IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELIZABETH RIZZUTO, Individually and in her capacity as surviving spouse of CHARLES RIZZUTO, JR., deceased, and as personal representative of the estate of CHARLES RIZZUTO, JR.,	)	No. 62,2015
Plaintiffs Below, Appellant,	)	
v.	)	
DELAWARE CLINICAL AND LABORATORY PHYSICIANS, P.A., a Delaware Corporation,	)	Appeal from the Superior Court of the State of Delaware in and for New Castle County
Defendant Below, Appellees.	)	C.A. No. N10C-12-156 DCS

DEFENDANT BELOW, APPELLEE DELAWARE CLINICAL LABORATORY PHYSICIANS, P.A.,'S ANSWERING BRIEF ON APPEAL

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Dated: May 15, 2015

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NATURE OF PROCEEDINGS

This is a claim for medical negligence filed by Elizabeth Rizzuto as the surviving spouse and representative of the Estate of Charles Rizzuto, Jr. (hereinafter "Plaintiff") against Delaware Clinical and Laboratory Physicians, P.A. (hereinafter, "DCLP" or "Defendant"). Plaintiff alleged Defendant committed medical negligence on January 20, 2009 when its staff medical technologist failed to properly support Charles Rizzuto, Jr., and allowed him to fall causing a fracture to the right hip, pain and suffering and loss of spousal services. (A24). Defendant denied all claims of negligence, causation and damages and asserted Plaintiff's injury was the result of comparative negligence or naturally occurring medical processes. (B1-7).

In the Pre Trial Stipulation, Plaintiff designated one medical expert witness, Elise Parker, R.N. (B18).

Trial proceeded on July 21, 2014. Plaintiff concluded her case after presenting testimony from Ms. Parker, Frank Beardell, M.D., and Elizabeth Rizzuto. (A42).

Defendant moved for judgment as a matter of law at the close of Plaintiff's evidence on the grounds that her medical expert, Elise Parker, R.N., did not establish a violation of the standard of care or that any alleged negligence caused Plaintiff's injury required under 18 Del. C. § 6853(e). (A105-A108). Plaintiff

opposed, arguing in part that it was obvious that the fall caused the fractured hip and the breach caused the fall. (A106). The Court denied Defendant's motion. (A107-108).

Defendant again moved for judgment as a matter of law again at the close of evidence, which Plaintiff opposed and the Court denied. (A196-198). After the Court gave appropriate instructions, the jury returned a verdict in favor of Plaintiff. (B24-63, A37-39). Defendant moved for judgment notwithstanding the verdict which was denied. (A197).

On August 1, 2014, Defendant renewed its Motion for Judgement as a Matter of Law or in the Alternative, a Motion for New Trial and Remittitur. (B67-143). Plaintiff opposed. (B186-203). The parties briefed and argued their positions on October 3, 2014. (A209-250).

By written decision on February 3, 2015, the Court granted Defendant's Renewed Motion for Judgment as a Matter of Law and conditionally denied Defendant's Motion for a New Trial, or in the alternative, Remittur. (Ex. A to Opening Br.).

Plaintiff appealed the entry of judgment to the Supreme Court on February 10, 2015, and filed her Opening Brief with Appendix on April 13, 2015. This is Defendant Below, Appellee Delaware Clinical and Laboratory Physicians, P.A.'s Answering Brief on Appeal.

SUMMARY OF ARGUMENT

[Prefatory Paragraph] Denied. The trial Court did not commit reversible error in granting judgment as a matter of law for Defendant when Plaintiff failed to produce medical expert testimony establishing a causal connection between the alleged deviation in care and injury, and none of the exceptions for the evidentiary requirement under 18 Del. C. § 6853 apply.

1. Denied. Liability and causation were disputed at trial and admitting that the fall caused some injury does not equate to admitting the cause of the fall or make a prima facie case on the issue of causation.

2. Denied. Plaintiff's sole medical expert, Eileen Parker, R.N., did not give any opinion on the cause of the fall. Testimony of fact witnesses cannot satisfy Plaintiff's requirement under 18 Del. C. § 6853(e) to produce expert testimony to a reasonable degree of medical probability causally linking the deviation in care to the injury.

3. Denied. A "common knowledge" exception contradicts the plain unambiguous text in the Delaware Medical Malpractice Act which states, in the absence of several exceptions not applicable to this case, a plaintiff's claim for medical malpractice *must* be supported by medical expert testimony.

STATEMENT OF FACTS

Medical Background Facts

Charles Rizzuto, Jr., fell during a visit at Defendant's office on January 20, 2009 and sustained a fracture to his right hip. (A26-27). At that time, he was under Defendant's care and attended to by a staff medical technologist, Eileen Kane. Defendant's Executor Director at that time was Muriel Hall. She received an email from Ms. Kane on January 20, 2009 reporting that she was attempting to weigh Mr. Rizzuto, he fell and landed on his right hip. (A46). Mr. Rizzuto passed away from unrelated causes on April 13, 2009.

Pleadings

Plaintiff brought a claim for medical negligence against Defendant alleging its medical technologist did not properly assess Mr. Rizzuto and allowed him to fall at a routine visit on January 20, 2009. (A23-25). Plaintiff further alleged the purported wrongful conduct caused a fracture, pain and suffering, and loss of spousal services.

Defendant denied all allegations of negligence, causation and damages in its Amended Answer to the Complaint. (B1-7). Defendant asserted the alleged injuries were due to naturally occurring medical processes, caused by Mr. Rizzuto or, in the alternative, Mr. Rizzuto was comparatively negligent in a manner proximately causing his own injuries. (B3-5).

Liability, causation and damages were disputed at trial. (A41, B13-15). As stated in the PreTrial Stipulation and Order, Defendant expected to prove

> " . . . . Mr. Rizzuto was negligent in failing to appreciate his signs, symptoms and medical condition and in failing to comply with the instructions as provided by Eileen Kane at DCLP. Defendant [sic] asserts [sic] that Mr. Rizzuto knew of his weakness and was specifically instructed to stay in his wheelchair when he was at DCLP. In violation of these instructions, Mr. Rizzuto proceeded to walk to a scale at DCLP's premises. Ms. Kane, a DCLP employee at the time, attempted to assist him once he walked onto the scale, but due to his weakness, Mr. Rizzuto lost his balance, slipped and fell. DCLP denies that the standard of care required Ms. Kane to force Mr. Rizzuto to remain in the wheelchair.
>
> DCLP further asserts that no act and/or omission on the part of DCLP caused or contributed to Mr. Rizzuto's alleged damages. DCLP asserts that Mr. Rizzuto caused his own injuries or, in the alternative, was comparatively negligent in a manner proximately causing his own injuries. DCLP will rely upon all affirmative defenses as asserted in the Amended Answer (D.I. 15)."

(A27). The parties designated one expert each to testify at trial. (B18-19).

Trial

Plaintiff called registered nurse, Elise Parker, R.N., to opine on standard of care and causation at trial. (A49-50; B18). Ms. Parker testified that Ms. Kane failed to properly assess Mr. Rizzuto or support him when he walked to the scale (A38). No testimony was elicited from Ms. Parker on direct examination suggesting the alleged breach in care caused Mr. Rizzuto to fall. (A126-138).

On cross, Ms. Parker was asked:

> Q: Do you have an understanding as to what caused Mr. Rizzuto's fall?
> A: I don't think I'm in a position to comment on that.

(A165). No questions about the cause of the fall were asked in re-direct. (A166-167). In addition to Ms. Parker, Plaintiffs called two fact witnesses. (A42, B18). Dr. Beardell testified he believed the cause of Mr. Rizzuto's fall was peripheral neuropathy or worsening of orthostatic hypotension. (A73-74).

Defendant called three witnesses at trial. (A42). Defendant presented expert testimony from a board certified hematologist, Ronald Sacher, M.D., on standard of care and causation. (B9-12, A147). His opinions were based on his review of the deposition transcripts, medical records, medical education, training and expertise, and experience and knowledge of the practice of hematology and phlebotomy. (B158). The jury heard testimony from Dr. Sacher that the medical technologist, Ms. Kane, acted appropriately and her decisions played no role in causing Plaintiffs' injuries. (B156-158, B168-169). Dr. Sacher further testified that Mr. Rizzuto's medical records demonstrated a history of prior falls and unsteadiness before January 20, 2009. (B162-163).

The jury heard testimony about the clinical nature of Mr. Rizzuto's pre-existing progressive conditions: amyloid, peripheral neuropathy, cardiac abnormalities, atrial fibrillation, and orthostatic hypertension, how those symptoms

manifest generally and in Mr. Rizzuto's specific case, and the degree to which these medical conditions impaired Mr. Rizzuto's motor function, balance and mobility. (B158-162).

The jury also heard Dr. Sacher's opinion that Mr. Rizzuto's actions caused the fall in Defendant's office: "In this case, you know, given that he had this orthostatic hypotension, atrial fibrilliation, that he was weak, he had lost weight, there was a high probability that if he didn't listen, he would fall, and he did." (B165-166). According to Dr. Sacher, Mr. Rizzuto had a responsibility to appreciate his vulnerabilities and risk of falling by not following a health care provider's instructions. (B165-166, B170).

Closing Arguments and Jury Verdict

The jury was charged, without objection, that Plaintiffs had to establish all three elements of their burden of proof with expert medical testimony to a reasonable degree of medical certainty. (B32-33, B37-39, B56-57, B255-256).

After the verdict, on July 23, 2014, Defendant orally moved for judgment notwithstanding the verdict, which the Court denied. (A197).

Defendant renewed its motion for Judgment for a Matter of Law in part, on the grounds that Plaintiffs' expert did not testify that the alleged negligence caused Mr. Rizzuto's fall or his injuries. (B67-143). Plaintiff responded that "[t]he expert testimony requirement in 18 *Del. C.* § 6853(e) was satisfied with testimony

of Eileen Kane, Ms. Parker, and [the incident report prepared by Ms. Parker]". (B186-188).

After consideration of the parties' written arguments and a review of the record, including transcripts of trial testimony and argument, the trial Court found there was no competent evidence in the record a reasonable jury could use to find in favor of Plaintiff on causation. (Ex. A to Opening Br.).

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE LEGAL ERROR IN GRANTING JUDGMENT AS A MATTER OF LAW IN DEFENDANT'S FAVOR WHEN PLAINTIFF'S SOLE MEDICAL EXPERT ADMITTED SHE COULD NOT GIVE AN OPINION ON CAUSATION.

A. Question Presented

Whether Plaintiff presented sufficient expert evidence to establish proximate causation under 18 *Del. C.* § 6853(e) to sustain a jury verdict in her favor? Defendant preserved this issue when it moved for Judgment as a Matter of Law, Judgment Notwithstanding the Verdict, and Renewed Judgement as a Matter of Law. (A105-108, A197, B67-143).

B. Scope of Review

This Court reviews *de novo* the trial court's decision to grant judgment as a matter of law. *Kardos v. Harrison,* 980 A.2d 1014, 1016 (Del. 2009)(citing *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 245 (Del. 2001)). "Under Rule 50(b), entry of a verdict in favor of Defendant is appropriate when, under the circumstances presented by the Plaintiff, reasonable minds could draw but one inference and that inference is that a verdict favorable to Plaintiff is not justified." *O'Hara v. Petrillo Bros., Inc.,* 216 A.2d 672, 674 (Del. 1966). However, a jury, is not permitted to make factual findings in favor of a party at trial if "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." *Carney*

v. Preston, 683 A.2d 47, 55-56 (Del. Super. Ct. 1996) (citing to Super. Ct. Civ. R. 50(a)).

Where the appellant fails to include all portions of the record relevant to the claims on appeal, this Court is precluded from undergoing appellate review and must affirm the lower court's ruling. *Trioche v. State*, 525 A.2d 151, 154 (Del. 1987); Supr. Ct. R. 9(e)(ii) and 14(e).

C. Merits of Argument

1. Plaintiff's failure to include all relevant portions of the record necessary for appellate review warrants affirmation of the trial judge's grant of judgment as a matter of law for Defendant.

Plaintiff failed to include "the complete docket entries in the trial court arranged chronologically in a single column" required by Supreme Court Civil Rule 14(e) as follows:

1. Defendant's Amended Answer to the Complaint dated July 13, 2011;

2. Defendant's Expert Disclosures dated April 12, 2012;

3. Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Remittitur with Exhibits dated August 1, 2014;

4. Plaintiff's Response to Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Remittitur with Exhibits dated August 22, 2014; and

5. Final Jury Instructions dated July 23, 2014 as to Evidence Equally Balanced, Comparative Negligence, Definition of Medical Negligence, Damages – Personal Injury, Preexisting or Independent Condition, Expert Testimony, Expert Opinion Must Be to a Reasonable Probability, and Instructions to Be Considered as a Whole.

These materials are necessary for appellate review to determine whether (1) the claimed error was preserved on the record which included any exhibits attached to the post-verdict motions; (2) because Plaintiff's appeal is premised on the content of the Pre Trial Stipulation and Order as well as the expert testimony presented at trial; and (3) to properly evaluate whether the record supported the findings charged to the jury to sustain a verdict in favor of Plaintiff on causation.[1] The failure to include relevant portions of the record necessary to consider the context of the claimed error precludes appellate review and prompts affirmance of the lower court's decision. *Trioche*, 525 A.2d at 154.

2. Defendant did not admit to any fact disposing of Plaintiff's obligation to present expert causation evidence, liability was disputed at trial and Plaintiff failed to present expert evidence on causation, as required by 18 *Del. C.* § 6853(e)(3), for the jury to find in her favor on causation.

[1] Defendant's inclusion of the relevant materials in its Appendix does not cure Plaintiff's defect or satisfy her obligation to furnish the necessary documents for appellate review.

According to the plain language of Title 18, section 6853 (hereinafter the "Act") and well settled precedent, "the production of expert medical testimony is an essential element of a plaintiff's medical malpractice case and, as such, is an element on which he or she bears the burden of proof." *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *certiorari denied*, 112 S. Ct. 1946, 504 U.S. 912 (1992); *see also Wahle v. Medical Cntr. of Del., Inc.*, 559 A.2d 1228, 1231 (Del. 1989)(recognizing that expert testimony was critical to proof of causal relationship between alleged deviation from standard of care and alleged personal injury in plaintiff's medical malpractice claim); *Valentine v. Mark*, 2004 WL 2419131, * 2 (Del. Super. Ct. Oct. 20, 2004)(finding plaintiff could not meet her statutory burden of proof of causation where "Plaintiff's only expert witness – indicate[d] that he is unwilling to testify to causation in this case"), *aff'd*, 2005 WL 1123370 (Del. May 10, 2005) (TABLE). Where a plaintiff's medical expert testifies at trial that she cannot offer an opinion to a reasonable degree of medical probability that the alleged medical negligence caused the claimed injuries, the Court must enter judgment for Defendant as a matter of law. *Mammerella v. Evantash*, 93 A.3d 629 (Del. 2014).

Plaintiff designated one expert witness in the Pre Trial Stipulation, Elise Parker, R.N. (B18). The jury heard testimony from Ms. Parker that "she was not sure" if Mr. Rizzuto played a role in the fall. (A165). She admitted she had no

opinion on the cause of Mr. Rizzuto's fall, stating, "I don't think I'm in a position to comment on that". (A165).

Plaintiff's only medical expert witness at trial failed to opine on causation or state with any degree of certainty what caused Mr. Rizzuto to fall. As a result, there was no sufficient basis for a jury to find that Plaintiff's injuries were proximately caused by Ms. Kane's conduct or decisions on January 20, 2009. *Kardos*, 980 A.2d at 1017 (holding that an expert must testify to a reasonable medical probability as to each of the elements of a medical malpractice claim).

Plaintiff's contention that she can cross the evidentiary threshold through fact witness testimony, non-expert circumstantial evidence or the Affidavit of Merit is untenable. This Court has consistently held that "[t]o establish liability for medical negligence, plaintiff[s] must present expert medical testimony on the physician's deviation from the standard of care **and** 'as to the causation of the alleged personal injury or death.'" *O'Donald v. McConnell*, 858 A.2d 960, 2004 WL 1965034, * 2 (Del. Aug. 19, 2004)(emphasis added)(summary judgment properly granted when medical malpractice plaintiff failed to satisfy the statutory requirement of proof through expert causation evidence)(citing 18 *Del. C.* § 6853(e)); *Mammarella v. Evantash,* 93 A.3d at 636 (Del. 2014)(affirming the lower court's determination that no reasonable jury could find in favor of plaintiff

on causation where the plaintiff's expert could not provide legally sufficient testimony to a reasonable degree of medical probability).

At trial, Defendant endeavored to prove Mr. Rizzuto's underlying medical conditions and decision to ignore the medical technologist's instruction caused his injuries and challenged negligence, causation and damages through evidence from its own expert, Dr. Sacher. Plaintiff's characterization of proximate cause as a simple factual determination to choose one version over the other ignores the critical fact that there was only **one** choice for an expert "version" of causation.

Under any fair reading of the record, Defendant disputed causation, negligence and damages; (2) Plaintiff designated one expert to opine on standard of care and causation; and (3) and that expert could not state what caused Mr. Rizzuto to fall, and as a result, link the alleged negligence of the medical technologist to any injury. The jury was properly instructed that in order to find in favor of Plaintiff, they would have to first find Plaintiff satisfied her burden of establishing that the alleged deviation in the standard of care was the proximate cause of injury through expert testimony stated to a reasonable degree of medical probability.[2] No reasonable jury could find in favor of Plaintiff on causation under a fair reading of the record as Plaintiff failed to adduce any expert testimony

[2] Plaintiff's failure to object to the jury charges defining medical negligence, expert testimony, and expert opinion must be given within a reasonable degree of probability waives any claim of error.

linking the fall and Defendant's conduct. *Carney*, 683 A.2d at 47, 55-56 ("A factual determination beyond the limits of reasonable judgment is at law a question of law.").

Plaintiff contends that the admission to the occurrence of the fall and the occurrence of some injury as a result established proximate causation to a reasonable degree of medical probability. This argument was not raised on the record below, and accordingly, waived. It should also be rejected on the merits because the Pre Trial Stipulation does not, as Plaintiff contends, contain an admission of liability or diminish Plaintiff's statutory burden of proof on an essential element of their medical negligence claim. That Defendant admitted Mr. Rizzuto fell on January 20, 2009 and fractured his right hip is immaterial; the question for the jury was whether that injury was proximately caused by an act or omission of Defendant. As the Plaintiff proffered no expert evidence on this point, Mrs. Rizzuto failed to establish medical negligence, as a matter of law.

Contrary to Plaintiff's assertion, *In re Will of Palecki*, 920 A.2d 413 (Del. Ch. 2007), does not support invocation of the absurdity doctrine. Rather, the Court cautioned against use of that maxim in all but "the most extreme circumstances". *Id.* at 415. The *Palecki* Court refused to "read out the requirement for a signature" because it would encroach on the General Assembly's legislative powers by

ignoring plain statutory text. *Id.* The Court in *Palecki* enforced the statute as written just as the Court should do here.

