

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**THE ESTATE OF CHESTER COX,  
by and through its Executrix, JENNIE  
LOU REEMER, and JENNIE LOU  
REEMER, heir at law of CHESTER  
COX, deceased,**

**Plaintiffs,**

**vs.**

**CIVIL ACTION  
No. 03-2507-GTV**

**CODY W. DAVIS, D.O.,**

**Defendant.**

**MEMORANDUM AND ORDER**

Plaintiffs, the estate of Chester Cox, by and through its executrix, Jennie Lou Reemer, and Jennie Lou Reemer, heir at law of Chester Cox, deceased, bring this wrongful death action against Defendant Cody W. Davis, D.O.<sup>1</sup> Plaintiffs allege that Defendant failed to properly diagnose a fractured vertebrae that the decedent suffered as a result of an automobile accident, and thus caused or contributed to the decedent's death. This action is before the court on Defendant's motion for partial summary judgment (Doc. 37). For the following reasons, Defendant's motion is denied.

---

<sup>1</sup> Jurisdiction is predicated on diversity of citizenship, 28 U.S.C. § 1332.

## **I. FACTUAL BACKGROUND**

The following factual background is taken from Plaintiffs' amended complaint.

On October 12, 2001, the decedent, Chester Cox, was involved in a motor vehicle accident in Hutchinson, Kansas. Reno County Emergency Medical Services transported Mr. Cox to the Hutchinson Hospital emergency room to receive treatment for injuries he received in the accident. At the hospital, Dr. Cody Davis examined Mr. Cox and ordered x-rays of his cervical, thoracic, and lumbar spine. Plaintiffs claim that the x-rays revealed a fracture of the thoracic spine, but that Dr. Davis failed to diagnose it. Plaintiffs further allege that the attending radiologist recommended additional testing, but that Dr. Davis instead discharged Mr. Cox and instructed him to follow up with a doctor for treatment of a muscular injury. That evening, Plaintiffs state that Mr. Cox felt a "pop" in his back and his condition worsened.

On October 13, 2001, Reno County Emergency Medical Services again brought Mr. Cox to the Hutchinson Hospital emergency room. He was diagnosed with a thoracic spine fracture and transferred to Via Christi St. Francis Medical Center ("Via Christi") in Wichita for treatment. Nine days later doctors at Via Christi performed a spinal fusion on Mr. Cox. On November 5, 2001, Mr. Cox died as a result of complications from his thoracic spine fracture.

## **II. SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P.

56(c). Lack of a genuine issue of material fact means that the evidence is such that no reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Essentially, the inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 251–52.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party’s case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. Anderson, 477 U.S. at 256. “[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” Id. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. The court must consider the record in the light most favorable to the nonmoving party. Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir.1984).

### **III. DISCUSSION**

Plaintiffs’ amended complaint alleges that Defendant negligently diagnosed Mr. Cox’s fractured vertebrae as a muscular injury, and as a direct result, Mr. Cox died from complications of his spinal fracture. Defendant requests the court to grant summary judgment in his favor

because Plaintiffs have failed to show that Defendant's alleged medical malpractice was the cause of the decedent's death.

“A claim of medical malpractice is based on actionable negligence and requires the same elements of proof as required in any negligence action.” Sharple v. Roberts, 816 P.2d 390, 397 (Kan. 1991). To establish a claim for medical malpractice in Kansas, a plaintiff must demonstrate that the defendant owed him a duty, the defendant breached the duty, and a causal nexus exists between the duty breached and the plaintiff's injury. Id. (quoting Durflinger v. Artiles, 673 P.2d 86, 91 (Kan. 1983)). “Under Kansas law, a physician has a duty to use reasonable and ordinary care and diligence in the diagnosis and treatment of his or her patients, to use his or her best judgment, and to exercise that reasonable degree of learning, skill and experience which is ordinarily possessed by other physicians in the same or similar locations under like circumstances.” Rios v. Bigler, 847 F. Supp. 1538, 1542 (D. Kan. 1994) (citing Durflinger, 673 P.2d at 92). “Except where the lack of reasonable care or the existence of proximate cause is apparent to the average layman from common knowledge or experience, expert testimony is required in medical malpractice cases to establish the accepted standard of care and to prove causation.” Bacon v. Mercy Hosp. of Ft. Scott, 756 P.2d 416, 420 (Kan. 1988) (citations omitted).

