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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001402-MR

PATRICIA INGRAM — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 14-CI-01107

RADIOLOGY ASSOCIATES OF NORTHERN KENTUCKY, PLLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Patricia Ingram ("Appellant") appeals from an Order of the Boone Circuit Court granting Summary Judgment in favor of Radiology Associates of Northern Kentucky, PLLC ("Appellee"). Appellant argues that Appellee's delay in diagnosing her breast cancer resulted in a less optimistic prognosis, that this prognosis supports a claim for damages arising from mental

anguish and emotional distress, and that the Boone Circuit Court erred in failing to so rule. For the reasons stated below, we find no error and AFFIRM the Order on appeal.

The facts are not in dispute. On October 28, 2011, Appellant underwent a bilateral diagnostic mammogram which was interpreted by Dr. Stephen Moeller. Dr. Moeller is a physician employed by Appellee. Upon interpreting the results, Dr. Moeller was concerned about an asymmetric density or apparent lesion in Appellant's right breast. On Dr. Moeller's recommendation, Appellant received an ultrasound of the breast. Based on the ultrasound, Dr. Moeller recommended that Appellant be scheduled for another diagnostic mammogram in one year.

The following year on October 30, 2012, Appellant underwent another mammogram. This mammogram was interpreted by Dr. Elizabeth Reichard, who was also employed by Appellee. Dr. Reichard's report did not address any asymmetric density in Appellant's breast and she recommended another mammogram in one year.

On July 26, 2013 – approximately nine months after the 2012 mammogram – Appellant experienced pain in her right breast and discovered a lump. The lump was determined to be cancerous and Appellant underwent treatment including surgery and chemotherapy. According to the record, Appellant has remained cancer-free since 2013.

Appellant would later allege that as a result of the delayed diagnosis, she experienced extreme emotional distress and mental anguish resulting from the increased risk of the recurrence of cancer. On July 24, 2014, she filed a Complaint in Boone Circuit Court against Appellee and Saint Elizabeth Medical Center, Inc.[1] alleging medical negligence in failing to properly assess, evaluate and treat her breast cancer in a manner consistent with the accepted standard of medical care. In support of the claim, Appellant offered expert testimony that the delayed diagnosis reduced her estimated five-year survival rate from 93% to 72%, with a commensurate reduction in her cure rate dropping from 85-90% to 60%. In contrast, Appellee offered proof that because Appellant has had no recurrence of cancer since its initial treatment, her estimated five-year survival rate is 90%.

On August 2, 2016, Appellee filed a Motion for Summary Judgment. In support of the Motion, Appellee argued that it was entitled to Summary Judgment because Appellant had not suffered any compensable injury under Kentucky law. It maintained that Appellant received the same treatment she would have received had she been diagnosed nine months earlier, and because Kentucky does not recognize the "lost or diminished chance theory", *Kemper v. Gordon*, 272 S.W.3d 146, 152 (Ky. 2008), Appellant could not prove the causation or injury elements of her negligence claim. Further, Appellee argued that since Appellant was not prepared to offer expert testimony in support of her emotional distress

[1] Saint Elizabeth Medical Center is not a party to this appeal.

claim, that cause of action must also fail. Appellant filed responsive pleadings and a hearing on the Motion was conducted on August 18, 2016.

After considering the arguments, the Boone Circuit Court noted the parties' agreement that under *Kemper* there can be no recovery for a lost or diminished chance of physical recovery resulting from alleged medical negligence. However, the court determined that pursuant to *Gill v. Burress*, 382 S.W.3d 57 (Ky. App. 2012), a plaintiff could survive Summary Judgment by pleading the aggravation of an existing condition rather than a lost or diminished chance of recovery if the proof supported the claim. In the matter at bar, the circuit court determined that Appellant argued that her condition was aggravated solely by way of mental anguish. It went on to conclude that though Appellee's expert, Dr. Harlan Meyer, testified in a general sense that a missed diagnosis and diminished chance of recovery could cause mental distress, Dr. Meyer had never met Appellant and had no direct testimony as to Appellant's alleged mental distress. Additionally, Appellant had never sought or received treatment for emotional distress. Based on the foregoing, the court concluded that Appellant could not produce evidence at trial that could warrant a Judgment in her favor and it sustained Appellee's Motion for Summary Judgment. This appeal followed.

Appellant now contends that the Boone Circuit Court committed reversible error in granting Summary Judgment in favor of Appellee. She first argues that her mental anguish, emotional distress and pain and suffering resulting

from her delayed diagnosis are compensable injuries under Kentucky law. Appellant directs our attention to *Kemper*, *supra*, for the proposition that compensable injuries can be found where mental and impaired earning power result from the fear caused by the risk of future harm. Citing *Gill*, *supra*, she goes on to argue that severe mental anguish, emotional distress and loss of ability to enjoy life resulting from a delayed breast cancer diagnosis are compensable injuries under Kentucky law. Appellant notes that she presented evidence in discovery that as a direct result of the alleged delay in her breast cancer diagnosis, she is at an elevated risk of recurrence. Finally, Appellant states that she is not seeking to recover on a claim of lost chance of recovery, which she acknowledges is not compensable in Kentucky. Rather, Appellant asserts that she "seeks to recover damages for the emotional distress associated with the increased chance of her cancer returning" as a result of Appellee's delayed diagnosis. Appellant states that she presented evidence of severe emotional distress in the form of her own affidavit, that she was prepared to offer the testimony of her friend Nicia Kaffenberger, and could offer the testimony of Appellee's expert Dr. Meyer who acknowledged in a general sense that an increased risk of cancer could cause a person to experience significant emotional trauma. In sum, Appellant argues that the entry of Summary Judgment was not warranted and that she is entitled to present her evidence to a jury.

The focus of Appellant's argument in this issue is that she has tendered evidence in discovery sufficient to sustain a cause of action for emotional distress. The Kentucky Supreme Court has held that in order to prevail on a claim of emotional distress,

> the plaintiff must present evidence of the recognized elements of a common law negligence claim: (1) the defendant owed a duty of care to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury. Furthermore, we recognize that emotional tranquility is rarely attained and that some degree of emotional harm is an unfortunate reality of living in a modern society. In that vein, to ensure claims are genuine, we agree with our sister jurisdiction, Tennessee, that recovery should be provided only for "severe" or "serious" emotional injury. A "serious" or "severe" emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiffs [sic] everyday life or require significant treatment will not suffice. ***And a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment.*** This rule accords with the concerns we expressed in [*Steel Technologies, Inc. v.*] *Congleton* [, 234 S.W.3d 920 (Ky. 2007),] and the majority of jurisdictions in the United States.

Osborne v. Keeney, 399 S.W.3d 1, 17-18 (Ky. 2012) (Emphasis added and footnotes omitted).

In *Osborne*, the Kentucky Supreme Court held clearly and without equivocation that expert testimony or scientific proof is a necessary prerequisite to

the recovery of damages for emotional distress. In the matter before us, it is uncontroverted that the sole proof tendered by Appellant in support of her claim of emotional distress was her own affidavit. She did not tender "expert medical or scientific proof" of her claim, and there is no dispute that Appellant neither sought nor received treatment for emotional distress. Appellant notes that her friend, Nicia Kaffenberger, would have testified at trial, but Appellant does not assert that Ms. Kaffenberger's testimony would constitute expert medical or scientific proof. Appellant claims that she could have elicited at trial the expert testimony of *Appellee's* witness, Dr. Harlan Meyer, to support her claim. However, as noted by the circuit court, Dr. Meyer never examined nor even met the Appellant and could not testify specifically as to Appellant's emotional state. In his deposition, when questioned in a general sense as to whether a delayed diagnosis could result in emotional distress, Dr. Meyer responded hypothetically by saying, "I guess, yes". However, because Dr. Meyer never met or examined Appellant, and could not testify as to her emotional injuries if any, his testimony at trial could not satisfy *Osborne*.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show 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." Kentucky Rule of Civil Procedure (CR) 56.03. "The record must be viewed

in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id*. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Appellant and resolving all doubts in her favor, we conclude that the Boone Circuit Court properly found that there were no genuine issues as to any material fact and that Appellee was entitled to a Judgment as matter of law. Appellant lacks the expert medical or scientific proof required by *Osborne* to sustain an emotional distress claim. Appellant's second and third arguments, to wit, that the circuit court improperly held that Appellant must present additional evidence to prevail on an emotional distress claim, and that she has not presented a genuine issue of material fact, are subsumed in her first argument and are moot. We find no error.

For the foregoing reasons, we AFFIRM the Order of the Boone Circuit Court granting Summary Judgment in favor of Appellee.

ALL CONCUR.

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