Moreover, Plaintiff points to no ambiguity in the text of the Act or how the language lends itself to anything other than the literal interpretation. *See, e.g, State v. Daniels*, 538 A.2d 1104, 1108-1110 (Del. 1988) (employing the "golden" rule of statutory construction to the criminal code where it was susceptible to two at least two interpretations). The Act specifically mandates that, before liability can be found in a medical malpractice action, the plaintiff bears the initial burden of presenting expert medical testimony as to both the alleged deviation from the applicable standard of care and the causal connection between the wrongful conduct and the alleged injury. *Russell v. Kanaga*, 571 A.2d 724, 732 (Del. 1990)(finding no error on appeal of directed verdict for defendant physician because plaintiffs were unable to produce any expert testimony that plaintiff's pain was caused through the medical negligence by defendant).

Plaintiff's reliance on *Dishmon v. Fucci,* 32 A.3d 338 (Del. 2011), which addressed the prophylactic effect of an affidavit of merit, is similarly misplaced. An affidavits of merit was not admitted into evidence. *Mammarella*, 93 at 636-637 (rejecting argument advanced by Plaintiff that even if expert's testimony did not establish causation, her affidavit of merit was legally sufficient to establish a prima facie case).

3. None of the experts gave an opinion at trial that the alleged breach by Defendant caused Plaintiff's injury and fact witness testimony of the medical technologist and the treating hematologist is legally insufficient to establish causation under 18 *Del. C.* § 6853.

The Court's grant of judgment as a matter of law is in clear accord with the expert evidence placed before the jury. The jury heard expert testimony from two individuals: Ms. Parker and Dr. Sacher. Ms. Parker gave no testimony that could reasonably be interpreted to link Defendant's deviation in the standard of care to Plaintiff's injury because she admitted that she could not "comment" on the cause of Mr. Rizzuto's fall. (A165). Dr. Sacher, however, gave direct testimony that there was no causal relationship between a deviation in the standard of care and Mr. Rizzuto's fall or injury. As a matter of law, Plaintiff failed to present expert causation evidence at trial.

Merely because Plaintiff describes Ms. Kane and Dr. Beardell as "experts" does not render the substance of their testimony expert evidence properly before the jury. Neither Ms. Kane nor Dr. Beardell were designated as expert witnesses in the Pre Trial Order, which as Plaintiff states, controls the presentation of evidence at trial. (B18-19). Assuming they were properly called as experts, neither Dr. Beardell nor Ms. Kane gave testimony connecting a deviation in care to Plaintiff's

injury within a reasonable degree of medical probability.[3] D.R.E. 703, 705; *Mammarella* at 635 (an expert medical opinion "should be stated in terms of 'a reasonable medical probability' or 'a reasonable medical certainty' . . .".)(citation omitted). Neither witness stated that but for the Defendant's breach of the standard of care the fall would not have occurred.

On the contrary, Dr. Beardell concluded the probable cause of the fall was an underlying unrelated medical condition. At trial he testified,

> Q: What impact did the peripheral neuropathy or worsening of orthostatic hypotension play in Mr. Rizzuto's fall?
> A: I assume that was the cause of it.

(A73-74). He attributed Plaintiff's fall to the fact that Mr. Rizzuto had failed to follow his instruction to see a cardiologist to evaluate his orthostatic hypertension. (A78). Furthermore, Dr. Beardell refused to describe Mr. Rizzuto as "compliant":

> Q: Okay. Overall would you rate him as a compliant patient?
> A: What do you mean by "complaint"?
> Q: Took the doctor's advice.
> A. He showed up when he was supposed to show up, but in terms of compliance, he, you know, often did things that he wanted to do, like go for the transplant.

(Trial Tr. at 12). He went on to state:

> A: One of the things that bothered me the most, especially around the time that he fell, is that I had seen him earlier before he had

[3] An inference that Ms. Kane, whose conduct forms the basis of Plaintiff's medical negligence claim, testified in any capacity that she breached the standard of care and injured the Plaintiff preponderates in favor of the Superior Court's conclusion that no reasonable jury could find in favor of Plaintiff on causation.

fallen when he was complaining of what I think of it now as accelerated hypotension, or accelerated orthostasis, . . . [H]is got worse fairly acutely. And usually it's a much more gradual worsening of it.

And there are a number of things that can be done for people with orthostatic hypotension, . . . And when I saw him in the fall, late fall, it may have been November 2008, he was complaining of having much worse orthostatic hypotension. My nurse noticed that he was having irregular heartbeat. And I was concerned that he might have atrial fibrillation with a rapid ventricular response. . . . And I had referred him to a cardiologist for evaluation of the arrhythmia and rate control. The - -

Q. I'm sorry.

A. When I saw him back in January [of 2009], he had not gone for that visit and was having problems still with an irregular heartbeat and a fast heartbeat, which made me suspicious that he had atrial fibrillation and made me concerned that it was one of the things that was directly contributing to the rapid worsening of his orthostatic hypotension. And that if we had the opportunity to control that, beta blockers, whatever the cardiologist would have recommended, his blood pressure and orthostasis may have been better controlled.

(A57-58, A81). At minimum, this testimony tends to support Defendant's position rebutting causation. Under any plausible reading of the record, it would not sustain Plaintiff's burden of proof to make a prima facie case on causation.

Even if Dr. Beardell was called as an expert at trial, such testimony would be limited to what was properly and timely disclosed.[4] *Russell v. K-Mart Corp.*, 761 A.2d 1, 4 (Del. 2000)(full disclosure of an expert's opinion is a prerequisite to their admissibility at trial); *see also, Sammons v. Doctors For Emergency Servs., P.A.*, 913 A.2d 519, 529 (Del. 2006)(excluding expert's opinion that decedent had sepsis in the emergency room and defendant's failure to diagnosis it led to her death when such opinion was disclosed for the first time at the expert's discovery deposition "because, among other things, the parties challenging the expert need to know before they attend the deposition what the opinions are going to be."); *see also Honeywell Int'l Inc. v. Universal Avionics Sys. Corp.*, 289 F.Supp.2d 493, 500 (D. Del. 2003)(limiting expert testimony to information contained within the expert's report and refusing to consider a theory that was supported by the expert's deposition testimony but not set forth in the expert's report on a motion for summary judgment). Because Plaintiff never disclosed Dr. Beardell would testify as an expert on causation, such evidence would not have been admissible at trial, or a proper basis for the jury to find on in Plaintiff's favor on the issue of causation.

[4] Plaintiff disclosed Dr. Beardell as an anticipated expert during discovery who would opine that Mr. Rizzuto was a compliant patient and that Mr. Rizzuto sustained a hip fracture in his office on January 20, 2009. (A49-50).

Plaintiff contends that testimony by Dr. Beardell that Plaintiff fell, complained about hip pain, underwent an X-ray and the X-ray showed a fracture "standing alone" provides the jury with legally sufficient evidence to find in favor of the Plaintiff on causation. Such a position is factually flawed and legally unsound. First, this testimony does not address the cause of Plaintiff's alleged injuries, much less why Mr. Rizzuto fell in Dr. Beardell's office. While that fact testimony may show the fall caused a hip fracture, it does not address the cause of the fall. Second, as a matter of law, those facts to do not amount to an opinion to a reasonable degree of medical probability that Defendant's deviation in care caused the fall or any injury.

Plaintiff's proposition that "expert" evidence from Ms. Parker, Dr. Beardell and Ms. Kane established causation is, in substance, based on inference. However, the statute "does not permit a jury to connect the dots between a bare allegation of medical negligence and an injury." *Dickenson v. Sopa*, 2013 WL 3482014, at * 4 , *aff'd*, 2013 WL 6726884 (Del. 2013); *see also Davis v. St. Francis Hospital*, 2002 WL 31357894 (Del. Super. Ct. Oct. 17, 2002)(granting defendant's summary judgment on negligent credentialing claim for failure to produce expert testimony on causation). Moreover, arguing that "proximate cause in this case turned on a simple factual dispute" fails to account for Dr. Beardell's testimony about Plaintiff's underlying conditions or that the jury was charge with determining

whether a pre-existing condition caused Mr. Rizzuto to fall. The record reflects Defendant presented expert testimony of Dr. Sacher to rebut causation and establish comparative negligence on the part of Mr. Rizzuto. Under a fair reading of the record, Plaintiff failed to produce expert causation evidence to satisfy their burden of proof as neither of the two experts presented testimony that could plausibly be interpreted as an expert causation opinion.

This Court previously rejected such a proposition when a defendant disputed causation on the grounds that the injury was caused by a subsequent fall and not the alleged negligent surgery in *Dickenson v. Sopa,* 2013 WL 3482014, (Del. Super. June 20, 2013), *aff'd,* 2013 WL 6726884 (Del. 2013)(TABLE). Plaintiff's sole expert opined that part of Plaintiff's hip implant was out of place but could not opine whether it was due to the surgery or due to the subsequent fall. *Id.* at * 1. Plaintiff opposed summary judgment on the basis that the expert's opinions were sufficient for a jury inference that Plaintiff's injuries were more likely than not caused by the surgery. *Id.* at * 4. The Court rejected Plaintiff's position because "18 *Del. C.* § 6853 requires a plaintiff in a medical negligence case to establish proximate cause by expert medical testimony." *Id.* at * 4.

