STATE OF MICHIGAN

COURT OF APPEALS

TIFFANY ADAMS, as Next Friend of SYDNEY ADAMS, a Minor,

Plaintiff-Appellant,

v

NORTH OAKLAND EAR, NOSE & THROAT CENTERS, PC, CARL SHERMETARO, D.O., MICHIGAN EAR, NOSE & THROAT ASSOCIATES, and BASHAR SUCCAR, M.D.,

Defendants-Appellees.

UNPUBLISHED
September 9, 2014

No. 315746
Oakland Circuit Court
LC No. 2011-123817-NH

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants in this medical malpractice action. We affirm.

I. FACTUAL BACKGROUND

Defendant Dr. Bashar Succar and defendant Dr. Carl Shermetaro are otolaryngologists—physicians who specialize in conditions involving the ears, nose, and throat. Dr. Succar works for Michigan Ear, Nose & Throat Associates (Michigan ENT) and Dr. Shermetaro works for North Oakland Ear, Nose & Throat Centers, PC (North Oakland ENT). Both doctors treated Sydney Adams during her early childhood for recurring ear infections and other medical issues.

Plaintiff's medical malpractice claim is based on the failure of both doctors to diagnose Sydney's submucous cleft palate and velopharyngeal insufficiency.[1] Beginning in 2003, Sydney

[1] A submucous cleft palate is "a separation of the muscle in the soft palate in which mucous membrane covers the defect; it may appear as a notch of the hard palate and bifurcation of the uvula." *Stedman's Medical Dictionary* (28th ed), p 1406. The palate is the "bony and muscular partition between the oral and nasal cavities," also known as the roof of mouth. *Stedman's Medical Dictionary* (28th ed), p 1406. Velopharyngeal insufficiency is an "anatomic or functional deficiency in the soft palate or superior constrictor muscle of the pharynx, resulting in

saw Dr. Succar when she was approximately 13 months old. After multiple procedures for her hearing, she sought a second opinion from otolaryngologist Dr. Shermetaro in 2005. Despite several additional procedures, her ear infections and hearing problems persisted.

Because Sydney still was experiencing speech and hearing problems, she sought out a third otolaryngologist, Dr. David Scapini, in October of 2008. Dr. Scapini noted a bifid uvula,[2] and recommended that Sydney be evaluated for a cleft palate. After an affirmative diagnosis, Sydney underwent surgery performed by Dr. Jugpal Arneja in February of 2009.

Plaintiff filed this instant action against defendants claiming that the negligence of defendants caused Sydney damages such as hearing loss, nutritional deficits, learning disabilities, and speech impediments. Defendants sought summary disposition, claiming that plaintiff failed to provide the requisite expert testimony on causation. The trial court ultimately agreed, and granted summary disposition to defendants. Plaintiff now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review *de novo* a grant or denial of a motion for summary disposition under MCR 2.116(C)(10). *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "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). In reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. ANALYSIS

When asserting a cause of action for medical malpractice, a plaintiff must establish the following four elements: "(1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care." *Kalaj v Khan*, 295 Mich App 420, 429;

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the inability to achieve velopharyngeal closure." *Stedman's Medical Dictionary* (28th ed), p 984.

[2] An uvula of soft palate is "a conical projection from the posterior edge of the middle of the soft palate, composed of connective tissue containing a number of racemose glands, and some muscular fibers (uvulae muscle)." *Stedman's Medical Dictionary* (28th ed), p 2080. A bifid uvula is a "bifurcation of the [uvula] constituting a partially cleft soft palate." *Stedman's Medical Dictionary* (28th ed), p 2080.

820 NW2d 223 (2012). In the instant case, only the fourth element—proximate cause—is at issue on appeal.

Proximate cause includes both cause in fact and legal cause. *Teal v Prasad*, 283 Mich App 384, 391; 772 NW2d 57 (2009). "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." *Id.* at 391-392 (quotations marks and citations omitted).

