

STATE OF MICHIGAN
COURT OF APPEALS

JAYNE A. HALL, Personal Representative of the
ESTATE OF KEITH HALL,

Plaintiff-Appellee,

v

MERCY MEMORIAL HOSPITAL
CORPORATION and DR. JEFFREY W.
COUTURIER,

Defendants,

and

DR. SUDJONO KOSIM,

Defendant-Appellant.

UNPUBLISHED
November 20, 2008

No. 276814
Monroe Circuit Court
LC No. 05-020901-NH

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

This action for medical malpractice is once again before this Court as on leave granted following remand by the Michigan Supreme Court. *Hall v Mercy Mem Hosp Corp*, 480 Mich 1184; 747 NW2d 227 (2008). We affirm.

I. Factual History

The decedent, Keith Hall, was involved in a motor vehicle accident on May 24, 2001. Although the decedent struck his head during the collision he did not immediately seek medical treatment. It was not until late the following day, at approximately 11:30 p.m., after experiencing headaches and dizziness that the decedent went to co-defendant Mercy Memorial Hospital's emergency room and was evaluated by co-defendant, Jeffrey Couturier, D.O., a board certified emergency room physician.

Dr. Couturier ordered a CT scan of the head while the decedent was in the emergency room, as part of his examination, to rule out the existence of a skull fracture or an intracranial bleed. While decedent remained at the emergency room, the film of the CT scan was forwarded to a radiologist, Dr. John Stanley, for interpretation off-site. Dr. Stanley reviewed the film and

faxed his report to the emergency room at approximately 2:30 a.m. on May 26, 2001. Dr. Stanley's report interpreted the CT scan as follows: "Area of hypodensity right frontal [lobe]. Suspicious for infarct. No bleed seen." Dr. Couturier testified at deposition and documented on the decedent's discharge papers that he reviewed Dr. Stanley's findings with the decedent and "advised him that he should follow up with his physician for further evaluation." Specifically, Dr. Couturier recalled mentioning to the decedent that the results of the CT scan indicated the "possibility" of a "stroke," but that he was unable to ascertain definitively the nature of the hypodensity. As a result, the decedent was discharged with a diagnosis of "acute scalp contusion with mild concussion."

Late in the workday on May 26, 2001, defendant, Dr. Sudjono Kosim, reviewed and interpreted the decedent's CT scan in order to prepare and issue a final radiology report. Dr. Kosim initially dictated his findings, which were then forwarded to a Hospital transcriptionist for typing.¹ Dr. Kosim's report indicated the following diagnostically, in relevant part:

There is a moderate area of decreased attenuation in the right frontal region involving the deep white matter which could represent ischemic infarction, focal cerebral edema or neoplasm. Neoplasm cannot be ruled out without intravenous contrast enhancement. There is no intracranial hemorrhage.

As a result of these findings, Dr. Kosim recommended, "contrast enhanced CT scan or MRI examination is suggested to rule out neoplasm." At deposition, Dr. Kosim asserted he requested a copy of his preliminary report be faxed to the emergency room and the decedent's identified primary care physician, Dr. Danilo A. Dona, and the final report indicates, "PRELIMINARY REPORT FAXED." Subsequently, Dr. Kosim reviewed the transcribed copy of the report and electronically provided his signature approving the report on May 29, 2001. Once Dr. Kosim's signature was obtained, the report is designated a "final" report and is sent through the Hospital's internal mail system to the emergency room and to the decedent's identified primary care or family physician. According to Hospital records, this final report was received in the emergency department on May 31, 2001. Dr. Dona did not recall receiving a copy of the report but also averred that at the time these events transpired, that the decedent was not his patient.²

Unfortunately, the decedent did not follow Dr. Couturier's advice and did not secure any follow-up care after his discharge from the emergency room for the anomaly noted in the CT scan. It was not until December 21, 2004, after decedent suffered a suspected seizure that additional medical evaluation was sought. When the decedent presented at the emergency room in 2004, medical tests showed:

¹ This initial dictation is viewed as a preliminary report and does not become a final report until the typed version is reviewed and signed by the dictating physician.

² Dr. Dona reported that, although the decedent's wife was his patient during this time period, he did not have any record of treating the decedent until August 24, 2002, for medical issues unrelated to the motor vehicle accident or the CT scan results.

