

STATE OF MICHIGAN
COURT OF APPEALS

ANDREW CORT,

Plaintiff-Appellant,

v

DONALD SEYFRIED, M.D. and HENRY FORD
HOSPITAL,

Defendants-Appellees.

UNPUBLISHED

December 22, 2020

No. 350467

Wayne Circuit Court

LC No. 18-005180-NH

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). On appeal, plaintiff argues the trial court erred when it granted defendants' motion because plaintiff presented sufficient evidence of proximate causation and breach of duty. Plaintiff also argues the trial court abused its discretion when it denied his request to file a second amended complaint. For the reasons set forth below, we affirm.

I. BACKGROUND

This medical malpractice case arose after defendant, Donald Seyfried, M.D., a neurosurgeon at Henry Ford Hospital, rescheduled plaintiff's laminectomy surgery. Plaintiff began experiencing pain in his left pinky and outer palm in December 2015. Plaintiff obtained an MRI and, according to the doctors that examined plaintiff after the MRI, plaintiff needed a laminectomy of the C4 to C7 vertebrae.

Plaintiff was first evaluated by Dr. Seyfried on April 18, 2016. During plaintiff's office visit, he was scheduled for surgery with Dr. Seyfried on May 10, 2016. According to plaintiff, Dr. Seyfried recommended that the surgery be performed "quickly." On May 9, 2016, plaintiff received a call from Dr. Seyfried's office staff informing plaintiff that his surgery, scheduled for the next day, was cancelled and delayed for 28 days.

On May 13, 2016, plaintiff called Dr. Seyfried's office to discuss defendants' decision to reschedule surgery. Henry Ford's telephone encounter notes from that day describe that plaintiff was in pain and upset about the cancellation:

Patient is calling stating that his surgery was authorized by his insurance 4/29 and would like to know why his surgery was cancelled. He is very confused and upset. He states his pain is every day getting worse and he would like a call back to discuss and get help.

A registered nurse from Henry Ford returned plaintiff's call the same day and noted the following in her telephone encounter notes:

Call returned as requested. Per OR scheduler, paperwork was faxed 04/29/2016; authorization still awaiting approval 05/05/2016; surgery rescheduled for 06/07/2016. Authorization has been received; valid until 06/10/2016—patient requesting earlier surgery date. Patient notified if earlier date becomes available; OR scheduler will notify to reschedule, understanding verbalized; OR scheduler Ester notified of request.

On May 18, 2016, plaintiff visited his primary care physician at Grace Health for a preoperative evaluation. Plaintiff told healthcare workers at Grace Health that his symptoms were stable and his cervical collar provided dramatic relief:

There's something else that's going on here that comes into play and that is my cervical hard collar, which was an amazing thing, that when I put the cervical hard collar on and it had an adjustable neck—adjustable chin strap so that when I adjusted it to the height so my eyes could see straight, the pain melted out of my fingertips, so that as bad as it was, I could almost forget about it because the hard collar took all that pain away.

Dr. Seyfried performed plaintiff's surgery on June 7, 2016. Plaintiff stated that after August 2016, his pain never increased beyond a 4 or 5 on a scale of ten.

Plaintiff filed his amended complaint on July 27, 2018. Plaintiff alleged that Dr. Seyfried's decision to reschedule the surgery was a breach of the standard of care owed to him under the law because Dr. Seyfried did not immediately reexamine plaintiff after he complained of worsening pain. Defendants moved for summary disposition of plaintiff's complaint, contending Dr. Seyfried did not breach the standard of care because Dr. Brian Holmes, plaintiff's expert witness, testified that a medical reexamination of plaintiff after his complaints on May 13, 2016, would not have been required if plaintiff's cervical collar stabilized his pain. Defendants also argued that even if plaintiff could demonstrate Dr. Seyfried breached a standard of care, plaintiff could not show causation.

After the summary disposition briefing in the trial court, but before the trial court's hearing on the motion, plaintiff filed a motion for leave to file a second amended complaint. The gravamen of plaintiff's motion was to add a claim for "lost opportunity" as a result of defendants' negligence.

The trial court granted defendants' motion for summary disposition, concluding plaintiff could not demonstrate Dr. Seyfried's alleged breach of the standard of care was the proximate cause of his alleged injury. The trial court also denied plaintiff's motion to file a second amended complaint. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and should be granted if, after consideration of the evidence submitted by the parties in the light most favorable to the nonmoving party, no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *Id.*; *Lakeview Commons v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). "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*, 469 Mich at 183. Further, a trial court's decision on a motion for leave to amend a complaint is reviewed for abuse of discretion. *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 349; 766 NW2d 30 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

III. DISCUSSION

As a preliminary matter, defendants argue this Court should not consider the majority of plaintiff's exhibits on appeal because they were not part of the record presented to the trial court in either party's briefing. Plaintiff, on the other hand, suggests this Court ignore defendants' arguments because, while plaintiff's exhibits were not attached to his brief, the exhibits were in the lower court record.

"This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). In the trial court, the parties relied on the deposition transcripts and telephone encounter notes in support of their summary disposition briefing. In addition, plaintiff relied on letters between himself and Henry Ford.¹ Plaintiff's request that this Court consider the notes he purportedly made before and after his doctor visits, as well as his various medical records, is denied as an attempt to improperly expand the record on appeal. See *id.*

With respect to the merits of the parties' arguments, the trial court concluded that plaintiff failed to establish that Dr. Seyfried's alleged breach of the standard of care—i.e., failure to reexamine plaintiff after he reported increased pain on May 13, 2016—was the proximate cause of any further injury or increase in symptoms. Plaintiff disagrees, arguing Dr. Holmes's testimony demonstrates Dr. Seyfried's breach of the standard of care was the proximate cause of plaintiff's injuries.

¹ Plaintiff did not attach his exhibits to his summary disposition briefing.

“The plaintiff in a medical malpractice action 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.” *Cox v Hartman*, 322 Mich App 292, 299; 911 NW2d 219 (2017) (quotation marks and citation omitted). “Generally, expert testimony is required in a malpractice case in order to establish the applicable standard of care and to demonstrate that the professional breached that standard.” *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016) (quotation marks and citation omitted).

“In order to be a proximate cause, the negligent conduct must have been a cause of the plaintiff’s injury and the plaintiff’s injury must have been a natural and probable result of the negligent conduct.” *O’Neal v St John Hosp & Med Ctr*, 487 Mich 485, 496; 791 NW2d 853 (2010); see also MCL 600.2912a(2) (“In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.”). “These two prongs are respectively described as ‘cause-in-fact’ and ‘legal causation.’ ” *O’Neal*, 487 Mich at 496. “While legal causation relates to the foreseeability of the consequences of the defendant’s conduct, the cause-in-fact prong generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.” *Id.* (quotation marks and citation omitted). “Finally, it is well-established that the proper standard for proximate causation in a negligence action is that the negligence must be ‘a proximate cause’ not ‘the proximate cause.’ ” *Id.* at 497, quoting *Kirby v Larson*, 400 Mich 585, 605; 256 NW2d 400 (1977).

Plaintiff’s medical expert, Dr. Holmes, testified that Dr. Seyfried breached the standard of care when he failed to reexamine plaintiff immediately after plaintiff’s May 13, 2016 telephone call reporting increased pain because such pain was indicative of a rapid progression of his symptoms. Dr. Holmes, however, never examined plaintiff. In fact, Dr. Holmes agreed with defendants that even if the surgery had been performed earlier, “it was unlikely [plaintiff] was going to get complete relief of his symptoms.” Dr. Holmes did not opine that Dr. Seyfried’s failure to immediately reexamine plaintiff was the cause of further injury to plaintiff.

“Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation.” *Ykimoff v Foote Memorial Hosp*, 285 Mich App 80, 87; 776 NW2d 114 (2009) (quotation marks and citation omitted). Thus, “[s]ummary disposition is not appropriate when the plaintiff offers evidence that shows that it is more likely than not that, but for defendant’s conduct, a different result would have been obtained.” *Id.* (quotation marks and citations omitted).

Plaintiff’s theory of causation is speculative in that he simply assumes that because Dr. Seyfried breached the standard of care, the symptoms he is presently experiencing are a direct result of that breach. Plaintiff has no direct evidence of further injury as a result of the delay in surgery. The circumstantial evidence plaintiff relies on—i.e., the fact that his symptoms worsened between May 23, 2016 and June 7, 2016—presents the possibility, but not the probability, that Dr. Seyfried’s alleged breach of the standard of care caused plaintiff’s injury. This is insufficient to create a genuine issue of material fact as to causation. See *id.*

Defendants also argue that plaintiff failed to establish a breach in the standard of care. We agree.

Plaintiff testified that after his MRI in February 2016, he visited another neurosurgeon and began wearing a cervical collar. Plaintiff stated that the collar “was an amazing thing” that decreased his pain such that he “could almost forget about [the pain] because the hard collar took all that pain away.” On May 18, 2016, after his phone call to Henry Ford, plaintiff told his primary care physician at Grace Health that his symptoms were stable as a result of the cervical collar.

Dr. Holmes, who did not review plaintiff’s deposition transcript before his own deposition, stated that if plaintiff’s cervical collar provided him with relief, it would indicate plaintiff was not experiencing a rapid progression and would not need to be reexamined. Specifically, Dr. Holmes testified: “If it’s the case that his hand symptoms were kept stable while in the collar, I think that supports an absence of progression of spinal cord injury.”

Thus, plaintiff’s own medical expert testified there would be no breach of the standard of care if it were the case that plaintiff’s symptoms were stabilized by the cervical collar. Because plaintiff consistently testified that his symptoms were stabilized by the collar, plaintiff failed to establish Dr. Seyfried breached the standard of care put forth by Dr. Holmes. Therefore, the trial court properly granted summary disposition in defendants’ favor.

Plaintiff also asserts on appeal that the trial court should have permitted him to amend his complaint to address various deficiencies in the first amended complaint. “Leave to amend a complaint should be freely given when justice so requires.” *A-1 Carpentry*, 281 Mich App at 349; see also MCR 2.118(A)(2). “Leave to amend should be denied only for particularized reasons, such as . . . where amendment would be futile.” *A-1 Carpentry*, 281 Mich App at 349.

Defendants suggest that plaintiff’s motion to amend his complaint was untimely because it was filed after discovery closed and after defendants filed their motion for summary disposition. However, defendants do not refer us to any court rule prohibiting plaintiff from seeking to amend his complaint after those events occurred. In fact, the court rules specifically contemplate affording a plaintiff the ability to amend after a motion for summary disposition under MCR 2.116(C)(10) is filed “unless the evidence then before the court shows that amendment would not be justified.” MCR 2.116(I)(5).

Plaintiff’s proposed amendment alleges that Dr. Seyfried’s breach of the standard of care was the proximate cause of plaintiff’s worsened condition. But nowhere in the proposed amended complaint does plaintiff offer any direct evidence of causation and relies, again, on circumstantial evidence and speculative inference—i.e., that because Dr. Seyfried breached the standard of care, such breach caused plaintiff’s injury. In other words, plaintiff’s proposed amended complaint suffers from the same defects as his first amended complaint; thus, any such amendment would be futile. This is especially true where plaintiff did not file an amended affidavit of merit from Dr.

Holmes providing explicit testimony on proximate causation. Accordingly, the trial court did not abuse its discretion when it denied plaintiff's request to amend his complaint.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Douglas B. Shapiro