Circuit Court for Montgomery County
Case No. 448254V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 939

September Term, 2019

JEANNE MARIE JOHNSON, et al.

v.

LINDSAY GOLDEN, et al.

Graeff,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: June 22, 2020

On April 7, 2015, Vincent Santiago sadly passed away from complications related to oral cancer. On June 21, 2018, Mr. Santiago's wife and his two adult children (plaintiffs/appellants) filed an amended complaint in the Circuit Court for Montgomery County against Dr. Lindsay Golden, M.D. and Montgomery Otolaryngology Consultants, P.A. ("MOC") (defendants/appellees) alleging negligence in failing to timely diagnose Mr. Santiago with cancer.[1] The amended complaint contained five counts: one survival claim and four wrongful death claims.[2] The case proceeded to trial, and at the close of appellants' case, appellees, relying on the "loss of chance" doctrine, moved for judgment. The court granted appellees' motion for judgment, ruling that Maryland does not recognize damages for the loss of chance of survival. Appellants timely appealed and present the following three issues for our review:

1. Whether the trial court erred as a matter of law in dismissing the survival claim, when [appellants'] evidence showed that prior to Mr. Santiago's death he suffered personal injuries resulting from the delayed diagnosis caused by Dr. Golden's negligence?

2. Whether the trial court erred as a matter of law in dismissing the wrongful death claims when [appellants'] evidence showed that Mr. Santiago would not have died had an earlier diagnosis of the cancer been made?

3. Whether the trial court abused its discretion when it prevented [appellants'] causation expert from explaining how perineural invasion affected the prognosis of stage 4-A tongue cancer?

[1] Mr. Santiago's father was listed as a "Use Plaintiff" in the amended complaint, but indicated that he did not wish to participate in the action. Accordingly, the circuit court dismissed this claim.

[2] Mr. Santiago's father, the "Use Plaintiff," was the fourth wrongful death claimant.

We conclude that, because appellants never sought "loss of chance" damages, the trial court erred in granting judgment against appellants based on the loss of chance doctrine. We further conclude that appellants produced sufficient evidence in their case in chief to satisfy the causation element of their survival and wrongful death claims. Accordingly, we vacate the judgment and remand for a new trial.

STANDARD OF REVIEW

Where the trial court grants a motion for judgment at the close of a plaintiff's case, we must determine whether, as a matter of law, the evidence produced, viewed in a light most favorable to the plaintiffs, was legally sufficient for the finder of fact to find the requisite elements of the claims by a preponderance of the evidence. *Sugarman v. Liles*, 234 Md. App. 442, 464 (2017) (quoting *Asphalt & Concrete Servs., Inc. v. Perry*, 221 Md. App. 235, 271-72 (2015)), *aff'd*, 460 Md. 396 (2018).

FACTUAL AND PROCEDURAL BACKGROUND

Because this case concerns the trial court's grant of appellees' motion for judgment, our factual recitation focuses predominantly on the facts relied upon in rendering that decision. On February 8, 2013, Mr. Santiago visited Dr. Golden, a board-certified otolaryngologist, because he had been experiencing dizziness and pain in his tongue. During the year preceding his initial visit with Dr. Golden, Mr. Santiago had experienced sensitivity and pain in the left rear side of his tongue, and that pain extended to his left ear. At this appointment, Mr. Santiago received a hearing test and a tongue scraping biopsy. Although the biopsy results indicated that the tested region was benign, the dermatopathologist made the following comments in his pathology report:

> THE BIOPSY IS SUPERFICIAL, FRAGMENTED AND SMALL LIMITING MORE DEFINITIVE DIAGNOSIS. IF THIS REPRESENT[S] A PARTIAL SAMPLE OF A CLINICALLY SUSPICIOUS LESION, FINDINGS MAY NOT BE REPRESENTATIVE OF THE ENTIRE LESION. CLINICAL CORRELATION IS ADVISED.

No further action was taken to investigate the cause of Mr. Santiago's discomfort.

