NO. COA05-1603

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

LEIGH ANNE FRANKLIN, Executrix of the Estate of William H. Franklin, Deceased,
Plaintiff,

v.

Wayne County
No. 04 CVS 593

BRITTHAVEN, INC., d/b/a BRITTHAVEN OF GOLDSBORO, and RUTH CHERRY,
Defendants

Appeal by plaintiff from judgment entered 22 August 2005 by Judge Jay D. Hockenbury in Wayne County Superior Court. Heard in the Court of Appeals 21 August 2006.

Hopper, Hicks & Wrenn, LLP, by William L. Hopper and James C. Wrenn, for plaintiff-appellant.

Yates, McLamb & Weyher, LLP, by Michael C. Hurley and Edgar M. Page, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff, Leigh Anne Franklin, as executrix of the estate of William H. Franklin ("decedent") appeals the entry of summary judgment in favor of defendants Britthaven, Incorporated and Ruth Cherry. We conclude plaintiff did not forecast sufficient evidence to create genuine issue of material fact as to whether defendants proximately caused decedent's death. Thus, we affirm summary judgment.

This Court is to review orders granting summary judgment under a *de novo* standard. *Murillo v. Daly*, 169 N.C. App. 223, 225, 609 S.E.2d 478, 480 (2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The party moving for summary judgment has the burden of establishing the absence of a triable issue of material fact warranting judgment as a matter of law. *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997). To this end, the moving party may prove that an essential element of the opposing party's claim does not exist or the opposing party cannot produce evidence to support an essential element of the claim. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). If the moving party meets this burden, "the burden is then on the opposing party to show that a genuine issue of material fact exists." *White v. Hunsinger*, 88 N.C. App. 382, 383, 363 S.E.2d 203, 204 (1988). In deciding a motion for summary judgment, the court must consider the evidence in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences to be drawn from the evidence. *Nicholson*, 346 N.C. at 744, 488 S.E.2d at 244.

The evidence before the trial court at the hearing on defendants' motion for summary judgment tended to show the following: Decedent, aged 85 years, was hospitalized on 14 July

2002. On 18 July 2002, decedent was discharged to Britthaven, a nursing home. The discharge summary from the hospital listed several principal diagnoses, including chest pain, new onset diabetes mellitus, urinary tract infections, and agitation/confusion. In addition, the discharge summary listed twelve secondary diagnoses, including congestive heart failure, coronary artery disease, hypertension, mild hypothyroidism, and a history of transient ischemic attacks.

On 21 July 2002, a nurse's assistant at Britthaven notified Ruth Cherry, a Licensed Professional Nurse, that decedent appeared to be in respiratory distress. At 7:15 a.m., Cherry examined decedent, finding mottled fingers and mouth and a low oxygen saturation. Cherry started decedent on oxygen. At roughly 8:15 a.m., decedent ate 10-20% of the food he was offered, but continued to be pale in color. Further, his pulse was lower than normal and his respirations were higher than normal.

Britthaven's facility physician, Dr. Robert Owens, arrived around 8:30 a.m. and examined decedent. Owens ordered decedent transported to the hospital. A convalescent transport service arrived at 9:30 a.m. and decedent was admitted to the hospital's emergency room at 9:45 a.m. On arrival, decedent was treated by Dr. Terry Grant. He was subsequently treated by Dr. Samuel McLamb. Decedent was in cardiogenic shock and died on 21 July 2002 at 7:05 p.m. The final diagnoses of decedent's condition included heart attack, cardiopulmonary arrest, probable sepsis, low oxygen and blood pressure, and low heart rate.

The dispositive issue in the present case is whether plaintiff forecast sufficient evidence from which a jury could find that defendants' conduct proximately caused the decedent's death. In medical malpractice cases, a plaintiff "must 'demonstrate by the testimony of a qualified expert that the treatment administered by the defendant was in negligent violation of the accepted standard of medical care in the community and that defendant's treatment proximately caused the injury.'" *Huffman v. Inglefield*, 148 N.C. App. 178, 182, 557 S.E.2d 169, 172 (2001) (quoting *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978)). "In order to be sufficient to support a finding that a stated cause produced a stated result, evidence on causation must indicate a reasonable scientific probability that the stated cause produced the stated result." *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 49, 575 S.E.2d 797, 802 (2003) (quoting *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995), *aff'd*, 343 N.C. 302, 469 S.E.2d 552 (1996)).

The causation between the negligence and death must be probable rather than merely possible. *White*, 88 N.C. App. at 387, 363 S.E.2d at 206. That which is probable is more likely to happen than not and has more evidence for than against. *Pruitt v. Powers*, 128 N.C. App. 585, 589, 495 S.E.2d 743, 746 (1998). In contrast, that which is possible may or may not happen. *Id.* Expert testimony as to the possible cause of a medical condition is admissible to assist the jury but "is insufficient to prove causation, particularly 'when there is additional evidence or

testimony showing the expert's opinion to be a guess or mere speculation.'" *Holley v. ACTS, Inc.*, 357 N.C. 228, 233, 581 S.E.2d 750, 753 (2003) (quoting *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000)). Plaintiff contends that defendants proximately caused the death of decedent by transporting decedent to the hospital more than two hours after he showed signs of respiratory distress. Undercutting this assertion, Dr. Robert Owens stated he could not say with any medical certainty that decedent would have had a greater chance of survival had he arrived at the hospital earlier. Similarly, both doctors who treated decedent at the hospital on 21 July 2002 stated in deposition testimony they did not think decedent would have fared any better if he had been transported to the hospital earlier. Toward a showing of proximate cause sufficient to survive summary judgment, plaintiff relies exclusively on the testimony of her expert witness, Dr. Gregory Rose.

In his deposition testimony, Dr. Rose was given multiple opportunities to offer his opinion as to whether decedent probably would have survived but for the delay in sending decedent to the hospital.

> Q: If I understand you, Doctor, you're saying that Mr. Franklin if he had gotten to the hospital sooner, however much sooner it was, would have had a better chance of survival, but you can't say how much better his chance would have been?
>
> A: Yeah. Yes, he would have had a better chance at survival.

Shortly thereafter, Dr. Rose again refused to opine as to a probability that an earlier hospital arrival would have resulted in decedent's survival.

> Q: Now, my question to you is do you know at what time an earlier arrival at the emergency room would have led to treatment that would have led to improvement that would have raised his chances above 50 percent to a reasonable degree of medical certainty? Do you know that?
>
> A: No, I don't.
>
> Q: So what you can tell us is that if he had gotten to the hospital quicker, his chances would have been better, but how much better you don't know?
>
> A: That's true.

Plaintiff cites the following passage of Dr. Rose's testimony in support of the contention that his testimony was sufficient to establish proximate causation.

> Q. Assume for me that the transport service arrived at the nursing home at 9:30 and that this resident had been discovered at 7 AM or approximately 7:15 AM in the condition that you earlier described with some evidence of respiratory difficulty, cyanosis around his lips and fingertips. Do you have an opinion to a reasonable degree of medical certainty whether the period of time between 7:15 AM and 9:30 made any difference to his ultimate outcome or whether transportation to the emergency room sooner within that time frame, sooner or after 7:15, would have changed his outcome?
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> A. Well, it's my opinion that in cardiogenic shock the quicker they get treated, the better the prognosis. And according to the National Myocardial Infarction Registry, the data published in '93, patients in cardiogenic shock treated with thrombolytics, their mortality time is reduced in patients treated with thrombolytic agents. And the reason I'm

> talking about thrombolytics is because there's not a lot more they can do at Wayne Memorial. And I'm not sure if they could have put in an intra-aortic balloon pump. I know they have a cath lab. I don't know if they put in a balloon pump in the cath lab. I would assume that they could if they needed to.
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> But let's say given the best case scenario at Wayne Memorial that they could put a balloon pump and he did get thrombolytic therapy earlier and he did reprofuse, it may have reduced mortality. If you can reprofuse someone in a timely manner with cardiogenic shock, you can reduce their mortality by up to half.

Through his answer, Dr. Rose indicated that his "best case scenario" would be that decedent arrives at the hospital earlier, decedent or his family consent to a balloon pump and thrombolytic agents, and decedent's heart reprofuses. Ultimately, this "best case scenario . . . may have reduced mortality." As to the statistical likelihood of this scenario, Dr. Rose stated in his deposition that up to eighty percent of patients who receive thrombolytics before entering cardiogenic shock can reprofuse and get substantial blood flowing back to their organs. For those who do receive thrombolytics and reprofuse, mortality is reduced "by up to half." According to Dr. Rose's testimony, and in a light most favorable to plaintiff, only half of the eighty percent, or forty percent, have an improved chance of survival under Dr. Rose's "best case scenario." Plaintiff's expert has forecast a course of action that might result in a better *possibility* of survival, as opposed to a *probability* of survival.

In *White*, 88 N.C. App. at 386-87, 363 S.E.2d at 205-06 (1988), this Court considered a physician's affidavit for evidence of proximate cause. The affidavit stated that the physician was "of the opinion that had [the patient] been transferred to a neurosurgeon earlier, his chances of survival would have been increased." *Id.* at 386, 363 S.E.2d at 206. Defendants were granted summary judgment and the ruling was affirmed on review. *Id.* at 387, 363 S.E.2d at 206. This Court held that in order to forecast proximate cause, a plaintiff must show more than that a different treatment would improve a patient's chances for recovery. *Id.* at 386, 363 S.E.2d at 206.

In the present case, Dr. Rose, through his deposition, conveys his general conclusion that earlier care could have led to a better chance of survival for the decedent. At no point did Dr. Rose opine that the decedent probably would have survived, even under the circumstances outlined in his "best case scenario." As in *White*, Dr. Rose's testimony simply indicates a different course of action that might have improved decedent's chances of survival, and therefore his testimony is not a sufficient forecast of proximate cause.

Relying on *Felts v. Liberty Emergency Serv., P.A.*, 97 N.C. App. 381, 388-89, 388 S.E.2d 619, 623 (1990), plaintiff argues that, in order to show proximate cause, a physician's testimony need not rise to the level of certainty as to a different treatment resulting in a different outcome. In *Felts*, this Court found a sufficient showing of proximate cause despite an expert's use of

the words "maybe" and "possible" where the expert's opinion provided a detailed enough explanation to forecast, as a scientific fact, the result being capable of proceeding from the particular cause. *Id.* at 389, 388 S.E.2d at 623-24. Plaintiff's expert testimony rose above "mere possibility" in providing detailed evidence of how an injury could have been prevented by a change in the defendant's actions. *Id.*, 388 S.E.2d at 623. In the present case, however, nothing in the record provides similar detailed evidence of how an earlier admission to the hospital would have, more likely than not, saved decedent's life. In fact, through Dr. Rose's testimony, specific percentages can be derived revealing that it was not reasonably probable, as a scientific fact, that the decedent would have lived had he been transported to the hospital more quickly.

Because plaintiff's forecast of the evidence shows the link between the defendants' alleged negligence and the decedent's death to be a mere possibility rather than a probability, plaintiff has not produced sufficient evidence to raise a genuine issue of material fact with regard to proximate causation. Defendants, therefore, have shown the non-existence of an essential element of plaintiff's claim and are entitled to summary judgment.

Plaintiff contends, as an alternative argument, that this Court should adopt the "loss of chance" doctrine. The "loss of chance" doctrine allows liability to result from a showing that defendants' negligence foreclosed a substantial possibility that the decedent would have survived. This argument, however, was not

made to the trial court. The first mention of this argument occurs in plaintiff's brief. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . ." N.C. R. App. P. 10(b)(1); *see Anderson v. Anderson*, 145 N.C. App. 453, 459, 550 S.E.2d 266, 270 (2001). As a result, we do not consider plaintiff's alternative argument.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e).