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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000182-MR

JAKE RICHMOND — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 13-CI-90274

DR. JASON HUNT AND INTEGRITY ORTHOPAEDICS AND REHABILITATION; AND DR. EDWARD MURDOCK — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: In this medical malpractice action, Jake Richmond appeals from two separate summary judgments of the Montgomery Circuit Court entered in favor of Dr. Edward Murdock; Dr. Jason Hunt; and Dr. Hunt's partnership, Integrity Orthopaedics Sports Medicine and Rehabilitation, PLLC. The circuit

court concluded that Murdock, Hunt, and Dr. Hunt's practice group were entitled to judgment because Richmond could not establish proximate cause at trial. After our review, we vacate and remand.

A few minutes after 8:00 p.m., on Monday, December 24, 2012, Richmond was taken to the emergency department at St. Joseph Hospital in Mt. Sterling. He was examined by a nurse and a physician's assistant (P.A.), Emily Krimm. P.A. Krimm was working under the supervision of Dr. Edward Murdock, who practices emergency medicine. Richmond complained of pain in his left elbow and down his forearm to his fingertips; the pain had begun on the previous Saturday night (December 22, 2012) when he felt a pop in his left arm as he was removing his vest. He reported having trouble rotating his forearm.

In his medical history, Richmond told the triage nurse that he had previously suffered with deep vein thrombosis in his leg. However, he had no history of an arterial blood clot. The nurse noted a "faint [radial] pulse" in the left arm and concluded that this was likely Richmond's baseline because of his age and tobacco usage. She observed that his capillary refill was normal.

Upon her examination, P.A. Krimm noted swelling and diffuse bruising in Richmond's left hand, wrist, forearm, and elbow. She observed tenderness at his wrist, forearm, and elbow. She also observed that sensation in the arm was intact (indicating no tingling or numbness), but she noted that Richmond

was unable to extend his fingers due to pain. She observed no vascular compromise, pallor, cool skin, or abnormal capillary refill. His tendon function and pulse were normal. The clinical impression of P.A. Krimm was that Richmond had torn a muscle, but nonetheless she recommended an ultrasound.

After some discussion with P.A. Krimm, Dr. Murdock decided that an ultrasound to confirm a muscle tear was unwarranted. He cancelled her order for the ultrasound without ever seeing or examining Richmond. P.A. Krimm wrapped Richmond's left arm and placed it in a shoulder sling. Again, his pulse was taken, and his neurovascular system appeared intact. Richmond reported that his pain had eased. He was instructed to return to the hospital if his symptoms worsened, if his pain increased, or if he had any further concerns. He was discharged with instructions to see Dr. Hunt at Integrity Orthopaedics in two or three days.

On Friday, December 28, 2012 (six days after his arm pain began, and four days after he was seen in the emergency department), Richmond saw Dr. Hunt, a hand surgeon, at Integrity Orthopaedics. Dr. Hunt obtained a medical history and examined Richmond. He noted normal radial and ulnar artery pulses but observed some diffuse swelling and tenderness in Richmond's forearm. Dr. Hunt measured Richmond's grip strength at 3 on a scale of 1 to 5. He felt that Richmond had likely ruptured the tendon in his forearm, and he ordered an MRI to confirm the diagnosis.

Richmond presented to St. Joseph Hospital in Mt. Sterling on Wednesday, January 2, 2013 (five days after the imaging was ordered), for the MRI. However, by this time he was not able to undergo the MRI. Richmond reported to radiology staff that his hand hurt so badly that he could not position it properly for the imaging. In the normal course of practice, Dr. Hunt would not have been made aware of Richmond's inability to undergo the MRI.

On Wednesday, January 9, 2013, more than two weeks after his initial visit to the emergency department at St. Joseph Hospital, Richmond returned to St. Joseph. His hand was swollen and bluish to pale in color. Dr. Ronald Hamilton examined Richmond. He believed that Richmond might be suffering with compartment syndrome -- diffuse swelling resulting in abnormal pressure and dangerously decreased blood flow. Dr. Hamilton ordered that Richmond be transferred to the University of Kentucky Medical Center for further care.

At the University of Kentucky, Richmond was diagnosed with acute limb ischemia. Surgeons tried to restore adequate circulation to Richmond's hand by performing a thromboembolectomy -- a surgical removal of the blood clot. That procedure was unsuccessful. Ultimately, all of the fingers and most of Richmond's left hand were amputated, leaving only his thumb. He also lost part of his forearm.

On December 20, 2013, Richmond filed this medical malpractice action against Dr. Murdock, Dr. Hunt, Integrity Orthopaedics, and others. Richmond contended that the failure of Murdock and/or Hunt to timely diagnose the blood clot deprived him of the opportunity to receive treatment that would have saved his hand. The doctors answered the complaint and denied any negligence. A period of discovery began.

Pursuant to the circuit court's order, Richmond was required to make his expert witness disclosure by February 1, 2016. However, he failed to meet this deadline, and Dr. Hunt and others filed motions for summary judgment. Subsequently, Richmond identified Dr. Paul Kearney, a general surgeon, as his medical expert for trial.

Following Dr. Kearney's deposition in January 2017, Dr. Murdock, Dr. Hunt, and Integrity Orthopedics moved again for summary judgment. In part, they argued that Richmond could not prove causation at trial. They contended that Dr. Kearney could state only that Richmond *might* have had a different outcome had he been properly diagnosed on December 24, arguing that Richmond thus fell short of the standard required to show negligence. Since Richmond could not make a *prima facie* case of negligence, they claimed that they were entitled to judgment as a matter of law.

In separate orders entered in November 2017, the Montgomery Circuit Court granted summary judgment in favor of the appellees. Although the court acknowledged that genuine issues of material fact existed as to the doctors' deviation from the standard of care, it nonetheless granted their motions for summary judgment based on causation alone – namely, that causation could not be established **with certainty** as a result of the testimony of Richmond's medical expert.

Richmond filed a motion to alter, amend, or vacate the summary judgments. Attached to his motion was Dr. Kearney's affidavit stating his opinion with a "high degree of medical probability" that if Dr. Murdock and/or Dr. Hunt had made a correct and timely diagnosis of limb ischemia, all or nearly all of Richmond's hand would have been salvaged. The motion was denied. This appeal followed.

Upon our review of a grant of summary judgment, we must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. Because summary judgment involves only legal questions and factual findings are not at issue, "an appellate court need not defer to the trial court's decision and will

review the issue *de novo.*" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Causation is a necessary element of proof in any negligence case. *Johnson v. Vaughn,* 370 S.W.2d 591 (Ky. 1963). While proof of injury may be demonstrated -- at least in part -- by medical records or even by lay testimony, proof of a causal link between a physician's breach of a standard of care and a patient's injury (causation) must be established by means of expert testimony. *Andrew v. Begley,* 203 S.W.3d 165, 170 (Ky. App. 2006) (explaining that a "plaintiff in a medical negligence case is required to present expert testimony that establishes . . . the alleged negligence proximately caused the injury"). The medical testimony must indicate that an alleged negligent act probably caused the injury and that a nexus between the alleged act and the injury is not merely a speculative possibility. *Jarboe v. Harting,* 397 S.W.2d 775 (Ky. 1965); *Jackson v. Ghayoumi*, 419 S.W.3d 40 (Ky. App. 2012); *Brown-Forman Corp. v. Upchurch,* 127 S.W.3d 615 (Ky. 2004); *Turner v. Commonwealth,* 5 S.W.3d 119 (Ky. 1999)(Medical causation must be proved to a reasonable medical probability).

However, while evidence of causation must be in terms of probability rather than mere possibility, the Kentucky Supreme Court has held that substance should prevail over form and that the total meaning -- rather than a word-by-word

construction -- should be the focus of the inquiry. *Walden v. Jones,* 439 S.W.2d 571 (Ky. 1968); *Morris v. Hoffman,* 551 S.W.2d 8 (Ky. App. 1977).

With these standards in mind, we examine the deposition testimony of Dr. Kearney, Richmond's medical expert, and the report that he prepared before his deposition. Upon examination by Dr. Hunt's counsel and in response to a question regarding a timeline for an effective diagnosis and treatment of an acutely ischemic limb, Dr. Kearney said: "— my point about this is the faster you get to it, the more likely you are to achieve any kind of limb salvage, and then at some point it's completely irretrievable and you lose the limb completely." When asked at what point a hand might be regarded as unsalvageable, he answered: "— well, I think your best crack at him would have been in those first 48 to 72 hours if you were going to salvage that limb." He testified that by the time that Richmond saw Dr. Hunt, "occlusion of his radial artery was complete. I think he was living on collaterals. He was living on a very small number of collaterals, and they were enough to barely keep things alive. . . ." Later in his testimony, however, Dr. Kearney indicated that chances to save fingers after the 72-hour window did not diminish significantly. He stated that "limbs can live much longer than you would ever predict" provided there is some "collateral circulation."

