85-LW-3518 (10th)

Thomas L. Holcomb and Carol S. Holcomb, Individually and as Legal Representatives of the Estate of Jessica Ann Holcomb, Deceased, Plaintiffs-Appellants

v.

Paul R. Gutheil, D.O., Marvin M. Sloin, D.O., Doctors Hospital, Surgery and Gynecology, Inc., and Family Practice-West, Inc., Defendants-Appellees.

No. 84AP-661 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on September 19, 1985.

APPEAL from the Franklin County Common Pleas Court.

MESSRS. DAGGER, JOHNSTON, OGILVIE, CHARLES & HAMPSON, and MR. STEVEN S. NELSON, for appellants.

MESSRS. PORTER, WRIGHT, MORRIS & ARTHUR, MR. CRAIG D. BARCLAY and MR. DARRELL R. SHEPARD, for appellees Paul R. Gutheil, D.O., and Family Practice-West, Inc.

MESSRS. WILES, DOUCHER, VAN BUREN, BOYLE & CASEY, and MR. DANIEL G. WILES, for appellees Marvin Sloin, D.O., and Surgery & Gynecology, Inc.

MESSRS. BAKER & HOSTETLER, MR. STEPHEN J. VERGAMINI and MR. CHARLES J. CHASTANG, for appellee Doctors Hospital.

OPINION

MOYER, J.

This matter is before us on the appeal of plaintiffs, Thomas L. and Carol S. Holcomb (Holcomb), from a summary judgment in favor of defendants, Dr. Paul R. Gutheil (Dr. Gutheil) and his professional corporation, Family Practice-West, Inc. (Family Practice).

Plaintiffs assert the following assignment of error:

> "The trial court abused its discretion and invaded the province of the jury when it entered its judgment that Paul R. Gutheil, D.O. and Family Practice-West, Inc. are entitled to judgment as a matter of law and that there are no genuine issues of material fact."

Facts appear from the record as follows. Plaintiff Carol Holcomb first visited Dr. Gutheil December 1, 1980, when she was approximately six months pregnant. Dr. Gutheil, a family practice physician, estimated her delivery date to be March 21, 1981.

Dr. Gutheil ordered an ultrasound test for Carol Holcomb February 25, 1981, from which the delivery date could have been estimated to be March 15, 1981.

Carol Holcomb had been diagnosed by others as a diabetic in May 1980. Dr. Gutheil anticipated that Carol Holcomb would deliver a large, "macrosomatic" baby, a typical complication encountered by pregnant diabetic mothers.

An affidavit by one Dr. Glick indicated that blood tests should be made to monitor blood-sugar levels of pregnant diabetic women on a weekly basis. Gutheil never ordered blood tests for Carol Holcomb until March 26, 1981.

On March 30, 1981, Dr. Gutheil ordered a nonstress test for Carol Holcomb at Doctors Hospital. On that date,

obstetric-gynecology specialists at the hospital admitted her to the hospital, noting among other things that she was overdue, diabetic, and possibly carrying a macrosomatic infant.

At the time of her admission, a Dr. Sloin, one of the specialists, became involved in managing her treatment. At some time on March 30, 1981, her case was considered to be possibly a "high-risk" pregnancy. Dr. Gutheil, a general practitioner, lacked privileges at the hospital to handle all activities involved in a complicated delivery. Therefore, Dr. Sloin's involvement was necessary to Carol Holcomb's care, which potentially involved a Caesarean section.

Carol Holcomb began labor March 30, 1981, and the labor was augmented with medication. Dr. Gutheil mechanically ruptured the amniotic membrane at approximately 8:50 p.m. A Caesarean section was contemplated, and a consent form signed at 9:45 p.m. Dr. Sloin decided, thereafter, to make a vaginal delivery. The child became stuck, a number of procedures were performed, and the child was ultimately delivered at 10:51 p.m. March 30, 1981, in extremely guarded condition. The child died the next morning.

Plaintiff has produced the affidavit of Dr. Glick, seeking to establish that negligence by Dr. Gutheil in the care of Carol Holcomb contributed to or resulted in the death of Holcomb's infant.

Dr. Gutheil asserted in defense that, even if there was negligence in his prenatal care of Carol Holcomb, it was not the proximate cause of the death of the Holcomb's infant. Rather, he asserts that Dr. Sloin's efforts were the conscious, responsible and intervening cause of the child's death, relieving Dr. Gutheil of responsibility.

Ohio Rules of Civil Procedure, Civ. R. 56(C), permits the granting of summary judgment if the evidence shows that there is:

> "*** [N]o genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ***. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. ***"

The summary judgment in this case was premature. Construing the evidence most strongly in the plaintiff's favor, reasonable minds can differ as to the material factual conclusion of proximate cause. While the sequence of events appears to be essentially undisputed in the stipulated record, the factual conclusions to be drawn therefrom are not so clear.

The trial court evidently felt that Dr. Sloin's role was as a conscious, responsible, intervening cause of the infant's death. Construing the evidence most strongly in favor of the plaintiff, however, it is equally possible to find: that the sole cause of death was not intervening negligence by Dr. Sloin; that Dr. Gutheil was negligent in his prenatal care of Carol Holcomb by permitting her to go post-term with a possibly macrosomatic infant; that Dr. Gutheil's negligence continued at the time of birth of the child by placing Carol Holcomb and her child in a position of danger; and that Dr. Gutheil's negligence therefore continued and combined with Dr. Sloin's negligence. It is also possible to conclude that joint management of Holcomb's care occurred, in that Dr. Gutheil mechanically ruptured the amniotic membrane after Carol Holcomb's admission to the hospital and continued his supervision of her care, being present in the delivery room; and that Dr. Gutheil's contractual responsibility, as attending physician, to care for Carol Holcomb never terminated. Such determinations of fact and proximate cause are ordinarily for the trier of fact under proper instructions from the court. Here, reasonable minds can differ on the conclusions to be drawn from the evidence, and the issue of proximate cause should be submitted to the jury. Lawrence v. Toledo Terminal Rd. Co. (1950), 154 Ohio St. 335.

Therefore, because Civ. R. 56(C) requires the resolution of all doubts in favor of the nonmovant, the factual conclusion on the issue of proximate cause is for the jury, and the grant of summary judgment was improper.

Accordingly, the plaintiffs' assignment of error is sustained, the judgment of the trial court is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed and remanded.

WHITESIDE and STILLMAN, JJ., concur.

STILLMAN, J., retired, of the Eighth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.