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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001691-MR

DESIREE DOUGLAS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 09-CI-05881

ADVANCED PAIN MEDICINE, P. S. C.;
AND SAROJ B. DUBAL, M.D.

APPELLEES

OPINION

AFFIRMING IN PART AND REVERSING IN PART

** ** * ** * ** *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Desiree Douglas appeals a grant of summary judgment for lack of causation on her medical malpractice claim.

In 2005, Douglas began experiencing neck pain which resulted in her first of many visits to a doctor. This pain worsened considerably by August 10, 2006, when Douglas saw her family physician, Dr. Michelle Welling. According

to Douglas's deposition, she told Dr. Welling she was experiencing a constant achy feeling on the side of her neck from her earlobe into her shoulder, her neck was swollen, she was hoarse in the mornings, she experienced a panic attack, and was feeling tired, cold and weak. Dr. Welling prescribed antidepressants and pain medications. When the medications did not relieve her symptoms, Dr. Welling prescribed Douglas other medications.

On September 25, 2007, Douglas returned to Dr. Welling. According to her deposition testimony, Douglas told Dr. Welling that her neck swelling had increased, she could feel a knot in her throat that was very sore to the touch and getting larger and harder. She was experiencing increased hoarseness and had difficulty sneezing and swallowing. She also reported the pain was making sleeping difficult.

After Douglas did not improve with physical therapy, Dr. Welling referred Douglas to Dr. Saroj B. Dubal at Advanced Pain Medicine, P.S.C. From November 27, 2007, through April 8, 2008, Dr. Dubal treated Douglas for pain over the course of nine appointments.

On February 8, 2008, Dr. Dubal ordered a CT exam of Douglas's neck without contrast from Dr. Jay Wigboldy. It is undisputed that Wigboldy misread the CT scan. However, he also recommended that because of the soft tissue mass on the images, Dr. Dubal order a CT exam with contrast if there was still clinical suspicion of abnormality. Dr. Dubal did not order the additional CT.

On December 15, 2008, Dr. Jan Weisberg diagnosed Douglas with medullary thyroid cancer and referred her to surgeon Dr. Victor Lawson. On January 7, 2009, Dr. Lawson removed her thyroid tumor and adjoining lymph nodes on one side of her neck and on May 6, 2009, removed the remaining part of her thyroid and adjoining lymph nodes from the other side of her neck. However, following these surgeries, Douglas's physicians determined the cancer had metastasized into Douglas's mediastinum, requiring additional surgery. Because the cancer distantly metastasized, it is considered to be at Stage IV and Douglas's long-term prognosis for survival is poor.

Douglas filed suits against Dr. Welling, Dr. Wigboldy, Dr. Dubal and their practice groups in two different circuit courts. The suit in Fayette Circuit Court involved Dr. Dubal and Dr. Wigboldy. Dr. Wigboldy and his practice group settled with Douglas. Therefore, we are only concerned with the litigation against Dr. Dubal and Advanced Pain Medicine.

The case progressed through discovery and the parties deposed their expert witnesses. Douglas deposed Dr. Henry Lynch and Dr. Larson. Dr. Dubal deposed Dr. James Stark. All experts agreed their testimony was necessarily limited because Douglas's type of cancer is relatively rare and has not received extensive study. While it is known to be a comparatively slow-growing cancer, there is little medical literature to rely on to determine when metastases occurred based on the stage of the cancer when eventually discovered. While the doctors' opinions differed regarding when Douglas's cancer became incurable, no expert was able to

testify based on reasonable medical probability that Douglas would have had a greater than 50% chance of recovery if she had been diagnosed during the period that Dr. Dubal was her treating physician. Douglas's own expert, Dr. Lynch, opined Douglas more likely than not could have been cured if diagnosed by 2005, well predating when she first saw Dr. Dubal on November 27, 2007. While the progression of Douglas's cancer to Stage IV may have occurred after Dr. Dubal's treatment, Douglas's experts agreed the metastases to her mediastinum occurred sometime between 2005 and the date of her first surgery.

Dr. Lynch and Dr. Stark testified the delay in Douglas's diagnosis and thyroidectomy forced her to endure ongoing pain (categorized by Dr. Lynch and Dr. Lawson as severe) that was ultimately relieved by her thyroidectomy. Dr. Lawson testified the advanced nature of her disease required him to perform two separate surgeries to remove her thyroid and adjoining lymph nodes in order to avoid damaging her recurrent laryngeal nerve. Dr. Stark testified that earlier diagnosis would have resulted in surgery while the tumor volume was smaller.

Based upon the depositions of these expert witnesses, Dr. Dubal and Advanced Pain Medicine filed a motion for summary judgment. They conceded breach of the standard of care for purposes of the motion, but argued summary judgment should be granted because Douglas failed to raise a factual issue as to causation because she could not establish she had a greater than 50% chance of survival if Dr. Dubal had timely diagnosed her condition or referred her to someone who would have done so. They argued Douglas could only recover under

the lost chance doctrine, which is not recognized in Kentucky. The trial court agreed and granted the motion for summary judgment. Douglas subsequently filed a motion to vacate summary judgment, which the trial court denied.

Douglas argues expert testimony established the delay in her diagnosis worsened her prognosis because during that delay her cancer progressed from a Stage III to a Stage IV as a result of metastases to her mediastinum. Additionally, the delay in treatment allowed the tumor volume in her neck to increase, resulting in more extensive surgeries, and the pain she was experiencing could have been relieved had the thyroidectomy been performed sooner.

It is appropriate for Douglas to seek recovery from Dr. Dubal on the theory that his failure to diagnose her cancer resulted in an aggravation of this previous existing condition by allowing her cancer to grow to a terminal stage. *See Gill v. Burress*, 382 S.W.3d 57, 62 (Ky.App. 2012). To survive summary judgment, Douglas was required to present expert testimony to establish an issue of fact as to whether Dr. Dubal's alleged negligence proximately caused her injury. *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky.App. 2006). However, because Kentucky has not adopted the lost chance doctrine, in order for Douglas to recover she had to show within reasonable probability that Dr. Dubal's failure to diagnose her thyroid cancer caused it to progress to incurability with the likely outcome that she will eventually die from this cancer. *Kemper v. Gordon*, 272 S.W.3d 146, 149-150 (Ky. 2008); *Noble v. Sartori*, 799 S.W.2d 8, 9 (Ky. 1990). Expert testimony opining Dr. Dubal's negligence resulted in this injury is only sufficient to meet

Douglas's burden if based "on reasonable medical probability and not speculation or possibility." *Andrew*, 203 S.W.3d at 170 (quoting *Sakler v. Anesthesiology Associates, P.S.C.*, 50 S.W.3d 210, 213 (Ky.App. 2001)). Douglas has failed to meet his burden.

However, only a partial summary judgment should have been granted. The trial court failed to address Douglas's additional claims regarding prolonged neck pain and more extensive neck surgery resulting from the delay in her diagnosis when it granted summary judgment dismissing her case in its entirety. A cognizable claim exists for a misdiagnosis leading to additional pain and suffering, and a more invasive course of treatment, regardless of the eventual positive or negative outcome for the patient. *See Bayless v. Boyer*, 180 S.W.3d 439, 443, 452 (Ky. 2005); *Dennis v. Fulkerson*, 343 S.W.3d 633, 635-637 (Ky.App. 2011). Because Douglas presented expert testimony that the delay in treatment resulted in an extended period of ongoing neck pain and more extensive surgical procedures, the trial court erred by not allowing her claim on these separate injuries to proceed.

Accordingly, we affirm in part and reverse in part the Fayette Circuit Court's summary judgment. We affirm as to Douglas's claim that Dr. Dubal injured her because his delayed diagnosis allowed her cancer to progress to a terminal condition. We reverse as to complete dismissal of Douglas's case. Douglas has presented a triable issue as to whether Dr. Dubal injured her because the delay in diagnosis caused her to experience continued pain and resulted in more extensive neck surgeries.

ALL CONCUR.

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