UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1429

September Term, 2015

NICOLE LUECKE, ET AL.

v.

STEPHANIE SUESSE

Wright,
Berger,
Friedman,

JJ.

Opinion by Wright, J.

Filed: October 28, 2016

This case comes to this Court as an appeal by Nicole M. Luecke, M.D. and Chesapeake Women's Care, P.A., appellants, following a jury award for $185,000.00 to Stephanie Suesse, appellee, for Dr. Luecke's negligent conduct. Suesse filed a medical negligence suit against appellants in the Circuit Court for Anne Arundel County alleging that appellants breached the applicable standard of care by failing to biopsy, order appropriate diagnostic imaging of, and render timely treatment to a persistent mass in her right breast. Suesse alleged that as a result of appellants' negligent conduct, the size of the mass in her breast grew unabated, requiring extensive medical treatment and surgery including a bilateral mastectomy. Additionally, she alleged that she suffered great pain, suffering, and severe mental anguish.

A jury trial commenced on May 12, 2015. Prior to the trial, appellants filed a motion *in limine* to preclude loss of chance of survival testimony. The circuit court denied the motion. At the conclusion of Suesse's case-in-chief, a motion for judgment was made by appellants and was denied by the court. Appellants again moved for judgment, at the conclusion of the defense, and it was again denied.

On May 9, 2015, the jury returned a verdict, awarding Suesse $35,000.00 in past medical expenses and $150,000.00 in non-economic damages. Following the verdict, appellants filed a motion for new trial alleging that juror misconduct had an unfairly prejudicial effect on the verdict. The motion was denied. Appellants also filed a motion for judgment notwithstanding the verdict contending that Suesse failed to establish the causation of her damages. That motion was denied as well. This appeal followed.

Questions Presented

Appellants ask:

> 1. Where evidence of a plaintiff's probability of survival at the time of the alleged malpractice and at the time of diagnosis was 88% or higher, did the trial court err in denying the motion *in limine* to exclude such testimony due to the lack of relevance and inherent prejudice?
>
> 2. Did the trial court err in denying the defendants' motion for judgment at the conclusion of plaintiff's and defendants' cases?
>
> 3. Did the trial court err in denying the motion for a new trial based on juror misconduct?
>
> 4. Did the trial court err in denying the motion for judgment notwithstanding the verdict?[1]

For the reasons stated below, we answer the first question in the affirmative, which precludes our need to address the remaining questions, and remand the case for further proceedings not inconsistent with this opinion.

FACTS

On December 3, 2007, Suesse presented to Chesapeake Women's Care after finding a mass in her right breast. She was examined by Dr. Luecke who scheduled a mammogram. The mammogram detected a mass, and the subsequent sonogram found the mass to be benign without features of malignancy.

On February 6, 2008, Suesse returned for an annual gynecology exam. Suesse recalls discussing the continued presence of the mass with Dr. Luecke, and that Dr.

[1] Appellants raise a fifth question in their reply brief, asking, "Did the trial court err in finding Dr. Singer to be qualified to testify regarding causation in a breast cancer case?" This question is not addressed because it was improperly first raised in the reply brief. *Fearnow v. Chesapeake & Potomac Tel. Co. of MD,* 342 Md. 363, 384 (1995).

Luecke felt the mass and described it as benign fibrous tissue, indicating that it was not problematic. Dr. Luecke's chart for Suesse includes "breast issues resolved," and Dr. Luecke has stated that she did not find any abnormalities during the breast exam, but rather that the abnormality found in 2007 was benign and caused by hormonal changes.

Suesse's next annual appointment was on February 19, 2009. During this appointment, Dr. Luecke found "cystic areas" in the right breast. Dr. Luecke has stated that she ordered a mammogram which Suesse did not obtain. Suesse disagrees.

On February 9, 2010, Suesse returned for her yearly gynecology exam. Dr. Luecke found a "stable mass" in her right breast. Dr. Luecke testified that, as a matter of routine practice, she would have referred Suesse for a mammogram and ultrasound, although she does not have an independent recollection of this appointment and the patient chart does not reflect a referral. Dr. Luecke identifies its absence as an oversight. Suesse did not obtain a mammogram and testified that Dr. Luecke did not advise her to obtain another mammogram.

On February 22, 2011, Suesse again returned for her yearly exam. Dr. Luecke testified that she did not find any abnormality and, therefore, did not order a mammogram.

On March 13, 2012, Suesse returned for her yearly exam and was seen by Bernadine Geary, CRNP. During the exam, Geary palpated an abnormality in Suesse's right breast. Suesse was referred for a mammogram which was accomplished on April 27, 2012. The mammogram reflected a mass, and a biopsy was recommended. A biopsy was performed on April 27, 2012, and resulted in the diagnoses of ductal

carcinoma in situ ("DCIS"). DCIS is the presence of abnormal cells inside the milk duct in the breast that have not spread to the surrounding breast tissue.

Suesse was referred to a breast surgeon and underwent a bilateral breast mastectomy on June 18, 2012, only the mastectomy of the right breast was medically recommended. Suesse decided to undergo the additional left breast removal in order that her breasts would be symmetrical. The pathology from the right breast revealed that there was no cancer in the right breast tissue.

Suesse filed suit against appellants alleging medical malpractice. Suesse alleged that appellants breached the applicable standard of care by failing to biopsy, order appropriate diagnostic imaging of, and render timely treatment to a persistent mass in her right breast. Suesse alleged that, as a result of appellants' negligent conduct, she underwent extensive medical treatment and surgery including, but not limited to, an otherwise avoidable bilateral mastectomy. Additionally, she alleged that she suffered severe mental anguish.

A jury trial began on May 12, 2015. Prior to the trial, appellants filed a motion *in limine* to preclude loss of chance of survival testimony as well as a motion *in limine* to preclude testimony and argument regarding Suesse's left breast mastectomy. The circuit court denied both motions.

Dr. Barry Singer, a practicing oncologist, testified as an expert witness for Suesse. Suesse also testified. At the conclusion of Suesse's case-in-chief, a motion for judgment was made by appellants and was denied by the circuit court.

Dr. Luecke proffered three expert witnesses. Appellants again moved for judgment at the conclusion of the evidence, and the motion was again denied.

On May 9, 2015, the jury awarded Suesse $35,000.00 in past medical expenses and $150,000.00 in non-economic damages. Following the verdict, appellants filed a motion for new trial alleging that juror misconduct had an unfairly prejudicial effect on the verdict. The motion was denied. Appellants also filed a motion for judgment notwithstanding the verdict, contending that Suesse failed to establish the causation of her damages, which was denied.

Additional facts will be included as they become relevant to our discussion, below.

DISCUSSION

Motions *in limine* seek rulings on admissibility of evidence. "The issue of whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court." *State v. Simms*, 420 Md. 705, 724 (2011) (citation omitted). "The fundamental test in assessing admissibility is relevance." *Thomas v. State*, 372 Md. 342, 350 (2002); *see* Md. Rule 5-402 ("[A]ll relevant evidence is admissible. Evidence that is not relevant is not admissible."). "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. On appeal, "the abuse of discretion standard of review is applicable to the trial court's determination of relevancy," and the "'de novo' standard of review is applicable to the trial judge's conclusion of law that the

evidence at issue is or is not of consequence to the determination of the action." *Simms*, 420 Md. at 724-25 (internal citations omitted).

The relevance of the testimony is determined by the underlying claim and Suesse's ability to recover for her distress.

Appellants argue that the circuit court erred in denying the motion *in limine* because the evidence was irrelevant and highly prejudicial. Specifically, appellants contend that the court incorrectly allowed irrelevant testimony from Suesse and Dr. Singer. Appellants attempted to exclude Suesse's deposition testimony that her "chances of getting a more serious invasive cancer have increased," and her conclusion that therefore her "life expectancy has the potential to be decreased." In addition, appellants attempted to exclude expert medical testimony from Dr. Singer including his "opinion regarding [Suesse's] prognosis in the future with respect to cancer and her diminished life expectancy."

