

STATE OF MICHIGAN
COURT OF APPEALS

TRUDY MILLER,

Plaintiff-Appellee,

v

SEILESH CHODAVARAPU BABU, M.D.,
MICHIGAN EAR INSTITUTE, PLLC, and
MICHIGAN HEARING CENTER, P.C.,

Defendants-Appellants,

and

PROVIDENCE HOSPITAL, PROVIDENCE
HOSPITALS AND MEDICAL CENTERS, INC.,
and ST. JOHN HEALTH,

Defendants.

UNPUBLISHED
November 17, 2015

No. 322947
Oakland Circuit Court
LC No. 2012-128140-NH

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendants appeal by right an order of the trial court entering judgment in favor of plaintiff after denying defendants' motions for judgment notwithstanding the verdict (JNOV) or a New Trial. This case stems from a surgical procedure on plaintiff's left ear, during which plaintiff experienced a leak of cerebrospinal fluid (CF) into her ear that resulted in a total loss of hearing in the ear. We reverse and remand for entry of judgment in defendants favor.

I. BACKGROUND

Plaintiff filed her complaint on July 13 2012, alleging medical malpractice directly against Dr. Seilesh Chodavarapu Babu and vicariously against the remaining defendants. Defendants filed their answer on October 4, 2012.

A jury trial began on February 10, 2014. At the close of plaintiff's proofs the defense moved for a directed verdict focusing their argument on a lack of proof on causation which was denied. The jury trial ended on February 20, 2014. The jury found that Dr. Babu was

professionally negligent and that his professional negligence was a proximate cause of plaintiff's injury. A judgment was awarded in plaintiff's favor in the amount of \$118,000.

On May 19, 2014, defendants moved for a JNOV on the ground that the evidence did not provide a basis for finding proximate cause. Alternatively, defendants requested a new trial on the following grounds: (1) the verdict was against the great weight of the evidence; (2) the court's refusal to give defendant's special jury instruction allowed the jury to find liability on a theory not pleaded; and (3) the jury's failure to allocate future damages on a year-by-year basis prevented the court from reducing future damages to present value, as required by statute. That motion was, also denied.

II. ANALYSIS

Defendants contend that the trial court erred in denying its motions for a directed verdict and JNOV/new trial. Defendants assert that the trial court should have granted either motion because plaintiff failed to prove that any alleged negligence on the part of Dr. Babu was the proximate cause of plaintiff's injury. We conclude that the trial court erred in denying defendants' motion for a directed verdict. Given this conclusion, we need not reach defendants' other arguments.

A. STANDARD OF REVIEW

The Court reviews a trial court's decision on a motion for a directed verdict de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). We consider only the evidence presented up to the time of the motion to determine whether a question of fact existed. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008).

B. DIRECTED VERDICT

"A party may move for a directed verdict at the close of the evidence offered by an opponent." MCR 2.516. The evidence is reviewed in the light most favorable to the nonmoving party, granting the nonmoving party every reasonable inference and resolving any conflict in the evidence in the nonmoving party's favor. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995). On appeal, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008) quoting *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Siberstein*, 278 Mich App at 455 quoting *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). Although directed verdicts are disfavored, particularly in negligence cases, *Berryman v K Mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992), if no factual question exists, the trial court may grant a directed verdict, *Chouman v Home-Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011).

It is therefore necessary to examine the elements of the plaintiff's case and the proofs presented to the trier of fact in the plaintiff's case in chief. In order to prevail in her medical malpractice claim, plaintiff had to establish: "(1) the standard of care, (2) breach of that standard of care by defendant[s], (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 688 NW2d 402 (2003). MCL 600.2912a codifies these common-law elements and requires plaintiff to prove that, "in light of the state of the art existing at the time of the alleged medical malpractice[.]" Dr. Babu did not provide "the recognized standard of practice or care within [his] specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury." MCL 600.2912a(1)(b).

"Proximate cause" includes both cause in fact and legal cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).

The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. . . . [*Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) (internal citations omitted).]

Craig, 471 Mich at 87-88, clarifies what it means to "adequately establish cause in fact":

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 set[s] 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 [t]he 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. [Internal quotation marks and citations omitted.]

Defendants contend that, "[a]t best, Dr. Rubenstein's testimony provides only a mere possibility that the results of additional testing would have required a different course of treatment." They analogize this case to *Dykes v William Beaumont Hosp*, 246 Mich App 471; 633 NW2d 440 (2001). In *Dykes* the court found that the plaintiff's expert on breach of the standard of care and causation failed to provide proof that the asserted breach "would have made any difference in the outcome or prolonged James's life." *Id.* at 479.

Plaintiff argues that the instant case is distinguishable from *Dykes*, explaining the difference as follows:

The Court of Appeals observed that the evidence associating the malpractice by Beaumont Hospital and the death of Dykes was wanting because the testimony of expert, Michael E. Trigg, MD, was contrary to his earlier affidavit. . . . There is no such conflict in the affidavit and the testimony of Dr. Rubenstein. Unlike *Dykes*, this case is not about disregarding the testimony of the expert about the nexus between negligence and injury.

To the extent that plaintiff understands the Court to have affirmed the grant of summary disposition to the defendants in *Dykes* because Dr. Trigg's deposition testimony contradicted his affidavit, plaintiff misconstrues the Court's opinion. The Court's reasoning revolved not around any contradiction between Dr. Trigg's deposition testimony and his affidavit, but around the nature of that contradiction. The Court affirmed the grant of summary disposition because Dr. Trigg could not assert with a reasonable degree of medical certainty that the hospital's failure to provide a bronchoscopy or an open lung biopsy reduced the decedent's chance of survival. *Id.* Contrary to plaintiff's assertion, *Dykes* was not about "disregarding the testimony of the expert about the nexus between negligence and injury." *Dykes* was about the fact that Dr. Trigg's expert's testimony was too speculative to establish that nexus.

Such is the case here. Dr. Rubenstein, plaintiff's sole causation expert, in answering questions on what the additional testing he opined should have been done would have revealed said he "suspected" it would have revealed a mobile stapes. When questioned further he acknowledged that he could not say with reasonable medical certainty that this would have been the case. He therefore failed to present proofs that more likely than not doing the testing would have improved the plaintiff's unfortunate outcome. Michigan's caselaw "requires more than a mere possibility or a plausible explanation." *Craig*, 471 Mich at 87. Accordingly, because Dr. Rubenstein's testimony was insufficient to establish but-for causation, the court abused its discretion in denying the motion for directed verdict.

We reverse the trial court's judgment against defendants and remand for entry of a directed verdict for defendants. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray