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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2000-CA-001260-MR

ANGELA M. BISCHOFF AND
DAVID METZGER, CO-EXECUTORS OF
THE ESTATE OF NANCY LEE BISCHOFF,
AS GUARDIAN AND NEXT FRIEND OF
DONALD BISCHOFF AND PHILLIP BISCHOFF — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 93-CI-006452

WILLIAM J. OLIVER, M.D.;
B. PRESTON THOMAS, M.D.;
CHRIS KAUFFMANN, M.D.;
JERRY N. CLANTON, M.D.; AND
COLUMBIA HEALTHCARE CORPORATION
f/k/a HUMANA OF VIRGINIA, INC.,
d/b/a SUBURBAN MEDICAL CENTER — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Angela M. Bischoff and David Metzger, as co-executors of the estate of Nancy Lee Bischoff, appeal from a judgment confirming a jury verdict which rejected their medical malpractice claims against William Oliver, M.D., B. Preston Thomas, M.D., and Jerry Clanton, M.D. The estate contends that the trial court erred in rejecting their tendered jury

instruction supporting their theory that the physicians' negligence deprived Nancy Bischoff of the greater chance of a better recovery which she would have had if her cancer had been diagnosed earlier. As a result, the estate contends that the instruction given to the jury misstated the standard for proving causation. We find that the instruction which the trial court gave to the jury accurately reflected existing Kentucky law. Hence, we affirm.

The underlying facts of this action are not in serious dispute. In September of 1991, Nancy Bischoff went to her doctor after she began to experience abdominal pain and nausea. Bischoff's doctor referred her to Dr. William Oliver at Suburban Hospital in Louisville. Dr. Oliver reviewed Bischoff's medical history and learned that she had been diagnosed with celiac's disease, a condition that prevents the small intestine from absorbing certain foods and nutrients. In addition, a previous ultrasound study had indicated a possibility of gallbladder disease. However, Dr. Oliver performed a repeat ultrasound study which showed no presence of gallstones. Further tests did not support a finding of gallbladder disease.

In October of 1991, Dr. Oliver hospitalized Bischoff and had several CT scans performed. The second CT test showed that Bischoff's small intestine was inflamed. Upon receiving the results of those tests, Dr. Oliver performed exploratory surgery and discovered a perforation and inflamation of the small intestine. After repairing the perforation, Dr. Oliver removed

tissue from the bowel area and then sent the tissue to the pathology department at Suburban Hospital.

Dr. B. Preston Thomas received the tissue and examined it. He reported back to Dr. Oliver that the tissue showed no evidence of a cancerous process. However, while Dr. Thomas's findings were consistent with the previous diagnosis of celiac's disease, he could find no cause for the perforation of Bischoff's small intestine.

In April of 1992, Bischoff returned to Dr. Oliver with similar abdominal pain. During a second exploratory surgery, Dr. Oliver found a perforation and a slight tear in the duodenum. This time, he did not send any of the tissue to the pathology department for analysis.

Three months later, Bischoff visited an ear, nose, and throat specialist after she began to experience respiratory problems. The specialist removed tissue from her nose and sent it to the pathology department at Suburban Hospital. Dr. Jerry Clanton examined the tissue and reported no abnormalities.

However, in September of 1992, Dr. Chris Kauffmann, another pathologist at Suburban Hospital, examined some of the tissue samples and began to consider the possibility of cancer. Dr. Kauffmann sent some of the samples to Dr. Robert Collins at Vanderbilt University. Dr. Collins identified lymphoma cells in the tissue samples removed from Bischoff's nose, as well as the samples removed from Bischoff's small intestine in October of 1991.

Bischoff immediately began chemotherapy treatment for the cancer. Unfortunately, the lymphoma had spread from her small intestine to her nasal passages and was much less treatable. Despite the chemotherapy, Bischoff died on March 23, 1993. On December 29, 1993, the executors of her estate brought a wrongful death action against Suburban Medical Center,[1] and against Drs. Oliver, Thomas and Clanton[2]. The estate argued that the physicians had been negligent in failing to diagnose Bischoff's lymphoma in October 1991. The estate asserts that this negligence deprived Bischoff of the better chance of recovery which could have come had her condition been timely diagnosed and treated. The defendants denied that they breached any standard of care, asserting that this type of cancer is difficult to diagnose. Further, they argued that even if the lymphoma had been diagnosed earlier, Bischoff's chances of surviving still would have been poor. As a result, the defendants claimed that the estate could not prove that any negligence on their part caused Bischoff's death.

The action came before the trial court for an eight-day jury trial in April 2000. The court asked the parties to tender proposed jury instructions. On the issue of negligence, the

[1] During the period of Bischoff's treatment, Suburban Medical Center was owned and operated by Humana of Virginia, Inc. Subsequently, Humana's hospital holdings were transferred to Galen of Kentucky, Inc. Thereafter, Columbia Heathcare Corporation took over following a merger with Galen. Although Columbia is a nominal party to this appeal, the estate does not seek any relief against it.

[2] A claim against Dr. Kauffmann was dismissed prior to trial, and the estate does not seek any relief from this order. However, Dr. Kauffmann is a nominal party to the appeal.

estate submitted the following instruction for the claim against Dr. Oliver:

> It was the duty of defendant, William Oliver, M.D., to use that degree of care and skill which is expected of a reasonably competent physician, general surgeon, acting in the same or similar circumstances, about which you have heard evidence.
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> If you believe from the evidence that defendant, William Oliver, M.D., failed to comply with this duty and that such failure on his part was a substantial factor in denying Nancy Bischoff the chance for the better results which might come from proper treatment of her condition, you will find for the plaintiffs, Estate of Nancy Bischoff and Donald Bischoff and Phillip Bischoff against William Oliver, M.D.
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> If you believe otherwise, you will find for the defendant, William Oliver, M.D.

The estate's tendered instruction relating to the claims against Dr. Thomas and Dr. Clanton was similarly phrased. The defendants objected to these instructions, arguing that they misstated the standard of proof. The trial court agreed and modified the second paragraph as follows:

> If you believe from the evidence that the defendant, William Oliver, M.D., failed to comply with this duty and that such failure on his part was a substantial factor **in causing the increased injury and death of Ms. Bischoff about which you have heard evidence**, you will find for the plaintiffs, Estate of Nancy Bischoff and Donald Bischoff and Phillip Bischoff against William Oliver, M.D., and so indicate on Verdict Form 1. **[Emphasis added]**

Although the trial court rejected the estate's instruction, the court did allow the estate's counsel to argue during closing that the defendants could be held liable if their negligence deprived Bischoff of a better chance for recovery.

Nevertheless, after retiring to deliberate, the jury found for the defendant physicians. The estate now appeals.

The estate primarily argues that the trial court's instruction improperly stated its burden of proof and in effect precluded any recovery under their theory of the case. The physicians respond that the trial court gave the standard jury instruction for medical malpractice, and that the estate was given an adequate opportunity to present its theory of recovery to the jury. Upon review of the record and the applicable law, we find that the jury was properly instructed.

The estate and the physicians seem to agree that loss of a better chance of recovery is a recognized item of damages for medical negligence. On closer examination, we find no Kentucky case law which explicitly supports this conclusion. In Burk v. Foster,[3] the former Court of Appeals stated that:

> We think, when a physician undertakes to give his attention, care, and skill to a given case of injury or disease, the patient is entitled to the chance for the better results that are supposed to come from such treatment, and as are recorded by the science of his profession to a proper treatment. That the patient might have died in spite of the treatment, or that 'ordinarily' they did die in such cases (as formerly in cases of cholera, smallpox, etc.), is no excuse to the physician who neglects to give his patient the benefit of the chance involved in a proper treatment of his case.[4]

[3] 114 Ky. 20, 69 S.W. 1096 (1902).

[4] Id. 69 S.W. at 1098.

However, the Court in Walden v. Jones,[5] explained that this language relates to the amount of proof necessary to submit a medical negligence issue to the jury. "We do not interpret Burk v. Foster as sustaining the argument that any chance of recovery, no matter how remote, entitles the plaintiff in a malpractice suit to have the issue of proximate cause submitted to the jury."[6] Furthermore, there has been no suggestion that the standard for establishing probable cause has been modified. Rather, it is well-established in medical negligence cases that the causal connection between an accident and an injury must be shown by medical testimony and the testimony must be that the causation is probable and not merely possible.[7]

Similarly, the estate relies heavily on certain language in Richard v. Adair Hospital Foundation Corp.[8] In Adair Hospital, this Court held there was a cause of action stated against a hospital for refusing to admit a baby suffering from pneumonia for treatment. The baby died hours later after being admitted at a second hospital. The court noted that the medical testimony established the child had been "denied a chance of recovery [which] would have been substantially better had treatment been rendered when the child was presented."[9]

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[5] Ky., 439 S.W.3d 571 (1968).

[6] Id. at 575.

[7] Jarboe v. Harting, Ky. 397 S.W.2d 775, 778 (1965).

[8] Ky. App., 566 S.W.2d 791 (1978).

[9] 566 S.W.2d at 793.

Again, Adair Hospital cannot be read as broadly as the estate asserts. The trial court in Adair Hospital granted a summary judgment for the hospital, finding no certain evidence that the child would have survived if she had been treated earlier. This Court reversed, noting that there was expert medical testimony to the effect that the child's chance of recovery would have been substantially better had treatment been rendered when the child was presented to the hospital. The Court held that a plaintiff must present medical testimony to show that the causal connection between negligence and the injury is probable and not merely possible. So long as the plaintiff presents such evidence, the question of causation is a matter for the jury to decide.[10] We do not read Adair Hospital as abrogating the traditional requirements for proving proximate causation.

Similarly, Davis v. Graviss[11] and Capital Holding v. Bailey[12] do not expressly adopt the loss of chance doctrine. Rather, both cases recognized that a plaintiff has a right to compensation for an injury that did not create an immediate threat to one's health but did cause an increased risk of future harm. So long as an increased risk of future harm is established as a reasonable likelihood, the jury may consider and compensate for the increased likelihood of future complications, including

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[10] Id. at 794.

[11] Ky., 928 S.W.2d 672 (1984).

[12] Ky., 873 S.W.2d 187 (1994).

mental distress.[13] However, neither of these cases alter the standard for proving proximate causation.

Indeed, the standard for proving causation is the central issue in this case. It is well established that tort liability for negligence requires the plaintiff to establish: (1) a duty; (2) a breach of that duty; (3) proximate causation; and (4) damages. The absence of any one of these elements precludes the claim.[14] The third element, proximate causation, consists of two distinct but related concepts: cause in fact and legal cause.[15]

To establish cause in fact, an act must be such that it induced the accident and without which the accident would not have occurred.[16] This is commonly referred to as the "but for" test: a defendant's conduct is the cause of the event if the event would not have occurred "but for" that conduct.[17] In contrast, legal cause concerns a determination of whether the defendant's conduct was a substantial factor in causing the injury. A defendant is not liable when the original negligence

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[13] Id. at 195.

[14] Illinois Central Railroad v. Vincent, Ky., 412 S.W.2d 874, 876 (1967); Helton v. Montgomery, Ky. App. 595 S.W.2d 257, 258 (1980). *See also,* Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 247 (1992). In some cases, the element of damages is included in the element requiring proof that the plaintiff suffered an injury which was proximately caused by the breach of a duty.

[15] Prosser and Keeton on Torts, (5th ed., 1984), §§ 41-42, pp. 263-280.

[16] Gerebenics v. Gaillard, Ky., 338 S.W.2d 216, 219 (1960).

[17] Prosser & Keeton, § 41, pp. 265.

is remote and only furnishes the occasion of the injury.[18] Legal cause includes the doctrines of foreseeability and intervening and superseding causes.[19]

The states which have recognized a cause of action for loss of chance acknowledge that this theory of recovery is a departure from the traditional standard for proximate cause. As noted by the Supreme Court of Kansas in Delaney v. Cade:[20]

> While a cause of action for the loss of a chance has been recognized in nonmedical cases since at least 1911, Chaplin v. Hicks, [1911] 2 K.B. 786 (C.A.), the doctrine did not gain much impetus in medical malpractice cases until publication in 1981 by Professor Joseph H. King, Jr., of his extensive article *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L. J. 1353 (1981).
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> The loss of chance theory arises in medical malpractice cases wherein the patient is suffering a preexisting injury or illness which is aggravated by the alleged negligence of the doctor or health care provider to the extent that the patient dies, when without negligence there might have been a substantial chance of survival or the actual recovery is substantially less than it might have been absent the alleged malpractice. In essence, the theory comes into play when the traditional probability standard of causation is not met.
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> The loss of chance theory began receiving broad support and acceptance after the publication of Professor King's article. In his article, Professor King presents various arguments in support of the proposition that a "lost chance" for a better recovery or survival has value and should be

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[18] Estate of Wheeler v. Veal Realtors and Auctioneers, Inc., Ky. App. 997 S.W.2d 497, 499 (1999).

[19] Deutsch v. Shein, Ky., 597 S.W.2d 141, 144 (1980).

[20] 255 Kan. 199, 873 P.2d 175 (1994).

> compensated when a physician's negligence has destroyed or substantially reduced such a chance.
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> It is the thesis of this article that the loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition. Preexisting conditions must, of course, be taken into account in valuing the interest destroyed. When those pre-existing conditions have not absolutely preordained an adverse outcome, however, the chance of avoiding it should be appropriately compensated even if that chance is not better than even. 90 Yale L. J. at 1354.
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> Thus, the issue of whether a court should adopt the loss of chance theory is essentially one of adopting a standard of causation which departs from the traditional standard applied in negligence cases. On the general question of whether to recognize the loss of chance cause of action, there are many cases on both sides of the issue. [Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R.4th 10 (1987)].[21]

Most significantly, the loss of chance rule represents not only a redefinition in the threshold of proof for causation, but also a fundamental redefinition of the meaning of causation in tort law.[22] The courts which have adopted this doctrine have set out valid reasons to do so.[23] However, the estate did not

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[21] Id. at 203-04, 873 P.2d at 178-79.

[22] Kilpatrick v. Bryant, 868 S.W.2d 594, 603 (Tenn., 1993) (*quoting* Falcon v. Memorial Hospital, 436 Mich. 443, 462 N.W.2d 44, 64 (1990) (Riley, C.J., dissenting); *See also* Kramer v. Lewisville Memorial Hospital, 858 S.W.2d 397 (Tex., 1993).

[23] *See* McMullen v. Ohio State University Hospitals, 88 Ohio St. 332, 725 N.E.2d 1117 (2000); Jorgenson v. Vener, 2000 S.D. 87, 616 N.W.2d 366 (2000); Snyder v. Contemporary Obstetrics & Gynecology, 258 Neb. 643, 605 N.W. 782 (2000); Wendland v. Sparks, 574 N.W.2d 327 (Iowa 1998); Delaney v. Cade *supra;* Wollen v. DePaul Health Center, 828 S.W.2d 681 (Mo. *banc., 1992*); Scafidi v. Seiler, 119 N.J. 93, 574 A.2d 398 (N.J. 1990); Perez v. Las Vegas Medical Center, 107 Nev. 1, 805 P.2d 589 (1991); Falcon v. Memorial Hospital, *supra*;

(continued...)

ask the trial court or this Court to adopt a new cause of action or a new proximate cause standard for loss of chance claims. Rather, the estate merely argues that Kentucky already recognizes loss of chance as a distinct claim, and therefore the jury instructions failed to reflect existing Kentucky law. We find that Kentucky does not yet recognize the loss of chance doctrine as an independent cause of action. Therefore, we conclude that the estate has not properly preserved any argument for adopting the cause of action in Kentucky.

Furthermore, even under the loss of chance doctrine, "[w]here the jury finds a patient would have had a greater than 50 percent chance of surviving had he received proper medical treatment, traditional negligence rules apply, not the loss of chance rule."[24] In the present case, the estate's expert testified that if Bischoff had been diagnosed and had begun treatment in October 1991, then her chances of survival over five years would have been as high as 87%. The physicians' expert testified that Bischoff's chance of survival at that time would have been no greater than 25%. In either event, there was clearly sufficient evidence to submit the matter to the jury under the traditional standard for proximate causation. Based

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[23](...continued)
McKellips v. St. Francis Hospital, Inc., 741 P.2d 467 (Okla.1987); Blackmon v. Langley, 293 Ark. 286, 737 S.W.2d 455 (Ark. 1987); Hastings v. Baton Rouge General Hospital, 498 So. 2d 713 (La. 1986); Aasheim v. Humberger, 215 Mont. 127, 695 P.2d 824 (Mont. 1985); Thompson v. Sun City Community Hospital, 141 Ariz. 597, 688 P.2d 605 (Ariz. 1984).

[24] Delaney v. Cade, 255 Kan. at 208, 873 P.2d at 181 (*citing* Donnini v. Ouano, 15 Kan. App. 517, 810 P.2d 1163 (1991)).

upon this evidence, the trial court would not have been required to give a loss of chance instruction.

Therefore, we return to the central question of the sufficiency of the jury instructions under Kentucky law. The wording of the trial court's instruction was consistent with that used by most of the medical malpractice instructions set out in Chapter 23 of Palmore's Kentucky Instructions to Juries (4th ed. 1989). Each of these suggested instructions requires a finding that the failure to comply with the appropriate duty of care was a substantial factor in causing a given plaintiff's "injuries" or "death" in general, rather than the particular plaintiff's specifically-named injurious event.[25]

The only exception to this pattern involves the suggested jury instruction based upon the facts of Deutsch v. Shein.[26] Deutch involved a doctor's negligent failure to test the plaintiff for pregnancy before ordering numerous x-rays for nausea, weakness and other symptoms. After learning that she was pregnant, the plaintiff underwent an abortion due to the serious risk of harm to her fetus stemming from the x-rays. After a trial, at which the doctor adduced evidence to show that an abortion in fact may not have been medically indicated, the jury found that the doctor's negligence in ordering the x-rays without testing for pregnancy was not a substantial factor in causing the plaintiff's injury of undergoing the abortion. On appeal, the Supreme Court ordered a new trial, noting that the substantial

[25] Palmore, § 23.01, p. 151; §23.04, p. 155

[26] Supra.

factor test pertained to the event from which the injury directly flowed, rather than simply to the ultimate injury of the abortion. Thus, the court held that the jury should have been instructed to determine whether the doctor's negligence was a substantial factor in causing the "event" of the plaintiff undergoing the harmful x-rays.[27]

Palmore's pattern instruction for misdiagnosis in a medical malpractice case closely parallels these facts.[28] We are not persuaded by the estate's contention that the instructions were flawed by virtue of their use of the bare bones terms "injury" and "death" rather than expressly setting out their theory that the physician's negligence deprived Bischoff of a better chance of recovery. Deutsch was a situation involving unusual intervening facts. In contrast, the facts in the present case involved common issues of proximate causation and no intervening events. Based upon the facts as presented at trial, we conclude that the standard negligence instruction given by the trial court was appropriate.

The estate next argues that the trial court erred when it limited counsel's cross-examination of Dr. Thomas. Earlier in

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[27] Id. at 145-46.

[28]

> 1. It was the duty of D in treating P and diagnosing her condition to exercise the degree of care and skill expected of a reasonably competent physician specializing in internal medicine and acting under similar circumstances. If you are satisfied from the evidence that D failed to comply with this duty and that such failure was a substantial factor in causing P to be irradiated with X-rays and radioactive substances while she was pregnant, you will find for P; otherwise you will find for D.

Palmore, § 23.05, p. 156.

the trial, the estate's expert, Dr. James Good, had referred to an article in a medical journal in support of his position that the physicians had been negligent.[29] The estate's counsel attempted to question Dr. Thomas about this article during his cross-examination. Counsel for the physicians objected, arguing that the treatise had not been established as authoritative at trial. The trial court sustained the objection, finding that no foundation had been laid to introduce the treatise under KRE 803(18).

The estate asserts that the trial court improperly sustained the objection without making a determination that the treatise was in fact authoritative. Upon review of the record, however, we find that the estate did not preserve this issue. Specifically, there is no avowal from Dr. Thomas concerning his responses to the questions about the article. When proposed evidence was not offered by avowal, any possible error is not preserved for review.[30] Under these circumstances, we cannot find any prejudice to the estate from the trial court's limiting the cross-examination about the article.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT.

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[29] Rao, Kagan & Nussbaum, *Management of Gastrointestinal Lymphoma*, American Journal of Clinical Oncology (1984).

[30] KRE 103(a)(2); Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).

BRIEF FOR APPELLANTS:

Gary L. Gardner
Damon B. Willis
Gardner, Ewing & Souza
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Damon B. Willis
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE WILLIAM OLIVER, M.D.:

C. Thomas Hectus
Hectus & Strause, PLLC
Louisville, Kentucky

BRIEF FOR APPELLEE B. PRESTON THOMAS, M.D., AND JERRY N. CLANTON, M.D.:

John T. Ballantine
J. Gregory Cornett
Ogden, Newell & Welch, PLLC
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE B. PRESTON THOMAS, M.D., AND JERRY N. CLANTON, M.D.:

John T. Ballantine
Louisville, Kentucky