IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL DISHMON, individually and as Executor of the Estate of JAMES L. DISHMON,	)	
Plaintiffs,	)	
v.	)	C.A. No. 06C-12-231 DCS
PASQUALE FUCCI, M.D. and BERNIE SCHNEIDER, PA-C	)	
Defendants.	)	

Upon Consideration of Defendants' Motion for Summary Judgment
Motion ***GRANTED***

May 16, 2013

ORDER

STREETT, J.

Appearances:

Bradley J. Goewert, Esquire, Wilmington, Delaware
Lorenza A. Wolhar, Esquire, Wilmington, Delaware
Attorneys for Defendants

Michael M. Bednash, Esquire, Christiana, Delaware
Attorney for Plaintiffs

Defendants Pasquale Fucci, M.D. ("Dr. Fucci") and Bernie Schneider, PA-C ("Schneider") have moved pursuant to Superior Court Civil Rule 59(e) for reargument of the Court's March 6, 2013 denial of summary judgment. Reargument is sought as to whether there is no genuine issue of material fact that Defendants' negligence caused Plaintiff James L. Dishmon's (the "decedent") death in 2004, and thus, Defendants are entitled to summary judgment as a matter of law.

Having considered the motion, the response, and oral argument at the April 19, 2013 hearing for reconsideration, the motion for summary judgment is granted.

Factual and Procedural Background

The decedent was admitted to Hockessin Hills nursing home on December 27, 2004.[1] Decedent, age 86, suffered from several medical conditions, including heart problems, diabetes, renal failure, and urinary tract infections.[2] On December 31, 2004, the decedent had a cardiac arrest[3] and died that day of acute coronary ischemia and coronary artery disease.[4]

On December 28, 2006, the decedent's son, Michael Dishmon ("Dishmon"), on his own behalf and as Executor of the decedent's estate, initiated a wrongful

[1] Compl. ¶ 1-2 (Dec. 28, 2006).

[2] *Id.*

[3] Pltfs.' Expert Disclosure Report, ¶ 4 (Sept. 26, 2012). The complaint does not reference what happened to the decedent that ultimately caused his death. In his expert disclosure report, Dr. Muncie states that the decedent "had a cardiac arrest on December 31, 2004."

[4] Compl. at ¶ 1.

death and survival action alleging medical negligence against the Defendants.[5] Dishmon alleged that the Defendants put a Do Not Resuscitate ("DNR") order into place contrary to his (Dishmon's) instructions, and consequently, no efforts were made to resuscitate the decedent when he suffered cardiac arrest.[6]

Plaintiffs' medical expert, Herman Lee Muncie, Jr., M.D. ("Dr. Muncie"), executed an Affidavit of Merit pursuant to 18 *Del. C.* § 6853 on January 10, 2007.[7] Dr. Muncie also prepared an expert disclosure report dated September 26, 2012. In the report, Dr. Muncie opined that the Defendants deviated from the standard of care by putting into place a DNR order for the decedent without the consent of either the decedent or his surrogate. Dr. Muncie further stated that the DNR order prevented the decedent from receiving resuscitative efforts upon his cardiac arrest.

On February 15, 2013, Defendants filed a motion for summary judgment on the basis that Dr. Muncie failed to address causation in his expert disclosure report. At oral argument on March 6, 2013,[8] Plaintiffs' counsel argued that the Plaintiffs had satisfied causation based on Dr. Muncie's deposition testimony which had taken place on March 1, 2013. Plaintiffs asserted that Dr. Muncie's deposition

[5] The claims of James L. Dishmon, Jr., Linda Davis, Patricia Miller, and Vicky Kennard against Defendants were dismissed pursuant to the parties' stipulation on January 9, 2013.

[6] Compl. at ¶ 2.

[7] *See Dishmon v. Fucci*, 32 A.3d 338, 343 (Del. 2011) (finding Dr. Muncie qualified to give expert testimony regarding the standard of care despite the absence of a curriculum vitae).

