

1 Present: Carrico, C.J., Compton, Lacy, Hassell, Keenan, Koontz,
2 JJ., and Poff, Senior Justice

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4 MARY ESTELLA POWELL,
5 EXECUTRIX OF THE ESTATE OF
6 WILLIAM G. POWELL, JR., DECEASED

7
8 v. Record No. 990319

OPINION BY
SENIOR JUSTICE RICHARD H. POFF
January 14, 2000

9
10 ANDREW MARGILETH, M.D.

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12
13 FROM THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG
14 John W. Scott, Jr., Judge

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16 This litigation commenced in January 1994 when William G.
17 Powell, Jr., (Powell) filed a motion for judgment against Dr. C.
18 R. Massey, III, and Dr. Andrew Margileth alleging medical
19 malpractice. Following Powell's death in 1995, his widow, Mary
20 Estella Powell, qualified as executrix of his estate, and the
21 trial court converted the case into a wrongful death action.

22 At the first trial of the case, the executrix non-suited
23 Dr. Margileth, and the jury returned its verdict in favor of Dr.
24 Massey. In April 1996, the executrix filed a motion for
25 judgment against Dr. Margileth alleging that his misdiagnosis
26 and treatment of his patient caused Powell's death from cancer-
27 related pneumonia. At the second trial conducted in June 1998,
28 the trial court granted the defendant's motion to strike the
29 plaintiff's evidence, and we awarded the plaintiff an appeal
30 from the judgment entered on that ruling.

1 We will review the chronology of the facts in evidence
2 related to questions presented by the plaintiff's assignment of
3 error.

4 On January 9, 1992, Dr. Massey, a specialist in
5 otolaryngology, measured a node in Powell's neck as 4 cm x 3 cm
6 and ordered a CT scan. As interpreted by a radiologist, the
7 scan conducted January 11, 1992 indicated that the size of the
8 "left cervical mass . . . is due to an enlarged internal jugular
9 node which most likely is an abscess"

10 On January 14, 1992, Dr. Massey aspirated fluid from the
11 enlarged node. Although he discussed the CT scan with Powell
12 and ordered cultures, he did not suggest a need for an
13 examination to rule out cancer.

14 Because Powell had told him that he had experienced some
15 exposure to cats, Dr. Massey referred Powell on January 21, 1992
16 to Dr. Margileth, an infectious disease specialist experienced
17 in the diagnosis and treatment of cat scratch disease. On
18 January 27, 1992, Dr. Margileth performed tests for tuberculosis
19 and cat scratch disease and measured the "swelling . . . in the
20 left anterior superior neck" as 4.4 x 6 x 2.6 cm. He advised
21 his patient that he had cat scratch disease and prescribed
22 antibiotics. The results of the CT scan had been furnished to
23 Dr. Margileth.

1 On February 18, 1992, Dr. Massey palpated a nodule in
2 Powell's neck which measured 4 x 2.8 cm. Dr. Massey performed
3 another examination on April 7, 1992 in the course of which he
4 suggested the possibility of cancer.

5 In June 1992, Powell discovered a second lump in his neck
6 and in July went for help to the Veterans Administration Medical
7 Center Hospital. A needle aspiration of the two lumps diagnosed
8 cancer representing a progression from stage III in January 1992
9 when the CT scan was conducted to stage IV in July 1992. Powell
10 underwent radiation therapy, surgery, and other treatment but
11 died of cancer three years later at the age of 40.

12 In the case of a wrongful death resulting from medical
13 malpractice, the plaintiff must prove a breach of the standard
14 of care and a proximate causal relationship between that breach
15 and the injury alleged. Griffett v. Ryan, 247 Va. 465, 470, 443
16 S.E.2d 149, 151 (1994); see also St. George v. Pariser, 253 Va.
17 329, 484 S.E.2d 888 (1997); Blondel v. Hays, 241 Va. 467, 403
18 S.E.2d 340 (1991).

