

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

HALINA AWSIENKO, surviving) 1 CA-CV 11-0335
spouse; NINA AWSIENKO, surviving)
child; and OLEG AWSIENKO,) DEPARTMENT E
surviving child,)
)
) **MEMORANDUM DECISION**
Plaintiffs/Appellants,)
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
RAAD HINDOSH, MD, and JANE DOE)
HINDOSH, husband and wife,)
)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-024190

The Honorable Edward O. Burke, Judge

AFFIRMED

Antonio M. Rosacci Phoenix
Attorney for Plaintiffs/Appellants

Jones, Skelton, and Hochuli, P.L.C. Phoenix
By Eileen Dennis Gilbride
Cristina M. Chait
Attorneys for Defendants/Appellees

H A L L, Judge

¶1 Halina Awsienko, Nino Awsienko, and Oleg Awsienko (the Awsienkos) appeal from the trial court's ruling granting summary judgment in favor of Raad Hindosh, M.D., on their claim of medical malpractice/wrongful death. For the reasons discussed below, we affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The following relevant facts are not disputed. On January 14, 2006, Filip Awsienko, a ninety-year-old man, presented to Tempe St. Luke's Hospital complaining of chest pain. At that time, Filip's known preexisting medical conditions included: hypertension, congestive heart failure, gout, diabetes, chronic renal failure, morbid obesity, hyperlipidemia, asthma, and atrial fibrillation. On January 16, 2006, Filip suffered a respiratory episode in which Dr. Hindosh and other medical staff intervened. Later that day, Dr. Hindosh transferred Filip to the Intensive Care Unit and Filip was intubated by another physician. Two weeks later, Filip was transferred to Mesa Select Specialty Hospital (Mesa Select). The attending pulmonary physician at Mesa Select evaluated Filip and determined that his age and condition prevented him from weaning off of ventilation and determined that his prognosis for recovery was poor. During the months of February, March, and April, Filip was transferred between four other hospitals and submitted to numerous tests and procedures. Doctors discovered

that he was suffering from encephalopathy due to anoxic brain damage and metastatic cancer that originated from his pancreas. Filip's attending physicians determined that they would not attempt chemotherapy or radiation therapy because of his weak condition and one physician opined that his chance of survival was less than one percent. On May 11, 2006, Filip died at Banner Desert Medical Center.

¶13 An autopsy was performed, and Michael Iliescu, M.D., concluded that Filip's death was caused by cardiac arrest due to sepsis and hypovolemia. Dr. Iliescu determined that other possible contributory conditions included: disseminated intra-abdominal adenocarcinoma of probable pancreatic origin, chronic obstructive pulmonary disease, atherosclerotic cardiovascular disease, metabolic encephalopathy, metabolic toxicity, dioxin toxicity, chronic congestive heart failure, respiratory failure, acute renal failure, bronchopneumonia, and anasarca.

¶14 On May 6, 2008, the Awsienkos filed a claim of wrongful death/medical malpractice against three hospitals and six doctors, including Dr. Hindosh. The complaint alleged that Dr. Hindosh "failed to act in a reasonable manner" when he attended to Filip on January 16, 2006.

¶15 In his deposition, the Awsienkos' expert, James Lineback, M.D., testified that, at approximately 10:10 a.m. on January 16, 2006, Dr. Hindosh "compound[ed]" Filip's respiratory

difficulties by giving him morphine, a "respiratory suppressant," when Filip was already experiencing labored breathing. In addition, Dr. Lineback testified that Dr. Hindosh violated the standard of care by failing to ventilate Filip, either "invasively or non-invasively," before 12:30 p.m. Dr. Lineback also opined that Dr. Hindosh's conduct on January 16, 2006 "set [Filip] for the cardiac arrest" and concluded that Filip would not have had a cardiac arrest on May 11, 2006 if Dr. Hindosh had not given Filip morphine and ventilated him more quickly on January 16, 2006.

¶16 On December 7, 2010, Dr. Hindosh filed a motion for summary judgment arguing that: (1) Dr. Lineback is not qualified to offer standard of care opinions against him and therefore the Awsienkos' wrongful death claim lacks the requisite expert testimony, and (2) even assuming that Dr. Lineback qualifies as an expert for purposes of this case, his deposition testimony does not demonstrate the required proximate causation and therefore the Awsienkos failed to present a prima facie case of medical negligence.

¶17 On February 24, 2011, in a twenty-one page detailed minute entry, the trial court granted Dr. Hindosh's motion for summary judgment. On March 28, 2011, the trial court reduced its February 24, 2011 minute entry ruling to a signed judgment.

The Awsienkos timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION

¶8 On appeal, the Awsienkos contend that the trial court erred by granting summary judgment in favor of Dr. Hindosh. The Awsienkos argue that Dr. Lineback was qualified to testify as an expert witness against Dr. Hindosh and assert that they set forth a prima facie case of medical malpractice/wrongful death.

¶9 A court shall grant summary judgment when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). Summary judgment should be granted, "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). If the evidence would allow a jury to resolve a material issue in favor of either party, summary judgment is improper. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

¶10 In reviewing a summary judgment, our task is to determine de novo whether any genuine issues of material fact exist and whether the trial court incorrectly applied the law.

L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co., 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We review the facts in the light most favorable to the party against whom summary judgment was entered, *Riley, Hoggatt & Suagee v. English, P.C.*, 177 Ariz. 10, 12-13, 864 P.2d 1042, 1044-45 (1993), and will affirm the entry of summary judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶11 "Causation is generally a question of fact for the jury unless reasonable persons could not conclude that a plaintiff had proved this element." *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, 419, ¶ 16, 231 P.3d 946, 951 (App. 2010). To establish a prima facie case of medical malpractice, the plaintiff must present expert medical testimony that the defendant's negligence was the proximate cause of harm, "unless a causal relationship is readily apparent to the trier of fact." *Gregg v. Nat'l Med. Health Care Servs., Inc.*, 145 Ariz. 51, 54, 699 P.2d 925, 928 (App. 1985).

¶12 Assuming, without deciding, that Dr. Lineback qualified as an expert witness to testify regarding standard of care and causation in this case, the trial court nonetheless found that "no reasonable jury could conclude what Dr. Hindosh did or failed to do on January 16, 2006, proximately caused Mr. Awsienko's May 11, 2006, death." We agree.

¶13 As noted by the Awsienkos, and the trial court, Dr. Lineback opined in his deposition that Dr. Hindosh violated the standard of care on January 16, 2006 by administering morphine to Filip and failing to "ventilate" him sooner. Dr. Lineback also stated his opinion that Filip would not have suffered cardiac arrest on May 11, 2006 had Dr. Hindosh's treatment on January 16, 2006 not fallen below the standard of care.

¶14 As noted by the trial court, however, "[t]here are several problems with Dr. Lineback's testimony." First, in reaching his medical conclusions, Dr. Lineback did not review and consider all of the relevant information. Dr. Lineback testified that he was presented with an "overwhelm[ing]" number of medical records and that reviewing all the information would have been "counterproductive." Instead, he only "glanced" at Filip's medical records predating 2006 and considered only the information relating to Filip's chest and lungs to reach his opinion. He was either unaware or did not consider that Filip had "very poorly" controlled diabetes, renal failure, kidney disease, and disseminated cancer to multiple major organs. Furthermore, Dr. Lineback ultimately agreed with Dr. Iliescu's autopsy report, stating that the cause of Filip's cardiac arrhythmia on May 11, 2006 was "probably multifactorial" and that sepsis was most likely the ultimate cause of his death. Dr. Lineback declined to opine regarding the source of the

sepsis and acknowledged that it could have been pulmonary, renal, or cancer-related. Therefore, the trial court did not err by finding no reasonable jury could conclude that Dr. Hindosh's care of Filip on January 16, 2006 proximately caused his death on May 11, 2006.

CONCLUSION

¶15 For the foregoing reasons, we affirm the trial court's summary judgment.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding
Judge

/s/
MARGARET H. DOWNIE, Judge