[8] The Court permitted Plaintiffs' counsel to present argument despite the fact that Plaintiffs had not filed a written response.

testimony addressed causation and Defendants' motion for summary judgment was denied. Defendants' counsel reserved the right to file a motion for reargument after the deposition transcript became available.[9]

Defendants filed their motion for reargument on March 13, 2013. On April 2, 2013, the Court requested that Plaintiffs' counsel either inform the Court that Plaintiffs did not contest Defendants' motion for reargument or file a brief on the issues raised in the motion. Plaintiffs submitted a response on April 4, 2013, and on April 12, 2013, Defendants filed a reply. A hearing was held on April 19, 2013.

Parties' Contentions

In their motion for reargument, Defendants maintain that Plaintiffs have not produced expert medical testimony that there was a chance greater than fifty percent that Defendants' alleged negligence in putting a DNR order in place resulted in the decedent's death, and therefore, Plaintiffs have failed to prove proximate causation.[10] In addition, Defendants assert that the loss of chance of survival doctrine, which Plaintiffs recently introduced into the case, is inapplicable in wrongful death actions and that Plaintiffs failed to timely and properly plead that doctrine's applicability in their survival action.[11]

[9] Defs.' Mtn. n. 11 (Mar. 13, 2013) ("The transcript had not been received at the time of the hearing.")

[10] *Id.* at ¶ 11.

[11] *Id.* at ¶ 12.

Plaintiffs responded that the decedent's chance of survival was reduced as a result of Defendants' negligence and that Dr. Muncie's deposition testimony indicates that the decedent had a four percent chance of survival if resuscitative efforts had been made.[12] Plaintiffs posit that the decedent had a zero percent chance of survival without resuscitative efforts.[13]

In reply, Defendants assert that Plaintiffs must prove to a reasonable degree of medical probability that the decedent suffered from a loss of chance of survival or an increased risk of harm as a result of the Defendants' alleged negligence.[14] They contend that Dr. Muncie's opinion amounted to "possibilities" rather than "probabilities" and argue that Dr. Muncie failed to link statistical evidence to the facts of this case.[15]

Standard of Review

A motion for reargument, pursuant to Superior Court Rule 59(e), "will be granted only if the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[16] The motion is not intended as a rehashing

[12] Pls.' Resp. ¶ 4-5 (Apr. 4, 2013).

[13] *Id.* at ¶ 3.

[14] Defs.' Reply ¶ 4 (Apr. 12, 2013).

[15] *Id.* at ¶ 4.

[16] *Fisher v. Beckles*, 2012 WL 5509621, *2 (Del. Super. Oct. 24, 2012) (internal quotation marks omitted).

of arguments already addressed by the Court or as a means of raising a new argument.[17]

Discussion

Upon consideration of the parties' arguments and review of the recently acquired deposition of Dr. Muncie, the Court finds that Plaintiffs have failed to provide expert testimony as to causation, an essential element of their case. Accordingly, Defendants are entitled to judgment in their favor.[18]

Summary judgment is granted only when there are no genuine issues of material fact after there has been adequate time for discovery and the moving party is entitled to summary judgment as a matter of law.[19] The Court views evidence in the light most favorable to the nonmoving party.[20] "Where the nonmoving party bears the ultimate burden of proof but has not made a sufficient showing on an essential element of the case, the moving party is entitled to judgment as a matter of law."[21]

Before liability can be established in a medical negligence action, a plaintiff must present expert medical testimony as to "(1) the applicable standard of care,

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[17] *Independence Mall, Inc. v. Wahl*, 2013 WL 871309, *1 (Del. Super. Jan. 17, 2013).

[18] *See O'Donald v. McConnell*, 2004 WL 1965034, *1 (Del. Aug. 19, 2004) (affirming Superior Court's grant of summary judgment in favor of defendant physician where plaintiff failed to provide expert causation evidence).

