EFiled: Jan 21 2014 11:05AM EST
Filing ID 54873486
Case Number 548,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BARBARA A. MAMMARELLA, Plaintiff-Below/ Appellant, v. ALAN B. EVANTASH, M.D., ALL ABOUT WOMEN OF CHRISTIANA CARE, INC. and CHRISTINE W. MAYNARD, M.D. Defendants-Below/ Appellees.	)	C. A. No. 548, 2013 On appeal from the Superior Court of the State of Delaware in and for New Castle County C.A. No.: N11C-12-242 VLR

APPELLEE ALAN B. EVANTASH, M.D.'S ANSWERING BRIEF

MORRIS JAMES LLP

Dennis D. Ferri (I.D. 94)
Allyson Britton DiRocco (I.D. 4830)
500 Delaware Avenue, Ste. 1500
P.O. Box 2306
Wilmington, DE 19899-2306
(302) 888-6800
dferri@morrisjames.com
adirocco@morrisjames.com
Attorneys for Defendant-Below/Appellee
Alan B. Evantash, M.D.

Dated: January 21, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This medical negligence lawsuit was filed by Plaintiff-below/Appellant Barbara Mammarella ("Mrs. Mammarella" or "Appellant") on December 28, 2011 against Defendants-below/Appellees All About Women, Christine Maynard, and Alan Evantash, M.D. (collectively, "Appellees"). Appellant alleged that Appellees failed to diagnose her breast cancer shortly after her October 16, 2009 right breast ultrasound and digital mammogram revealed a new 6 mm mass. Appellant was diagnosed with breast cancer on May 7, 2010. Appellant contends that the alleged medical negligence[1] caused a seven month delay in her diagnosis.

After the conclusion of David D. Biggs, M.D.'s ("Dr. Biggs") trial deposition, Appellees filed a joint Motion for Summary Judgment on July 18, 2013. The trial judge denied the motion based upon Appellant's counsel's representations to the Court that his expert, Dr. Biggs, would offer an opinion that the delay in diagnosis caused a change in Mrs. Mammarella's treatment options, namely, that she would have to undergo chemotherapy, and radiation was no longer an option. (A-148-49.)

---

[1] Specifically, Appellant alleged that Appellees breached the standard of care when they: (1) failed to recognize that the mass should have been biopsied; (2) failed to order a biopsy of the mass; (3) failed to treat, surgically or otherwise, the mass; and (4) erroneously advised Appellant that the mass was benign and that she was cancer free and that she should be monitored in one (1) year. It is important to note that the Complaint contains an allegation that she developed metastatic cancer as a result of the delay. However, Appellant has never been diagnosed with metastatic cancer, and therefore, that assertion is inaccurate. (B-3-4.)

Dr. Biggs, Appellant's sole causation expert,[2] was unavailable for trial. His trial deposition was taken on September 3, 2013. Trial was scheduled to begin on September 23, 2013.

Appellees filed a joint Motion for Judgment as a Matter of Law (the "Motion"). Since Dr. Biggs' trial deposition was taken prior to trial, the trial judge was able to consider all of the medical expert testimony that would be submitted to the jury on the issue of causation. The trial judge granted the Motion on September 19, 2013 and found that no reasonable jury could find in favor of the Appellant on the medical causation issue. Appellant appeals the trial judge's decision. This is Appellee Dr. Evantash's Answering Brief.

[2] (*See* A-117, A-147-48.)

SUMMARY OF ARGUMENT

1. Denied. The trial judge properly granted Appellees' motion for judgment as a matter of law because no reasonable jury could find in favor of Appellant on the medical causation issue.

STATEMENT OF FACTS

Dr. Evantash adopts the Statement of Facts set forth in Appellees All About Women and Christine W. Maynard, M.D.'s Answering Brief.

ARGUMENT

I. THE TRIAL JUDGE PROPERLY GRANTED APPELLEES' MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE NO REASONABLE JURY COULD FIND IN FAVOR OF THE APPELLANT ON THE MEDICAL CAUSATION ISSUE

A. Question Presented

Did the Superior Court err when it granted Appellees' Motion for Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50(a)(1)? (A-110-163.)[3]

B. Scope of Review

"This Court's standard of review of a Superior Court ruling on a motion for judgment as a matter of law is 'whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the non-moving party, raise an issue of material fact for consideration by the jury."' *Savage v. Anagnostakos*, 765 A.2d 952, *1 (Del. 2000) (TABLE) (*quoting Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998)); *see also Kardos v. Harrison, D.O.*, 980 A.2d 1014, 1016-1017 (Del. 2009).

C. Merits of Argument

Title 18, section 6853(e) of the Delaware Code, provides, in pertinent part: "No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of

[3] "A" refers to the Appendix filed with Appellant's Opening Brief.

care in the specific circumstances of the case *and as to the causation of the alleged personal injury or death.*" 18 *Del. C.* § 6853(e) (emphasis added).

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

Dishmon v. Fucci, 2013 WL 2151695, at *2 (Del. Super. May 16, 2013) (internal citations and quotations omitted); *see also Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (*citing Russell v. Kanaga*, 571 A.2d 724, 732 (Del. 1990)) (emphasis added).

Under Delaware law, "when an expert offers a medical opinion it should be stated in terms of 'a reasonable medical probability' or 'a reasonable medical certainty.'" *O'Riley v. Rogers*, 69 A.3d 1007, 1011 (Del. 2013) (citation omitted). "A doctor cannot base his expert medical opinion on speculation or conjecture . . . 'a doctor's testimony that a certain thing is possible is no evidence at all.' A doctor's opinion about 'what is possible is no more valid than the jury's own speculation as to what is or is not possible.'" *Id.* (citations omitted.) (emphasis omitted.)

Appellant contends that the alleged negligent delay in diagnosis caused the following types of harm to Mrs. Mammarella:

- A 33% increase in size of a malignant tumor;
- A risk of death over the next years at 17% based on the size and characteristics of the tumor;
- The disqualification of radiation therapy as a practical mode of treatment;
- The rigors and debilitating effects of the recommended chemotherapy regimen; and
- The accompanying "psychological impact" on the patient of fear, dread and apprehension.[4]

(O.B.[5] at 10-11.) In the pretrial stipulation, Appellant alleged, "Because of the increase in size [of the nodule in her breast] Plaintiff had to undergo chemotherapy treatment and lost the option of partial breast irradiation treatment which would have been available to her in October, 2009. The side effects of chemotherapy were more disfiguring, disabling, painful and fatiguing than irradiation." (B-6.)

---

[4] Appellant cites Mrs. Mammarella's testimony concerning her own psychological impact as evidence concerning causation. However, plaintiff's own testimony is insufficient to meet the requirements to present *medical expert testimony* regarding causation pursuant to 18 *Del. C.* § 6853(e).

[5] "O.B." refers to the Appellant's Opening Brief.

Appellant identified Mrs. Mammarella's treating oncologist, Dr. Biggs, as her sole expert on the issue of causation.[6] Dr. Biggs was unavailable for trial, and his videotaped trial deposition was taken prior to trial. His trial deposition testimony fails to support Appellant's claims that her treatment options changed as a result of the alleged medical negligence, or any of Appellant's other theories of causation. During his trial deposition, Dr. Biggs provided the following pertinent testimony:

> Q. Okay. At this stage, the meeting on May 13th, were you and the team in a position to recommend whole breast radiation versus partial breast, or was that still an open issue at that point?
>
> A. I think that was still an open issue because you have to have negative margins, you have to have a complete excision, and in this case it would have involved an informed consent to participate in the clinical trial. So no, I think it was -- it was not a decision that was going to be made that day, as I recall.

(B-39-40 at 16:23-17:10.)

* * *

> Q. There has -- there will be testimony in trial, and we talked about it then, that Mrs. Mammarella was under the impression that if the tumor on biopsy turned out to be less than 8 -- 8 centimeters or less in

---

[6] Appellant also disclosed as experts Emily Penman, M.D., F.A.C.S., David Powers, M.D., Lawrence Milner, M.D., and Gabriella D'Andrea, M.D. However, Appellant's counsel withdrew Dr. D'Andrea as a witness. Dr. Penman testified that she had no medical opinions supporting plaintiff's claim that the alleged delay in diagnosis had any effect on her chances of survival or treatment options. (B-33 at 14-15, B-34 at 21-23.) Dr. Powers testified that he was not qualified to provide causation opinions. (B-27-29 at 161-67.) Dr. Milner testified that he would not be providing any causation opinions. (B-31 at 24.) Appellant's counsel also represented to the Court that Dr. Biggs would be his sole expert on causation. (A-117, A-147-48.)

size, that she was a candidate for radiation treatment instead of chemotherapy first. Is that a correct statement?

A. You'd have to ask her what her impression was. My goal in that initial meeting is to try to provide a general framework for understanding how we make decisions, and so that was my goal. If that came across as being very specific, that was unintentional.

(B-42-43 at 28:23-29:11.)

* * *

Q. So any discussions you had with a patient prior to that June 8th, 2010 consultation would have been in tentative or speculative terms. Is that fair to say?

A. Yes, correct.

(B-44 at 33:20-24.)

* * *

Q. If one were to ask you in your medical opinion what this patient's treatment would have been prior to her definitive diagnosis, could you give an opinion to that effect?

A. No.

Q. Okay. And so if one were to ask you what this patient's treatment would have been or what treatment she would have required in October 2009, you couldn't state that, correct?

A. Correct.

Q. Okay. You would be speculating if you gave that information, correct?

A. Correct.

(*Id.* at 35:6-19.)

* * *

Q. And do you have any opinion as to how big Mrs. Mammarella's tumor would have been in October 2009 based on the imaging studies alone?

A. The -- no.

Q. And so you can't tell the jury how big Mrs. Mammarella's tumor was in October 2009, correct?

A. Correct.

(*Id.* at 36:10-18.)

* * *

Q. You had testified at your deposition that to a reasonable degree of medical probability you could not determine what her risk of metastatic disease was at 6 millimeters as opposed to 1.1 centimeters. Do you stand by that testimony?

A. Yes. And that's what I was trying to get at. You know, we're talking about categories of disease. You know, if -- if you ask is there a difference between, you know, a tumor that's over 2 centimeters in size and one that's 5 millimeters in size, well, maybe so. But when you start, like, trying to dissect it down to millimeters of difference, you're asking more of the data than is there. And so no, I don't think anybody can tell you that.

Q. Okay. So is it fair to say when you're talking about differences of a few millimeters here and there, determining the risk of metastatic disease is sort of a speculative endeavor, it's guesswork? Is that a yes?

A. Yes. I mean, it's -- if you're trying to talk about the difference of a few millimeters, yeah.

(B-45 at 39:4-40:4.)

* * *

> Q. And you had testified at your deposition that, to your knowledge, Mrs. Mammarella hasn't sustained any permanent side effects as a result of her chemotherapy treatment. Do you stand by that testimony today?
>
> A. Yes.
>
> Q. I just want to make sure that we all understand your testimony today. You can't tell the jury to a reasonable degree of medical probability what Mrs. Mammarella's treatment would have been in October 2009. Is that correct?
>
> A. Correct.

(B-45-46 at 40:24- 41:12.)

The trial judge correctly found that "[a]t no point is the doctor ever able to say within a reasonable degree of medical probability that the prognosis for treatment would have changed had she been diagnosed in October of 2009." (A-161.) The trial judge further found that Dr. Biggs' testimony was speculative, and he was unable to state with reasonable medical probability whether defendant's failure to diagnose in October of 2009 had caused Mrs. Mammarella to have different treatment options. (A-161-62.) The trial judge properly concluded that Dr. Biggs' testimony was insufficient to establish proximate cause. (*Id.*) Since Dr. Biggs' testimony would be the only expert testimony concerning proximate cause to be submitted to the jury, the trial judge properly granted Appellees' Motion and dismissed the case. (*Id.*)

The trial judge relied, in part, upon *Kardos v. Harrison, D.O.*, in granting the Motion. 980 A.2d 1014. In *Kardos*, the plaintiff brought a medical negligence claim against a physician alleging that the patient's chance of survival from endometrial cancer was reduced as a consequence of the physician's alleged negligence. The plaintiff's sole causation expert was videotaped in a trial deposition prior to trial. The plaintiff's causation expert "was unable to state with reasonable medical probability whether [the defendant-physician's] failure to refer the decedent to an oncologist in a timely manner had caused her lost chance of survival." *Id.* at 1019. The plaintiff failed to prove causation, which was an element on which she carried the burden of proof. Therefore, this Court affirmed the Superior Court's decision to grant the defendant's motion for judgment as a matter of law. *Id.*

