

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RUTH HUNTER, Conservator of the Estate of  
KALIYA HUNTER, a minor,

UNPUBLISHED  
March 14, 2006

Plaintiff-Appellant/Cross-Appellee,

v

No. 263982  
Kent Circuit Court  
LC No. 03-010866-NH

BUTTERWORTH HOSPITAL/SPECTRUM  
HEALTH HOSPITALS, DR. JEFFREY DOOD,  
DR. SUSAN HICKS, and DR. RALPH E.  
MATHIS,

Defendants-Appellees/Cross-  
Appellants.

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Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition in this medical malpractice action. Defendants filed a cross-appeal from the trial court's denial of their request for sanctions for filing a frivolous action. We affirm.

In November 2003, plaintiff filed a complaint on behalf of her minor daughter, alleging medical malpractice against the treating physicians during the delivery of the minor child and vicarious liability against defendant hospital. Specifically, plaintiff alleged that defendants failed to recognize fetal distress and should have performed a cesarean section earlier. The minor child began experiencing absence seizures after reaching four years of age. Plaintiff further alleged that the minor child suffered from respiratory problems as well as significant motor and speech difficulties. The parties stipulated to extend scheduling order deadlines on two different occasions. In April 2005, defendants filed a motion to extend the time for submitting a motion for summary disposition because of the delay in deposing plaintiff's causation expert, Dr. Michael Brazil. However, defendants also moved to exclude plaintiff's other causation expert, Dr. Ronald Gabriel. Specifically, defendants alleged that plaintiff had failed to respond to requests to provide a deposition date for Dr. Gabriel. Plaintiff did not oppose the motion to extend the time for filing a motion for summary disposition. However, plaintiff objected to the request to limit Dr. Brazil as the only causation expert. Plaintiff alleged that Dr. Gabriel, a pediatric neurologist, requested additional testing before offering his full opinion, and the tests were scheduled for May and July of 2005. Plaintiff filed her own motion to extend the scheduling order dates by sixty days to account for the outstanding tests.

After entertaining oral argument on the motions, the trial court granted the extension with regard to the filing of the motion for summary disposition. However, the trial court questioned the validity of even naming Dr. Gabriel on plaintiff's expert witness list when the doctor was unprepared to provide an opinion regarding causation. Consequently, the trial court concluded that the listing as an expert was a "nullity" and the deadline for naming expert witnesses had long since passed. Thus, a written order entered that provided that the motion to extend time for filing the motion for summary disposition and to limit experts was granted.

After Dr. Brazil was deposed, defendants filed their motion for summary disposition, alleging that the testimony failed to link the proximate cause of the minor child's injuries to any alleged malpractice by defendants. Rather, plaintiff attempted to support causation by relying on a conclusive statement by Dr. Brazil following a leading question posed by plaintiff's counsel. Although Dr. Brazil alleged that there may have been a hypoxic event (essentially a lack of oxygen) prior to the actual birth, he expressly stated on multiple occasions that the cause of absence seizures was unknown. In opposition to the motion, plaintiff alleged that a flexible approach to admission of evidence was permitted, and in any event, the issue raised by defendants was a matter of the weight to be given the evidence, not an issue of admissibility. Plaintiff further alleged that Dr. Brazil gave an opinion regarding causation to a reasonable degree of medical certainty. The trial court concluded, in a written opinion, that the testimony failed to establish causation and set forth merely a possibility. The trial court later amended the opinion to deny defendants' request for sanctions. Both parties appeal as of right, and we affirm.

Plaintiff first alleges that the trial court erred in granting defendants' motion for summary disposition because the testimony of Dr. Brazil created a genuine issue of material fact regarding causation. We disagree. Appellate review of summary disposition decisions is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail do not satisfy the burden in opposing a motion for summary disposition. *Quinto, supra.*

In a medical malpractice action, the plaintiff must prove: (1) the applicable standard of care; (2) breach of that standard by defendant; (3) injury; and (4) proximate cause between the alleged breach and the injury. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Failure to present proof regarding any element is fatal to a claim. *Id.* A bad result, in and of itself, is not sufficient to raise an issue for the jury in a professional negligence action. *Woodard v Custer*, 473 Mich 1, 8; 702 NW2d 522 (2005). An expert must present evidence that "but for" the negligence, the result ordinarily would not have occurred when such a determination can not be made by the jury as a matter of common understanding. *Id.* "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." *Craig v Oakwood Hosp*, 471 Mich 67, 70-71; 684 NW2d 296 (2004). The

plaintiff need not prove that an act or omission was the sole catalyst of the injuries, but must present evidence from which the jury could conclude that the act or omission was a cause. *Id.* The trial court, in its role as gatekeeper, must ensure that expert testimony presented pursuant to MRE 702 is reliable regardless of whether the testimony is based on “novel” science. *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004).

