

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001913-MR

KAREN STEVENSON, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF WAYNE STEVENSON

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 05-CI-00461

CLARK REGIONAL MEDICAL
CENTER, INC.; REBECCA D.
BARTEE, D.O.; GEORGE T. HANNA,
M.D.; AND DAVID A. MCMENAMIN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,¹ SENIOR JUDGE.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

HENRY, SENIOR JUDGE: Karen Stevenson, individually and as the executrix of the estate of her late husband, Wayne Stevenson, appeals from a summary judgment of the Clark Circuit Court in this medical negligence action. The circuit court held that Stevenson's claim under the doctrine of lost or diminished chance was precluded by the recent decision of the Kentucky Supreme Court in *Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008). Because we are bound to follow the precedent established by our Supreme Court, we affirm.

In November 2002, Wayne Stevenson became suddenly ill and was admitted to Clark Regional Medical Center complaining of nausea, vomiting and abdominal pain. He was diagnosed with acute pancreatitis. The admitting physician, Dr. George Hanna, consulted a gastroenterologist, Dr. David McMenamain, and a general surgeon, Dr. Rebecca Bartee, to evaluate Wayne for possible gallstone pancreatitis. After examining Wayne on November 11, 2002, Dr. McMenamain ruled out alcohol-induced pancreatitis, and after reviewing an ultrasound of the gallbladder and common bile duct, found both to be normal. None of the doctors ordered a CT scan, even though they were unable to find a cause for the pancreatitis.

Dr. Bartee examined Wayne on November 12, 2002. She called for a CT scan if Wayne was in significant pain or his white blood cell count rose, but he briefly improved and the scan was not performed. Dr. Bartee suggested CT scans on two more occasions, but Wayne gradually improved and was released from the

hospital. He returned to his work as an automobile salesman. He continued to experience abdominal pain and other symptoms, but largely ignored them because he was advised he would suffer from symptoms of pancreatitis and that they would come and go.

On August 6, 2004, he went to Clark Regional Medical Center suffering from exhaustion, yellow eyes and diarrhea. The admitting physician, Dr. Kathryn Jones, ordered a CT scan of his abdomen, which showed “cystic appearing masses in his pancreas raising the question of a possible neoplasm.” On August 16, 2004, Wayne was admitted to St. Joseph’s Hospital in Lexington where he was diagnosed with advanced pancreatic cancer. He was initially treated medically and then underwent surgery in November 2004.

Wayne Stevenson filed a medical malpractice action on August 4, 2005, alleging that the defendants had negligently failed to diagnose him with pancreatic cancer when he was treated at Clark Regional in November 2002. He underwent a regimen of chemotherapy following the surgery, but ultimately passed away on February 25, 2006. An amended complaint was filed on August 17, 2006, reviving the case in the name of his estate.

The complaint asserted that the defendant physicians’ failure to order an abdominal CT scan was a substantial factor in causing Wayne to have a loss of chance of recovery or survival. The only claims against Clark Regional were for imputed liability based on the doctrine of respondeat superior.

The plaintiff produced an expert witness, Dr. Stephen J. Pandol, to testify on the issues of negligence and causation. Dr. Pandol is a Professor of Medicine at UCLA, and is one of the world's leading experts on the diagnosis and treatment of pancreatitis and pancreatic cancer. In his deposition, Dr. Pandol testified that if Wayne Stevenson's pancreatic cancer had been diagnosed and removed in early 2003, his chance of surviving the cancer for a period of five years would have been 20 to 40 percent. The defendants filed motions for summary judgment in which they argued that Kentucky did not recognize a cause of action for loss of chance of recovery. The circuit court deferred ruling on the motions because the Supreme Court was going to address the issue in a pending, factually-similar case, *Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008). Upon entry of a decision in *Kemper*, the circuit court granted summary judgment to the defendants in conformity with the ruling.

In *Kemper*, the Supreme Court held that Kentucky does not recognize the doctrine of lost or diminished chance for tort recovery in medical malpractice cases. This doctrine allows a jury to compensate a plaintiff for his or her lost or diminished chance of survival due to a late diagnosis. Under the traditional all or nothing approach, Karen Stevenson would have been required to prove within a reasonable probability that Wayne would have recovered or survived absent his doctors' negligent conduct. *Id.* at 149-50. Dr. Pandol's testimony foreclosed this approach. Under the lost or diminished chance doctrine, however, Karen need not have proved that the misdiagnosis was a substantial factor in causing Wayne's

death. Rather, all that was required was a showing that the misdiagnosis diminished Wayne's chance for recovery or survival. *Id.* at 150.

Under the all or nothing rule, the compensable injury would be Wayne's death resulting from the cancer. *Id.* Under the lost or diminished chance doctrine, however, the compensable injury would be Wayne's lost opportunity of recovery or survival from the cancer. *Id.* As the Supreme Court noted, "[t]he difference in these two doctrines is drastic." *Id.* Under the traditional rule, Karen would have to prove that Wayne would have had a better than 50% chance of recovery absent the alleged malpractice. Under lost or diminished chance claim, however, Karen could have recovered on a proportional basis for any lost or diminished chance of survival found by the jury. *Id.*

On appeal, Stevenson argues that since 1978, the law in Kentucky has recognized that in medical negligence cases where there is evidence of failure to timely treat a patient's disease or condition and that delay reduced the patient's chance of recovery, the patient has a right to take his case to the jury on damages. She bases this argument on the holdings in *Richard v. Adair Hosp. Found. Corp.*, 566 S.W.2d 791 (Ky. App. 1978), and *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984). She contends that the Supreme Court improperly broke with this precedent in *Kemper*. She further argues that *Kemper* is based on the following unfounded assertions: (1) that the loss of chance is a doctrine pertaining to liability, not causation; (2) that the loss of chance doctrine "will open a whole new and expensive industry of experts"; and (3) that Kentucky courts need to limit the

rights of plaintiffs in medical negligence lawsuits because such lawsuits place an undue financial burden on society.

Whatever the merit of these criticisms of *Kemper*, “[t]he Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.” Rules of the Supreme Court (SCR) 1.030(8)(a). Stevenson does not argue that the circuit court misapplied the *Kemper* holding. Nor could this case be resolved in her favor under *Richards* or *Adair*, because the *Kemper* court was careful to distinguish those cases and to stress that they did not establish the doctrine of lost chance. Stevenson nonetheless urges us to overrule *Kemper*. We are powerless to do so because we simply “cannot overrule the established precedent set by the Supreme Court[.]” *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000), citing *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986).

The summary judgment of the Clark Circuit Court is therefore affirmed.

ALL CONCUR.

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