STATE OF MICHIGAN

COURT OF APPEALS

HAROLD BROWN and NORMA BROWN,

Plaintiffs-Appellants,

V

DAVID BURK, M.D., RICHARD WACKSMAN, M.D., and BAY EYE CARE CENTER, PC,

Defendants-Appellees,

and

CHARLES ZENZEN, M.D.,

Defendant.

UNPUBLISHED
October 27, 2011

No. 298994
Ogemaw Circuit Court
LC No. 08-656968-NH

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition granted in favor of defendants. We affirm.

Harold Brown underwent surgery to have a cataract removed from his right eye on April 6, 2006. During surgery he moved his head, which caused a tear in the posterior capsule. Plaintiff was seen on April 7 and 13, 2006, by defendants Burk and Wacksman; the medical records indicated no problems from the surgery. On April 14, 2006, plaintiff awoke and noticed a loss of vision in his right eye. He contacted defendants and was seen on an emergency basis. Defendants immediately referred plaintiff to a specialist, who diagnosed plaintiff with a detached retina. Brown underwent surgery on April 17, 2006, to re-attach his retina.

Plaintiffs filed suit against defendants on October 6, 2008, alleging negligence and malpractice. After deposition of plaintiffs' expert witness, two allegations remained: Burk should have told Brown about the tear in the posterior capsule and warned plaintiffs of the signs and symptoms of retinal detachment, and Burk and Wacksman should have performed a dilated exam on April 7 or 13, 2006, respectively, to examine the back of the eye and retina.

Defendants moved for summary disposition under MCR 2.116(C)(10), on the ground that plaintiffs failed to establish a material question of fact regarding proximate causation. The trial

court granted summary disposition, finding that plaintiffs' expert's opinion was based on speculation and could not support the element of causation.

We review a trial court's decision on a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008); *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). Summary disposition is proper when the moving party can show that no genuine issue as to material fact exists. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). When the moving party meets its burden, the non-moving party can then present evidence that demonstrates a genuine issue of material fact, making summary disposition inappropriate. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. The non-moving party must present evidentiary material, which is something more than speculation or conjecture. *Coblentz*, 475 Mich at 569. The court is to consider all the evidence in a light most favorable to the non-moving party. *Id*. at 567, 568.

In a medical malpractice case the plaintiff has the burden to establish: (1) the applicable standard of care, (2) that the defendant breached that standard of care, (3) the existence of an injury, and (4) that the defendant's breach proximately caused the injury. *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005); *Velez v Tuma*, 283 Mich App 396, 398; 770 NW2d 89 (2009). To establish proximate cause, the plaintiff must show that but for the defendant's action, the plaintiff's injury would not have occurred and that the defendant's conduct could foreseeably create a risk of harm to the plaintiff. *Velez*, 283 Mich App at 398. However, if the plaintiff's theory of causation is based purely on speculation or conjecture, then it is proper for the court to direct summary disposition in favor of the defendant. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994); *Robins v Garg*, 276 Mich App 351, 362; 741 NW2d 49 (2007).

Plaintiffs' theory of causation is based on the deposition testimony of their expert Dr. Bryant. Plaintiffs argue that the opinions given by Bryant demonstrate that it is more likely than not that had defendants performed a dilated exam of Brown's right eye, the retinal damage would have been found and Brown's vision loss would have been reduced. We disagree.

The statements relied on by plaintiffs are not based in fact, and are speculation and conjecture on Bryant's part. Bryant used language like "if" and "had" when talking about the dilated exams. He also admitted that he could only speculate about the results of dilated exams, since no such exam had been done.

Plaintiffs argue that the following exchange with Bryant demonstrated the necessary causation,

> *Q.* Now, do you have an opinion as to whether if an exam was done on that date what would have been the outcome for Mr. Brown as far as his resulting retinal detachment? Would an exam have been--if an exam had been performed at that time, could something have been done to prevent the worsening retinal tear that he suffered?
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> . . .

> *A.* I can answer? More likely than not if an exam had been done and there were findings of retinal tear or a retinal hole or retinal detachment and a repair had been done while the macula was still attached, then the outcome would have been much better.

We are not persuaded. Bryant said, *had* an exam been performed and *had* that exam revealed retinal damage, then *had* the proper action been taken, Brown's outcome would have been better. But Bryant's statements are speculation; he did not opine with a reasonable degree of medical certainty what a dilated exam may have shown.

Plaintiffs also asserted that Burk's failure to warn plaintiffs of signs and symptoms of retinal detachment was also a proximate cause of Brown's injuries. The physician derived this standard of care testimony from his own experience and offered no scientific journals or other authority to support his assertion. Whether this standard of care could have survived a *Daubert* challenge is unknown. However, even if we were to accept this as the standard of care, plaintiff would not be entitled to relief. Had such a warning been given it would have merely resulted in plaintiff presenting himself to defendants with specific complaints. However, as discussed above, plaintiff's expert was unable to testify regarding the likely outcome of the resulting retinal exam.

Plaintiffs failed to prove that a genuine issue of material fact existed. The trial court did not err in granting summary disposition in favor of defendants.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly