

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

SCOTT V. KHAN

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RICHARD C. SCOTT, PERSONAL REPRESENTATIVE OF THE  
BRANDI J. BLOCK ESTATE, APPELLANT,

v.

SHAHBAZ KHAN, M.D., APPELLEE.

**FILED**

OCT 13 2009

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEAL

Filed October 13, 2009. No. A-09-349.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David A. Domina and Brian E. Jorde, of Domina Law Group, P.C., L.L.O., for appellant.

Brien M. Welch and Amber L. Blohm, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Richard C. Scott, personal representative of the estate of Brandi J. Block, appeals from the order of the district court for Madison County, which granted summary judgment in favor of Shahbaz Khan, M.D. Scott brought a wrongful death claim on behalf of Block's next of kin based on Khan's alleged psychiatric negligence in his treatment of Block and a claim on behalf of Block's estate for Block's conscious pain and suffering prior to her death. On appeal, Scott asserts that the court erred in finding no genuine issue of material fact on the issue of proximate causation in connection with the wrongful death claim. Scott further asserts that the court erred in finding that the claim for Block's conscious pain and suffering was a noneconomic damages component of the wrongful death claim and not a separate claim for relief. Because there was no genuine issue of material fact as to the cause of Block's death, we affirm the district court's grant of summary judgment in Khan's favor with respect to the wrongful death claim. However,

because we find that the claim for Block's conscious pain and suffering was a separate claim, properly joined in the same suit with the wrongful death claim and not a component of damages in the wrongful death claim, we reverse, and remand that portion of the district court's decision for further proceedings.

## BACKGROUND

Block, who had previously been diagnosed with schizoaffective disorder, bipolar type, began treating with Khan, a psychiatrist, on February 20, 2007, after her former psychiatrist moved his practice. Block last saw Khan on June 25, the day before her death on June 26.

Scott filed a complaint in the district court on April 18, 2008. Scott alleged that Khan was negligent in his treatment of Block in various ways and set forth a claim for wrongful death on behalf of Block's next of kin and a claim on behalf of Block's estate for Block's conscious pain and suffering prior to her death.

In his answer, filed May 21, 2008, Khan admitted that he had occasion to treat Block as a patient, but he denied that he was negligent in any way that caused or contributed to Block's death. Khan affirmatively stated that at all relevant times, he met the applicable standard of care when he provided medical care and treatment to Block. Khan denied any causal relationship between any action or inaction alleged on his part and any damages set forth in Scott's complaint.

Khan filed a motion for summary judgment on February 3, 2009. The district court heard Khan's motion for summary judgment on February 27. The evidence presented at the hearing shows that Khan provided psychiatric medical care to Block from February 20 to June 25, 2007. As a part of that care, Khan provided diagnostic examinations and developed a psychiatric treatment plan. During that time, Khan also prescribed various psychiatric medications. Block was compliant with taking the medications prescribed by Khan. There is no indication that Block committed suicide. At the hearing, Scott presented evidence in support of the claim that Khan was negligent in his treatment of Block. Because the district court found that Scott failed to present a genuine issue of material fact as to causation in connection with Block's wrongful death, we focus solely on specific evidence relating to the cause of Block's death.

Dr. David J. Jaskierny, Jr., conducted the autopsy of Block on June 27, 2007. In his original report, Jaskierny stated:

This woman had active prescriptions for anti-seizure medications, yet none of them were identified in her postmortem blood sample. The cause of death in this 23-year old female is most likely a fatal seizure. Her condition might have been adversely [a]ffected by the toxicity caused by the greatly elevated levels of one of her antidepressant medications.

A forensic toxicology report attached to the autopsy report showed levels above the expected range of one of the drugs Block was taking but also reflected that reference ranges and toxic concentrations for the drug had not been established. In an amended report dated December 17, 2008, Jaskierny stated:

This summary is being amended (changed) due to the receipt of additional clinical medical information. This additional information was not available or known at the time of the autopsy or the filing of the original report. Review of this additional information

reveals that the patient apparently has no history of seizures or seizure activity. Furthermore, it appears that the medications that could have been for the treatment of seizures that were listed on the medication list received at the time of the autopsy were actually meant to treat other disorders including, but not limited to, bipolar disorder, manic disorders, and migraine headaches. Thus, this additional information necessitates a change in the cause of death. It is now felt that the cause of death in this 23-year old is undetermined. There are no findings in this autopsy to suggest foul play. Furthermore, it is now unclear what effect, if any, the elevated level of her one antidepressant medication may have had.