After continuing to experience the same symptoms complained of in February 2013, Mr. Santiago visited Dr. Golden again on May 7, 2014. This time, Dr. Golden recommended an excisional biopsy, but Mr. Santiago first decided to seek a second opinion from Dr. Kenneth Newkirk. After Dr. Newkirk also recommended the biopsy, Mr. Santiago returned to Dr. Golden for a second biopsy on July 8, 2014. This biopsy revealed the presence of invasive squamous cell carcinoma.

Following his cancer diagnosis, Mr. Santiago underwent various treatments at Johns Hopkins Hospital, including a partial glossectomy,[3] radiation treatment, and palliative chemotherapy. These treatments were ultimately unsuccessful, and on April 7, 2015, Mr. Santiago eventually passed away due to complications related to his oral cancer.

As stated above, Mr. Santiago's wife, Jeanne Johnson, and his two surviving children, Jason and Rebecca Santiago, filed a complaint and later an amended complaint against Dr. Golden and MOC alleging negligence by failing to properly diagnose Mr. Santiago's cancer in February 2013. The first count of the amended complaint was a survival action filed by Ms. Johnson, personal representative of Mr. Santiago's estate, to recover for the pain, suffering, and medical and financial expenses Mr. Santiago endured

[3] A partial glossectomy is a procedure to remove less than half of the tongue.

and incurred as a result of Dr. Golden and MOC's alleged negligence. The remaining counts sounded in wrongful death, with Mr. Santiago's wife and two children each seeking to recover damages for their emotional pain and suffering by prematurely losing Mr. Santiago.[4] The case proceeded to trial.

Relevant to this appeal, at trial appellants called Dr. Stewart Packer as a causation expert. Dr. Packer, an expert in the field of medical oncology and hematology, testified that he believed Mr. Santiago was suffering from oral squamous cell carcinoma as early as February 8, 2013, when Dr. Golden performed the first biopsy. Dr. Packer stated that in February of 2013, Mr. Santiago's cancer would have been in Stage 1 and, had it been properly diagnosed at that time, his prognosis for survival would have been between 70 and 80 percent. According to Dr. Packer, by the time doctors diagnosed Mr. Santiago's cancer in late July and early August 2014, the cancer was in Stage 4-A, and his five-year survival rate had dropped to "right around 50, 55 percent." Dr. Packer opined that, had Mr. Santiago's cancer been diagnosed in February of 2013, "it's more likely than not that he would not have had a recurrence[,]" and would not have died within the following five years.[5]

At the close of appellants' case, appellees moved for judgment. Appellees' trial

[4] Unlike her adult children, Ms. Johnson sought damages for pecuniary losses in addition to her emotional pain and suffering.

[5] A five-year time period is apparently a recognized medical standard used to define recovery in cancer cases.

counsel argued that appellants' claims could not stand because the Maryland Court of Appeals had rejected the "loss of chance" doctrine as a theory for recovering damages.[6] Appellees' trial counsel explained how Dr. Packer testified that Mr. Santiago's chance of surviving his oral cancer in February 2013 was 70 to 80 percent, and that at the time of the diagnosis in late July and early August 2014, Mr. Santiago's chance of survival had dropped to greater than 50 percent, but less than 55 percent. Because Mr. Santiago's chance for survival still remained greater than 50 percent, appellees argued that appellants could not show that it was "more likely than not that the defendant's conduct [was] the cause of the wrongful death."

The court took a recess to read two cases appellees provided in support of their motion: *Weimer v. Hetrick*, 309 Md. 536 (1987), and *Fennell v. S. Md. Hosp. Ctr., Inc*., 320 Md. 776 (1990). Following the recess, appellees' counsel continued arguing that, even assuming medical negligence, Mr. Santiago's chance of survival did not drop below 50 percent, and that he was still more likely than not to have survived despite the alleged negligence. Appellees' counsel asserted that, under these circumstances, appellants had only proven a "loss of chance" of survival, but had not proven that the alleged negligence caused Mr. Santiago's death. Appellees' counsel added that this "loss of chance" argument applied to both the survival claim and wrongful death claims.

