

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN MAGNOTTA,

Plaintiff-Appellant,

v

BON SECOURS HOSPITAL,

Defendant-Appellee,

and

HENRY FORD HEALTH SYSTEM,

Defendant.

UNPUBLISHED

December 17, 2002

No. 234580

Wayne Circuit Court

LC No. 99-939670-NH

Before: O’Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court’s order granting summary disposition to defendant Bon Secours Hospital pursuant to MCR 2.116(C)(10) in this medical malpractice action. We affirm.

Plaintiff first argues that the lower court erred in granting summary disposition on the basis that plaintiff produced no evidence that she had a greater than fifty-percent opportunity to achieve a better result. We disagree.

A motion for summary disposition pursuant to MCR 2.116(C)(10), which tests the factual support for a claim, is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999); *Oade v Jackson National Life Ins Co of Michigan*, 465 Mich 244, 251; 632 NW2d 126 (2001). When deciding a motion for summary disposition under MCR 2.116(C)(10), the court considers affidavits, pleadings, depositions, admissions, and all other documentary evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Maiden v Rozweed*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

judgment as a matter of law. MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

To prove medical malpractice, a plaintiff is required to show that the defendant's negligence proximately caused the plaintiff's injuries. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997); *Dykes v Beaumont Hospital*, 246 Mich App 471, 476-477; 633 NW2d 440 (2001). A plaintiff's burden of proof in a medical malpractice case is governed by MCL 600.2912a(2), which provides:

Proximate cause of defendant's negligence; recovery barred where opportunity to survive, or for better result, was less than 50%. 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%.

See *Dykes, supra* at 477; *Wickens v Oakwood Healthcare System*, 242 Mich App 385, 392; 619 NW2d 7 (2000), rev'd in part 465 Mich 53 (2001).

Plaintiff essentially asserts a loss of opportunity to achieve a better result. According to plaintiff, had the proper antibiotics been administered, she might have had a greater than fifty-percent chance to save her prosthetic knee. To survive summary disposition, however, plaintiff had the burden of producing evidence to support this claim. Plaintiff failed to meet that burden.

Plaintiff argues that the deposition testimony of her treating orthopedic surgeon established that she had a greater than fifty-percent chance at a better result had the appropriate antibiotics been administered. Plaintiff's reliance on this testimony is misplaced. Although plaintiff's surgeon testified that he hoped plaintiff's prosthetic knee would remain intact without complications, he further testified that once infection occurred and could not be successfully debrided, the chances of salvaging the knee were not very good. At best, the deposition testimony was inconclusive. However, in an affidavit, the surgeon opined that more likely than not any type of antibiotic therapy would have failed and the result would have been the same. Thus, plaintiff did not counter defendant's motion with evidence to support the existence of a question of fact regarding whether she had a greater than fifty percent chance of a better result.

Moreover, plaintiff's own expert witness declined to testify that plaintiff's knee would have been saved with the appropriate antibiotics. Plaintiff's expert testified that the likelihood of successfully treating plaintiff's infection without removal of the knee was only about twenty percent.¹ Plaintiff presented no evidence that had the proper antibiotics been administered she

¹ Plaintiff argues the deposition testimony of this expert should not have been used because the deposition was taken for discovery purposes only. Rule 2.116(C)(10) does not require a deposition be admitted into evidence. The objective of discovery is to make available, before trial, all relevant facts that might be admitted into evidence. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). Materials obtained through discovery are properly considered on motions that test the legal sufficiency of a plaintiff's claim. See, e.g., (continued...)

would have had a greater than fifty-percent opportunity to achieve a better result. Rather, the evidence was consistent: once the need for antibiotics arose, the chance of saving plaintiff's knee was unlikely. Therefore, even viewing the evidence in the light most favorable to plaintiff, she failed to demonstrate a genuine issue of material fact regarding the opportunity to achieve a better result. *Dykes, supra* at 479.

Plaintiff also challenges the constitutionality of MCL 600.2912a(2). The party challenging the constitutionality of a statute has the burden of proving the law's invalidity. *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). Plaintiff failed to sufficiently brief this issue. Beyond plaintiff's proposition that this statute violates equal protection and due process, plaintiff does not support her position with appropriate argument or case law. Plaintiff cannot merely state a proposition and leave it to this Court to find support and rationalize a basis for her claim, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may she give an issue cursory treatment with little or no citation to supporting authority, *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Because plaintiff failed to sufficiently brief this issue, we deem it abandoned and decline to address it.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie

(...continued)

Dykes, supra at 475.