"While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004) (emphasis in original). Moreover, "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." *Id.* (quotation marks and citation omitted). A plaintiff asserting a claim of medical malpractice must establish that "she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." MCL 600.2912a(2). A plaintiff in a medical malpractice action must produce expert testimony on the issue of causation. *Teal*, 283 Mich App at 394.

In the instant case, plaintiff failed to provide expert testimony establishing a causal link between defendants' failure to diagnose Sydney's submucous cleft palate and her hypernasality and other speech problems. While plaintiff highlights the testimony of Dr. Allan Beck, he provides no guidance on this issue, as he was offered as an expert on the standard of care. Beck opined that the delay in correcting Sydney's submucous cleft palate "would require intensive therapy," and that there was a possibility it would not be enough to correct her compensatory behaviors. However, Beck's opinion was derived solely from the notes of the surgeon—Dr. Jugpal Arneja—who performed Sydney's corrective surgery. Beck was not providing his own expert opinion. When asked, Beck acknowledged that he could not offer his own opinion about the effect of defendants' failure to diagnose Sydney's submucous cleft palate sooner. Beck also testified that he would "defer to an expert such as Dr. Arneja" on the issue of when "a surgery would be optimally performed."[3] Moreover, generalized statements about an injury the patient may have suffered are inadequate. Evidence must be presented regarding causation of the specific injury in this case. See MCL 600.2912a(2); see also *City of Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998) ("[p]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact.").

[3] Moreover, in light of his testimony that he was not qualified to provide guidance regarding causation, Beck's affidavit of merit does not establish a genuine issue of material fact. See *Pennington v Longabaugh*, 271 Mich App 101, 105; 719 NW2d 616 (2006).

Second, and contrary to plaintiff's argument, Sydney's medical records and Dr. Arneja's notes do not create a genuine issue of material fact.[4] As we have previously held, "expert testimony is required to establish causation in an action for medical malpractice." *Teal*, 283 Mich App at 394. While Dr. Arneja's notes shed some light on his personal opinion, they are not "expert testimony." Indeed, plaintiff failed to provide deposition testimony or even a sworn affidavit from Dr. Arneja. Furthermore, while Dr. Arneja may have been willing or able to testify at trial, a trial court cannot rely on a party's mere promise to introduce testimony or evidence at trial. See *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). Nor has plaintiff demonstrated that Dr. Arneja's "knowledge, skill, experience, training, or education" would qualify him as an expert. See MRE 702.

Plaintiff also failed to present evidence of a causal connection for several other injuries alleged in her complaint. Plaintiff asserted that defendants' negligence caused Sydney to suffer "hearing loss, nutritional deficits, learning disabilities and speech impediments." She further claimed that defendants' negligence resulted in emotional trauma and learning delays, and the possibility that Sydney may need a hearing aid. Yet, plaintiff failed to produce any evidence that the delay in diagnosis, and the resulting delay in corrective surgery, was a cause of Sydney's hearing loss or nutritional deficits. Consequently, summary disposition is appropriate with respect to plaintiff's claims.

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[4] Plaintiff relies on the following statement from Dr. Arneja's notes: "I have also told family that the ideal time to perform VPI surgery is between three to four years of age before speech patterns become very difficult to correct." Plaintiff further highlights the following statement from his postoperative notes:

> After all of the diagnostic testing was performed we discussed with the family that Sydney certainly had velopharyngeal insufficiency as well as a submucous cleft palate and our preference would have been to repair this at approximately 1-2 years of age upon establishment of the diagnosis. Unfortunately, we are operating on Sydney late, after many of the speech patterns have been well established. This results in outcomes that are difficult to predict regarding speech and specifically hypernasality with correction of overall speech intelligibility. Certainly intensive therapy might be requisite. Furthermore, secondary surgical procedures might clearly be requisite.

III. CONCLUSION

Because plaintiff failed to produce any expert testimony of causation, the trial court properly granted summary disposition to defendants. We affirm.

Defendants may tax costs consistent with MCR 7.219.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra