[Cite as *Riddle v. Auerbach*, 2011-Ohio-556.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Laura L. Riddle,	:	
Plaintiff-Appellant,	:	
		No. 10AP-508
v.	:	(C.P.C. No. 07CVA-07-10022)
Bruce L. Auerbach, M.D.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on February 8, 2011

Butler, *Cincione & DiCuccio*, *N. Gerald DiCuccio*, and *William A. Davis*, for appellant.

Roetzel & Andress, *LPA*, *Robert B. Graziano*, and *Michael R. Traven*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Laura L. Riddle ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas granting summary

judgment in favor of appellee, Bruce L. Auerbach, M.D. ("appellee"). For the reasons that follow, we affirm.

{¶2} Appellant filed this action both in her individual capacity and in her capacity as the administrator for the estate of Michael D. Riddle ("Mr. Riddle"). On August 11, 2002, Mr. Riddle went to Holzer Medical Center in Jackson, Ohio, complaining that he was experiencing a severe shortness of breath. Mr. Riddle had a family history of heart disease, with his mother and father each having died of heart attacks at ages 62 and 42, respectively. Mr. Riddle also had a history of heart disease, having suffered a previous heart attack.

{¶3} Based on the results of testing performed at the Holzer Medical Center, Mr. Riddle was transferred to Mount Carmel Health Center in Columbus, where he was placed in the cardiac care unit. Appellee was the cardiologist on duty at the time.

{¶4} Upon arrival, a Mount Carmel physician other than appellee diagnosed Mr. Riddle with "angina vs. myocardial infarction v. bilary tract [gallbladder] disease." Several prescriptions and tests were ordered, including an ultrasound on Mr. Riddle's gallbladder. However, no order was given for the administration of any anticoagulant medication.

{¶5} At around 8:30 a.m., appellee called in to check on Mr. Riddle, and ordered that the gallbladder test be delayed until the following day. Appellee personally saw Mr. Riddle at around 9:30 a.m., but did not order any specific treatment or testing, and again no order was given for the administration of any anticoagulant medication. At 10:48 a.m., Mr. Riddle complained of severe chest pain, became unresponsive, and was subsequently pronounced dead.

{¶6} Appellant filed this action naming as defendants appellee and Mount Carmel Health, alleging wrongful death and medical malpractice in Riddle's treatment.[1] Appellant identified as her expert witness Donald L. Wayne, M.D. Appellee conducted a discovery deposition with Dr. Wayne during which Dr. Wayne testified that, given his medical history and the tests that had been conducted, Mr. Riddle was at a high risk for having a myocardial infarction. Dr. Wayne further testified that the appropriate course of care required administration of an anticoagulant such as heparin and a IIb/IIIa agent such as ReoPro as treatment while a heart attack was being either confirmed or ruled out as the cause of Mr. Riddle's symptoms.

{¶7} With regard to the issue of causation, Dr. Wayne testified as follows:

> Q. * * * Any other criticisms against Dr. Auerbach other than the failure to give the heparin and the IIb/IIIa agent?
>
> A. No.
>
> Q. Okay. And I assume you hold the opinion that all of these failures from Holzer through Dr. Auerbach caused Mr. Riddle's death?
>
> A. I think it contributed to Mr. Riddle's death.
>
> Q. Any other causation opinions that you hold? And you understand what I mean by that?
>
> A. No. If you'd clarify that?
>
> Q. I know you've testified before, and the issues in a medical/legal case are what is the standard of care; was there a deviation from the standard of care; did that deviation cause harm to the patient, and what that harm was. So I'm really on the third prong of causation.

[1] Appellant's claims against Mount Carmel Medical Center were subsequently voluntarily dismissed by appellant.

Do you have an opinion as to what the failure of any of the physicians to give the anticoagulation caused?

A. Would he have - - better approach, would he have died had he gotten the anticoagulation?

Q. Yes.

A. I can't answer that. That's speculation. And I don't speculate. I would say that if you were going to give this 50-year-old male every chance that he possibly had, that the failure to give him anticoagulants contributed to not giving him the best chance.

Q. A loss of chance is what you're saying?

A. Yes.

* * *

Q. So just so I'm clear, you are not here to say more likely than not if Mr. Riddle was given heparin at any point in time that he would have lived?