The written medical report of Dr. Kearney was much more **forceful** in establishing a causal nexus between the undisputed mis-diagnosis and the

amputations. However, his deposition testimony was less resolute and somewhat equivocal. Counsel for Dr. Murdock questioned Dr. Kearney in the following exchange:

> [1]Q: More probably – more probably than not, you cannot say that had Dr. Murdock seen this patient, that he – that Mr. Richmond would have had any different of an outcome can you?
>
> A: Well, that you can't say, right, because even if – even if he had got the diagnosis correct and you sent him right -- he--it might have been too late for his hand, It was very possibly it was too late for his hand already.
>
> Q: You can't say more probably than not that it would have saved the limb?
>
> A: That's right. You can't because . . . until you open up that arm, you really don't know. You really don't know how much damage there is going to be.

In summarizing this testimony, Dr. Murdock argues that it is fatal to Richmond's case: "Richmond failed to establish **any causal nexus** between any alleged deviation from the standard of care and Mr. Richmond's injuries." (Murdock brief at p. 5). (Emphasis added).

However, in his written report, Dr. Kearney opined that "a hypercoagulable state **should have been considered immediately**" and that "[a]

[1] Record at 421-423, deposition of January 9, 2017, of Dr. Paul Kearney.

more thorough exam would have detected pulse discrepancy and acute ischemic possibly saving the limb." (Emphasis added).

On appeal, Richmond contends that the circuit court erred by concluding that Drs. Murdock and Hunt and Dr. Hunt's practice group were entitled to judgment as a matter of law because Richmond could not establish proximate cause at trial. He argues that the testimony of Dr. Kearney consistently indicated that earlier treatment for a blood clot is always better and that "the faster you get to it, the more likely you are to achieve any kind of limb salvage."

Drs. Murdock and Hunt argue that Kearney was unable to conclude in this specific case -- based on reasonable medical probabilities -- that negligence was a substantial cause of Richmond's injury. They contend that Kearney's testimony indicates only that there was a **chance or possibility** that the delay in a proper diagnosis caused the injury.

The sole issue on appeal before this Court is whether summary judgment was improvidently and prematurely entered. At the heart of this issue is the query: whether the unquestioned deviation by the doctors from the proper standard of care (as acknowledged by the trial court in its order) served to establish a nexus as to causation creating a material issue of fact requiring submission to a jury. After our analysis of the record and the law, we conclude that sufficient evidence was presented to create a genuine issue of material fact as to causation

under the unique circumstances of this case so as to render the entry of summary judgment erroneous.

Both appellant and appellees pick and choose language from Dr. Kearney's deposition utilizing *probability* and *possibility* almost interchangeably. The fact that emerges, however, is that Dr. Kearney opined **that time was of the essence** in saving Richmond's fingers:

> [2]Q Do you believe that the hand at some point became unsalvageable regardless of when the diagnosis was made?
>
> A Even if – well, I think your best crack at him would have been in those first 48 to 72 hours if you were going to salvage that limb.
>
> Q First 48 to 72 hours from the onset of symptoms?
>
> A: Yeah, from 12/24. So you had until about 12/28 if you were going to make a good stab at this guy.

Dr. Kearney also testified **that if Richmond had received a correct diagnosis** by December 27, there was a **probability** that his injury would have been less severe:

> [3]Q My point is you're comfortable saying with probability that if the diagnosis is made December 27th or earlier, it's likely they could have preserved the fingers?
> A That's right.

[2] Record at 357, Kearney Deposition.
[3] Record at 362, Kearney Deposition.

We note that Dr. Murdock did not personally examine Richmond on December 24 and that he cancelled the ultrasound originally recommended and scheduled by P.A. Krimm – even though Richmond exhibited "**classic warning signs**" and symptoms of acute ischemia of a limb. (Emphasis added). Noting additionally the fact that Richmond had a history of a previous blood clot, Dr. Kearney referred to Dr. Murdock's failure to diagnose limb ischemia as follows:

> [4]Q Given his classic presentation of sudden arm pain, followed by textbook findings, acute severe pain, paralysis of his digits, swelling, mottling and a diminished radial pulse on physical exam, vascular disease and a hypercoagulable state should have been considered immediately. Did I read that correctly?
>
> A That is correct.
>
> Q And what I take from that is that not only through your training and experience in the filed of surgery, but as well as from your knowledge of what's in the literature, whether it's Schwartz or Sabiston or UpToDate, whatever source you want to point to, there are certain presentations which are regarded as being **classic for acute ischemia**?
>
> A That's right.
>
> Q And the -- if I understand your itemization of those things, they would be acute, severe pain, finger paralysis, swelling and mottling and a diminished radial pulse, at least with respect to Mr. Hunt's case -- excuse me. Mr. Richmond's case?