[19] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991); *Green v. Weiner*, 766 A.2d 492, 492 (Del. 2001).

[20] *Edwards v. Fam. Practice Assocs.*, 798 A.2d 1059, 1062 (Del. Super. 2002).

[21] *O'Donald*, 2004 WL 1965034 at *1.

(2) the alleged deviation from that standard, and (3) the causal link between the deviation and the alleged injury."[22] Experts are required to testify to a degree of reasonable medical probability regarding all three elements.[23] The plaintiff is required to provide expert medical testimony as to the standard of care, causation,[24] and "credible evidence of each of these elements from which a reasonable jury could find in their favor."[25] In the absence of credible medical testimony that establishes negligence or an applicable statutory exception, a defendant will be entitled to summary judgment.[26]

Here, Dr. Muncie, who is qualified to provide expert testimony as to the applicable standards of care for Dr. Fucci and Physician Assistant Schneider, opined in his expert disclosure report that both Defendants deviated from their respective standard of care. Therefore, the sole issue before the Court is whether the Plaintiffs have met their burden as to causation. The Court finds that Plaintiffs have not produced expert medical testimony that the Defendants' alleged

[22] *Simmons v. Bay Health Med. Ctr.*, 2007 WL 4237723, *1 (Del. Super. Nov. 30, 2007).

[23] *Kardos v. Harrison*, 980 A.2d 1014, 1017-1018 (Del. 2009) (citing *Floray v. State*, 720 A.2d 784, 786 (Del. 1998)).

[24] 18 *Del. C.* § 6853(e); *See also O'Donald*, 2004 WL 1965034 at *1.

[25] *Green v. Weiner*, 766 A.2d at 495.

[26] *Davis v. St. Francis Hosp.*, 2002 WL 31357894, *2 (Del. Super. Oct. 17, 2002).

negligence proximately caused the decedent's death. Consequently, because Plaintiffs have not satisfied causation, they cannot prevail in this action.[27]

Under Delaware law, a plaintiff alleging negligence must prove "a reasonable connection" between the defendant's negligent act or omission and the resulting injury or death by a preponderance of the evidence to satisfy the causation element.[28] It is well settled that Delaware adheres to the "but for" standard in determining proximate causation.[29] Proximate cause is defined as "one which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."[30] In a medical negligence action, "[t]he plaintiff's medical expert must provide direct testimony demonstrating the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injuries."[31] This means that the plaintiff is required to put forth "expert testimony to show that the

[27] *See Valentine v. Mark*, 2004 WL 2419131, *2 (Del. Super. Oct. 20, 2004) (granting summary judgment for plaintiff's failure to establish causation where plaintiff's expert's deposition testimony that he did not believe that the alleged breach in the standard of care caused a material change in life expectancy), *aff'd* 2005 WL 1123370 (Del. May 10, 2005).

[28] *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991).

[29] *Reddy v. PMA Ins. Co.*, 20 A.3d 1281, 1290 (Del. 2011).

[30] *Id.* (quoting *Duphily v. Del. Elec. Co-op, Inc.*, 662 A.2d 821, 829 (Del. 1995)).

[31] *Henry v. Fisher*, 2010 WL 1427354, *1 (Del. Super. Apr. 7, 2010).

defendant's action breached a duty of care in a manner that proximately caused the plaintiff's injury."[32]

In the instant case, the deposition testimony of Plaintiffs' sole medical expert did not demonstrate a causal connection between Defendants' alleged negligence (exercise of a DNR order) and the decedent's death. Relevant portions of Dr. Muncie's deposition testimony are:

> Defense Counsel: Do you have an opinion that [the decedent] would have survived had resuscitative effort been initiated at Hockessin Hills following [the decedent's] cardiac arrest?
>
> ….
>
> Dr. Muncie: My opinion is that any patient or any person that arrests in any location statistically has, at best, ten percent maybe even up to twenty percent, if it is a witness bystander arrest of surviving. So most patients who arrest actually don't survive. And so, in that circumstances, [the decedent] would have fallen into the category that, again, not many patients do survive cardiac arrest.
>
> Defense Counsel: So it's your opinion that more likely than not [the decedent] would not have survived any attempts at resuscitation on December 31, 2004?
>
> Dr. Muncie: Correct. Statistically he would – his likelihood of surviving was small.[33]
>
> ….
>
> Plaintiffs' Counsel: You testified that efforts at resuscitation typically are successful … about ten to twenty percent of the time?

[32] *Davis v. St. Francis Hosp.*, 2002 WL 31357894 at *3. *See also Guinan v. A.I. duPont Hosp. for Children*, 597 F.Supp.2d 517 (E.D. Pa. 2009) (finding Delaware law requires that the plaintiff's medical expert must opine that the defendant's deviation from the standard of care was the "but for" cause of the plaintiff's injury).

[33] Dep. of Herbert L. Muncie, M.D., 8 (Mar. 1, 2013) (hereinafter "Dep.").

> Dr. Muncie: Correct. Optimistic would be those numbers, yes.
>
> Plaintiffs' Counsel: How about at a nursing home setting such as with [the decedent], do those numbers change?
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> Dr. Muncie: In [a nursing home] setting, those numbers are probably less, maybe four percent … survive their cardiac or respiratory arrest.[34]
>
> ….
>
> Defense Counsel: Would that number be even lower in terms of [the decedent's] comorbid conditions?
>
> Dr. Muncie: I don't know if it would be any lower. I mean, it's hard to know. I mean, those are – that number reflects a general ill population. And, again, that is not very successful. But, again, he – he had a number of comorbidities, so would it have made it, again, not likely that he was going to survive a cardiac or respiratory arrest.[35]

The basis for Plaintiffs' medical negligence claim is that Defendants improperly put a DNR order in place and thereby failed to resuscitate the decedent. Plaintiffs allege that no resuscitative efforts were made after the decedent went into cardiac arrest because Dr. Fucci and Schneider negligently put a DNR order into place. Thus, Plaintiffs' medical expert must testify to a reasonable degree of medical probability that, but for the DNR order, the decedent would have likely survived his cardiac arrest had resuscitative efforts been made. However, Dr. Muncie candidly stated that most patients do not survive cardiac arrest and that the

[34] Dep. at 31-32.

[35] Dep. at 32.

decedent fell into that category. Moreover, Dr. Muncie testified that it was unlikely that the decedent would have survived cardiac arrest had resuscitative efforts been made. Dr. Muncie explained that it was unlikely that the decedent would have survived, had resuscitative efforts been made, due to the number of comorbid conditions suffered by the decedent at the time.

Plaintiffs' expert was unable to establish causation as required by statute.[36] Plaintiffs have failed to show that resuscitative efforts would have made any difference when the decedent went into cardiac arrest.

Plaintiffs also recently raised loss of chance as an additional theory in its case. Because Delaware does not recognize loss of chance as a viable theory in wrongful death actions, Plaintiffs cannot prevail under a loss of chance theory in their wrongful death claim.[37] However, it is recognized in a survival action.[38]

Under the loss of chance doctrine, "a plaintiff is permitted to recover damages for the diminution of that person's chance of survival."[39] Unlike in a wrongful death action where the statute requires that the defendant's negligence

[36] *See Valentine v. Mark*, 2004 WL 2419131 at *2.

[37] *See U.S. v. Cumberbatch*, 647 A.2d 1098, 1103 (Del. 1994) (holding that Delaware does not recognize the loss of chance doctrine in a wrongful death action based on medical negligence because the statute requires that the negligence cause the death).

[38] *See Edwards v. Fam. Practice Assocs.*, 798 A.2d at 1061 (finding that, where medical negligence was not a cause of death, the plaintiffs could raise loss of chance of survival even though plaintiffs were unable to maintain their wrongful death action).

