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IN THE COURT OF APPEALS OF INDIANA

Karen Goodwin, as the Personal Representative of the Estates of Darlene and Danny Keller,

Appellant-Plaintiff,

v.

Michael Toney, D.C.,

Appellee-Defendant.

December 14, 2022

Court of Appeals Case No. 22A-PL-1532

Appeal from the Vigo Superior Court

The Honorable John T. Roach, Judge

Trial Court Cause No. 84D01-2112-PL-7422

Mathias, Judge.

[1] Karen Goodwin, as the personal representative of the Estates of Darlene and Danny Keller, appeals the Vigo Superior Court's entry of summary judgment for Michael Toney, D.C., on Goodwin's complaint alleging negligence. Goodwin raises two issues for our review, which we restate as follows:

1. Whether the trial court abused its discretion when it struck the affidavit of one of Goodwin's witnesses.

2. Whether the trial court erred when it entered summary judgment for Toney.

[2] We affirm.

Facts and Procedural History

[3] In July 2018, Darlene was experiencing moderate neck and shoulder pain. She visited Toney in Terre Haute for chiropractic care on multiple occasions starting that month. Toney opined that Darlene had "segmental and somatic dysfunction of cervical region, segmental and somatic dysfunction of thoracic region, radiculopathy of thoracic region, and segmental and somatic dysfunction of lumbar region." Appellant's App. Vol. 2, p. 13. His treatment of her focused on her spine.

[4] On October 1, Darlene again visited Toney. At that visit, Toney "did an adjustment with a combination of electrical stimulation and weights." *Id.* at 14. Darlene experienced "a sudden onset of neck pain, weakness[,] and paresthesia (numbness and tingling) of her 4th and 5th fingers on her left hand." *Id.* However, Darlene did not immediately see a medical doctor. Instead, she returned to Toney on October 3, described her pain as "a 10," and continued treatment with Toney. *Id.*

[5] The next day, Darlene met with Dr. Roger Bailey about her pain. He ordered an MRI of her cervical spine. That MRI showed "a 40% compression fracture"

at the C7 vertebra "as well as evidence of metastatic disease at [the] C6, C7, T1, and T2" vertebrae. *Id.* at 15. He diagnosed Darlene with a "compression fracture of [the] cervical spine; cancer metastatic to bone; and cervicalgia." *Id.* Dr. Bailey believed Darlene's need for more specialized care to be urgent, and he directed her to go to the emergency room at Terre Haute Regional Hospital, where he asked Dr. Timothy Hopkins, a neurosurgeon, to meet her.

[6] Darlene met with Dr. Hopkins, who diagnosed her with "a metastatic tumor with destruction of C7 (front and back)" and "posterior compression of C6-C7 and T1 nerve roots." *Id.* Dr. Hopkins recommended surgery, which Darlene had on October 10 and 14, followed by four weeks of radiation therapy. On January 8, 2019, Darlene died.

[7] Goodwin, as the personal representative to Darlene's estate, filed a proposed complaint with the Indiana Department of Insurance against Toney. Daniel, Darlene's husband, joined the proposed complaint with a claim of loss of consortium. Daniel died on June 1, 2021, and Goodwin was substituted as the personal representative for his estate as well. In November, a Medical Review Panel unanimously agreed that Toney "failed to comply with the appropriate standard of care" in his treatment of Darlene's pain, yet the panel was "unable to render an opinion as to whether the conduct complained of was or was not a factor" in Darlene's claim for damages. *Id.* at 18.

[8] Goodwin then filed her complaint against Toney in the trial court. Toney moved for summary judgment and submitted two supporting affidavits, one

from Dr. Harold J. Pikus, a neurosurgeon, and one from Dr. Joel Appel, a hematologist and oncologist. In his affidavit, Dr. Pikus stated, after having reviewed Darlene's medical history, as follows:

> a. Ms. Keller suffered from symptoms associated with adenocarcinoma of unknown origin metastatic to the spine. She had no known primary cancer. This form of stage 4 cancer has a high mortality rate with a poor prognosis. For patients with [Ms]. Keller's risk profile, metastatic adenocarcinoma has approximately a 3.9-month average survival.
>
> b. Ms. Keller's [d]eath was indeed premature and untimely, but only due to her malignancy. No action or inaction of any of the healthcare providers led to, promoted, or accelerated her unfortunate outcome[.]
>
> c. The cervical fracture that Ms. Keller sustained was due to the cancer's involvement with the bones of her cervical spine. There is no evidence of a traumatic fracture of any of the cervical vertebrae. There is no evidence of physical trauma to any region of the cervical spine or neck.
>
> *d. Nothing [Toney] did or did not do caused or contributed to the cancer involving Ms. Keller's cervical spine or any of the consequences of that cancer.*
>
> *e. There was no avoidable delay or diagnos[is] on the part of any healthcare provider including [Toney].*

Id. at 53 (emphasis added). Accordingly, Dr. Pikus opined, "based upon [a] reasonable degree of medical probability[,] that *the care and treatment provided to*

[Darlene] by [Toney] did not cause the injuries and/or harm as alleged . . . ." *Id.* at 54 (emphasis added).

[9] Similarly, in his affidavit, Dr. Appel stated:

> a. The patient had Stage IV breast cancer with bone and liver metastases at the time of diagnosis in October[] 2018.
>
> b. The patient had Stage IV breast cancer at the time of her first visit with [Toney] in July[] 2018.
>
> c. The five-year survival of Stage IV breast cancer that is triple negative is approximately 10%.
>
> d. The prognosis was the same both at the time of the initial visit with [Toney] and at the time of the actual diagnosis.
>
> e. If chemotherapy could have been initiated earlier than the time of diagnosis, this would not have had an impact on the five-year survival.
>
> f. The pat[i]ent was not a candidate for any operative procedure to prolong her life both at the time of diagnosis and at the time of the first visit with [Toney].
>
> g. The biology of the breast cancer (triple negative) does not change with time; what was identified in October[] 2018 was biologically unchanged in July[] 2018.
>
> *h. As a result of an alleged delay of 3 months from the time of first evaluation and the diagnosis of metastatic triple negative breast cancer, there was no further damage incurred by this patient from the perspective of opportunities for therapy that would have altered her survival.*

Id. at 63 (emphasis added). Thus, Dr. Appel agreed with Dr. Pikus, "based upon [a] reasonable degree of medical probability[,] that *the care and treatment provided to [Darlene] by [Toney] did not cause the injuries and/or harm as alleged* . . . ." *Id.* (emphasis added).

[10] In response to Toney's motion for summary judgment, Goodwin designated the affidavit of Anthony Hillebrand, a physical therapist. Hillebrand stated that he believed Toney had failed to render appropriate care and treatment to Darlene, and Toney's "failure to properly examine, diagnose, order diagnostic testing, and property treat the condition presented . . . caused or contributed to her injuries, specifically the fracturing of her C7 vertebra and subsequent pain and suffering[,] or at least delayed appropriate care." *Id.* at 83. Toney moved to strike Hillebrand's affidavit on the ground that he was not qualified to render an opinion on medical causation. The trial court granted Toney's motion and entered summary judgment for Toney. This appeal ensued.

1. The Trial Court Properly Struck Hillebrand's Affidavit.

[11] We first address Goodwin's argument on appeal that the trial court abused its discretion when it struck Hillebrand's affidavit. A trial court on summary judgment "has broad discretion in ruling on a motion to strike." *Moryl v. Ransone*, 4 N.E.3d 1133, 1138 n.5 (Ind. 2014). A trial court abuses its discretion when its decision is contrary to the logic and effect of the facts and circumstances before it. *E.g.*, *McCoy v. State*, 193 N.E.3d 387, 390 (Ind. 2022).

[12] "In a medical negligence claim, the plaintiff must prove *by expert testimony* not only that the defendant was negligent[] but also that the defendant's negligence proximately caused the plaintiff's injury." *Clarian Health Partners, Inc. v. Wagler*, 925 N.E.2d 388, 392 (Ind. Ct. App. 2010) (emphasis added), *trans. denied*, *disapproved of on other grounds*, *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1189 n.5 (Ind. 2016). As we have explained:

> When an injury is objective in nature, the plaintiff is competent to testify as to the injury and such testimony may be sufficient for the jury to render a verdict without expert medical testimony. Ordinarily, however, the question of the causal connection between a permanent condition, an injury[,] and a pre-existing affliction or condition is a complicated medical question. When the issue of cause is not within the understanding of a lay person, testimony of an expert witness on the issue is necessary. An expert, who has the ability to apply principles of science to the facts, has the power to draw inferences from the facts which a lay witness or jury would be incompetent to draw. . . .

Daub v. Daub, 629 N.E.2d 873, 877-78 (Ind. Ct. App. 1994) (citations omitted), *trans. denied*. Further:

> Indiana Evidence Rule 702 requires that an expert be qualified as such by his knowledge, skill, experience, training, or education. Additionally, an expert must have sufficient skill in the particular area of expert testimony before the expert can offer opinions in that area. Therefore, before an expert may testify in an area, the proponent of the expert must show that the expert is competent in that area. Moreover, questions of medical causation of a particular injury are questions of science *necessarily dependent on the testimony of physicians and surgeons learned in such matters*.

Armstrong v. Cerestar USA, Inc., 775 N.E.2d 360, 366 (Ind. Ct. App. 2002) (emphasis added) (cleaned up), *trans. denied*.

[13] Here, in an attempt to establish a genuine issue of material fact on the question of medical causation, Goodwin submitted the affidavit of Hillebrand, a physical therapist. Goodwin claims that Hillebrand was qualified to opine on whether Toney's treatment of Darlene caused her to fracture her C7 vertebra or made the chance of that fracture more likely. But we conclude that those are complex medical questions requiring expert testimony. Hillebrand is a physical therapist; he is not a physician and he is not licensed to practice medicine. He is therefore not qualified to render an opinion as to medical causation here, and the trial court properly struck Hillebrand's affidavit.

[14] Still, Goodwin asserts that part of her allegations include Darlene's pain and suffering, and Hillebrand is qualified to testify as to whether Toney's treatment of Darlene may have caused or aggravated her pain and suffering. But Goodwin is again mistaken. Pain is a subjective experience of an underlying condition, and we have long held that, "where a plaintiff's injuries are subjective in nature, expert medical testimony is required to prove causation." *Harris v. Jones*, 143 N.E.3d 1012, 1017 (Ind. Ct. App. 2020) (citing *Topp v. Leffers*, 838 N.E.2d 1027, 1033 (Ind. Ct. App. 2005), *trans. denied*). Accordingly, again, Hillebrand is not qualified to opine on the cause of Darlene's pain. We therefore affirm the trial court's striking of Hillebrand's affidavit.

2. The Trial Court Properly Entered Summary Judgment for Toney.

[15] We thus turn to Goodwin's argument on appeal that the trial court erred when it entered summary judgment for Toney. As our Supreme Court has made clear,

> [w]e review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.* (internal citations omitted).
>
> The initial burden is on the summary-judgment movant to "demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted). And "[a]lthough the non-moving party has the burden on appeal of persuading us that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that he was not improperly denied his day in court." *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906, 909-10 (Ind. 2009) (internal quotation marks omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (omission and some alterations original to Hughley).

[16] In support of his motion for summary judgment, Toney designated the affidavits of Dr. Pikus and Dr. Appel. In their affidavits, both doctors described Darlene's medical conditions that resulted in her pain, suffering, and ultimate demise. Both doctors agreed that those medical conditions existed independently of Toney's treatment, would have existed with or without his treatment, would have existed regardless of any acts done by Toney, and concluded that Toney's treatment of Darlene "did not cause the injuries and/or harm as alleged . . . ." Appellant's App. Vol. 2, pp. 53, 63. Accordingly, Toney's designated evidence established a prima facie showing that Toney's alleged negligence played no causal role in Darlene's injuries.

[17] The burden thus shifted to Goodwin to designate expert testimony to create a genuine issue of material fact on the question of medical causation. As explained in Issue One, she failed to do so. The trial court therefore properly entered summary judgment for Toney, and we affirm the trial court's judgment.

[18] Affirmed.

Robb, J., and Foley, J., concur.