

STATE OF MICHIGAN
COURT OF APPEALS

MAUREEN TOBIN and PATRICK TOBIN,

Plaintiffs-Appellants,

v

JEFFREY SHILLMAN, CAMERON GETTO, and
SOMMERS, SCHWARTZ, SILVER &
SCHWARTZ, P.C.,

Defendants-Appellees.

UNPUBLISHED

June 13, 2006

No. 257445

Oakland Circuit Court

LC No. 2004-056966-NM

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

FORT HOOD, J. (*concurring*).

I concur in the conclusion reached by the majority. Review of the deposition testimony of Dr. Edward McGuire revealed that he treated plaintiff after the alleged medical malpractice by Dr. Law. However, when Dr. McGuire's deposition commenced, he stated that, to the best of his knowledge, he was not retained as an expert. Furthermore, Dr. McGuire stated that he was prepared to testify about his own treatment of plaintiff and had not reviewed the notes of Dr. Law for at least six weeks. More importantly, Dr. McGuire expressly stated that he did not have a basis to offer an opinion regarding Dr. Law or any other physician's breach of the standard of care with regard to plaintiff's treatment.

Dr. McGuire concluded that there was a "red flag" in the treatment of plaintiff that was indicative of a complication. Yet, Dr. McGuire could not relate the complications he treated plaintiff for to any lapse by Dr. Law. Although he acknowledged that quicker action might have resulted in fewer complications, he would not definitively conclude that the chance for infection would have decreased. Dr. McGuire would only attribute some of plaintiff's problems or complications to any alleged delay by Dr. Law. Dr. McGuire could not conclude, based on the record available, that Dr. Law should have diagnosed an infection where plaintiff did not complain of pain or bleeding.¹ He opined that discomfort occurs because of the nature of the

¹ Dr. McGuire indicated that he only had a couple of pages of notes from Dr. Law. There is no indication that Dr. McGuire was provided any deposition testimony or answers to interrogatories in which Dr. Law expanded on his notes or explained his treatment plan.

surgery, which involves removal of a foreign body when sutures are pre-attached to the bone anchor. Therefore, Dr. McGuire could not conclude that, with a quicker response time, none of plaintiff's problems would have occurred. In fact, he acknowledged that many patients enduring sling procedures might never achieve satisfactory results.

Plaintiff alleges that the trial court erred in granting summary disposition because it failed to view the testimony in the light most favorable to plaintiff. On the contrary, review of the deposition testimony revealed that Dr. McGuire was not prepared to render an opinion based on the limited notes he had obtained from Dr. Law. 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.* 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. *Craig v Oakwood Hosp*, 471 Mich 67, 70-71; 684 NW2d 296 (2004). The factual information provided to Dr. McGuire did not provide a foundation to establish causation in the underlying medical malpractice case. There is no indication that plaintiff requested the opportunity to retain another expert regarding the issue of causation. Because the underlying case could not be established, the trial court properly dismissed the legal malpractice action.

/s/ Karen M. Fort Hood