STATE OF MICHIGAN

COURT OF APPEALS

JOHN BIUNDO, as Personal Representative of the Estate of REITHA M. BIUNDO, deceased, Plaintiff-Appellant, v SURJIT S. MAHAL, MD, Defendant-Appellee.	UNPUBLISHED April 8, 2014 No. 313569 Wayne Circuit Court LC No. 10-011810-NH

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

This medical malpractice wrongful death action arises following the decedent's death by suicide on March 7, 2007. Plaintiff, as personal representative of the estate of the deceased, appeals as of right from the trial court's order granting summary disposition to defendant, who acted as the decedent's treating psychiatrist for a period of time prior to her death. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The decedent was hospitalized on December 9, 2006 after arriving at the Emergency Center of Henry Ford Wyandotte Hospital complaining of depression, anxiety, sleeplessness, erratic appetite, feelings of hopelessness and helplessness, and suicidal thoughts. The decedent had a history of respiratory ailments for which she was taking antibiotics, several steroidal asthma medications, and over the counter antihistamines. Her medical records indicated that in the past after taking a particular steroidal asthma medication, Symbicort, the decedent experienced depression. The decedent was not taking Symbicort at the time of her hospitalization.

The decedent was evaluated by defendant on December 10, 2006. Defendant's diagnostic impression was that the decedent suffered from a "mood disorder, not otherwise specified, with features of bipolar disorder, manic type" and an "anxiety disorder, not otherwise specified, severe." Defendant prescribed the medications Lexapro, Geodon, and Xanax, and indicated that when she was stable she would be discharged to live with her husband.

The decedent was discharged on December 11, 2006. Five days later, the decedent was readmitted to the hospital after an intentional overdose of Xanax. The decedent had left a suicide note. Defendant examined the decedent on December 18, 2006. The decedent reported that she

had been depressed and not sleeping. Defendant noted that "[a]ntidepressants do not seem to be working for her" and that she was a "high suicidal risk." Defendant ordered that the decedent be transferred to the adult psychiatric specialty unit when she was medically stable, and indicated that the decedent was "most likely going to need electroconvulsive therapy [ECT] because antidepressants seem to have failed her or do not work as well and she is a likely candidate to commit suicide."

The decedent was transferred to the adult psychiatric specialty unit on December 21, 2006. The decedent was discharged on December 25, 2006. Defendant noted on the decedent's discharge summary that the decedent currently had "some residual symptoms of depression but, all in all, she had no suicidal or homicidal thoughts, ideations or plans and coherent [sic] and in touch with reality." Defendant further noted that he had discussed ECT with the decedent since she was "not responding to any other treatment." Although the decedent's husband was in favor of ECT, the decedent did not want to receive the treatment. The decedent was discharged with a two-week supply of medications and instructed to follow up in outpatient care; the discharge summary states that "[o]utpatient arrangements were set up for her." The decedent's final diagnosis was "Major depression, recurrent, severe, with massively suicidal attempt in remission. Obsessive-compulsive disorder."

On January 4, 2007, the decedent met with her pulmonologist, Dr. Ghandi. The decedent indicated that she was very depressed and that "[s]he has not been able to take antidepressants, as she did not like it." Ghandi consulted with defendant and prescribed the medications Clonazepam and Remeron.

The decedent saw defendant on January 11, 2007. Defendant's records state in relevant part:

> HISTORY AND BACKGROUND INFORMATION: Reitha has been suffering from depression and anxiety. She has episodic suicidal thoughts. She has been on medication. She has problems with sleeping. She also has feelings of tiredness and motivation level is poor and history of depression goes backs [sic] for a number of years. She has not been in continuous treatment. I met with her husband along with the patient and explained to them what the options were and as treatment I recommended that she stay in psychotherapy however it has been stated that somebody already comes to their house to give her psychotherapy. She has been on medication but it does not work very well for her so she was recommended that she be on Electroconvulsive therapy however there are insurance problems because they have a 50 percent copay on their insurance and Mr. Buindo stated that financially he is not able to afford the 50 percent copay for treatment. I also talk [sic] about the possibility of Vagus nerve stimulation therapy however that again was turned down by the couple because of the expense involved and to [sic] because the insurance company does not pay for the treatment.

Defendant observed that the decedent did not have any "hallucinations, delusions or disorder of the thought process" and did not have any "acute suicidal thought at this time." Defendant recommended that the decedent stay in psychotherapy, stay on her medications, and that she

undergo ECT. Defendant noted that he would see the decedent again in two weeks and gave her a "guarded" prognosis. Defendant stated in his deposition that he gave the decedent a 30 day supply of Remeron; it is unclear whether a 30-day supply of Clonazepam was also given.

Defendant closed the decedent's case on January 19, 2007. The discharge summary prepared by defendant states that "patient or husband do not want to make any further appointments" and that they "may call and schedule appointment" if "there is a change of mind." Defendant stated that the decedent and her husband refused the treatment recommendations of ECT and Vagus nerve stimulation and did not want to make further appointments. Defendant stated that if the decedent was not going to undergo ECT and/or Vagus nerve stimulation, and if defendant was "not going to be doing the psychotherapy, if I cannot treat her the way a patient with her condition needs to be treated, then I don't see how I have any other options" than to close the case.

On March 7, 2007, the decedent committed suicide by firearm. The decedent had purchased the firearm the day before.[1]

Plaintiff filed a medical malpractice wrongful death action in the trial court. Plaintiff alleged that defendant breached his duty of care to the decedent by inappropriately discharging her from the hospital, leading to her first suicide attempt, and further by failing to implement an adequate treatment plan during her second hospitalization and discharging her in a severely depressed state, leading to her second and successful suicide attempt. Plaintiff provided an affidavit of merit from Dr. Gerald A. Shiener, M.D., in support of his complaint.[2] Shiener opined that defendant failed to adequately monitor the decedent's progress and provide adequate treatment to ensure her safety, and that if not for this breach of the duty of care, it was more likely than not that the decedent would not have committed suicide.

Defendant moved the trial court for summary disposition pursuant to MCR 2.116(C)(10), alleging that there was no genuine issue of material fact as to the cause of decedent's suicide, because proximate cause could not be established due to the fifty-five days that passed between the last time that defendant saw the decedent and her death. Plaintiff responded that a question of fact existed as to proximate cause. The trial court heard oral argument on defendant's motion, and received supplemental briefing from the parties. The trial court issued an opinion from the bench on October 24, 2012, granting defendant's motion for summary disposition. The trial court entered an order granting defendant's motion on November 9, 2012.

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[1] The parties dispute whether plaintiff acknowledged driving the decedent to the gun store. The record evidence is inconclusive in that respect.

[2] Plaintiff also proffered the testimony of Dr. Andrew Leuchter, M.D., although Leuchter did not file an Affidavit of Merit in this case. Leuchter testified that defendant inadequately diagnosed the decedent and violated the standard of care by failing to discharge her with medications or an adequate treatment plan on December 25, 2006. He also testified that steroidal medications can cause or exacerbate depression and that the decedent's prior reaction to steroidal medication should have been considered.

In its opinion delivered from the bench, the trial court concluded:

> As in *Teal*,[3] *supra*, plaintiff cannot show the cause of her injury was the premature discharge from the hospital by defendants. As in *Teal* plaintiff has no evidence as to Reitha's mental state, moods, stability, medication, and treatment status. No one knows whether Reitha had medication and, if so, whether she took it as prescribed. Plaintiff has presented no evidence to connect the discharge in December 2006 with the injury in March 2007. Without such evidence plaintiff's claim that defendant's malpractice caused Reitha's death some fifty-six days later is speculation. *Teal*, *supra*, at 393.
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> Plaintiff argues Reitha was a high risk of suicide, if untreated, and, therefore, suicide was foreseeable. Dr. Shiener opined defendant failed to account for the cortical steroids effect on the mood, failed to formulate a treatment plan, and failed to monitor Reitha. See plaintiff's supplemental brief, pages 4 and 5." [sic] All of these opinions about defendant go to his actions predischarge from the hospital on December the 25th, 2006. Nothing addresses the circumstances between January the 11th, and March the 7th, 2007. The failure of plaintiff to provide that causal link between the two and to address circumstances between January the 11th and March the 7th fails to establish the requisite causal link as required by law. In short, plaintiff has failed to establish that Dr. Mahal's actions were the proximate cause of plaintiff's injury. The Motion for Summary Judgment is granted.

This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant, *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Bd of Trustees of Policemen & Firemen Retirement Sys v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable

[3] *Teal v Prasad*, 283 Mich App 384; 772 NW2d 57 (2009), discussed *infra*.

doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

We conclude that the trial court did not err in granting summary disposition to defendant.

"In a medical malpractice case, plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); see also MCL 600.2912a(2). Although the parties dispute whether there was a breach of the applicable standard of care in the instant case, the trial court dismissed plaintiff's case on the grounds that plaintiff failed to establish proximate cause. As we affirm the trial court on that ground, we do not address whether the other elements of a successful medical malpractice claim were proven (as indeed the trial court did not address them). *Id*.

Proximate cause is a term of art that encompasses both the cause-in-fact and legal cause. *Teal v Prasad*, 283 Mich App 384, 391; 772 NW2d 57 (2009). The first element requires a showing that "but for" defendant's negligence, the plaintiff's injury would not have occurred, while the second requires a showing that the consequences of defendant's acts were foreseeable, such that defendant should be legally held responsible for such consequences. *Id*., citing *Skinner v Square D. Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). A court must find that a defendant's negligence was a cause-in-fact of plaintiff's injury before it can find that defendant's negligence was the legal cause of those injuries. *Teal*, 283 Mich App at 391. "[A] plaintiff cannot establish causation if the connection made between the defendant's negligent conduct and the plaintiff's injuries is speculative or merely possible." *Id*. at 392.

Both parties recognize that this Court addressed the issue of proximate cause in the context of a medical malpractice suit involving suicide in *Teal*. The parties dispute whether the instant case is distinguishable from *Teal*, so as to compel a different result. We hold that it is not.

In *Teal*, as in the instant case, the plaintiff was the personal representative of the estate of a decedent (Teal) who had committed suicide, and the defendants included the psychiatrist who had discharged the decedent from the hospital. *Id*. at 386-387. Teal was admitted to a hospital providing psychiatric care after a failed suicide attempt. *Id*. at 386. Teal was discharged four days later with prescriptions for various psychotropic medications and instructions to continue his treatment with follow-up appointments with his therapist or a psychiatrist if necessary. *Id*. at 388. Teal's treating physicians noted that the decedent did not have suicidal ideations or intentions at the time of discharge. *Id*. at 377 and n 1. At an appointment with a social worker eight days later, Teal indicated that "he had on-going thoughts and feelings of suicide but had no desire or intent to act on them." *Id*. at 388. Later that day, the decedent committed suicide. *Id*.

Dr. Shiener, the same expert witness who provided the affidavit of merit in the instant case, testified in *Teal* that the defendants violated the standard of care by inadequately diagnosing and treating Teal, and negligently discharging him from the hospital without an

adequate treatment plan. *Id*. at 389-390. As in the instant case, the trial court granted summary disposition to the defendants pursuant to MCR 2.116(C)(10) on the grounds that the plaintiff had not established proximate cause. *Id*.

