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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Angela Williams, as mother and next friend of Li'Jonas Earl Williams, a deceased minor

v.

Dr. Wesley H. Barry, Jr., and Advanced Surgical Associates, P.C.

Appeal from Montgomery Circuit Court
(CV-16-901044)

WISE, Justice.

The plaintiff below, Angela Williams ("Williams"), as mother and next friend of Li'Jonas Earl Williams, a deceased minor, appeals from a judgment as a matter of law entered in

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favor of the remaining defendants below, Dr. Wesley H. Barry, Jr., and Advanced Surgical Associates, P.C. (hereinafter sometimes collectively referred to as "the defendants"). We reverse and remand.

Facts and Procedural History

Li'Jonas Williams was a 17-year-old with sickle-cell disease. On June 29, 2014, Li'Jonas went to the emergency room at Southern Regional Medical Center in Georgia ("the Georgia hospital") complaining of back and chest pain. A CT scan performed at the Georgia hospital showed that Li'Jonas had cholelithiasis, which is stones in the gallbladder.

On July 7, 2014, Li'Jonas and Williams saw Li'Jonas's pediatrician in Montgomery, Dr. Julius Sadarian. Dr. Sadarian's notes indicated that Li'Jonas "presents with preventive exam and referral for gallstones removal." Dr. Sadarian referred Li'Jonas to Dr. Barry for gallbladder removal.

On July 17, 2014, Li'Jonas and Williams saw Dr. Barry, a board-certified surgeon, at his practice, Advanced Surgical Associates, P.C. Dr. Barry stated that patients complete a patient-history form and that his records include a summary of

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that history. Dr. Barry noted that Li'Jonas was "[a] 17-year old with documented gallstones" based on a review of the CT scan. Dr. Barry also noted that Li'Jonas had sickle-cell disease. Dr. Barry's notes indicated that Li'Jonas had had about a one-month history of intermittent pain in the upper abdomen and then radiating to the back and that Li'Jonas's symptoms were associated with nausea and fatty-food intake.

Dr. Barry testified that the fact that Li'Jonas's symptoms were associated with fatty-food intake was consistent with gallbladder disease. Dr. Barry testified that he did not order an ultrasound because he already had the CT scan showing the presence of gallstones. Dr. Barry diagnosed Li'Jonas with chronic cholecystitis and cholelithiasis and recommended that he undergo a cholecystectomy, which is the removal of the gallbladder.

Dr. Barry performed the cholecystectomy on Li'Jonas at Jackson Hospital on the morning of August 4, 2014. Dr. Barry testified that Li'Jonas tolerated the procedure well; that Li'Jonas did not experience any complications during the surgery; and that Li'Jonas had only about 10ccs of blood loss during the surgery. Testimony was presented that 10ccs is the

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equivalent of about 2 teaspoons. Dr. Barry testified that, to remove the gallbladder, the cystic artery and the cystic duct must be cut. He further testified that, during such a surgery, he typically places four surgical clips on the cystic artery and four surgical clips on the cystic duct. Dr. Barry was asked whether, on occasion, he may have used more than four clips. Dr. Barry responded that he was sure that he might have and that, if he did not like how one clip fit, he might put another on. Dr. Barry further testified that, once he has put the four clips on the artery and the four clips on the duct, he then cuts the artery and the duct between the four clips on each structure. Dr. Barry testified that, once he cuts the artery and the duct, he removes the gallbladder; that some of the clips come out with the gallbladder; that the remaining clips stay inside the body; and that those clips are intended to stay in the body forever. He further testified that the purpose of the clips is to close and secure the artery and the duct so that, once the gallbladder is removed, those structures are closed off and there is no bleeding from the artery and nothing coming from the duct. He further testified that, if you were to cut the cystic artery without

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securing it with clips, it would continue to bleed tremendously; that it would be immediately obvious; and that that did not happen with Li'Jonas.

Li'Jonas did not experience any problems when he was in the post-anesthesia-care unit or when he was in the outpatient recovery room. He was subsequently discharged from Jackson Hospital at 11:22 a.m.

On the evening of August 4, 2014, Li'Jonas was found unresponsive at his home. Emergency personnel arrived at the scene and started CPR. Li'Jonas was transported to the Baptist Medical Center South emergency room by ambulance. Li'Jonas arrived at the emergency room at 7:06 p.m. According to hospital records, Li'Jonas was brought to the hospital by emergency-medical services ("EMS"); he was unresponsive; and the amount of downtime was unknown. The records also indicated that EMS personnel stated that Li'Jonas had had his gallbladder removed that day; that he went home; that his family went to a football game; and that, when they came back home, Li'Jonas was unresponsive. Emergency-room personnel continued CPR and performed various treatments in an attempt to revive Li'Jonas. The notes of Dr. Amitricia Lumpkin, one

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of the doctors who treated Li'Jonas in the emergency room, indicated that Dr. John Moorehouse, another physician who treated Li'Jonas, had performed a FAST¹ ultrasound and that the FAST ultrasound showed no cardiac activity and that there was no free intraperitoneal fluid. Testimony was presented that the finding of no free intraperitoneal fluid meant there was no fluid or blood in Li'Jonas's abdomen. Ultimately, the efforts to revive Li'Jonas were unsuccessful, and he was pronounced dead at 7:38 p.m.

On August 4, 2016, Williams sued Dr. Barry, Advanced Surgical Associates, Jackson Hospital, and Renea Majors, a postoperative nurse at Jackson Hospital, and she subsequently amended her complaint several times.² In her fourth amended complaint, Williams asserted a wrongful-death claim based on allegations of medical malpractice pursuant to the Alabama Medical Liability Act, § 6-5-480 et seq. and § 6-5-540 et

¹"FAST" stands for Focus Assessment with Sonogram for Trauma.

²The trial court entered a summary judgment in favor of Jackson Hospital and Majors "with regard to all acts or omissions other than Nurse Majors' handling of Li'Jonas Williams' discharge from the hospital on August 4, 2014." The remaining claims against Jackson Hospital and Majors were subsequently dismissed.

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seq., Ala. Code 1975, and a claim of negligence/wantonness. On December 18, 2017, Dr. Barry and Advanced Surgical Associates filed their answer to the fourth amended complaint, which they later amended.

The trial in this case started on August 27, 2018. On September 10, 2018, the defendants filed a written motion for a judgment as a matter of law at the close of Williams's evidence. Williams filed a written response and a supplemental response to that motion. On September 11, 2018, the trial court entered an order granting the defendants' motion for a judgment as a matter of law.

On October 10, 2018, Williams filed a motion to alter, amend, or vacate the judgment. On November 8, 2018, the defendants filed their opposition to Williams's postjudgment motion. Williams's postjudgment motion was subsequently denied by operation of law. This appeal followed.

Standard of Review

""When reviewing a ruling on a motion for a [judgment as a matter of law], this Court uses the same standard the trial court used initially in granting or denying the motion. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate issue is whether the nonmovant has

presented sufficient evidence to allow the case or issue to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992).... A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a [judgment as a matter of law], this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. If the question is one of law, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992)."

"[Alabama Dep't of Transp. v. Land Energy, Ltd.,] 886 So. 2d [787,] 791-92 [(Ala. 2004)] (quoting Ex parte Alfa Mut. Fire Ins. Co., 742 So. 2d 1237, 1240 (Ala. 1999))."

Housing Auth. of Birmingham Dist. v. Logan Props., Inc., 127 So. 3d 1169, 1173 (Ala. 2012).

"We apply the same standard of review to a ruling on a motion for a [judgment as a matter of law] as the trial court used in initially deciding the motion. This standard is 'indistinguishable from the standard by which we review a summary judgment.' Hathcock v. Wood, 815 So. 2d 502, 506 (Ala. 2001). We must decide whether there was substantial evidence,

when viewed in the light most favorable to the plaintiff, to warrant a jury determination. City of Birmingham v. Sutherland, 834 So. 2d 755 (Ala. 2002). In Fleetwood Enters., Inc. v. Hutcheson, 791 So. 2d 920, 923 (Ala. 2000), this Court stated that "[s]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." 791 So. 2d at 923 (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989))."

"Alabama Power Co. v. Aldridge, 854 So. 2d 554, 560 (Ala. 2002)."

"Black v. Comer, 38 So. 3d 16, 22 (Ala. 2009)."

Hill v. Fairfield Nursing & Rehab. Ctr., LLC, 134 So. 3d 396, 401 (Ala. 2013).

Discussion

Williams argues that the trial court erroneously granted the defendants' motion for a judgment as a matter of law. Specifically, she asserts that she "presented substantial evidence of breaches of the standard of care by Dr. Barry that proximately caused Li'Jonas's death." Williams's brief at p. 17.

"This Court has stated:

"'"To prevail on a medical-malpractice claim, a plaintiff must prove '"1) the appropriate standard of care, 2) the doctor's deviation from that standard, and 3) a proximate causal connection between the doctor's act or omission constituting the breach and the injury sustained by the plaintiff.'" Pruitt [v. Zeiger], 590 So. 2d [236,] 238 [(Ala. 1991)] (quoting Bradford v. McGee, 534 So. 2d 1076, 1079 (Ala. 1988))." Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533, 549 (Ala. 2008).

"'"A plaintiff in a medical-malpractice action must ... present expert testimony establishing a causal connection between the defendant's act or omission constituting the alleged breach and the injury suffered by the plaintiff. Pruitt v. Zeiger, 590 So. 2d 236, 238 (Ala. 1991). See also Bradley v. Miller, 878 So. 2d 262, 266 (Ala. 2003); University of Alabama Health Servs. Found., P.C. v. Bush, 638 So. 2d 794, 802 (Ala. 1994); and Bradford v. McGee, 534 So. 2d 1076, 1079 (Ala. 1988). To prove c a u s a t i o n in a medical-malpractice case, the plaintiff must demonstrate '"that the alleged negligence probably caused, rather than only possibly caused, the plaintiff's injury.'" Bradley, 878 So. 2d at 266 (quoting University of Alabama Health Servs., 638 So. 2d at 802)."

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"Sorrell v. King, 946 So. 2d 854, 862 (Ala. 2006)."

"Breland v. Rich, 69 So. 3d 803, 814-15 (Ala. 2011)."

Smith v. Fisher, 143 So. 3d 110, 123 (Ala. 2013).

"The plaintiff in a medical-malpractice action is required to present substantial evidence indicating both that the defendant health-care provider "failed to comply with the standard of care and that such failure probably caused the injury or death in question." Mobile OB-GYN, P.C. v. Baggett, 25 So. 3d 1129, 1133 (Ala. 2009) (quoting § 6-5-549, Ala. Code 1975)."

Hill, 134 So. 3d at 401.

A. Breach of the Standard of Care

Dr. Hien Tan Nguyen, a board-certified surgeon, testified as an expert for Williams. During his testimony, Dr. Nguyen stated that, based on Dr. Barry's notes, it was his understanding that Dr. Barry made three diagnoses when he initially saw Li'Jonas -- sickle-cell disease, cholelithiasis, and chronic cholecystitis, which means that there has been long-term inflammation of the gallbladder. He testified that Dr. Barry's notes basically state that Li'Jonas might have a condition associated with the dysfunction of his gallbladder. He further testified that, in this situation, Li'Jonas was stating he was having nausea after fatty-food intake, which

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implies that there was something wrong with his gallbladder. However, he testified that, prior to this, there were no other medical records that suggested that Li'Jonas had pain or nausea of any kind after eating fatty foods.

Dr. Nguyen testified that Dr. Barry should have had an ultrasound performed on Li'Jonas before he committed him to surgery. He also testified that the ultrasound was required before making a diagnosis of cholecystitis. He further testified that, based on Li'Jonas's bilirubin levels, an ultrasound should have been performed to determine whether Li'Jonas also had a stone in his biliary tree, which would have required a separate procedure from the cholecystectomy. Dr. Nguyen testified that the CT scan that had been conducted at the Georgia hospital was a CT angiogram; that the purpose of that CT scan was to look for blood-vessel issues; that it was not performed to look at the gallbladder; and that the scan just incidentally found gallstones in the gallbladder. He further testified that that CT scan was completely inadequate for making a diagnosis of chronic cystitis; that it was inadequate for determining whether there was a stone in

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the biliary tree; and that the CT scan was not designed to look for those things. Subsequently, the following occurred:

"[PLAINTIFF'S COUNSEL:] Dr. Nguyen, do you agree with me that Dr. Barry breached the standard of care by not conducting this ultrasound on Li'Jonas' gallbladder prior to performing the surgery?

"[DR. NGUYEN:] With all due respect, Dr. Barry, I absolutely do think that you breached the standard of care by not getting this ultrasound in this young kid.

". . . .

"[PLAINTIFF'S COUNSEL:] Do you believe that Dr. Barry breached the standard of care by recommending this cholecystectomy?

"[DR. NGUYEN:] I believe that there was an insufficient evidence to make a diagnosis that the gallbladder was inflamed.

"As a matter of fact, in retrospect, looking at the pathology report, we know that the gallbladder was normal and did not need to be removed. We also know from Dr. Barry's own words that when he performed the operation, the gallbladder looked normal. He described it as a Robin's egg, a blue Robin's egg. That is a normal gallbladder and did not need to be removed.

"There was insufficient evidence at the beginning to make the diagnosis of gallbladder disease. During the operation, there was insufficient visual evidence that the gallbladder was diseased. And after the surgery, the pathology report, which is something that we are mandated to do -- we can't remove an organ from a patient and throw it away. We have to send it to pathology.

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The pathologist came back with a thorough report stating, in essence, that the gallbladder was absolutely normal. And that basically corroborates my opinion that this patient did not need his gallbladder removed surgically.

"[PLAINTIFF'S COUNSEL:] And is it your opinion, Dr. Nguyen, based on your training, skill, and knowledge and experience as a general surgeon that Dr. Barry breached the standard of care when he performed this surgery on August 4, 2014?"

"[DR. NGUYEN:] It is."

Dr. Nguyen also testified that Dr. Barry's diagnosis of cholelithiasis just meant that there were stones within the gallbladder. He went on to testify that the simple fact that there are stones in the gallbladder does not mean that the gallbladder is not working correctly. He further testified that, of the people who have stones in the gallbladder, maybe 20 percent become symptomatic; that 80 percent of people who have gallstones do not need an operation because the stones are not bothering them; that the only time the gallbladder needs to be removed is if the stones are causing some of type of dysfunction; that there was not evidence indicating that the stones in Li'Jonas's gallbladder were causing any kind of dysfunction in this case; and that, therefore, the diagnosis

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of having stones in the gallbladder was not enough to commit Li'Jonas to surgery.

The defendants presented conflicting evidence to establish that the gallbladder surgery was medically necessary; that the standard of care did not require that Dr. Barry order an ultrasound before recommending and performing surgery on Li'Jonas; and that Dr. Barry did not breach the standard of the care by recommending and performing the cholecystectomy on Li'Jonas. However, when viewing the evidence in a light most favorable to Williams, Dr. Nguyen's testimony presented substantial evidence to create a factual dispute requiring resolution by the jury as to whether Dr. Barry breached the applicable standard of care by recommending and performing an unnecessary surgery on Li'Jonas.

