

STATE OF MICHIGAN
COURT OF APPEALS

MARIE HUDDLESTON,

Plaintiff-Appellant,

v

TRINITY HEALTH MICHIGAN d/b/a SISTERS
OF MERCY HEALTH CORPORATION and/or
ST. JOSEPH MERCY HOSPITAL – ANN
ARBOR, IHA OF ANN ARBOR, P.C., d/b/a
ASSOCIATES IN INTERNAL MEDICINE –
CHERRY HILL, ASSOCIATES IN INTERNAL
MEDICINE – CHERRY HILL, P.C., and DR.
JOYCE LEON,

Defendants-Appellees,

and

HURON VALLEY RADIOLOGY, P.C. and DR.
DAVID E. BAKER,

Defendants.

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

In this medical malpractice action, Marie Huddleston (“Huddleston”) appeals as of right the trial court’s grant of summary disposition¹ in favor of Trinity Health - Michigan d/b/a Sisters of Mercy Health Corporation and/or St. Joseph Mercy Hospital - Ann Arbor (“the Hospital”), IHA of Ann Arbor, P.C. d/b/a Associates in Internal Medicine - Cherry Hill and Associates in Internal Medicine - Cherry Hill, P.C. (“IHA”), and Dr. Joyce Leon (“Leon”). We reverse the grant of summary disposition in favor of IHA and Leon and remand to the trial court for further proceedings, but affirm the grant of summary disposition in favor of the Hospital.

¹ MCR 2.116(C)(10).

UNPUBLISHED
September 11, 2012

No. 303401
Washtenaw Circuit Court
LC No. 09-000657-NH

In 2003, Huddleston underwent a CT scan of the abdomen and the scan revealed the presence of a lesion on her kidney. It is undisputed that the presence of the lesion was not reported to Huddleston and that she was, in fact, informed that the results of her scan were satisfactory. In 2008, Huddleston again underwent a CT scan of her abdomen which revealed the presence of a now much larger lesion on her kidney. Huddleston was then advised of the prior report concerning the existence of the lesion since 2003 and further advised that the lesion was cancerous and required the removal of her entire kidney. In her complaint, Huddleston alleged that the Hospital, IHA and Leon delayed in diagnosing her with kidney cancer resulting in her having to undergo a total nephrectomy² of the left kidney in 2008 instead of a partial nephrectomy in 2003. Leon and IHA moved for summary disposition, contending that Huddleston had suffered no injury as a result of the five year delay in diagnosing and treating her condition. The Hospital concurred in the motion and additionally moved for summary disposition on the basis that Huddleston did not provide sufficient expert testimony to establish a breach in the applicable standard of care by the Hospital. The trial court granted summary disposition in favor of defendants, dismissing Huddleston's action.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A court must consider the pleadings, "affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). "[S]ummary disposition may be granted [under this subsection] if there 'is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.'" *Id.*, quoting MCR 2.116(C)(10). To survive a motion for summary disposition, the nonmoving party "must produce evidence showing a material dispute of fact left for trial." *Village of Dimondale*, 240 Mich App at 566.

On appeal, Huddleston first argues that the trial court committed reversible error when it granted summary disposition in favor of Leon, IHA and the Hospital on the basis that Huddleston did not suffer a "compensable injury." We agree.

To recover for medical malpractice, Huddleston "must establish: (1) the standard of care, (2) breach of that standard of care, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006). As a general rule:

[I]n a tort action, the tortfeasor is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated. [*Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966)].

² A total nephrectomy is the surgical excision of a kidney. *Random House Webster's College Dictionary* (1997).

“A party asserting a claim has the burden of proving its damages with reasonable certainty.” *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). However, damages will not be found to be speculative “merely because they cannot be ascertained with mathematical precision.” *Id.*

Here, the injury claimed is the more extensive surgery, i.e., the removal of Huddleston’s entire kidney rather than removal of only part of her kidney. There is no question that there was significant growth of the cancerous tumor on her kidney between when it was initially revealed in June 2003 (but not reported to her) and June 2008 when another scan showing the tumor was reported to Huddleston and addressed. The 2003 report notes a 2.7 x 2.5 cm lesion. The 2008 report notes a 5.2 x 4.4 cm lesion. Dr. Michael Sarosi, who read the 2008 radiology report notes: “This lesion has enlarged significantly since the prior study.” While not binding in this state, we would note that other states have found that the growth of a tumor, by itself, constitutes a compensable injury for purposes of medical malpractice. For example, in *Evers v Dollinger*, 95 NJ 399, 408; 471 A2d 405 (1984), the court held:

[T]he malignant tumor grew significantly, not imperceptibly, during a seven months delay attributable to defendant's malpractice. Plaintiff clearly established that defendant's failure to diagnose the tumor prevented her from undergoing a mastectomy to excise the tumor at the earliest opportunity in 1977. As a proximate result of this malpractice, the tumor remained, grew, and spread in her body. An increase in the size of a malignant tumor, by definition, results in the spread of cancer cells into once healthy tissue, and therefore is an injury in and of itself.