In sum, since both Dr. Beardell and Ms. Kane testified as fact witnesses, they did not did not give any expert opinions at trial to a reasonable degree of medical probability that would satisfy Plaintiff's statutory burden of proof. *See*

O'Donald, 2004 WL 1965034, at * 2 ("Without expert medical testimony as to a breach of the standard of care and causation, the plaintiff cannot prevail." *Id.*)(citing *Burkhart v. Davies*, 602 A.2d 56; 18 *Del. C.* § 6853). Even when read in conjunction with Ms. Kane's testimony, the health care provider and expert evidence does not place Plaintiff over the evidentiary threshold and is an insufficient basis for a reasonable jury to find a *prima facie* case of medical negligence.

3. The Delaware Medical Malpractice Act requires that, in the absence of several exceptions which are not applicable to this case, a plaintiff's claim for medical malpractice *must* be supported by medical expert testimony.

Plaintiff's request that this Court carve out an exception because causation is "self-evident" flouts clear legislative intent and a long line of precedent. *See Robinson v. Mroz*, 433 A.2d 1051, 1056 (Del. 1981)("The need for expert medical testimony upon which to posit liability in a medical malpractice action had been clearly established under Delaware case law prior to the [enactment of the Act]")(citing *Christian v. Wilmington Gen. Hosp. Ass'n*, 135 A.2d 727)(Del. 1957; *Peters v. Gelb*, 314 A.2d 901 (Del. 1973)). In *Robinson*, this Court aptly concluded the Act "particularized the need for expert medical testimony and defined those cases in which a rebuttable inference of negligence could arise without it." *Robinson*, 433 A.2d at 1057. Section 6853 of the Act relieves the plaintiff of the obligation of presenting expert medical testimony in the singular circumstance where "a malpractice review panel has found negligence to have occurred and to have caused the alleged personal injury or death **and the opinion of such panel is admitted into evidence**." 18 *Del. C.* § 6853 (emphasis added). Even in that instance, a jury verdict on the issue of causation would have a record of a malpractice review panel linking the deviation to the injury. Plaintiff fails to offer any authoritative support or textual ambiguity for the Court to read in a "common knowledge" exception under the plain language of the statute. *See*

Coastal Barge Corp. v. Coastal Zone Indus. Control Board, 492 A.2d 1242 (noting that if a statute is unambiguous, the court's role is "limited to an application of the literal meaning of the words" *Id.* at 1246).

Moreover, the General Assembly certainly was capable of providing a mechanism for "obvious" liability where no expert testimony is required because that is precisely what it did for three factual scenarios. Title 18, Section 6853(e) provides in pertinent part that:

> "a rebuttable inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances: (1) A foreign object was unintentionally left within the body of the patient following surgery; (2) an explosion or fire originating in a substance used in treatment occurred in the course of treatment; or (3) a surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body. Except as otherwise provided herein, there shall be no inference or presumption of negligence on the part of a health care provider."

18 *Del. C.* § 6853(e). Under recognized Principles of Statutory Construction for the General Assembly's silence on an exception for a fall in doctor office breaks bone during exam, or "within common knowledge", must be deemed purposeful. *Leatherbury v. Greenspun,* 939 A.2d 1284, 1291 (Del. 2007) (applying the maxim expression unius est exclusion alterius and noting that "when provisions are expressly included in one statue but omitted from another, we must conclude that the General Assembly intended to make these omissions").

Rather than addressing the exceptions enumerated in the Delaware Statute at issue, Plaintiff instead advances irrelevant arguments about Medical Malpractice Acts enacted in other states. *Brower v. Sisters of Charity Providence Hosps.*, 763 S.E. 2d 200 (S.C. Aug. 6, 2014)(excusing medical malpractice plaintiff from filing expert affidavit with Notice of Intent to File Suit when codified common knowledge exception applied); *Lawrence v. Frost St. Outpatient Surgical Cntr., L.P.*, 2004 W.L. 2075401 (Cal. App. 4th Dist. Sept. 17, 2004)(applying common knowledge" exception where Plaintiff can invoke res ipsa loquitur).

Defendant agrees *O'Donald v. McConnell* applies. *O'Donald* dealt with an appeal of the trial court's grant of summary judgement after the medical malpractice plaintiff was unable to present expert evidence on causation. *O'Donald* at * 1. The plaintiff argued error on appeal because "his injury 'obviously resulted from the breach of the standard of care' and that he could prove causation indirectly through expert testimony on the nature of Plaintiff's injury. *Id.* at * 2. This Court found "[t]his argument ignores the purpose of expert medical testimony, as recognized by the General Assembly, which is that, *subject to the exceptions listed in the statute*, the proximate cause of injuries that are claimed to be attributable to medical negligence *are not within the common knowledge of a layperson.*" *Id.* (emphasis added). Consistent with the trial court's decision in this case, the *O'Donald* Court found the plaintiff's inability to present

expert evidence on causation warranted judgment as a matter of law in favor of the Defendant. While the Plaintiff points to *Green v. Weiner*, 766 A.2d 492 (Del. 2001) and *Simmons v. Bayhealth Med. Cntr., Inc.*, 950 A.2d 659, 2008 WL 2059891 (Del. 2008) as support for applying the "common knowledge" exception in this case, the proximate causation was not an issue addressed by the Court on appeal. Plaintiff's reliance on *Dougherty v. Horizon House, Inc., et al.* 2008 WL 3488532 (Del. Super. Ct. June 25, 2015) for the proposition that the Court should view this case akin to res ipsa loquitor is misplaced. Dougherty did not consider the issue of whether a jury can infer causation without expert opinion as the issue addressed application of 18 *Del. C.* § 6853(c).

Plaintiff cites to no binding Delaware precedent, procedural rule or textual ambiguous language in arguing that this Court should rewrite the Medical Malpractice Statute on an ad hoc basis. *See, e.g., Littleton v. Ironside*, 2010 WL 8250830 (Del. Super. Ct. Oct. 6, 2010) (zero verdict cannot stand where Defendant stipulated its negligence caused the accident and all experts agreed the accident caused a soft tissue injury); *Vohrer v. Kinniken*, 2014 WL 1203270 (Del. Super. Ct. Feb. 26, 2014)(finding that maintenance worker was not a "professional" requiring expert opinion on the standard of care but plaintiffs failure to designate liability expert fatal to claims as "the Plaintiffs are unable to make a showing of proximate cause." *Id.* at * 4); *Smith v. Chrysler*, 1996 WL 945018 (Del. Super. Ct.

Oct. 25, 1996) (finding that expert testimony is required to show plaintiff's injury was proximately caused by the failure to warn).

CONCLUSION

Because Plaintiff failed to include the relevant materials in her appendix, this Court cannot consider the claimed error and must affirm the decision of the Trial Court. In the alternative, Plaintiff has failed to show that the Superior Court erred determining there was legally insufficient proof causally relating Plaintiff's alleged injuries to any deviation in the standard of care by Defendant. Plaintiff's sole expert at trial was unable to state, to a reasonable degree of medical probability, that Defendant's deviation from the standard of care caused Plaintiff's injuries. Because Plaintiff failed to provide expert causation evidence to meet an essential element of their case, no reasonable jury could find in favor of the Plaintiff on proximate causation, as a matter of law. Therefore, this Court should affirm the lower Court's decision.

Respectfully submitted,

BY: *//s// Lauren C. McConnell*
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Dated: May 15, 2015

Not Reported in A.2d, 2002 WL 31357894 (Del.Super.)
(Cite as: 2002 WL 31357894 (Del.Super.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.
DAVIS
v.
ST. FRANCIS HOSPITAL, et. al.

No. 00C-06-045-JRJ.
Submitted July 26, 2002.
Bench Ruling July 30, 2002.
Written Decision Oct. 17, 2002.

Re: Defendant's Motion for Partial Summary Judgment as to Plaintiff's Negligent Credentialing Claim-Granted.

JURDEN, J.

Dear Counsel:

*1 I was pleased to hear the parties have resolved this matter. I thank counsel for their exemplary efforts in this regard. The following is my written opinion memorializing my "bench" ruling on July 30, 2002, granting summary judgment on the plaintiffs' negligent credentialing claim.

Background

This wrongful death medical negligence suit arises from emergency room ("ER") care provided to decedent, Vincent James Davis, Sr., by defendant, Jamie E. Roques, M.D., on February 9, 1999 at St. Francis Hospital ("St.Francis"). In a complaint filed in this Court on June 6, 2000, plaintiffs allege that St. Francis was liable based on the theory of *respondeat superior*, or apparent ostensible agency. On, August 2, 2001, plaintiffs filed an Amended Complaint asserting additional allegations, including a negligent credentialing claim against St. Francis. On July 11, 2002, St. Francis filed a motion for partial summary judgment on this issue. St. Francis contends that while plaintiffs have offered testimony to establish St. Francis' failure to follow the St. Francis Department of Emergency Medicine Delineation of Clinical Privileges ("Delineation") was a violation of St. Francis' own standards, plaintiffs have presented no expert testimony establishing a causal connection between the deviation and the alleged injury. In response, the plaintiffs argued that causation is established by the fact that St. Francis violated its by-laws and, as a proximate result of that violation, Dr. Roques was in the ER on February 9, 1999, the day the decedent sought emergency medical care. In other words, according to the plaintiffs, if St. Francis had not deviated from its own standards, Dr. Roques would not have been in the ER and would not have treated the decedent. Plaintiffs point out that it was St. Francis, not the decedent, who had control over the selection of Dr. Roques as the attending physician. Plaintiffs also point out that Dr. Roques was the only physician on duty in the St. Francis Hospital ER on the morning of February 9, 1999. Thus, the plaintiffs maintain that a jury may properly find St. Francis' violation of its own policies was a contributing factor in the death of the decedent.

Facts

On November 24, 1998, St. Francis Hospital's Board of Directors approved the appointment and clinical privileges of Dr. Roques, an internist, as "Provisional Staff, Department of Emergency Medicine, Class II." After six months, Dr. Roques was granted "Class II" privileges. To obtain "Class II" privileges, a physician must:

[b]e qualified for appointment in the Department of Emergency Medicine on completion of three years postdoctoral education in an ACGME or AOA approved Emergency Medicine residency program or other acceptable training or experience that leads to eligibility for board certification by the American Board of Emergency Medicine by any of their special application categories or the American Osteopathic Board of Emergency Medicine.

*2 On February 9, 1999, the decedent presented at the St. Francis ER with complaints of a burning epigastric pain radiating to the chest. The decedent advised ER personnel that he had a history of hypertension and that he smoked approximately thirty (30) cigarettes per day. A basic work up was performed, including an electrocardiogram (EKG) and various other tests. Dr. Roques examined the decedent and diagnosed non-cardiac chest pain, esophagitis and diabetes. He instructed the decedent to follow-up with a family practitioner. It is undisputed that at the time decedent presented at the ER, Dr. Roques was not board-eligible in emergency medicine.

The next day, Dr. Baag examined the decedent. Apparently, relying on Dr. Roques' diagnosis that the decedent's chest pain was "non-cardiac" in etiology, Dr. Baag diagnosed the decedent with dyspepsia and new onset Type II diabetes mellitus. Dr. Baag referred the decedent to a nurse for instruction on diabetes management.

On February 13, 1999, the decedent collapsed at home and was later pronounced dead at St. Francis. An autopsy performed on February 14, 1999 revealed that the decedent died as a result of an acute massive myocardial infarction.

Standard of Review

Summary judgment may only be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[FN1] When considering a motion for summary judgment, the Court must consider the facts in the light most favorable to the non-moving party.[FN2]

FN1. *Wilson v. Joma, Inc.*, 537 A.2d 187, 188 (Del.1998).

FN2. *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del.Super.Ct.1973).

In *Cleotex Corp. v. Catrett*,[FN3] the United States Supreme Court held that where the non-moving party bears the ultimate burden of proof, summary judgment may be granted if the moving party can demonstrate a complete failure of proof concerning an essential element of the non-moving party's case. "In such a situation there can be no genuine issue as to any material fact, since complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."[FN4] The Delaware Supreme Court has applied this standard to the plaintiff's burden of presenting expert testimony to establish liability in a medical malpractice case.[FN5]

FN3. 477 U.S. 317, 324 (1986).

FN4. *Id.* at 322-23.

FN5. *See, e.g., Burkhart v. Davies*, 602 A.2d 56, 59 (Del.1991), *cert denied*, 504 U.S. 912 (1992).

Pursuant to title 18, section 6853 of the Delaware Code, before liability can be found in a medical negligence action, plaintiffs bear the burden of presenting expert medical testimony as to both an alleged deviation from the applicable standard of care and a causal connection between the deviation and the alleged injury.[FN6]

FN6. DEL.CODE ANN tit. 18, § 6853 (2002); *Burkhart*, 602 A.2d at 59.

Discussion

St. Francis claims it is entitled to summary judgment on the plaintiffs' negligent credentialing claim because plaintiffs have failed to offer proof concerning the "essential element of causation." Before liability can be established in a medical malpractice action, plaintiff must present expert medical testimony "as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death."[FN7] In the absence of an applicable statutory exception or competent medical testimony establishing negligence, defend-

ant is entitled to summary judgment.[FN8]

FN7. § 6853; *Burkhart,* 602 A.2d at 59.

FN8. § 6853; *Burkhart,* 602 A.2d at 60.

*3 "The law is clear that [in a medical malpractice action] an expert medical opinion must be provided not only for liability but for causation."[FN9] The plaintiffs argue that this Court should apply the "substantial factor" definition of proximate cause. This, the Court cannot do. In *Culver v. Bennett,* the Delaware Supreme Court reaffirmed its adherence to the "but for" definition of proximate cause, not the "substantial factor" test.[FN10] The "but for" definition is summarized as follows: "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."[FN11] Therefore, in accord with section 6853, the plaintiff must present expert testimony to show that the defendant's action breached a duty of care in a manner that proximately caused the plaintiff's injury.

FN9. § 6853; *Russell v. Kanaga,* 571 A.2d 724, 732 (Del.1990).

FN10. 588 A.2d 1094, 1097 (Del.1991).

FN11. *Id.* (citing *Prosser and Keeton on Torts* 266).

As noted above, the plaintiffs argue that causation is established by the fact that St. Francis violated its policy by granting Class II privileges to Dr. Roques, which in turn, placed Dr. Roques in the ER, and thus, in a position to serve as the decedent's attending physician. This broad theory of negligence suggests that Dr. Roques was not qualified to be in the ER at all, however, the plaintiffs have identified no expert medical witness to testify that St. Francis' failure to adhere to the Delineation was a proximate cause of the decedent's death.[FN12] And, in fact, the plaintiffs' experts admitted in deposition that Dr. Roques' training in internal medicine rendered him competent to treat patients in an ER. The plaintiffs' ER expert, John Oldham, M.D., a board certified internist like Dr. Roques, testified, "I would be impeaching myself if I said that having internal medicine training would make [Dr. Roques] not qualified [to treat Mr. Davis in the emergency room]. I have internal medicine training and I do feel I am qualified to treat chest pain."[FN13] When questioned as to whether "the hospital's violation of its, bylaws, either in allowing Dr. Roques to work there or in allowing him to be alone in the emergency room [had] any cause and effect relationship with the quality of care?" Dr. Oldham replied, "[t]he quality of care is a totally different issue than the credentialing issue"[FN14] When pressed, Dr. Oldham admitted he was not opining to a reasonable degree of medical probability that there was "any cause and relationship between the two."[FN15] In addition, the plaintiffs' expert on issues of hospital administration, Arthur Kaufman, M.D., testified that, although based on the hospital's bylaws, Dr. Roques should not have been in the ER, he would not opine that "but for Dr. Roques' treating Mr. Davis, Mr. Davis would not have died."[FN16] Thus, neither Dr. Oldham nor Dr. Kaufman opined that St. Francis' failure to abide by the Delineation was a proximate cause of the decedent's death.

FN12. *Compare Riggs Nat'l Bank v. Boyd,* No. C.A.96C-05-122-WTQ, 2000 WL 303308, at *5 (Del.Super.2000), *appeal denied,* 755 A.2d 390 (Del.2000) (holding that the testimony of one expert physician, whose expertise in credentialing was suspect, was insufficient to create a genuine issue of fact in order to survive a motion for summary judgment).

FN13. Deposition of John Oldham, M.D., May 1, 2002 at 89 (Hereinafter "Oldham Dep. at _").

FN14. *Id.* at 95-96.

FN15. *Id.*

FN16. Deposition of Arthur M. Kaufman, M.D., June 26, 2002 at 87 (Hereinafter "Kaufman Dep. at _").

Conclusion

*4 Without competent medical testimony establishing that the breach of the Deliniation *proximately caused* the decedent's death, i.e., that but for the breach, the decedent would not have died, the Court must grant summary judgment on the credentialing claim. For the foregoing reasons, St. Francis' Motion for Partial Summary Judgment is GRANTED.

IT IS SO ORDERED.

Del.Super.,2002.
Davis v. St. Francis Hosp.
Not Reported in A.2d, 2002 WL 31357894 (Del.Super.)

END OF DOCUMENT

Not Reported in A.3d, 2013 WL 3482014 (Del.Super.)
(Cite as: 2013 WL 3482014 (Del.Super.))

H

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware
William Dickenson, Plaintiff,
v.
David Sopa, D.O., Defendant.

C.A. No. K10C–10–035 WLW
Submitted: March 7, 2013
Decided: June 20, 2013

Upon Defendant's Motion to Dismiss. *Denied.*
Upon Defendant's Motion for Summary Judgment. *Granted.*
Charles E. Whitehurst, Jr., Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorney for Plaintiff.

Richard Galperin, Esquire of Morris James LLP, Wilmington, Delaware; attorney for Defendant.

ORDER

WITHAM, R.J.

I. Issues

*1 1. Whether the aforementioned action should be dismissed due to Plaintiff's failure to timely submit an expert report and seasonably supplement the tardy report; or,

2. Alternatively, whether the Court should grant summary judgment in Defendant's favor on the grounds that Plaintiff failed to produce an expert report identifying the proximate cause of Plaintiff's alleged injuries.

II. Relevant Factual and Procedural Background

This is a medical malpractice action arising out of a right hip replacement performed by Defendant David Sopa, D.O. (hereinafter "Defendant") on William Dickenson (hereinafter "Plaintiff") on October 23, 2008 at Beebe Medical Center. Plaintiff was discharged and began outpatient therapy a few days later. On October 31, 2008, Plaintiff fell while walking with the aid of his crutches. Defendant contends that, as a result of this fall, Plaintiff re-injured his right hip, requiring additional diagnostic tests and surgeries.

Plaintiff initiated the present action on October 22, 2010. His complaint alleges that Defendant breached the standard of care by improperly performing Plaintiff's surgery and failing to order follow-up radiographic studies, and that Defendant's negligence, and not the subsequent fall, was the proximate cause of Plaintiff's resulting injuries.

This Court issued a scheduling order on April 24, 2012. The scheduling order established October 15, 2012, as the deadline by which Plaintiff was to identify experts. Three days before this deadline, a representative of Plaintiff's counsel e-mailed defense counsel asking to extend this deadline to October 31, 2012, for the identification of liability experts and November 15, 2012, for economic experts. Defense counsel granted these requests.

On November 16, 2012, over two weeks after the agreed extension and Plaintiff had yet to identify his experts and had made no additional requests for an extension of time, Defendant filed the instant motion to dismiss. Later that day, Plaintiff faxed a copy of a letter from Bradford A. Slutsky, M.D. (hereinafter "Dr. Slutsky"), addressed to Plaintiff's counsel in which Dr. Slutsky opined that the acetabular component of Plaintiff's hip replacement was out of place, but concluding that he could not "be 100 [percent] certain that the position of the cup was related to the way it was placed in by the surgeon or to the fall." Plaintiff's counsel indicated in this facsimile that he was awaiting clarification of these findings from Dr. Slutsky, but these attempts for clarification went unanswered for several weeks, as Dr. Slutsky left on vacation on October 23, 2012.

In his response to Defendant's Motion to Dismiss filed on December 4, 2012, Plaintiff claims to have sent the aforementioned clarification to defense counsel on November 29, 2012. At this time, Plaintiff claims to have also indicated to defense counsel that the report may have to be amended again after Dr. Wilson Choy, Plaintiff's treating orthopaedic surgeon, is deposed. Defense counsel claims that, to date, he has yet to receive a supplemental or revised report from Dr. Slutsky. Defendant insists that any effort by the Plaintiff to comply with the disclosure requirements set forth in Superior Court Civil Rule 26 (hereinafter " Rule 26 ") came too late. Therefore, Defendant moves for dismissal of the action pursuant to Superior Court Civil Rule 41(b) on the ground that Plaintiff has contravened the rules of this court.

III. Motion to Dismiss

*2 Superior Court Civil Rule 41(b) allows a defendant to move to dismiss an action for a plaintiff's failure to prosecute or comply with the Court's rules or any order of the Court.[FN1] Rule 41(b) permits the Court, *sua sponte,* to dismiss an action so long as the Court provides notice and follows the procedure set forth in 41(e).[FN2] Dismissal is within the sound discretion of the Court and the Court's duty is to "analyze the circumstances of each case separately and balance the need for judicial economy against Delaware's preference for affording the litigant her day in court." [FN3] The Court will not dismiss an action based on mere inaction; however, where there is gross neglect or lack of attention, dismissal may be proper.[FN4]

FN1. Del.Super. Civ. R. 41(b).

FN2. Del.Super. Civ. R. 41(e).

FN3. *Gregory v. Hyundai Motor America,* 2008 WL 2601388, at *2 (Del.Super.Jul. 2, 2008).

FN4. *Id.*

Dismissal is now, clearly, the disfavored sanction for discovery violations.[FN5] In determining whether dismissal is an appropriate discovery sanction for a party's discovery violation, this Court must balance the following six factors, first articulated in *Drejka v. Hitchens Tire Services, Inc.:*

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6)the meritoriousness of the claim or defense.[FN6]

A motion to dismiss should only be granted if no other sanction is more appropriate under the circumstances. Parties who ignore or extend scheduling deadlines without promptly consulting the trial court do so at their own peril. [FN7] That is, "any party that grants an informal extension to opposing parties counsel will be precluded from seeking relief from the court with respect to any deadlines in the scheduling order." [FN8]

FN5. *See Drejka v. Hitchens Tire Serv., Inc.,* 15 A.3d 1221, 1224 (Del.2010) ("[T]he sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort.") (citations omitted); *see also Gricol v. Sipple,* 2012 WL 5431092, at *1 (Del.Super.Oct. 22, 2012) (noting that the Superior Court has been directed to, more often than not, enforce scheduling orders by imposing monetary penalties on those attorneys who violate discovery deadlines).

FN6. *Drejka,* 15 A.2d at 1226 (citing *Minna v. Energy Coal S.p.A.,* 984 A.2d 1210, 1215 (Del.2009)).

FN7. *Christian v. Counseling Resource Assoc., Inc.,* 60 A.3d 1083, 1085 (Del.2013). *Christian* was among a quartet of cases the

> Supreme Court handed down in January intended to clarify the application of the so-called *Drejka* text. *See also Hill v. DuShuttle,* 58 A.3d 403 (Del.2012); *Keener v. Iskin,* 58 A.3d 407 (Del.2013); *Adams v. Aidoo,* 58 A.3d 410 (Del.2013). In *Christian,* the Supreme Court cautioned that should a party miss a discovery deadline, opposing counsel has two choices—resolve the matter informally or promptly notify the court. *Christian,* 60 A.3d at 1088. If counsel contacts the court, that contact can take the form of a motion to compel, a proposal to amend the scheduling order, or a request for a conference. *Id.* However, if the party chooses not to involve the court, that party will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward. *Id.*
>
> FN8. *Christian,* 60 A.3d at 1085.

In the present case, Plaintiff has failed to identify his liability experts within the time limits imposed by this court's scheduling order. The six factors set forth in *Drejka,* applied here, lead me to conclude that this failure, by itself, does not justify dismissal. No facts suggest that Mr. Dickenson was personally responsible for his attorney's failure to identify his liability experts within the time limits prescribed in the scheduling order.

*3 Defendant has suffered at least some prejudice by Plaintiff's delay in identifying and rendering an expert report. Defendant is entitled to receive expert reports sufficiently in advance of trial to provide him with a reasonable opportunity to defend himself. The Court's scheduling order would have given Defendant nearly seven months to prepare its defense and depose Dr. Slutsky. By skirting discovery deadlines, Plaintiff would have left Defendant at a significant disadvantage had the parties preserved the original trial date of May 28, 2013. However, this court has continued the trial to January 27, 2014 in light of Defendant's motion. This continuance has cured any potential prejudice Defendant may have suffered as a result of Plaintiff's dilatoriness in identifying and producing his expert reports.

Turning to the third factor, Plaintiff's counsel has shown a history of dilatoriness throughout the course of this litigation. Defendant has made repeated requests for expert reports, and has, on at least one occasion, moved to compel answers to interrogatories which were overdue for several months. Plaintiff's counsel has repeatedly missed discovery deadlines and requested extensions. However, it cannot be said that the delay that is at issue here resulted from the willful misconduct of Plaintiff's counsel. Instead, the delay can be attributed to Dr. Slutsky's own dilatoriness in supplementing his own report.

Nonetheless, defense counsel could have brought Plaintiff's dilatoriness to the Court's attention sooner. Instead, he chose to grant Plaintiff an extension of time to identify and produce Dr. Slutsky's report. This was extended as a courtesy which is the hallmark of civility in the Delaware Bar. The dictates of *Christian* are clear. By granting this extension, Defendant has waived his right to contest any late filings from that point forward. This includes a waiver of the right to move to dismiss the case pursuant to Rule 41(e). Accordingly, I find that dismissal of Plaintiff's complaint for failure to timely file an expert report is too harsh a sanction. Defendant's motion to dismiss is hereby *DENIED.*

IV. Defendant's Motion for Summary Judgment

Alternatively, Defendant asks the Court to grant summary judgment in his favor on the basis that Plaintiff has failed to adduce expert medical testimony opining that Defendant's alleged negligence was the proximate cause of Plaintiff's injuries. Defendant contends that because there is a complete failure of proof concerning an essential element of Plaintiff's medical negligence case, he is entitled to judgment as a matter of law.

Defendant's current motion is not in the vein of

a traditional summary judgment motion. The query presented here is not whether there are genuine issues of material fact that preclude summary adjudication; but rather, whether one party failed to produce evidence to support a fundamental element of one's complaint. Where as here, there has been "adequate time for discovery [and] the nonmoving party has failed to make a sufficient showing on an essential element of the case," the standard to be employed is the same as for a directed verdict.[FN9] To establish liability for medical negligence, plaintiff must present expert medical testimony on the physician's deviation from the standard of care and "*as to the causation* of the alleged personal injury or death."[FN10] Without expert medical testimony as to a breach of the standard of care and causation, the plaintiff cannot withstand a motion for summary judgment.[FN11]

FN9. *Burkhart v. Davies,* 602 A.2d 56, 60 (Del.1991).

FN10. 18 *Del. C.* § 6853 (emphasis added).

FN11. *Burkhart,* 602 A.2d at 59; *see also Crookshank v. Bayer Healthcare Pharm,* 2009 WL 1622828, at *3 (Del.Super. May 22, 2009) (finding that a conclusory expert report that stated the defendant's drug was known to cause injuries similar to the plaintiff's was insufficient to show that the drug caused the plaintiff's injuries); *Valentine v. Mark,* 2004 WL 2419131, at *2 (Del.Super.Oct. 20, 2004) (granting summaryjudgmentinfavorofdefendant-doctor after finding that plaintiff's expert was unwilling to testify that defendant's misdiagnosis was the proximate cause of plaintiff's injury).

*4 Plaintiff has failed to offer expert medical testimony that Defendant's medical negligence proximately caused the alleged injuries. Dr. Slutsky was the only expert that Plaintiff offered in defense of Defendant's motion for summary judgment. Dr. Slutsky does not opine with any degree of certainty that Defendant's alleged negligence was the cause of Plaintiff's injuries. He states only that the acetabular component of Plaintiff's hip implant is malpositioned; that Defendant did not order post-operative x-rays of Plaintiff's right hip and; without these x-rays, he can not opine as to whether Defendant's alleged negligence contributed to the malposition of Plaintiff's implant. Plaintiff, therefore, cannot establish causation in the manner required by the statute; that is, Plaintiff cannot prove that Defendant negligently performed Plaintiff's hip replacement and that this negligence proximately caused the alleged injuries.

Plaintiff attempts to salvage his case by arguing that a jury could draw an inference from Dr. Slutsky's opinion that Plaintiff's injuries were more likely than not caused by the malpositioning of the acetabular component of his implant. But 18 *Del. C.* § 6853 requires a plaintiff in a medical negligence case to establish proximate cause by expert medical testimony. It does not permit a jury to connect the dots between a bare allegation of medical negligence and an injury. The expert discovery deadline has long passed, and Plaintiff has not procured an expert to testify that Defendant deviated from the standard of care while performing Plaintiff's surgery and that its breach proximately caused Plaintiffs' injuries. Where the nonmoving party bears the ultimate burden of proof and has failed to make a sufficient evidentiary showing on an essential element of his case, the moving party is entitled to judgment as a matter of law. For that reason, Defendant's Motion for Summary Judgment must be *GRANTED.*

IT IS SO ORDERED.

Del.Super., 2013
Dickenson v. Sopa
Not Reported in A.3d, 2013 WL 3482014 (Del.Super.)

END OF DOCUMENT

858 A.2d 960, 2004 WL 1965034 (Del.Supr.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 858 A.2d 960, 2004 WL 1965034 (Del.Supr.))

C

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.
Richard W. O'DONALD and Jerri O'Donald, husband and wife, Plaintiffs Below, Appellants,
v.
Edward J. MCCONNELL, M.D., Defendant Below, Appellee.

No. 332004.
Submitted July 21, 2004.
Decided Aug. 19, 2004.

Background: In medical malpractice case, the Superior Court, New Castle County, granted physician's motion for summary judgment based on the plaintiff's failure to provide expert causation evidence. Plaintiff appealed.

Holding: The Supreme Court held that absence of expert medical testimony as to causation of alleged personal injury precluded recovery on medical malpractice claim.

Affirmed.

West Headnotes

Health 198H ⇐821(5)

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk815 Evidence
198Hk821 Necessity of Expert Testimony
198Hk821(5) k. Particular Procedures. Most Cited Cases

Absence of expert medical testimony as to causation of alleged personal injury precluded recovery on medical malpractice claim brought against physician who failed to timely diagnose patient's lung cancer. 18 Del.C. § 6853.

Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 00C-12-236.

Before STEELE, Chief Justice, HOLLAND and JACOBS, Justices.

ORDER

*1 This 19th day of August 2004, it appears to the Court that:

(1) Appellant Richard O'Donald, the plaintiff below in a medical malpractice case, appeals the Superior Court's grant of summary judgment for the defendant below-appellee, Dr. Edward McConnell. Because O'Donald failed to provide expert causation evidence to meet an essential element of his case, the Superior Court correctly granted summary judgment in favor of the defendant physician.

(2) Mr. O'Donald (who was a non-smoker) first complained of a cough to his family physician, Dr. McConnell, during an April 28, 1998 office visit. Between April 1998 and January 2000, O'Donald was seen and treated two additional times in the office. He claims that he telephoned Dr. McConnell's office to complain of a persistent cough on two or three occasions. In January 2000, Dr. McConnell again examined O'Donald and noted a significant worsening of his condition. Dr. McConnell ordered a chest x-ray, which revealed multiple nodules throughout both of his lungs, which later were identified as a rare, inoperable, alveolar cancer. O'Donald was treated by oncologist Dr. Kenneth Algazy, whom the plaintiff later intended to use as an expert witness in his malpractice case.

(3) O'Donald alleges that Dr. McConnell should have ordered a chest x-ray after his initial April 1998 office visit, and, that if a chest x-ray had

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(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 858 A.2d 960, 2004 WL 1965034 (Del.Supr.))

been taken, it would have led to an earlier diagnoses of his cancer, and thereby increased his chances of survival.

(4) This lawsuit, filed on December 28, 2000, has a tortuous procedural history that includes missed deadlines, motions to compel and to dismiss, and a stay pursuant to 18 *Del. C.* § 4218 because the defendant's insurer became insolvent during the pendency of the action. Of significance here is the defendant's second motion to dismiss, to which plaintiff did not respond before the scheduled hearing date. Nor did plaintiff's counsel appear at an office conference to discuss that motion. At that conference, the Superior Court denied the defendant's motion to dismiss, but granted monetary sanctions against the plaintiff. The Court also granted the defendant's motion to exclude Dr. Algazy's testimony with respect to the standard of care and proximate cause because of the plaintiff's failure to provide discovery.[FN1] The plaintiff did not appeal the order excluding Dr. Algazy's testimony and imposing the sanctions.

FN1. Order, April 3, 2003. The trial judge ordered $200 in attorney's fees to be paid to defense counsel for preparation of the motion, because of the plaintiff's prior failure to answer interrogatories or provide expert discovery.

(5) On December 30, 2003, the defendant filed a second summary judgment motion, based on the plaintiff's failure to identify a "proximate cause" expert. The Superior Court granted the defendant's motion, and this appeal (on that issue only) followed.

(6) This Court reviews a trial court's grant of summary judgment *de novo*.[FN2] Summary judgment is to be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[FN3] Where the nonmoving party bears the ultimate burden of proof but has not made a sufficient showing on an essential element of his case, the moving party is entitled to a judgment as a matter of law.[FN4]

FN2. *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 833 (Del.1992).

FN3. Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del.1991).

FN4. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

*2 (7) To establish liability for medical negligence, plaintiff must present expert medical testimony on the physician's deviation from the standard of care and "as to the causation of the alleged personal injury or death."[FN5] Without expert medical testimony as to a breach of the standard of care and causation, the plaintiff cannot prevail.[FN6]

FN5. 18 *Del. C.* § 6853.

FN6. *Burkhart v. Davies*, 602 A.2d 56; 18 *Del. C.* § 6853.

(8) O'Donald's claim of error on appeal is that his injury "obviously resulted from the breach of the standard of care," and that, although Dr. Algazy was precluded from testifying about a proximate causation by order of the trial court, causation would be established-even without medical testimony about causation-by Dr. Algazy's testimony about the nature of the plaintiff's injury. The appellant asserts that "[c]ertainly, in this day and age, and state of knowledge, in a circumstance such as this it would be indisputable, that a failure to timely diagnose lung cancer is, itself a cause of diminished life expectancy."[FN7] This argument ignores the purpose of expert medical testimony, as recognized by the General Assembly, which is that, subject to the exceptions listed in the statute, the proximate cause of injuries that are claimed to be attributable to medical negligence are not within the common knowledge of a layperson.[FN8]

FN7. Appellant's Opening Brief at 15. O'Donald did not raise or argue the theory

> of "loss of chance," also known as reduced chance of survival. (*See Shively v. Klein*, 551 A.2d 41 (Del.1988); *Edwards v. Family Practice Assocs.*, 798 A.2d 1059 (Del.Super.Ct.2002)). Even under a "loss of chance" theory, however, O'Donald would have been required to provide testimony that the alleged failure to diagnose was at least a "substantial cause" of his loss of chance at survival. (*Shively, supra).* Because Dr. Algazy's testimony on causation was barred, O'Donald could not have met this burden, either.
>
> FN8. *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372 (Del.1991).

(9) Appellant's argument that causation is "obvious" and "indisputable" fails to satisfy the statutory requirement of proof in a medical negligence case. Where the nonmoving party bears the ultimate burden of proof and has failed to make a sufficient evidentiary showing on an essential element of his case, the moving party is entitled to a judgment as a matter of law. For that reason, summary judgment was properly granted in the defendant's favor.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

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(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

Karen VALENTINE, as executrix of the Estate of William Valentine, deceased, and in her own right and as parent and natural guardian of her minor son, Tyler Valentine, Plaintiff Below, Appellant,

v.

Michael MARK, M.D., Defendant Below, Appellee.

No. 493,2004.

Submitted March 30, 2005.

Decided May 10, 2005.

Background: Medical malpractice plaintiff sued doctor. The Superior Court, New Castle County, No. 02C-12-244, granted doctor's motion for summary judgment. Plaintiff appealed.

Holding: The Supreme Court held that plaintiff was not entitled to continuance of trial date or longer extension for identification of experts.

Affirmed.

Pretrial Procedure 307A ⚿25

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak25 k. Sequence and Timing; Condition of Cause. Most Cited Cases

Pretrial Procedure 307A ⚿717.1

307A Pretrial Procedure
307AIV Continuance
307Ak717 Absence of Witness or Evidence
307Ak717.1 k. In General. Most Cited Cases

Medical malpractice plaintiff was not entitled to a continuance of her trial date or a longer extension than the one she received for the identification of experts; trial court ruled that plaintiff had ample time to find experts and that defendant doctor should have his day in court, and nothing in the record suggested that trial court's decision was arbitrary or capricious.

Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 02C-12-244.

Before STEELE, Chief Justice, HOLLAND and BERGER, Justices.

ORDER

*1 This 10th day of May, on consideration of the briefs of the parties, it appears to the Court that:

1) In this medical malpractice action, Karen Valentine appeals from a decision of the Superior Court granting summary judgment to Michael Mark, M.D. Valentine filed the complaint on December 30, 2002. On November 13, 2003, the trial judge entered a scheduling order that, among other things, set a trial date of November 1, 2004, and required Valentine to provide her expert's report or Rule 26(b) disclosures by April 14, 2004. In April 2004, the date for identification of experts (but not the trial date) was extended, by stipulation of the parties. Under the amended scheduling order, Valentine was to disclose her experts by June 15, 2004. When that deadline arrived, Valentine filed a motion to extend the time limit once again. On July 19, 2004, the trial court heard the motion and granted an extension, but only until August 1, 2004. The trial court retained the scheduled trial date.