An area of low attenuation near the right vertex region with minimal shift of the midline. On the MRI scanning, a large lesion about 5 cm is seen in multiple views somewhat pushing the midline towards the left, mostly pericallosal and possibly occupying most of the cingulated gyrus.

At this time, the 2001 film was discovered in the decedent's hospital records and it was opined that a "similar yet smaller lesion, compared to the present CT brain, without any mass effect at that time." Ultimately, the decedent was diagnosed with a Grade II oligoastrocytoma. Unfortunately, despite treatment and surgery for the tumor, the decedent succumbed to the disease and died on July 29, 2006.

II. Procedural History

Plaintiff filed her complaint on December 13, 2005, alleging Dr. Kosim:

[B]reached the applicable standard of care by failing to timely read and release the final CT report and by failing to notify by phone or in person Dr. Couturier or Dr. Dano [sic] or the Plaintiff of the abnormal findings on the final CT scan reading and of the recommendation for a contrast enhanced CT or MRI to rule out "neoplasm."

The complaint was accompanied by the affidavit of merit of Clifford Beinart, MD. In the affidavit of merit, Dr. Beinart identified the applicable standard of care as including, but not limited to:

- a. Timely read the CT scan films;
- b. Accurately interpret the CT scan films;
- c. Promptly communicate the findings of the CT scan film to the emergency room physician who ordered the CT scan and to Dr. Dona, the Plaintiff's primary care doctor.

Dr. Beinart asserted Dr. Kosim breached the applicable standards of care "by failing to promptly release the final CT scan report even though he had timely read that report and accurately interpreted it" and by "failing to promptly communicate the findings to the emergency room physician and to the family doctor." Dr. Beinart opined that Dr. Kosim would have complied with the applicable standard of care if he had not "wait[ed] two days to release the CT scan report" or if he had "either promptly sent the CT scan report or personally communicated his findings to the emergency room physician and/or to the referring family doctor."

However, when subsequently deposed, Dr. Beinart opined that Dr. Kosim had complied with the applicable standard of care as outlined in the affidavit of merit. Rather, after signing the affidavit, Dr. Beinart indicated his opinion had changed and that he now believed that Dr. Kosim was obligated to also verbally communicate his findings directly to Dr. Couturier. The altered criteria was attributed by Dr. Beinart to "newly discovered" evidence pertaining to a discrepancy that existed between Dr. Stanley's preliminary report and Dr. Kosim's final report regarding the suspected neoplasm and the recommendation for further evaluation. However, both of these

reports were available to Dr. Beinart before completion of the affidavit of merit as part of his review of “all medical records of Keith Hall supplied to me by the Plaintiff’s attorney.”

Based on the deposition testimony of Dr. Beinart that Dr. Kosim met the applicable standard of care, as detailed in the affidavit of merit, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court denied the motion finding questions of fact existed regarding whether Dr. Kosim had promptly communicated his findings to either the emergency room or Dr. Dona. The trial court noted discrepancies in testimony and the absence of any documentary evidence to verify that Dr. Kosim provided a faxed copy of his preliminary report to either the emergency room or Dr. Dona before the release of his final report on May 29, 2001. The trial court found that a release date of May 29, 2001, for the final report “does not appear to meet the standard of prompt communication. At least there’s a question of fact here.” The trial court further determined the affidavit of merit “sufficiently” provided defendant with notice of plaintiff’s claims. The trial court discounted testimony by Dr. Couturier that, even if he had received a personal communication from Dr. Kosim after the decedent had been discharged regarding his diagnostic findings, Dr. Couturier would not have responded differently or have attempted to personally contact the decedent because he had already instructed him to seek follow up consultation with his own physician. The trial court determined that Dr. Couturier’s reaction was “speculative” and “does not have any bearing on Kosim’s duty of care” or the sufficiency of the affidavit of merit. The trial court also noted that Dr. Dona testified that he never received a preliminary report and, therefore, did not contact the decedent, as would have been his practice even for someone who was not his patient, had he received such a document.

Defendant filed an application for leave to appeal to this Court on March 16, 2007. In lieu of granting leave to appeal, a panel of this Court vacated the trial court’s order denying summary disposition and remanded “for further proceedings pursuant to *Kirkaldy* [*v Rim*, 478 Mich 581; 734 NW2d 201 (2007).] *Estate of Keith Hall v Mercy Mem Hosp Corp*, unpublished order of the Court of Appeals, entered October 25, 2007 (Docket No. 276814). Following the denial of his motion for reconsideration, defendant sought leave to appeal to the Michigan Supreme Court on January 25, 2008. In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the Court of Appeals and remanded the matter to this Court “for consideration as on leave granted.”

