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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/17/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ESTATE OF FILIP A. AWSIENKO;) No. 1 CA-CV 10-0891
HALINA AWSIENKO, surviving)
spouse; NINA AWSIENKO, surviving) DEPARTMENT E
child; and OLEG AWSIENKO,)
surviving child,) **MEMORANDUM DECISION**
)
Plaintiffs/Appellants,) (Not for Publication -
) Rule 28, Arizona Rules of
v.) Civil Appellate Procedure)
)
TEMPE ST. LUKE'S MEDICAL CENTER,)
LP; BANNER HEALTH, INC. dba)
BANNER DESERT MEDICAL CENTER;)
RAAD HINDOSH, M.D.,)
)
Defendants/Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-024190

The Honorable Edward O. Burke, Judge (Retired)

AFFIRMED

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J O H N S E N, Judge

¶1 Halina Awsienko, Nina Awsienko, Oleg Awsienko and the Estate of Filip A. Awsienko (collectively "the Awsienkos") appeal from the superior court's entry of summary judgment in favor of Tempe St. Luke's Medical Center, LP ("St. Luke's") and Banner Health, Inc. ("Banner") and from an order awarding attorney's fees and costs to Dr. Raad Hindosh. For the reasons that follow, we affirm the judgments in favor of St. Luke's and Banner but dismiss the appeal of the award to Hindosh for lack of jurisdiction.

FACTS AND PROCEDURAL BACKGROUND

¶2 On January 14, 2006, 90-year-old Filip Awsienko ("Mr. Awsienko") was admitted to St. Luke's for chest pain and shortness of breath. During treatment involving rehydration two days later, Mr. Awsienko suffered respiratory failure concurrent with a myocardial infarction. Over the following few months, Mr. Awsienko was transferred six times among six health facilities, finally arriving at a Banner hospital, comatose, on

March 29. After a course of dialysis treatment from May 4 to May 11, Mr. Awsienko suffered a code arrest and died on the afternoon of May 11, 2006.

¶3 In May 2008, the Awsienkos filed a wrongful death suit alleging medical malpractice against three medical facilities and six treating physicians, including Hindosh. In support of their claims, the Awsienkos disclosed as expert witnesses three doctors, Dr. Michael Iliescu, Dr. James Wilson and Dr. Nadar Kamangar, and two nurses, Carmen A. Donan and Kathryn H. Cronin. After discovery closed, Banner and St. Luke's moved for summary judgment.

¶4 While the summary judgment motions were pending, the Awsienkos moved for leave to substitute a new expert to replace Wilson, whom the Awsienkos had identified as an expert witness in their case against St. Luke's, among others. The superior court granted the substitution motion, conditioned on payment by the Awsienkos of "all" the costs and attorney's fees the defendants had incurred in deposing Wilson. Shortly thereafter, the court granted summary judgment in favor of Banner and St. Luke's, concluding that the Awsienkos failed to offer evidence sufficient to create a genuine issue of material fact precluding judgment against them.

¶5 Hindosh, Banner and St. Luke's filed statements of costs seeking fees and costs related to the Wilson deposition,

and after a hearing, the superior court awarded the amounts requested over the Awsienkos' objections. This timely appeal followed.

DISCUSSION

A. Jurisdiction.

¶6 In general, "jurisdiction of appeals is limited to final judgments which dispose of all claims and all parties." *Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981); see Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(1) (2011) (authorizing appeal "[f]rom a final judgment entered in an action or special proceeding commenced in a superior court"). Pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure, the superior court may, "upon an express determination that there is no just reason for delay," designate as "final" (and thus immediately appealable) a judgment that disposes of fewer than all claims. Ariz. R. Civ. P. 54(b); see also *Maria v. Najera*, 222 Ariz. 306, 307, ¶ 6, 214 P.3d 394, 395 (App. 2009). Without the express determination of finality required by Rule 54(b), however, the interlocutory judgment is not subject to immediate appeal. See *Stevens v. Mehagian's Home Furnishings, Inc.*, 90 Ariz. 42, 44-45, 365 P.2d 208, 209-10 (1961); *Maria*, 222 Ariz. at 307, ¶ 6, 214 P.3d at 395.

¶7 The judgments dismissing the claims against St. Luke's and Banner, both of which also contained the awards of fees and

costs relating to the Wilson deposition, were entered pursuant to Rule 54(b). We have jurisdiction over the Awsienkos' appeals from those judgments pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1).