Appellants' trial counsel responded by noting that Dr. Packer's testimony indicated

[6] We note that appellants' amended complaint never specifically sought or mentioned "loss of chance" damages.

that Mr. Santiago would have survived had he been diagnosed when his cancer was in Stage 1, and that for purposes of the survival claim, he could have avoided undergoing painful subsequent treatments, including radiation, chemotherapy, and extra biopsies. Appellants' counsel further noted that Mr. Santiago's cause of death was oral cancer, and because this was "the actual cause . . . we know that according to Dr. Packer, [Mr. Santiago] would not have died had he been diagnosed earlier." Appellants' counsel argued against dismissal of the wrongful death claims, distinguishing appellants' case from *Weimer*, where the plaintiffs "were trying to essentially amend the wrongful death statute to include damages for the loss of the chance of survival." Appellants' counsel then argued that the survival claim should not be dismissed, distinguishing Mr. Santiago's case from *Fennell* by stating that in *Fennell*,

> the only damages that they were seeking to recover were loss of chance of survival, they weren't seeking to recover medical expenses, they weren't seeking to recover all the pain and suffering that somebody went through because of the negligence that would have been avoided had the earlier diagnosis have occurred. *It's just one element of damages which the Court said they don't recognize* and [] there's no instruction that deals with loss of chance of survival.

(Emphasis added).

The trial court rejected appellants' arguments, stating:

> So, with the wrongful death, what we're compensating for is the death, and so that requires that assuming the negligence occurred, that the negligence actually caused the death, and these cases make it clear that can't be speculative. It's got to be proven. It's got to be greater than a 50 percent chance.
>
> So, here my problem is the plaintiff's expert, Dr. Packer, said that Mr. Santiago's chance of survival even after, if we assume negligence, the defendant's intervening act of negligence, was still greater than 50 percent,

> and I went back and checked what he said and he did initially say 50 to 55 percent and then [appellants' trial counsel], you asked him, you followed up with a second question and he said, over 50 percent was his response to what his chance of survival was in August of 2014 with the stage 4.
>
> *So, that being the case, it doesn't seem feasible that if we assume the negligence here, that the defendant's negligence could be the proximate cause because he still had a greater than 50 percent chance of survival even after that act of negligence occurred. So, at best or at worse, depending on how you want to view that, the negligence in this case, if there was negligence, resulted in a no greater than 30 percent loss of chance*.

(Emphasis added).

Appellants' trial counsel responded, "But there's more than just loss of chance of survival in the survival claim. There's pain and suffering. There's increased treatment. Those are all different and they weren't claiming those." The trial court responded, "But getting the damages for those is dependent upon getting a finding of causation, and I don't think that can happen even viewing everything in the light most favorable to plaintiff based upon Dr. Packer's testimony." Plaintiffs' counsel responded,

> if someone's negligent and they don't kill you, but they require you to undergo treatment that you would not have undergone had they not been negligent, you can recover that. So, if you take, the only reason the loss of chance of survival comes in there is if there's a death, and personally, I don't understand how the loss of a chance of survival can be something that the person who's not around anymore can claim as damages, but the damages someone's trying to get I think is anything that you would be able to get had there not been a death, and had there not been a death in this case, you would have been entitled to recover damages for the extra treatment that he underwent for the pain and suffering he underwent because of all of the extra treatment that he underwent, for the medical expenses he incurred because of all that extra treatment, and I don't see anything in *Fennell* that says that that's incorrect.
>
> *What they simply say is in the survival claim, you cannot recover damages from loss of chance of survival* and if Your Honor has some way for distinguishing a case where there's no death where somebody can get

> these damages but in a case where someone dies, you can't get those damages, and I mean the extra, the things that I talked about. I just can't see how that's possible and it just doesn't make sense to me.

(Emphasis added). The trial court granted appellees' motion for judgment as to all counts. As stated above, appellants timely appealed. We shall provide additional facts as necessary.

DISCUSSION

In their brief, appellants argue that the trial court erred in dismissing the survival claim based on the "loss of chance" doctrine because they "did not present a claim for 'loss of chance' . . . rather, they presented testimony regarding conscious pain and suffering and increased medical treatment and expenses that Mr. Santiago underwent prior to his death due to Dr. Golden's negligence." Appellants further argue that the trial court similarly erred in relying on the "loss of chance" doctrine to dismiss their wrongful death claims. In their view, the court failed to consider the causation evidence in a light most favorable to them—namely, that Dr. Packer testified that Dr. Golden's negligence caused Mr. Santiago's death. In short, appellants assert that they never claimed "loss of chance" damages and thus the "loss of chance" doctrine does not apply.[7] As we shall explain, we agree with appellants that the trial court erred in dismissing the claims pursuant to the "loss of chance" doctrine.

In order to explain why the "loss of chance" doctrine does not apply here, it

[7] Appellants also contend that the trial court erroneously excluded relevant testimony from their causation expert.

behooves us to briefly explain the doctrine. "'Loss of chance' of survival refers to 'decreasing the chance of survival as a result of negligent treatment where the likelihood of recovery from the preexisting disease or injury, prior to any alleged negligent treatment, was improbable, i.e., 50% or less.'" *Marcantonio v. Moen*, 406 Md. 395, 415 (2008) (quoting *Fennell*, 320 Md. at 781). "Loss of chance may include loss of chance of a positive or more desirable medical outcome, loss of chance of avoiding some physical injury or disease, or a loss of chance to survive." *Fennell*, 320 Md. at 781.

The Court of Appeals has explained its rationale for declining to adopt the "loss of chance" doctrine in the context of wrongful death claims:

> In *Weimer*, we concluded that the Maryland wrongful death statute requires a plaintiff seeking to recover damages under the statute to prove, by a preponderance of the evidence, that the defendant's negligence proximately caused the decedent's death. Accordingly, we held that wrongful death claims where the defendant's alleged negligence deprived the plaintiff of less than a (50 percent) probable chance of survival are not compensable under Maryland Law.

Marcantonio, 406 Md. at 416 (citation omitted) (citing *Weimer*, 309 Md. at 554). Similarly, the Court of Appeals has declined to adopt "loss of chance" damages in the context of survival claims because the Court was,

> unwilling to relax traditional rules of causation and create a new tort allowing full recovery for causing death by causing a loss of less than 50% chance of survival. In order to demonstrate proximate cause, the burden is on the plaintiff to prove by a preponderance of the evidence that "it is more probable than not that defendant's act caused his injury."

Fennell, 320 Md. at 786-87 (quoting *Peterson v. Underwood*, 258 Md. 9, 17 (1970)). In other words, in Maryland, where the plaintiff's chance of surviving an underlying disease or medical condition is already below 50 percent prior to any negligence, a plaintiff cannot

recover damages related to any loss of chance of survival because the underlying disease or condition was the likely cause of the plaintiff's death irrespective of any negligence.

Marcantonio unequivocally demonstrates why the "loss of chance" doctrine does not apply here. In *Marcantonio*, Ms. Schaefer and her husband, Mr. Marcantonio, (the "Marcantonios") filed a cause of action against her medical providers, alleging that they had negligently failed to diagnose and treat her cancer. 406 Md. at 399. After Ms. Schaefer passed away, Mr. Marcantonio "amended the complaint to add wrongful death and survivorship claims against The Medical Providers." *Id*. At depositions, the Marcantonios' experts testified that, had Ms. Schaefer been diagnosed properly in August or September of 2000, her chance of survival would have been 80 percent, and "that in all medical probability, her cancer would have been curable." *Id*. at 400. In a subsequent affidavit, one of the experts asserted that the medical providers' failure to diagnose the cancer "was a substantial factor in proximately causing her death." *Id*. at 402. The circuit court ultimately struck the Marcantonios' causation experts' affidavits, finding that they materially contradicted their deposition testimony, and granted summary judgment in favor of the health care providers on the basis that the Marcantonios had "not offered evidence that would establish proximate causation of 51 percent or more of the chance of loss . . . of survival." *Id*. at 402-03.

On appeal, the Court of Appeals held that the circuit court erred by striking the affidavits, and more importantly for our purposes, that the court erred by entering summary judgment "on the basis that the Marcantonios failed to establish sufficient evidence of proximate cause." *Id*. at 414. In a footnote, the Court of Appeals noted that, at the time of

the allegedly negligent diagnosis, Ms. Schaefer's chance of survival was 80 percent. *Id*. at 414 n.16. When the medical providers finally began treating her, however, Ms. Schaefer's chance of survival had decreased to 50 to 60 percent. *Id*. The footnote explained that the circuit court (and this Court) determined that the Marcantonios could not establish proximate causation because the medical providers' negligence only deprived Ms. Schaefer of, at most, a 30 percent chance of survival. *Id*.

In holding that the Marcantonios had presented sufficient evidence regarding proximate causation to survive a motion for summary judgment, the Court stated, "Taking into consideration the affidavits of [the causation experts], the evidence of this case, when viewed in a light most favorable to the Marcantonios, raises genuine issues of material fact regarding causation." *Id*. at 415. The Court held that the case did "not involve the issue of 'loss of chance' as that doctrine is defined by Maryland law," stating,

> "Loss of chance" of survival refers to "decreasing the chance of survival as a result of negligent treatment where the likelihood of recovery from the preexisting disease or injury, prior to any alleged negligent treatment, was improbable, i.e., 50% or less. On the basis of the record before [the Court], the evidence indicate[d] that Ms. Schaefer had an alleged 80 percent chance of survival prior to The Medical Providers' alleged negligence. *Because Ms. Schaefer's alleged chance of survival exceeded 50 percent, the loss of chance doctrine [was] inapplicable to the Marcantonios' claims.*

Id. (emphasis added) (citation omitted) (quoting *Fennell*, 320 Md. at 781). The Court of Appeals concluded by noting that, "the facts as alleged do not support a loss of chance claim." *Id*. at 416. Indeed, the Court of Appeals observed that the Marcantonios did "not allege a loss of chance claim in their complaint[.]" *Id*. at 415 n.17. Rather, the medical providers and the circuit court had simply "characterized the claim in that manner." *Id*.

The "loss of chance" doctrine did not apply in *Marcantonio* because the evidence did not reveal that, prior to any alleged negligence, Ms. Schaefer's chance of survival was less than 50 percent. *Id*. at 415. In our view, the instant case is on all fours with *Marcantonio,* and we likewise conclude that the "loss of chance" doctrine does not apply here. Dr. Packer testified that when Mr. Santiago first visited Dr. Golden in February 2013, Mr. Santiago's chance of surviving oral cancer was between 70 and 80 percent, and when Mr. Santiago's cancer was finally diagnosed, his chance of surviving was greater than 50 percent but less than 55 percent. We note the striking similarity of the statistical survival percentages in *Marcantonio* and the instant case. We apply *Marcantonio's* language to the case at bar: "On the basis of the record before us, the evidence indicates that [Mr. Santiago] had an alleged [70 to 80] percent chance of survival prior to [appellees'] alleged negligence. Because [Mr. Santiago's] alleged chance of survival exceeded 50 percent, *the loss of chance doctrine is inapplicable* to the [appellants'] claims." *Id*. (emphasis added). Moreover, as in *Marcantonio*, appellants did not allege a loss of chance claim in their complaint, nor did they ever make a loss of chance claim at trial. Indeed, they affirmatively disavowed any such claim. Accordingly, the trial court erred when it struck appellants' survival and wrongful death claims on the basis that they were "loss of chance" claims precluded by Maryland precedent.

Having established that the court erred by relying on the "loss of chance" doctrine to dismiss appellants' claims, we next turn to whether appellants presented sufficient evidence at trial to establish causation for the survival and wrongful death claims. We begin with the wrongful death claims.

In *Marcantonio,* the Court of Appeals noted that to succeed on a claim for wrongful death, the plaintiff must prove, by a preponderance of the evidence, "that the defendant's negligence proximately caused the decedent's death." *Id*. at 416 (citing *Weimer,* 309 Md. at 554). In *Marcantonio*, one of the plaintiff's experts opined that the "failure to properly diagnose . . . and the resultant failure to begin immediate treatment were the proximate cause of [the decedent's] death." *Id*. at 400. A second plaintiff's expert testified that "had Ms. Schaefer's condition been properly diagnosed . . . that in all medical probability her cancer would have been curable." *Id*. The Court held that this causation evidence was sufficient to survive a motion for summary judgment. *Id*. at 415.