B. Proximate Cause

Next, we must determine whether Williams presented substantial evidence that the purportedly unnecessary surgery was the proximate cause of Li'Jonas's death.

"The standard for proving causation in a medical-malpractice action is not proof that the complained-of act or omission was the certain cause of the plaintiff's injury. Instead, as this Court has frequently reiterated, the standard is one of the 'probable' cause: ""There must be more than

the mere possibility that the negligence complained of caused the injury; rather, there must be evidence that the negligence complained of probably caused the injury."'" Lyons v. Vaughan Reg'l Med. Ctr., LLC, 23 So. 3d 23, 27-28 (Ala. 2009) (quoting Sorrell v. King, 946 So. 2d 854, 862 (Ala. 2006), quoting in turn DCH Healthcare Auth. v. Duckworth, 883 So. 2d 1214, 1217 (Ala. 2003), quoting in turn Parker v. Collins, 605 So. 2d 824, 826 (Ala. 1992) (emphasis omitted))."

Hill, 134 So. 3d at 406.

"'In Cain v. Howorth, 877 So. 2d 566 (Ala. 2003), this Court stated:

"'"'"To present a jury question, the plaintiff [in a medical-malpractice action] must adduce some evidence indicating that the alleged negligence (the breach of the appropriate standard of care) probably caused the injury. A mere possibility is insufficient. The evidence produced by the plaintiff must have 'selective application' to one theory of causation."'"

"'877 So. 2d at 576 (quoting Rivard v. University of Alabama Health Servs. Found., P.C., 835 So. 2d 987, 988 (Ala. 2002)).'"

Lyons v. Vaughan Reg'l Med. Ctr., LLC, 23 So. 3d 23, 28 (Ala. 2009) (quoting Sorrell v. King, 946 So. 2d 854, 862 (Ala. 2006)). In Golden v. Stein, 670 So. 2d 904 (Ala. 1995), this Court noted that, when a plaintiff alleges medical malpractice based on an unnecessary medical procedure, expert testimony is

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not necessary to prove certain types of damages. However, "any claims for damages based on complications from the unnecessary procedure would be subject to the general rule that expert testimony is normally required to establish proximate cause in the medical malpractice context." 670 So. 2d at 908.

In this case, Williams introduced into evidence Li'Jonas's death certificate, which listed the cause of death as cardiopulmonary arrest. "Post Gall bladder surgery" was listed under the section of the death certificate titled "Other Significant Conditions Contributing to Death." However, no autopsy was performed at that time.

The evidence established that Li'Jonas's body was exhumed over two and one-half years after he died; that Dr. James Shaker performed an autopsy on Li'Jonas's body on March 20, 2017; that Dr. Shaker prepared an autopsy report; and that Dr. Amy Hawes and Dr. Jonathan Eisenstat observed the autopsy. Evidence was also presented indicating that the embalming of Li'Jonas's body was not very good and that the body was severely decomposed at the time of the autopsy.

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Dr. Shaker did not testify at trial, but his autopsy report was admitted into evidence. In the "Final Anatomic Diagnoses" section of his report, Dr. Shaker listed the following under the subsection titled "Hepatobiliary System":

- "A. Intraperitoneal hematoma, approximately 110 grams of clotted blood mixed with liquid blood
- "B. Cystic duct with surgical metallic clip
- "C. Cystic artery without visible surgical clipping."

He further listed the cause of death as "Postoperative Complication of Cholecystectomy." In the "Internal Examination" section of the report, under the Hepatobiliary System subsection, Dr. Shaker stated, in pertinent part:

"The gallbladder has been surgically removed with one surgical clip noticed over the cystic duct. The cystic artery has no surgical clipping."

During the trial, Dr. Nguyen testified that he believed that the surgery performed by Dr. Barry caused Li'Jonas's death. Subsequently, the following occurred:

"[PLAINTIFF'S COUNSEL:] And what do you base that -- what medical findings do you base that on?"

"[DR. NGUYEN:] Well, first of all, it's a 17-year-old kid who died within 12 hours after an operation. There's not a lot of things that can kill a person that fast. One of which is bleeding. If the person bleeds, they can die within 12 hours."

In this situation I base my opinion on the operative notes on what was used to clip the cystic artery on the medical records showing that the patient basically was in cardiopulmonary arrest after he was discharged from the hospital the same day and an autopsy report which documented there was -- that there was no clip on the cystic artery which is one of the blood vessels that has to be divided for the gallbladder to be removed.

"[PLAINTIFF'S COUNSEL:] And did that surgery report also document that there was a certain amount of blood in the area of the operation?

"[DR. NGUYEN:] The autopsy report was striking to me in that it was done two years after Li'Jonas died. This body was exhumed and evaluated by forensic pathologists.

"Within the documentation, there was also mention of 110 grams of blood or blood-related products found within the pelvis two years after the patient died.

"[PLAINTIFF'S COUNSEL:] And is that striking to you as a physician?

"[DR. NGUYEN:] Absolutely, it is. Because, as you know, blood products, these red blood cells, are rather fragile. You know, if it's just a small amount of blood, it probably would have broken down by the time that the forensic pathologist exhumed the body."

Dr. Eisenstat testified as an expert for the defense. Dr. Eisenstat testified that he was the chief medical examiner for the Georgia Bureau of Investigation and that, on occasion, he would consult on private litigation matters such as this

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case. In this case, Dr. Eisenstat attended Dr. Shaker's autopsy of Li'Jonas's body as an observer. He further testified that the first thing he noted during the autopsy was the fact that the body was severely decomposed.

Dr. Eisenstat testified that, at the time of the autopsy, he knew there was a question regarding the cholecystectomy Dr. Barry had performed on Li'Jonas before his death; that he and Dr. Shaker focused pretty intensely on the location where the gallbladder was removed; and that that was the area underneath the liver. He testified that he observed while Dr. Shaker exposed and viewed that area of the body and that he took multiple photographs as well. Dr. Eisenstat testified that he saw that Dr. Shaker had reported that he "found the cystic duct with surgical metal clip and the cystic artery without visible surgical clipping." However, he testified that he did not agree with those findings from Dr. Shaker. When asked why he did not agree, he replied:

"Well, it's very apparent for me at the time of autopsy and then obviously reviewing the photographs as I reviewed the case that there were multiple clips on different structures in what I'll call the gallbladder fossa or the area where the gallbladder used to be."

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On a subsequent page of the autopsy report, Dr. Shaker reported that the gallbladder had been surgically removed with one surgical clip noticed over the cystic duct and that the cystic artery had no surgical clipping. Dr. Eisenstat testified that he absolutely disagreed with that finding.

Dr. Eisenstat was asked about Dr. Shaker's opinion as to Li'Jonas's cause of death. Dr. Eisenstat testified that, essentially, Dr. Shaker's opinion was that there was no clip on the cystic artery, which led to bleeding that in turn led to or contributed to Li'Jonas's death. He stated that it was his understanding that Dr. Shaker's general conclusion was that Li'Jonas bled to death because the cystic artery was not clipped. However, Dr. Eisenstat testified that there was not any evidence that Li'Jonas bled to death.

When going through the photographs, Dr. Eisenstat testified that he could see multiple surgical clips at the location where the gallbladder had been removed and that he could see surgical clips on two different structures. In discussing one of the photographs he took during the autopsy, Dr. Eisenstat stated:

"So we have two structures where the anatomy of that area and what is supposed to be clipped is the

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cystic duct and the cystic artery, and we have two tubular structures that are at different angles that are both clipped multiple times."

While Dr. Eisenstat was looking at a photograph Dr. Hawes took during the autopsy, the following occurred:

"[DEFENSE COUNSEL:] So is it your opinion that we've got five or six surgical clips documented at the location they should be following the removal of the gallbladder?

"[DR. EISENSTAT:] Yes, sir.

"[DEFENSE COUNSEL:] And do I follow that based on your opinion of what we're looking at, based on the angle and the direction and the plane on which these clips are viewed here that -- am I following you that these clips in your opinion show that a tubular structure is clipped and these clips show that a separate tubular structure is clipped?

"[DR. EISENSTAT:] Yes, sir.

"[DEFENSE COUNSEL:] And, Doctor, what is your understanding as to how many structures are clipped and secured during the removal of a gallbladder?

"[DR. EISENSTAT:] So the two major structures are the cystic duct and the cystic artery. Now, you know, you may have little what we call -- what the surgeons call bleeders which doesn't mean a massive bleed. They're just -- you need to clip off these little vessels.

"But the major structures are the cystic artery which is a branch of a bigger artery going up to the gallbladder and then the cystic duct which is a branch of a bigger duct that goes to the liver that's going up to the gallbladder.

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"So those are -- need to be clipped prior the removal of the gallbladder?

"[DEFENSE COUNSEL:] And is it your opinion that there are two tubular structures clipped and secured in these photographs?

"[DR. EISENSTAT:] Yes, in the area of the gallbladder fossa.

"[DEFENSE COUNSEL:] Doctor, in terms of general anatomy, can you discern from this photo where the artery would likely be in comparison with the duct?

"[DR. EISENSTAT:] Well, you know, from -- from anatomy itself, the artery actually comes up a little over the duct itself. So, you know, if you were to look at these two structures, the one that's coming out at us just from an anatomical point of view would be the artery and the one coming down would be the duct.

"But I have to say, you know, he was decomposed, so there was alteration of the normal tissue. And I'll say, you know, I -- I can't be specific, but that would be the normal anatomy there.

"[DEFENSE COUNSEL:] Dr. Eisenstat, given the condition of the body, did you observe any specific dissection identification and dissection by Dr. Shaker of the artery and the duct during the autopsy?

"[DR. EISENSTAT:] I did not, no."

(Emphasis added.)

Dr. Eisenstat testified that, based on what he had observed during the autopsy and what he had observed in the autopsy photographs, it was his opinion that there was no

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evidence indicating that Li'Jonas was bleeding from the cystic artery as a result of the surgery. He further testified that he had reviewed the medical records from Dr. Barry and Jackson Hospital regarding the surgery; that he did not see any indication that there were any issues with bleeding during the surgical procedure; and that he did not see anything in the records that would be indicative of an intra-abdominal bleed. He further testified that he had reviewed the emergency-room records from Baptist South. With regard to those records, he stated:

"[DEFENSE COUNSEL:] Did you see any indication in the emergency room records that would support a theory that Li'Jonas Williams had bled to death prior to his arrival at the emergency room?

"[DR. EISENSTAT:] So, I mean, he essentially came in essentially dead on arrival. So there were a number of -- there was nothing in there that would have said that he -- he bled to death. But already being dead on arrival, that's a little hard.

"But there wasn't -- they did do a test that confirmed what I saw at autopsy that there wasn't any intra-abdominal hemorrhage.

"[DEFENSE COUNSEL:] And what test is that?

"[DR. EISENSTAT:] That's the FAST test, F-A-S-T."

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He further testified that he was referring to the FAST ultrasound.

Dr. Eisenstat testified that he was also familiar with Dr. Shaker's conclusion that he found approximately 110 grams of clotted blood mixed with liquid blood. Defense counsel asked Dr. Eisenstat if he had considered that conclusion and if he had an opinion as to whether that was an indication of internal bleeding. Dr. Eisenstat replied that he absolutely did consider that and that there were a few problems there. He testified that he believed that the 110 grams was a mixture of a little bit of blood, decomposed liver, and possibly some embalming fluid. Dr. Eisenstat testified that the amount of material that was present and the localization of whatever the decomposed material was was nowhere near what he would expect for hemorrhagic complications from a procedure that contributed to or caused someone's death.

When asked if he agreed or disagreed with Dr. Shaker's conclusion in the autopsy report that the cause of death was postoperative complications of cholecystectomy, Dr. Eisenstat replied:

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"Well, I mean, it's a very general statement. As I -- as we've talked about, there's no mechanical post-operative complication of the cholecystectomy.

". . . .

"... You know, unfortunately, Li'Jonas did not have an autopsy right when he died. So doing an autopsy on an embalmed, whether it be good embalming or a not good embalming, decomposed individual makes it much more difficult to say what the actual cause of death was. But as far as post-operative complication of cholecystectomy, there was absolutely no mechanical post-operative complication from the procedure."

He further testified that it was his opinion that Li'Jonas "did not die as a result of the cystic artery not being clipped because the cystic artery was clipped."

Defense counsel asked whether Dr. Eisenstat had any opinions as to what might have caused Li'Jonas's death. Dr. Eisenstat testified that he had a differential diagnosis, which was a list of possibilities. He further testified that he did not believe that anyone, including Dr. Shaker, could make a definitive determination to a degree of medical probability as to what was the cause of death for Li'Jonas. However, he stated that he thought he could say to a reasonable degree of medical certainty that mechanical

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complications from the surgery and bleeding were not what caused his death.

During the plaintiff's counsel's cross-examination of Dr. Eisenstat, the following occurred:

"[PLAINTIFF'S COUNSEL:] And I want to get this straight. It's your testimony today to the ladies and gentlemen of the jury that you can look in that photograph and it's your position that those clips are on the cystic artery and cystic duct?

"[DR. EISENSTAT:] Yes. Because they're both tubular structures. And also there's no evidence of any bile leak or -- which would be a green discoloration. There's no evidence of, in my opinion, a hemorrhagic complication. So in that area which is where you have the cystic duct and cystic artery, it's basically what's there may be a little soft connective tissue.

"We have multiple clips on two tubular structures which is the area of the cystic duct and cystic artery. So more likely than not, it is the cystic duct and cystic artery."

Subsequently, the following occurred:

"[PLAINTIFF'S COUNSEL:] And so can you identify for me where the cystic duct is?

"[DR. EISENSTAT:] Well, where all of those clips are going up is clipping off one tubular structure, and then up to the left coming out of us -- out of the picture towards us is another tubular structure. So like I said when I was asked on direct, I started to say from an anatomic standpoint which would be which, but then I followed up by saying, well, he's decomposed, so it's a little more difficult to say which one is which.

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"[PLAINTIFF'S COUNSEL:] That it's decomposed and it's hard to show these people or even yourself as a forensic pathologist where the cystic duct and artery is?

"[DR. EISENSTAT:] What I can say is I can't tell you which one is which, but they're both tubular structures, and those are the two tubular structures that lie underneath the liver in that location.

"[PLAINTIFF'S COUNSEL:] Is it your testimony that that's one of those tubular structures that's on that scissored clip?

"[DR. EISENSTAT:] I think the tubular structure runs where all the clips are. So, yes, underneath that, there is a tubular structure, but it's also the clip at the bottom and the clip just above it.

"So it's not just one clip on one tubular structure. There's a number of clips on that tubular structure."

"[PLAINTIFF'S COUNSEL:] Do you agree with me that, more likely than not, this surgery contributed in causing Li'Jonas Williams' death?

"[DR. EISENSTAT:] No, I can't say that.

"[PLAINTIFF'S COUNSEL:] Okay. But you can't rule that out, can you, as possible?

"[DR. EISENSTAT:] I will agree with you. I can't fully rule that out. I can rule out the mechanical aspect, but I can't rule out that it had any contributing factor."

(Emphasis added.) Subsequently, the following occurred:

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"[PLAINTIFF'S COUNSEL:] Can you identify where the cystic artery is?

"[DR. EISENSTAT:] Well, like I said, it's difficult because of the decomposition, but through the line of questioning of the -- the structure that's up and towards the top and the left with the two clips on it, that's probably the cystic artery. But what I'll say is that can I be a hundred percent specific? No, I can't.

"[PLAINTIFF'S COUNSEL:] Okay. So you can't sit here today, you didn't see it at the autopsy, and you can't see it here today after blowing these pictures up, and you can't identify to the jury where there is a clip on the cystic artery?

"[DR. EISENSTAT:] No. What I can say is that there's two tubular structures in that area, each of which have multiple clips on them, and that's the area where the cystic duct and the cystic artery are.

"[PLAINTIFF'S COUNSEL:] That tubular, what you suggest is the cystic artery, is not visible?

"[DR. EISENSTAT:] I'm sorry. Say again.

"[PLAINTIFF'S COUNSEL:] Is the cystic artery visible?

"[DR. EISENSTAT:] Well, it's decomposed and squished for lack of a better term.

"[PLAINTIFF'S COUNSEL:] All right. And Dr. Shaker said he dissected that artery; correct?

"[DR. EISENSTAT:] He said that in his deposition, yes.

"[PLAINTIFF'S COUNSEL:] But is there -- of all of these photos, is there anything better than this

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photograph that's up there to show how there is a clip on the cystic artery?

"[DR. EISENSTAT:] No. This is by far the best photograph.

"[PLAINTIFF'S COUNSEL:] And you can't tell the ladies and gentlemen of the jury which -- if there is a clip on the cystic artery, you can't point it out, can you?

"[DR. EISENSTAT:] Well, again, I'm going to go back to the same thing. There are two tubular structures in that area. Anatomically, it would make sense that the top left is the cystic artery, but due to decomposition, I can't say specifically if that is the artery or not.

"[PLAINTIFF'S COUNSEL:] And is that a single clip on the cystic duct? Is that what you suggest is the cystic duct? Did I not hear you say just in redirect right here that on the anatomy, this -- these lower ones would be the cystic duct?

"[DR. EISENSTAT:] Correct.

"[PLAINTIFF'S COUNSEL:] Okay. So Dr. Shaker says that there was one clip on the cystic duct; correct?

"[DR. EISENSTAT:] I know what he says there. He says that there's only one clip in the entirety of the gallbladder fossa. It's very obvious that there are multiple clips there.

"So I don't want to get into an argument with Dr. Shaker. I full on disagree with him. It's very obvious that there are multiple clips in different planes on two different structures that are located in the area where the cystic duct and the cystic artery would be. There's no significant associated

hemorrhage. You can't just take one thing by itself and you put the case together.

"And I -- so I disagree with Dr. Shaker. He did say there's one clip, which I'll let the picture speak for itself, and that it was only on one structure. I don't know what else I can say about that.

"[PLAINTIFF'S COUNSEL:] I'll pull it up and read it to you. But it says under hepatobiliary system, B, cystic duct with surgical, metallic clip; correct?

"[DR. EISENSTAT:] Yes, he said that.

"[PLAINTIFF'S COUNSEL:] That's a singular clip.

"Can you identify where the cystic duct is clamped by more than one clip in this picture?

"[DR. EISENSTAT:] Well, in my opinion and, again, through anatomy, the duct is probably that here right there where you have the one, two, three clips going upwards, at least three clips going upwards.

"[PLAINTIFF'S COUNSEL:] But can you see the cystic duct in those?

"[DR. EISENSTAT:] Sir, it's decomposed, so things are going to collapse. So can I say I see the cystic duct? No. Can I say I see the cystic artery? No.

"But when you look at where the clips are and you look that they're scrunched, decomposed tubular structures, they are the cystic duct and cystic artery because there's nothing else that's there."

(Emphasis added.)

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The defense also called Dr. Richard Stahl as an expert. Dr. Stahl testified that he was a surgeon and an associate professor of surgery in the gastrointestinal-surgery division at the University of Alabama at Birmingham and that he was board certified in general surgery. Dr. Stahl testified that he had had occasions to become involved in determining cause of death in cases and in preparing death certificates.

Dr. Stahl testified that he had reviewed Dr. Shaker's deposition. He further testified that it was his understanding that Dr. Shaker, upon conducting an autopsy two and one-half years after death, had concluded that Li'Jonas bled to death and that he reached that conclusion because the cystic artery remained unclipped and unsecured after the gallbladder-removal surgery. Dr. Stahl testified that he had reviewed the autopsy report and photographs and that, based upon his review, he disagreed with Dr. Shaker's conclusion that Li'Jonas bled to death from an unclipped artery. Dr. Stahl testified that Dr. Shaker indicated in his deposition that there was a single clip. However, Dr. Stahl testified that he saw at least five, and possibly six, surgical clips in an autopsy photograph; that those clips appeared to be on two

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separate structures; and that those clips appeared to be appropriately placed. He further testified that there was not a great deal of blood in the abdomen. Dr. Stahl testified that, based on the autopsy photographs, he believed that the findings of a cystic duct with a surgical clip and a cystic artery without visible surgical clipping were wrong. When testifying, he stated that the photographs showed two structures that were clipped and identified what he believed to be the cystic artery and the cystic duct in one of the autopsy photographs. He further testified that, when a cholecystectomy is performed, two structures are clipped by the surgeon -- the cystic artery and the cystic duct -- and that he believed there were two structures clipped in the autopsy photograph.

Dr. Stahl acknowledged that, during his deposition, he said that the clips were applied to structures but that the structures themselves were largely decomposed; that there were two structures; and that he was not sure which one was the cystic duct and cystic artery. When asked if he was now able to review and determine the cystic duct and the cystic artery, Dr. Stahl replied:

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"With not a hundred percent certainty, but, yes, I think we have a pretty good idea. I have a pretty good idea of which is which."

He further explained that the deposition was a telephone deposition and that he was looking at Xerox copies of the photographs and not high-resolution images. Dr. Stahl testified that, when looking at the photographs on the computer with higher resolution, he had a pretty good estimation as to which structure was which. He further testified that he could see the cystic duct and the cystic artery in the photographs.

Dr. Stahl testified that he had also seen Dr. Shaker's findings and conclusions stating that there was an intraperitoneal hematoma that consisted of approximately 110 grams of clotted blood mixed with liquid blood. However, after having seen the photographs, the autopsy report, and Dr. Shaker's deposition testimony, it was his opinion that that finding would not support a conclusion that Li'Jonas bled to death.

Dr. Stahl also testified regarding differential diagnoses as to the cause of death in this case. He subsequently testified that, based on what happened at the time of death

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and the passage of time until the autopsy, he thought it would be impossible to tell with certainty the cause of death for Li'Jonas. However, he testified that he believed, "to a degree of medical certainty," that Li'Jonas did not die because he bled to death from an unclipped artery. He further testified that he did not think that there was any evidence of that. Dr. Stahl also testified that, based upon his education, training, and experience and his review of all the information and records, it was his opinion that Dr. Barry's surgery did not cause any injury or trauma to Li'Jonas; that Dr. Barry performed the surgery in an appropriate manner in accordance with the standard of care; and that the surgery did not cause Li'Jonas to suffer internal bleeding that resulted in his death. Dr. Stahl further testified that it was his opinion that Li'Jonas did not die from a postoperative complication of a cholecystectomy and that that was to a reasonable degree of medical certainty. He further testified that, although Li'Jonas died after undergoing surgery, he did not die as a direct result of that surgery. Finally, Dr. Stahl testified that, although he stated in his deposition

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that he was not certain as to what caused Li'Jonas's death, he could pretty easily say that it was not caused by hemorrhage.

The theory of Williams's claim against Dr. Barry was that he had breached the standard of care by recommending and performing an unnecessary surgery and that the unnecessary surgery was the proximate cause of Li'Jonas's death. Dr. Nguyen testified that it was his opinion that Dr. Barry had breached the standard of care by recommending and performing the surgery without first conducting an ultrasound and that the surgery was the proximate cause of Li'Jonas's death. Dr. Nguyen testified that he based his opinion as to the cause of death on the findings in Dr. Shaker's autopsy report. It is true that the defendants presented sharply conflicting evidence as to the issue of causation. Although Dr. Shaker's autopsy report referenced only one surgical clip, the undisputed evidence presented at trial established that multiple surgical clips were found in the location where Li'Jonas's gallbladder had been removed. Dr. Eisenstat and Dr. Stahl testified that the autopsy photographs showed that two distinct structures had been clipped. The defense also presented evidence indicating that only two structures -- the

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cystic duct and the cystic artery -- are typically clipped during a cholecystectomy.

However, Dr. Eisenstat testified that he could not, with 100% certainty, identify the cystic artery because of the decomposition of the body. Additionally, although Dr. Eisenstat testified that the cystic artery and the cystic duct are the two structures that are typically clipped during a cholecystectomy, he also stated:

"Now, you know, you may have little what we call -- what the surgeons call bleeders which doesn't mean a massive bleed. They're just -- you need to clip off these little vessels."

Additionally, although Dr. Eisenstat testified that mechanical complications from the surgery and bleeding were not what caused Li'Jonas's death, he could not completely rule out the possibility that the surgery was a contributing factor in Li'Jonas's death.

Based on the foregoing, when the evidence is viewed in a light most favorable to the plaintiff, Williams presented substantial evidence to create a factual dispute requiring resolution by the jury as to the issue whether the surgery performed by Dr. Barry was the proximate cause of Li'Jonas's death.

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For these reasons, the trial court erred when it granted the defendants' motion for a judgment as a matter of law.

Conclusion

For the above-stated reasons, we reverse the trial court's judgment and remand this case for proceedings consistent with this opinion.³

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

Sellers, J., dissents.

³Based on the foregoing, we pretermitt discussion of the remaining arguments raised by Williams.