STATE OF MICHIGAN

COURT OF APPEALS

KATHERINE HIGGS, Individually and as Personal Representative of the ESTATE OF DARYL HIGGS,

Plaintiff-Appellant,

v

ST. JOHN PROVIDENCE, DR. ELIZABETH ANNE BANKSTAHL, M.D., and DR. MOHAMMAD KHALED TASHKANDI, M.D.,

Defendants-Appellees,

and

DR. MICHAEL NATHAN HELMREICH, M.D., DR. GRANT EDWARD NELSON, M.D., DR. JOHN/JANE DOE ANESTHESIOLOGIST(S), and DR. JOHN/JANE DOE GI-ATTENDING,

Defendants.

UNPUBLISHED
April 29, 2021

No. 352499
Wayne Circuit Court
LC No. 18-008005-NH

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, individually and as personal representative of the Estate of Daryl Higgs, appeals as of right the trial court's order granting defendants'[1] motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. BACKGROUND

[1] When referring to defendant doctors and St. John Providence as a collective, we use the term "defendants."

This case arises from the death of Daryl Higgs after his declining a blood transfusion on the basis of his religious beliefs. On the afternoon of June 21, 2016, Higgs, a Jehovah's Witness, was doing door-to-door field service for the church. Feeling nauseated, he cut his field service short and returned home to rest. That evening, Higgs fainted twice. Worried for his wellbeing, his family called 911.

Higgs arrived by ambulance to St. Johns Providence at approximately 2:00 a.m. His hemoglobin was approximately 9.5 g/dl. A normal hemoglobin for people with Higgs's characteristics would be 13 or 14 g/dl. After being under observation for approximately six hours, internal medicine resident Dr. Mohammad Khaled Tashkandi evaluated Higgs. Considering Higgs's symptoms, Tashkandi recommended Higgs undergo an Esophagogastroduodenoscopy (EGD). An EGD is a procedure in which a tube with a camera is inserted down the patient's throat so that doctors can examine the patient's stomach and intestines. An EGD is used primarily for diagnostic purposes, but it can also be used to access a patient's stomach and intestines for treatment.

In the afternoon, Drs. Ryan Wolok and Michael Helmreich were called to evaluate whether Higgs needed to be transferred to the intensive care unit (ICU). Wolok determined that Higgs had a gastrointestinal bleed. Worried that Higgs would lose too much blood before doctors could intervene, Wolok wanted to give Higgs a blood transfusion but Higgs refused. It was against Higgs's religion to be administered any blood products or components. Higgs signed a waiver memorializing his decision to decline all blood product or components.

Wolok immediately transferred Higgs to the ICU and sought to have Higgs undergo an EGD. Wolok urged gastroenterologist Dr. Ann R. Quaine to perform one, but according to Wolok, Quaine said that the anesthesiologist thought that Higgs was too unstable to undergo an EGD, because his blood pressure and hemoglobin were low, and his heart rate was high.

Unable to perform a blood transfusion, Wolok and his team sought to stabilize Higgs for an EGD with IV fluids. Higgs became increasingly unstable and, Quaine and the anesthesiologist agreed to perform the EGD that evening at approximately 7:00 p.m. During the procedure, Quaine found a bleeding ulcer in Higgs's intestinal tract. She injected it with epinephrine and cauterized it to stop the bleeding.

The next morning, defendants discovered that Higgs was still bleeding and recommended a laparotomy to view the abdominal organs. Dr. Abdelkader Hawasli, the surgeon, noting that Higg's hemoglobin was 3.5G/dL, informed Higgs's family that, without a blood transfusion, Higgs was unlikely to survive the surgery. Plaintiff consented to the surgery. Hawasli performed the surgery just before noon on June 24, 2016. Tragically, Higgs died from cardiac arrest the next morning.

Approximately two years later, plaintiff sued St. John's Providence and various doctors involved in Higgs's care for medical malpractice causing wrongful death. Plaintiff alleged that defendants breached the standard of care by failing to treat Higgs's internal bleeding in a timely manner. Plaintiff alleged that defendants should have performed the EGD and laparotomy on Higgs sooner than they did. Plaintiff retained three expert witnesses to support her theory: Dr. Neil J. Farber, an internal medicine expert; Dr. Todd D. Eisner, a gastroenterology expert; and Dr.

Paul Rein, an anesthesiology expert. All three experts opined that defendants breached the standard of care by failing to treat Higgs before his blood count dropped too low.

Defendants moved for summary disposition under MCR 2.116(C)(10). Defendants argued that, even if defendants were negligent,[2] the doctrine of avoidable consequences precluded plaintiff from recovering an award. Defendants noted that, under the doctrine of avoidable consequences, a party is not allowed to recover for losses that he or she could have avoided through reasonable effort or expenditure and argued that here, Higgs could have avoided death had he accepted a blood transfusion—a treatment that was minimally invasive and presented little risk.

Citing this Court's decision in *Braverman v Granger*, 303 Mich App 587; 844 NW2d 485 (2014), plaintiff responded that the doctrine of avoidable consequences did not preclude a plaintiff from recovering if a reasonable alternative to the forgone treatment existed. Plaintiff argued that here, there was a reasonable alternative treatment available: defendants could have performed surgery earlier in lieu of a blood transfusion.

Unpersuaded, the trial court granted defendants' motion for summary disposition. The trial court ruled that, by rejecting a blood transfusion, Higgs had failed to take advantage of objectively reasonable means to avoid the consequences of defendants' ostensibly negligent conduct. The trial court rejected plaintiff's effort to distinguish this case from *Braverman*. It found that the blood transfusion was a minimally invasive procedure, and that all three of plaintiff's expert witnesses agreed that it would likely have saved Higgs's life.

This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision to grant summary disposition de novo. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac*, 309 Mich App 611, 617; 873 NW2d 783 (2015). "A motion under MCR 2.116(C)(10) 'tests the factual support of a plaintiff's claim.' " *Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013), quoting *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In considering a motion under MCR 2.116(C)(10), we examine "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "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.

[2] Defendants, for the purposes of their motion, agreed to assume—without admitting—that defendant doctors were negligent: "Although Defendants specifically deny any acts of negligence/malpractice in this case, the Court may assume, for purposes of this motion only, that Plaintiff can establish a breach of the standard of care."

III. ANALYSIS

On appeal, plaintiff argues that the trial court erred because there is a genuine issue of material fact as to whether a blood transfusion was an objectively reasonable treatment under the circumstances. We disagree.

We emphasize that in reaching our opinion we are not expressing any viewpoint regarding religion generally or any particular religious belief or expression. To the contrary, it is reflective of the spirit of the First Amendment of the United States Constitution and its guarantee of every person's right to freely exercise and express the religious beliefs of his or her choice, without governmental interference.

We understand that people make decisions and choices in all aspects of their lives, as is their right, and bear the consequences of those decisions as is their responsibility. In this sad case, Katherine Higgs and her family made a choice, and decided to forgo a blood transfusion based upon religious beliefs. Ms. Higgs's choice resulted in a consequence for her. Sadly, that consequence was her death. The religious basis of her choice does not insulate her from application of the doctrine of avoidable consequences. That doctrine prevents a party from recovering damages that could have been avoided through reasonable effort. *Braverman*, 303 Mich App at 598. Thus, once one person has acted negligently toward another, the latter must use such means as are reasonable under the circumstances to avoid or minimize his or her damages. *Id*. at 597-598, citing *Shiffer v Bd of Ed of Gibraltar Sch Dist*, 393 Mich 190, 197; 224 NW2d 255 (1974). When applying the doctrine of avoidable consequences, courts examine a plaintiff's conduct after the plaintiff's injury—not a plaintiff's conduct before his or her injury. *Id*. at 598, citing *Kirby v Larson*, 400 Mich 585, 617-618; 256 NW2d 400 (1977). This doctrine is "designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community." *Shiffer*, 393 Mich at 198.

Applied in the medical malpractice context, the doctrine of avoidable consequences requires a patient who claims injury by a doctor to exercise reasonable effort to avoid aggravating their injury. See *Braverman*, 303 Mich App at 607-608. A patient fails to exercise such reasonable effort if he or she refuses an objectively reasonable treatment—one that a reasonably prudent person in the patient's position would have accepted. *Id*. at 606-607. When considering whether a treatment is objectively reasonable, courts may consider factors such as (1) the gravity of the original injury, (2) the intrusiveness of the proposed medical treatment, (3) the risk of complications that proposed medical treatment presents, (4) the feasibility of alternative medical treatments, (5) the expense of the proposed medical treatment, and (6) the increased likelihood of recovery had the patient accepted the treatment. *Id*. at 606.

In this case, the medical negligence claimed by plaintiff was the failure to perform the EGD at some time after Higgs's admission to the hospital but before the surgery the next day. In *Braverman*, a doctor's negligent conduct caused the plaintiff to start bleeding internally. *Id*. at 589. As a result, the plaintiff needed a blood transfusion. *Id*. The plaintiff refused the transfusion on religious grounds and that refusal led to her death. *Id*. The Court held that the plaintiff's refusal was unreasonable. *Id*. at 607. Examining the factors cited above, the Court made the following five findings:

1) plaintiff's internal bleeding posed a great threat to her life;

2) the blood transfusion would have been a minimally invasive procedure;

3) the blood transfusion was necessary;

4) there were no alternative treatments to her internal bleeding available; and

5) the plaintiff would have likely survived had she accepted the transfusion.

Id. at 595, 607-608. Considering those circumstances, the Court held that reasonable minds could not disagree that a reasonable person in the plaintiff's position would not have refused a blood transfusion. *Id*. at 608.

Braverman is practically indistinguishable from this case. Like in *Braverman*, here, defendants' putative negligent conduct allowed Higgs's blood count to drop to a dangerously low level. Additionally, like in *Braverman*, plaintiff's experts agreed that a blood transfusion could have saved Higgs's life by restoring Higgs's blood count to a sustainable level.[3] Yet Higgs, like the decedent in *Braverman*, refused the blood transfusion on religious grounds. Further, Higgs did so knowing that his internal bleeding posed a grave threat to his life and that the blood transfusion would have been a minimally invasive procedure. Just as in *Braverman*, reasonable minds could not disagree in this case: a reasonably prudent person in Higgs's position, armed with this same knowledge, would not have refused a blood transfusion.

Attempting to distinguish *Braverman*, plaintiff argues that, unlike the decedent in *Braverman*, Higgs had an alternative treatment available to him that could have substituted for a blood transfusion. According to plaintiff, a timely laparotomy could have served as an alternative to a blood transfusion. Therefore, in contrast to *Braverman*, a blood transfusion was not *necessary* here, as Higgs had other treatment options. Plaintiff concludes that this creates a question of fact as to whether a blood transfusion was an objectively reasonable treatment here. We are not persuaded.

The record here shows that a laparotomy would not have substituted for a blood transfusion. The doctrine of avoidable consequences applies only after a defendant's negligence has injured a plaintiff. Therefore, in this case, the doctrine would apply forward from the point at which Higgs's hemoglobin dropped below 8.4 g/dl. According to plaintiff's expert witnesses, this was the point just before or after which defendants should have begun treating Higgs lest he lost

[3] Dr. Farber testified that a blood transfusion would probably have been lifesaving up until the point that Higgs's hemoglobin dropped to 3.5 g/dl. Dr. Eisner agreed. Dr. Eisner testified that Higgs may have survived had his hemoglobin been prevented from dropping to 3.5 g/dl. Finally, Dr. Rein testified that there is a "much, much, much greater chance that [Higgs] would be with us today," had Higgs received a blood transfusion.

his chance of surviving.[4] Beyond this point, Higgs was required to accept an objectively reasonable treatment to recover his chance at surviving. A laparotomy was not one of his options. Although a laparotomy may have prevented his blood count from dropping further, it would do nothing to replenish the blood he had already lost.

Next, even if a laparotomy was an available alternative life-saving treatment , plaintiff assumes that this fact alone would be enough to generate an issue of fact as to whether a blood transfusion was an objectively reasonable treatment. In making this assumption, plaintiff disregards that the question is not whether some alternative treatment existed; the question is whether that treatment was a *feasible treatment to preserve his life*. See *Braverman*, 303 Mich App at 606. Here, a laparotomy was not a feasible treatment option. As just discussed, it would not replenish Higgs's blood loss, and as plaintiff's own expert Farber testified, once Higgs's hemoglobin dipped below 8.4 g/dl, Higgs was unlikely to survive a laparotomy.

Reasonable minds could not disagree that a blood transfusion was an objectively reasonable treatment under the circumstances. Consequently, by refusing a blood transfusion, Higgs failed to make a reasonable effort to mitigate his damages. All common law limitations on Higgs's cause of action apply to plaintiff's wrongful-death action. See *Denney v Kent Co Rd Comm*, 317 Mich App 727, 731, 735; 896 NW2d 808 (2016). Therefore, Higgs's violating the doctrine of avoidable consequences bars plaintiff from an award of damages.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens

[4] Eisner explained that Higgs might have been saved had doctors not allowed his hemoglobin to drop from 8.4 g/dl to 3.5 g/dl between the evening of June 22, 2016, and the morning of June 23, 2016. Farber agreed, explaining that Higgs lost his chance at survival at some point after his hemoglobin dropped below 8.4 g/dl.

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Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

BOONSTRA, J. (*concurring*).

I concur in the majority opinion, but write separately for two reasons. First, I would characterize plaintiff's argument a little differently. As I read it, plaintiff never quite argues that a blood transfusion was not an objectively reasonable treatment under the circumstances (although that indeed is the "proper inquiry" under *Braverman v Granger*, 303 Mich App 587, 606; 844 NW2d 485 (2014)). Rather, what plaintiff argues is that the refusal of a blood transfusion was objectively reasonable given that (in plaintiff's view) an alternative treatment (i.e., earlier surgery) was available. At bottom, however, what plaintiff seeks is not to distinguish *Braverman* but rather to create an exception that would swallow the *Braverman* rule. But the expert testimony in this case does not reflect (as plaintiff suggests) that an alternative treatment was available. Instead, it merely reflects that that when faced with a patient (such as plaintiff) who refuses the best treatment

option, health care providers should then pursue the next best option. But a next best option does not equate to an alternative treatment within the meaning of *Braverman*. And a refusal of treatment does not become objectively reasonable under *Braverman* whenever a next best option could then be followed.[1] A next best option will always exist, and equating it to an alternative treatment would in effect render *Braverman* a nullity.[2]

Second, having served on the *Braverman* panel, I find my concurring opinion in that case to be equally applicable here, and I therefore adapt and repeat it here in full:

> I fully concur in the majority opinion and in its excellent analysis. I write separately to emphasize that our opinion should not be interpreted as reflective of any viewpoint regarding religion generally or any particular religious belief or expression. To the contrary, it is reflective of the spirit of the First Amendment of the United States Constitution and its guarantee of every person's right to freely exercise and express the religious beliefs of his or her choice, without governmental interference.
>
> That said, however, it bears noting that every person bears responsibility for the decisions and choices that he or she makes in life. People make decisions and choices in all aspects of their lives, and for untold hosts of reasons. But regardless of the reasons, decisions and choices have consequences. It is the essence of personal responsibility that the makers of decisions and choices, relative to their own lives, bear the consequences that flow from those decisions and choices. Our recognition of that fact is in no respect a criticism or indictment (or endorsement, for that matter) of any person's decision or choice (or of the reasons for which it was made). It is merely an acknowledgement of the principle of personal responsibility.
>
> In this sad case, [Katherine Higgs] and her family made a choice, and decided to forgo a blood transfusion that likely would have saved her life. In her particular case, and while the reasons could have been many, the reason for doing so was based on her religious beliefs. But the reason simply does not matter. The choice was hers to make, whether for reasons of religion, or for altogether different reasons entirely, or in fact for no reason at all. But as in any aspect of life, in which choices result in consequences, Ms. [Higgs's] choice resulted in a consequence for her. Sadly, that consequence was her death.

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[1] Nor, of course, would it mean, under *Braverman*, that the preferred treatment option is not an objectively reasonable means of avoiding or minimizing damages.

[2] In any event, the feasibility of alternative treatments is merely one factor among many to be considered in evaluating whether, under the given circumstances, the proposed treatment (here, a blood transfusion) was an objectively reasonable means to avoid or minimize damages.

> However unfortunate the nature of that consequence, it does not provide a basis for shifting responsibility for the consequence of Ms. [Higgs's] choice to others.[3] That choice, no matter how principled, admirable, and honorable it might have been, was hers and hers alone to make, and with that choice came the consequences that naturally flowed from it, irrespective of the righteousness of the reasons for which she made her choice.
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> For these additional reasons, I concur in the majority opinion.

Braverman, 303 Mich App at 610-611 (BOONSTRA, J., concurring).

/s/ Mark T. Boonstra

[3] In this case, that shifting of responsibility would place Ms. [Higgs's] medical professionals in the untenable position of having to choose between bearing legal responsibility for the consequences of Ms. [Higgs's] religion-based choices or, alternatively, opting not to treat her. In either event, they likely would face legal action, of different sorts. The First Amendment does not require that medical professionals be placed between such a rock and hard place.