This Court affirmed, *id*. at 390, 395, finding that the plaintiff failed to establish that the alleged early discharge of Teal was a "but for" cause of Teal's suicide. *Id*. at 392. This Court noted that "after his discharge, Teal's whereabouts were largely unknown" until his suicide eight days later. *Id*. Additionally,

> [t]he parties presented no conclusive information regarding Teal's mental state during this time, his changing moods over this time, or whether he was taking the medication prescribed for him on his release from the hospital. Plaintiff also presented no evidence indicating how Teal's discharge, whether premature or not, triggered a chain of events leading to Teal's suicide. In the absence of such evidence, plaintiff's claim that defendant's alleged malpractice caused Teal's death eight days later constitutes mere speculation. [*Id*. at 393.]

Exactly the same lack of information regarding the decedent's mental state is present in this case. Plaintiff is correct that the number of days between discharge and suicide is not itself dispositive of the issue of proximate cause; however, the period of time for which the trial court lacked any information on the decedent's mental state was almost seven times as long as in *Teal*. Plaintiff's claim that defendant's conduct "triggered a chain of events" leading to the decedent's suicide is therefore that much more speculative. *Id*. at 393.

Plaintiff argues that *Teal* is distinguishable because Teal's condition was under control upon his discharge, and the decedent's condition in this case was not. However, this Court in *Teal* was very clear that the plaintiff's claim was fatally flawed "*whether [the discharge was] premature or not*," due to the absence of evidence of Teal's mental state after discharge. *Id*. at 393-394 (emphasis added). Further, as in *Teal*, the instant case "is not a situation in which defendants knew that [the decedent] was suicidal and would kill [her]self as soon as [she] had the chance." *Id*. at 394. None of the evidence presented in this case indicates that the decedent was actively suicidal at the time of either hospital discharge or at the time of defendant's last visit with her; to the contrary, the documentary evidence indicates that decedent indicated that she did not have active suicidal ideation or plans at either her second discharge or her last meeting with defendant.

Plaintiff speculates that the decedent's suicide was the result of a natural progression of a disease left untreated by defendant. This Court notes that defendant in fact treated the decedent with antidepressants, offered and was informed that she was undergoing psychotherapy, and offered her two additional treatment modalities that were rejected.[4] Further, at their last meeting,

[4] The decedent, of course, had the right to determine the course of her own medical treatment, absent a court order to the contrary. See MCL 3330.1401; 330.1403. However, a person refusing medical treatment generally may not pursue a remedy in medical malpractice for the avoidable consequences of that decision, even if the standard of care is breached. See

defendant prescribed her additional medication and gave her a 30-day supply of at least one of the medications. Plaintiff's theory that the decedent's mental illness naturally progressed and worsened as a direct result of defendant's conduct is mere speculation; plaintiff cannot establish "a reasonable inference, based on a logical sequence of cause and effect, that defendant['s] actions triggered the causal chain leading to [her] suicide." *Id*. at 393.

Plaintiff's expert witnesses were not able to provide evidence to establish "but for causation." Expert testimony is required to establish causation in medical malpractice actions. *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705l 400 NW2d 629 (1986). Shiener and Leuchter's testimony failed to establish such a causal connection between defendant's actions and the decedent's suicide nearly two full months after defendant last saw her. Although the experts maintain that defendant's decision to discharge the decedent from the hospital, and to close her case after the January 11 meeting, led to her suicide, they have not supported their opinion with specific facts that would establish such a chain of events, as is required of expert witnesses. *Skinner*, 445 Mich at 173.

Because plaintiff cannot establish causation-in-fact, plaintiff has also failed to establish that defendant's actions were the legal cause of the decedent's death. *Teal*, 283 Mich App at 395. Therefore, we affirm the trial court's order granting defendant's motion for summary disposition.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra

Braverman v Granger, ___ Mich App ___; ___ NW 2d; WL92243 (2014). Thus, assuming that a causal link could be drawn between the decedent's refusal of ECT and Vagus nerve stimulation and her suicide, her refusal may still have prevented her from recovering damages.