¶18 The Awsienkos also appeal from the order granting Hindosh his attorney's fees associated with the Wilson deposition. This order did not dispose of the Awsienkos' negligence claim against Hindosh and was not entered pursuant to Rule 54(b). We therefore have no jurisdiction over the Awsienkos' appeal from the Hindosh order; that appeal is dismissed.

B. Motions for Summary Judgment.

1. Legal principles.

¶19 We review *de novo* a grant of summary judgment, viewing the evidence and drawing reasonable inferences in favor of the non-moving party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002) (citing *Thompson v. Better-Bilt Aluminum Prod. Co.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992)). Summary judgment is proper "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 School v. Reeves*, 166 Ariz. 301,

309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1) (summary judgment warranted if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

¶10 In appropriate circumstances, a defendant moving for summary judgment may demonstrate the absence of genuine issues of material fact by "point[ing] out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the claim." *Orme School*, 166 Ariz. at 310, 802 P.2d at 1009 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986) (White, J., concurring)). We may affirm summary judgment on any ground raised in the parties' motion papers in the superior court, *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000), even if the superior court did not explicitly consider that ground, *Zuck v. State*, 159 Ariz. 37, 42, 764 P.2d 772, 777 (App. 1988).

¶11 To prove medical negligence, a plaintiff must provide evidence that the defendant failed to meet the applicable professional standard of care and that the breach proximately caused the alleged injury. A.R.S. § 12-563 (2011). As a general rule, both standard of care and causation must be established through qualified expert testimony. *Barrett v. Harris*, 207 Ariz. 374, 378, ¶ 12, 86 P.3d 954, 958 (App. 2004)

(expert medical testimony required “unless the connection is readily apparent to the trier of fact”); *Peacock v. Samaritan Heath Serv.*, 159 Ariz. 123, 126, 765 P.2d 525, 528 (App. 1988). Summary judgment is appropriate if the plaintiff fails to provide the requisite expert opinion evidence as to either element. See *Gorney v. Meaney*, 214 Ariz. 226, 232, ¶ 17, 150 P.3d 799, 805 (App. 2007).

2. Summary judgment in favor of St. Luke’s.

¶12 The Awsienkos argue the superior court erred in entering summary judgment in favor of St. Luke’s because the record contained expert opinion evidence that St. Luke’s nurses breached the standard of care, which “ultimately led to the decedent’s death.”

¶13 “The proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred.” *Robertson v. Sixpence Inns of Am.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990) (citations omitted); see also *Barrett*, 207 Ariz. at 379, ¶ 11, 86 P.3d at 958. More specifically, for liability to attach, the defendant’s negligence “must be ‘a substantial factor in bringing about the harm.’” *Thompson*, 171 Ariz. at 554, 832 P.2d at 207 (citing Restatement (Second) of Torts §§ 431(a), 433

(1965)). Further considerations in assessing whether negligent conduct is a substantial factor in producing harm include:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time.

Restatement (Second) of Torts § 433; see also *Thompson*, 171 Ariz. at 554, 832 P.2d at 207; *Barrett*, 207 Ariz. at 381-82 & n.7, ¶¶ 24-27, 86 P.3d at 961-62.

¶14 On summary judgment, the Awsienkos relied solely on Cronin as a standard-of-care and causation expert in their claim against St. Luke's. Cronin's initial report stated that nurses at St. Luke's violated the standard of care by failing to timely communicate Mr. Awsienko's fluid levels to doctors on the morning of January 16, 2006, in the hours preceding a fluid overload that required him to be intubated later that afternoon. This breach, Cronin's report asserted, "contributed to the deterioration of Mr. Awsienko's condition that started a chain of events, which eventually contributed to his demise." Her opinion drew a causal relationship between the alleged failure

to communicate fluid levels on January 16 to Mr. Awsienko's respiratory failure on the same day.

¶15 During her deposition, however, Cronin declined to testify that negligence at St. Luke's caused Mr. Awsienko's death. She testified that while negligence by the St. Luke's nurses "led to a major complication of respiratory failure" in Mr. Awsienko, the "ultimate cause of his death later, after this event, is outside of my scope." Thus, by her own admission, Cronin provided no evidence that alleged negligence at St. Luke's in January 2006 caused Mr. Awsienko's death four months later.

¶16 The Awsienkos argue on appeal that Kamangar and Iliescu offered expert testimony that linked alleged negligence by the St. Luke's nurses to Mr. Awsienko's death. The record contains no testimony by Kamangar relating to alleged negligence by St. Luke's. According to the Awsienkos' disclosure statement, Kamangar would testify only "regarding standard of care and causation for defendant Desert Banner Medical Center," not St. Luke's. Kamangar's expert report similarly was limited to "pivotal issues surrounding Mr. Awsienko's care during his final hospitalization at Banner Desert Medical Center."

¶17 The Awsienkos also offered Iliescu's autopsy report as expert evidence relating to the cause of Mr. Awsienko's death. At the outset, the autopsy report designates "[c]ardiac arrest

due to sepsis and hypovolemia" as cause of death, with 14 "[o]ther possible contributory conditions," including "intra-abdominal adenocarcinoma of probable pancreatic origin," "chronic obstructive pulmonary disease," "chronic congestive heart failure, respiratory failure [and] acute renal failure." The report subsequently attributes death to "sepsis (multifactorial), hypovolemia, and multi-organ failure (heart, lung and kidney - with the heart being the most severe)," and acknowledges that "[a]denocarcinoma may have aggravated and possibly led to some of these pathological processes (organ failure and sepsis)."

¶18 Iliescu's report mentions Mr. Awsienko's January 16 respiratory failure only once, and then only as a previous diagnosis and not as a causal factor in his death. Although Iliescu includes lung failure as one of 16 pathological processes leading to death, his report does not tie lung failure to the events at St. Luke's on January 16, let alone address whether Mr. Awsienko's course over the four months after he left St. Luke's was a "natural" series of events resulting from the alleged negligence on January 16.

¶19 Without expert evidence sufficient to prove a causal relationship between the alleged negligence at St. Luke's and Mr. Awsienko's death, St. Luke's was entitled to judgment as a

matter of law. See *Gregg v. Nat'l Med. Health Care Services, Inc.*, 145 Ariz. 51, 54, 699 P.2d 925, 928 (App. 1985).

3. Summary judgment in favor of Banner.

¶20 Relying on an expert witness report by Donan, the Awsienkos claimed Banner hemodialysis nurses breached the standard of care by failing to properly treat a hematoma that developed at the exit site of Mr. Awsienko's intrajugular catheter. Donan's report described a large hematoma, visible in autopsy photographs, as evidence of violations of the nursing standard of care. In her deposition, she pointed out that according to a record dated May 7, a nurse noted a "large clot" at the catheter site; Donan asserted that later medical records did not specify that the clot was treated or removed.

¶21 The parties vigorously dispute on appeal whether Donan retracted her standard-of-care opinion during her deposition and whether, if she did, her two subsequent standard-of-care affidavits create a genuine issue of fact. Without reaching those issues, we conclude summary judgment was proper because the Awsienkos failed to offer evidence sufficient to create a genuine issue of fact that any negligence by the Banner nurses caused Mr. Awsienko's death.

¶22 According to Donan, bacteria could have formed in the hematoma at the catheter site, causing sepsis, which contributed to Mr. Awsienko's death. But at her deposition, Donan

acknowledged that she was not qualified to offer an opinion on the cause of death. Rather than rely on Donan to establish causation, in their response to Banner's motion for summary judgment, the Awsienkos cited Kamangar's report, which pointed to "[t]he likely presence of line sepsis given the presence of a large clot on the dialysis catheter." But in his deposition, Kamangar likewise denied that he was offering a causation opinion regarding Banner's nursing care.

¶23 In response to Banner's motion for summary judgment, the Awsienkos also cited Iliescu's autopsy report, which noted "some bacterial colonization" in the hematoma at the catheter site. As we have said, Iliescu's autopsy identified "[c]ardiac arrest due to sepsis and hypovolemia" as the cause of death. As for the origin of the sepsis, the report noted it was "[m]ulti-factorial," arising from a tracheostomy leak, a gastrostomy tube, IV lines and bronchopneumonia, in addition to the intrajugular catheter leak. During his deposition, however, Iliescu minimized the role of the catheter as a source of the sepsis that helped to cause Mr. Awsienko's death. He testified as follows:

Q. When you make a diagnosis of sepsis as a pathologist, you are basing that on potential portals for entry of infection; true?

A. No, not only on that.

Q. That's one of the -

A. One of the -

Q. - bases; correct?

A. - minute, minor contributory. In a case like this, the major source of sepsis is bronchopneumonia. We also have urinary tract infection. So you have multiple sources of sepsis. But the major issue, the major cause of the sepsis in this case, which is documented pathologically, is bronchopneumonia with minor component of aspiration pneumonia.

Later, Iliescu testified:

Q. And you've told us that when you're ranking the source of infections, you're saying that the source of infection that may have come from the hematoma is on the bottom of the ladder, is that right?

A. Yes.

Q. And when you say bottom of the ladder, is that its least likely cause as compared to some of the other sources?

A. Yes.

¶24 On this record, we conclude the Awsienkos failed to offer evidence from a qualified expert witness that any alleged negligence by the Banner nurses was "a substantial factor" in Mr. Awsienko's death. See *Thompson*, 171 Ariz. at 554, 832 P.2d at 207; Restatement (Second) of Torts §§ 431(a), 433. Accordingly, we hold the superior court properly entered summary judgment in favor of Banner.

C. Award of Attorney's Fees and Costs for Wilson Deposition.

¶25 The Awsienkos had identified Wilson as their expert witness against St. Luke's; he also was the primary causation expert witness in their claims against two other defendants. Wilson's deposition began on October 30, 2009. When counsel recessed the deposition after five hours, the Awsienkos' lawyer agreed to make Wilson available for a second day of deposition. Before the second day of his deposition could be scheduled, however, Wilson withdrew from the matter. After discovery closed, the Awsienkos asked for leave to designate another expert to take Wilson's place. The court granted the Awsienkos' motion, on the condition that they "shall pay all attorneys' fees and costs incurred by defendants and their counsel in connection with" the Wilson deposition.

¶26 St. Luke's requested a total of \$6,276.50 in fees and costs, including \$3,139 in attorney's fees and \$3,137.50 in fees paid to its own expert witnesses "for Review of Dr. Wilson's Deposition." Banner filed a sworn request for a total of \$3,180.20 in connection with the deposition, including \$2,835 in "Attorney's Fees for travel and deposition" and airfare of \$345.20 (the deposition was taken in California). Over the Awsienkos' objections and after hearing oral argument, the

superior court awarded St. Luke's and Banner the full amount of their requests.¹

¶27 We review the superior court's award of attorney's fees for abuse of discretion. *Solimeno v. Yonan*, 224 Ariz. 74, 82, ¶ 36, 227 P.3d 481, 489 (App. 2010). We reverse only if, viewing the record in the light most favorable to sustaining the superior court's determination, there is no reasonable basis for the award. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001).

¶28 The Awsienkos first argue the awards constituted a windfall to St. Luke's and Banner because by the time the court ruled, both defendants had been dismissed from the case and so would not have had to incur any additional expense in deposing the expert that the Awsienkos might designate to replace Wilson. This argument fails to recognize that St. Luke's and Banner might not have incurred the expenses they did but for the Awsienkos' decision to designate Wilson in the first place. Under the circumstances, we conclude the superior court did not abuse its discretion in conditioning its order granting the Awsienkos' request for leave to withdraw Wilson and name a substitute expert witness on the requirement that the Awsienkos

¹ The court also awarded Banner and St. Luke's the full amount of their claimed taxable costs. The Awsienkos do not object to the taxable costs the court awarded.

reimburse defendants for "all" the fees and costs they incurred in connection with the Wilson deposition.

¶129 The Awsienkos also argue that the fees and costs the court awarded were unreasonable. An application for attorney's fees normally is accompanied by an affidavit setting out a reasonable basis for the amount of fees claimed. See *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 185, 673 P.2d 927, 929 (App. 1983). Banner's fees request was sworn by its counsel, who stated that he had personal knowledge that his client had incurred the expenses sought in connection with the Wilson deposition. Although the St. Luke's request was not sworn, it stated that the lawyer who signed the request had "personal knowledge that the taxable costs and expert witness fees" requested had been incurred. The St. Luke's request continued, "Documentation of any of the above costs is available upon request."

¶130 Although neither Banner nor St. Luke's specified the billing rate charged or the number of hours incurred by counsel (or in the case of St. Luke's, by its own expert witnesses), given that Wilson was the Awsienkos' main expert witness as to causation and was deposed for five hours in California, we cannot conclude the superior court abused its discretion in awarding the fees and costs.

CONCLUSION

¶31 For the reasons stated above, we affirm the judgments in favor of Banner and St. Luke's. We dismiss for lack of jurisdiction the appeal of the fees and costs award in favor of Hindosh.

/s/

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/

PATRICA A. OROZCO, Judge

/s/

MARGARET H. DOWNIE, Judge