

RENDERED: JANUARY 27, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002113-MR

MARK LYNN HAYES, II, INDIVIDUALLY
AND AS ADMINISTRATOR OF THE ESTATE
OF KIMBERLY CARTER HAYES

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 07-CI-01377

ASHLAND HOSPITAL CORPORATION,
D/B/A KING'S DAUGHTERS' MEDICAL
CENTER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

TAYLOR, CHIEF JUDGE: Mark Lynn Hayes, II, individually and as
administrator of the Estate of Kimberly Carter Hayes, (collectively referred to as

appellants) bring this appeal from an October 22, 2010, summary judgment of the Boyd Circuit Court dismissing their medical malpractice action. We affirm.

Kimberly Carter Hayes was a morbidly obese forty-five-year old woman who was a resident of a long term nursing facility. In 2006, she was admitted to Ashland Hospital Corporation, d/b/a King's Daughters' Medical Center (Medical Center) for treatment of severe skin infections in her skin folds (including a medically resistant bacteria infection), cellulitis, and psoriasis. While an inpatient, Kimberly was prescribed and administered the antibiotic vancomycin. Subsequently, Kimberly was discharged from the Medical Center and returned to the long-term nursing facility.

Within twenty-four to forty-eight hours of discharge, Kimberly was again admitted to the Medical Center. Upon admission, it was noted that Kimberly suffered from acute renal failure, hypotension, and severe drug induced rash. Kimberly was transferred to Ohio State Medical Center, where she ultimately died in August 2006.

Appellants filed a complaint against the Medical Center alleging medical negligence. Appellants maintained that Kimberly's death was due to vancomycin toxicity and claimed that the Medical Center breached the standard of care when its pharmacy failed to monitor Kimberly's vancomycin levels.

Eventually, the Medical Center filed a motion for summary judgment arguing that appellants failed to identify expert testimony as to the standard of care or as to causation to establish the Medical Center's negligence. By summary

judgment, the circuit court concluded that the absence of expert testimony was fatal and dismissed appellant's medical negligence action against the Medical Center. This appeal follows.

Appellants contend that the circuit court erred by rendering summary judgment dismissing their medical negligence claim against the Medical Center. Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). The record must be viewed in a light most favorable to the nonmoving party, with all doubts resolved in the nonmoving party's favor. *Id.*

Appellants specifically maintain that sufficient facts were introduced to create material issues of fact upon breach of the standard of care and causation. In particular, appellants argue:

Appellant[s] assert[] that expert testimony was not necessary to create a genuine issue of material fact because [the Medical Center]'s own medical records established both the standard of care and its breach. First, at Appendix "B", [sic] is a medical record regarding decedent's care when she was first discharged from [the Medical Center]. This record includes reference to the fact that, "That pharmacy here [at the Medical Center] was ordered to continue to follow the vancomycin levels and manage the dosing." Even more significant is the Physician's Order Sheet included herein at Appendix "C" which states, "Pharmacy was ordered to continue to follow levels of vancomycin & dosing **which apparently was not done by pharmacy.**" Emphasis supplied. This record goes on to again include vancomycin toxicity as a diagnosis.

. . . .

The death certificate indicates a cause of death being a drug induced rash. See Appendix “D” attached hereto. The certificate was signed by Dr. Stephen Hoffman. In his deposition, Dr. Hoffman discussed the complicated nature of the decedent’s condition and potential causes of the condition. While admittedly disclaiming any designation as an expert, Dr. Hoffman did opine that the drug induced rash could have been caused by the drug vancomycin. Dr. Hoffman also opined in response to questions on an insurance form that rash was drug induced vanco or methotrexate. Finally, the results of a biopsy performed at the direction of Dr. Hoffman were consistent with a drug induced rash. In summary, Dr. Hoffman testified that in his opinion a drug induced rash was “the most likely of the several possibilities,” Appellant[s] submit[] that this testimony created a genuine issue of material fact that the failure to monitor the vancomycin resulted in the drug induced rash from which the decedent suffered prior to her death. (Citations omitted.)

In addition to Dr. Hoffman’s testimony, [the Medical Center]’s own medical records contain evidence of decedent suffering from a drug induced rash. For example, a consultation note dated July 31, 2006, attached hereto as Appendix “B”, [sic] states that, “Obviously, she has developed vancomycin toxicity and this is discontinued.” Once again, [the Medical Center]’s own records provide evidence to create a genuine issue of material fact. While this record alone may not be sufficient evidence of causation, when coupled with Dr. Hoffman’s testimony, it is apparent that Appellant could present evidence at trial that would support a verdict in his favor. . . .

Appellants’ Brief at 4-6.

To prove medical negligence, a plaintiff must demonstrate the standard of care (duty), breach of the standard of care, and that such breach caused injury. *See*

Andrew v. Begley, 203 S.W.3d 165 (Ky. App. 2006). Generally, an expert opinion is required in a medical negligence action to establish the standard of care, breach of such standard, and causation. *Jarboe v. Harting*, 397 S.W.2d 775 (Ky. 1965); *Morris v. Hoffman*, 551 S.W.2d 8 (Ky. App. 1977). Our case law has carved out one exception to this rule in medical and professional malpractice actions where the negligence is so apparent that a layperson with general knowledge would have no difficulty in recognizing the malpractice. *Stephens v. Denison*, 150 S.W.3d 80 (Ky. App. 2004).

In this case, appellants allege that Kimberly died as the result of vancomycin toxicity and that such toxicity was the result of the Medical Center's failure to monitor her vancomycin levels. However, appellants failed to offer proof to establish a material issue of fact as to causation. Stated simply, appellants failed to present evidence that Kimberly's alleged vancomycin toxicity caused her death. Appellants attempt to rely upon the expert testimony of her treating physician at Ohio State Medical Center, Dr. Stephen Hoffman. In his deposition, Dr. Hoffman was adamant that the exact cause of Kimberly's death was unknown. He did opine that either methotrexate or vancomycin toxicity were possible causes but could not render an opinion as to the exact cause. Moreover, Dr. Hoffman was unsure as to whether Kimberly's skin rash was even drug induced and stated that the rash could have been caused by a psoriatic flare. Therefore, we must conclude that appellants failed to present the necessary expert proof that Kimberly's death was caused by vancomycin toxicity. Appellants also failed to establish that the

alleged negligence was so apparent that a layperson could recognize the malpractice.

Accordingly, there being no genuine issue of material fact as to causation of death, the circuit court properly rendered summary judgment dismissing appellants' medical malpractice claim.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey D. Hensley
Flatwoods, Kentucky

BRIEF FOR APPELLEE:

Sean M. Whitt
Ashland, Kentucky