A. I can't answer the question.

Q. Can you tell me - - okay, let me just do it this way: Let's go on timing, okay?

A. Mm-hmm.

Q. Let's start at 12:18, a.m. at Holzer, if that's a good number to use for Holzer - - or let's say 12:30, let's round them off, 12:30, a.m., Holzer; 5 o'clock, a.m., Mount Carmel; and 6 o'clock a.m. at Mt. Carmel; and 9:30, a.m., Mt. Carmel. Fair numbers?

A. Fair numbers.

Q. Okay. If Mr. Riddle was given anticoagulation at 12:30, a.m., do you have an opinion as to what his chance of survival or living was?

A. I'm going to go back and say the same thing I said before, I can't tell you whether he would have survived,

depending whether he got it at 12:00, 12:30, all the way until the time that he died. Hold on for a second.

Q. I'm with you, I'm listening.

A. Incrementally, it would have been better for him the earlier rather than the later.

Q. Yes.

A. Okay. The fact that it wasn't given at any time was a deviation of standard of care.

Q. I'm with you.

A. I can't give you a statistical analysis of when there would be a cut-off or not. Incrementally, it would seem, it's more logical that the earlier would have been better. So the 12:00 or 12:15 or 12:30 would have been better than the 3:00, the 5:00, the 6:00, the 9:30.

Q. Right.

A. So I can't - - you're getting into an area that there is no way that anybody is going to give you an answer to that.

Q. Okay. So I just need to make a quick record here then. Can you quantify Mr. Riddle's, can you quantify the loss of chance at 12:30, a.m.?

A. I can't give you a quantitative analysis of this whole thing. I think that it's impossible to give you that kind of number.

(Wayne depo., 69-73.)

{¶8} Upon further questioning regarding loss of chance, Dr. Wayne testified:

Q. Okay. Now, back to my other questions, can you just bear with me, because there's legal reasons I ask these questions. Can you quantify Mr. Riddle's loss of chance by not getting heparin at 12:30, a.m.?

A. It's greater than a 50 percent.

> Q. Can you quantify his loss of chance by not getting heparin at 5:00, a.m.?
>
> A. It's probably still greater than a 50 percent chance.
>
> Q. How about at 6:00, a.m.?
>
> * * *
>
> A. In terms of death, I can't answer that.
>
> * * *
>
> I mean I can't tell you in terms of - - I mean, you know, you're quantifying, you know, chance of survival or not, chance of the drug working or not.

(Wayne depo., 78-79.)

{¶9} Appellee filed a motion for summary judgment pursuant to Civ.R. 56. In support of the motion, appellee pointed to Dr. Wayne's deposition testimony. Accepting appellant's assertion that the case involved a loss of chance of recovery, appellee argued that since Dr. Wayne could not state a specific percentage chance of survival that had been lost due to the failure to administer anticoagulants, appellant could not bear her burden of establishing damages. Thus, appellee argued that he was entitled to judgment as a matter of law.

{¶10} Appellant filed a memorandum contra the motion for summary judgment. Appellant argued that it was not necessary for Dr. Wayne to have stated an exact percentage of the lost chance for recovery in order for the case to be submitted to a jury. Appellant argued instead that it was only necessary for Dr. Wayne to state his opinion that the failure to administer anticoagulants increased the risk of harm to Mr. Riddle.

{¶11} Appellant attached to her memorandum contra an affidavit executed by Dr. Wayne, in which Dr. Wayne purported to clarify his deposition testimony. The affidavit stated, in relevant part:

