

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY VIA,

Plaintiff-Appellant,

v

BEAUMONT HEALTH SYSTEM, WILLIAM
BEAUMONT HOSPITAL TROY, and AMY
JOANNE ADAMS,

Defendants-Appellees.

UNPUBLISHED
October 21, 2014

No. 316776
Oakland Circuit Court
LC No. 2011-122519-NH

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right from the trial court's order granting defendants summary disposition under MCR 2.116(C)(10). We affirm.

I

Plaintiff was admitted at defendant hospital on March 17, 2010. On March 22, 2010, during a visit with her husband, plaintiff began coughing up blood, after which she developed trouble breathing. Plaintiff was intubated, suffered cardiac arrest and required cardiopulmonary resuscitation. After she was stabilized, doctors discovered and removed a plastic single-dose pill package with a small amount of foil attached to it from her esophagus. Plaintiff had to remain in intensive care on ventilation for several days after this incident. She testified that she did not recall anything about her hospital stay except she had a vague memory of a nurse telling her to swallow or take "something" out of her mouth.

On the day of the incident, Nurse Amy Joanne Adams had administered six medications in pill form to plaintiff. Each had been individually wrapped. Adams testified that she showed each pill to plaintiff, told her what medication it was, opened the package, and placed the pill in a cup. Adams also testified that, after opening all of the packages, she then gave plaintiff each pill, one at a time, in a spoonful of applesauce since plaintiff had trouble swallowing. Adams stated

that right after giving plaintiff the pills, she threw the packages in a trash can under the sink. Adams testified that she did not give plaintiff a plastic pill package.¹

Plaintiff alleged in her complaint that the pill package and subsequent intubation caused laceration, ulceration, and severe bleeding, which led to pain and suffering, difficulty swallowing, and permanent debilitation. Plaintiff further alleged that defendant Adams or another hospital employee administered a pill to plaintiff without removing the packaging. In addition, plaintiff alleged that the standard of care was breached by the failure to administer her medication safely, including removing it from the package, requiring that it be taken while the nurse is watching the patient, and not leaving the packages open at the bedside. Plaintiff's expert, Tracey Christy, signed the affidavit of merit. In the lower court, she asserted several alternative grounds for malpractice: (1) that Adams administered a pill to plaintiff that was packaged, or (2) that Adams or another hospital staff member left an empty pill package in a place where plaintiff could swallow it. Tracey opined that the pill wrapper cut plaintiff's throat and esophagus causing blood to enter her lungs, which ultimately resulted in cardiopulmonary distress due to lack of oxygen. Plaintiff also asserted in the complaint that she has since suffered a reduced ability to ambulate, respiratory problems, and bladder incontinence as a result of the incident, but Christy had not reviewed plaintiff's medical records and did not provide any expert testimony regarding plaintiff's condition and any damages resulting from the incident.

Defendants moved for summary disposition, which the trial court initially denied in part and granted in part. The trial court concluded a question of fact existed regarding causation, but that there was no genuine issue of material fact concerning the issue of permanent and continuing damages from the incident because plaintiff failed to offer any expert testimony to prove those damages. On reconsideration, the trial court also granted defendants' motion for summary disposition as to causation. The trial court stated, "Plaintiff's tenuous causation theory rests on the premise that Defendant Amy Adams, R.N., left a pill package in Plaintiff's room, which Plaintiff then mistakenly swallowed."² The trial court went on to discuss "several troubling deficiencies in Plaintiff's causation proofs," which included lack of evidence that Adams left a pill package in the room, lack of evidence that defendants used pill packages similar to the one that injured plaintiff, and lack of evidence that plaintiff was at risk for accidentally swallowing a pill package, as well as the fact that plaintiff's expert had admitted that there was more than one plausible explanation for how the pill package got into plaintiff's throat. Relying on *Skinner v Square D Co.*, 445 Mich 153, 165; 516 NW2d 475 (1994), the trial court held that plaintiff had failed to meet her "threshold requirement for presenting evidence that would take her causation theory beyond a mere possibility and show that it was probable."

II

¹ Adams claimed plaintiff's husband was present during the administration of the medications, but her husband denied being present.

² It appears that plaintiff abandoned the theory that Adams had given plaintiff a pill still in its wrapper. The pathology report and Adams's deposition testimony indicated that there was no pill in the wrapper that was removed from plaintiff's throat.

This Court reviews de novo a trial court's decision whether to grant or deny a motion for summary disposition under MCR 2.116(C)(10). *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

“In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996)(citations omitted). “Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Id.*; see also MCR 2.116(G)(4). The moving party is entitled to judgment as a matter of law where “the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.” *Quinto*, 451 Mich at 362.

In a medical malpractice case, the plaintiff must establish four elements: (1) the applicable standard of care, (2) that the defendant breached that standard of care, (3) that the plaintiff suffered injury, and (4) that the defendant’s breach was a proximate cause of the plaintiff’s injury. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994); *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005); MCL 600.2912a.

The causation element requires a showing that “but for” defendant’s conduct the plaintiff’s injury would not have occurred. *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 285; 602 NW2d 854 (1999). Where the jury would be required to speculate, or the probabilities are at best evenly balanced, judgment as a matter of law in favor of the defendant is required. *Id.* Our Supreme court stated in *Skinner*:³

We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. . . . [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight

³ Plaintiff argues that *Skinner* is inapplicable because *Skinner* was not a medical malpractice case, but rather a products liability case. This argument lacks merit. Both this Court and the Michigan Supreme Court have applied *Skinner* in the medical malpractice context. See *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 88-89; 776 NW2d 114 (2009), and *O’Neal v St John Hosp & Med Ctr*, 487 Mich 485, 496; 791 NW2d 853 (2010).

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. [*Skinner*, 445 Mich at 164.]

Plaintiff's two alternative theories—that Adams administered a pill in its packaging and a pill package was left in a place where plaintiff could swallow it—could not take her causation theory out of the realm of mere possibility. First, there is no documentary evidence or witness testimony that Adams gave plaintiff a pill still in its package. Adams's testimony that she had a clear memory of giving plaintiff her pills that morning and did not give plaintiff a pill that was still in its wrapper, stands uncontroverted by contrary evidence. Because plaintiff may not rest on her mere allegations, defendant was entitled to summary disposition on this theory. *Quinto*, 451 Mich at 362.

Second, the theory that a pill package was left in a place where plaintiff could swallow it is purely speculative and has no basis in established fact. “[A]n expert’s opinion is objectionable where it is based on assumptions that are not in accord with the established facts.” *Badalamenti*, 237 Mich App at 286. Even a causation theory based on circumstantial evidence “must have some basis in established fact.” *Skinner*, 445 Mich at 164. Christy averred that leaving medication for plaintiff to self-administer would have been a violation of the standard of care because plaintiff’s underlying condition made her confused and, therefore, vulnerable and capable of unwittingly putting things in her mouth. Christy could only opine that a pill package “could have been” left at plaintiff’s bedside by one of the nurses. But no evidence demonstrated that this is what actually happened. Rather, according to Adams, she threw all of the empty pill packages in the garbage. Moreover, there were no markings on the plastic single-dose pill package recovered from plaintiff’s esophagus that could be used to confirm that it came from defendant hospital or was associated with one of the six medications Adams gave plaintiff. Absent any evidence in the record that is in accord with Christy’s opinion, the trial court properly granted defendant’s motion for summary disposition regarding this theory.

Plaintiff argues that summary disposition was inappropriate because she should have been allowed to proceed to trial on a theory of *res ipsa loquitur*. We disagree. Whether the doctrine can be applied to a certain set of facts is a question of law for the court to decide. See *Jones v Porretta*, 428 Mich 132, 154 n 8; 405 NW2d 863 (1987).

Plaintiff did not plead *res ipsa loquitur* in her complaint, and this failure, alone, is fatal to plaintiff’s assertion of *res ipsa loquitur* because “[a] plaintiff’s theory in a medical malpractice case must be pleaded with specificity and the proofs must be limited in accordance with the theories pleaded.” *Badalamenti*, 237 Mich App at 284. However, plaintiff’s *res ipsa loquitur* theory also fails on the merits. Under the doctrine of *res ipsa loquitur*, in certain factual situations, the law will allow a jury to infer negligence from circumstantial evidence in the absence of direct proof. Prosser & Keeton, *Torts* (5th ed), § 39, p 243. In order to avail herself of the doctrine, plaintiff was required to meet the following conditions:

- (1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and

(4) [e]vidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Woodard*, 473 Mich at 7 (citations and internal quotation marks omitted).]

Plaintiff failed to establish any of these conditions.

First, “ ‘the fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury.’ ” *Woodard*, 473 Mich at 7, quoting *Locke*, 446 Mich at 231. Plaintiff’s expert did not assert that the type of injury plaintiff suffered does not ordinarily occur without negligence, and because this type of injury does not ordinarily occur at all, it would not have been in the “common understanding of the jury” that the injury would not occur in the absence of negligence. A bad result, alone, is not sufficient to satisfy this condition. *Locke*, 446 Mich at 230-231.

Second, there is no evidence that the pill package that injured plaintiff was in the exclusive control of defendants. There are no identifying marks linking the pill package to the medication Adams gave plaintiff or any other medication used by the hospital. Moreover, even if the package was left at plaintiff’s bedside, as she postulates, it was not in defendants’ exclusive control because hospital staff was not present in plaintiff’s room at all times, and plaintiff’s husband visited and helped take care of plaintiff.

Third, there are no facts in the record to support the theory that plaintiff swallowed the package only and exclusively because Adams administered her medicine, and not as the result of plaintiff’s voluntary action. In addition, plaintiff’s alternative theory, that the package was improperly left at her bedside, would have necessarily involved plaintiff voluntarily putting the pill package in her mouth after it was left within her reach. Thus, plaintiff cannot establish the third, voluntary action condition.

Fourth, the record does not indicate that the “true explanation of the event” is more readily available to defendants than it is to plaintiff. Plaintiff has the pathology report and the medical records related to the event. Plaintiff and plaintiff’s expert examined the pill package. Plaintiff deposed Nurse Adams. There is no indication that any relevant records from the hospital are being withheld or that defendants know the “true explanation,” and although plaintiff testified that she remembers very little from the hospital stay when she suffered the injury, her husband was present when she began coughing up blood.

Because the four elements of *res ipsa loquitur* are not met, plaintiff cannot rely on the doctrine to create an inference of negligence and salvage her claim.⁴

Affirmed. Defendants, as the prevailing parties under MCR 7.219, may tax costs.

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder

/s/ Donald S. Owens

⁴ In light of this conclusion that the trial court properly granted summary disposition to defendants for lack of sufficient evidence of causation, we decline to address plaintiff's argument that the trial court erred by also granting summary disposition as to the permanent and continuing nature of her damages because plaintiff did not proffer expert testimony to prove these damages. See *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).