STATE OF MICHIGAN

COURT OF APPEALS

SHERRY TERIACO and DAVID TERIACO,

Plaintiffs-Appellants,

v

DAVID B. MUNRO, M.D., P.C. and GALE SANDOVAL, Nurse Practitioner,

Defendants-Appellees.

UNPUBLISHED
January 27, 1998

No. 195526
Jackson Circuit Court
LC No. 95-727422

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Plaintiffs filed a medical malpractice action against defendants arising out of the alleged failure of defendant, nurse practitioner Sandoval to properly treat and timely diagnose an infection from which plaintiff Sherry Teriaco was suffering or to refer her to a specialist for treatment and diagnosis. The trial court granted summary disposition in favor of defendants, and plaintiffs appeal as of right. We affirm.

The trial court granted summary disposition pursuant to MCR 2.116(C)(10), finding that there was no evidence that Sandoval's actions were the proximate cause of the destruction of Sherry's spinal discs and bony tissue, which required surgical intervention[1]. Plaintiffs argue on appeal that the trial court erred in granting defendants' motion. They argue that their experts' testimony established that Sandoval's conduct was a substantial factor leading to the need for surgery. They contend that the testimony revealed that Sandoval's negligence prevented a timely diagnosis, and that had the infection been discovered in its early stages, antibiotic treatment would likely have eliminated the need for surgery. Moreover, they also argue that proximate cause can be inferred from the evidence.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Nichols v Clare Community Hospital*, 190 Mich App 679, 681; 476 NW2d 493 (1991). Summary disposition may be granted when, "except for the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* We review the grant or denial of summary disposition de novo. *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 227; 556 NW2d 180 (1996).

In order to sustain a claim for medical malpractice, plaintiff had the burden of proving four elements: (1) the applicable standard of care; (2) a breach of that standard by defendant; (3) injury; and (4) that the injury was proximately caused by the negligence of defendant in breaching the standard of care. *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997); *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). To survive the motion for summary disposition, plaintiff was required to present evidence establishing a genuine issue of material fact on the issue of proximate cause, which was the issue in dispute. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). Proving proximate cause requires proof of both cause in fact and legal cause. *Weymers, supra* at 647. To establish cause-in-fact, plaintiff must present substantial evidence that "more likely than not, but for the defendant's conduct", the injury would not have occurred. *Id.* at 647-648. Legal cause is not relevant until cause in fact is established. *Skinner, supra* at 163.

In a medical malpractice action, expert testimony is usually required to establish the existence of causation because the scientific knowledge necessary to determine whether an injury is truly attributable to something a medical professional did or failed to do is generally not within the common understanding of a reasonable jury. See *Locke, supra*, 223, 231-233; *Ghezzi v Holly*, 22 Mich App 157, 163; 177 NW2d 247 (1970). In *Locke*, a needle broke off into the plaintiff's body during an operation. A directed verdict was granted to the defendant because no expert testimony on the standard of care was given. The Court stated that it "has long recognized the importance of expert testimony in establishing a medical malpractice claim, and the need to educate the jury and the court regarding matters not within their common purview." *Locke, supra* at 223. The Court noted that "while expert testimony is the traditional and the preferred method of proving medical malpractice", there are exceptions, such as the doctrine of res ipsa loquitur. *Id.* at 230.

Here, plaintiffs cannot point to any known exception that would obviate the need for expert medical testimony on the issue of whether the proximate cause of plaintiff's damages was the untimely diagnosis of the infection. The issue is not within common knowledge. Plaintiffs offered no expert testimony to establish the link between the treatment and the injury. Although there was ample testimony as to the standard of care and breach thereof, the offered experts either explicitly refused to testify as to causation in the case, or merely speculated that a timely diagnosis may have affected the outcome.

Expert Dr. Forrester testified that she was not asked to testify nor would she testify about whether an earlier diagnosis would have altered the outcome. Although she testified that frequently the type of infection at issue can be treated medically if the diagnosis is early enough, she would not comment about the specific outcome of this case based on the facts. She indicated that she would defer such an opinion to a neurosurgeon, orthopedic or infectious disease specialist. Expert nurse practitioner Wilkosz explicitly stated that she was only rendering testimony regarding the standard of care. She had no opinion that had Sandoval acted differently, a different outcome would have resulted. Expert Dr. Dickinson also did not offer testimony that any acts or omissions by Sandoval proximately caused the injuries. In fact, he testified that he had no opinion about whether Sandoval's treatment caused an injury. When pressed on the issue during deposition, he indicated that he had not seen any records that would allow him to make that determination, but that if antibiotics had been prescribed in May, when

plaintiff first presented to Sandoval for treatment, there was a possibility that surgery would not have been necessary. He also testified that a large percentage of people, whom he had seen, suffering from similar infections respond to antibiotics. However, Dickinson continually maintained that he was not the appropriate specialist to make the determination for this case and that he would have to speculate to answer questions regarding proximate causation. Expert Dr. Engelberg testified that he could not determine proximate cause and that it would be very difficult for him to even speculate about whether anything Sandoval did or did not do would have made a difference. Conspicuously absent from the experts' testimony was evidence that could lead to a finding that "but for" Sandoval's conduct, injury would not have occurred.

The evidence was also insufficient to support an inference that the breach of the standard of care caused the injuries. In *Skinner, supra* at 164, the Court noted that "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. *Rather, 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.* [*Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (emphasis added).]

The evidence must demonstrate more than a mere possibility and courts cannot permit the jury to guess. *Skinner, supra*, 445 Mich 166, citing *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957). It is clear from our review of the record that the trial court properly determined that summary disposition was appropriate. There was insufficient evidence to submit the issue of proximate cause to the jury where the evidence of proximate cause was purely speculative. The jury would have had to guess as to proximate cause in this case.

On appeal, plaintiffs also argue that the trial court erred in determining that two of their expert witnesses were not qualified to testify as to causation in this case. This issue is moot in light of our ruling with regard to the motion for summary disposition. We note, however, that the record does not support plaintiffs' claim that the trial court determined that their experts were not qualified on the issue of causation.

Affirmed.

/s/ Harold Hood
/s/ Gary R.McDonald

[1] The liability claim against David B. Munro, M.D.,P.C. is based on the doctrine of respondeat superior because Sandoval was employed by the P.C.