III. Standard of Review

This Court reviews a trial court’s decision on a summary disposition motion de novo. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). In addition, this Court also reviews de novo questions of law regarding the sufficiency of an affidavit of merit. *Vanslebrouck v Halperin*, 277 Mich App 558, 560-561; 747 NW2d 311 (2008), lv granted 481 Mich 918 (2008).

IV. Arguments on Appeal

Defendant first contends the trial court erred in denying his motion for summary disposition because the theory regarding Dr. Kosim’s alleged breach of the applicable standard of care was not supported by Dr. Beinart’s affidavit of merit.

To initiate an action for medical malpractice, a plaintiff must file a complaint and an affidavit of merit. *Young v Sellers*, 254 Mich App 447, 451; 657 NW2d 555 (2002). In accordance with MCL 600.2912d, an affidavit of merit is required to contain the following:

(1) [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

(a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

The legislative purpose underlying the statute has been interpreted as providing "a gate-keeping role of ensuring against frivolous medical malpractice claims." *King v Reed*, 278 Mich App 504, 516; 751 NW2d 525 (2007).

In the circumstances presented, there is no dispute that plaintiff's affidavit of merit is not deficient on its face as it is sworn to by a properly qualified physician and contains statements which meet the requirements of MCL 600.2912d(1). Rather, defendant challenges whether the affidavit of merit supports plaintiff's claim of negligence against Dr. Kosim for his alleged failure to verbally communicate his interpretation and concerns following review of the CT scan directly to Dr. Couturier.

During his deposition, plaintiff's expert, Dr. Beinart, clearly acknowledged that Dr. Kosim promptly and correctly interpreted the CT scan. In the affidavit of merit, Dr. Beinart opined that Dr. Kosim would have successfully complied with the applicable standard of care if he had "either promptly sent the CT scan report or personally communicated his findings to the emergency room physician and/or to the referring family doctor." Ultimately, Dr. Beinart indicated that, following discovery, it appeared that Dr. Kosim had met the criteria within the affidavit of merit. However, Dr. Beinart subsequently revised his opinion regarding the standard of care, contending that Dr. Kosim was also required to verbally communicate his findings to the emergency room physician because his findings were more extensive and recommended further testing or evaluation, resulting in discrepancies from the initial report issued by Dr. Stanley. Defendant's challenge centers on his assertion that the alleged breach of the standard of care, as

delineated in the affidavit of merit, is not substantiated or supported by Dr. Beinart's deposition testimony. Consequently, defendant argues that it is improper to permit the matter to proceed to trial, as plaintiff's claim cannot be saved by the interjection of a new theory of negligence, which is not contained within or is contrary to the affidavit of merit.

A similar issue arose in *Dykes v William Beaumont Hosp*, 246 Mich App 471; 633 NW2d 440 (2001), a medical malpractice action in which the plaintiff's expert gave deposition testimony, which was contradictory to statements approved by the expert within the affidavit of merit pertaining to that decedent's potential for survival had a proper diagnosis and treatment timely occurred. In that case, the defendant sought summary disposition, asserting that the plaintiff had failed to demonstrate the existence of a genuine issue of material fact pertaining to causation. In upholding the trial court's grant of summary disposition in favor of the defendant, this Court noted, "the deposition testimony of plaintiff's sole expert witness failed to establish the requisite causal link between defendant's conduct and [the decedent's] life expectancy or death." *Id.* at 478. Relying on the principles previously elucidated in *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244; 477 NW2d 133 (1991) and *Gamet v Jenks*, 38 Mich App 719; 197 NW2d 160 (1972), this Court approvingly cited:

As a result of his own deposition testimony, plaintiff's ability to present a case was challenged. His affidavit merely restated his pleadings. Deposition testimony damaging to a party's case will not always result in summary judgment. However, when a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence.

* * *

If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact. [*Dykes, supra* at 480-481, citing *Barlow, supra* at 250 (internal citations and quotation marks omitted).]