In his affidavit, dated February 10, 2009, Jaskierny opined that Block did not die from a medication overdose but that the cause of Block's death was medically unexplained and undetermined.

Khan presented an affidavit dated February 13, 2009, from Dr. James Claude Upshaw Downs, a medical examiner with a subspecialty in forensic pathology. Downs reviewed Block's medical records and various other documents relevant to this case. Based on his review of the documentation identified in his affidavit and his education, training, and experience as a medical doctor in the subspecialty of forensic pathology, Downs opined that the cause of Block's death was medically unexplained and that the autopsy performed did not reveal a cause of death. Downs further opined that Block's death was not caused by any of the medication prescribed for her by Khan or any other physician who may have prescribed medication to her. According to Downs, the elevated levels of one of Block's antidepressant medications as identified in the forensic toxicology report attached to the autopsy report "can most likely be explained by post-mortem redistribution and/or decomposition which will artificially make the levels appear elevated," and he opined that the levels were not medically sufficient to have caused Block's death.

Dr. Loren P. Peterson, a psychiatrist, also reviewed Block's medical records and other documentation on Khan's behalf. In his affidavit dated February 7, 2009, Peterson opined that Block's death was medically unexplained but not related in any way to the use of antidepressants or caused as a result of black box warnings which accompanied the use of the antidepressants. Peterson further opined that the level of one of Block's antidepressants as identified in the toxicology report was "medically insufficient to have caused deleterious effects and certainly not sufficient to have caused [Block's] death based upon available literature."

In Khan's affidavit dated February 3, 2009, he noted that Block's medical records showed that she had experienced allergic reactions to food which she had consumed in December 2006 and February 2007. Khan stated that although Block's medical records showed she had a history of anaphylaxis to food, whether Block died as a result of anaphylaxis was unknown as the cause of her death was unknown. Khan did not have an opinion to a reasonable degree of medical certainty as to Block's cause of death, other than that it was not related to any of the medication which he had prescribed for her. Khan stated further that as he was not a pathologist or forensic pathologist, he would defer to Jaskierny and Downs on an opinion as to the cause of death.

Dr. Carl Greiner testified by deposition taken on October 29, 2008. We note that Greiner's deposition was taken prior to the date of Jaskierny's amended autopsy report. Greiner

testified that he would not be offering an opinion as to the cause of Block's death because he did not have sufficient information to render such an opinion. Greiner did not have sufficient information to conclude that Block was confused and overdosed on one of her medications, stating simply that he did "not have an opinion on that." The following exchange then occurred between Khan's attorney and Greiner:

Q: Do you have an opinion as to what, if any failures of Dr. Khan whereby he fell below the standard of care caused or contributed to cause her death?

A: Yes, I do.

Q: Okay. So what's her cause of death?

A: The medical report [initial autopsy report] suggests either seizure or overdose. I accept those as being what the reviewer came up with. I don't feel like I have an independent ability to confirm that.

Q: Well, how is it, then, your testimony, Doctor, as an expert that anything that Dr. Khan failed to do or did do contributed to cause her death if you don't know what caused her death?

A: My opinion is that he did not provide adequate supervision of her care, and in the absence of adequate provision for her care, she died.

Q: In order to hold that opinion, don't you have to have an opinion as to what caused her death?

A: Not necessarily.

Q: Really?

A: Correct.

Q: Could she have died from an unknown disease that was not found on autopsy that had nothing to do with the care that Dr. Khan provided?

A: I guess it's possible but unlikely.

Q: Well, then I'll ask you again, do you have an opinion which you can state to a reasonable degree of medical certainty as to the cause of . . . Block's death?

A: Not to a reasonable degree of medical certainty, no.

Greiner was unsure that the level of one of Block's antidepressant medications found in the toxicology report represented an overdose, and he agreed that a toxicologist would be more qualified to render an opinion with respect to the toxic effects of medicine and whether it contributed to an overdose or a death. Greiner did not have an opinion as to whether Block's death was a suicide.

In his deposition, Greiner testified, "I believe that . . . Khan was negligent in his assessment and treatment of . . . Block and in the negligence of assessing the severity of her illness, in not hospitalizing her, that she was not able to care for herself and died." However, when asked whether Block's "inability to care for herself caused or proximately caused her death," Greiner responded, "I don't know the specific reason, no." Upon cross-examination by Scott's attorney, Greiner opined that a board-certified psychiatrist with experience and training similar to Khan's upon evaluating Block would have concluded on June 25, 2007, that Block should have been hospitalized, that Khan failed to do so, and that Khan's professional negligence

caused Block's death. Greiner rendered this final opinion even though he did not know the exact reason for Block's death.

The district court entered an order on March 12, 2009, granting Khan's motion for summary judgment. The court found that Scott's claim for conscious pain and suffering was "a non-economic damage component of the wrongful death action" and did not state "a separate theory of recovery." The court found that the uncontroverted evidence showed that the cause of Block's death was unknown. The court determined that Khan's evidence was sufficient to make a prima facie case that Khan did not commit malpractice. The court noted that while Scott presented evidence in the form of Greiner's testimony that Khan was negligent in his assessment and treatment of Block and thus deviated from the standard of care, Scott furnished no expert testimony as to the cause of Block's death. The court found evidence of causation as to Block's death to be "notably absent." Viewing the evidence in a light most favorable to Scott, the court determined that Scott had provided evidence as to Khan's negligence, but had failed to show that Khan's negligence was a proximate cause of Block's death. Accordingly, the court granted summary judgment in Khan's favor and dismissed the complaint. Scott subsequently perfected his appeal to this court.

#### ASSIGNMENTS OF ERROR

Scott asserts, consolidated and restated, that the district court erred in (1) granting summary judgment in favor of Khan and dismissing the wrongful death claim, and (2) failing to consider the conscious pain and suffering claim.

#### STANDARD OF REVIEW

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Lamar Co. v. City of Fremont*, 278 Neb. 485, \_\_\_ N.W.2d \_\_\_ (2009). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

#### ANALYSIS

##### *Proximate Cause in Wrongful Death Claim.*

Scott asserts that the district court erred in granting summary judgment in favor of Khan and dismissing the wrongful death claim.

Neb. Rev. Stat. § 30-809 (Reissue 2008) is intended to authorize an action to recover damages from a tort-feasor for negligence or some other action resulting in the death of another person. *Olsen v. Farm Bureau Ins. Co.*, 259 Neb. 329, 609 N.W.2d 664 (2000). The wrongful death action in this case is based on Khan's alleged psychiatric negligence or malpractice. To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm. *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008). See 13 C.O.A.2d 453, § 10 (1999) (to establish prima facie case of psychiatric

negligence or malpractice, plaintiff must prove that psychiatrist's violation of applicable standard of care proximately caused harm of which plaintiff complains).

The question in our consideration of the wrongful death claim is whether Khan's alleged deviation from the standard of care was a proximate cause of Block's death. A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Id.* A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

The evidence is undisputed in this case that the exact mechanism or medical reason for Block's death is unknown or undetermined. While Greiner testified that Khan was negligent, in other words, that Khan deviated from the standard of care, and that Khan's professional negligence caused Block's death, Greiner also explicitly testified that he would not be offering an opinion as to the medical reason for Block's death. Greiner testified that he did "[n]ot necessarily" have to have an opinion as to the medical reason for Block's death in order to render the opinion that "in the absence of adequate provision for [Block's] care [by Khan], [Block] died." When asked whether Block could have "died from an unknown disease that was not found on autopsy that had nothing to do with the care that . . . Khan provided," Greiner replied, "I guess it's possible but unlikely."

Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002). Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not. *Id.* When viewing the evidence in the light most favorable to Scott and giving him the benefit of all reasonable inferences deducible from the evidence, we conclude that Greiner's testimony was insufficient to establish with the requisite degree of medical certainty that Khan's conduct was a proximate cause of Block's death. In other words, Greiner's testimony fails to establish that Block's death would not have occurred but for Khan's conduct. As noted above, Greiner "guess[ed]" that it was "possible but unlikely" that Block could have died from an "unknown disease that was not found on autopsy" that had nothing to do with Khan's care. While this testimony to a certain extent excludes the possibility of Block's death being the result of an "unknown disease that was not found on autopsy," such testimony is not the same thing as stating that Block's death was, more likely than not, caused by Khan's negligence and not some other cause or causes. See *Doe v. Zedek, supra* (psychiatrist's expert testimony in medical malpractice action as to causation of plaintiff's mental suffering insufficient where testimony failed to distinguish damages allegedly caused by claimed malpractice from damages caused by other factors). We find no error in the district court's grant of summary judgment in Khan's favor on the wrongful death claim.

*Conscious Pain and Suffering Claim.*

Scott asserts that the district court erred in failing to consider the conscious pain and suffering claim brought by Scott on behalf of Block's estate.

The district court relied on Neb. Rev. Stat. § 25-21,185.08(3) (Reissue 2008) to find that the conscious pain and suffering claim was a noneconomic damage component of the wrongful death claim and not a separate claim for relief. Section 25-21,185.08(3) defines noneconomic damages to mean "subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation, but shall not include economic damages." However, a wrongful death action is brought by the personal representative on behalf of the statutory beneficiaries. Neb. Rev. Stat. § 30-810 (Reissue 2008). The plain language of § 30-810 plainly limits a wrongful death recovery to the loss suffered by a decedent's next of kin; it provides no basis upon which to recover a decedent's own damages. *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989). Pain and suffering endured by the decedent as a result of the conduct of a defendant is not an element that may be recovered under the wrongful death statutes. *Weatherly v. Blue Cross Blue Shield*, 2 Neb. App. 669, 513 N.W.2d 347 (1994). An action for wrongful death may be joined with an action on behalf of the decedent's estate. *Nelson v. Dolan*, *supra*. For example, as an element of a decedent's personal injury action, conscious prefatal-injury fear and apprehension of impending death survives a decedent's death, under the provisions of Neb. Rev. Stat. § 25-1401 (Reissue 2008), and inures to the benefit of such decedent's estate. *Nelson v. Dolan*, *supra*.

In connection with the claim for conscious pain and suffering, Scott alleged that Block knew she was ill and that her illness was associated with the medications prescribed for her by Khan, that she was aware that her overall functioning was declining, that she returned to Khan for reevaluation and care, but that she did not receive responsive care which complied with the standard of professional conduct to which Khan was held. Scott further alleged that as a direct and proximate result of Khan's failure to provide responsive care in compliance with the applicable standard of professional conduct, Block sustained conscious mental and physical pain, anguish, suffering, and general damages.

As discussed above, the wrongful death claim failed because there was no genuine issue of material fact as to whether Khan's negligence caused Block's wrongful death. The claim for conscious pain and suffering, although also based on a negligence theory, more specifically is based on the allegation that Khan's negligence in failing to provide responsive care proximately caused Block's conscious pain and suffering. Because the district court did not consider this claim, we must reverse, and remand for further proceedings. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Weber v. Gas 'N Shop*, 278 Neb. 49, 767 N.W.2d 746 (2009).

#### CONCLUSION

We affirm the district court's grant of summary judgment in favor of Khan with respect to the wrongful death claim brought by Scott on behalf of Block's next of kin. Because the court failed to consider the separate claim brought by Scott on behalf of Block's estate for Block's

conscious pain and suffering prior to her death, we reverse, and remand that portion of the court's decision for further proceedings.

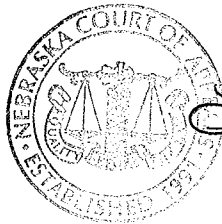
AFFIRMED IN PART, AND IN PART REVERSED AND  
REMANDED FOR FURTHER PROCEEDINGS.



THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.



*Janet Amussen*  
Clerk/Deputy Clerk

COURT OF APPEALS NO.	A-09-0349
TRIAL TRIBUNAL NO.	CI08-207
DATE OPINION FILED	October 13, 2009
DATE OPINION CERTIFIED	October 13, 2009