Appellants aver that this testimony is both irrelevant and not compensable under Maryland law as an element of damages because Suesse retained a greater than 50 percent probability of survival.[2]

In response, Suesse argues that the circuit court properly denied the motion *in limine* because the testimony was relevant as a matter of law to Suesse's claim for emotional distress. Suesse attempts to distinguish an argument for "loss of chance of survival" from "mental anguish associated with an increased risk of developing a more

[2] In his deposition, Dr. Singer testified that Suesse's likelihood of survival is between 88 and 93 percent, decreased from a likelihood of survival of 98 percent.

serious cancer that could lead to death." For the following reasons, we agree with appellants.

The elements of the tort of medical malpractice are "duty (standard of care); breach of the standard; causation of injury; and damages." *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 330 (2012) (citation omitted). The issues regarding recovery for decreased chances of survival under Maryland law are intricate and have been considered as they relate to both causation and damages.

The concept of loss of a substantial possibility of survival originated in *Hicks v. U.S.*, 368 F.2d 626 (4th Cir. 1966), where a doctor breached his professional duty owed to a patient by misdiagnosing an ailment. The Court concluded that if the ailment had been properly diagnosed, the proper course of action would have been to operate and the patient would have survived, therefore allowing the plaintiff to recover under the law despite the defendant's argument that proximate cause was not established because it was speculative to conclude that a prompt operation would have saved the plaintiff's life. *Id.* at 632.

The first time the Court of Appeals addressed *Hicks* was in *Thomas v. Corso*, 265 Md. 84 (1972), where the jury found the defendant negligent for failing to render timely care to an injured patient who later died. The Court held that the testimony and evidence presented were "sufficient to justify a jury finding [that] a substantial possibility of survival" was destroyed by defendant's negligence. *Id.* at 102. Later, the Fourth Circuit evaluated *Thomas* and concluded that *Thomas* was not intended to relax causation standards, but that Maryland law recognized the loss of substantial possibility of survival

as a separate cause of action. *Waffen v. U.S. Dep't of Health & Human Servs.*, 799 F.2d 911, 915-17 (4th Cir. 1986).

The Court of Appeals returned to the issue in *Cooper v. Hartman*, 311 Md. 259 (1987), and concluded:

> the plaintiff must prove that the defendant's negligence *probably* caused the plaintiff to lose a substantial possibility of recovery. "Probability exists when there is more evidence in favor of a proposition than against it (a greater than 50% chance that a future consequence will occur)."

Id. at 269. The Court of Appeals also stated this standard for the award of damages for all injuries in *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 666 (1983), stating, "recovery of damages based on future consequences of an injury may be had only if such consequences are reasonably probable or reasonably certain. Such damages cannot be recovered if future consequences are mere possibilities." (Internal quotations omitted).

Together, these cases created and affirmed the Maryland law that a reduction in survival percentages is not compensable and not an element of damages when the patient retains a greater than 50 percent probability of survival.

Both Suesse and her expert witness, Dr. Singer, recognize that the cancer's return is a "possibility," not a "probability." Even if the outside range of increased chances of the cancer's return are correct, Suesse now has at least an 88 percent chance of survival compared to the "normal" chance of 98 percent for DCIS patients. This represents, at worst, a ten percent possibility of a negative outcome as a result of the delayed diagnosis, with all factors being interpreted in the light most favorable to Suesse's argument. This loss of survivability fails to meet the medical probability required and is instead a mere

possibility. *Davidson v. Miller*, 276 Md. 54, 62 (1975). As such, Suesse's claim is not compensable under Maryland law.

However, perhaps even more importantly for the present case is the state of Maryland law that "[l]oss of chance of survival in itself is not compensable unless and until death ensues." *Fennell v. Southern Maryland Hosp. Center, Inc.*, 320 Md. 776, 790 (1990). Suesse survived her cancer and still has substantial possibility of recovery. Therefore, loss of chance of survival is not an appropriate claim in this case. Suesse recognizes this and argues that her claim is not loss of chance of survival, but rather for emotional distress, and alleges that appellants mischaracterize the testimony identified in the motion *in limine*. Suesse recognizes that the claims would draw from a similar pool of evidence, but she argues that *Fennell* and the related "loss of chance" doctrine does not address Suesse's mental distress from "still living with a present, contemporaneous fear of contracting disease into the future and cognizant of a related death."

Although Suesse argues that this testimony was instead evidence of emotional distress, we are not persuaded. Attempting to rename the argument does not change the fundamental claim being made by Suesse. Suesse's deposition testimony clearly establishes that her distress is based on her belief that she has a decreased likelihood of survival. This "injury" is not supported by prevailing case law, and the testimony was a circumspect attempt to present the "loss of chance of survival" argument under the guise of emotional distress.

Suesse attempts to persuade us that this distinction is similar to the distinction made by the Court of Appeals in *Rhone v. Fisher*, 224 Md. 223, 231-32 (1961), where the

Court chose not to recognize claims for shortened life expectancy, but made allowances for shortened life expectancy to be considered in determining the mental pain which the plaintiff has suffered and will suffer in the future. We agree with Suesse's interpretation of *Rhone* and the continued recognition of this law. However, damages from shortened life expectancy are distinguishable from *fear* of a shortened life expectancy, which is what Suesse's testimony presented.

Finally, Suesse looks to *Exxon Mobil Corp. v. Albright*, 433 Md. 303 (2013), to support her argument for inclusion of the testimony. While both parties correctly state that *Exxon* is distinguishable,[3] we agree with Suesse that it is instructive but disagree with the conclusions she draws from the opinion. *Exxon*, in the final analysis, is in fact squarely against her.

In *Exxon,* the Court considered the cases brought by residents of Jacksonville, Maryland, after a gas leak contaminated the well water supply. *Id.* at 316. Residents brought claims including negligence, strict liability, trespass, nuisance, and fraud. *Id.* at 322. After a Baltimore County jury trial, the circuit court entered judgment awards over $496 million in compensatory damages and over $1 billion in punitive damages. *Id.* at 317. The station owner appealed, and the property owners filed a petition for *certiorari*. *Id.* at 330.

Among other issues, the Court addressed whether Maryland law allows "recovery for emotional distress based on fear of contracting cancer that arose from defendant's

[3] At the outset, Suesse correctly noted that *Exxon* is distinguishable because Dr. Luecke's conduct did not cause Suesse's cancer.

tortious act" and if so, "under what circumstances may a plaintiff recover for fear of cancer." *Id.* at 351-52. Exxon argued that because the plaintiffs failed to establish the existence of a present disease, or that they were more likely than not to contract cancer as a result of the gas leak, it was entitled to judgment as a matter of law on the emotional distress claim for fear of contracting cancer. *Id.* at 348. In Maryland, recovery for emotional damages must arise out of tortious conduct. *Id.* at 350 (citing *Hamilton v. Ford Motor Credit Co.*, 66 Md.App. 46, 63 (1986)). However, emotional injury is compensable without physical impact. *Id.* (citing *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 77-78 (1909)). Concern over the ease of feigning emotional injury guided the development of law in this area, and the Court required an underlying tort in order to provide a "sufficient guarantee of genuineness that would otherwise be absent in a claim for mental distress alone." *Id.* (quoting *Vance v. Vance*, 286 Md. 490, 498 (1979)).

Keeping in mind the development of the case law and the underlying principles regarding emotional injury and the law, the *Exxon* Court held:

> to recover emotional distress damages for fear of contracting a latent disease, a plaintiff must show that (1) he or she was exposed actually to a toxic substance due to the defendant's tortious conduct; (2) which led him or her to fear objectively and reasonably that he or she would contract a disease; and (3) as a result of the objective and reasonable fear, he or she manifested a physical injury capable of objective determination.

Id. at 352.

