

STATE OF MICHIGAN
COURT OF APPEALS

EBONY WHITE, Conservator for MA’KIERAN
MOSS, Minor,

UNPUBLISHED
September 25, 2014

Plaintiff-Appellee,

v

No. 304221
Wayne Circuit Court
LC No. 08-106604-NH

HUTZEL WOMEN’S HOSPITAL a/k/a
HARPER-HUTZEL HOSPITAL,

Defendant-Appellant,

and

SUSAN BERMAN, MD, NICOLE MAHONEY,
MD, and SHUKRI ABDULLAH, MD

Defendants.

Before: MARKEY, P.J., and FITZGERALD and OWENS, JJ.

OWENS, J (*dissenting*).

I respectfully dissent from the majority opinion and would reverse the trial court’s order denying defendant’s motion for a judgment notwithstanding the verdict (JNOV), and remand for entry of judgment in favor of defendant.

I agree with defendant’s argument that plaintiff failed to present evidence from which the jury could reasonably conclude that a breach of the applicable standard of care by defendant proximately caused Ma’Kieran’s cerebral palsy. The majority opinion correctly identifies the applicable standard of review, as well as the four elements needed to establish a medical malpractice claim, which includes proximate cause. To establish proximate cause, plaintiff must prove two elements: “(1) cause in fact, and (2) legal cause, also known as proximate cause” *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994) (quotations and citation omitted). “The cause in fact element generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.” *Id.* at 163. The legal cause element “normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.” *Id.* “[A] court must find that the defendant’s negligence was a cause in fact of the plaintiff’s injuries before it can hold that the

defendant's negligence was the proximate or legal cause of those injuries." *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004). Our Supreme Court has stated:

It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. A valid theory of causation, therefore, must be based on facts in evidence. And while the evidence need not negate all other possible causes, this Court has consistently required that the evidence exclude other reasonable hypotheses with a fair amount of certainty. [*Id.* at 87-88 (emphasis in original) (quotations and citations omitted).]

"Where the connection between the defendant's negligent conduct and the plaintiff's injuries is entirely speculative, the plaintiff cannot establish a prima facie case of negligence." *Id.* at 93.

In this case, the causal connection between Ma'Kieran's cerebral palsy and the events described by plaintiff's experts are speculative at best. Dr. Ronald Zack testified that Dr. Susan Berman breached the standard of care by failing to order a caesarian section at 2:00 p.m., or at least seek reassurance due to non-reassuring heart tones evidenced on the fetal heart monitor. However, Dr. Michael Berke testified Dr. Berman breached the standard of care by failing to deliver the baby by 2:30 p.m. Thus, the standard of care experts' testimony did not correlate, as they could not agree on when the breach occurred.

In addition, Zack testified that there was a period of decreased beat-to-beat variability, which could be a potential for hypoxia. Zack also testified that the pattern on the monitoring strips was "in between," so a doctor should have got reassurance because you cannot point to an area and say that the patient is having hypoxia. Zack's opinion was based solely on the fetal monitoring strips, which he used to determine that Berman breached the standard of care in failing to seek reassurance. However, Zack's testimony was contradictory in that he also testified that normal fetal monitoring strips do not necessarily rule out brain problems, because some babies with genetic defects in the brain go through labor with a normal strip. Even though he was called as the standard of care expert, Zack admitted that he could not identify what caused the hypoxia. He stated that there are numerous things that can cause hypoxia. Likewise, Berke testified that the standard of care required the doctor to gain reassurance or perform a caesarian section because there was a nonreassuring pattern on the strips. However, Berke testified that he could not point to a place on the monitoring strip and say, "this is where the brain damage occurred." Thus, Zack and Berke both admitted that the evidence each used to determine that Berman breached the standard of care did not necessarily indicate that injury is likely to occur.

Further, plaintiff's sole causation expert, Dr. Ronald Gabriel, testified that Ma'Kieran's injuries occurred within the last hour of delivery, sometime after 3:59 p.m. The lack of oxygen and blood flow (or hypoxia) caused Ma'Kieran to experience asphyxia at birth, which led to the injuries. However, Gabriel testified that based on the beat-to-beat variability and late or variable decelerations, which is what Zack and Berke relied on to determine that Berman breached the

standard of care, hypoxia can be predicted, but “[w]hether or not it causes brain damage is another matter.” Thus, based on the experts’ testimony, there is no causal connection between non-reassuring heart tones on the fetal heart monitor and Ma’Kieran’s resulting cerebral palsy. Because the evidence when viewed in a light most favorable to plaintiff, fails to establish her claim as a matter of law, see *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000), the trial court should have granted defendant’s motion for a JNOV, and therefore, I would reverse.

/s/ Donald S. Owens