> 4. Subsequent to my review of the above described medical and hospital records of Mr. Riddle, I had a telephone conference with [appellant's counsel], and described to him the opinions I held regarding the care of Mr. Riddle at Mount Carmel Medical Center. I told him that it was my opinion, to a reasonable medical probability, that the care of the patient by Dr. Auerbach, the cardiologist to whom Mr. Riddle had been admitted, as well as by the interns or residents employed by the hospital who cared for the patient, fell below acceptable standards of medical care under the circumstances, as given the patient's prior history of heart disease, his symptoms and history upon presentation at Holzer Medical Center, his elevated Troponin levels and his worsening EKG consistent with acute myocardial infarction, his admitting diagnosis should have been acute myocardial infarction until proven otherwise. As such, until the patient could be taken for cardiac catheterization to determine the extent of his coronary artery disease, reasonable and appropriate standards of care required that he receive anticoagulant therapy in the form of the drug heparin to protect his heart muscle by preventing the formation of blood clots further obstructing his coronary arteries. This was not done prior to his terminal event.
>
> 5. [Appellant's counsel] then asked me whether if heparin had been administered prior to the terminal event, I could state to a reasonable medical probability, more likely than not, that the patient's death would probably have been prevented. I advised [counsel] that I could not do so, as since Mr. Riddle never underwent cardiac catheterization and the extent of his coronary artery disease was never determined, I could not predict what that study might have found, and therefore, the degree of success that could be achieved in treating his particular disease.
>
> 6. I further advised [counsel] that given the well-known effectiveness of anticoagulation in protecting patients such as Mr. Riddle prior to the definitive treatment of their coronary artery disease, I could only state to a reasonable

medical probability that Mr. Riddle would have had a 50/50, or 50% chance of surviving had heparin been administered. I have not changed these opinions.

7. My deposition was taken by the attorneys for Dr. Auerbach and the hospital on February 5, 2009. During the course of that deposition, I stated my opinion, set forth above, that Dr. Auerbach and the residents and interns caring for Mr. Riddle fell below acceptable standards of medical care in not administering heparin to the patient. Subsequent to that deposition, I was contacted by [appellee's counsel] and informed that these attorneys had filed what is known as a motion for summary judgment for the reason that I could not render an opinion as to Mr. Riddle's percentage chance of survival had heparin been administered. [Counsel] has provided me with a copy of the transcript of my deposition, which I have reviewed.

8. In my deposition, I stated my opinion at multiple times that Dr. Auerbach and the residents or interns caring for the patient deviated from acceptable standards of care in not administering heparin. I further testified to my opinion that this failure contributed to the patient's death. (Page 69.) I further testified that the failure to administer heparin definitely cost the patient a chance of survival. (Page 73, 75), and that had it been administered, almost up until the time of death, there was a greater than 50% likelihood of it having a beneficial effect (Page 76-77).

9. It was my understanding of the questions I was asked at Pages 71-73, 78-79, and Page 118, that I was asked whether I could render an opinion as to what the specific numerical percentage of survival would have been had heparin been administered, at any particular point in time, and I stated I could not do so, as such would be speculation. However, it remains my opinion, to a reasonable medical probability, that had heparin been administered to Mr. Riddle from the time of his admission to Mount Carmel Medical Center through the time Dr. Auerbach personally saw the patient at approximately 9:30 a.m., given the effectiveness of that therapy in most patients, Mr. Riddle would have had a 50/50 chance, or 50% likelihood of survival. I hope that this clarifies my deposition testimony and opinions.

{¶12} The trial court issued a decision and entry granting appellee's motion for summary judgment. As part of its decision, the trial court considered the extent to which it could consider Dr. Wayne's affidavit. The court found that the affidavit contradicted, rather than clarified, Dr. Wayne's deposition testimony without adequately explaining the circumstances under which his opinion changed. The court therefore declined to consider Dr. Wayne's affidavit in considering the motion for summary judgment.

{¶13} The court then concluded that Dr. Wayne's deposition testimony was sufficient to place before a jury the question of whether appellee's conduct fell below the acceptable standard of care and whether Mr. Riddle suffered a decreased chance of survival as a result. However, the court concluded that Dr. Wayne's unwillingness to place a specific percentage on the lost chance of recovery was fatal to appellant's case. The court concluded that "Dr. Wayne's deposition testimony does not present any evidence that would permit a jury to measure the * * * chance of survival that Mr. Riddle lost, or to measure the amount of that chance from which Dr. Auerbach can be held responsible, which it must do in order to award damages." (Decision and Entry, 17.)

{¶14} Appellant filed this appeal, and asserts a single assignment of error:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF IN REFUSING TO CONSIDER THE AFFIDAVIT OF PLAINTIFF'S EXPERT WITNESS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND IN GRANTING THE MOTION FOR SUMMARY JUDGMENT, RULING AS A MATTER OF LAW PLAINTIFF'S EXPERT WITNESS HAD FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT ON THE ISSUES OF PROXIMATE CAUSE AND DAMAGES.

