STATE OF MICHIGAN

COURT OF APPEALS

BRIDGET M. JARZOMBEK,

Plaintiff-Appellant,

v

CLINTON WOMEN'S HEALTH CARE, P.C., JOHN E. UCKELE, M.D., and STEPHEN P. PERRY, M.D.,

Defendants-Appellees.

UNPUBLISHED
February 10, 2005

No. 250355
Macomb Circuit Court
LC No. 2002-001382-NH

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff brought this medical malpractice action, alleging that defendants failed to timely diagnose and treat her ectopic pregnancy with the drug Methotrexate, and also failed to realize that the drug treatment was unsuccessful and that additional drug treatment or surgery was necessary. Plaintiff alleges that, as a result of defendant's alleged malpractice, she was required to undergo emergency surgery to remove her fallopian tube. The trial court granted defendants' motion for summary disposition, concluding that there was no genuine issue of material fact that there was not a greater than fifty percent probability that plaintiff's fallopian tube could have been saved but for defendants' alleged malpractice and, therefore, defendants were entitled to judgment as a matter of law under MCL 600.2912a(2).

Plaintiff's complaint alleges in part that defendants committed malpractice because they failed to diagnose and treat her ectopic pregnancy with Methotrexate before June 8, 2001. Plaintiff's expert, Dr. Robert Zack, testified in his deposition that there would have been a ninety percent likelihood of successful treatment with Methotrexate if plaintiff had received the injection on June 1, but the likelihood of successful treatment dropped to sixty to ninety percent by June 8.

MCL 600.2912a(2) provides:

> Proximate cause of defendant's negligence; recovery barred where opportunity to survive, or for better result, was less than 50%. 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. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

In *Fulton v William Beaumont Hospital*, 253 Mich App 70, 83; 655 NW2d 569 (2002), this Court held that "MCL 600.2912a(2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds fifty percent." In other words, to satisfy the proximate cause element in a medical malpractice action, the plaintiff must show that the differential between the plaintiff's initial opportunity to survive or achieve a better result and the plaintiff's opportunity following the malpractice is greater than fifty percent. See *id.* at 82-84.

Plaintiff acknowledges that the trial court correctly applied this Court's decision in *Fulton* with respect to the malpractice claim involving defendants' alleged failure to treat her with Methotrexate before June 8. But plaintiff maintains that *Fulton* was wrongly decided and urges this Court to express its disagreement with that decision and follow it only because it is required to do so under MCR 7.215(J), thereby enabling the judges of this Court to be polled to determine whether a conflict panel should be convened to resolve the matter. We decline to do so. We note that in *Ensink v Mecosta County General Hospital*, 262 Mich App 518; 687 NW2d 143 (2004), lv pending, a different panel of this Court followed *Fulton* only because it was required to do so under MCR 7.215(J)(2). The judges of this Court were polled pursuant to MCR 7.215(J)(3), and the result was evenly divided, so a special panel was not convened. *Ensink v Mecosta County General Hospital*, 262 Mich App 801 (2004).

Furthermore, we conclude that the trial court erred in granting defendants summary disposition of plaintiff's additional claim that defendants committed malpractice when they failed to determine on June 11, 2001, that the ectopic pregnancy had not resolved, and failed to either administer a second Methotrexate injection or surgically remove the pregnancy at that time by performing a "linear salpingostomy." With regard to this theory, plaintiff's expert, Dr. Zack, averred in an affidavit that defendants should have performed an ultrasound on June 11, to determine whether the June 8 Methotrexate injection was working. Dr. Zack further averred:

> A fallopian tube can be saved by salpingostomy to a reasonable degree of medical certainty any time before the tube ruptures. Likewise, even if it was too late to administer more Methotrexate, the tube would have been saved if a salpingostomy were performed. This Plaintiff's tube could have been saved any time up to and including June 22, 2001.

In granting summary disposition, the trial court stated:

> [T]he Court is satisfied that plaintiff has failed to raise a genuine issue of material fact as to whether defendants had committed malpractice by failing to order an ultrasound on June 11, 2001 and by failing to either administer another injection of medication or perform surgery. The Court is mindful that the affidavit of Dr. Zack indicates that plaintiff's fallopian tube could have been

> saved to a reasonable degree of medical certainty at any time up to and including June 22, 2001. However, the Court opines that such language is vague in that it fails to set forth an actual percentage of success, as required under MCL 600.2912a(2). Plaintiff has therefore failed to meet her statutory burden of proof.

The trial court erred in determining that summary disposition was required because Dr. Zack's affidavit was too vague concerning the opportunity to achieve a better result. Although Dr. Zack did not expressly quantify the likelihood of achieving a better result with earlier intervention, his statements that "the tube *would have been saved* if a salpingostomy were performed" and that "[p]laintiff's tube could have been saved *any time* up to and including June 22, 2001," were sufficiently definite to convey a better than fifty percent opportunity to achieve a better result. Indeed, his statement that plaintiff's tube "would have been saved" if a salpingostomy had been performed earlier is couched in almost absolute terms. At a minimum, the statement demonstrates that there is a genuine issue of material fact regarding whether the likelihood of achieving a better result is greater than fifty percent. Additionally, we find no support in the record for defendants' claims that Dr. Zack's affidavit should not be considered because it contradicts his deposition testimony. Accordingly, the trial court erred in granting summary disposition of this claim.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello