IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

May 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

ROBERT COX, Adminstrator of the Estate of Linda Cox Johnson, Deceased,

Plaintiff/Appellant,

vs.

GENERAL CARE CORP. d/b/a HCA REGIONAL HOSPITAL OF JACKSON, BEVERLYANN JETTON, NURSE, SHEWANNA MACKEY, RECEPTIONIST, and JOSEPH RAGON M.D.,

Defendants/Appellees.

Madison Law No. C-92-245

Appeal No.
02A01-9412-CV-00269

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY
AT JACKSON, TENNESSEE

THE HONORABLE PHIL B. HARRIS, JUDGE

For the Plaintiff/Appellant:
William A. Cohn
Cordova, Tennessee

For the Defendants/Appellees
Sadia S. Staton
Jackson, Tennessee

John D. Burleson
Jackson, Tennessee

AFFIRMED

HOLLY KIRBY LILLARD, JUDGE

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

ALAN E. HIGHERS, J.

This is a wrongful death suit brought by Robert Cox (Cox), as administrator of the estate of the decedent, Linda Cox Johnson (Johnson), alleging medical malpractice against General Care Corporation, d/b/a HCA Regional Hospital of Jackson (HCA), and several of its emergency room personnel. The trial court granted summary judgment to HCA. Cox appeals the summary judgment as well as the trial court's denial of Cox's motions to strike the affidavit of HCA's expert and amend the Complaint. Cox also appeals the alleged denial of a motion to consolidate the case at bar with a related suit; however, the record is silent as to what, if any, action the trial court took regarding this motion. We affirm the trial court's denial of Cox's motion to strike the affidavit of HCA's expert and the entry of summary judgment in favor of HCA. We find no error regarding amendment of the Complaint, and the consolidation issue is pretermitted by our affirmance of the trial court's entry of summary judgment.

On August 27, 1991, Johnson visited Dr. Bob Souder (Souder) for diagnosis and treatment of an illness. At Souder's direction, Johnson went to HCA the next day for some outpatient tests. Over the next two days, Johnson felt progressively worse, and on the morning of Saturday, August 31, 1991, relatives took Johnson to the HCA emergency room. The parties dispute the time at which Johnson arrived at the emergency room. The parties also dispute the time Johnson was first examined by a physician. At some point after she arrived at HCA's emergency room, she was moved to HCA's intensive care unit, where she died. Cox's Complaint, filed on August 21, 1992, alleges that HCA and its staff were negligent in not treating Johnson promptly upon her arrival at the emergency room. Cox had also filed a separate lawsuit against Souder in another court.

HCA filed a motion with the trial court for summary judgment. In support of its motion, HCA submitted the affidavit of a medical expert, Dr. Richard Stein. Cox moved the court to strike Stein's affidavit and, in opposition to the motion for summary judgment, offered the affidavit of his own expert, Dr. Philip Leavy. Cox also moved the court to allow him to amend his Complaint to identify the laboratory which ran some tests on the decedent at HCA's laboratory. In addition, Cox moved for joinder of the separate suit against Souder to the case at bar. The trial court denied Cox's motion to strike Stein's affidavit, granted HCA's motion for summary judgment, and denied Cox's motion to amend the Complaint. The record is silent as to whether the trial court took any action regarding the motion to join the instant case with the separate lawsuit against Souder.

In this appeal, Cox asserts that his motion to strike Dr. Stein's affidavit should have been granted and that the trial court erred in granting HCA's motion for summary judgment. Cox also argues that his motion to amend his Complaint should have been heard prior to the motion for summary judgment and asserts that, had it been heard first, the amended Complaint would have survived HCA's motion for summary judgment. Cox contends that the trial court denied his motion for joinder and seeks to appeal that denial, but does not cite any portion of the record which contains the trial court's denial of the joinder motion.

We first consider the denial of appellant's motion to strike the affidavit of Dr. Richard Stein submitted by HCA in support of its motion for summary judgment. Stein's affidavit states his opinion that, to a reasonable degree of medical certainty, even if Johnson had received appropriate treatment promptly at the time Cox maintains that she arrived at HCA's emergency room, this would not have prevented her death. The admissibility of expert testimony is a matter within the sound discretion of the trial court and will only be overturned on appeal when the court has arbitrarily exercised or abused that discretion. ***State v. Ballard***, 855 S.W.2d 557, 562 (Tenn. 1993); ***Austin v. City of Memphis***, 684 S.W.2d 624, 634 (Tenn. App. 1984). Cox argues that Stein's affidavit consisted of baseless conjecture and speculation. However, Stein's affidavit states that his opinion is based on Johnson's hospital records, the autopsy report, information reasonably relied on by other physicians in the field of hematology, and his own research and experiences in treating patients with similar symptoms. The trial court did not abuse its discretion in denying the motion to strike, and its denial is affirmed.

We next consider the entry of summary judgment in favor of HCA. A trial court should grant a motion for summary judgment when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Tenn.R.Civ.P. 56.03. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. ***Id.*** at 210-11. In ***Byrd***, the court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this

> regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth ***specific facts*** showing that there is a genuine issue of material fact for trial. "If he does not so respond, summary judgment . . . shall be entered against him."

Id. at 211 (citations omitted). Summary judgment is only appropriate when the case can be decided on the legal issues alone. ***Id.*** at 210. Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. ***Johnson v. EMPE, Inc.***, 837 S.W.2d 62, 68 (Tenn. App. 1992). Review of the order granting summary judgment is, therefore, ***de novo.***

In order to carry his burden in a medical malpractice action, a plaintiff must prove the following:

> (1) The recognized standard of acceptable professional practice in the profession and the speciality thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

T.C.A. § 29-26-115(a)(1)-(3) (1980); ***Hurst v. Dougherty***, 800 S.W.2d 183, 185 (Tenn. App. 1990). To prove negligence, a plaintiff must establish each element: duty, breach of duty, causation, proximate cause, and damages. ***Kilpatrick v. Bryant***, 868 S.W.2d 594, 598 (Tenn. 1993). In medical malpractice actions, negligence and causation are usually established by medical expert testimony. T.C.A. § 29-26-115(b) (1980); ***Stokes v. Leung***, 651 S.W.2d 704, 706 (Tenn. App. 1982). The Tennessee Supreme Court has stated that "[c]ausation in fact is a matter of probability, not possibility, and in a medical malpractice case, such must be shown to a reasonable degree of medical certainty." ***Kilpatrick***, 868 S.W.2d at 602 (citing ***White v. Methodist Hosp. South***, 844 S.W.2d 642, 648-49 (Tenn. App. 1992)). Thus, in order to establish causation, the medical expert testimony must show to a reasonable degree of medical certainty that the tortious conduct of the defendant caused the injury to the patient.

HCA presented competent expert testimony to show lack of proximate cause; that is, even if HCA had been negligent in not treating Johnson promptly, prompt treatment would not have prevented her death. Stein's affidavit stated that it was his opinion, within a reasonable degree of medical certainty, that Johnson's life could not have been saved even if Johnson had immediately

received prompt treatment at the time the plaintiff asserts she arrived at HCA's emergency room. It then became Cox's burden to go beyond the pleadings to establish that there was indeed a genuine issue of material fact on the issue of proximate cause.

Cox offered affidavit testimony of his own expert, Dr. Philip Leavy, to rebut the Stein affidavit submitted by HCA. On the issue of proximate cause, Leavy's affidavit states as follows:

> It appears to me upon the facts presented to me and upon the medical records presented to me, that there is a ***possibility*** that the decedent's death could have been prevented by prompt and proper medical attention from the Defendant HCA Regional Medical Center. Under no circumstances was death automatic. (Emphasis added.)

Thus, Leavy's affidavit states only that there is "a possibility" that Johnson's death could have been prevented had HCA acted properly. In essence, based on Leavy's affidavit, Cox sought recovery for Johnson's "lost chance of survival," discussed by the Tennessee Supreme Court in ***Kilpatrick***, ***supra***. In ***Kilpatrick***, the Court declined to relax the traditional causation standard, stating that a " 'doctor's testimony that a certain thing is possible is no evidence at all.' " ***Kilpatrick***, 868 S.W.2d at 602 (quoting ***Lindsey v. Miami Dev. Corp.***, 689 S.W.2d 856, 861-62 (Tenn. 1985)). Proof of causation equating to a "possibility" is not sufficient, as a matter of law, to establish by a preponderance of the evidence in a medical malpractice case that the defendant's tortious conduct caused the plaintiff's injury. Leavy's affidavit was insufficient to rebut the affidavit submitted by HCA; thus, the trial court's entry of summary judgment in favor of HCA must be affirmed.

Cox next asserts error in the trial court's denial of the motion to amend. Cox's Complaint states that "Bob T. Souder, M.D. ran medical laboratory tests, ***the result of which he requested from a laboratory***" (emphasis added). Cox later moved the trial court to add the following sentence to the Complaint: "The laboratory which ran the medical tests was the laboratory of the Defendant HCA Regional Hospital." However, neither the Complaint nor the proposed amendment allege negligence in relation to the tests conducted on August 28, 1991. Since the amended complaint would not have stated a claim for negligence with regard to the August 28, 1991 laboratory tests, it would not have survived HCA's motion for summary judgment. Any error by the trial court on the motion to amend would be harmless error. Likewise, hearing the motion to amend after the granting of summary judgment did not change

the result in this case. The trial court's actions regarding the motion to amend are affirmed.

Finally, Cox argues that the trial court erred in failing to grant his motion to join the instant lawsuit with the separate lawsuit against Dr. Souder. We decline to consider this issue because (1) there is nothing in the record establishing the trial court's ruling on the motion and (2) the issue is pretermitted by our affirmance of the trial court's grant of summary judgment in favor of HCA.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the Appellant, for which execution may issue if necessary.

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HOLLY KIRBY LILLARD, J.

CONCUR:

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W. FRANK CRAWFORD, P.J., W.S.

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ALAN E. HIGHERS, J.