Opinion issued February 22, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-01000-CV

SUZETTE KYLE, PATRICE WARD, VICKI KYLE, AND JAMESSEE KESEE, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MELINDA KYLE, DECEASED, Appellants

V.

ROBERT HILLERY, M.D. AND SOUTHWEST SURGICAL ASSOCIATES, L.L.P., Appellees

---

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Case No. 10-DCV-186324

MEMORANDUM OPINION

This is an appeal from the trial court's order granting summary judgment in favor of appellees Robert Hillery, M.D. and Southwest Surgical Associates, L.L.P.

(collectively "Hillery"). Appellants Suzette Kyle, Patrice Ward, Vicki Kyle, and Jamessee Kesee, individually and on behalf of the estate of Melinda Kyle, deceased, sued Hillery for medical malpractice. Hillery moved for no-evidence and traditional summary judgment, and the trial court granted the motion. Appellants filed a timely appeal. Because the trial court properly granted summary judgment in favor of Hillery, we affirm.

Background

In September 2008, Oak Bend Medical Center admitted 69-year-old Melinda for treatment of her gangrenous left foot. After initial medical treatment and procedures failed, Dr. Tripathy consulted with Dr. Hillery about a below-knee amputation. Dr. Hillery performed the amputation. After the procedure, the hospital temporarily placed Melinda in the intensive care unit ("ICU"). She then moved to a regular floor. While she was in the hospital, she went into respiratory and cardiac arrest and died.

Before the amputation, Melinda was being administered an anticoagulant, Heparin. One of Melinda's doctors—not Dr. Hillery—stopped this medication before the amputation. No one prescribed this medicine after her surgery.

After Melinda's death, appellants sued Hillery, contending that Melinda's death was the result of a pulmonary embolus that, appellants assert, was caused by

Hillery's negligent failure to restart the administration of an anticoagulant after the amputation.

Hillery moved for traditional and no-evidence summary judgment. In his no-evidence motion, Hillery argued that there was no evidence of causation. In his traditional motion, Hillery argued that the evidence conclusively proved that he was not negligent and that his actions were not the cause of Melinda's death. The trial court granted the motion without specifying its reasons. Appellants appealed.

Discussion

In their sole issue, appellants contend that the trial court erred by granting summary judgment. Because appellants presented no evidence showing that there was a reasonable medical probability that Hillery's alleged negligence—failing to re-prescribe anticoagulants—proximately caused Melinda's death, we affirm.

A. Standard of Review

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in

the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each of the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524.

"No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010) (citation omitted). "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Id.* (citation omitted).

Likewise, "[w]hen the circumstances are equally consistent with either of two facts, neither fact may be inferred." *Id.* (citation omitted).

B. Applicable Law

In a medical malpractice case, the plaintiff must prove that (1) the defendant owed him a duty to act according to an applicable standard of care, (2) the defendant breached the applicable standard of care, (3) he suffered an injury, and (4) within a reasonable medical probability, the defendant's breach proximately caused his injury. *Tejada v. Gernale*, 363 S.W.3d 699, 708–09 (Tex. App.—Houston [1st Dist.] 2011, no pet.)

We focus on causation here. Medical malpractice plaintiffs "are required to adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants." *Jelinek*, 328 S.W.3d at 532–33. This standard requires plaintiffs to prove that it is "more likely than not" that the ultimate harm or condition resulted from the negligence at issue. *Id.* at 533; *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 399–400 (Tex. 1993) (citations omitted). A defendant's act or omission need not be the sole cause of an injury, as long as it is a substantial factor in bringing about the injury. *Bustamante v. Ponte*, 529 S.W.3d 447, 457 (Tex. 2017).

