IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1258-2

Filed: 3 July 2018

Durham County, No. 15 CV 4722

STEVEN GRODENSKY, Plaintiff

v.

ROGER MCLENDON, MD, DUKE UNIVERSITY HEALTH SYSTEM, INC. d/b/a DUKE UNIVERSITY MEDICAL CENTER, ASSOCIATED HEALTH SERVICES, INC., DUKE MEDICINE GLOBAL SUPPORT CORPORATION, THE DUKE UNIVERSITY SCHOOL OF MEDICINE RESEARCH FOUNDATION, and PRIVATE DIAGNOSTIC CLINIC, Defendants

Appeal by plaintiff from order entered 29 March 2017 by Judge Rebecca W. Holt in Durham County Superior Court. Heard in the Court of Appeals 3 April 2018. Plaintiff's petition for rehearing granted 14 June 2018.

Fred D. Smith, Jr., P.C., by Fred D. Smith, Jr. and Jeremy Ross Swindlehurst, and Young, Haskins, Mann, Gregory, McGarry & Wall, P.C., by Robert W. Mann, pro hac vice, for plaintiff-appellant.

McGuireWoods LLP, by Mark E. Anderson, Joan S. Dinsmore, and Jacob D. Charles, for defendant-appellees.

CALABRIA, Judge.

Where plaintiff raises no argument with respect to the hospital defendants, we deem any such argument abandoned, and hold that the trial court did not err in

granting a directed verdict in favor of those defendants. Where plaintiff forecast evidence of proximate causation sufficient to go to a jury, the trial court erred in granting a directed verdict. We reverse the trial court's order granting a directed verdict, and remand for further proceedings.

I. Factual and Procedural Background

On 29 September 2015, Steven Grodensky ("plaintiff") filed a complaint against Duke University Health System, Duke University Medical Center, Associated Health Services, Inc., Duke Medicine Global Support Corporation, Duke University School of Medicine Research Foundation, and Private Diagnostic Clinic, PLLC (collectively, "Duke Medicine" or "the Duke Medicine defendants"), and Dr. Roger McLendon ("Dr. McLendon") (collectively, "defendants"), alleging that defendants performed an unnecessary surgery.

According to plaintiff, in November of 2008, Dr. Allan H. Friedman ("Dr. Friedman"), who was not named as a defendant, performed an operation to remove a potentially malignant tumor from the base of plaintiff's skull. Plaintiff subsequently received radiation treatments, and was monitored through periodic MRIs. On 2 May 2013, one such MRI revealed some concerns in plaintiff's left temporal lobe. On 20 May 2013, Dr. Friedman, also an employee of Duke Medicine, performed a biopsy of plaintiff's brain. Dr. McLendon, the neuropathologist involved, confirmed that the tissue sample was adequate. Dr. Friedman obtained two specimens; in his pathology

report, Dr. McLendon indicated that one was a glioma, and the other a glioblastoma. Both are considered malignant growths.

Based upon Dr. McLendon's report, Dr. Friedman scheduled plaintiff for surgery. Dr. Friedman removed what he believed was a malignant glioma, along with plaintiff's entire left inferior temporal lobe. Dr. Thomas J. Cummings ("Dr. Cummings") submitted a pathology report for the specimens removed during the surgery, and determined that 90% of the removed tissue showed no obvious abnormality, that 10% showed "necrosis and mild hypercellularity[,]" and that these findings were consistent with radiation effect. Dr. McLendon reported in his pathology report that the brain tissue contained "gliosis, necrosis, macrophages . . . and inflammation[.]"

In a subsequent pathology report, Dr. McLendon noted that the original diagnoses of glioma and glioblastoma were "no longer operative[,]" instead noting that they had been revised, that the tissue was "clearly reactive and benign in appearance[,]" and that "technical problems interfered with the interpretation of the original study."

Plaintiff's complaint alleged that, beginning with Dr. Friedman's biopsy, Dr. McLendon was negligent in failing to correctly diagnose plaintiff's brain tissue sample. Plaintiff further alleged that the various Duke Medicine defendants, as Dr. McLendon's employers, were vicariously liable.

On 10 December 2015, defendants filed their answer and motion to dismiss. Defendants moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging that several of the Duke Medicine defendants were not health care providers for plaintiff, and were thus improper defendants. Defendants' answer further argued that defendants complied with the standard of care in the industry, that plaintiff's complaint failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, and that plaintiff's failure to provide information to health care providers constituted contributory negligence or a failure to mitigate damages. Defendants therefore sought dismissal of the complaint.

On 13 March 2017, defendants filed a written motion for a directed verdict. Defendants alleged that plaintiff's evidence failed to establish that Dr. McLendon breached the standard of care applicable to a neuropathologist, that plaintiff failed to offer expert testimony regarding proximate cause, and that therefore plaintiff failed to establish gross negligence.

On 29 March 2017, the trial court entered an order on defendants' motion for a directed verdict. The trial court found that plaintiff called only one expert witness at trial, Dr. Clayton Wiley ("Dr. Wiley"), a neuropathologist, who did not testify as to the standard of care applicable to Duke Medicine. The trial court noted that plaintiff had subpoenaed Dr. Friedman, but declined to call him as a witness, and did not produce any expert testimony regarding the cause of Dr. Friendman's

recommendation of brain surgery, nor any evidence that Dr. Friedman would not have recommended the surgery had Dr. McLendon otherwise comported himself. The trial court determined, *inter alia*, that plaintiff failed to present any evidence that Duke Medicine had breached any applicable duty of care owed to plaintiff, and that plaintiff had failed to present any evidence that Dr. McLendon's alleged breach of the applicable duty of care was a proximate cause of plaintiff's surgery or any damage to plaintiff. The trial court therefore granted a directed verdict in favor of defendants.

Plaintiff appeals.

II. Standard of Review

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

III. Directed Verdict

In his sole argument on appeal, plaintiff contends that the trial court erred in granting a directed verdict in favor of defendants.

A. Duke Medicine

In its order, the trial court held that plaintiff had failed to present sufficient evidence that Duke Medicine had breached any applicable duty of care owed to plaintiff. On appeal, plaintiff raises no argument with respect to the Duke Medicine defendants. Accordingly, we deem any such argument abandoned. N.C.R. App. P. 28(b)(6). We therefore affirm the trial court's order with respect to the Duke Medicine defendants.

B. Dr. McLendon

In its order, the trial court held that plaintiff had failed to present sufficient evidence that Dr. McLendon's erroneous neuropathology was the proximate cause of plaintiff's harm, namely his surgery. In other words, plaintiff had the burden at trial to show that, but for Dr. McLendon's alleged breach of duty of care, plaintiff would not have suffered the harm that he did. On appeal, plaintiff contends that he met this burden, and that the trial court erred in entering a directed verdict. We agree.

"A medical negligence plaintiff must rely on expert opinion testimony to establish proximate causation of the injury in a medical malpractice action." *Hawkins v. Emergency Med. Physicians of Craven Cty., PLLC*, 240 N.C. App. 337, 342, 770 S.E.2d 159, 163 (2015). The reasons for this rule are a matter of well-

established precedent: courts must rely on medical expertise to explain medical causation, which is a matter removed from lay knowledge. *Campbell v. Duke Univ. Health Sys., Inc.*, 203 N.C. App. 37, 44, 691 S.E.2d 31, 36 (2010). Therefore, plaintiff had the burden to establish, by way of expert testimony, not only that Dr. McLendon owed and breached a duty of care, but also that the breach of that duty was the proximate cause of plaintiff's harm.

The trial court acknowledged that the testimony of Dr. Wiley, a neuropathologist, was sufficient to establish the duty of care owed by a neuropathologist like Dr. McLendon. Nevertheless, the trial court determined that Dr. Wiley was not qualified to testify as an expert in neurosurgery or surgical procedures. The trial court held that he could not offer an expert opinion on the factors influencing a neurosurgeon's decision to operate.

This decision by the trial court was erroneous. This Court has held that "[i]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than the trier of fact." *Hamilton v. Thomasville Med. Assocs., Inc.*, 187 N.C. App. 789, 793, 654 S.E.2d 708, 710 (2007) (emphasis, citations and quotation marks omitted). In *Hamilton*, the plaintiff suffered a stroke, allegedly as a result of his doctors' malpractice. The plaintiff's expert witnesses included an

internist and a neurologist. The neurologist was asked to testify about whether the plaintiff's condition was amenable to surgery; the trial court, on the defendants' motion *in limine*, excluded the neurologist's testimony. This Court held that the neurologist was "in a better position than the trier of fact to have an opinion on the subject of whether Mr. Hamilton would have suffered a stroke but for Dr. Blackwell's failure to read the 29 November 1999 MRI[,]" and that therefore the trial court erred in granting the defendants' motion *in limine* to exclude the neurologist's testimony. We further held that, because the testimony should have been admitted, the trial court erred in granting summary judgment in favor of the defendants. *Id.* at 794, 654 S.E.2d at 711.

We hold that the facts in the instant case parallel those in *Hamilton*. It is true that Dr. Wiley was admitted as an expert in neuropathology, and not surgery. However, similar to the neurologist in *Hamilton*, Dr. Wiley was "in a better position than the trier of fact to have an opinion" on whether plaintiff would have been subjected to surgery but for Dr. McLendon's misdiagnosis. We hold that the trial court therefore erred in excluding his testimony as expert testimony.

Dr. Wiley's testimony was expert testimony which tended to demonstrate proximate causation. Taking plaintiff's evidence as true, and giving plaintiff the benefit of all reasonable inferences, we hold that it was sufficient to withstand a motion for a directed verdict. Accordingly, we hold that the trial court erred in

entering a directed verdict in favor of Dr. McLendon. We reverse the portion of the directed verdict order holding that plaintiff failed to prove proximate cause, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges BRYANT and HUNTER concur.

Report per Rule 30(e).