

STATE OF MICHIGAN
COURT OF APPEALS

MELVIN TENNYSON, Personal Representative
of the Estate of APRIL TENNYSON, Deceased,

UNPUBLISHED
July 24, 2003

Plaintiff-Appellee/Cross-Appellant,

v

No. 234302
Oakland Circuit Court
LC No. 96-524090-NH

BOTSFORD HOSPITAL GROUP, INC.,

Defendant-Appellant/Cross-
Appellee.

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals, and plaintiff cross appeals, from a judgment of the circuit court entered on a jury verdict in favor of plaintiff on plaintiff's medical malpractice claim. We reverse.

Plaintiff's decedent was diagnosed in 1995 with breast cancer. Decedent died during the pendency of this action. The basis for plaintiff's claim is an alleged failure to promptly diagnose her condition, thus depriving her of a greater likelihood of survival. Although suit was brought against various practitioners, all claims except those against defendant were resolved before trial. Remaining was plaintiff's claim against Botsford Hospital regarding the failure to diagnose decedent's cancer at her visits to their clinic in 1994.

Decedent went to the Botsford clinic in 1994 after discovering a lump in her right breast. She was seen by both a resident, Dr. Carron, and by the supervising physician, Dr. Tenner. A lump was detected by palpation during an examination on June 22, 1994, and decedent was referred for a mammogram, with instructions to return to the clinic two weeks after the mammogram for a follow-up. A mammogram was performed on July 18 and was negative.¹ According to Dr. Tenner, decedent was to be referred to a surgeon for a biopsy at the appointment to review the mammogram results, but that decedent was a no-show for the appointment. A message was left for decedent to reschedule. Decedent did and had an

¹ Specifically, according to Dr. Tenner, there was no discernible mass appearing on the mammogram and no significant change from a March 2, 1993, mammogram.

appointment on August 3, seeing first Dr. Carron and then Dr. Tenner. According to Dr. Tenner, decedent refused a surgical referral for biopsy at the August 3 appointment. Decedent referred to the fact that the mammogram was unchanged from the previous one and that she had seen a surgeon in 1993, was told that she had fibrocystic breast disease, and that she was advised that a biopsy was not recommended then. Dr. Tenner testified that he did not tell decedent that the lump was benign and that he did not advise decedent to forego a biopsy because of the mammogram results. In fact, Dr. Tenner specifically testified that decedent was told on August 3 to have a biopsy.

Dr. Carron testified that she told decedent to see a surgeon for a biopsy. She testified that her initial impression was that the lump was probably benign and secondary to decedent's fibrocystic disease, but that cancer needed to be ruled out. She also testified that decedent refused the surgical referral for biopsy at the August 3 appointment, citing the unchanged mammogram.

In her deposition, decedent had a different recollection of the August 3 appointment. According to decedent, she was told that the lump was just a cyst and that Dr. Tenner specifically told her that he did not recommend a biopsy because the mammogram was clear and did not show any cancer.

It is undisputed that the applicable standard of care in this case is that Drs. Carron and Tenner needed to refer decedent for a surgical biopsy. That is, where there is a palpable lump in the breast and a negative mammogram, a needle biopsy is required to rule out cancer as the mammogram may produce a false negative. The likelihood of a false negative is even greater in a younger patient (decedent was in her early 30s) as the breast tissue is denser and a malignancy is more difficult to detect.

Thus, the only issue to be resolved, with respect to liability, is whether decedent was, in fact, referred to a surgeon for a biopsy by either Dr. Carron or Dr. Tenner during decedent's treatment at the Botsford clinic.

Defendant raises a number of issues, one of which is dispositive. Defendant argues that the trial court erred in admitting decedent's deposition and, without decedent's deposition testimony, defendant was entitled to a directed verdict or judgment NOV because there would be no evidence to support the proposition that plaintiff was not referred for biopsy. We agree.

Decedent gave two depositions in this case. First, there was a so-called "discovery deposition" requested by the defendants. Second, there was a so-called video "trial deposition," scheduled by plaintiff for the purpose of preserving decedent's testimony for use at trial in the event that decedent died before trial (as did happen). The discovery deposition was commenced on Friday, October 4, 1996. Decedent was questioned by the attorneys for the other two defendants, Omnicare Health Plan and DMC Health Care Centers. Before DMC's attorney was finished and before Botsford's attorney could question decedent, the deposition was halted because decedent was overdue for her medication and would not be able to continue afterwards.

On Tuesday, October 8, plaintiff commenced decedent's "trial deposition." After questioning by plaintiff's counsel, the "trial deposition" was recessed and the "discovery

deposition” was resumed to permit the completion of questioning by DMC and Botsford. After the completion of the “discovery deposition,” decedent’s “trial deposition” was resumed. Decedent was first cross-examined by counsel for Omnicare, but the deposition was halted after no more than thirteen minutes into Omnicare’s cross-examination. Citing decedent’s health, plaintiff’s counsel recessed the deposition at that point, indicating that it would be completed at a later date. However, the deposition was never completed.

Defendant argues that the trial court erred in admitting decedent’s “trial deposition.” We agree. At issue is whether decedent’s testimony comes within the deposition testimony exception to the hearsay rule. MRE 804(b)(5) provides that deposition testimony of an unavailable witness is admissible as follows:

Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

We agree with defendant that defendant had no opportunity to cross-examine decedent at the “trial deposition” and, therefore, the requirements of MRE 804(b)(5) were not met. Plaintiff raises a number of arguments on this point, none of which we find persuasive.

First, plaintiff argues that defendant deliberately chose to reserve its cross-examination until a later date, foregoing the opportunity to cross-examine decedent at the time. Plaintiff, however, misrepresents the record in this respect. Before the cross-examination of decedent at the “trial deposition” began, defendant’s counsel made the following statement:

I’d only like to state on the record—I believe Mr. Worsham stated it earlier, but just to reiterate the fact that counsel for Botsford General Hospital and I believe counsel for DMC are reserving our rights to continue this cross-examination because we only finished the discovery deposition about an hour ago so we’re going to reserve our right to that at a later date.

Defense counsel did not, as plaintiff suggests, decline to cross-examine decedent at that time. Rather, counsel was merely reserving to the right to *continue* the cross-examination at a later date after being able to review the completion of the “discovery deposition.” Furthermore, the deposition was not concluded that day with defendant’s attorney requesting a postponement of the cross-examination. Rather, before even the completion of one defendant’s cross-examination (that by Omnicare), plaintiff’s counsel ended the deposition:

MR. WORSHAM [plaintiff’s attorney]: Jack [Omnicare’s attorney], as I’ve indicated to you, her health is in position now I think we better conclude the deposition and we’ll continue with your cross-examination at the next session.

Thus, this is not a case, as plaintiff argues, of defendant making the “deliberate and calculated decision not to cross-examine” decedent.

Next, plaintiff argues that defendant waived its opportunity to cross-examine decedent. See *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1999). Plaintiff argues that defendant did so by choosing to resume the “discovery deposition” on October 8 rather than proceeding to the cross-examination phase of the “trial deposition,” leaving that for another day.² Plaintiff argues that defendant took the risk whether decedent would survive long enough to permit the completion of the deposition. This argument is disingenuous. Plaintiff’s argument is premised on the concept that it was unreasonable for defendant to wish to complete its “discovery deposition” before conducting its portion of the “trial deposition.” However, one of the purposes of a discovery deposition is to prepare for trial and the questioning of a witness at trial. Furthermore, plaintiff points to no evidence that defendant was in any way responsible for a delay in the taking of the “discovery deposition.”³ Additionally, plaintiff’s argument presupposes that only defendant wished to complete the “discovery deposition.” In fact, there is no indication from the record that the other two defendants would have agreed to continuing the “trial deposition” before the completion of the “discovery deposition.”

Plaintiff next argues that defendant did have the opportunity to cross-examine decedent in the “discovery deposition” and defendant failed to offer that testimony. We might agree with plaintiff had the “discovery deposition” been offered at trial rather than the “trial deposition.” However, at issue here is not whether the “discovery deposition” would have been admissible. Regardless of defendant’s opportunity to cross-examine decedent during the “discovery deposition,” that opportunity did not exist during the “trial deposition” and, therefore, the “trial deposition” was not admissible. Furthermore, we do not believe it reasonable to suggest that it would have been adequate to present the jury with plaintiff’s portion of the “trial deposition” and defendant’s portion of the “discovery deposition.” The two are simply not on equal footing. The “discovery deposition” was taken for purposes of preparing for trial, not for presentation at trial. Moreover, while defendant would anticipate the “trial deposition” to be presented at trial, that was not the case with the “discovery deposition.” Additionally, the questions asked in the “discovery deposition” would not necessarily be tailored to follow up plaintiff’s questioning of decedent during the trial deposition as defendant would be planning to do so in the “trial deposition,” not the “discovery deposition.”⁴

² As just discussed, it is inaccurate to say that defendant intentionally postponed its cross-examination of decedent during the “trial deposition.” At most, it can be said that defendant was aware that they might not be able to complete the “trial deposition” that day and it would have to continue at a later date.

³ In fact, at the “trial deposition,” counsel for Omnicare represented that there had been earlier attempts to take decedent’s “discovery deposition,” which were cancelled by decedent due to health.

⁴ Also, it is not entirely clear from the record before us whether the continuation of the “discovery deposition” was videotaped or not (it appears that it was not). If not, then there would be the additional disparity of plaintiff’s portion of the “trial deposition” being presented with the jury actually seeing the decedent’s direct examination testimony, while having her cross-examination testimony read from a written transcript.

Finally, plaintiff argues that defendant is at fault for failing to reschedule the continuation of decedent's "trial deposition," noting that the record does not reflect that decedent refused to appear for a continued deposition or, if she did so refuse, that defendant took any action in the trial court to compel decedent to continue the deposition. Although defendant would dispute the allegation regarding decedent being made available for continuation of the cross-examination, we believe that plaintiff unreasonably places the burden on defendant to have arranged for the continuation of the "trial deposition." It was plaintiff who requested the deposition and it was plaintiff who wished to use it at trial. Therefore, the burden was on plaintiff, not defendant, to ensure that the requirements were met for the deposition to be admissible at trial. See *Lombardo v Lombardo*, 202 Mich App 151, 154; 507 NW2d 788 (1993) (party seeking admission of deposition bears the burden of establishing admissibility). Therefore, it is plaintiff's failure, not defendant's, that the "trial deposition" was never concluded.⁵

For the above reasons, we conclude that the trial court abused its discretion in admitting the "trial deposition." *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). That deposition was inadmissible hearsay and should have been excluded.

Turning to the second part of defendant's argument under this issue, defendant argues that, with the "trial deposition" not being admissible, the trial court erred in denying defendant's motions for directed verdict and judgment NOV. We agree. In order for plaintiff to prevail on this claim, it was necessary for plaintiff to establish that Drs. Carron and Tenner violated the standard of practice by failing to refer decedent for a surgical biopsy of the lump at the time of their examination of her in 1994.⁶ Both Drs. Carron and Tenner unequivocally testified that a biopsy was recommended and that decedent refused to undergo a biopsy. The only evidence presented by plaintiff that no such recommendation was given to decedent was decedent's testimony in her deposition that Dr. Tenner told her that a biopsy was not recommended. Without her deposition testimony, there was no evidence from which the jury could conclude that no surgical referral occurred.⁷ Accordingly, had the trial court correctly ruled that decedent's deposition testimony was inadmissible, defendant was entitled to either a directed verdict at the end of plaintiff's case or a judgment NOV after the jury verdict. See *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000) (directed verdict or judgment NOV appropriate only if the evidence fails to establish claim as a matter of law).

⁵ We might give some weight to this argument if plaintiff made a showing that there had been attempts by plaintiff to resume the deposition and defendant delayed the continuation of the deposition until it was too late. However, plaintiff does not make such an allegation, much less a showing that that was the case.

⁶ In fact, even plaintiff's expert testified that if decedent had been referred for a biopsy, but she refused to have one, the standard of care was complied with.

⁷ Plaintiff certainly identifies no such evidence. In fact, plaintiff does not even offer an argument in response to defendant's argument that it was entitled to a directed verdict or judgment NOV if plaintiff's deposition was determined to be inadmissible. Rather, plaintiff solely addresses the argument whether the deposition was, in fact, admissible.

In light of our resolution of the above issue, it is unnecessary to address the remaining arguments raised by defendant or by plaintiff on cross appeal.

The judgment of the circuit court is reversed and the matter is remanded to the trial court for entry of judgment in favor of defendant. We do not retain jurisdiction. Defendant may tax costs.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Bill Schuette