

STATE OF MICHIGAN
COURT OF APPEALS

AARON FORREST AMES, Personal
Representative of the Estate of LUCY AMES,
Deceased,

UNPUBLISHED
April 21, 2011

Plaintiff-Appellant,

v

No. 295010
Gratiot Circuit Court
LC No. 06-010212-NH

GREGORY R. STRAUTHER, M.D., GRATIOT
HEALTH SYSTEM, d/b/a GRATIOT
COMMUNITY HOSPITAL, ALBERT B. ROSS,
M.D., and JONERIC NOTARNICOLAR, M.D.,

Defendants,

and

DAVID H. WIEDEMER, M.D., MICHIGAN
GASTROENTEROLOGY INSTITUTE, P.C.,
MICHAEL BUETOW, M.D., WOON-MAN
CHUNG, M.D., SPARROW HEALTH
SYSTEMS, DIANE SIMEONE, M.D., JAMES A.
KNOL, M.D., KATHLEEN GRAZIANO, M.D.,

Defendants-Appellees.

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff, the personal representative of the estate of decedent, Lucy Ames, appeals as of right an October 19, 2009, order acknowledging the settlement of all matters between plaintiff and defendants Gregory R. Strauther, M.D., and Gratiot Health System, d/b/a Gratiot Community Hospital, and dismissing the action by stipulation following a jury trial. Plaintiff challenges earlier orders, entered between September 5, 2006, and November 20, 2006, summarily dismissing defendants-appellees David H. Wiedemer, M.D., Michigan Gastroenterology Institute, P.C., Michael Buetow, M.D., Woon-Man Chung, M.D., Sparrow Health Systems, Diane Simeone, M.D., James A. Knol, M.D., and

Kathleen Graziano, M.D.¹ Plaintiff also challenges a September 2, 2008, order denying his motion for relief from the earlier orders granting summary disposition. We affirm.

I.

On March 14, 2002, decedent was admitted to Gratiot Community Hospital for severe abdominal pain in the left and right upper quadrants of her abdomen. On March 16, 2002, Dr. Strauther performed an attempted laparoscopic cholecystectomy² with conversion to open cholecystectomy on decedent. Bleeding from the liver made removal of the gallbladder difficult. Thirteen days after the gallbladder removal, on March 29, 2002, decedent was transferred from Gratiot Community Hospital to Sparrow Health System for an endoscopic retrograde cholangiopancreatography (ERCP) and stent placement due to continued bile drainage. Dr. Albert Ross, a gastroenterologist, performed the ERCP by injecting dye into the ducts in the biliary tree and a drainage film was taken after the ERCP, which Dr. Buetow reviewed. In a report, Dr. Buetow noted that there was some filling of the left hepatic ducts, though incomplete filling of the right hepatic duct. Following the ERCP, decedent was returned to Gratiot Community Hospital.

Because plaintiff continued to experience an elevated temperature, accompanied by abdominal pain and nausea 26 days after the gallbladder removal, on April 11, 2002, she was transferred to Sparrow Health System for another ERCP and removal of the stent. Dr. Wiedemer performed the ERCP, which Dr. Chung reviewed. In his report, Dr. Chung noted that there was no filling defect seen in the visualized biliary tree. Following the ERCP, decedent again returned to Gratiot Community Hospital. Dr. Strauther discharged decedent on April 19, 2002, hoping that the continuing bile leak of an unidentified source would eventually stop and noting that decedent's postoperative course had been complicated by gastritis and acute renal failure.

On May 28, 2002, decedent was referred to the University of Michigan Medical Center under the care of Dr. Simeone for non-resolution of a right sided bile leak. During this hospitalization, decedent underwent a percutaneous trans hepatic cholangiography with right PTC tube placement, which revealed a right sided bile leak with intra abdominal bile collection, and an ERCP, which revealed an occlusion of the right hepatic duct and was believed to have resulted from the misplacement of a surgical clip during Dr. Strauther's cholecystectomy.

On July 3, 2002, U of M defendants operated on decedent, removing the right lobe of her liver³ because of injury to the hepatic duct. During this operation, the cecum was perforated. As of July 13, 2002, decedent had been septic for 24 hours and her cecum had ruptured. Dr. Knol

¹ Dr. Simeone, Dr. Knol, and Dr. Graziano will hereinafter be referred to collectively as "U of M defendants."

² Cholecystectomy is the surgical removal of the gallbladder.

