[Cite as *Davis v. Ryan*, 2012-Ohio-324.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Deborah A. Davis, Deceased, Thomas E. Davis, Widower-Claimant,	:	
Plaintiff-Appellant,	:	No. 11AP-198
v.		(C.P.C. No. 09CVD11-17025)
Marsha Ryan, Administrator, Ohio Bureau of Workers' Compensation et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on January 31, 2012

Portman, *Foley & Flint LLP*, and *Frederic A. Portman*, for appellant.

Michael DeWine, Attorney General, and *Derrick L. Knapp*, for appellee Marsha Ryan, Administrator, Ohio Bureau of Workers' Compensation.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Thomas E. Davis, widower of Deborah A. Davis ("decedent"), appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of appellees, Bureau of Workers' Compensation ("BWC")

and Ohio Education Association ("OEA"), regarding appellant's right to participate in Ohio's Workers' Compensation Fund. For the following reasons, we affirm.

{¶2} Decedent was employed by OEA in a clerical position. At the time of her death in November 2005, she had a pre-existing cardiac condition and had already undergone double coronary bypass surgery one year earlier. Following the surgery, decedent eventually returned to work and was not placed on any long-term exercise or walking restrictions.

{¶3} On the morning of November 21, 2005, decedent attempted to park in a handicap parking spot in the parking lot behind the OEA building on East Broad Street in Columbus, Ohio. After discovering that the parking spot was blocked by a construction truck, decedent drove to the remote OEA parking lot located one block south of the OEA building. A public parking garage was located in the block between the OEA building and the remote OEA parking lot.

{¶4} Decedent's co-worker, Terry Kalisczak, saw decedent crossing the street from the remote OEA parking lot. Decedent told Kalisczak about how her usual parking spot was blocked, and Kalisczak said that she would ask the driver to move the truck. Decedent then returned to her car, and when Kalisczak returned to inform decedent that the truck was being moved, Kalisczak found her unresponsive in her car. No postmortem was conducted; however, decedent's death certificate stated that the cause of death was an acute myocardial infarction.

{¶5} Appellant, as administrator of decedent's estate, filed a workers' compensation claim for death benefits. The BWC ultimately denied the application, and appellant appealed to the Franklin County Court of Common Pleas. Appellees moved

for summary judgment, arguing that there was no causal connection between decedent's employment and her death. Specifically, appellees argued that the death did not occur within the scope of decedent's employment, did not arise out of decedent's employment, and was not aggravated by her work activities. Appellees pointed to deposition testimony taken from decedent's treating cardiologist, Dr. Kevin Hackett, in a separate personal-injury action filed by appellant against the company that owned the truck blocking the handicapped parking spot. That action was later dismissed with prejudice.

{¶6} In his deposition, Dr. Hackett testified about decedent's pre-existing heart condition and her coronary bypass surgery in 2004. According to Dr. Hackett, decedent was 5 feet 4 inches tall, weighed 317 pounds, and had a body mass index of 45, which is considered morbidly obese. Decedent smoked two packs of cigarettes per day and suffered from a multitude of heath problems, including systemic hypertension, reactive airway disease, high cholesterol, diabetes, and obstructive sleep apnea. Describing decedent as a "poster child for heart disease," Dr. Hackett testified that decedent "was at risk for having a heart attack at any point." (Deposition, 12-14.) Dr. Hackett stated that, given decedent's health problems and because no postmortem was conducted, he could not determine the cause of decedent's heart attack within a reasonable degree of medical probability. Appellant filed a memorandum opposing summary judgment, to which appellees replied.

{¶7} The trial court granted summary judgment in favor of appellees, reasoning that there was no evidence that decedent's death was caused by anything other than natural deterioration from pre-existing physical conditions. According to the trial court,

appellant failed to present any evidence that decedent overexerted herself or that overexertion triggered decedent's heart attack.

{¶8} In a timely appeal, appellant now advances a single assignment of error for our consideration:

> THE LOWER COURT ERRED WHEN IT SUSTAINED APPELLEE ADMINISTRATOR'S MOTION FOR SUMMARY JUDGMENT.

{¶9} Appellant's sole assignment of error claims that Dr. Hackett's deposition created a genuine issue of fact as to whether decedent's death was caused by overexertion from her attempt to walk from the parking lot. According to appellant, Dr. Hackett's testimony established that decedent was injured "in the course of" and "arising out of" her employment, as required for compensation under R.C. 4123.01(C).

{¶10} This court reviews decisions granting summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶8. To obtain summary judgment, the movant must show that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶29.

{¶11} The movant bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party meets this initial burden, the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is

a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶12} "The test of the right to participate in the Workers' Compensation Fund is not whether there was any fault or neglect on the part of the employer or his employees, but whether a 'causal connection' existed between an employee's injury and his employment either through the activities, the conditions or the environment of the employment." *Bralley v. Daugherty* (1980), 61 Ohio St.2d 302, 303. For the purposes of workers' compensation, " '[i]njury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." R.C. 4123.01(C). Injury does not, however, include an "[i]njury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body." R.C. 4123.01(C)(2).

{¶13} The requirement that the injury be received "in the course of" and "arising out of" the employment is phrased in the conjunctive, and "each prong of the formula must therefore be * * * satisfied before compensability will be allowed." *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277. The "in the course of" requirement relates to the time, place, and circumstances of the injury, whereas the "arising out of" requirement refers to a causal connection between the employment and the injury. Id.

{¶14} It is well-settled that expert testimony regarding causation must be expressed in terms of probability, not possibility. *Stinson v. England* (1994), 69 Ohio St.3d 451, paragraph one of the syllabus. "At a minimum, the trier of fact must be provided with evidence that an employee's employment-related activity 'more likely than not' caused the employee's injury." *Cyrus v. Yellow Transp., Inc.*, 169 Ohio App.3d 761,

2006-Ohio-6778, ¶8, quoting *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 369. "An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." *Stinson* at paragraph one of the syllabus. Although no "magic words" are required, the expert's testimony, when viewed in its entirety, must equate to an expression of probability. *Rhodes v. Firestone Tire & Rubber Co.*, 10th Dist. No. 08AP-314, 2008-Ohio-4898, ¶11.

{¶15} In this case, although appellant claimed that the cause of decedent's death was overexertion based on her attempt to walk to the office from the remote OEA parking lot, Dr. Hackett could not reach this conclusion within a reasonable degree of medical probability. Throughout his deposition, Dr. Hackett testified that he did not know the cause of decedent's death because there was no postmortem and because decedent had a multitude of health problems. (Deposition, 66, 68-69.) Dr. Hackett repeatedly answered "no" when asked whether he could conclude, within a degree of medical probability, that the act of walking would trigger an acute myocardial infarction. (Deposition, 48-49.) In fact, Dr. Hackett did not place decedent on any exercise or walking restrictions after her surgery.

{¶16} Despite this testimony, appellant asserts that Dr. Hackett did provide sufficient testimony of causation based on hypothetical questions he answered in a questionnaire presented to him by appellant's counsel. Although Dr. Hackett answered that decedent's attempt to walk from the remote OEA parking lot could have contributed to her heart attack, he later explained the reason for this answer in his deposition. According to Dr. Hackett, the questionnaire asked him to "assume," among other things, that decedent overexerted herself by walking from the remote OEA parking lot:

> I answered this yes because of the assumption of assumptions which were that if she had -- and I'll stand by this and I won't get involved in all of this because I had no idea when I signed it how far she walked, et cetera, et cetera. What I'm going to say is if she had to exert herself beyond what was normally tolerable by her, it could have precipitated a heart attack, and that's all I'm going to say. And I said this up front, I don't know what she died of. And there's a multitude of things and there was no postmortem done. And I said this all along, if we knew the postmortem, I think it would make life much simpler.

(Deposition, 68-69.)

{¶17} Thus, even if the questionnaire answered by Dr. Hackett constituted evidence of the type required by Civ.R 56, it did not establish within a degree of probability that decedent's walk caused overexertion or that overexertion caused an acute myocardial infarction. Indeed, Dr. Hackett rejected any such interpretation of the questionnaire during his deposition. Dr. Hackett reiterated that, to find a causal connection between decedent's walk from the remote OEA parking lot and the acute myocardial infarction, he would have to assume (1) that walking caused decedent to overexert herself and (2) that overexertion caused a heart attack. However, even with these assumptions, Dr. Hackett could only opine that overexertion "could have precipitated a heart attack." (Deposition, 68-69.)

{¶18} Appellant also argues that decedent's attempt to walk to the OEA building aggravated her pre-existing cardiac condition. Appellant is correct in asserting that the version of R.C. 4123.01(C) in effect at the time of decedent's death did not require proof of "substantial" aggravation, see *Schell v. Globe Trucking, Inc.* (1990), 48 Ohio St.3d 1; however, appellant was still required to present evidence that decedent's attempt to walk from the remote OEA parking lot amounted to aggravation of her pre-existing heart

condition. Again, the cause of decedent's death was unknown, and, as the trial court correctly found, appellant's "theory that [the heart attack] was caused by over-exertion is purely conjectural and unsupported by any evidence in the record." (Feb. 10, 2011 Decision and Entry, 6.)

{¶19} Based on the above, we find that appellant failed to present sufficient evidence that decedent's heart attack was caused by some work-related activity. Therefore, the trial court correctly granted summary judgment in favor of appellees.

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

Judgment affirmed.

KLATT and DORRIAN, JJ., concur.

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