[39] *Kardos v. Harrison*, 980 A.2d at 1018 (citing *U.S. v. Anderson*, 669 A.2d 73 (Del. 1995)).

cause the death,[40] in a survival action, "it is the reduced possibility of survival which is the basis of the claim, not the death itself."[41]

In the instant case, Plaintiffs raised the loss of chance doctrine in 2013, several years after its original 2006 complaint. However, Delaware law requires that a claim of medical negligence, including the loss of chance theory, must be pleaded with particularity.[42] In the instant case, the loss of chance theory was not mentioned in the original pleading and Plaintiffs have not moved to amend the original pleading. Moreover, although Plaintiffs cite *United States v. Anderson*[43] to support the proposition that it is sufficient for them to show that the decedent's chance of survival was reduced as a result of Defendants' negligence, *Anderson* is distinguishable because the "increased risk" theory (which is analogous to the loss of chance theory) was mentioned in the plaintiff's complaint.

Furthermore, in order to prevail under a loss of chance of survival theory, Plaintiffs are required to demonstrate, through expert testimony, to a reasonable medical probability that the decedent's chance of survival was reduced as a result of the Defendants' negligence.[44] Dr. Muncie did not testify that the decedent's

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[40] *U.S. v. Anderson*, 669 A.2d at76 (citing *U.S. v. Cumberbatch*, 647 A.2d at 1103).

[41] *U.S. v. Cumberbatch*, 647 A.2d at 1103.

[42] *Shively v. Klein*, 551 A.2d 41, 44 (Del. 1988) (finding that a loss of chance theory "must be pleaded with particularity and taken up at the pretrial conference so that the opposing side has the appropriate knowledge of the issue and the court has the chance to consider it before trial").

[43] *U.S. v. Anderson*, 669 A.2d at78.

[44] *Kardos*, 980 A.2d at 1018-1019 (affirming Superior Court's judgment in favor of the defendant where the plaintiff's expert testimony as to whether earlier intervention would have prolonged the plaintiff's life was

chance of survival was reduced by the Defendants' putting a DNR order into place, he testified as to the general unlikely survival rate of nursing home patients who suffer cardiac arrest, and he did not offer an opinion regarding the decedent's life expectancy.[45] Here, Plaintiffs did not properly plead (and have not moved to amend their complaint) the loss of chance theory as part of their survival claim, and Dr. Muncie did not testify to a degree of reasonable medical probability that the Defendants' alleged negligence reduced the likelihood that the decedent would have survived. Hence, Plaintiffs cannot prevail under their survival claim on the loss of chance theory.[46]

ACCORDINGLY, Defendants' motion for reargument is ***GRANTED***. The Court ***VACATES*** its March 6, 2013 order denying Defendants' motion for summary judgment and hereby ***GRANTS*** summary judgment in Defendants' favor.

IT IS SO ORDERED.

/s/ Diane Clarke Streett
Judge Diane Clarke Street

"speculative" and failed to satisfy the reasonable medical probability standard); *Pignataro v. George & Lynch, Inc.*, 2013 WL 1088333, *5 (Del. Super. Mar. 13, 2013) ("It was in *Kardos* that the expert's inability to offer a last chance survival opinion with reasonable medical probability, which was fatal"). *See also O'Donald*, 2004 WL 1965034 at FN 7. ("Even under a 'loss of chance' theory … [the plaintiff] would have been required to provide testimony that the alleged failure to diagnose was at least a 'substantial cause' of his loss of chance of survival").

[45] Dep. at 24.

[46] *See Parker v. Wilk*, 2006 WL 337041, *1 (Del. Super. Feb. 13, 2006) (granting summary judgment where Plaintiffs claim of loss of chance of survival was not established by expert medical testimony as to causation and damages), *aff'd* 2006 WL 2846347 (Del. Oct. 3, 2006).