³ Right hepatic lobectomy.

and Dr. Graziano operated again. However, decedent subsequently died on July 30, 2002, because of sepsis, multisystem organ failure and heart failure.

Plaintiff filed a complaint in Washtenaw Circuit Court, alleging that the negligence of medical professionals and facilities involved in decedent's case following her March 2002 admission to Gratiot Community Hospital was the direct and proximate cause of her death. Defendants-appellees moved for summary disposition. U of M defendants argued that there was no evidence that, but for their actions, decedent's injuries would not have occurred. They cited testimony from general surgery expert, Leonard F. Milewski, M.D., that he was not critical of the care and treatment U of M defendants provided to decedent. Dr. Wiedemer, Michigan Gastroenterology Institute, P.C., Dr. Buetow, Dr. Chung, and Sparrow Health Systems relied on MCL 600.2912a to argue that plaintiff failed to prove that decedent's loss of an opportunity to survive was greater than 50 percent. They cited testimony from Dr. Milewski that decedent only had a 30 percent chance of survival after Dr. Strauther's cholecystectomy injured her hepatic duct on March 16, 2002. The Washtenaw Circuit Court granted defendants-appellees' motions for summary disposition.

On November 21, 2006, after defendants-appellees were dismissed, and when only defendants Dr. Strauther and Gratiot Health System remained in the action, the Washtenaw Circuit Court transferred venue to Gratiot Circuit Court. During the course of further discovery, plaintiff took the depositions of Dr. Strauther's experts. Those experts were critical of the care provided to decedent by Sparrow Health Systems and University of Michigan Medical Center. Strauther's experts opined, among other things, that decedent's ERCPs were not read correctly.

Based on these experts' depositions, in December 2007, plaintiff filed a motion for relief from the orders granting summary disposition and transferring venue, MCR 2.612. However, plaintiff withdrew that motion pending the outcome of *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008), which involved MCL 600.2912a. Plaintiff re-filed the motion for relief in August 2008, urging the trial court to exercise its equitable power under MCR 2.612(C)(1)(f) and arguing that on the basis of *Stone* the lost opportunity to survive doctrine did not apply to his claims as it was not pleaded in the complaint. Defendants-appellees argued that plaintiff's motion was based on newly discovered evidence, MCR 2.612(C)(1)(b), and thus was improperly filed outside the one year time limit on such motions MCR 2.612(C)(2). Further, defendants-appellees argued that, even if plaintiff's claims were not based on the lost opportunity to survive, plaintiff failed to establish that, but for their actions, decedent's injuries would not have occurred. The trial court denied plaintiff's motion, finding that plaintiff's arguments would be more appropriate for appellate review than relief from judgment under MCR 2.612(C)(1)(f).⁴

⁴ This Court denied plaintiff's application for leave to appeal the trial court's order. *Ames v Strauther*, unpublished order of the Court of Appeals, issued October 3, 2008 (Docket No. 287873).

Plaintiff's action against defendants Dr. Strauther and Gratiot Health System proceeded to a jury trial and was ultimately dismissed by stipulation of the parties on October 19, 2009. This appeal followed.

II.

Plaintiff's first argument on appeal is that the lost opportunity theory does not apply to his claims. We agree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 86; 776 NW2d 114 (2009).⁵

MCL 600.2912a(2) addresses the burden of proof in medical malpractice actions:

In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.⁶

In *Stone v Williamson*, 482 Mich 144, 154; 753 NW2d 106 (2008), Chief Justice Taylor, whose opinion was joined by Justices Corrigan and Young, explained, "Under this [lost opportunity] theory, a plaintiff would have a cause of action independent of that for the physical injury and could recover for the malpractice that caused the plaintiff to go from a class of patients having a 'good chance' to one having a 'bad chance.'" Although the Justices disagreed regarding whether the lost opportunity theory applied in *Stone* and whether MCL 600.2912a was enforceable, the jury's verdict was affirmed because it was clear from the instructions it was given that it found the traditional malpractice elements were met—the defendants' negligence more probably than not caused the plaintiff's injuries. *Stone*, 482 Mich at 162-163.

In *Velez v Tuma*, 283 Mich App 396; 770 NW2d 89 (2009), where the plaintiff alleged that the defendant failed to timely and properly diagnose and treat an acute vascular insufficiency condition, this Court noted, "because a majority of the *Stone* Court held that the *Stone* case was not a lost-opportunity case, the correctness of *Fulton* could not be reached and it remains undisturbed." *Velez*, 283 Mich App at 402. Like *Stone*, this Court concluded that the plaintiff

⁵ We note that on June 10, 2010, this Court denied Dr. Buetow and Dr. Chung's motion to dismiss plaintiff's appeal on the basis of jurisdiction and the failure to provide transcripts required by MCR 7.204(C)(2).

