STATE OF MICHIGAN

COURT OF APPEALS

JANICE KEY,

Plaintiff-Appellant,

v

GREAT WEST LIFE & ANNUITY INSURANCE COMPANY, HUNTINGTON NATIONAL BANK, and DARCI ROBINSON,

Defendants-Appellees.

UNPUBLISHED
July 18, 2006

No. 267682
Kalamazoo Circuit Court
LC No. D04000463 CK

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants Great West Life and Annuity Insurance Company (Great West), Huntington National Bank (Huntington), and insurance agent Darci Robinson. This case arose after Great West denied plaintiff's death benefit claim because of a misrepresentation in her husband's application for life insurance. We affirm.

According to plaintiff, she dropped out of school in ninth grade. She met her husband in 1983. According to the death certificate, her husband had attended college for two years. Plaintiff stated her husband was first diagnosed with diabetes in 1990. When he was first diagnosed, he was instructed to control his diabetes with diet and exercise. Plaintiff married her husband in 1992 or 1993. He began taking medication for his diabetes in 1995. Plaintiff stated that her husband was treated continuously with medication thereafter. Medical records of office notes dated March 10, 1999, November 7, 2001, January 7, 2002, February 28, 2002, March 12, 2002, March 26, 2002, and April 10, 2002, indicated her husband sought treatment for his diabetes.

Plaintiff and her husband opened an account with Huntington in 2002. When plaintiff was making a deposit one day, she saw a pamphlet for life insurance. Plaintiff took the policy home, and she and her husband looked at it. They decided to apply, but plaintiff was confused about the following question in the application:

> As of the date you sign this application and <u>within the last 10 years</u> has a medical professional diagnosed you as having or treated you for:

* * *

Diabetes?

Plaintiff claimed she was confused because her husband had been treated for the last twelve or thirteen years, not the last ten years, so she asked Robinson how the question should be answered. According to plaintiff, Robinson said the question did not apply because it had been more than ten years since plaintiff's husband had been diagnosed. However, plaintiff acknowledged she did not discuss her husband's treatment or condition with Robinson; she explained that she thought treatment went together with diagnosis.

Robinson, on the other hand, had a slightly different version of events. She testified that either plaintiff or her husband (she could not recall which) stated the husband had diabetes but that it had been diagnosed thirteen years earlier, so the couple was unsure how to answer the question. She read the question together with the person; when they got to the second part of the question "or treated you for," the person asked what it meant. She claimed she told the person that if the husband was under a doctor's care, taking medication, or taking insulin in the last ten years, the person had to answer yes. She then asked if the husband was taking medication, and the person said no; she asked if the husband was controlling his diabetes with diet and exercise, and the person said yes.

Plaintiff stated she filled out the top portion of the application with respect to beneficiary information while her husband filled out the portion regarding medical history. She claimed that only the top portion was filled out when she spoke with Robinson. The application was purportedly signed by plaintiff's husband June 1, 2002; the question with respect to diabetes was checked no. Joan Anderson, a manager with Great West, indicated that a "yes" answer to any medical history question would result in a rejection of the simplified insurance application. Plaintiff testified that she and her husband applied for life insurance policies on each other with two other companies about the same time they applied for the instant policy. One company denied the application for insurance on her husband because of her husband's medical record. The other company issued a policy for $50,000, but cancelled the policy eight months before her husband died because of his medical records.

Plaintiff's husband died on July 5, 2003, as a result of subarachnoid hemorrhage.[1] Plaintiff submitted a claim to Great West for insurance benefits on July 17, 2003. Laverne Wilder, an associate manager for Great West, testified that she denied the claim for the reasons stated in the denial letter she sent plaintiff. The August 7, 2003 denial letter indicated that because plaintiff's husband had died within two years of obtaining the insurance policy, a routine investigation to verify the information in the application was performed. The investigation

[1] A subarachnoid hemorrhage is when blood collects beneath one of the membranes that covers the brain. A spontaneous subarachnoid hemorrhage occurs with little warning and is frequently caused by a ruptured aneurysm or blood vessel abnormality. Diabetes does not appear to be linked to this condition. http://www.healthatoz.com/healthatoz/Atoz/ency/subarachnoid_hemorrhage_pr.jsp.

revealed that plaintiff's husband had a history of diabetes for which he received treatment during the ten years before he applied for insurance. Thus, the question pertaining to diabetes in the application was inaccurately answered no; if it had been correctly answered yes, the policy would not have been issued.

After an unsuccessful attempt to appeal the denial through Great West, plaintiff filed the instant action for (I) a declaratory judgment that the question in the application was ambiguous, (II) professional negligence against Robinson, (III) vicarious liability against Huntington and Great West, (IV) breach of contract by Great West, and (V) misrepresentation. The trial court granted defendants summary disposition on all counts pursuant to MCR 2.116(C)(10). We review a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo, in a light most favorable to the nonmoving party, to determine whether admissible documentary evidence established an issue of material fact that would preclude summary disposition. *Harts v Farmers Ins Exch*, 461 Mich 1, 5; 597 NW2d 47 (1999).

Plaintiff first argues the court erred when it found undisputed testimony that plaintiff had not told her husband about her conversation with Robinson before he filled out the application. We disagree.

To prove negligence, a plaintiff must establish that (a) the defendant owed the plaintiff a duty, (b) the defendant breached the duty, (c) causation, and (d) damages. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 325; 661 NW2d 248 (2003). To establish causation, the plaintiff must prove both cause in fact and proximate cause. *Id.* at 326. Regarding an employer's liability for the negligent acts of its employees, a plaintiff must additionally prove (a) an employment relationship, and (b) the act was committed within the scope of employment. *Hersel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). With respect to plaintiff's vicarious liability count, the trial court essentially found that plaintiff was unable to prove causation. Although determination of causation is generally reserved for the trier of fact, a court may decide the issue as a matter of law if there is no dispute. *Holton, supra* at 326.

Plaintiff argues that she presented testimony contradicting the testimony the court found undisputed; therefore, an issue of material fact existed. However, plaintiff twice unequivocally stated that she and her husband did not discuss her conversation with Robinson. This testimony, standing alone, clearly supported the trial court's ruling. In contrast to the testimony cited by the court, the testimony relied on by plaintiff to establish that Robinson's purported advice caused her husband to check "no" was speculative. A party may not rely on speculation or conjecture to create an issue of material fact. *Ghaffari v Turner Constr (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005), citing *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998). Hence, the court did not err when it disregarded the speculative testimony and determined plaintiff was unable to prove causation. *Ghaffari, supra* at 464-465.

Given our resolution of plaintiff's first issue, we find the remaining issues moot and decline to address them. See *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 10-11; 651 NW2d 356 (2002) (failure to prove any element in a medical malpractice action is fatal), *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003) (an issue is moot when it becomes impossible to fashion a remedy).

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray