RENDERED: JULY 18, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000016-MR

DONALD M. HEAVRIN, EXECUTOR OF
THE ESTATE OF ROBERT E. HARROD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 96-CI-000372

HUNT B. JONES, M.D.;
EDWARD L. SCOFIELD, M.D.; AND
CARDIOTHORACIC SURGICAL ASSOCIATES, P.S.C. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: Donald Heavrin, the executor of the estate of Robert E. Harrod, deceased, appeals from orders of the Jefferson Circuit Court, entered July 12, 2001, and November 27, 2001, dismissing his claims for damages against doctors Hunt Jones and Edward Scofield. Heavrin alleges that the doctors did not

diagnose Harrod's cancer as soon as they should have and thus deprived him of the benefits of earlier treatment. The trial court ruled that Heavrin had failed to proffer evidence tending to show that the doctors' alleged negligence caused Harrod any harm. We agree and affirm.

Harrod consulted the doctors, Jones his primary-care physician and Scofield a thoracic surgeon, in August 1993. They found fluid in the pericardial sac, the membrane that envelops the heart, and in both lungs. They also found enlarged lymph nodes in the mediastinum, the mid-chest region. Apparently these symptoms are strongly indicative of cancer, particularly in a patient such as Harrod with a long history of heavy smoking. Dr. Scofield removed a small portion of the pericardial sac for testing and to drain the fluid; he had the fluid tested; he performed a bronchoscopy in the course of which he washed the lymph nodes; and he had the wash solution tested. None of these tests returned definitive evidence of cancer. Not until March 1994, when Dr. Scofield performed a biopsy on one of Harrod's enlarged lymph nodes, were cancer cells recovered. Soon thereafter Harrod began undergoing radiotherapy, but he succumbed to the cancer in September 1994.

Heavrin contends that the doctors should have performed a biopsy in August 1993. Had they done so, he argues, the cancer would have been identified months earlier than it was

and there is a chance that treatment would have been more effective. The trial court ruled that Heavrin could not recover unless he proved that there was a substantial chance of a better outcome had Harrod been diagnosed and treated sooner. Because Heavrin's proffered expert testimony did not meet that burden, the trial court dismissed his claim. Heavrin insists that the trial court imposed too severe a burden of proof.

To establish a prima facie case of medical malpractice, a plaintiff must introduce evidence, in the form of expert testimony, demonstrating (1) the standard of care recognized by the medical community as applicable to the particular defendant, (2) that the defendant departed from that standard, and (3) that the defendant's departure was a proximate cause of the plaintiff's injuries.[1] Heavrin is prepared to offer testimony by Michael Huncharek, M.D., that a reasonably careful practitioner would have diagnosed Harrod's cancer sooner than Jones and Scofield did.

To make out a prima facie case of causation, Heavrin must present expert testimony that establishes that it is probable, not merely possible, that damages resulted from the

[1] Reams v Stutler, Ky., 642 S.W.2d 586 (1982); Jarboe v. Harting, Ky., 397 S.W.2d 775 (1965).

allegedly tardy diagnosis.[2] Heavrin claims that the doctors' negligence caused Harrod to suffer a "lost chance" of more successful treatment. Huncharek testified that Harrod's cancer may have advanced from stage IIIA to stage IIIB between August of 1993 and March of 1994. If so, according to Huncharek, then his chance of a successful treatment (survival for five years) was reduced from about ten or fifteen percent to about five percent. Heavrin's argument from this evidence appears to be twofold, corresponding to two forms in which some courts have adopted the lost-chance doctrine.

He first argues that the reduction of even a slim chance of survival should be deemed sufficient evidence to raise a jury question as to whether the negligence caused Harrod's allegedly premature death.[3] As noted above, however, precedents from our highest court clearly require that the alleged harm result probably, not merely possibly, from the alleged negligence. Even were we so inclined, it would not be for this Court to depart from that precedent.

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[2] Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122 (1991); Walden v. Jones, Ky., 439 S.W.2d 571 (1968).

[3] Herskovits v. Group Health Cooperative of Puget Sound, 664 P.2d 474 (Wash. 1983); Gardner v. Pawliw, 696 A.2d 599 (N.J. 1997).

Citing Richard v. Adair Hospital Foundation Corp.,[4] Heavrin argues that the proximate cause required by our precedents is only a "substantial probability" that negligence resulted in harm, not necessarily a likelihood "more probable than not." We need not address this distinction, however, for even if we agreed with Heavrin about the distinction, his proffered evidence does not, as the trial court found, meet a substantial probability requirement. Indeed, it is doubtful whether his evidence could be thought to establish even the possibility that the alleged negligence cased premature death.

More interesting is Heavrin's suggestion that Harrod's injury was not his allegedly premature death, but the lost chance itself of more effective treatment. No Kentucky court has recognized this theory of recovery, but courts elsewhere have.[5] Under this theory, Heavrin would be obliged to prove not that the allegedly tardy diagnosis probably caused a premature death, but that it probably caused Harrod to lose a chance for more effective treatment.

[4] Ky. App., 566 S.W.2d 791 (1978).

[5] Alberts v. Schultz, 975 P.2d 1279 (N.M. 1999) (citing Baer v. Regents of the University of California, 972 P.2d 9 (N.M. App. 1999) and adopting this version of the lost-chance doctrine); Kramer v. Lewisville Memorial Hospital, 858 S.W.2d 397 (Tex. 1993) (discussing but rejecting several variations on the lost-chance theory of recovery).

Although the theory is interesting, this case permits us neither to accept nor to reject it. Heavrin did not obtain a ruling on this theory from the trial court; the question was thus not properly preserved for our review. Even if we accepted the theory, moreover, we are persuaded that Heavrin's causation evidence would not suffice.

The biopsy showed that Harrod had a relatively untreatable type of cancer. Heavrin's expert testified that the cancer may have been at stage IIIA in August 1993, but may already have been at stage IIIB. In either case, the sad fact is that the chance for effective treatment had already become slight. The expert's inability to say that in August Harrod's cancer was at an earlier stage, and the fact that, regardless of its stage, the cancer was very likely untreatable persuade us that Heavrin could not meet his burden of showing that the doctors' alleged negligence had probably caused Harrod to lose a chance of effective treatment, even if that was the extent of his burden.

We agree, in sum, with the trial court's conclusion that Heavrin's evidence failed to establish one of the elements of his prima facie case. There is no merit to his contention that the trial court abused its discretion by addressing this issue at a pre-trial hearing. The issue did not ripen until Heavrin announced shortly before trial that he would rely on his

expert's deposition. At that point the trial court was justified in asking Heavrin to show that the deposition met his prima facie burden. If it did not, after all, a costly trial would be pointless.[6] Nor is there any merit to his claim that he was not given an adequate opportunity to prepare for the hearing. The case was already six years old and had been continued three times. Heavrin had eleven days to prepare. He has identified nothing he would have done differently with more time, and even if there was something, the trial court's thoughtful response to his motion to reconsider eliminated any possibility of prejudice.[7]

Accordingly, we affirm the July 12, 2001, order of the Jefferson Circuit Court.

ALL CONCUR.

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[6] *Cf.* Curry v. Curry, Ky. App., 834 S.W.2d 701 (1992) (trial court did not abuse its discretion by entertaining a pivotal but technically tardy motion to dismiss).

[7] Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991) (discussing factors bearing on the appropriateness of a continuance); Kentucky Farm Bureau Mutual Insurance Company v. Burton, Ky. App., 922 S.W.2d 385 (1996) (trial court is entrusted with broad discretion to rule on motions for continuance).

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