Opinion issued November 6, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-04-00551-CV

THAO CHAU AND HA DIEN DO, INDIVIDUALLY AND AS NEXT FRIEND OF THEIR MINOR CHILDREN, S.D. AND H.D., Appellants

V.

JEFFERSON RIDDLE, M.D. AND GREATER HOUSTON ANESTHESIOLOGY, P.A., Appellees

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On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2002-36481-A

MEMORANDUM OPINION ON REMAND

Thao Chau and Ha Dien Do, individually and as next friend of their minor children, S.D. and H.D. (collectively referred to as "the Dos"), appealed the trial

court's order granting Jefferson Riddle, M.D. and Greater Houston Anesthesiology, P.A.'s ("GHA") motion for summary judgment and dismissing the Dos' claims against them. In five issues, the Dos argued that (1) the trial court erred in striking their expert's affidavit and their second supplemental designation of expert witnesses; (2) the trial court erred in striking two paragraphs from another expert's affidavit; (3) the trial court erred in overruling their objections to the affidavits filed by two defense experts; and (4) the trial court erred in granting Riddle and GHA's motion for summary judgment and dismissing the Dos' claims. We affirmed the trial court's order, based in part on our holding that Riddle was entitled to assert the Good Samaritan defense, and the Dos petitioned the Texas Supreme Court for review. The Texas Supreme Court granted the Dos' petition for review and reversed our judgment as to whether Riddle had established his entitlement to the Good Samaritan defense as a matter of law. The Texas Supreme Court remanded the case for us to consider whether the summary judgment should be affirmed on alternate grounds.

We reverse the trial court's grant of summary judgment in Riddle and GHA's favor.

Background

On October 29, 2001, Dr. Jefferson Riddle was an on-call anesthesiologist at Memorial Southwest Hospital. On this same day, Thao Chau, pregnant with twins,

went into labor at Memorial Southwest and remained in labor until the morning of October 30, 2001. Ms. Chau's obstetrician, Dr. Le, decided to perform an emergency cesarean section, and Dr. Riddle was called to provide anesthesia for Ms. Chau during the surgery. After an unsuccessful attempt to use epidural anesthesia, Dr. Riddle administered general anesthesia to Ms. Chau.

At 2:46 a.m. on October 30, 2001, S.D. was delivered "floppy," without any tone and very pale. The neonatal team took over S.D.'s care, but, after failing to resuscitate him, Dr. Le asked Dr. Riddle to assist. Dr. Riddle proceeded to intubate S.D. Afterwards, Dr. Riddle, using a stethoscope, listened and reported hearing breath sounds in S.D.'s chest. He also reported seeing S.D.'s chest rise. At this time, the neonatal team proceeded with the resuscitation, and Dr. Riddle returned to Ms. Chau, who was experiencing bleeding from a uterine atony.[1]

S.D.'s endotracheal tube was secured by a nurse on the neonatal team. Two members of S.D.'s neonatal team reported hearing breath sounds in S.D.'s chest, although one other member reported not hearing breath sounds. The neonatal team started chest compressions as S.D. remained unresponsive. Dr. Ruiz-Puyana, an on-call neonatologist, arrived in the operating room approximately 13 to 15 minutes after

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[1] In his affidavit, Dr. Riddle explained that a uterine atony is a potentially life-threatening condition that occurs "where there is excessive bleeding from the uterus due to the failure of the uterus to sufficiently contract after delivery."

S.D. was delivered and took over efforts to resuscitate him. Dr. Ruiz-Puyana reported not hearing breath sounds and found that the intubation tube was lodged in S.D.'s esophagus. Dr. Ruiz-Puyana extubated and re-intubated S.D., at which time his color improved, but he still did not have a heart rate. Dr. Ruiz-Puyana then administered medications and afterwards detected a heart rate. S.D. suffered permanent brain damage due to a lack of oxygen.

On July 22, 2002, the Dos brought a healthcare liability suit against Dr. Riddle alleging medical malpractice in his care of S.D. The suit also named GHA, Riddle's employer, as being vicariously liable for the alleged negligence.[2]

The trial court granted Riddle and GHA's motion to limit expert testimony to one witness in each area of expertise. The Dos designated Dr. Ronald Katz as their sole testifying anesthesiology expert.