Savage v. Anagnostakos is also a similar case to the present one. 765 A.2d 952 (Del. 2000) (TABLE). In *Savage*, the plaintiff sued the defendant-physician for medical negligence and alleged that she was injured as a result of the defendant's delay in performing surgery. This Court held that the plaintiff was required to show that the deviation in the standard of care caused the plaintiff's injuries. In order to prove causation, the plaintiff "needed a medical expert to conclude that the injuries, more likely than not, would have diminished sooner but for the delay in surgery." *Id.* at *1. This Court held that the "Superior Court did

not err in concluding that no expert medical expert testimony as to 'causation of the alleged personal injury or death' was presented." The Superior Court's decision to grant the defendant's motion for a directed verdict was affirmed based on the absence of medical expert testimony regarding causation. *Id.*

Superior Court Civil Rule 50 (a) (1) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Appellant did not meet her burden to provide expert testimony concerning causation to a reasonable medical probability. Dr. Biggs was not able to testify to a reasonable degree of medical probability that the alleged delay in diagnosis of Mrs. Mammarella's breast cancer from October of 2009 to May of 2010 had any effect on her prognosis or treatment. Appellant failed to comply with 18 *Del. C.* § 6853. The trial judge properly granted Appellees' Motion because there is no legally sufficient evidentiary basis for a reasonable jury to find that the Appellees' alleged conduct had any effect on her prognosis or treatment pursuant to Superior Court Rule 50 (a) (1). When the evidence and all reasonable inferences are drawn in a light most favorable to Appellant, there are no issues of material fact to be considered by the jury.

Appellant contends that the Affidavit of Merit he filed in this case supports his claim of negligence and provides evidence of causation. This argument is flawed for several reasons. First, filing an Affidavit of Merit to initiate a medical malpractice action is very different from presenting medical expert opinions to support a claim of negligence at trial. An Affidavit of Merit is insufficient for Appellant to clear the hurdle of 18 *Del. C.* § 6853(e). Appellant relies on *Dishmon v. Fucci*, however that case is distinguishable because it dealt with issues related to a motion to dismiss the complaint rather than a motion for judgment as a matter of law. A plaintiff's burden is much more arduous in requiring the presentation of medical expert opinions to support her claims at the trial phase of a lawsuit in accordance with 18 *Del. C.* § 6853(e) compared to providing an affidavit of merit when filing a complaint.

Furthermore, the physician who signed the Appellant's Affidavit of Merit is David Powers, M.D. ("Dr. Powers"). Dr. Powers is a gynecologist and does not have expertise related to chemotherapy, radiation, and other treatment options for cancer. Dr. Powers testified in his deposition that he is not qualified to provide an opinion about the change in prognosis for breast cancer treatment, and that he would defer to Mrs. Mammarella's treating oncologist (Dr. Biggs) concerning her treatment and prognosis. (B-27-29 at 161- 167.) Therefore, Appellant's Affidavit

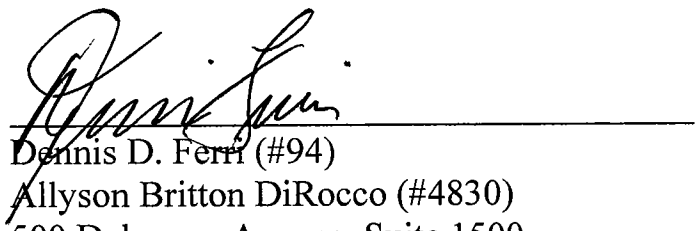
of Merit signed by Dr. Powers is insufficient to establish causation to a reasonable degree of medical probability under 18 *Del. C.* § 6853(e).

Appellant contends that the present case implicates the issue of increased risk of harm. (O. B. at 13.) Appellant made no such claims or allegations concerning increased risk of harm in her Complaint or the Pretrial Stipulation and is, therefore, barred from raising the issue at this stage. (B-1-5, B-6-25.) Furthermore, as set forth in *Kardos* (discussed above), even in cases where increased risk of harm is at issue, the plaintiff has the burden to provide medical expert testimony to a reasonable degree of medical certainly concerning causation. If that requirement is not met, then the case should be dismissed, as was properly done in this case.

CONCLUSION

For the foregoing reasons set forth above, the Superior Court's decision should be affirmed.

MORRIS JAMES LLP



Dennis D. Ferri (#94)
Allyson Britton DiRocco (#4830)
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899-2306
(302) 888-6800
Attorneys for Defendant Below/Appellee
Alan Evantash, M.D.

Dated: January 21, 2014