19 When ruling on a defendant's motion to strike the
20 plaintiff's evidence, the trial court must draw all reasonable
21 inferences the evidence may raise in favor of the plaintiff.
22 Hadeed v. Medic-24 Ltd., 237 Va. 277, 285-86, 377 S.E.2d 589,
23 593 (1989). If it appears from the record that such inferences
24 are reasonable, then the issues concerning standards of care and

1 proximate cause are questions of fact to be determined by a
2 jury.

3 In a memorandum opinion dated October 6, 1998 explaining
4 its decision to grant the defendant's motion to strike the
5 plaintiff's evidence, the trial court held that "there is no
6 evidence or reasonable inference that would allow a jury of
7 reasonable persons to conclude that the Defendant's breaches of
8 the standards of care proximately caused the decedent's
9 injuries; adversely altered the required method of treatment; or
10 adversely affected his rate of survival."

11 Dr. Francois E. Holder, one of the plaintiff's expert
12 witnesses, testified that the defendant's misdiagnosis of cat
13 scratch disease caused his patient delay in diagnosis and
14 treatment of his cancer from January until July, and that if he
15 had been "informed of the possibility of cancer in January, and
16 options were offered in terms of biopsy for fine needle
17 aspirations, Mr. Powell would have had a diagnosis of cancer
18 probably the first week of February." Asked whether the delay
19 was "a direct and proximate cause of the failure of Dr.
20 Margileth to comply with the required standard of care," Dr.
21 Holder answered, "Yes, it was."

22 Dr. M. Karim Ali, who had treated Powell at the VA
23 Hospital, testified as an expert in the staging, treatment, and
24 surgery of cancer. Asked what would have been Powell's

1 "percentage chance of survival for 5 years" if he had "received
2 him as a patient based on the January 11, 1992 CAT scan report,"
3 which identifies the cancer as stage III, Dr. Ali said that
4 Powell would have had "[a]round 75 percent" chance of surviving
5 5 years compared to the "15 to 20 percent" chance he had in July
6 1992.

7 Dr. Oscar Tercilla, a professor at Medical College of
8 Virginia, was qualified as an expert in the staging and
9 treatment of cancer, estimating prognosis at the cancer stage,
10 and medical treatment caused by failure to make a timely
11 diagnosis. Dr. Tercilla testified as follows:

12 If Mr. Powell had been treated in January as opposed to
13 July it is my opinion that he had a higher likelihood of
14 being controlled of this disease than he had when he
15 presented at the VA in July. Because of that, you would
16 have avoided his recurrence which occurred in July of 1993
17 with the tumor reappearing in his tonsil and subsequent
18 treatment that came from that.

19
20 Absent a recurrence, the witness agreed "[i]n all
21 likelihood" that Dr. Margileth's patient "would still be alive."

22 Dr. Barbara Kipreos, a pathologist at the VA center, was
23 asked her opinion whether, "if Dr. Margileth would have
24 requested a fine needle aspirate at the Mary Washington Hospital
25 pathology laboratory" in January 1992, "Mr. Powell's cancer
26 would have been diagnosed at that time." In reply, the witness

1 said, "Yes, it is my opinion that it would have been diagnosed
2 at that time."*

3 We disagree with the trial court's ruling that "there is no
4 evidence or reasonable inference that would allow a jury of
5 reasonable persons to conclude that the Defendant's breaches of
6 the standards of care proximately caused the decedent's injuries
7 . . . or adversely affected his rate of survival." Qualified
8 experts in the field testified otherwise.

9 We hold, therefore, that the trial court erred in granting
10 the defendant's motion to strike the plaintiff's evidence, and
11 we will reverse the judgment entered below and remand the case
12 for a new trial in accordance with this opinion.

13 Reversed and remanded.

* The trial court found "no evidence before this court" that Powell would have consented to a fine needle aspiration if Dr. Margileth had recommended one during his examinations on January 27 and January 30. Irrespective of the issue whether such proof was required, we note that the record shows that Powell consented to such procedure on January 14 when his primary care physician, Dr. Massey, aspirated the large node in his neck.