Suesse identifies *Exxon* as instructive in determining what evidence is relevant in her claim for emotional distress, and she argues that that without allowing testimony of this type, the jury could not be provided with adequate information to determine the

reasonableness of her fear. However, Suesse's position fails to recognize that under the *Exxon* standard, her claim for damages fails and renders the testimony irrelevant.

Viewing the issues in the light most favorable to Suesse, let us assume that the delayed diagnosis did in fact cause a ten percent increased chance of the cancer's return, and that increased chance of return is the "exposure" we are considering. Hypothetically, if we allowed this ten percent increased chance of recurrence to meet the first prong of the *Exxon* test (not that it necessarily would), Suesse would then be required show that this increased risk caused an objectively reasonable fear that she would contact the disease. Suesse argues that this requirement supports introduction of her testimony regarding her knowledge of the fact that microinvasion could not be ruled out because it showed that she had a "rational basis" for her claimed mental anguish. Suesse states that without this testimony, the jury would have no grounds for ascertaining whether she rationally or irrationally feared for the future. Although *Exxon* addressed the fear of developing cancer, not the fear of recurrence of cancer, the Court of Appeals identified the challenges related to how a plaintiff must prove an objectively reasonable fear. *Id.* at 354-57. The Court concluded that mere exposure to a toxic substance is insufficient for reasonable fear, but rather that "the circumstances of actual exposure to a toxic substance must lead a reasonable person in the plaintiff's position to believe that contracting a disease is a real consequence of the defendant's tortious conduct." *Id.* at 356-67. Again, assuming that the "exposure" is the increased likelihood of recurrence, and again, assuming in Suesse's favor that despite testimony from her own expert witness that even with the delayed diagnosis she had a 90 percent chance of survival, her fear was

reasonable and objective. Suesse, however, would still have to meet the third prong of the *Exxon* standard. The third prong requires that a plaintiff must demonstrate physical injury in order to recover damages for emotional distress. In Maryland, a plantiff "may recover damages for emotion distress 'if a physical injury *resulted from* the commission of the tort, regardless of impact.'" *Id.* at 357 (quoting *Hoffman v. Stamper,* 385 Md. 1, 34 (2005) (emphasis in original). Here, if the increased risk of recurrence is the exposure, Suesse had alleged no physical injury resulting from that increased risk, and for this reason, her claim fails.

Alternatively, we might consider the delay in diagnosis as the "exposure." Again, viewing all elements in the light most favorable to Suesse, the fear then becomes that the delayed diagnosis increased her chances of recurrence, and the reasonableness test is again applied. Here, perhaps the growth in the tumor size does indeed meet the physical manifestation test. However, *Exxon* requires that the "exposure" be "as a result of the defendant's tortious conduct." *Id.* at 363. Suesse has argued that the delayed diagnosis is the tortious conduct itself. To analogize this to *Exxon,* the plaintiffs did not suffer emotional distress from the gas line break itself but rather from the resulting tainted water. Suesse's claim would again fail under this view of her "exposure."

As to either interpretation of the elements, following the standard from *Exxon,* Suesse could not recover for her slight fear of recurrence, and her testimony that her chances of getting a more serious invasive cancer had increased was inadmissible.

"In determining whether improperly admitted evidence . . . prejudicially affected the outcome of a civil case, the appellate court balances 'the probability of prejudice from

the face of the extraneous matter in relation to the circumstances of the particular case . . . .'" *State of Md. Deposit Ins. Fund Corp. v. Billman*, 321 Md. 3, 17 (1990) (citation omitted). The potential of the presence of Suesse distressing as to her fear of death certainly meets this standard as such testimony would have an obvious effect on any jury.[4]

For the above reasons, we hold that the circuit court abused its discretion in admitting evidence related to Suesse's decreased loss of survival and her fear of recurrence, and therefore, the motion *in limine* was improperly denied. We reverse the court's judgment and remand for further proceedings wherein such evidence shall not be admitted. Accordingly, we need not address Suesse's other issues on appeal.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[4] The only factual basis added at trial was Suesse's testimony of undiagnosed depression.