[4] Record at 338-342. Kearney Deposition.

A Yeah, Mr. Richmond. He had -- he had each and every one of those --

Q Okay.

A -- on his first presentation. And in fact, between the nurses and Emily, who is a fairly young, inexperienced P.A., she actually picked up on that stuff . And -- and, you know, she picked up on that. And her [*sic*] and the nurse document basically an acutely ischemic limb. They document it. Now, I'm not so sure they understood what it was but -- but they certainly did document it. They were all over it. **And then the thing that bothered me the most is an ultrasound might have helped you here.** Not looking for venous thrombosis, but it might have helped you if somebody was savvy enough, you would have noticed that there was a very limited vascular supply in that forearm. It would have --you know, I mean, **Doppler ultrasound can be very effective** in deter -- detecting flows and lack of flow. This is a guy who -- who you would have said, okay, well, we need -- here is a -- is a sequential or multilevel vascular pressures in that limb and that would have --boom, you would have made the diagnosis right then and there. And --

Q Let me just cut you-- let me interrupt you here for a second --

A Yeah.

Q -- to keep myself on the right track.

A Yeah.

Q What you've described there in terms of the staff's evaluation of him and those findings --

A Yeah.

Q -- those are findings that were noted on December 24, 2012?

A That's right. Christmas Eve, yeah.

Q Okay.

A **So some of this is bad timing. Christmas Eve, right**.

Q With respect to his presentation to Dr. Hunt on December 28th --

A Yeah.

Q -- which would have been four days later, he did -- he had significant pain.

A Actually, the 26th. I think two days later. He showed up on Monday, didn't he? I think -- I thought it was -- maybe it is 26, but -- maybe it was 28, but I have 26 in my notes. 12/26, who also failed to identify acute limb ischemia.

Q Okay.

A So what bothers me is you've got two -- well, I don't know if they're boarded. I'm going to assume they were boarded physicians, board certified. Let's assume for a moment they're board certified physicians. **Two board certified physicians miss -- missed this**. And more distressing to me, and I'll -- and this doesn't involve Dr. Hunt now. I'm not -- although I'm not letting him off the hook. **Murdock didn't see the patient on Christmas Eve. Come on. You've got a guy with all these warning signs**. If I was sitting there and drinking my coffee and the P.A. says, you know, his arm is mottled and the pulse is down, he has this history of DVT, he smokes, he's been taking narcotics, you know, somebody should -- like ding, ding, ding, ding. Okay. Maybe I ought to have a look at this guy's hand. Because an experienced clinician probably could have -- I'm telling you, just from the description if you walk in and look at that arm -- right, it's me, I walk in. I don't even have to examine the guy. All I've got to do is look at that hand.

> I see it's mottled, swollen. I'm like, oh, man, there's something bad there. Now, I may not know exactly what it is, but I know it's bad and I know it involves his vascular system. **That's what bothered me the most about this that Murdock admitted that he -- in his testimony that he had not evaluated this patient,** he relied on the experience of a young P.A. (Emphases added).

We are persuaded that this case falls squarely within the precedent and spirit of *Baylis v. Lourdes Hosp., Inc*., 805 S.W.2d 122 (Ky. 1991), in which the Supreme Court focused on substance rather than mere form or semantics as follows:

> It is beyond dispute that causation is a necessary element of proof in any negligence case. . . . While evidence of causation must be in terms of probability rather than possibility, we have held that substance should prevail over form and that the total meaning, rather than a word-by-word construction, should be the focus of the inquiry. . . .
>
> From the testimony given and the circumstances surrounding the onset of anaphylactic shock in appellant, a jury could reasonably have found that appellees' negligence was a proximate cause of the condition.

Id. at 124-25 (citations omitted). The *Baylis* Court reversed entry of a directed verdict and remanded for trial.

Similarly, we conclude that summary judgment was inappropriately entered in this case. Material issues of fact abound. And the fact that time was of the essence -- coupled with the clear sequence of diagnostic errors – reinforces the

existence of genuine issues of material fact sufficient to defeat a motion for summary judgment.

Consequently, we vacate the order of summary judgment and remand for additional proceedings.

ALL CONCUR.

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