

IN THE COURT OF APPEALS OF IOWA

No. 8-571 / 07-1882
Filed August 27, 2008

RICHARD TYLER DICKENS,
Individually and as Special Executor
for THE ESTATE OF SHARON KENYON,
Plaintiffs-Appellants,

vs.

ASSOCIATED ANESTHESIOLOGISTS, P.C.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,
Judge.

The special executor of the Sharon Kenyon Estate appeals from the trial
court's summary judgment ruling dismissing the executor's malpractice lawsuit
against Associated Anesthesiologists, P.C. **AFFIRMED.**

Christopher Kragnes of Kragnes & Associates, P.C., Des Moines, for
appellant.

Loree Nelson of Gislason & Hunter, L.L.P., Des Moines, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

HUITINK, P.J.

The special executor of the Sharon Kenyon Estate appeals from the trial court's summary judgment ruling dismissing the executor's medical malpractice lawsuit against Associated Anesthesiologists, P.C.

I. Background Facts and Proceedings.

The summary judgment record includes evidence of the following. Sharon Kenyon died of a heart attack following back surgery at a Des Moines hospital. Richard Dickens, as special executor of Kenyon's estate, sued Associated Anesthesiologists, P.C. (A.A.) for malpractice, claiming A.A.'s employees breached the applicable standards of care and their fault was a proximate cause of Kenyon's death and resulting damages. A.A. denied its employees were at fault or their fault, if any, was the proximate cause of Kenyon's death and resulting damages.

The executor retained Dr. Terrance Vaisvilas, a board certified anesthesiologist, to review the relevant medical record and prepare a report concerning Kenyon's care and treatment by A.A.'s employees. In his resulting report, Dr. Vaisvilas indicated A.A.'s employees breached the applicable standards of care by failing to adequately evaluate Kenyon's heart condition prior to surgery and by failing to admit her to the intensive care unit following surgery. In his subsequent deposition testimony, Dr. Vaisvilas testified

Q. Now, with regard to this criticism that Ms. Kenyon should have been transferred to the ICU rather than the med-surge floor, are you able to state to a reasonable degree of medical certainty that that would have changed her eventual outcome?

.....

A. No, I guess I can't say that. It certainly would have reduced her risk of her eventual outcome. It would have certainly optimized her care and could have – it might have changed the outcome.

Q. Let's define what we are referencing when we use the term outcome. Eventually she died. Everyone knows that. You are not able to say to a reasonable degree of medical certainty that transferring her to the ICU immediately postop would have prevented her eventual death, correct? A. Right. I can't say that.

Q. We know – well, I shouldn't say we know. In your opinion, did she suffer an MI on August 31, 2000? A. Yes.

Q. Can you say to a reasonable degree of medical certainty that transferring her to the ICU immediately postop would have prevented the MI that she experienced on August 31, 2000? A. No, I can't say that.

....

Q. Operating under that scenario, let's just make the assumption that Ms. Kenyon eventually needed to have back surgery. If the anesthesiologist had cancelled the back surgery on August 30th, eventually Ms. Kenyon has back surgery with some sort of evaluation and perhaps treatment in between. A. Optimization.

Q. Even with optimization of her cardiac -- A. Recommendations.

Q. Even with optimization and recommendations of her cardiac status, you cannot state to any reasonable degree of certainty that her outcome would have been different with regard to her postoperative events, can you? A. Well, other than with those recommendations and a full and complete understanding of her preop status, other than that the plan should have included invasive monitoring and ICU admission for at least 72 hours.

Q. Okay. A. Now, that would have helped her in my opinion. Now, whether or not she would have had an MI I can't say with a reasonable degree of medical certainty, but clearly she should have been in an intensive care unit to be more carefully monitored and regulated.

Q. I want to make sure. Are you addressing the hypothetical I just gave you or are you addressing the actual scenario here? A. I guess I was addressing the hypothetical with this scenario in mind.

Q. Let's back up. A. Maybe I screwed the question up. I am sorry.

Q. Let's make sure we are on the same page. We are on your hypothetical. Dr. Jaborn [sic] cancels the surgery on August 30th. A. Dr. Jaborn, okay, cancels the surgery.

Q. Well, someone cancels surgery. I don't care who. Somehow surgery on August 30th gets cancelled. She has here

what you phrase as recommendations and optimization of her cardiac status. A. Yes.

Q. Someone determines that she still needs to have back surgery. She comes back and she has back surgery. A. Yes.

Q. Under that scenario then you are not able to say to a reasonable degree of medical certainty that she would not have had an MI? A. No, I am not able to say that with a reasonable degree of medical certainty.

A.A. thereafter moved for summary judgment “on the grounds that there is no genuine issue of material fact the Plaintiff cannot prove a prima facie case of medical malpractice.” The trial court, specifically citing the foregoing deposition testimony, concluded that “there is no genuine issue of material fact on the issue of proximate cause and Defendants are entitled to judgment as a matter of law.” The executor’s malpractice lawsuit was accordingly dismissed, resulting in this appeal. On appeal, the executor contends Dr. Vaisvilas’ deposition testimony was sufficient to establish a genuine issue of fact on the issue of proximate cause and the trial court erred by concluding otherwise.

II. Scope of Review.

Our scope of review on appeal from an entry of summary judgment is well-settled.

We, like the district court, are obliged to view the factual record in the light most favorable to the resisting party, affording that party all reasonable inferences that the record will bear. Summary judgment is proper only if the record made shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. If the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper. . . . Our review, therefore, is for the correction of errors at law.

Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 649-50 (Iowa 2000)

(citations omitted).

III. The Merits.

To establish a prima facie case of medical malpractice, the plaintiff must demonstrate the applicable standard of care, the violation of this standard of care, and a causal relationship between the violation and the harm allegedly suffered by the plaintiff. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001). In medical malpractice actions, expert testimony of a technical nature is required to show standards of care and causation. *Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991); see also *DeBurkarte v. Louvar*, 393 N.W.2d 131, 135 (Iowa 1986) (“In medical malpractice actions, expert testimony is generally necessary to establish causation.”).

Expert testimony indicating a probability or likelihood of a causal connection is considered sufficient to create a genuine issue of material fact on the causation element of medical malpractice. *Hansen v. Central Iowa Hosp. Corp.*, 686 N.W.2d 476, 485 (Iowa 2004). In the absence of other evidence from which causation may be inferred, expert testimony indicating a malpractice defendant’s fault possibly or could have caused an injury and resulting damages is not sufficient to satisfy the probability or likelihood standard. *Winter v. Honeggers’ & Co.*, 215 N.W.2d 316, 323 (Iowa 1974).

Our review of the summary judgment record leads us to the same result reached by the trial court. As the trial court correctly concluded, Dr. Vaisvilas “could have” or “might have” testimony does not satisfy the likelihood or probability standard required to generate a genuine issue of material fact on this issue. Moreover, the remaining record fails to disclose any evidence from which causation may be inferred when considered in combination with Dr. Vaisvilas’

testimony. See *id.* Because the trial court applied the correct legal standards to the undisputed facts in the summary judgment record, we affirm the trial court's ruling granting A.A.'s motion of summary judgment dismissing the executor's malpractice lawsuit.

AFFIRMED.