RENDERED: APRIL 1, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000056-MR

BROOKE A. MORGAN APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 08-CI-000822

JEFFREY D. GLAZER, M.D. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; LAMBERT,[1] SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Brooke A. Morgan brings this appeal from an October 29, 2009, judgment of the Jefferson Circuit Court granting summary judgment in favor of Jeffrey D. Glazer, M.D. and dismissing Morgan's complaint alleging medical negligence. We affirm.

[1] Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Brooke Morgan was a patient of gynecologist, Dr. Jeffrey Glazer. Sometime in 2004, Morgan began to experience pain in her low back and her lower right front quadrant. Dr. Glazer determined Morgan had a cyst on her right ovary. On November 19, 2004, Dr. Glazer performed a laproscopic ovarian cystectomy to remove the cyst. The operative report indicated that an 8.0 cm ovarian cyst was removed from Morgan's right ovary. Morgan had a follow-up appointment with Dr. Glazer on February 7, 2005. An ultrasound conducted on that date reported that Morgan's right ovary was "normal". A second ultrasound was conducted on March 3, 2005. The report indicated that the right ovary was "poorly seen, if identified, appears normal."

Morgan subsequently moved to southern Illinios to attend graduate school. In May 2006, Morgan began seeing a new gynocologist, Dr. Francis Tsung. Later that year, an ultrasound revealed that Morgan now had a cyst on her left ovary. Dr. Tsung performed a disgnostic laproscopy and left ovarian cyst drainage on January 22, 2007. During the procedure, Dr. Tsung noted that Morgan's right ovary was absent. Dr. Tsung informed Morgan that her right ovary was absent following surgery.

Morgan filed a complaint against Dr. Glazer on January 22, 2008. Therein, Morgan alleged that Dr. Glazer committed medical negligence in the performance of the November 19, 2004, surgery by removing her right ovary

without her knowledge or consent. In his answer, Dr. Glazer denied removing Morgan's right ovary.

On July 13, 2009, Dr. Glazer moved for summary judgment on the ground that Morgan had not idientified an expert to testify that Dr. Glazer breached the standard of care in his treatment of Morgan. By summary judgment entered October 29, 2009, the circuit court determined that "expert testimony is required in order for Morgan to sustain her burden of proof" that Dr. Glazer committed medical negligence in the performance of the November 19, 2004, surgery. Thus, the circuit court granted Dr. Glazer's motion for summary judgment and dismissed Morgan's complaint. This appeal follows.

Morgan contends the circuit court erred by granting Dr. Glazer's motion for summary judgment and dismissing her medical negligence action against Dr. Glazer. Morgan specifically asserts that her treating physician, Dr. Tsung, testified by deposition that her right ovary was absent and that such testimony constituted expert testimony sufficient to create a genuine issue of material fact. We disagree.

Summary judgment is proper where there exists no issue of material fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991). When considering a motion for summary judgment, all facts and inferences must be viewed in a light most favorable to the non-moving party. *Ogden v. Employers Fire Insurance Co.,* 503 S.W.2d 727 (Ky. 1973).

In order to maintain a claim for negligence, plaintiff must prove duty, breach, causation, and injury. *Grubbs v. Barbourville Family Health Center, PSC,* 120 S.W.3d 682 (Ky. 2003). Generally, the negligence of a physician must be established by expert medical testimony. *Johnson v. Vaughn,* 370 S.W.2d 591 (Ky. 1963). To do so, a medical expert must testify to: "(1) the standard of skill expected of a reasonably competent medical practitioner and (2) that the alleged negligence proximately caused the injury." *Andrew v. Begley,* 203 S.W.3d 165, 170 (Ky. App. 2006).

However, in this Commonwealth, we have recognized two exceptions to the general rule requiring expert testimony in a medical malpractice case. *Id.* With these two exceptions, expert medical testimony is not required to establish negligence. The first exception is applicable where a layperson with general knowledge would have no difficulty recognizing the negligence. In this exception, the medical negligence is within the knowledge and understanding of an individual with no medical training. *Id.* The second exception "occurs when 'medical experts may provide a sufficient foundation for *res ipsa loquitur* on more complex matters.'" *Id*. at 170 (quoting *Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992)).

In this case, there existed ultrasound reports indicating the presence of Morgan's right ovary after Dr. Glazer's surgery and expert testimony that Morgan's right ovary could be absent due to reasons other than surgical removal – devascularization or retroperitonealization. Morgan's only expert evidence

consisted of the testimony of her treating physician, Dr. Tsung. However, Dr. Tsung did not testify that Dr. Glazer breached the standard of care in his treatment of Morgan, that Morgan's right ovary was previously removed by Dr. Glazer, or that Dr. Glazer was otherwise negligently responsible for the absent right ovary. Dr. Tsung simply testified that the right ovary was absent during the surgical procedure he performed in 2007.

The record indicates that Morgan failed to produce expert medical testimony evidencing that Dr. Glazer breached the standard of care and that such breach caused her to suffer the loss of her right ovary. And, this is not a case where medical expert testimony provided for application of *res ipsa loquitur* or where a lay person could easily recognize such negligence. Accordingly, neither exception to the general rule regarding expert testimony in a medical malpractice case was applicable to this case. Consequently, we conclude that Morgan was required to present medical expert testimony evidencing Dr. Glazer's negligence. As Morgan failed to do so, she did not present a *prima facie* case of Dr. Glazer's medical negligence.

Morgan next contends the circuit court erred by rendering summary judgment prematurely. Specifically, Morgan asserts that the circuit court should have determined "whether Brooke needed additional expert testimony before dismissing the case on summary judgment."

It is well-established that upon a motion for summary judgment the moving party has the burden of establishing that no genuine issue of material fact

exists. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). It is equally settled:

> If uncontroverted affidavits which clearly disclose the facts show that a genuine issue does not exist, the opposing party has an obligation to do something more than rely upon the allegations of his pleading. Since the moving party has the burden, he must make a prima facie showing that would entitle him to a summary judgment. The opposing party is then required by counter-affidavit, or otherwise, to show that evidence is available justifying a trial of the issue involved. . . .

Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914, 916 (Ky. 1955).

In this case, the record reveals that Dr. Glazer's motion for summary judgment was supported by an affidavit of an expert witness who opined that Dr. Glazer did not breach the standard of care in his surgical treatment of Morgan. Despite the circuit court granting Morgan an extension of time to respond to Dr. Glazer's motion for summary judgment, Morgan failed to secure expert testimony establishing Dr. Glazer's negligence or expert testimony to otherwise dispute Dr. Glazer's expert's opinion. It was incumbent upon Morgan to tender some expert evidence demonstrating a material issue of fact existed regarding whether Dr. Glazer breached the standard of care in his treatment of Morgan and that such breach caused her injury. *See Neel v. Wagner-Shuck Realty Co.*, 576 S.W.2d 246 (Ky. App. 1978). Moreover, Morgan had some eighteen months from the filing of her complaint until entry of summary judgment to obtain such expert testimony. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). As

such, the circuit court properly granted Dr. Glazer's motion for summary judgment and dismissed Morgan's complaint.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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