⁶ In *Fulton v William Beaumont Hosp*, 253 Mich App 70, 83; 655 NW2d 569 (2002), this Court stated that "MCL 600.2912a(2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds fifty percent."

presented a traditional malpractice claim—the defendant’s negligence more probably than not caused the amputation. Contrary to the defendant’s argument on appeal that the plaintiff failed to establish a loss of opportunity of greater than 50 percentage points to establish causation, this Court also concluded that the plaintiff did not make a specific claim for the loss of an opportunity to attain a better result and therefore the plaintiff was not required to prove a loss of opportunity greater than 50 percent. *Id.* at 403.

A review of the lower court record, particularly the complaint, demonstrates that like the plaintiffs in *Stone* and *Velez*, plaintiff pleaded only a traditional claim of medical malpractice and plaintiff did not plead a lost opportunity to survive. Plaintiff alleged that the negligence of defendants and defendants-appellees was the direct and proximate cause of decedent’s death. This claim for damages for an unfavorable result is distinguishable from claims, like that in *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), for damages for the loss of an opportunity. To the extent that the Washtenaw Circuit Court relied on the lost opportunity theory in granting defendants-appellees’ motions for summary disposition, we conclude that the trial court erred.

Plaintiff argues that summary disposition was inappropriate because a question of fact exists regarding causation in his traditional claim of medical malpractice (i.e., but for defendants-appellees’ actions, decedent’s death would not have occurred). The record before the Washtenaw Circuit Court at the time of the dismissals demonstrates that decedent had a 30 percent chance of survival after Dr. Strauther injured her hepatic duct during the March 16, 2002, cholecystectomy. Plaintiff cites evidence from Dr. Michael J. Foley, a radiologist, who explained:

And I think any time that you look at a case, you are looking at it in terms of had the clip been identified and the abnormality been confirmed, it would have led to an earlier diagnosis and an earlier action that more likely than not would have allowed the patient to have a better outcome.

However, when asked to opine whether decedent’s outcome in this particular case would have changed, Dr. Foley replied:

Right. I’m not even attempting to go there. So, I mean, if you’re asking the question to define that I’m not going to go there, I agree, I’m not going to go there. Because I’m not -- as you pointed out, I have not reviewed the University of Michigan records. I’m not a -- I’m not trying to foresee the future of how it would have played out any other way.

Dr. Foley then stated that his testimony was limited to the standard of care of a radiologist and that he could not testify regarding whether decedent would have died if the radiologist had made the interpretation that was required by the standard of care. Moreover, based on the medical records Dr. Milewski had reviewed at the time of his deposition, he was not critical of the care and treatment U of M defendants provided to decedent. Thus, in light of Dr. Milewski’s testimony that decedent only had a 30 percent chance of survival after the March 16, 2002 injury to her hepatic duct and the absence of expert testimony that more likely than not, but for actions

by defendants-appellees in decedent's care subsequent to that injury, decedent would not have died, we conclude that summary disposition was appropriate.⁷

Next, plaintiff argues that the trial court erred by denying his motion for relief from judgment under MCR 2.612(C)(1)(f). We review a trial court's decision on a motion under MCR 2.612 for abuse of discretion. *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007).

MCR 2.612(C) provides, in relevant part:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

(2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

Three requirements must be satisfied for relief to be granted under MCR 2.612(C)(1)(f):

(1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to

⁷ This Court will not disturb a ruling of the trial court if that court reached the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

achieve justice. [*Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999) (citations omitted).]

We conclude that it was not an abuse of discretion to deny plaintiff's claim for relief to the extent that it was based on newly discovered evidence because such a claim fell under subsection b and it was not filed within one year of the dismissals according to MCR 2.612(c)(2). We also conclude that it was not an abuse of discretion to deny plaintiff's claim for relief to the extent that it was based on *Stone*. "Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered." Here, no such misconduct has occurred. Moreover, it was not outside the range of principled outcomes for the trial court to determine that, because plaintiff had not yet exhausted appellate review of the orders granting summary disposition in light of *Stone*, extraordinary circumstances did not exist to mandate setting aside the judgment to achieve justice.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder