STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2145

Jeremiah Bouley, as Trustee
for the Heirs of Delight L. Bouley, Deceased,
Appellant,

vs.

Jeffrey C. Windschitl, M.D., et al.,
Respondents.

Filed January 8, 2008
Affirmed
Hudson, Judge

Stearns County District Court
File No. C9-04-4436

David G. Johnson, Robert K. Randall, Borkon, Ramstead, Mariani, Fishman & Carp, Ltd., Suite 100, Parkdale I, 5401 Gamble Drive, Minneapolis, Minnesota 55416 (for appellant)

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Considered and decided by Randall, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant challenges the district court's summary judgment in this medical-malpractice action, alleging that respondents hospital and physician failed to evaluate

decedent adequately and admit her under a 72-hour hold under Minn. Stat. § 253B.05, subd. 2(a) (2002). Appellant argues that (1) the district court improperly used a *Frye-Mack* analysis to evaluate appellant's expert opinions; (2) if the court properly used a *Frye-Mack* analysis, it abused its discretion by not ordering an evidentiary hearing, and (3) there was a factual dispute as to causation precluding summary judgment. Respondents assert that they are immune from suit under the immunity provision of section 253B. We conclude that because the district court did not use the *Frye-Mack* test and did not err by granting summary judgment on the basis of lack of causation, we need not reach the immunity issue, and we affirm.

FACTS

At about 2:35 a.m. on March 18, 2003, a St. Cloud police officer was dispatched to a Walgreen's drug store after decedent Delight Bouley reported a suspicious vehicle in the store parking lot that appeared to be "casing" other cars. The officer could not find such a car. At about 11:45 p.m. the same day, the same officer and another officer responded to a second call from Bouley at the parking lot at the Quality Inn. Bouley, appearing "very emotional," told police that she had seen another gray car in the McDonald's parking lot and she believed her former husband had hired someone to kill her. The officer could not locate the car and learned from dispatch that Bouley's only Sherburne County police contact was a 2002 mental-health call. Police contacted Bouley's 17-year-old daughter, who told them that Bouley had been diagnosed with bipolar disease and was allergic to prescribed medication, but she made no comments suggesting that Bouley was suicidal or might harm someone.

The officers decided to transport Bouley to St. Cloud Hospital for further mental-health evaluation. Bouley eventually cooperated, making no comments suggesting that she might harm herself or others. She asked the officers to call a close friend, who told police that Bouley believed her ex-husband was trying to harm her, had been previously treated at a mental hospital, was possibly bipolar, and had an allergic reaction to medication which produced hallucinations.

At the hospital, one of the officers applied for a 72-hour hold under Minn. Stat. § 253B.05, subd. 2(a) (2002), alleging a belief that Bouley was "a mentally ill person in imminent danger of causing injury to herself or others if not immediately restrained." The application recited Bouley's beliefs that her ex-husband was trying to kill her and that she was being followed, her daughter's statements of bipolar diagnosis, and medication allergies.

An emergency-room nurse placed Bouley in a room at 1:25 a.m. and spoke briefly to one of the officers. The nurse interviewed Bouley, who stated that she had fibromyalgia and a mental-health reaction to prednisone, but no other mental-health history. The nurse initially noted on Bouley's chart a history of bipolar disease, but crossed out the notation and wrote "error" when Bouley denied it. The nurse then spoke to Jeffrey Windschitl, M.D., an emergency-room physician, for two to five minutes. She told him that there was a new patient who had been brought in by police officers who had questions about her mental-health history, that the nurse "had the impression [Bouley] was cooperative and honest," and that no hallucinations or psychosis were noted.

Dr. Windschitl testified that although he read the emergency-hold application, it was not usual procedure to speak to the police officers who bring in a patient unless he believed it necessary. He did not remember speaking to the nurse but normally read a nurse's notes before evaluating a patient. He recalled a small part of his visit with Bouley, including that she was "very pleasant" and "made very good eye contact." Dr. Windschitl's report notes Bouley's "history of previous psychiatric illness with admission to Fairview," as well as her statements that "her psychosis was prednisone-induced" and that "[s]he had been tried on multiple medications and had bad reactions to these." He notes a past medical history of fibromyalgia, allergies, and asthma, and her denial of "any hallucinations, specifically visual or auditory," or "any suicidal intent." Dr. Windschitl reports that he "d[id] not believe [Bouley was] psychotic"; that he spoke on the phone with her friend, who denied that Bouley had a history of psychosis; and that he did "not believe [Bouley] require[d] a hold at this time." He directed that the hospital call a cab to take Bouley to her hotel and that she follow up with her regular physician. Bouley was discharged at 2:10 a.m.

Bouley's friend testified that she talked to Bouley in the hospital and that she appeared "coherent" but "clearly upset"; the friend asked Bouley to call her the next morning. When the friend did not hear from Bouley at that time, she called the Holiday Inn, where Bouley said her van was, and discovered Bouley had not checked in. About midmorning she received a call from a St. Cloud women's shelter, asking her to come pick up Bouley, who had spent the night at the shelter. As the two women drove in Bouley's van toward the Twin Cities, the friend noticed that Bouley was "upset,

somewhat distracted," and still fearful about someone following her, but there were no concerns Bouley would hurt herself or another person.

Bouley called a clinic and was able to schedule an emergency mental-health appointment for the next day. She spent that night at the friend's townhome in Anoka, requesting to sleep in the same room with her friend. The next morning Bouley's friend found that Bouley had emptied the kitchen cupboards and turned up the thermostat to 80 degrees. The friend went to her own doctor's appointment, but called Bouley from her cell-phone and discovered that Bouley had summoned the police. The friend convinced the police to leave because Bouley had an appointment that day with her own doctor. The friend then accompanied Bouley to her mental-health provider, leaving after speaking to the provider because she felt Bouley would get the help she needed. A psychologist at the clinic noted that Bouley had "some paranoid thinking" but "continue[d] to deny any suicidal or homicidal ideation." The psychologist thought "she had a delusional disorder of the paranoid type but was not ill enough to warrant hospitalization nor emergency hold." Bouley was given samples of Risperdal and set up for appointments for follow-up visits the next week. Clinic personnel allowed Bouley to drive home in her van.

At about 9:25 p.m. the same day, at least four witnesses saw Bouley drive her van at 70-80 miles per hour in an erratic manner on a county road near Otsego, pulling in front of oncoming traffic and returning to her lane at the last possible minute. Several cars had to take evasive action to avoid a collision. Bouley was killed when she collided head-on with another vehicle.

Appellant Jeremiah Bouley, as trustee for Bouley's heirs, filed a complaint alleging that (1) Dr. Windschitl negligently failed to fully evaluate Bouley under Minn. Stat. § 253B.05, subd. 3(b) (2002); failed to admit her; and failed to have her further evaluated; and (2) St. Cloud Hospital negligently failed to communicate Bouley's mental-health status to Windschitl and failed to accurately report the necessary facts presented by the officers. Appellant supported his medical-malpractice claim with answers to interrogatories indicating testimony from three expert witnesses that Windschitl and the hospital, through its employees, violated applicable standards of care in dealing with Bouley.

The district court granted respondents' motion for summary judgment, determining that plaintiff's expert opinions that Bouley was in a manic state at the time of her accident were not supported by the evidence and that because Bouley was alone at the time of the accident and they had never examined Bouley, their opinions were "mere speculation." The district court concluded that "[s]ince Plaintiff's expert opinions are speculative and will not assist the trier of fact, and since Plaintiff has failed to establish any real links between Dr. Windschitl's conduct and Bouley's accident, Plaintiff is unable to demonstrate the causation element of his medical malpractice claim." This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995); *see* Minn. R. Civ. P.

56.03 (setting forth district court standard for summary judgment). No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quotation omitted). This court views the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But a party must rely on more than mere assertions to resist summary judgment. *DLH, Inc*. at 71.

I

Appellant argues that the district court improperly required appellant's expert affidavits to "explain away" all possible causes for the harm suffered by Bouley, confusing the standard for admissibility of evidence under the *Frye-Mack* evidentiary test with the standard of proof for direct causation. The *Frye-Mack* standard governs "the admissibility of novel scientific evidence in Minnesota" and requires that when such evidence is offered, "the district court must determine whether it is generally accepted in the relevant scientific community [and whether it has] foundational reliability." *Goeb v. Tharaldson*, 615 N.W.2d 800, 810, 814 (Minn. 2000) (citations omitted). The *Frye-Mack* test does not apply if the proffered evidence is not derived from emerging scientific techniques. *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 528 (Minn. 2007).

The district court, in its memorandum of law supporting summary judgment, cited this court's opinion in *McDonough v. Allina Health System*, 685 N.W.2d 688 (Minn. App. 2004). In *McDonough*, this court upheld the exclusion of expert opinion based on its failure to meet the *Frye-Mack* standard. *Id.* at 696. But this court also determined

that, after exclusion of that testimony and absent additional competent expert testimony, causation had not been established, and summary judgment was appropriate as a matter of law. *Id.* at 697. In this case, the district court did not rule appellant's expert opinions inadmissible, but concluded that the record did not demonstrate causation as a matter of law, based in part on appellant's "fail[ure] to establish any real links between Dr. Windschitl's conduct and Bouley's accident." Further, the district court cited other cases on causation that did not mention the *Frye-Mack* standard. We therefore conclude that the district court did not improperly use the *Frye-Mack* test to determine causation.

II

Appellant argues that the district court improperly granted summary judgment on the issue of causation. To establish a prima facie case of medical malpractice, a plaintiff must show by expert testimony the applicable standard of care, that the defendant breached that standard, and that the breach was a direct cause of the plaintiff's injuries. *Fabio*, 504 N.W.2d at 761. "A 'direct cause' is a cause that had a substantial part in bringing about" the accident, harm, or injury. 4 *Minnesota Practice,* CIVJIG 27.10 (2006). Minnesota law uses the terms "direct cause," "proximate cause," and "substantial factor" interchangeably. *Id.*, cmt. *See Lestico v. Kuehner*, 204 Minn. 125, 133, 283 N.W. 122, 127 (1938) (equating "proximate cause" with "substantial factor" in assessing negligence when plaintiff was injured in car accident). Although causation is generally a fact question for the jury, "where reasonable minds can arrive at only one conclusion," proximate cause becomes a question of law and may be disposed of by summary judgment. *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995). The standard for

causation in medical-malpractice actions requires that the plaintiff establish that it was "more probable than not that his or her injury was a result of the defendant health care provider's negligence." *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992).

The district court granted summary judgment based on lack of a showing of causation. The district court determined that the opinions of appellant's experts, William Orr, Ph.D., M.D., and John Cronin, M.D., were speculative and would not assist the trier of fact. The court noted that the appellant's experts opined that Bouley was in a manic state at the time of her accident and supported that theory by stating that "it is common for persons in a manic state to drive erratically." But the court observed that there was a lack of evidence to show that Bouley was in a manic state at the time of the accident and that appellant had "failed to establish any real links between Dr. Windschitl's conduct and Bouley's accident."

The district court, by implication, determined that appellant's expert-review affidavits failed to meet the statutory requirements for those affidavits in medical-malpractice actions. *See* Minn. Stat. § 145.682 (2006). Expert-review affidavits must set forth "an outline of the chain of causation that allegedly resulted in damage to [the plaintiff]." *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 193 (Minn. 1990). Conclusory and broad statements of causation are not sufficient. *Anderson v. Rengachary*, 608 N.W.2d 843, 847–48 (Minn. 2000); *see also Stroud v. Hennepin County Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996) (holding that expert affidavit did not meet statutory requirements when it furnished only broad, conclusory statements on causation

and "[did] not provide an outline of the chain of causation between the alleged violation of the standard of care and the claimed damages").

Appellant's expert opinions claim that respondents breached the standard of care by failing to properly evaluate or hold Bouley until she could obtain further mental-health treatment. Dr. Orr opined that Dr. Windschitl breached the standard of care by releasing Bouley in a cab to go back to her vehicle, rather than arranging for her to be with another person until she could see her own mental-health provider the next day, or by offering in-patient psychiatric care. Plaintiff's expert Dr. John Cronin opined that the purpose of issuing a hold would have been to put Bouley in the hands of mental-health professionals.

But the record shows that, after Bouley was released from the hospital early in the morning of March 18, she spent most of the next day with a friend, who delivered Bouley to her own mental-health provider on March 20. The friend did not allow Bouley to drive alone, and, apart from going to her own doctor's appointment, did not leave Bouley until she believed that Bouley was safe in the care of her own provider. Therefore, any negligence in evaluating or releasing Bouley unsupervised on the night of March 18 could be a direct cause of Bouley's death only if appellant could establish that Bouley died as a result of a delay in diagnosis or treatment occurring before she was delivered to her own mental-health provider on March 20. Appellant's experts' opinions fail to show such a link and thus fail to establish a genuine factual dispute regarding whether it is more probable than not that such a delay caused her death.

Further, any causal link between respondents' conduct and Bouley's death is attenuated because of the nearly 48-hour delay between Bouley's release from the

hospital and her accident. Finally, appellant asserts that Bouley would not have been out driving had it not been for respondents' negligence. This theory, however, relies on the "but-for" causation test, which has been rejected by Minnesota courts. *Harpster v. Hetherington*, 512 N.W.2d 585, 586 (Minn. 1994). We conclude that the district court did not err by determining that appellant has failed to establish a genuine issue of material fact on the issue of causation.

III

Respondents argue, for the first time on appeal, that they are immune from suit under the Minnesota Treatment and Commitment Act for their acts of failing to place Bouley under a 72-hour emergency hold. *See* Minn. Stat. § 253B.23, subd. 4 (2006). We reject appellant's argument that respondents are precluded from raising an immunity defense before this court. *See Behrens v. Pelletier*, 516 U.S. 299, 311, 116 S. Ct. 834, 841 (1996) (holding that despite a prior appeal, if a party seeks summary judgment on immunity grounds and the court denies the motion, the party can take an immediate interlocutory appeal); *see also Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004) (stating unlike an affirmative defense, the defense of immunity is not waived if it is not included in the answer). But because we affirm the district court's summary judgment on its stated basis of lack of causation, we need not consider whether an immunity defense applies to bar appellant's claim.

Affirmed.

Dated: _____ _____
Judge Natalie E. Hudson