

STATE OF MICHIGAN
COURT OF APPEALS

GORDON FRENCH, Personal Representative of the
Estate of LESSIE RUTH FRENCH, Deceased,

UNPUBLISHED
January 21, 2000

Plaintiff-Appellant/Cross-Appellee,

v

No. 204786
Wayne Circuit
LC No. 95-512176 NH

DR. K.A. GOWDA, MD, DR. K.A. GOWDA, MD,
PC, DR. N. GUPTA, MD, and DR. N. GUPTA, MD,
PC,

Defendants-Appellees/Cross-Appellants,

and

DR. ARTHUR MORLEY, MD, DR. ARTHUR
MORLEY, MD, PC, DR. J.N. CHING, DR. J.N.
CHING, MD, PC, OAKWOOD UNITED
HOSPITALS, INC., d/b/a SEAWAY HOSPITAL,
DR. GEORGE F. HOLMES, MD, and
DR. GEORGE F. HOLMES, MD, PC.,

Defendants.

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

GRIBBS, J. (*dissenting*).

I respectfully dissent.

Plaintiff's suit alleged that Dr. Gupta failed to make a proper referral to Dr. Gowda, a cardiologist with whom plaintiff's decedent had a previous relationship, and that Dr. Gowda failed to respond to requests for his consultation in plaintiff's decedent's care. The trial court granted defendants' motions for summary disposition, concluding that plaintiff was unable to produce sufficient evidence that any alleged malpractice was the proximate cause of the decedent's death. I disagree and

would find that there was sufficient evidence of negligence by the two defendants to present a question of fact to the jury on the issue of medical malpractice.

One of plaintiff's expert witnesses, board-certified cardiologist Dr. James A. Grimes, specifically testified that if Mrs. French had been provided adequate cardiology care between September 23, 1991 and September 26, 1991, she would likely have lived. Dr. Grimes was deposed and in response to defendants' motions for summary disposition, provided an affidavit that stated, in pertinent part:

5. It is my professional opinion that if a competent board certified cardiologist had examined Mrs. French and had undertaken a reasonable investigation into her cardiac and lung status that the diagnosis of pulmonary embolus would have been made and appropriate treatment would have been administered.

6. Had the diagnosis been made and treatment been administered it is my professional opinion that there was a high probability (over 50%) that Mrs. French would have survived and would not have died during this hospitalization.

Dr. Grimes' affidavit also provides evidence as to the negligence of Dr. Gupta:

4. It is my professional opinion that Dr. Gupta departed from the standard of care in the following manner:

[a] When Dr. Gupta wrote "I will call" Dr. Gowda in his consult, it was Dr. Gupta's professional responsibility for himself to place a call to Dr. Gowda, notwithstanding any hospital protocol that required clerks and/or nurses to notify Dr. Gowda personally and this amounted to a breach of the standard of care for a cardiologist.

[b] Dr. Gupta breached the standard of care for a cardiologist by failing to follow up to verify that the consult by Dr. Gowda was performed. My review of the records and his deposition reveal that he did not do that. In my opinion this was a departure from standard care.

Although Dr. Gowda contends that there was no evidence that he was actually notified of the consultation request, plaintiff presented evidence that the hospital secretary telephoned his office and left a notice in his mailbox.

Ordinarily the determination of proximate cause is left to the trier of fact, but if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should rule as a matter of law. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995).

In this case, I believe that plaintiff presented sufficient evidence to support a finding that the alleged malpractice proximately caused the decedent's death. With respect to Dr. Gupta, while there was insufficient evidence that his failure to personally contact Dr. Gowda was a proximate cause of the decedent's death, there was evidence from which a jury could have found that his alleged failure to follow-up on his consult request to confirm that Dr. Gowda had been notified, and intended to see the decedent, was a proximate cause of the decedent's death. Plaintiff's expert testified that the standard of care required Dr. Gupta to follow-up.¹ It could reasonably be inferred that, had he done so, he would have realized that Dr. Gowda was not going to attend to the patient, at which time the decedent would have had the option of allowing either Dr. Gupta or another doctor to timely provide treatment. Alternatively, it could reasonably be inferred that, had Dr. Gupta followed-up and discovered that Dr. Gowda did not receive the consult request, he would have relayed the request and Gowda would then have timely treated the patient. In light of testimony that that it was more likely than not that the decedent would have survived had she timely received treatment, I conclude that sufficient evidence of proximate cause was presented to submit the issue to the trier of fact.

I also conclude that plaintiff presented sufficient evidence to support a finding that Dr. Gowda's negligence was a proximate cause of the decedent's death. Plaintiff alleged that Dr. Gowda failed to appropriately respond to requests that he become involved in the decedent's care. As noted previously, plaintiff's expert testified that, had Dr. Gowda become involved in the decedent's care on either September 23rd (the date the consult was requested) or September 24th, the decedent's death more likely than not would have been averted. He also testified that it was more likely than not that, had Dr. Gowda timely initiated treatment, he would have come up with the correct diagnosis and initiated therapy. While the trial court found that this testimony pertaining to the likelihood of survival was insufficient to establish the requisite causality, I believe that it affords a reasonable basis for the conclusion that, more likely than not, Dr. Gowda's alleged breach in the standard of care was a cause in fact of the decedent's death. *Weymers v Khera*, 454 Mich 639, 647-648; 536 NW2d 834 (1995); *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). The trial court found dispositive the fact that plaintiff's expert's opinion concerning causation was based on a series of actions that Dr. Gowda would have taken had he seen the decedent, but that there was no evidence that Dr. Gowda would have actually performed any of the steps mentioned. However, although there was no direct evidence that Dr. Gowda would have taken the various actions mentioned, plaintiff's expert testified that the actions would have been required by the standard of care. This testimony would have provided the jury with a reasonable basis to conclude that Dr. Gowda, at a minimum, would have complied with the standard of care. Therefore, the fact that there was no direct evidence pertaining to

the actions that Dr. Gowda would have taken was not a proper basis upon which to conclude that causality had not been shown.

The trial court also stated that plaintiff's expert failed to indicate that Dr. Gowda would have been required by the standard of care to diagnose a pulmonary embolism. However, viewing the testimony as a whole, plaintiff's expert did opine that a diagnosis of pulmonary embolism would have been part of a differential diagnosis and that it was more likely than not that Dr. Gowda would have arrived at that diagnosis and initiated therapy. From this testimony, the jury could have found that a diagnosis of pulmonary embolism was within the standard of care.

In light of the foregoing discussion, I find that sufficient evidence of the requisite cause in fact was presented to create an issue for the trier of fact. Substantial evidence was presented which formed a reasonable basis for an inference of negligence and proximate cause. *Skinner, supra* at 166. The evidence indicated a logical sequence of cause and effect. *Id.* at 167-168. Specifically, the expert testimony referred to above, concerning the likelihood of diagnosis and survival had the decedent been seen by Dr. Gowda, was sufficient to create a genuine issue of material fact as to these matters.

I would reverse and remand for further proceedings.

/s/ Roman S. Gribbs

¹ Given this testimony, I would also reject Dr. Gupta's contention that summary disposition was warranted because there was no evidence showing a breach in the standard of care.