Following a review of the deposition as a whole, the trial court properly granted defendants’ motion for summary disposition. Dr. Brazil testified that the etiology of absence seizures was unknown, and there was “no one thing” that could account for the condition. He also acknowledged that there was a theory that genetics may play a role in the development, but there was no actual confirmation of that theory. Dr. Brazil expressly stated that one could opine that anoxia during labor could be a cause, but “you can make a case on the other side too.” He testified that one could examine the hippocampus area of the brain to look for damage. However, Dr. Brazil could not give an opinion regarding the hippocampus of the minor child because he did not have an image with coronal views to make that assessment. Additionally, he further stated that there was an assumption that events that occur “either at birth *or while intrauterine*” may relate back to seizures. In essence, Dr. Brazil acknowledged that there was no agreed upon cause, and when encountering a seizure disorder, there was a “list of different *potential* contributing factors.”

Upon questioning by defense counsel, the following exchange occurred:

*Q.* No, I’m talking about an opinion that with a reasonable degree of medical certainty Absence seizures in a case were related to hypoxia?

*A.* I know I’ve mentioned before that that’s possible but I’m not saying in this case or any other case that you could say that the birth anoxia for sure led to the Absence seizure like the other articles say. There’s no way to say for sure all you can say is it’s possible.

However, when presented with a leading question by plaintiff’s counsel, the following exchange transpired over defense counsel’s objection:

*Q.* And would you agree that the causation, because I don’t think this was ever asked of you, the causation, in other words the link between this child’s damages and deficits that are in the records of Dr. Schiff and others, are causally related to the delay in delivery, is that your opinion and is it based upon a reasonable degree of medical certainty?

*A.* I believe that’s correct. [Objection omitted.]

This leading question and answer was contrary to the deposition testimony as a whole. Consequently, the trial court noted that leading questions are disfavored and subject to being stricken which precludes their consideration. The admission of leading questions from a deposition at trial presents an issue that rests in the sound discretion of the trial court. See *Battle Creek Food Co v Kirkland*, 298 Mich 515, 527-529; 299 NW 167 (1941). Under the circumstances, the trial court properly granted the summary disposition motion.

Plaintiff next alleges that the trial court abused its discretion in excluding causation witness Dr. Ronald Gabriel. We disagree. The trial court's decision to extend discovery is reviewed for an abuse of discretion. *Nuriel v YWCA*, 186 Mich App 141, 146; 463 NW2d 206 (1990). When determining whether to extend discovery, the trial court should consider whether granting the request will facilitate or hamper the litigation. *Id.* "Factors such as the timeliness of the request, the duration of the litigation and the possible prejudice to the parties should also be considered." *Id.*

Based on this record, the trial court's decision to deny the request to extend discovery and to grant the request to limit the experts was not an abuse of discretion. *Nuriel, supra*. The case was filed in November 2003, and the parties stipulated to two extensions of the scheduling order. The trial court's second amendment provided that it would be the final scheduling order. On May 20, 2004, plaintiff filed her expert witness list with Dr. Gabriel's name on the list. However, in April 2005, Dr. Gabriel had not been presented for deposition, and plaintiff had not provided a deposition date. The trial court was advised that Dr. Gabriel had requested additional tests that would not be completed until July 2005. Although plaintiff asserted that a mere 60 days was required to complete the discovery, this did not account for a review of the medical test results, the deposition of Dr. Gabriel, and the defense need to prepare to refute any opinion. Moreover, this extension assumed that the testing would result in an opinion in plaintiff's favor. Curiously, Dr. Gabriel did not provide an affidavit in the interim regarding his opinion pending additional testing. Consequently, the trial court properly questioned why Dr. Gabriel had been named on the witness list when he was not prepared to provide a causation opinion. Based on the previous extensions, the duration of the case, the uncertainty regarding the outcome of the tests and the opinion, and the extension of the case into the future to account for the tests, the trial court did not abuse its discretion. *Nuriel, supra*.

Lastly, defendant contends that the trial court clearly erred in failing to order sanctions for filing a frivolous lawsuit. We disagree. A trial court's determination that an action is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662. Whether a claim is frivolous is contingent on the facts of each case. *Id.* at 662. The mere fact that the plaintiff did not ultimately prevail does not indicate that the position was frivolous. *Id.* In light of the uncertainty regarding the medical testing and its outcome, the trial court did not clearly err in failing to grant the defense request for sanctions.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Helene N. White  
/s/ Karen M. Fort Hood