MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin L. Moyer and Moyer Law Firm, P.C.,
Appellants-Defendants,

v.

Nancy Lemen,
Appellee-Plaintiff

July 19, 2023

Court of Appeals Case No. 22A-CT-1797

Interlocutory Appeal from the Marion Superior Court

The Honorable Cynthia J. Ayers, Judge

Trial Court Cause No. 49D04-2002-CT-5817

Memorandum Decision by Judge Crone
Judge Kenworthy and Senior Judge Robb concur.

Crone, Judge.

Case Summary

[1] Nancy Lemen (Lemen) and her husband Mark (Mark) (collectively the Lemens) entered into a retainer agreement with Kevin L. Moyer and Moyer Law Firm, P.C. (collectively Moyer), to represent them against vascular surgeon Dr. Robert McCready, who provided medical care to Mark. Moyer did not file suit against the doctor before the statutory limitation period for medical malpractice expired, and Mark subsequently died. Lemen filed a complaint against Moyer alleging that he was negligent in not filing a medical malpractice action within the statutory limitation period and that he breached his contract with the Lemens. Moyer filed a motion for summary judgment, and Lemen filed a cross-motion for summary judgment. The trial court denied both motions. Moyer now appeals, arguing that the trial court erred in denying his motion. We disagree and therefore affirm.

Facts and Procedural History

[2] Mark fell off a roof and fractured his "right lower extremity" in July 2011. Appellants' App. Vol. 2 at 54. His recovery was suboptimal, and on February 10, 2012, he presented to Dr. McCready with compromised blood flow to his right leg. Imaging revealed an aneurysm and blood clots in multiple arteries in that leg. Dr. McCready's treatment team administered heparin and implanted a stent, which generated a clot that required "re-intervention." *Id.* The treatment salvaged Mark's leg, but one or more of his toes were amputated.

[3] In January 2014, the Lemens entered into a retainer agreement with Moyer to represent them against Dr. McCready. During their consultation, Lemen informed Moyer of her belief that the doctor had "overdosed" Mark with heparin, "which consequently damaged his lungs." *Id.* at 43 (Lemen's memorandum in opposition to Moyer's motion for summary judgment and in support of Lemen's cross-motion for summary judgment) (citing, inter alia, Plaintiff's Exs. 1 (Moyer's deposition) and 2 (retainer agreement)).[1] Moyer did not file suit against Dr. McCready before the two-year statutory limitation period for medical malpractice expired. Mark died in September 2018 due to pulmonary fibrosis.

[4] In February 2020, Lemen filed a complaint against Moyer alleging that his failure to timely file a complaint against Dr. McCready was both negligent and a breach of his contract with the Lemens. Moyer filed a motion for summary judgment asserting that Lemen had "failed to disclose the medical expert testimony required to prove an actionable medical malpractice in the underlying case" and thus he was entitled to judgment as a matter of law. *Id.* at 25.

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[1] Moyer intentionally omitted the cited exhibits from his appendix on the basis that they "are not relevant to the issue before the Appellate Court[,]" Appellants' App. Vol. 1 at 3 n.iii, but we were able to access them through the Odyssey Case Management System. Indiana Appellate Rule 50(A)(2)(f) provides in pertinent part that an appellant's appendix in a civil appeal "shall contain … pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal[.]" Because we review summary judgment rulings de novo, appellants should err on the side of overinclusiveness and leave the relevancy determination to us.

[5] Lemen filed a response in opposition to Moyer's motion and a cross-motion for summary judgment, in support of which she designated the report of Dr. Scott Cameron. Dr. Cameron opined that Dr. McCready's treatment fell below the standard of care and that

> [t]he popliteal stent which ultimately thrombosed no doubt was contributory to [Mark's] pain and suffering and need for toe amputation. Ongoing tissue necrosis would flood [Mark's] blood with inflammatory cytokines on a chronic basis which could potentially lead to remodeling of tissue at distant sites including his lungs and also prevent adequate local wound healing. I do believe that [Mark's] pulmonary fibrosis (lung remodeling) which is stated to have been a cause of his ultimate demise is multifactorial and challenging to attribute solely to the [medical] procedure performed on February 10 of 2012.

Id. at 58. Moyer filed a response in opposition to Lemen's cross-motion and designated the report of Dr. Paul Skudder, who opined that Dr. McCready's treatment did not fall below the standard of care and did not "contribute to [Mark's] pulmonary disease." *Id*. at 75. After a hearing, the trial court denied Moyer's motion and Lemen's cross-motion for summary judgment. Only Moyer now appeals the trial court's ruling.