More importantly, the case of *Sutter v Biggs*, 377 Mich 80, relied upon by both parties, supports allowing Huddleston’s case to proceed. In that case, a doctor removed one of a child’s ovaries and fallopian tubes, without her or her parents’ consent or knowledge. Some years later, when she was an adult, the patient developed a cyst on her other fallopian tube, and the prior removal was discovered. Due to the cyst, the patient had to have her remaining fallopian tube removed and was thus rendered unable to have children. She thereafter sued the doctor who removed her first ovary and fallopian tube for malpractice. While the court precluded her from obtaining damages for her inability to have children (that result being seen as too tenuous and remote from the original action of unauthorized removal of her ovary and fallopian tube), she was allowed to recover for the loss of her “reserve” fallopian tube (being one of two). True, the removal of the fallopian tube was unauthorized and the organ bore no signs of disease, so in those ways differs from the instant case. However, the fact remains that the *Sutter* jury had to find that the plaintiff was *injured* in some way by the removal of the first fallopian tube in order to award her damages. And, our Court specifically referenced that the damages were awarded for the loss of her “reserve” fallopian tube. The concurrence also indicated that:

[B]y wrongfully excising [the plaintiff’s] right fallopian tube, defendant deprived her of her fertility reserve provided by nature. For this he may be held liable in damages. The situation is, of course, unusual, simply because there are not many instances in which the body is provided with two means of performing the same function, either of which will completely fulfill that function in the absence of the

other. A situation somewhat analogous to the loss of one fallopian tube is the loss of one eye . . .” *Id.* at 93.

Notably, Justice Adams in his dissent stated, “In this respect, I would liken the loss of a fallopian tube to the loss of a kidney. A human being can survive with one kidney. If a physician wrongfully removes one kidney, is the injured person to be restricted to minimal damages or is recovery by his estate to be so restricted in event of his death because the second kidney was lost from some other cause?”

We find the reasoning in *Sutter* sound. Nature has provided the human body with two kidneys and simply because the body can survive and adapt without one does not negate a doctor’s responsibility to timely diagnose disease concerned with one of the pair. The human body also has two lungs, two eyes, two ears and other sets of organs which, it could be argued, are not required to perform in pairs to serve their intended purposes. We are highly concerned, however, with the potential implications in giving a “pass” to malpractice that occurs in the case of one of a pair of duplicate organs.

In the present matter, Huddleston’s expert testified that if her kidney had been operated on in 2003, only 10-20% would have been removed, leaving her with a fully functioning kidney. Where, as here, the failure to diagnose led to the removal of an entire reserve organ when a timely diagnosis would have left at least 80% of the organ intact and fully functioning, there is a question of fact as to whether plaintiff has suffered any damages due to the loss of the organ. Summary disposition was thus improper.

Huddleston next argues that the trial court committed reversible error when it found that she did not provide sufficient expert testimony to support her claim of medical malpractice against the Hospital. Huddleston’s argument is twofold. She first asserts that expert testimony was not needed to establish the standard of care, and alternatively contends that sufficient expert testimony was provided to demonstrate that the Hospital may have breached a duty owed to Huddleston making summary disposition improper. We disagree.

Regarding Huddleston’s first argument, we find that expert testimony is necessary to determine the standard of care applicable to the Hospital regarding the delivery of radiology reports to Leon. Generally in a medical malpractice action, a plaintiff is required to present expert testimony “to establish the standard of care and to demonstrate the defendant’s alleged failure to conform to that standard.” *Decker v Rochowiak*, 287 Mich App 666, 685; 791 NW2d 507 (2010). Expert testimony is used to “educate the jury and the court regarding matters not within their common purview.” *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005), quoting *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). As explained by the Michigan Supreme Court:

In a case involving professional service the ordinary layman is not equipped by common knowledge and experience to judge of the skill and competence of that service and determine whether it squares with the standard of such professional practice in the community. For that, the aid of expert testimony from those learned in the profession involved is required. [*Id.* at 223, quoting *Lince v Monson*, 363 Mich 135, 140; 108 NW2d 845 (1961)].

Therefore, such testimony “is essential to establish a causal link between the alleged negligence and the alleged injury.” *Pennington*, 271 Mich App at 104.

The standard of care applicable to the Hospital regarding the delivery of radiology reports to requesting physicians is outside of the “common purview” of a juror. *Woodard*, 473 Mich at 6. Huddleston’s complaint alleges that the Hospital:

[1] [F]ailed to immediately fax as well as mail to Defendant Leon MD’s office at Associates a copy of the radiology report for the June 9, 2003 CT scan of the abdomen so as to inform them of the necessity for additional studies to be done; [and]

[2] [F]ailed to follow up with Defendant Leon MD’s office to verify that they had in fact received this report which reflected a potentially cancerous lesion and required additional testing to be performed[.]

Without expert testimony it is unclear whether the Hospital was in fact required to fax and mail the June 2003 radiology report to Leon’s office. As the trial court aptly noted, without expert testimony, “How is the jury going to know whether it’s the hospital’s responsibility to provide the doctor with the report or the doctor’s responsibility to obtain the report from the hospital?” It is also speculation that the standard of care required that the Hospital confirm Leon’s receipt of radiology reports. The witness testimony actually supports the contrary, as hospital employee Joseph Garcia testified that it was not his practice to obtain written confirmation of receipt of deliveries from the doctors’ offices that he delivered materials to. Thus, Huddleston’s assertion that expert testimony is not required must fail. *Decker*, 287 Mich App at 685; *Locke*, 446 Mich at 223.

Regarding Huddleston’s alternative argument, we find that the expert testimony cited by Huddleston is insufficient to demonstrate that the Hospital may have breached a duty owed to Huddleston. A witness may be qualified to testify as an expert based on his or her “knowledge, skill, experience, training, or education.” MRE 702. A review of the record reveals that radiologist David E. Baker, M.D.’s testimony was not attached to any of the pleadings related to Leon, IHA or the Hospital’s motions for summary disposition. Thus, Huddleston’s reliance on such testimony is improper. *Id.*

Even if this Court were to consider Baker’s testimony, it does not establish the standard of care applicable to the Hospital regarding delivery of radiology reports. Baker testified that it was his understanding in 2003 that after he dictated, reviewed and signed radiology reports, “the report went through the hospital delivery system so that it was delivered to the referring physician in a way compatible with whatever that referring physician requested[.]” While Baker is a radiologist and worked at the Hospital in 2003, he admitted that the delivery of radiology reports “varied from physician to physician” and he did not “know all of the specifics of how that happened.” As such, Baker lacks the “knowledge, skill, experience, training, or education” to testify as an expert regarding the standard of care applicable to the Hospital. *Id.*

Internal medicine expert Robert L. Smith, M.D. is also not qualified to provide expert testimony regarding the standard of care applicable to the Hospital. Smith testified that he has

never been employed or supervised “the operation of a radiology department in a hospital[.]” Smith has also never been a radiology technician and has not worked in the mail or film room of a radiology department. Moreover, Smith testified that he was unaware of the Hospital’s “usual practice with regard to sending [radiology] reports to ordering physicians” so he could not provide an opinion regarding whether the Hospital failed to “follow their usual practice with regard to sending reports to ordering physicians[.]” As a result, Smith was unable to provide opinions regarding the Hospital’s radiology department communicating the results of the abdominal CT scan to Leon. Thus, Huddleston’s reliance on Smith’s testimony to establish the standard of care of the Hospital is improper. *Id.*

Finally, the testimony of Garcia and Leon, as well as the affidavit of meritorious defense of radiologist Anthony Munaco, M.D. do not support Huddleston’s position that the trial court erred in granting summary disposition in favor of the Hospital. Garcia testified that in 2003, he had a “route sheet” that had a list of doctors’ offices that he was to deliver items to, which included radiology reports. The radiology reports for each practice were kept in a separate envelope. Once he made a delivery, Garcia would mark the practice off of the route sheet. At the end of the day, Garcia would provide the route sheet to his supervisor. Garcia’s testimony fails to demonstrate that the Hospital was required to immediately fax or mail Leon the radiology reports she requested or that written confirmation of delivery was required. Rather, Garcia indicated that it was not required that the doctors’ offices sign acknowledging receipt of deliveries. Additionally, neither Leon’s testimony nor Munaco’s affidavit support that the Hospital violated the applicable standard of care. Because Huddleston did not demonstrate that there was a triable issue of material fact regarding the Hospital’s alleged negligence, the trial court did not err in granting summary disposition in the Hospital’s favor. *Village of Dimondale*, 240 Mich App at 566.

Reversed and remanded to the trial court for further proceedings, as to IHA and Leon. Affirmed as to the Hospital. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Michael J. Kelly