{¶15} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the

party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221. We construe the facts in the record in a light most favorable to appellant, as is appropriate on review of a summary judgment. We review questions of law de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145.

{¶16} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion, and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. Once the moving party has met its initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. Id.

{¶17} The parties have agreed that this case is governed by the loss of chance doctrine. Prior to the adoption of the loss of chance doctrine, all medical negligence cases were subject to the general rules governing proof of causation, which require a plaintiff to show that an incident of medical negligence "probably," or more likely than not, caused the patient's injury or death. *McDermott v. Tweel*, 151 Ohio App.3d 763, 2003-Ohio-885. Under this traditional view, where a patient's chance of recovery was less than 50 percent prior to the act of medical negligence, "recovery was foreclosed

altogether, as plaintiff was logically unable to establish that the negligence was more likely than not the cause of the patient's injury or death." Id. at ¶40.

{¶18} The loss of chance doctrine was adopted by the Supreme Court of Ohio in order to address that type of result. *Roberts v. Ohio Permanente Med. Group*, 76 Ohio St.3d 483, 1996-Ohio-375. Under the doctrine, a patient whose chance of survival was less than 50 percent prior to the act of medical negligence can recover damages where the medical negligence has caused the patient's chances of recovery to decrease even further. Id. Under the loss of chance doctrine, "the plaintiff must present expert medical testimony showing that the health care provider's negligent act or omission increased the risk of harm to the plaintiff. It then becomes a jury question as to whether the defendant's negligence was a cause of the plaintiff's injury or death." Id. at paragraph one of the syllabus. Once the plaintiff has met the initial burden of showing that the health care provider's actions increased the risk of harm to the plaintiff, the trier of fact must determine the degree to which the plaintiff's chance of recovery or survival has been decreased and then use that percentage to calculate the damages to be awarded. Id. at 488.

{¶19} "The plaintiff is not required to establish the lost chance of recovery or survival in an exact percentage in order for the matter to be submitted to the jury. Instead, the jury is to consider evidence of percentages of the lost chance in the assessment and apportionment of damages." Id. In a loss of chance case, in order to determine the damages to be awarded:

> [T]he trial court must instruct the trier of fact to consider the expert testimony presented and (1) determine the total amount of damages from the date of the alleged negligent

> act or omission, including but not limited to lost earnings and loss of consortium; (2) ascertain the percentage of the patient's lost chance of survival or recovery; and (3) multiply that percentage by the total amount of damages.

Id. at 489.

{¶20} Thus, "[w]hile *Roberts* does not require specific evidence of the percentage of chance lost in order to establish proximate cause, it does require such evidence to establish damages." *Turner v. Rosenfield*, 8th Dist. No. 89441, 2008-Ohio-1932, ¶34. Therefore, the loss of chance doctrine contemplates that the trier of fact will be provided with two pieces of evidence (in addition to the normally required evidence regarding the applicable standard of care, the total amount of damages, etc.) to be applied in determining the amount of damages to be awarded: the percentage chance of the patient's recovery or survival prior to the alleged act of medical negligence, and the amount by which that percentage chance of recovery or survival decreased as a result of the alleged act of medical negligence.

{¶21} The issue in this case is whether Dr. Wayne's deposition testimony showed the absence or existence of genuine issues of material fact regarding the application of the loss of chance doctrine to appellant's claims. In his deposition testimony, Dr. Wayne stated his opinion that the complete failure to order administration of an anticoagulant from the time Mr. Riddle presented at Holzer Medical Center until the time of his death constituted a lapse from the standard of care. However, the only relevant time period remaining in this case is the time period during which Mr. Riddle was under appellee's care because appellee is the only remaining defendant at this point.

{¶22} Appellant correctly points out that Dr. Wayne was not required to testify as to a specific percentage loss of chance in order to establish the existence of a genuine issue of material fact on the issue of causation. However, the issue is whether there was sufficient evidence by which a jury could determine the percentage chance of Mr. Riddle's recovery or survival at the time he came under appellee's care, and the decrease in that percentage resulting from appellee's alleged negligence, thus determining the amount of damages to be awarded under the loss of chance doctrine.