3) Valentine first complains that the trial court abused its discretion in refusing to continue the trial date and in granting only a limited extension of time for the identification of experts. Valentine needed the continuance because: (i) she had re-

cently learned that potential witnesses would not be allowed to participate in the trial; and (ii) various family tragedies prevented Valentine from assisting counsel in preparation for trial. The trial court based its decision on the fact that Valentine had had ample time to find experts and that Mark should have his day in court. In addition, the trial court noted that five trial days had been reserved for this case, and that it would be unfair to other litigants if those days were not used.

4) As Valentine acknowledges, the trial court has discretion to resolve scheduling issues and to control its own docket.[FN1] We find nothing in the record to suggest that the trial court's decision was arbitrary or capricious. To the contrary, we find that the trial court acted well within its discretion, given the amount of time the case had been pending and the need to maintain scheduled trial dates.

FN1. *Weber v. Weber,* 1988 WL 93433 (Del.Supr.).

5) Valentine also complains that the trial court erred in granting Mark's motion to dismiss, which the court converted to a motion for summary judgment. We find no merit to this argument, and affirm on the basis of the trial court's decision dated October 20, 2004.

6) Finally, Valentine argues that she should be allowed to pursue a claim based on the "loss of chance" doctrine. We will not consider this argument, as it was not fairly presented to the trial court, and determination of this issue is not required in "the interests of justice."[FN2]

FN2. Del.Sup.Ct. R. 8.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

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(Cite as: 2004 WL 2419131 (Del.Super.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.
Karen VALENTINE, as Executrix of William Valentine, deceased, and in her own right, and as parent and guardian of her minor son, Tyler Valentine, Plaintiff,
v.
Michael MARK, M.D., Defendant.

No. Civ.A. 02C-12-244PLA.
Submitted Oct. 15, 2004.
Decided Oct. 20, 2004.

Upon Defendants' Motion for Summary Judgment. Granted.

Michael D. Carr, Wilmington, Delaware, for Plaintiff.

Richard Galperin, Morris, James, Hitchens & Williams, LLP, Wilmington, DE, for Defendant.

ORDER

ABLEMAN, J.

*1 Upon consideration, Defendant's motion for summary judgment, improperly titled Defendant's Motion To Dismiss, must be GRANTED. It appears to the Court that:

1. This is a medical negligence case in which Plaintiff Karen Valentine has alleged that Defendant Michael Mark, M.D. failed to properly diagnose her husband's ("Decedent") brain tumor for a two month period. Valentine believes that Dr. Mark's misdiagnosis that a stroke had caused Decedent's condition, as well as his failure to inform Decedent that brain cancer was a possible alternative cause of the illness, breached the applicable standard of medical care, and led to a measurable decline in Decedent's life expectancy. Valentine has thus filed a survivorship action on behalf of Decedent, and a wrongful death action for herself and her minor son.

2. The relevant facts are easily summarized and not in dispute. Decedent suffered a series of seizures in January 2001, for which he sought care from Dr. Mark. Dr. Mark sent Decedent to a radiologist, who performed a CAT scan. The radiologist interpreted the imaging as being indicative of a stroke. Dr. Mark agreed, and prescribed a regimen of care consistent with that opinion.

Dr. Mark recognized that there was some possibility that his diagnosis was wrong and that Decedent may actually have had a brain tumor. Dr. Mark chose not to inform Decedent and Valentine of that possibility, for several reasons. First, Dr. Mark believed the likelihood of cancer was small, and he did not want to alarm Decedent. Second, Dr. Mark knew that the only way to test for the type of brain tumor at issue was to perform a surgical biopsy, i.e. extract a portion of Decedent's brain for testing. Finally, Dr. Mark also knew that if a tumor had caused Decedent's symptoms, that tumor would be quickly and inevitably fatal. Dr. Mark therefore believed that it would be compassionate to withhold this differential diagnosis from the Valentines, and specifically decided to do so to avoid unnecessary alarm.

In March 2001, Decedent suffered a second series of seizures, for which he sought care at a different hospital. The hospital diagnosed Decedent's condition as a glioblastoma multiform, a malignant, rapidly growing, and incurable tumor. The hospital's diagnosis was especially grim because the tumor appeared in the frontal lobe area of Decedent's brain. This meant that it could not be removed, a difficult and often futile task regardless of location, without significantly impairing the brain's executive functions: language skills, cognition, memory, and decision-making.

The hospital referred Decedent back to Dr. Mark, who adhered to his original diagnosis. The Valentines believed the hospital, rather than Dr. Mark, and sought out other neurological care for brain cancer. This alternative medical provider confirmed the tumor, but was unable to do anything for Decedent, who died in August 2001.

3. In preparation for this litigation, the plaintiff engaged a medical expert, Stephen S. Kamin, M.D. Dr. Kamin is responsible for the neurological residency program at New Jersey Medical School, and also actively practices neurology. Dr. Kamin was deposed on September 1, 2004. The deposition prompted this motion to dismiss, which is more properly termed a motion for summary judgment since it based upon factual matters outside of the complaint.

*2 Dr. Kamin is of the opinion that Dr. Mark breached his duty of care to the Valentines by failing to disagree with the radiologist's interpretation of the first CAT scan, and thus failing to diagnose the tumor. Significantly, however, Dr. Kamin does not believe that this breach caused any material change in Decedent's life expectancy. A few excerpts of his deposition are particularly relevant:

Defense Counsel: Are you going to be giving an opinion in this case as to the effect, if any, on the fact ... that this GBM [tumor] wasn't diagnosed until March, when you feel it should have been diagnosed in January?

Dr. Kamin: I will not be giving a specific opinion on whether there was an effect on the outcome. FN1

FN1. Dep. of Stephen S. Kamin, M.D., at 14, *hereinafter* "Kamin at _."

Defense Counsel: And just to finish with where I began, to make sure you are not going to be giving testimony as to what the ultimate effect that failure to diagnose and treat in January had on Mr. Valentine?

Dr. Kamin: Yes. I cannot say to a reasonable degree of medical certainty, or probability, that it made a difference. FN2

FN2. Kamin at 40.

Plaintiff's Counsel: Assuming that William Valentine was representative of that study, are you able to say, based on the studies, had, in January, he been diagnosed and properly an recommend[ed] promptly to radiation and chemotherapy does that put him in an average life expectancy of 18 months?

Dr. Kamin: Probably not ... I agree that it probably was not resectable [i.e., surgically treatable], even incompletely. FN3

FN3. Kamin at 44.

4. Summary judgment is proper when, considering all the evidence in a light most favorable to the non-moving party, there is no genuine issue of material fact that would require a trial. FN4 Summary judgment differs from a dismissal in that the former is a measure of the evidence presented, while the later is usually a measure of the legal sufficiency of a pleading. Since Defendant's motion depends upon Dr. Kamin's deposition, it is properly considered as a summary judgment motion, not a motion to dismiss.

FN4. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

18 Del. C. § 6853 reads, in relevant 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 care in the specific circumstances of the case and as to the causation of the alleged personal injury or death ...

The quoted excerpts from the deposition of Dr. Kamin-Plaintiff's only expert witness-indicate that he is unwilling to testify to causation in this case. The plaintiff therefore cannot establish causation in the manner required by the statute; that is, the plaintiff cannot prove that the two months in which Decedent labored under a misdiagnosis made any difference at all in his probable life expectancy. Without causation, no negligence claim can succeed. Summary judgment is therefore appropriate.

5. Plaintiff's counsel has attempted to repair his failure to establish causation with a somewhat inventive argument, claiming that Dr. Mark's failure to advise Decedent of alternative possible causes of his symptoms deprived Decedent of the right to seek other opinions. This breach, says the plaintiff, meant that Decedent did not grant informed consent to the stroke treatment, or to the lack of brain cancer treatment. Plaintiff also characterizes Dr. Mark's decision to withhold the differential diagnosis as willful, wanton, and malicious.

*3 This argument lacks merit. First, the evidence presented does not at all support the plaintiff's characterization of Dr. Mark's actions as willful or sinister in any respect. Plaintiff offers no reason why Dr. Mark would have maliciously withheld a proper diagnosis from Decedent in order to force him into an incorrect treatment regime. The evidence does support a finding that Dr. Mark, agreeing with other experts, thought that a tumor was unlikely, and made a professional decision that the negative effects of offering that diagnosis, i.e. alarm, a painful brain biopsy, and foreknowledge of inevitable death, outweighed the minimal gains of offering it. Dr. Kamin testified that decisions of when and how to tell patients that they may have a tumor is "a matter of style." [FN5] While Dr. Mark's decision may have been ultimately incorrect, it certainly was not malicious.

FN5. Kamin at 43.

More importantly, an informed consent action still requires expert testimony as to causation. The Informed Consent Statute, 18 Del. C. § 6852, is found under the "Medical Negligence" chapter of the Delaware Insurance Code. It also specifically references informed consent as a subset of medical negligence, saying, "No recovery of damages based upon a lack of informed consent shall be allowed in any action for medical negligence unless" certain conditions are met. Section 6853 makes it abundantly clear that, barring certain grotesque exceptions, only expert testimony can prove the essential element of causation. Section 6852 cannot therefore be used as a backdoor around the requirement that causation in medical negligence cases be supported by expert testimony.

6. For all the foregoing reasons, Defendants' Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED.

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