Johnson," her OB/GYN in two days, nothing in the ER records stated that she must have an appointment within two days. Thus, viewing the facts in the light most favorable to Clifton, it appears that Clifton did, in fact,

explained that she did not tell Dr. Johnson that she had been to the ER because she "was under the assumption that everything was normal." She believed that she could have obtained an earlier appointment with Dr. Johnson "[i]f there was an emergency."

Clifton also called Dr. Bahu and scheduled an appointment for Tuesday, May 19, 2015. Clifton's May 19, 2015 appointment with Dr. Bahu forms the basis of her medical malpractice suit. At that appointment, Clifton told Dr. Bahu that she was still spotting and had mild gas pains. Laboratory testing revealed that her beta hCG level was 2,751.66. Dr. Bahu's notes indicated a "[t]hreatened [m]iscarriage."[5] Following the May 19, 2015 appointment, Dr. Bahu sent the laboratory test results to Dr. Johnson's office.

Dr. Bahu was aware of Clifton's scheduled June 9 appointment with Dr. Johnson. He did not advise Clifton to see Dr. Johnson earlier than June 9, and nothing he told Clifton made her feel that it was imperative to seek an earlier appointment on her own initiative. Furthermore, although Dr. Bahu stated that he could have called Dr. Johnson's office to request an earlier appointment for Clifton, he chose not to do so because Clifton was doing about the same if not a little better as compared to the day of her ER visit. Dr. Richard M. Hays, a licensed and board-certified physician in family medicine and Clifton's standard-of-care expert, testified that by not calling Dr. Johnson (or another OB/GYN) to get Clifton an earlier appointment, Dr. Bahu breached the standard of care.

Dr. Bahu did not order an ultrasound or advise Clifton to obtain an ultrasound. Dr. Hays testified that Dr. Bahu should have ordered an ultrasound. Although he did not diagnose Clifton with an ectopic pregnancy, Dr. Bahu told Clifton a "tubal," i.e. ectopic pregnancy could not be ruled out. She recounted that he told her to immediately return to the ER if she felt sick, was running a fever, had any cramping or heavy bleeding, or experienced "anything more persistent than what was going on at that point in time[.]"

Clifton testified that between May 19, 2015 and June 6, 2015, her only health issue was some intermittent light spotting. She denied feeling feverish or experiencing any cramping. However, on June 6, 2015, during dinner she began sweating, appeared pale, and had difficulty walking. Her husband took her to the ER at St. Mary's Hospital. The ER notes from the June 6 visit indicated that Clifton complained of abdominal pain and spotting and was pale and diaphoretic.[6] An ultrasound was performed, and it was "compatible with a ruptured ectopic

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follow the directions given by the ER to follow-up with her OB/GYN. Her deviation from the ER's direction comes from the fact that she did it on Monday, May 18 instead of Sunday, May 17.

[5] Dr. Bahu testified at his deposition that he wrote down "threatened miscarriage" most likely on the basis of his review of the ER notes. Dr. Bahu stated that a threatened miscarriage was not his personal diagnosis or impression. Dr. Bahu testified that had he "thought it was an acute threatened miscarriage," he would have sent Clifton back to the hospital.

[6] The June 6, 2015 hospital notes state that Clifton reported cramping during the 5 days before the ER visit. At her deposition, Clifton explained that the cramping noted on the hospital records was because something she ate made her gassy.

pregnancy." Shortly thereafter, Clifton underwent surgery to remove her ruptured right fallopian tube.

In March 2017, Clifton had a hysterosalpingiography performed on her left fallopian tube to determine whether it was viable. The procedure revealed that it was not, which meant that Clifton would be unable to conceive children naturally.

In June 2017, Clifton filed a medical malpractice action against defendants. She contended that Dr. Bahu was negligent for failing to timely perform proper testing, for failing to perform an ultrasound on May 19, 2015, for failing to address her concerns and symptoms, for failing to diagnose her ectopic pregnancy on May 19, 2015, for failing to timely treat her ectopic pregnancy with Methotrexate,[7] for failing to timely refer her to an OB/GYN for administration of Methotrexate, and for failing to provide appropriate follow-up care and treatment based on the information that was or should have been available. Clifton alleged that as a direct and proximate result of Dr. Bahu's breaches of the standard of care, she "suffered a ruptured ectopic pregnancy which resulted in the removal of her right fallopian tube, which required surgical intervention and extensive medical treatment." Clifton further alleged that her right fallopian tube was her only viable fallopian tube; therefore, the removal of her right fallopian tube caused her "to lose her fertility." Count II concerned defendant Family Practice Centre of Livonia, P.C., alleging that it was vicariously liable for Dr. Bahu's negligence.