Riddle and GHA moved for both traditional and no-evidence summary judgments. The motion asserted that there was no evidence that Dr. Riddle was negligent in his care of S.D. and, in the alternative, if there was a fact issue on this claim, Dr. Riddle should prevail under a traditional summary judgment because he proved his Good Samaritan affirmative defense.

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[2] Numerous healthcare providers were sued in addition to Riddle and GHA. The claims against Riddle and GHA were severed from the remaining claims in this case.

The trial court granted summary judgment to Dr. Riddle and GHA, without specifying particular grounds, and dismissed the case with prejudice. On remand, we consider whether the trial court erred in granting Dr. Riddle and GHA's no-evidence summary judgment motion.

Standard of Review

Because the propriety of granting a summary judgment is a question of law, we review the trial court's decision de novo. *Natividad v. Alexsis, Inc*., 875 S.W.2d 695, 699 (Tex. 1994).

In reviewing a no-evidence summary judgment, we "must examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion" to determine whether more than a scintilla of evidence was presented on the challenged elements of the nonmovant's claim. *City of Keller v. Wilson*, 168 S.W.3d 802, 825 (Tex. 2005). More than a scintilla of supporting evidence exists if the evidence would allow reasonable and fair-minded people to differ in their conclusions. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." *Id.* (quoting *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983)).

The summary judgment rule provides that summary judgment proof must contain facts that would be admissible in evidence. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997); *see also* TEX. R. CIV. P. 166a(f). To prove facts through an interested witness, the testimony must be uncontroverted, clear, positive, direct, credible, free from contradiction, and susceptible to being readily controverted. *McIntyre*, 109 S.W.3d at 749. "The relevant standard for an expert's affidavit opposing a motion for summary judgment is whether it presents some probative evidence of the facts at issue." *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996). A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment. *McIntyre*, 109 S.W.3d at 749. A party offering an expert's affidavit must demonstrate that the witness "possesses special knowledge as to the very matter on which he proposes to give an opinion." *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998).

Analysis

To prevail at trial on their claim of medical malpractice, the Dos would have been required to establish a "reasonable medical probability" that Riddle's acts or omissions proximately caused S.D.'s alleged injuries. *See Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995); *Duff v. Yelin*, 751 S.W.2d 175, 176 (Tex. 1988). Meeting that burden requires proof of the following elements: (1) that Riddle

had a duty to comply with a specific standard of care; (2) that Riddle breached that standard of care; (3) that S.D. was injured; and (4) that there was a causal connection between the breach of the standard of care and the injury. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.03(a)(4) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(13) (Vernon 2005)) (including a cause of action against a physician within definition of "health care liability claim"); *Price v. Divita*, 224 S.W.3d 331, 336 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Day v. Harkins & Munoz*, 961 S.W.2d 278, 280 (Tex. App.—Houston [1st Dist.] 1997, no writ); *see also IHS Cedars Treatment Ctr. v. Mason,* 143 S.W.3d 794, 798 (Tex. 2004) (generally stating elements of negligence claim).

The causation element of a negligence claim comprises the two following components: the cause in fact, or "substantial factor," component and the foreseeability component. *IHS Cedars Treatment Ctr*., 143 S.W.3d at 798; *Leitch v. Hornsby*, 935 S.W.2d 114, 118–19 (Tex. 1996); *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). Foreseeability requires that a person of ordinary intelligence would have anticipated the danger caused by the negligent act or omission. *Doe v. Boys Clubs of Greater Dallas, Inc*., 907 S.W.2d 472, 478 (Tex. 1995). Because both elements are required, a party who establishes only that an injury was foreseeable cannot prevail. *Grider v. Mike O'Brien, P.C.*, 260 S.W.3d 49, 57

(Tex. App.—Houston [1st Dist.] 2008, pet. denied).

Merely showing that S.D.'s injuries would not have occurred but for Riddle's alleged negligence is not sufficient. Riddle's alleged negligence must have been a substantial factor in bringing about S.D.'s claimed harm. *See IHS Cedars Treatment Ctr.*, 143 S.W.3d at 799 (citing *Lear Siegler*, 819 S.W.2d at 472); *see also Boys Clubs*, 907 S.W.2d at 477 (explaining that defendant's conduct may be too attenuated to constitute legal cause of alleged injury "even if the injury would not have happened but for the defendant's conduct") (citing *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995); *Lear Siegler*, 819 S.W.2d at 472). Accordingly, evidence that shows only that the defendant's alleged negligence did no more than furnish a condition that made the alleged injuries possible will not suffice to establish the substantial-factor, or cause-in-fact, component of proximate cause. *See IHS Cedars Treatment Ctr.*, 143 S.W.3d at 799 (*citing Boys Clubs*, 907 S.W.2d at 477; *Union Pump*, 898 S.W.2d at 776; *Lear Siegler*, 819 S.W.2d at 472).

Further, the ultimate standard of proof on the causation issue "is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred." *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 400 (Tex. 1993) (stating that the test is whether it is "more likely than not" that the ultimate

harm or condition resulted from the alleged negligence). "Hence, where pre-existing illnesses or injuries have made a patient's chance of avoiding the ultimate harm improbable even before the allegedly negligent conduct occurs—*i.e.*, the patient would die or suffer impairment anyway—the application of traditional causation principles will totally bar recovery, even if such negligence has deprived the patient of a chance of avoiding the harm." *Id.*

Duty

The Dos argue that the summary judgment evidence raised at least a scintilla of evidence from which the trial court could conclude that Dr. Riddle had a duty to comply with a specific standard of care in treating S.D. We agree. In his affidavit and deposition testimony, Dr. Katz, the Dos' expert, states that, in his expert opinion as a board-certified anaesthesiologist, Riddle had a duty to S.D., and that duty included intubating S.D. within the standard of reasonably prudent anesthesia care, *i.e.*, properly intubating S.D., personally securing the tube, checking for breath sounds, and personally checking the end-tidal CO2 to ensure proper placement of the tube.

The record reveals that the evidence before the trial court on summary judgment, coupled with the Texas Supreme Court's holding that questions of fact precluded summary judgment in Riddle's favor on his Good Samaritan defense,

amount to at least a scintilla of evidence precluding a no-evidence summary judgment in Riddle and GHA's favor on the issue of whether Riddle had a duty to comply with a specific standard of care in treating S.D.

Breach

Riddle and GHA contend that the trial court's entry of summary judgment was correct because there is no evidence that Dr. Riddle breached any duty he owed to S.D. Specifically, they point to the testimony of the Dos' sole expert, Dr. Katz, and claim that, while Dr. Katz was critical of other aspects of Dr. Riddle's performance, Dr. Katz never offered the specific opinion that Dr. Riddle misplaced S.D.'s intubation tube. Riddle and GHA point to Katz's testimony regarding a number of possible scenarios regarding S.D.'s intubation, which included the possibility that Riddle properly intubated S.D. and the tube was dislodged during the taping process, or sometime afterwards. Katz also admitted in his deposition that he could not be certain the tube was indeed inserted properly in the first place, and then became dislodged, or whether it was never placed properly at all.

Dr. Katz's testimony, however, when taken as a whole and in conjunction with his affidavit, reveals that it was his opinion that Dr. Riddle breached the standard of care by failing to properly intubate S.D., and that Riddle further compounded this error by failing to personally secure the tube and check for breath sounds, and by

failing to check the end-tidal CO2, which would have confirmed the tube was placed properly. Katz stated that these errors breached the standard of care and, "in all medical probability, contributed to the baby's hypoxia, which caused and resulted in the adverse outcome and brain damage of [S.D.]." Katz's testimony was clear that, even if Riddle had properly inserted the tube, Katz believed that Riddle's failure to personally secure the tube and to check the end-tidal CO2 were breaches of the applicable standard of care.

Under the standard we are bound to apply in reviewing a no-evidence summary judgment, we find this statement was sufficient to defeat Riddle and GHA's no-evidence motion as to breach because it raises at least a scintilla of evidence in support of the Dos' claims that Riddle's acts and omissions breached the applicable standard of care. *See, e.g., King Ranch, Inc.*, 118 at 751.

Causation

Riddle and GHA also contend that summary judgment in their favor was proper because Dr. Katz's testimony on the issues of causation and damages was speculative and mere conjecture.

To constitute evidence of causation, a medical expert's opinion must rest in reasonable medical probability. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995); *Ins. Co. of N. Am. v. Myers*, 411 S.W.2d 710, 713 (Tex. 1966). This

rule applies whether the opinion is expressed in testimony or in a medical record, as the need to avoid opinions based on speculation and conjecture is identical in both situations. *Crye*, 907 S.W.2d at 500. Reasonable probability is determined by the substance and context of the opinion and does not turn on semantics or on the use of a particular term or phrase. *Id.*; *Myers*, 411 S.W.2d at 713.

The weakness of facts in support of an expert's opinion generally goes to the weight of the testimony rather than the admissibility. *Onwuteaka v. Gill*, 908 S.W.2d 276, 283 (Tex. App.—Houston [1st Dist.] 1995, no writ). Nevertheless, an expert's opinion regarding causation that is based completely upon speculation and surmise amounts to no evidence. *Id.*; *see also Schaefer v. Tex. Employers' Ins. Ass'n*, 612 S.W.2d 199, 204–05 (Tex. 1980) (holding that expert's medical opinion constituted no evidence because it was based upon speculation and surmise rather than reasonable medical probability).

The expert testimony of Dr. Katz, when taken together with his affidavit, reveals that Dr. Katz's expert opinion as a board-certified anaesthesiologist was that Dr. Riddle's failure to properly insert, secure and check S.D.'s intubation tube, "in all medical probability, contributed to the baby's hypoxia, which caused and resulted in the adverse outcome and brain damage of [S.D.]." Under the standard we are bound to apply in reviewing a no-evidence summary judgment, we find this statement

was sufficient to defeat Riddle and GHA's no-evidence motion as to causation because it raises at least a scintilla of evidence in support of the Dos' claims that Riddle's acts and omissions proximately caused S.D. harm. *See, e.g., King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

Apportionment

Riddle and GHA next argue that there was no evidence to establish the amount of harm, if any, that S.D. may have suffered as a result of Riddle's alleged negligence. Riddle and GHA point to Katz's admission that he could not quantify the amount of additional damage that S.D. (who was already "floppy" and "unresponsive" at the time of his birth) may have suffered due to oxygen deprivation caused by Riddle's failure to properly intubate him. Dr. Katz admitted during his deposition that there was "no way" for him to determine the amount of brain damage S.D. may have suffered before and during his delivery versus the amount of brain damage caused by the allegedly improper intubation. At his deposition, the following exchange occurred:

> Q: Is it your belief that anyone, regardless of their specialty, can apportion out the extent of damage to this child in utero versus any damage which may have occurred extrautero, based upon the medical information we have?
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> . . .

A: I'm not an expert, but my reaction is I don't think so.

Q: It would be pure speculation, wouldn't it?

. . .

A: I personally think if someone said that they could apportion how much occurred before and afterwards, I would question them very closely on "How could you say that? How do you know that?"

I don't think you can do that. However, I have to tell you that in other cases that I have reviewed, I have seen neurologists who attempted to do that.

Q: Utilizing, in your opinion, sound medical judgment?

A: Well, I've wondered how in the world they could do that, and I find it hard to believe, but competent neurologists whom I respect have given such testimony. I don't see how you can do it, I don't think it's possible, but that is my view as a nonneurologist.

Dr. Katz's affidavit, however, is clear that it is his opinion that Riddle's allegedly improper intubation of S.D. "contributed to the baby's hypoxia and brain damage" and "there was definitely post-delivery hypoxia; and the acts and omissions of Dr. Riddle, which were below the standards of reasonably prudent anesthesia care, caused this post-delivery hypoxia and resulted in brain damage to [S.D.]." Thus, the state of the summary judgment evidence is that, while Dr. Katz was unable to testify as to the quantity of damage S.D. may have incurred, it was his opinion that Riddle's acts and omissions caused some degree of additional damage. We find this testimony

sufficient to defeat Riddle and GHA's no-evidence motion for summary judgment on the issue of damages. *See, e.g., King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

Conclusion

We reverse the order of the trial court granting summary judgment and remand this case to the trial court for further proceedings in accordance with this opinion.

George C. Hanks, Jr.
Justice

Panel consists of Justices Nuchia, Keyes, and Hanks.