A plaintiff's failure to establish these elements against a particular defendant will entitle that defendant to judgment as a matter of law. Rios, 847 F. Supp. at 1542 (citing Mellies v. Nat'l Heritage, Inc., 636 P.2d 215, 218 (Kan. Ct. App. 1981)). Defendant argues that Plaintiffs cannot

meet their burden to show that Defendant's actions were the proximate cause of Mr. Cox's death. See Sharples, 816 P.2d at 397 (quoting Allman v. Holleman, 667 P.2d 296 (1983)) (defining proximate cause as the "the natural and probable consequence of the wrongful act"). Specifically, Defendant maintains that Plaintiffs' only medical expert, Philip G. Leavy, Jr., MD, testified in his deposition that Defendant did not do anything to cause the death of Mr. Cox. The relevant portion of Dr. Leavy's deposition states:

Q. The slippery slope started with the automobile accident, true?

A. No. The slippery slope started after the auto accident when the injury was totally missed. I mean, the process started with the auto accident, but the downhill slope started when this patient's injury was totally missed and he was treated improperly.

Q. Dr. Davis did not cause Mr. Cox's sepsis, did he?

A. Except in terms of what I just mentioned, no. I mean, he didn't have a direct hand in it, no.

Q. Dr. Davis did not cause the death of Mr. Cox, did he?

A. I think I answered that question two questions ago. If this slippery slide would have been stopped when it was possible, my feeling is that all the other things may not have occurred. I can't say for sure.

Q. Exactly. You don't know what all happened with Mr. Cox's spine between the 12th and 13th, and so you cannot state with medical probability that Dr. Davis caused the death of Mr. Cox, can you?

Mr. Rice: Object to the form.

The Witness: That's correct.

Defendant's motion rests solely on Dr. Leavy's admission to the last question that he could not "state with medical probability that Dr. Davis caused the death of Mr. Cox." Plaintiffs respond twofold.

First, Plaintiffs assert that the single deposition answer Defendant relies upon in his motion is inadmissible. Plaintiffs note that their attorney properly objected to the form of the question during the deposition. They argue that the question misstated the proper legal standard for expert

medical opinions as “medical probability” instead of “reasonable medical probability.” See Pope v. Ransdell, 833 P.2d 965, 974 (Kan. 1992) (“When medical experts are giving opinion testimony, the expert must give such opinions within a reasonable medical probability.”). Further, they state that the question is legally deficient because Defendant’s attorney only used the word “caused,” when a claim for medical malpractice can be based on conduct that “caused or contributed” to a plaintiff’s injuries. Because of these deficiencies, Plaintiffs argue that the question Defendant relies upon is inadmissible and may not be used at trial or for purposes of his motion for summary judgment.

Second, Plaintiffs argue that Dr. Leavy’s deposition testimony demonstrates that genuine issues of material fact exist as to whether Defendant contributed to the decedent’s death. While conceding that Defendant’s actions are not the sole cause of Mr. Cox’s death, Plaintiffs maintain that the portions of Dr. Leavy’s testimony quoted above establish that Defendant’s malpractice contributed to the decedent’s death. See Sharples, 816 P.2d at 397 (citations omitted) (stating that a plaintiff must generally establish “a causal connection between the negligent act and the injury or that the act caused or contributed to the injury.”).

The court concludes that Dr. Leavy’s deposition testimony, taken as a whole, is sufficient to create a genuine issue for trial as to whether Defendant’s actions were a contributing cause to Mr. Cox’s death. Dr. Leavy testified that Defendant “totally missed” Mr. Cox’s injury and provided him with improper medical treatment. The court determines that these statements provide the degree of proof required from a medical expert to submit the case to a jury. In addition, the court

reserves ruling on the admissibility of Defendant's last question quoted above until trial.

Accordingly, Defendant's motion for summary judgment is denied.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendant's motion for partial summary judgment (Doc. 37) is denied.

Copies of this order shall be transmitted to counsel of record.

**IT IS SO ORDERED.**

Dated at Kansas City, Kansas, this 14th day of September 2004.

/s/ G.T. VanBebber  
G. Thomas VanBebber  
United States Senior District Judge