STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF STEVEN A. WAGAR, by DORIS ANN WAGAR, as Personal Representative, Plaintiff-Appellant,	UNPUBLISHED August 12, 2021
v	No. 354674 St. Clair Circuit Court
AARON K. CLARK, M.D. and AARON K. CLARK, M.D., PC, Defendants-Appellees.	LC No. 18-001939-NH

Before: SAWYER, P.J., and BOONSTRA and RICK, JJ.

PER CURIAM.

Plaintiff, through its personal representative, appeals by right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On September 9, 2016, plaintiff's decedent, Steven A. Wagar (Wagar), was seen by defendant Dr. Aaron K. Clark, M.D. (Dr. Clark), a primary care physician. They discussed Wagar's medical history and episodes of gastrointestinal bleeding. Dr. Clark performed a physical examination and scheduled a return visit in December. Wagar saw Dr. Clark again on December 9, 2016; following this appointment, Dr. Clark ordered diagnostic tests of Wagar's heart. An carotid duplex ultrasound test and a magnetic resonance angiogram test were performed at McLaren Hospital in Port Huron on December 28 and 29, 2016. The tests revealed blockages in Wagar's carotid arteries. Based on the test results, Dr. Clark referred Wagar to a vascular surgeon. On January 6, 2017, Dr. Hilde Jerius, M.D. (Dr. Jerius), a vascular surgeon, examined Wagar, conducted another carotid duplex ultrasound test, and concluded that Wagar had "a greater than

80% suspected asymptomatic right carotid stenosis."[1] Dr. Jerius prescribed medication and referred Wagar to two additional specialists for neurological evaluation and cardiac risk factor assessment. She did not recommend immediate heart surgery.

On January 9, 2017, Wagar reported to the Emergency Department of McLaren Hospital. Wagar told medical staff that he had passed out at work after experiencing stomach pain and noticing blood in his stool. The next day, Wagar was admitted to McLaren Hospital after suffering a stroke. Wagar died on January 12, 2017.

In August 2018, plaintiff filed suit against defendants, asserting one count of medical malpractice against Dr. Clark and one count of vicarious liability against Dr. Clark's professional corporation, defendant Dr. Aaron K. Clark, PC. Plaintiff alleged that Dr. Clark had breached the applicable standard of care by failing to immediately schedule an ultrasound after Wagar's December 9, 2016 office visit, failing to review the results of that ultrasound as soon as possible, and failing to "[e]mergently refer the patient to a vascular surgeon" after receiving the results of the ultrasound. Plaintiff's complaint was accompanied by affidavits of merit from Dr. Mark B. DeYoung, M.D. (Dr. DeYoung) and Dr. D. Preston Flanigan, M.D. (Dr. Flanigan), who opined in their respective affidavits that Wagar would not have suffered a stroke had Dr. Clark fulfilled his duties under the standard of care. Dr. Flanigan opined at his deposition that Dr. Clark's alleged breach of the standard of care was a proximate cause of Wagar's stroke.

After the close of discovery, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not demonstrate proximate cause because Wagar had, in fact, been seen by a vascular surgeon, who did not recommend immediate surgery. The trial court agreed, stating in relevant part:

> [W]e know when Dr. Jerius, a Vascular Surgeon saw Mr. Wagar on January 6, 2017, she performed a second carotid duplex scan within her office which yielded the same results as the duplex performed on December 28th and based on those results, Dr. Jerius did not board Mr. Wagar to undergo a carotid endarterectomy within seven to ten days. And, Dr. Clark has no control over when Dr. Jerius believes an endarterectomy should be performed.

The trial court granted defendants' motion for summary disposition, and subsequently denied plaintiff's motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW

"Appellate review of the grant or denial of a summary-disposition motion is de novo . . . ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v*

[1] Carotid artery stenosis is a narrowing of the artery caused by plaque build-up. This condition causes an increased risk of stroke. See https://www.mayoclinic.org/diseases-conditions/carotid-artery-disease/symptoms-causes/syc-20360519 (last visited July 20, 2021).

Barton Malow Co, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. "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." *Id.*

III. ANALYSIS

Plaintiff argues that the trial court erred when it granted summary disposition in defendants' favor, because Dr. Flanigan's deposition testimony created a genuine issue of material fact regarding causation. We disagree.

"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." *Cox v Hartman*, 322 Mich App 292, 299; 911 NW2d 219 (2017) (quotation marks and citation omitted). "Failure to prove any one of these elements is fatal." *Id.* (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).

Dr. Flanigan testified, essentially, that Dr. Clark did not act quickly enough in ordering an ultrasound and in referring Wagar to a vascular surgeon, and that, had he made the referral earlier, Wagar could have had surgery and therefore avoided the stroke. Dr. Flanigan opined that Dr. Clark's delay was a proximate cause of Wagar's stroke. Plaintiff relies on *Martin v Ledingham*, 488 Mich 987; 791 NW2d 122 (2010), and *Ykimoff v Foote Mem Hosp*, 285 Mich App 80; 776 NW2d 114 (2009), in arguing that Dr. Flanigan's testimony created a genuine issue of material fact with respect to causation. Those cases, however, are distinguishable. In *Martin* and *Ykimoff*, the plaintiffs' experts opined that a treating physician would have made different treatment decisions had the physician received critical information sooner. See *Martin*, 488 Mich at 987-988, *Ykimoff*, 285 Mich App at 89, 115. In both cases, the treating physicians testified, to the contrary, that they would not have acted differently had they received the information sooner. Our Supreme Court and this Court held that the conflicting testimony created a genuine issue of

material fact. In *Martin*, the Supreme Court stated that "the treating physician's averment" that he would not have acted differently presented "a question of fact and an issue of credibility for the jury to resolve." *Martin*, 488 Mich at 988. In *Ykimoff*, this Court noted the "speculative" nature of the treating physician's testimony that he would not have acted differently, and held that a genuine issue of material fact existed regarding whether the plaintiff would have received different treatment had the treating physician received information on the plaintiff's condition earlier.

In contrast to *Martin* and *Ykimoff* , in which the conflicting testimony of the expert witness and the treating physician created a credibility contest for the jury, the trial court in this case was not confronted with speculation regarding what a treating physician *might* or *might not* have done differently; rather, it received evidence of what had actually occurred. Specifically, despite concluding that Wagar had "a greater than 80% suspected asymptomatic right carotid stenosis," Dr. Jerius did not recommend immediate surgery. Therefore, Dr. Flanigan's speculation—that had Wagar been referred to a vascular surgeon earlier, he would have undergone immediate heart surgery to prevent a stroke—was not borne out by what actually happened when Wagar did see a vascular surgeon. And neither of plaintiff's experts testified that Dr. Jerius would have made a different determination had she received the referral earlier.[2] Therefore, unlike in *Martin* and *Ykimoff*, there was no conflicting testimony concerning causation upon which reasonable minds could differ; rather, Dr. Flanigan's opinion was contradicted by what actually happened, and was revealed to be mere speculation.

"Where the connection between the defendant's negligent conduct and the plaintiff's injuries is entirely speculative, the plaintiff cannot establish a prima facie case of negligence." *Craig v Oakwood Hosp*, 471 Mich 67, 93; 684 NW2d 296 (2004). See also *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994). Therefore, when an expert provides an opinion that is "based on assumptions that are not in accord with the established facts," the trial court acts properly when it disregards that opinion. *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999). The speculative nature of plaintiff's causation evidence was not sufficient to create a genuine issue of material fact. See *Craig*, 471 Mich at 93.

Plaintiff also argues that the trial court erred in its characterization of Dr. Flanigan's testimony regarding the cause of Wagar's stroke. The trial court added:

> Furthermore, Plaintiff's causation expert Dr. Flanigan testified "we know the carotid did not occlude, because it is open after the stroke based on the CTA that was done. So it is not thrombotic stroke at the level of the carotid artery."

It is not clear from the trial court's ruling why it recited this portion of Dr. Flanigan's testimony, which arguably concerns the issue of whether Wagar's stroke was caused by a blockage of the carotid artery. Although defendants argued in their motion for summary disposition that there was

[2] Plaintiff argues on appeal that, had Dr. Clark made the referral earlier, Wagar might have been seen by a different vascular surgeon, who might have made a different decision. This argument also is speculative, and we note that plaintiff did not assert a claim of medical malpractice against Dr. Jerius.

insufficient evidence that a carotid artery blockage had caused the stroke, the trial court granted summary disposition on the basis of the fact that Dr. Jerius had not ordered immediate surgery after evaluating Wagar. Therefore, any error in the trial court's reference to Dr. Flanigan's testimony is harmless and does not warrant reversal.

Plaintiff also asks this Court, if it determines that reversal of the trial court's order is not warranted, to remand so that the trial court may conduct a *Daubert*[3] hearing to "further explore" the issue of causation. We conclude that a *Daubert* hearing is unnecessary. A *Daubert* hearing is conducted when an expert witness's qualifications or methodology are in dispute. See *Elher v Misra*, 499 Mich 11, 22-23; 878 NW2d 790 (2016) ("Under *Daubert*, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.") (quotation marks and citations omitted). Plaintiff does not explain how a *Daubert* hearing would alter the trial court's determination that plaintiff did not demonstrate a genuine issue of material fact regarding causation in light of Dr. Jerius's decision not to order immediate surgery. This Court can discern no purpose that would be served by remanding for a *Daubert* hearing.

Affirmed.

/s/ David H. Sawyer
/s/ Mark T. Boonstra
/s/ Michelle M. Rick

[3] *Daubert v Merrill Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).