{¶23} When asked to quantify Mr. Riddle's chance of recovery or survival at each of the relevant points in time from the time he presented at Holzer Medical Center until the time he died, Dr. Wayne stated:

> I'm going to go back and say the same thing I said before, I can't tell you whether he would have survived, depending whether he got it at 12:00, 12:30, all the way until the time that he died.
>
> * * *
>
> I can't give you a statistical analysis of when there would be a cut-off or not. Incrementally, it would seem, it's more logical that the earlier would have been better. So the 12:00 or 12:15 or 12:30 would have been better than the 3:00, the 5:00, the 6:00, the 9:30.
>
> * * *
>
> So I can't - - you're getting into an area that there is no way that anybody is going to give you an answer to that.
>
> * * *
>
> I can't give you a quantitative analysis of this whole thing. I think that it's impossible to give you that kind of number.

(Wayne depo. 72-73.)

{¶24} Dr. Wayne's deposition testimony establishes, generally, that Mr. Riddle's chance of recovery or survival had logically decreased between the time Mr. Riddle presented at Holzer Medical Center and the time Mr. Riddle came under appellee's care. However, nothing in Dr. Wayne's deposition testimony establishes either what that percentage of recovery or survival was or the amount by which that chance decreased as a result of appellee's alleged negligence. Consequently, nothing in Dr. Wayne's deposition constitutes evidence that would allow a trier of fact to apply the loss of chance doctrine; in fact, Dr. Wayne's deposition establishes that under the circumstances of this case, it would be impossible for any trier of fact to apply the loss of chance doctrine.

{¶25} We emphasize that this conclusion does not necessarily mean that a plaintiff in a loss of chance case must always provide expert testimony regarding exact percentages in order to survive a motion for summary judgment. However, where, as here, the expert testimony offered by Dr. Wayne in his deposition states that no percentage loss of chance can be calculated, there is no evidentiary basis to support a loss of chance claim, and summary judgment is appropriate.

{¶26} Appellant points to the affidavit executed by Dr. Wayne that was attached to her memorandum contra appellee's motion for summary judgment, arguing that this affidavit constitutes evidence showing that the loss of chance doctrine can be applied. The Supreme Court of Ohio has held that an affidavit executed by a nonparty expert witness that contradicts the expert's previous deposition testimony cannot be used to establish the existence of genuine issues of material fact precluding the grant of

summary judgment when the affidavit does not set forth any explanation for the contradiction. *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237.

{¶27} Appellant argues that Dr. Wayne's affidavit did not contradict his deposition testimony, but instead merely supplemented and explained the testimony. We disagree. In his deposition, Dr. Wayne stated that Mr. Riddle's chance of recovery or survival at the time of appellee's alleged negligent act could not be calculated at any of the relevant points in time from the time Mr. Riddle presented himself at Holzer Medical Center until the time of his death, but in the affidavit, Dr. Wayne stated that this percentage could be calculated, and that Mr. Riddle's chance of recovery or survival was 50 percent throughout this period of time.[2]

{¶28} Dr. Wayne's affidavit also does not include any explanation for the contradiction between his deposition testimony and the affidavit. Instead, the affidavit states that it had always been Dr. Wayne's opinion that Mr. Riddle had a 50 percent chance of recovery or survival if an anticoagulant had been administered at any point prior to his death.[3] Consequently, we cannot say the trial court erred in refusing to consider Dr. Wayne's affidavit in deciding the motion for summary judgment.

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[2] Dr. Wayne's statement that Mr. Riddle had a 50 percent chance of recovery throughout the relevant time period also contradicts his deposition testimony that, logically, Mr. Riddle's chance of recovery had to have decreased throughout the relevant time.

[3] We note that, if Dr. Wayne's affidavit had been considered with regard to the motion for summary judgment, that affidavit would have removed appellant's claims from application of the loss of chance doctrine because, according to the affidavit, Mr. Riddle had an even chance of recovery. We have held that the loss of chance doctrine does not apply in a case where the patient had a 50 percent or greater chance of recovery or survival at the time of the alleged negligent act. *McDermott* at ¶43 ("the case law does not presently allow for the application of the loss of chance doctrine to a case * * * in which the injured patient had an even or greater-than-even chance of recovery at the time of the alleged medical negligence").

{¶29} Therefore, the trial court did not err in granting appellee's motion for summary judgment. Accordingly, appellant's assignment of error is overruled.

{¶30} Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.

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