Moreover, in a medical malpractice case, proximate cause must be established through expert testimony. *Tejada*, 363 S.W.3d at 709; *see Jelinek*, 328 S.W.3d at

533–34. "[E]xpert testimony that the event is a possible cause of the condition cannot ordinarily be treated as evidence of reasonable medical probability except when, in the absence of other reasonable causal explanations, it becomes more likely than not that the condition did result from the event." *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 707 (Tex. 1970); *see Jelinek*, 328 S.W.3d at 536. Similarly, the causal connection between the defendant's negligence and the injuries cannot be based upon mere conjecture, speculation, or possibility. *Morrell v. Finke*, 184 S.W.3d 257, 272 (Tex. App.—Fort Worth 2005, pet. denied) (first citing *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995); then citing *Lenger*, 455 S.W.3d at 706; then citing *Marvelli v. Alston*, 100 S.W.3d 460, 470 (Tex. App.—Fort Worth 2003, pet. denied)). "Perhaps," "possibly," "can," and "could" indicate mere conjecture, speculation, or possibility rather than qualified opinions based on reasonable medical probability. *W.C. LaRock, D.C., P.C. v. Smith*, 310 S.W.3d 48, 58 (Tex. App.—El Paso 2010, no pet.); *see also Columbia Med. Ctr. of Las Colinas v. Hogue*, 271 S.W.3d 238, 247 (Tex. 2008) ("perhaps" and "possibly" do not indicate reasonable medical probability); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 729–30 (Tex. 1997) ("can" and "could" do not indicate reasonable medical probability).

"[W]hen the evidence demonstrates that 'there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence

excluding those causes with reasonable certainty.'" *Bustamante*, 529 S.W.3d at 456 (quotation omitted); *see Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 217–18 (Tex. 2010) (noting, though, that medical causation expert need not disprove every possible cause other than the one espoused by him absent evidence presenting other plausible causes of the injury or condition that could be negated).

Furthermore, it is not enough for an expert simply to opine that the defendant's negligence caused the plaintiff's injury. *Jelinek*, 328 S.W.3d at 536. The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury. *Id.* "'[A] claim will not stand or fall on the mere ipse dixit of a credentialed witness.'" *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009) (quoting *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)).

The Texas Supreme Court's *Jelinek* opinion is instructive. There, the Court found no evidence of causation when the only evidence offered equally supported two different conclusions. 328 S.W.3d at 538. The Court explained:

> By conceding that Casas's symptoms were consistent with infections not treatable by [the drugs defendants allegedly negligently failed to administer], Dr. Daller undermined his conclusion that an undetected infection was also present. While it is possible that Casas did have such an infection, its presence can only be inferred from facts that are equally consistent with the Candida and coagulase-negative staph infections.

Id. at 536. Because the circumstances were "equally consistent with either of two facts, neither fact may be inferred." *Id.* at 537 (quotation omitted). The Court thus concluded that "an anaerobic infection [could not] be proved or disproved," because

"it is equally plausible that Casas had such an infection or that she did not. Dr. Daller opined that she did, but he did not explain why that opinion was superior to the opposite view. Such evidence raises no more than a possibility of causation, which is insufficient." *Id.*

C. Analysis

Because appellants did not adduce any evidence establishing causation to a reasonable medical probability, we affirm. Like in *Jelinek*, the "evidence raises no more than a possibility of causation, which is insufficient." *See id.*

In his no-evidence summary-judgment motion, Hillery asserted that no evidence established that his alleged negligence caused Melinda's death. Appellants responded by submitting expert testimony from Dr. Lawrence Boyle, arguing that his testimony demonstrated causation and defeated the no-evidence motion. But appellants failed to make the requisite showing.

Dr. Boyle's testimony—the only evidence submitted by appellants to defeat summary judgment—did not constitute evidence that, to a reasonable medical probability, showed (or raised a fact issue regarding) causation. Instead, Dr. Boyle offered mere possibilities as to cause of death, admitted that no evidence showed that the use of anticoagulants would have prevented Melinda's death, and failed to show that any action taken or not taken by Hillery was the culprit.

First, Dr. Boyle testified that it was "possible" that Melinda's death was caused by a pulmonary embolism:

> Q: Do you have an opinion as to the cause of death?
>
> A: It's suspicious for pulmonary embolus.
>
> . . .
>
> Q: So you believe that the code . . . was the result of a pulmonary embolus?
>
> A: Possibly.
>
> Q: What are the other possibilities?
>
> A: Cardiac arrhythmia, myocardial infarction.
>
> Q: Any others?
>
> A: Those would be the top three.

But as explained above, "possible" is not enough. Dr. Boyle did not eliminate the other two plausible causes of Melinda's death, testifying that he merely made a "clinical guess as to the cause of death":

> Q: What is the factual basis of your opinion that pulmonary embolus was the most probable of your three top possibilities?
>
> A: I have no facts—an autopsy wasn't done, so there is no way to testify precisely what killed her. . . .
>
> . . .
>
> Q: So there's no support in the records, factual support, that she had a pulmonary embolus? . . .
>
> A. Not that I' m aware of.

> Q: So your opinions that she had a pulmonary embolus are your subjective judgment?
>
> A: Clinical. Subjective judgment, correct.
>
> Q: All right. How did you eliminate the cardiac arrhythmia possibility as being a cause?
>
> A: I did not eliminate any of those.
>
> Q: So you did not eliminate cardiac arrhythmia?
>
> A: No, sir.
>
> Q. How did you eliminate myocardial infarction as being a probable cause?
>
> A. I did not eliminate that either.
>
> . . .
>
> Q. [T]here's not specific findings in the record, either the vital signs or laboratory test, that supports or rules out any of the three?
>
> A. Correct.

Importantly, Dr. Boyle also testified that even if Melinda's death was caused by a pulmonary embolism, there was no evidence that restarting an anticoagulant after the surgery—which appellants alleged was Hillery's negligent act—would have prevented her death:

> Q: . . . Assuming pulmonary embolism caused the code, what evidence do you have that anticoagulation would have prohibited that?
>
> A: None.

And he had "no opinion as to what day a clot would have formed that ended up being a pulmonary embolism, if that's what occurred." He also "d[id] not know" whether

"if Ms. Kyle would have been anticoagulated on the second third or fourth day [the anticoagulants] would have helped her."

In short, Dr. Boyle testified that a pulmonary embolism was only one possible cause of Melinda's death, he did not eliminate other plausible causes, and he testified that there was no evidence that resuming the use of anticoagulants would have prevented Melinda's death even if a pulmonary embolism was the cause. Further, he could not say when an alleged blood clot formed; such a clot could have formed at a time in which resuming the use of anticoagulants would not have helped.

His testimony does not show to a reasonable medical probability that Hillery's alleged negligence was a substantial factor in causing Melinda's death. *See Lenger*, 455 S.W.2d at 707; *see also Hogue*, 271 S.W.3d at 247 (that condition is possible cause of the patient's injury does not indicate reasonable medical probability); *Crump*, 330 S.W.3d at 217–18 (if there are other plausible causes of injury, proponent of causation evidence must offer evidence excluding those causes with reasonable certainty).

As was the case in *Jelinek*, "[w]hile it is possible that [Melinda] did have [a pulmonary embolism], its presence can only be inferred from facts that are equally consistent with [other causes of death.]" 328 S.W.3d at 536. Moreover, there is no evidence that had Dr. Hillery prescribed anticoagulants after surgery, they would have saved Melinda. Dr. Boyle "did not explain why [his] opinion was superior to

the opposite view. Such evidence raises no more than a possibility of causation, which is insufficient." *Id*.; *see also Hodgkins v. Bryan*, 99 S.W.3d 669, 674–75 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (affirming grant of no-evidence summary judgment as to causation where expert's affidavit was conclusory—it did not include facts or studies to support that decedent would have survived brain cancer with prompt treatment).

We overrule appellants' sole issue.

Conclusion

We affirm the trial court's judgment.

Jennifer Caughey
Justice

Panel consists of Justices Jennings, Massengale, and Caughey.