Appellants likewise met their burden here. Dr. Packer testified that, had Mr. Santiago's cancer been diagnosed in February 2013, and had Mr. Santiago received surgical treatment to remove the cancer, "it's more likely than not that he would not have had a recurrence." Furthermore, in the following colloquy, Dr. Packer indicated that Mr. Santiago would have survived but-for appellees' negligence:

> [Plaintiffs' trial counsel]: Do you have an opinion whether had [Mr. Santiago's] cancer been diagnosed in February of 2013 when he was a stage 1 and he'd undergone surgery, whether he then would have gone on to die within the first five years?
>
> [Dr. Packer]: I think, I think he would not have died.

Taking this evidence in the light most favorable to appellants, they produced sufficient evidence that appellees' negligence caused Mr. Santiago's death. *See Goss v. Estate of Jennings*, 207 Md. App. 151, 164 (2012) (stating that "If there is 'any evidence, however slight, legally sufficient as tending to prove negligence,' then the trial judge must leave the

weighing and evaluating of that evidence to the jury." (quoting *Moore v. Myers*, 161 Md. App. 349, 363 (2005))). Accordingly, appellants presented sufficient evidence that Dr. Golden's negligence proximately caused Mr. Santiago's death.

We also conclude that appellants presented sufficient evidence to meet the causation element of the survival claim. "A survival action is a claim personal to the decedent that the decedent could have brought in his own right if he had lived." *Beyer v. Morgan State Univ.*, 139 Md. App. 609, 619 (2001) (citing *Benyon v. Montgomery Cablevision Ltd. P'Ship*, 351 Md. 460, 474 (1998)). This Court has explained that a personal representative "stands in the place of the decedent" and that

> recovery is limited to the loss actually caused to the deceased prior to that person's death. Thus, "[d]amages in Survival Statute actions are limited to compensation for pain and suffering sustained, expenses incurred, and loss of earnings, by the deceased from the time of the infliction of the injury to the time of death."

Jones v. Flood, 118 Md. App. 217, 221 (1997) (quoting *Biro v. Schombert*, 41 Md. App. 658, 665 (1979), *aff'd*, 351 Md. 120 (1998).

Here, Ms. Johnson, the personal representative of Mr. Santiago's estate, sought recompense for Mr. Santiago's having to "undergo additional surgeries and treatment" which she claimed caused Mr. Santiago "severe mental anguish and emotional pain and suffering; whereby he was prevented in engaging his usual duties and activities; was caused to incur hospital and medical expenses; and was caused to incur financial losses and damages." At trial, Dr. Packer testified that, had Dr. Golden properly diagnosed Mr. Santiago's cancer in February 2013, Mr. Santiago would not have required radiation therapy, chemotherapy, and subsequent surgery, and would have only needed to undergo a

single surgery. As to specific noneconomic damages, we note that Dr. Packer opined that radiation to the head and neck area is "exceedingly unpleasant." Accordingly, Ms. Johnson presented legally sufficient evidence at trial that Dr. Golden's negligence caused Mr. Santiago to suffer unnecessary medical treatment, thereby causing him emotional pain and suffering, as well as additional medical expenses and other potential financial losses.

CONCLUSION

The trial court erred when it relied on the "loss of chance" doctrine in dismissing appellants' claims. Not only did appellants never seek "loss of chance" damages, but the doctrine is inapplicable where the chance of survival prior to any alleged negligence exceeds 50 percent as it did here. Additionally, the evidence adduced at trial regarding causation for both the survival and wrongful death claims was legally sufficient to survive a motion for judgment. Accordingly, we vacate the trial court's judgment in favor of appellees and remand for a new trial.[8]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY APPELLEES.

[8] Appellants also claim that the trial court erred by improperly excluding Dr. Packer's testimony regarding the effect of perineural invasion. The trial court sustained the appellees' objection on the basis that the question had already been "[a]sked and answered." Because we are remanding for a new trial, we need not address this issue as it is unlikely to recur.