The *Dykes* Court adopted this reasoning and found "no meaningful distinction" exists for cases involving affidavits of merit that are subsequently contradicted by deposition testimony. Specifically, the Court held:

Indeed, in medical malpractice cases, a plaintiff is required to file an affidavit of meritorious claim by a health professional at the commencement of the action. MCL 600.2912d. In such cases, summary disposition would rarely, if ever, be warranted even if effective cross-examination of that person at deposition negates an element of the plaintiff's prima facie case. [*Dykes, supra* at 481-482.]

Defendant mistakenly challenges the trial court's ruling as permitting a modification or amendment of the affidavit of merit to allow the assertion of a "new" theory of negligence based on the failure of Dr. Kosim to verbally communicate with the emergency room physician. However, a review of the trial court's ruling indicates that the existence of a factual issue is not

based on Dr. Kosim's failure to communicate verbally with Dr. Couturier. Rather, the trial court denied summary disposition based on Dr. Kosim's inability to demonstrate that he promptly communicated with the emergency room physician based on the absence of proof that Dr. Kosim's preliminary report was actually sent by facsimile as requested. Specifically, the trial court found, in relevant part:

Now the affidavit of merit indicates that the Defendant was required to *promptly* communicate the findings.

Now in general terms prompt communication would seem to me to involve verbal or any other form of communication

While the Defendant claims he requested a preliminary final report to be sent to the emergency room, the Plaintiff correctly points out that this document has never been produced.

There was also some testimony that indicated that it possibly may have been destroyed.

Even if a fax would meet the standard of prompt communication it does not appear that such communication can be said to have occurred, at least . . . there's certainly a . . . question of fact on that point. [Emphasis added.]

Because the trial court determined the existence of a genuine issue of fact based on the contradictory evidence, we find the trial court did not err in denying summary disposition.

With regard to defendant's additional argument that plaintiff should not be permitted to interject a "new theory" of negligence, which required verbal communication, we concur, but not for the reasons asserted by defendant. The affidavit of merit asserted the necessity only for the prompt communication of Dr. Kosim's findings and not their specific verbal communication. Consequently, while prompt communication could have included verbal discourse or notification, it is not limited solely to that method. Hence, if Dr. Kosim is able to demonstrate that he timely forwarded his report to the appropriate individual, he has met the asserted standard of care. Additionally, Dr. Beinart's assertion that the alteration of his opinion regarding the necessity of verbal communication based on evidence secured through discovery is disingenuous. As noted in *Reed, supra* at 519-520:

An affidavit of merit is presumed valid until rebutted. . . . [A]ssuming that the affidavit of merit would be valid if the amended theories of liability were reasonably revealed only during discovery, defendant . . . would have the burden of proving that plaintiff could have known of the amended theories before discovery.

Dr. Beinart purportedly determined that the standard of care should be revised based on discrepancies existing between Dr. Stanley's preliminary report and Dr. Kosim's final report. However, contrary to his testimony, such a discrepancy was evident at the time of the completion of the affidavit of merit. As required by MCL 600.2912d(1) Dr. Beinart, in signing the affidavit of merit, averred that he "reviewed the notice and all medical records supplied to him or her by

the plaintiff's attorney concerning the allegations contained in the notice." These two reports were available well before discovery was undertaken or the complaint filed. Hence, plaintiff was certainly aware of this potential claim substantially before Dr. Beinart or any other witnesses were deposed in this matter, precluding the amendment or alteration of the affidavit of merit based on newly discovered evidence.

For his final issue, defendant contends the trial court erred in denying summary disposition based on plaintiff's failure to demonstrate a causal link between the alleged malpractice and the injury sustained. However, this causation argument was not raised in the trial court as a separate issue. Defendant did indicate in his motion for summary disposition that Dr. Couturier testified that he would not have attempted to contact the decedent even if he had received Dr. Kosim's preliminary or final report, because (a) he had already instructed the decedent to contact his primary or family care physician for follow-up and (b) although the diagnosis was serious it did not constitute an "acute" or "immediate life threatening" situation. However, defendant made reference to this evidence only in the context of his argument that Dr. Beinart's testimony was irrelevant and should be stricken. Defendant did not assert a causation argument in support of his motion for summary disposition. As such, this argument is not properly preserved for appellate review. "Issues raised for the first time on appeal are not properly preserved and, thus '[n]ot subject to review' save for 'exceptional circumstances.' On the record here before us we do not discern any 'extraordinary circumstances' requiring us to abandon this cardinal rule." *Lantz v Southfield City Clerk*, 245 Mich App 621, 627 n 4; 628 NW2d 583 (2001).

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot