

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re ESTATE OF DENNIS BURNS, Deceased.

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UNPUBLISHED  
August 6, 1996

ANDREW BURNS, Personal Representative of the  
ESTATE OF DENNIS BURNS, Deceased,

Plaintiff-Appellant,

v

Nos. 176896; 177776  
LC No. 91-070093-NH

EDWARD W. SPARROW HOSPITAL, EDWARD  
W. SPARROW HOSPITAL ASSOCIATION,  
INTERNAL MEDICINE ASSOCIATES, P.C.,  
JAMES MCCOY, M.D., FRED ISAACS, M.D., and  
LANSING RADIOLOGY ASSOCIATES, P.C.,

Defendants-Appellees,

and

RAYMOND HANSEN, M.D., and LAURA KRAMER,  
M.D.,

Defendants.

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ANDREW BURNS, Personal Representative of the  
ESTATE OF DENNIS BURNS, Deceased,

Plaintiff-Appellant,

v

No. 177892  
LC No. 91-070093-NH

EDWARD W. SPARROW HOSPITAL, EDWARD  
W. SPARROW HOSPITAL ASSOCIATION,  
JAMES MCCOY, M.D., RAYMOND HANSEN,

M.D., LAURA KRAMER, M.D., and FRED  
ISAACS, M.D.,

Defendants,

and

INTERNAL MEDICINE ASSOCIATES, P.C., and  
LANSING RADIOLOGY ASSOCIATES, P.C.,

Defendants-Appellees.

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ANDREW BURNS, Personal Representative of the  
ESTATE OF DENNIS BURNS, Deceased,

Plaintiff-Appellant,

v

Nos. 180682  
LC No. 91-070093-NH

EDWARD W. SPARROW HOSPITAL, EDWARD  
W. SPARROW HOSPITAL ASSOCIATION,  
INTERNAL MEDICINE ASSOCIATES, P.C.,  
JAMES MCCOY, M.D., RAYMOND HANSEN,  
M.D., LAURA KRAMER, M.D., FRED ISAACS,  
M.D., and LANSING RADIOLOGY ASSOCIATES,  
P.C.,

Defendants-Appellees.

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Before: Young, P.J., and Corrigan and M.J. Callahan,\* JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals of right the orders granting summary disposition to defendants. In Nos. 176896, 177892, 177776, and 180682, plaintiff appeals from the orders granting summary disposition to all defendants on the malpractice issue. In No. 176896, plaintiff appeals the order dismissing his breach of implied contract and breach of implied warranty claims

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\* Circuit judge, sitting on the Court of Appeals by assignment.

against defendant-doctors McCoy, Isaacs, Hansen, and Kramer and defendant Internal Medicine Associates (IMA). We affirm.

Plaintiff's decedent, Dennis Burns, a fifty-year-old man with preexisting liver disease, complained of abdominal pain in October, 1989. On October 5, 1989, Burns was admitted to defendant Sparrow Hospital by defendant Dr. Fred Isaacs, the on-call doctor for defendant IMA. The four individual defendants are partners in defendant IMA, and they rotated supervision on Burns' case as follows: (1) Dr. Fred Isaacs – October 5 and 6; (2) Dr. James McCoy – October 6 through 14; (3) Dr. Raymond Hansen – October 14 through 21; and (4) Dr. Laura Kramer – October 21 through the date Burns was transferred.

To combat infection, Isaacs prescribed the drug Gentamicin, which can damage the kidneys. On October 7, a CAT scan of the decedent's abdomen was performed; personnel from defendant Lansing Radiology reviewed it, but noted no inflammatory changes. Five days later, another CAT scan was performed. On October 14, a gastroenterologist examined the CAT scans and found evidence of an abscess, which was drained on October 15.

On October 15, doctors decreased the frequency of the Gentamicin administration. On October 17, the decedent suffered renal failure. Doctors determined that the Gentamicin had caused a deterioration of the decedent's kidneys and discontinued the medication.<sup>1</sup> Burns was then transferred to the University of Michigan, where he underwent a liver and kidney transplant on November 8. Burns remained hospitalized there until he died on January 30, 1990.

Plaintiff later filed suit, alleging medical malpractice against all defendants, and breach of contract and warranty against IMA and its doctors. Defendants later separately moved for summary disposition, which the circuit court granted. Plaintiff appeals.

Plaintiff contends that the circuit court erred by dismissing his malpractice claims against defendants. We review *de novo* summary disposition orders under MCR 2.116(C)(10). *Fitch v State Farm Fire & Casualty Co*, 211 Mich App 468, 470; 536 NW2d 273 (1995). In a medical malpractice claim, a plaintiff must prove the following elements: (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. MCL 600.2912a; MSA 27A.2912(1), *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). The issue of proximate causation is generally a question for the jury. *McMillan v State Highway Comm*, 426 Mich 46, 63; 393 NW2d 332 (1986). If the facts bearing upon aspects of proximate cause other than causation in fact are not in dispute and if reasonable minds could not differ about applying the legal concept to those facts, the court decides the issue as a matter of law. *Id.* at n 8.

Plaintiff first asserts that the circuit court erred in granting summary disposition to defendant Isaacs, arguing that Isaacs treated the decedent after October 6, 1989, and breached the applicable standard of care. Isaacs denied any involvement in the case after October 6, 1989, which was eleven

days before the decedent suffered renal failure. Beyond mere speculation, plaintiff failed to provide any evidentiary proofs to refute Isaacs' testimony. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994); *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991). Also, plaintiff's expert, Dr. Thomas Dell, did not implicate Isaacs when identifying how defendants breached the standard of care. Plaintiff therefore did not establish the requisite breach of the standard of care, *Locke, supra*, and the court appropriately granted summary disposition.

Plaintiff next contends that the circuit court should not have granted summary disposition in favor of defendant McCoy. Plaintiff failed to present requisite evidence of proximate causation with regard to McCoy. *Locke, supra*. Indeed, plaintiff's expert Dell stated that, provided McCoy was not involved with the decedent's later treatment, McCoy did not breach the standard of care. Plaintiff further argues that testimony from other doctors will establish proximate causation. The existence of a disputed fact must be established by admissible evidence. MCR 2.116(G)(4); *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). Plaintiff's promise to offer factual support at trial is insufficient to overcome a summary disposition motion.

Additionally, plaintiff argues that defendant Sparrow's Pharmacology Department should have warned the treating doctors about the increased risk of nephrotoxicity (poisoning of the kidneys) in prescribing Gentamicin. Plaintiff's expert, Dr. James O'Donnell, stated that use of the drug Gentamicin was not contraindicated in the decedent's treatment and that Sparrow Hospital's Dosing Service only monitored the toxicity levels in the decedent's blood; it did not choose the drug. Further, the decedent's doctors stated that they were aware of the effects of the drug. Plaintiff failed to present any testimony that, had the Dosing Service disseminated the toxicity information to the doctors, the doctors would have taken a different course of action. Accordingly, plaintiff did not establish proximate causation. *Locke, supra*. The court properly granted summary disposition on plaintiff's malpractice claim against defendants Sparrow Hospital and Sparrow Hospital Association.

Plaintiff also contends that, but for defendant Lansing Radiology's inaccurate conclusions about the CAT scan, an earlier diagnosis would have resulted. Plaintiff did not support this claim. Plaintiff's expert, Dr. Arnold Friedman, testified that it was beyond his expertise to say whether an abscess drainage, performed earlier, would have altered the decedent's condition or whether the failure to report the changes in the CAT scan proximately caused the decedent's death. *Locke, supra*. Plaintiff therefore failed to present evidence of proximate causation between the alleged breach by defendant Lansing Radiology Associates and the decedent's death.

Plaintiff similarly failed to present evidence of causation between the alleged breaches of the standard of care by defendants Hansen and Kramer and the decedent's death. Dell testified that Hansen and Kramer breached the standard of care in three ways. First, they failed to discontinue the administration of Gentamicin by October 16, 1989.<sup>2</sup> Dell maintained that the Gentamicin should have been discontinued by that date; nonetheless, he testified that he could not conclude that defendants' failure to stop the medication by that date caused the decedent's death. Further, defendants stopped giving the decedent Gentamicin on October 17, 1989. Dell stated that he could not determine the

damage incurred by the administration of Gentamicin for one additional day. Plaintiff's argument on this point thus fails.

Second, plaintiff's expert Dell contended that Hansen and Kramer breached the standard of care by failing to consult with a nephrologist by October 17, 1989.<sup>3</sup> Dell admitted that he was not a nephrologist and that he did not know what else could have been done to improve the decedent's condition. This expert testimony thus did not establish the proximate cause required to maintain plaintiff's action in medical malpractice.

Third, Dell stated that Hansen and Kramer should have informed the decedent as soon as they suspected that he would not recover. Hansen testified that he did not believe the decedent would die during treatment. Additionally, Kramer told the decedent on October 22, 1989, that she did not expect him to leave the hospital. Plaintiff provided no evidence that defendants' failure to inform the decedent of his impending death earlier was the proximate cause of his death. Plaintiff did not meet the threshold requirements of a medical malpractice action against defendants.

Finally, plaintiff contends that the circuit court erred in dismissing his breach of warranty and breach of contract claims pursuant to MCR 2.116(C)(10), arguing that defendants' motions were untimely filed such that defendants have waived their defenses to this claim. We disagree. First, the motion was properly brought pursuant to MCR 2.116(C)(10), rather than (C)(8). Contrary to plaintiff's argument, information outside of the pleadings was necessary for a determination of the motion. Second, this Court does not recognize breach of implied warranty and breach of implied contract claims in medical malpractice actions because such claims are redundant. *Awkerman v Tri-County Orthopedic Group, PC*, 143 Mich App 722, 725; 373 NW2d 204 (1985); *Grewe v Mt Clemens General Hospital*, 47 Mich App 111, 113-114; 209 NW2d 309 (1973). See also MCL 566.132(1)(g); MSA 26.922(1)(g) (reflecting that the absence of a written document about medical care is fatal to a claim of breach of contract in this context). *Powers v Peoples Community Hospital*, 183 Mich App 550, 553-554; 455 NW2d 371 (1990).

Affirmed.

/s/ Robert P. Young, Jr.  
/s/ Maura D. Corrigan  
/s/ Michael J. Callahan

<sup>1</sup> The parties dispute the date that the decedent received the final dose of Gentamicin. For the purposes of this opinion, we will assume that the last day that Gentamicin was administered was October 17.

<sup>2</sup> Kramer did not begin treating the decedent until October 21, 1989, or three days after the Gentamicin was discontinued, so plaintiff's argument only applies to Hansen.

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<sup>3</sup> Because Kramer began to treat the decedent on October 21, 1989, and a nephrologist consultation was ordered the next day, this argument is without merit regarding Kramer.