Following discovery, defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that Clifton could not establish that the alleged negligence by Dr. Bahu was the proximate cause of her injury. In response, Clifton argued that her right fallopian tube ruptured and had to be removed because Dr. Bahu failed to take appropriate action on May 19, 2015. She maintained that Dr. Bahu should have pursued further testing or sent her immediately to Dr. Johnson or another OB/GYN who would have performed the appropriate testing, made the diagnosis of an ectopic pregnancy, and treated her before the rupture. Both parties supported their briefs with documentary evidence. Following oral argument, the trial court granted summary disposition in favor of defendants.

This appeal follows.

II. CAUSATION

A. STANDARD OF REVIEW

Clifton argues that the trial court erred by granting defendants summary disposition. Our review of a trial court's decision to grant or deny summary disposition is de novo. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Wright v Genesee Co*

[7] Methotrexate is used to treat an ectopic pregnancy and works by stopping the growth of the fertilized egg before a rupture occurs. In an affidavit, plaintiff averred that if she had been "offered Methotrexate as treatment to resolve [her] ectopic pregnancy, [she] would have consented to receiving it, over risking the rupture and loss of [her] fallopian tube."

Bd of Drain Comm'rs, 504 Mich 410, 417; 934 NW2d 805 (2019). In her brief on appeal, Clifton argues at length that the trial court made multiple factual and legal errors when evaluating defendants' summary-disposition motion. Based on our review of the record and the trial court's opinion, it is evident that the court's ruling was partially based upon an inaccurate view of the facts. However, because our de-novo review affords no deference to the trial court's opinion, reversal of the court's opinion is not warranted simply because the court made incorrect statements in its decision. Rather, we may only reverse the court's opinion granting summary disposition if, based on our independent review of the record, we determine that "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

"A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). Summary disposition must be granted under MCR 2.116(C)(10) "if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Only substantively admissible evidence actually proffered by the parties may be considered when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). In addition, the reviewing court may not assess credibility, weigh the evidence, or resolve factual disputes. *Pioneer State*, 301 Mich App at 377.

B. ANALYSIS

"The plaintiff in a medical malpractice action bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Cox v Bd of Hosp Managers for the City of Flint*, 467 Mich 1, 10; 651 NW2d 356 (2002) (quotation marks and citation omitted). Failure to establish any one of these four elements is fatal to a plaintiff's medical malpractice suit. *Id.* Clifton presented expert testimony showing that Dr. Bahu breached the standard of care by failing to intervene with Dr. Johnson's office to ensure that she got an earlier appointment or by failing to conduct or order further testing to evaluate her pregnancy.[8] For purposes of their motion for summary disposition, defendants did not dispute that Dr. Bahu breached that standard of care. Rather, they argued that his alleged breach of the standard of care was not the proximate cause of Clifton's injuries.

[8] We offer no opinion on whether there was or was not a breach of the standard of care in this case. Clifton produced expert testimony from Dr. Hays regarding the standard of care for a family care doctor faced with a pregnant patient who was experiencing spotting and had an ultrasound that did not confirm an intrauterine pregnancy. Dr. Hays testified that in order to comply with the standard of care, Dr. Bahu would have had to either conduct further testing himself or call Dr. Johnson's office to ensure that Clifton got an earlier appointment. That testimony was not properly challenged during the summary disposition proceedings and we decline to examine it now.

Pursuant to MCL 600.2912a(2), "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." As explained by our Supreme Court, "proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as 'proximate cause.' " *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994) (quotation marks and citation omitted). The *Skinner* Court explained:

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. [*Id*. at 163 (quotation marks and citation omitted).]

Legal cause is only relevant once a plaintiff has established cause in fact. *Id*. In *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 87; 776 NW2d 114 (2009), this Court explained:

> Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation. All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Summary disposition is not appropriate when the plaintiff offers evidence that shows that it is more likely than not that, but for defendant's conduct, a different result would have been obtained. [Quotation marks and citations omitted.]

Viewing the evidence in the light most favorable to Clifton, it is clear that she cannot establish cause in fact. Dr. Hays testified that Dr. Bahu should have conducted further testing or "picked up the phone, called Dr. Johnson's office and got her in there the next day—and told him this is not a normal uncomplicated intrauterine pregnancy and that [sic] please see her."

Dr. James Wheeler, Clifton's causation expert, testified that a reasonably prudent OB/GYN, upon receiving such a phone call, would have seen Clifton either May 19, 2015 or May 20, 2015. Dr. Wheeler explained that at the visit, an OB/GYN would have taken Clifton's history, conducted a very gentle physical examination, and would have ordered an ultrasound. He opined that with better than 90% certainty, an ultrasound conducted on May 19, 2015 or May 20, 2015 would have shown an empty uterus. He noted that, although the ultrasound may or may not have shown the ectopic pregnancy, at that time an OB/GYN would have been "highly suspicious" of an ectopic pregnancy. He added that if a pregnant patient's beta hCG is "2,000 or higher, that is an ectopic pregnancy until proven otherwise."[9] Dr. Wheeler stated that if the patient was hemodynamically stable, an OB/GYN would have asked for the patient's consent to administer methotrexate, which he opined would have resolved the ectopic pregnancy before the patient's fallopian tube ruptured. Clifton averred in an affidavit that if she was "offered Methotrexate as

[9] Again, Clifton's beta hCG was over 2,000 on May 19, 2015.

treatment to resolve my ectopic pregnancy, [she] would have consent to receiving it, over risking the rupture and loss of my fallopian tube."[10]

Critically, Dr. Wheeler's causation testimony centers on what a reasonably prudent OB/GYN would have done if Dr. Bahu called on May 19, 2015. Dr. Wheeler, however, conceded that he had no knowledge of what Dr. Johnson would have done if he had seen Clifton on May 19, 2015. Clifton speculates that Dr. Johnson would have seen her earlier in an emergency situation. However, the record is devoid of anything to suggest that if Dr. Bahu called Dr. Johnson's office on May 19, 2015, Dr. Johnson would have agreed to see Clifton earlier. Nor is there anything in the record suggesting that Dr. Johnson would have taken the course outlined above by Dr. Wheeler. In order to establish cause-in-fact, a plaintiff cannot simply present evidence that the defendant "*may* have caused his injuries." *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004). "[M]ore than a mere possibility or plausible explanation is needed." *Id*. Thus, the plaintiff must set forth "specific facts that would support a reasonable inference of a logical sequence of cause and effect." *Id*. (quotation marks and citation omitted). Here, in the absence of testimony regarding what Dr. Johnson would have done if he had been called by Dr. Bahu on May 19, 2015, an essential link in the logical sequence of cause and effect is missing from Clifton's case. Without it, the jury may only speculate on what would have happened if Dr. Johnson had been contacted. Because speculation as to causation is not permitted, summary disposition was warranted in this case.

Finally, although Clifton also argues that Dr. Bahu breached the standard of care by not conducting or ordering an ultrasound on May 19, 2015, she failed to present any evidence showing that Dr. Bahu's failure to do so caused her fallopian tube to rupture. Instead, it appears that if Dr. Bahu had obtained an ultrasound on May 19, 2015, it would have merely provided additional information requiring him to intervene with Dr. Johnson's office to ensure that Clifton received more timely care. Again, as there is nothing in the record showing that Dr. Johnson would have, in fact, acted on such information in a timely fashion, Clifton cannot establish cause-in-fact related to this breach of the standard of care.

Affirmed. Defendants, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Mark T. Boonstra

[10] We note that Dr. Wheeler did not testify that an ultrasound on May 19 or May 20, 2015 would have shown an ectopic pregnancy. Rather, he opined that by not seeing an intrauterine pregnancy on an ultrasound when the patient's beta hCG was over 2,000, an OB/GYN would have been "highly suspicious" of an ectopic pregnancy and would have essentially presumed it was ectopic "until proven otherwise." Clifton's affidavit averring that she would have consented to Methotrexate indicates she would have taken the drug to treat an ectopic pregnancy. She does not actually aver that she would have taken the drug to end a pregnancy that was not confirmed to be an ectopic pregnancy.