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STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BRORSON, Personal Representative of the ESTATE OF MARK BRORSON,

Plaintiff-Appellee,

v

M.A. SCHWARTZ OPTOMETRIST, INC., and SCOTT SCHWARTZ, O.D.,

Defendants-Appellants.

UNPUBLISHED
October 27, 2022

No. 357655
Macomb Circuit Court
LC No. 2020-000467-NH

Before: RONAYNE KRAUSE, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

In this wrongful-death action alleging medical malpractice and negligence, defendants appeal by leave granted[1] the trial court's order denying their motion for partial summary disposition. On appeal, defendants argue that the trial court erred in denying their motion because plaintiff failed to create a genuine issue of material fact whether defendants' conduct proximately caused the death of decedent Mark Brorson (hereafter "decedent"). We agree and remand for the trial court to dismiss plaintiff's wrongful-death claims.[2]

I. BACKGROUND

Decedent was 62 years old and wheelchair-bound due to an injury he sustained in 1978 while serving in the Air Force. Decedent was paraplegic and lacked both voluntary control over,

[1] See *Estate of Mark Brorson v M A Schwartz Optometrist, Inc*, unpublished order of the Court of Appeals, entered October 21, 2021 (Docket No. 357655).

[2] Although both plaintiff's negligence and medical malpractice claims mostly focused on defendants' alleged liability for decedent's suicide, we note that defendants only requested *partial* summary disposition specific to their liability for the death. We express no opinion as to any possible other remaining issues, such as defendants' potential liability for decedent's broken leg or medical treatment.

and sensation in, his legs. Defendant Schwartz is a licensed optometrist with an office in Sterling Heights. Plaintiff is decedent's brother and the personal representative of decedent's estate. On January 29, 2019, decedent went to an optometry appointment at defendant's office. During the eye examination, decedent slipped out of his wheelchair while attempting to maneuver himself to certain examination equipment, and he required assistance to help him back into his wheelchair. It would later turn out that decedent had suffered fractures to both of the bones in his lower left leg. However, presumably due to his lack of sensation in his legs and his prior confinement to the wheelchair, the injury went unnoticed by everyone present at the time. The rest of the optometry appointment was apparently completed without incident. Decedent did not express any concern to defendant at the time, and neither decedent nor plaintiff had any further contact with defendant thereafter.

After returning home, decedent and at least one of his in-home care providers noticed swelling in his leg that progressively got worse instead of better. Plaintiff testified that, other than being angry about the fall, decedent nevertheless seemed to be in good spirits. Nevertheless, despite having a longstanding dislike of being in hospitals, decedent went to the Emergency Department at Beaumont Hospital to determine what was wrong with his leg. Decedent was admitted to the hospital on February 1, 2019. X-rays revealed that he had broken his leg. Decedent was initially optimistic about coming home the next day. However, the injury to his leg was deemed inoperable, and his leg would need to be placed in a brace that would preclude him from getting around in his own home, so he would need to be kept longer and possibly placed in a rehabilitation or nursing home. Decedent became despondent and fatally shot himself the next day with his personal handgun that he had brought with him to the hospital.[3] According to plaintiff, the entire family and everyone else involved was "shocked" by decedent's suicide, because there was no reason to believe decedent would kill himself. Although he had a history of disliking being in hospitals, he had never previously harmed himself during his previous hospital stays.

Plaintiff subsequently filed a wrongful-death complaint, asserting, in relevant part, that defendant committed medical and ordinary negligence by failing to ensure decedent's safety at the January 2019 optometry appointment. Plaintiff further alleged that the negligence proximately caused decedent's death by suicide four days later. Following discovery, defendants moved for partial summary disposition under MCR 2.116(C)(10), arguing that they could not be held liable for decedent's death under either of plaintiff's legal theories because there was no proximate cause connecting defendants' conduct to the death.

The trial court held a hearing on defendants' motion and denied their request for partial summary disposition. Regarding proximate causation, the trial court found persuasive Justice LEVIN's opinion in *Adams v Nat'l Bank of Detroit*, 444 Mich 329; 508 NW2d 464 (1993), under which a "chain of causation" test was appropriate. The trial court reasoned that defendants had not challenged whether decedent's broken leg was reasonably foreseeable, so "the next question would be whether it was reasonably foreseeable that a quadriplegic person after learning of their

[3] According to plaintiff, decedent often carried his gun with him when he left his house, because it made him feel safer given his "inability to fend off potential harm because he was paralyzed."

leg being broken and the ensuing consequences such as complete loss of independence might cause [decedent] to be despondent and take his own life." The trial court reasoned that

> the evidence submitted suggests a straight line from the moments when [decedent] understood the gravity of his injury and the impact it would have on his leg to him intentionally taking his own life . . . [Decedent] had taken his own life upon understanding not just the nature of the injury, but the consequences of the injury and the impact that it could have on his life.

The court concluded that reasonable minds could differ on the foreseeability of decedent's suicide; in particular, a question of fact existed concerning whether "[decedent] would commit suicide after sustaining an injury that would completely upend his life."

Defendants then moved for reconsideration, arguing that the trial court erred in applying the chain-of-causation test from *Adams* because that test was not endorsed by a majority of the Court. Defendants also reasserted that, applying the proper legal standards for proximate cause, decedent's suicide was an unforeseeable act that was influenced by the passage of time and a superseding event out of defendants' control. The trial court disagreed with defendants and denied their request for reconsideration. The court reasoned that, under either the chain-of-causation standard advocated by Justice LEVIN in *Adams*, or under the higher standard advocated by Justice BRICKLEY's concurrence in *Adams*, the evidence was sufficient to raise a question of fact regarding whether decedent's suicide was reasonably foreseeable. This appeal followed.

II. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. Issues of law are also reviewed de novo. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008). "Proximate cause is usually a factual issue to be decided by the trier of fact, but if the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, the issue is one of law for the court." *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 393; 808 NW2d 240 (2010) (quotation marks and citation omitted). "In ruling on a motion for summary disposition, a court considers the evidence then available to it."[4] *Quinto v Cross & Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996).

[4] Notwithstanding the incongruity of plaintiff objecting to consideration of testimony provided by plaintiff's own proposed psychiatry expert, we therefore agree with plaintiff that it would be inappropriate for us to consider the deposition of Dr. Larry Kirstein, which was not taken until more than two months after the trial court denied defendants' motion for partial summary disposition. However, an affidavit provided by Dr. Kirstein may be properly considered.

III. GENERAL PRINCIPLES OF LAW

To establish a prima facie case of medical malpractice, a plaintiff must prove the following four elements:

> (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care. [*Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).]

" 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Id*.

Similarly, the elements for ordinary negligence are: "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 336 Mich App 616, 626; 971 NW2d 716 (2021). Accordingly, both ordinary negligence and medical malpractice claims require that the plaintiff establish proximate cause for the injuries sustained. *Ray v Swager*, 501 Mich 52, 63; 903 NW2d 366 (2017); *Craig*, 471 Mich at 86-87. We therefore need not consider at this time whether plaintiff's claims properly sound in ordinary negligence or in medical malpractice. Cf. *Meyers v Rieck*, ___ Mich ___, ___; ___ NW2d ___ (2022) (Docket No. 162094), slip op at pp 6-8. For either kind of claim, the courts must examine whether the consequences of an act were foreseeable and whether the defendant should be held legally responsible for those consequences. *Ray*, 501 Mich at 63; *Craig*, 471 Mich at 87. "In order for negligence to be the proximate cause of an injury, the injury must be the natural and probable consequence of a negligent act or omission, which under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as a result of his negligent act." *Dawe*, 289 Mich App at 393-394 (quotation marks and citation omitted).

IV. FORESEEABILITY

Defendants argue that proximate cause is lacking as a matter of law because decedent's suicide was unforeseeable because the suicide was not "the natural and probable consequence of" their allegedly negligent conduct. They further contend that decedent's suicide would still have been unforeseeable even if they had known his injury would require placement in a rehabilitation facility or nursing home. They emphasize that not even decedent's close family ever expected his suicide, even after he expressed unhappiness at not being able to return home from the hospital. Indeed, plaintiff conceded at his deposition that everyone was "shocked" by decedent's suicide and that even though decedent was known to be unhappy about hospital stays, there was no reason to expect decedent to kill himself.

Furthermore, because defendants' arguments were generally raised in the trial court, we disagree with plaintiff's argument that they are not preserved for appeal. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227-228; 964 NW2d 809 (2020).

Defendants argue that, because decedent's suicide was not even foreseeable to decedent's family, it could not be foreseeable to them. Defendants assert that the suicide's unforeseeability is further supported by numerous evaluations conducted at Beaumont after the optometrist appointment and shortly before his death showing no risks of depression or suicide. Although defendants concede that they could be liable for any unique injuries resulting from a plaintiff's preexisting physical conditions, e.g., decedent's paraplegia causing his leg to break more easily than expected, they maintain that decedent's mental distress causing his suicide was neither a physical condition nor did it exist until after decedent's interactions with defendants.

As an initial matter, plaintiff correctly observes that defendants must take the plaintiff as they find him, including any particular underlying susceptibilities to injury. *Wilkinson v Lee*, 463 Mich 388, 394-397; 617 NW2d 305 (2000). Furthermore, there is no reason why any such susceptibilities may only be physical. Here, however, the evidence is that, notwithstanding decedent's physical condition, he had no underlying mental susceptibilities. Indeed, plaintiff's own proposed psychiatry expert, Dr. Larry Kirstein, averred that although decedent placed "a high level of importance in maintaining independence and living in his own home, decedent remained "well-adjusted" and "functioning" until after his admission to Beaumont Hospital. According to Dr. Kirstein, it was apparently the prospect of entering an extended care facility or nursing home that created the "overwhelming despondence that impelled him to a suicide death rather than submitting to the custodial care of a rehabilitation facility." Furthermore, critically, the injury suffered must be "the general kind of harm the defendant negligently risked." *Ray*, 501 Mich at 64 (quotation omitted). The "eggshell plaintiff" rule thus pertains to the extent of the harm suffered rather than the type of harm suffered.

In *Hickey v Zezulka*, 439 Mich 408, 415-416; 487 NW2d 106 (1992), superseded in part by statute on other grounds as stated in *Lamp v Reynolds*, 249 Mich App 591 (2002), the decedent committed suicide by hanging himself with his belt and socks while he was incarcerated in a police department holding cell, after the arresting officer violated multiple department policies specifically intended to prevent self-harm by an inmate by failing to remove the decedent's personal articles and failing to check on him. Under those unusual circumstances, which included the existence of a special duty of care and the violation of policies specifically intended to prevent the very harm that occurred, our Supreme Court found the decedent's suicide foreseeable. *Hickey*, 439 Mich at 439-440. In contrast, in *Johnson v City of Detroit*, 457 Mich 695, 711-712; 579 NW2d 895 (1998), our Supreme Court determined that a jail inmate's suicide was not foreseeable because the officers had been given no indication that the decedent was suicidal (opinion of MALLETT, C.J., joined in relevant part by TAYLOR, BOYLE, and WEAVER, J.J.). Although not binding upon us, it appears that Justice RILEY succinctly explained the general rule: that a person's suicide is not actionable in negligence unless the defendant had assumed some special duty to protect the decedent from suicide specifically, or possibly unless the defendant had some special knowledge that the decedent was a specific suicide risk. See *Hickey*, 439 Mich at 447-448 (RILEY, J., concurring in part).

Certainly, it is a matter of common, everyday knowledge that falls, even from short distances, can cause serious injuries. It is also easy to imagine how a person with, for example, a blood-clotting disorder or similar medical vulnerability could even die as a result of a fall. Similarly, it is equally easy to imagine how an actor might be liable for a person's suicide as a result of, for example, intentional infliction of emotional distress. In other words, decedent's

broken leg and ensuing need for rehabilitation treatment could be foreseeable. However, especially given that even decedent's family was shocked by his suicide, there is simply no way defendants should have expected decedent to *kill himself* as a result of the fall. Therefore, we agree with defendants that decedent's suicide was an unforeseeable result of defendants' conduct and, therefore, that proximate cause is lacking as a matter of law. The suicide was not a "natural and probable consequence" of the alleged negligence "which under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as a result of his negligent act." See *Dawe*, 289 Mich App at 393-394. The trial court erred by examining whether it was reasonably foreseeable that decedent would commit suicide after learning that he could not immediately return home. Instead, the trial court should have considered whether decedent's suicide was a foreseeable result of defendants' alleged failure to provide a safe eye exam.

V. THE "*ADAMS* TEST"

The parties also dispute the trial court's reliance upon the chain-of-causation test from *Adams*. We agree with defendants that the trial court erred.

In *Adams*, the decedent had been employed by defendant the National Bank of Detroit (NBD). A temporary employee whose last name also happened to have been Adams made fraudulent withdrawals from a customer's account, and in the ensuing police investigation, a NBD employee improperly—for a multitude of reasons—supplied the police with the decedent's name. As a result, the decedent was arrested and arraigned for a crime he did not commit. Even after NBD discovered its mistake, it essentially closed ranks against the decedent, who, as a result of the damage done to his life, eventually committed suicide. See *Adams*, 444 Mich at 332-333 (LEVIN, J.), 344-349 (MALLETT, J.), 356-360 (BRICKLEY, J.). At issue in *Adams* was not NBD's liability for negligence, but rather whether the exclusive remedy provision of the Workers' Disability Compensation Act precluded the decedent's estate from maintaining an intentional-tort claim against NBD. *Id*. at 332 (LEVIN, J.), 355 (BRICKLEY, J.).

No opinion in *Adams* was signed by more than three Justices. Justice LEVIN, joined by Justice BOYLE in a separate concurrence, would have held that the causation element for an intentional tort should be determined by the chain-of-causation test set forth in *Hammons v Highland Park Police*, 421 Mich 1; 364 NW2d 575 (1984). *Adams*, 444 Mich at 342-343 (LEVIN, J., and BOYLE, J.). Justice BRICKLEY, joined by Justices GRIFFIN and RILEY, addressed whether NBD had the requisite "state of mind" to commit an intentional tort and concluded that it did not. *Adams*, 444 Mich at 383 (Brickley, J.). Justice MALLETT, joined by Chief Justice CAVANAGH, did not explicitly accept either test, but rather they held that even under Justice BRICKLEY's test, the evidence was sufficient to establish an intentional tort. *Adams*, 444 Mich at 343-344, 354-355 (MALLETT, J.). Notably underpinning *all* of the opinions is that *Adams* was a workers' compensation case and addressed whether the plaintiff had established an *intentional* tort.

Hammons was also a workers' compensation case in which the decedent committed suicide because he was denied career advancement that he strongly desired. *Hammons*, 421 Mich at 4-6. The Court considered whether there was "an adequate causal nexus between the work-related injury and the suicide." *Id*. at 9. The Court adopted the proposition that if the work-related injury *directly* causes the decedent to become insane or delirious, *and* that insanity or delirium causes the

decedent to commit suicide, then an adequate causal nexus has been established. *Id*. at 12-15. However, importantly,

> where the resulting insanity is such as to cause suicide through a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicide act even though the choice is dominated and ruled by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury. [*Id*. at 12-13 (quotation omitted).]

Notwithstanding the evidence that decedent was "extremely despondent," there is no evidence that he lacked conscious volition or knowledge of the consequences of shooting himself. Therefore, decedent was not insane within the meaning of *Hammons*. Even presuming it made sense to apply a workers' compensation intentional-tort case,[5] the "chain of causation" test establishes that the decedent's tragic suicide *was* a superseding cause of his death.

We note that two other cases discussed by the parties seem unhelpful. Defendants rely on *Teal v Prasad*, 283 Mich App 384; 772 NW2d 57 (2009). In *Teal*, the decedent was being treated for depression by the defendants following a suicide attempt, and the defendants were being sued for prematurely discharging the decedent from a hospital without a proper diagnosis and treatment plan, following which the decedent killed himself. *Teal*, 283 Mich App at 386-389. This Court observed that the defendants could, conceivably, have locked the decedent in an empty room for the rest of his life, thereby precluding the decedent from killing himself. *Id*. at 392. However, there was "scant evidence" of the decedent's mental state when he was discharged from the hospital, and the plaintiff simply "presented no evidence indicating how [the decedent's] discharge, whether premature or not, triggered a chain of events leading to [the decedent's] suicide." *Id*. at 393-394. Therefore, the Court found that the plaintiff had not established "but-for" causation." *Id*. at 395. Here, defendants cannot be liable for the decedent's death because it was unforeseeable and a superseding cause, but plaintiff has established "but-for" causation. *Teal* is therefore inapposite.

In the context of governmental liability, this Court held that a decedent's suicide was "the one most immediate, efficient, and direct cause of" the decedent's death, thereby precluding a finding of proximate causation within the meaning of MCL 691.1407(2)(c). *Cooper v Washtenaw Co*, 270 Mich App 506, 508-511; 715 NW2d 908 (2006). However, *Cooper* is of little value here, because under the statute, the question was *the* proximate cause of the decedent's death. *Id*. In the kind of proceeding before us, "there may be more than one proximate cause of an injury." *Dawe*, 289 Mich App at 394 (quotation omitted); see also *Ray*, 501 Mich at 64-65. Again, plaintiffs have established "but-for" causation, so *Cooper* is also inapposite.

[5] We recognize that although there was no single majority opinion in *Adams*, the "chain of causation" test in *Hammons* was adopted by a majority of the Court. Nevertheless, the applicability of that test to a negligence claim is questionable.

However, "but for" causation does not, by itself, establish proximate causation. *Ray*, 501 Mich at 63-72; *Craig*, 471 Mich at 86-87. Under the circumstances, we agree with defendants that decedent's suicide constituted an unforeseeable superseding event that precludes defendants' liability for decedent's death. We reiterate that we express no opinion regarding any other liability defendants might potentially have in this matter arising out of decedent's fall. However, the trial court erred by failing to grant defendants' motion for partial summary disposition.

Reversed and remanded. We do not retain jurisdiction. Defendants, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Kathleen Jansen
/s/ Christopher M. Murray