Discussion and Decision

[6] Moyer contends that the trial court erred in denying his motion for summary judgment on Lemen's claims. "To prove a legal malpractice claim, the plaintiff-client must show: (1) employment of the attorney (the duty); (2) failure of the attorney to exercise ordinary skill and knowledge (the breach); (3) proximate

cause (causation); and (4) loss to the plaintiff (damages)." *Beal v. Blinn*, 9 N.E.3d 694, 700 (Ind. Ct. App. 2014), *trans. denied* (2015). "To establish causation and the extent of harm in a legal malpractice case, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence." *Id*. "This proof generally requires a 'trial within a trial.'" *Thayer v. Vaughan*, 798 N.E.2d 249, 255 (Ind. Ct. App. 2003), *aff'd on reh'g in relevant part*, 801 N.E.2d 647 (2004), *trans. denied*.

[7] To prevail on her legal malpractice claim, Lemen has the burden of establishing the elements of the underlying medical malpractice claim. *Schultheis v. Franke*, 658 N.E.2d 932, 939 (Ind. Ct. App. 1995), *trans. denied* (1996). "A claim of medical malpractice requires proof that (1) a duty was owed to the patient by the doctor, (2) the doctor breached that duty by allowing his conduct to fall below the applicable standard of care, and (3) the plaintiff suffered a compensable injury proximately caused by the breach." *Id*.

[8] "Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law." *Beal*, 9 N.E.3d at 699 (citing Ind. Trial Rule 56(C)). In reviewing a summary judgment ruling, we stand in the trial court's shoes, applying the same standard in deciding whether to affirm or reverse that ruling. *Id*. at 700. "Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law." *Id*. "In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party." *Id*. The trial court in this case entered findings of fact in support

of its judgment, which "are not required in summary judgment proceedings and are not binding on appeal." *Id*. The party appealing the ruling bears the burden of demonstrating that the trial court erred. *Id*. "We will affirm the trial court's summary judgment ruling on any basis supported by the designated evidence." *Cruz v. New Centaur, LLC*, 150 N.E.3d 1051, 1055 (Ind. Ct. App. 2020).

[9] Our supreme court has explained,

> To obtain summary judgment [in Indiana], a moving party must affirmatively dispel all determinative genuine issues of material fact. It is not enough to cite the absence of evidence and claim that the non-moving party is thereby unable to prove an element of its case. Rather, the moving party must demonstrate that the undisputed facts conclusively establish the absence of a required element of the non-moving party's case.

Manley v. Sherer, 992 N.E.2d 670, 676 (Ind. 2013). "[W]hile federal practice permits the moving party to merely show that the party carrying the burden of proof *lacks* evidence on a necessary element, we impose a more onerous burden: to affirmatively 'negate an opponent's claim.'" *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (quoting *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)).

[10] Moyer's summary judgment motion, which relied primarily on pre-*Jarboe* cases, merely pointed to Lemen's lack of expert testimony to support her medical malpractice claim, and thus Moyer failed to meet his onerous burden of affirmatively negating that claim. In support of her opposition to Moyer's summary judgment motion, Lemen designated Dr. Cameron's report, which, at

minimum, establishes genuine issues of material fact that are not conclusively negated by Dr. Skudder's report.[2] Based on the foregoing, we affirm the trial court's denial of Moyer's summary judgment motion.

[11] Affirmed.

Kenworthy, J., and Robb, Sr.J., concur.

[2] Moyer contends that he is entitled to summary judgment because Dr. Cameron did not unequivocally opine that Dr. McCready's medical treatment was the sole cause of Mark's pulmonary fibrosis. We note that "[t]he defendant's act need not be the sole cause of the plaintiff's injuries. Many causes may produce the injurious result; the essential question is whether the defendant's wrongful act is one of the proximate causes rather than a remote cause." *Hamilton v. Ashton*, 846 N.E.2d 309, 316 (Ind. Ct. App. 2006) (citation omitted), *clarified on reh'g*, 850 N.E.2d 466, *trans. denied*. "A party's act is the proximate cause of an injury if it is the natural and probable consequence of the act and should have been reasonably foreseen and anticipated in light of the circumstances." *Id*. "Proximate cause requires, at a minimum, that the harm would not have occurred but for the defendant's conduct." *Id*. The question of proximate cause is generally left to the factfinder because it often requires a weighing of disputed facts. *Martin v. Ramos*, 120 N.E.3d 244, 251 (Ind. Ct. App. 2019).