UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

September Term, 2014

No. 1603

GEORGE EDWARD HARDY, JR.

v.

ADVANCED RADIOLOGY, P.A.

No. 2611

ESTATE OF CHARLES ARNOLD

v.

GEORGE E. HARDY

Wright,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: August 17, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

19 days. Here, we are tasked with determining whether a 19-day delay in discovering and diagnosing a cancerous tumor harmed appellant, George E. Hardy, Jr. Accepting that Charles J.E. Arnold, M.D., breached the standard of care when he failed to properly interpret a computed tomography ("CT") scan, we conclude that Hardy failed as a matter of law to establish the necessary causal link between Dr. Arnold's breach and Hardy's injury. Accordingly, we reverse.

BACKGROUND

On February 23, 2006, Hardy underwent a CT scan of his abdomen at St. Joseph Medical Center (hereinafter the "first CT scan"). Dr. Arnold, a radiologist, interpreted the CT scan as showing "[n]o acute finding in the abdomen"—nothing abnormal. On March 14, 2006, 19 days later, Hardy underwent another CT scan of his abdomen, this time at Franklin Square Hospital (hereinafter the "second CT scan"). Two radiologists independently interpreted the second CT scan and reported the detection of a mass in Hardy's abdomen and indicated that they "cannot exclude carcinoid tumor"—there may or may not be cancer. Still hospitalized on March 16, 2006, a surgical consult was ordered to evaluate the mass. Dr. Naji Fakhouri, a surgeon, reviewed the second CT scan and reported that the mass in Hardy's abdomen looked benign and recommended a follow-up CT scan in three to four months to assure stability. No biopsy or surgery was performed. Hardy's primary care physician, Dr. Richard O'Malley, was made aware of the second CT scan and the treatment plan recommended by Dr. Fakhouri.

Follow-up CT scans were performed annually for the next four years. Anthony Chiaramonte, II, M.D. interpreted the third CT scan performed in April 2007. A fourth CT scan, performed in April 2008, was interpreted by an unnamed radiologist. The radiology report from the fourth CT scan was submitted to Charles Ross Eck, Jr. M.D., Hardy's primary care physician at that time. Performed in February 2010, the fifth CT scan was interpreted by Bijan Keramati, M.D. Each CT scan was interpreted as showing the mass at a stable size—approximately three centimeters—neither growing nor shrinking. On December 30, 2011, five years after Hardy's first CT scan, Hardy underwent his sixth CT scan, this time showing that the mass had doubled in size to approximately 6.4 centimeters. Surgery was performed, but, the mass could not be fully removed. A biopsy of the mass led to its diagnosis as a cancerous tumor.

Hardy and his wife, Judith A. Hardy, filed a medical malpractice action in January, 2013, in the Circuit Court for Baltimore County against Dr. Chiaramonte, Dr. Eck, Dr. Keramati, and their respective employers. The complaint was amended in October 2013 to include Dr. Arnold. Hardy alleged that Dr. Chiaramonte, Dr. Eck, and Dr. Keramati, were negligent "in that they failed to employ appropriate treatment, surgery, tests … [and] failed to properly and appropriately diagnose." Through their amended complaint, the Hardys also sought damages for injuries suffered as a result of Dr. Arnold's alleged negligence in interpreting the first CT scan and for allegedly failing to timely diagnose the cancerous tumor. Dr. Fakhouri, the surgeon responsible for evaluating Hardy after the second CT scan was not named as a defendant.

During the course of trial, Hardy called three experts who each testified that there was no change in the size of the mass between 2006 and 2010. Dr. Arnold Friedman,[1] a radiologist, testified that the size of the mass remained stable, "plus or minus" three centimeters, between 2006 and 2010. Dr. Eric Rubin, a diagnostic radiologist, testified that the mass "was in the range of plus or minus three centimeters through the period of time between 2006 and 2010." Dr. Lee Levitt, a medical oncologist, called to offer causation and damages opinions, testified that the mass remained "around three centimeters" from 2006 and 2010. On cross, Dr. Levitt opined that the 19-day delay between the first and second CT scans had no impact on Hardy's prognosis, nor his treatment.

Both Dr. Friedman and Dr. Rubin testified that Dr. Arnold breached the standard of care by failing to identify the mass in Hardy's abdomen. This fact is not disputed on appeal.

Hardy's general surgery expert, Dr. Dennis Bordan, testified that had Hardy been referred to him in February 2006, he personally would have performed surgery:

> [HARDY'S COUNSEL]: Had Hardy been referred to you as a general surgeon, what would your evaluation and treatment of him have been?
>
> [DR. BORDAN]: Surgery. That is by far the most effective and primary treatment for [a cancerous tumor].

[1] No relation to the authoring judge.

Critically, however, Dr. Bordan did not testify that the standard of care required biopsy or surgery. In fact, Dr. Bordan did not offer testimony that anyone, named defendant or otherwise, violated the standard of care.

Dr. Arnold moved for judgment twice, once at the close of Hardy's case-in-chief and again at the close of all the evidence. In both motions, Dr. Arnold argued that Hardy failed to establish causation and, therefore, did not prove a *prima facie* case of negligence. Both motions were denied. The jury returned a verdict for Hardy. Only Dr. Arnold was found negligent. The verdict sheet read: Dr. Arnold "breached the standard of care in his care and treatment of [Hardy]" and Dr. Arnold's breach "was a cause of [Hardy's] injuries and damages." All other named defendants were determined by the jury not to have breached of the standard of care. The jury awarded $20,635: $1,635 in past medical expenses and $19,000 in non-economic damages.

Dissatisfied with the damages award, the Hardys moved for a new trial on the issue of damages alone. The circuit court denied the motion. Dr. Arnold, arguing that the Hardys, as a matter of law had failed to prove causation in light of their experts' testimony and therefore did not prove a *prima facie* case of negligence, moved for Judgment Notwithstanding the Verdict ("JNOV"). The circuit court denied the motion. Hardy noted this appeal. Dr. Arnold cross-appealed, arguing that the trial court erred in denying his motion for JNOV.

ANALYSIS

Because of the way we resolve this case, we begin our analysis with Dr. Arnold's cross-appeal. Through his cross-appeal, Dr. Arnold asks this Court to hold that the trial

court erred when it denied his motion JNOV. Dr. Arnold argues that the evidence presented by Hardy at trial was insufficient as a matter of law to establish causation and, therefore, that Hardy failed to present a *prima facie* case of negligence. Hardy insists that sufficient evidence was presented to establish a causal link between Dr. Arnold's breach of the standard of care and Hardy's injury.[2]

This Court in *Blue Ink, Ltd. v. Two Farms, Inc*. detailed the appropriate standard of review for motions for JNOV:

> A motion for JNOV under Rule 2-532 "tests the legal sufficiency of the evidence."
>
> * * *
>
> On review of a circuit court's decision to grant or deny a motion for JNOV, we are concerned with the dichotomy between the role of the judge, to apply the law, and the role of the jury, to decide the facts. As we explained in *Pickett v. Haislip*, "[o]nly where reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury." Although we review the circuit court's legal

[2] Hardy also argues that the issue on cross-appeal is unpreserved. We disagree. Arnold's argument during trial, in his motions for judgment, in his motion for JNOV, and now on cross-appeal has been the same: the actions of Dr. Arnold did not cause Hardy's injury. Rules 2-532(a) and 2-519 act to ensure that the trial judge is aware of the exact basis for a party's contention that the evidence presented is insufficient. *Hickey v. Kendall*, 111 Md. App. 577, 603 (1996) (explaining that the purpose of and application of the "particularity requirement [in motions for JNOV] is to make the trial judge aware of the exact basis for the movant's contention that the evidence is insufficient."); *Nelson v. Carroll*, 350 Md. 247, 250 (1998) (sufficient particularity "is determined in light of legal arguments that have been made in the course of the action, with particular emphasis on whether the trial judge could identify, through a process analogous to incorporation by reference, the argument that was being made in support of the motion."). All parties involved, including the trial judge, were on notice and understood Dr. Arnold's arguments at each stage of trial. Therefore, we hold that Dr. Arnold's cross-appeal is preserved.

> findings *de novo*, we must determine "whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence."

Blue Ink, Ltd. v. Two Farms, Inc., 218 Md. App. 77, 91 (2014) (internal citations omitted). "In a jury trial, the amount of legally sufficient evidence needed to create a jury question is slight. Thus, if the nonmoving party offers competent evidence that rises above speculation, hypothesis, and conjecture, the JNOV should be denied." *Barnes v. Greater Baltimore Med. Ctr., Inc*., 210 Md. App. 457, 480 (2013) (internal citations omitted).

In questioning the sufficiency of Hardy's causation evidence, we must review exactly what evidence is considered sufficient to establish causation. To prove causation, the plaintiff must proceed by way of the "but for" test in cases where only one negligent act is at issue: "cause-in-fact is found when the injury would not have occurred absent or 'but for' the defendant's negligent act." *Pittway Corp. v. Collins*, 409 Md. 218, 244 (2009) (internal citations omitted). If two or more independent negligent acts bring about an injury, however, the "substantial factor test" controls: "[c]ausation may be found if it is 'more likely than not' that the defendant's conduct was a substantial factor in producing the plaintiff's injuries." *Id.*

Medical malpractice cases normally require expert testimony to establish causation:

> [E]xpert testimony must show causation to a "reasonable degree of probability." Reasonable probability exists when there is more evidence in favor of the causation than against it. In *Franklin v. Gupta*, an expert testified regarding five instances where the standard of care had been breached and testified that the patient's condition would have been less likely to occur if the doctor would have followed the standard of care. The expert concluded that "the events would have not occurred, or would have been less likely to have

> occurred ... .” We held that this testimony satisfied the causation element.

Barnes, 210 Md. App. at 481 (internal citations omitted). In a medical malpractice case, whether an expert's testimony establishes causation depends on the expert's ability to establish more evidence in favor of the causation than against it.

We determine that on the evidence presented, a reasonable fact-finder could not find evidence of causation, by a preponderance of the evidence. At trial, Hardy's theory of causation was as follows: if Dr. Arnold had adhered to the standard of care and properly interpreted the first CT scan by identifying the presence of the mass, that information would have been conveyed to a surgeon for consultation, and that surgeon would have performed a resection to remove the mass that same day. Instead, the tumor was not removed, Hardy's theory goes, resulting in a terminal prognosis.

Hardy's theory, however, is incomplete. Nineteen days after Dr. Arnold's failure with the first CT scan, another doctor discovered and identified the mass on the second CT scan, and, even with the mass properly identified, Dr. Fakhouri, the surgeon who actually treated Hardy, decided not to remove the mass. Dr. Fakhouri did not, as Hardy's theory suggests, immediately remove the mass.[3] And there was no testimony offered that Dr. Fakhouri's decision not to remove the mass violated the standard of care. *See supra* slip

[3] Thus Hardy's theory appears to hinge on the decision by Dr. Fakhouri not to perform a biopsy or surgical resection of the mass after the second CT scan. Despite this, Hardy never sued Dr. Fakhouri. Our point is not to suggest that Dr. Fakhouri was negligent; rather we merely point out a hole in Hardy's theory that has existed since filing his complaint.

op. at 3 (Dr. Bordan testified what he would have done but did not opine that the standard of care was violated). Therefore, Hardy is unable to establish that the 19-day delay between Dr. Arnold's incorrect interpretation of the first CT scan and the mass being identified was the cause of Hardy's terminal prognosis five years later. Dr. Fakhouri did not fail to remove Hardy's terminal tumor because of Dr. Arnold's incorrect interpretation; Dr. Fakhouri chose not to remove Hardy's tumor for reasons completely unrelated to Dr. Arnold. Thus, Hardy was unable to establish causation because he was unable to show that "but for" Dr. Arnold's failure to interpret correctly the first CT scan, Hardy's injury would not have occurred.[4]

We reverse the trial court's denial of Arnold's motion for JNOV and order that it be granted. As a result, we do not reach Hardy's issues on appeal.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED WITH DIRECTION TO GRANT APPELLEE/CROSS-APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. COSTS TO BE PAID BY APPELLANTS/CROSS-APPELLEES.

[4] The parties address this case as a question of whether a second tort (Dr. Fakhouri's allegedly tortious decision not to operate) was a intervening or superseding cause of Hardy's injury. According to plaintiff, this second tort (for which Hardy never sued) was merely an intervening cause and that the first tort (Dr. Arnold's failure to read the CT scan) was a continuing cause of harm to Hardy. According to the defendants, by contrast, the second tort was a superseding cause, cutting off Dr. Arnold's liability. *See Pittway Corp.*, 409 Md. at 247-50 (explaining that "[l]iability is avoided only if the intervening negligent act or omission at issue is considered a superseding cause of the harm to the plaintiffs"). We find neither approach to be satisfactory. Before a second tort can be an intervening or superseding cause, there must be a first tort. *Id*. at 247-48 (explaining that we need only determine whether an act is either intervening or superseding "[w]hen multiple negligent acts or omissions are deemed a cause-in-fact of a plaintiff's injuries"). And here there was no first tort.