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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001042-MR

PATRICK D. FRYMAN — APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 07-CI-00313

JANE F. WICZKOWSKI — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

ACREE, CHIEF JUDGE: At issue is whether the Fleming Circuit Court erred in finding Appellant, Patrick D. Fryman, needed expert medical testimony to establish the respective medical standard of care and corresponding breach thereof for Fryman's medical negligence claim against Appellee, Dr. Jane F. Wiczkowski, to survive summary judgment. Finding no error, we affirm.

I. Facts and Procedure

On December 18, 2006, between 6:30 a.m. and 7:20 a.m., Fryman went to the Fleming County Hospital's (Hospital) emergency room complaining of back pain and shortness of breath. Prior to Fryman's arrival at the Hospital, Dr. Wiczkowski maintains she spoke with Fryman's family physician, Dr. Glenn Womack. Dr. Womack allegedly informed Dr. Wiczkowski that Fryman was coming to the Hospital and directed Dr. Wiczkowski to stabilize Fryman for admission to the cardiac care unit.

Fryman was seen by Dr. Wiczkowski at 7:40 a.m. Dr. Wiczkowski performed a physical examination and ordered several laboratory tests; Dr. Wiczkowski did not order an electrocardiogram (EKG).[1] After examining Fryman, Dr. Wiczkowski recommended Fryman be admitted to the Hospital.

At approximately 9:35 a.m., Fryman was transferred out of the Hospital's emergency room and admitted to the Hospital's Intensive Care Unit (ICU). Dr. Womack assumed care of Fryman. An EKG was then performed; the EKG was abnormal. Hospital staff faxed to Dr. Womack Fryman's EKG results at 10:23 a.m. Approximately two hours later, at Dr. Womack's request, Dr. Mubashir Qazi, the Hospital's attending cardiologist, reviewed Fryman's EKG. Based on his findings, Dr. Qazi decided to transfer Fryman to St. Joseph Hospital (St. Joseph) in Lexington, Kentucky. Prior to transport, Fryman was given heart-related medications. Fryman was transferred via helicopter to St. Joseph at approximately

[1] Dr. Wiczkowski maintains she and Dr. Womack agreed Fryman would be transferred to the cardiac care unit and an EKG would be performed there.

1:40 p.m. and discharged from the Hospital. While on the way to St. Joseph, Fryman claims he suffered several strokes as well as a heart attack.

On December 6, 2007, Fryman filed suit against Dr. Wiczkowski and the Hospital claiming he received substandard care on December 18, 2006, causing extensive damage to his body and heart, and resulting in substantial medical expenses. Fryman claimed Dr. Wiczkowski failed and refused to provide a diagnosis and treatment of Fryman's illness. Discovery ensued. In response to interrogatories propounded by Dr. Wiczkowski, Fryman identified Hope Scott, R.N., as his expert witness in support of his malpractice claim.

Thereafter, the parties filed competing motions for summary judgment. As grounds for her motion, Dr. Wiczkowski claimed, because Fryman did not intend to call at trial a qualified expert witness to establish the medical standard of care and breach thereof, summary judgment was proper. On April 15, 2009, the circuit court denied both motions.[2]

Fryman then supplemented his expert disclosures, identifying Deborah S. Urlage, R.N., as an additional expert witness. Fryman claimed Urlage would testify "as a medical expert . . . [w]ith regard to the practices, procedures and circumstances followed by physicians and hospitals pertaining to when electrocardiograms are to be made of a patient's heart[.]" Plaintiff's Supplemental

[2] Concurrently, the circuit court granted the Hospital's motion for summary judgment on sovereign immunity grounds and dismissed Fryman's claims against the Hospital. In an unpublished opinion entered on August 3, 2010, this Court affirmed the circuit court's grant of summary judgment in the Hospital's favor. *Fryman v. Fleming County Hospital*, 2009-CA-000865-MR, 2010 WL 1508187, at *1 (Ky. App. April 16, 2010).

Response to Defendant's First Set of Interrogatories. Dr. Wiczkowski filed a second motion for summary judgment, asserting Fryman still lacked the requisite expert medical testimony needed to sustain his medical negligence claim. Fryman opposed the motion.

On August 27, 2010, the circuit court concluded expert testimony on the medical standard of care was necessary, but denied Dr. Wiczkowski's motion for summary judgment, ordered the parties to engage in mediation, and afforded Fryman ninety days from the circuit court's ruling to identify an expert if mediation was unsuccessful. The circuit court clarified that a nurse's testimony could not establish a physician's medical standard of care.

The parties engaged in mediation on November 1, 2010; the mediation was not successful. Fryman tendered a mediation report to the circuit court on December 10, 2010. Concomitantly, the circuit court granted Fryman an additional forty-five days – until January 24, 2011 – to secure an expert. When Fryman failed to do so, Dr. Wiczkowski renewed her summary judgment motion.

The circuit court held a hearing on Dr. Wiczkowski's motion on May 6, 2011. At the hearing, Fryman confirmed he would not hire an expert despite the circuit court's August 27, 2010 order requiring him to do so. Accordingly, on May 11, 2011, the circuit court granted Dr. Wiczkowski's motion for summary judgment finding the absence of expert testimony was fatal to Fryman's medical malpractice claim and dismissing Fryman's medical negligence action against Dr. Wiczkowski. This appeal followed.

As additional facts become relevant, they will be discussed.

II. Standard of Review

The circuit court's decision to grant summary judgment is reviewed *de novo*. *Harstad v. Whiteman*, 338 S.W.3d 804, 809 (Ky. App. 2011). In reviewing a circuit court's grant of a summary judgment motion, we must ascertain "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). That is, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

"While a review of summary judgment is *de novo*," we review the circuit court's "ruling in regard to the necessity of an expert witness for an abuse of discretion" because the decision regarding the "necessity of an expert witness" rests within the circuit court's sound discretion. *Celina Mutual Ins. Co. v. Harbor Ins. Agency, LLC*, 332 S.W.3d 107, 111 (Ky. App. 2010) (citations omitted). The test for abuse of discretion is "whether the trial judge's decision was arbitrary,

unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). With these standards as our guide, we review the circuit court's order granting summary judgment in Wiczkowski's favor.

III. Analysis

Fryman presents several arguments on appeal. First, Fryman asserts that the circuit court abused its discretion when it concluded Fryman needed expert testimony for his medical malpractice claim to survive summary judgment. Specifically, Fryman contends expert testimony is unnecessary because: (1) under the doctrine of *res ispa loquitur*, the jury is competent to pass judgment and conclude from common experience and knowledge that Fryman's damages would not have occurred if Dr. Wiczkowski had utilized reasonable skill and care in diagnosing and treating Fryman's heart condition, and (2) Dr. Wiczkowski's conduct amounted to negligence *per se*. Additionally, Fryman argues the circuit court erred in denying Fryman's motion to compel Dr. Qazi to answer certain deposition questions. Third and finally, Fryman argues the circuit court committed prejudicial error when it denied Dr. Wiczkowski's summary judgment motion in 2009 and subsequently granted Dr. Wiczkowski's motion based upon the same facts and circumstances two years later. We are not persuaded by any of these arguments.

To prevail on a claim of medical negligence, the plaintiff must offer proof that the defendant physician's treatment fell "below the degree of care and skill

expected of a reasonably competent practitioner, and that the negligence proximately caused injury or death." *Reams v. Sutler*, 642 S.W.2d 586, 588 (Ky. 1982). Due to the complexity of medical procedures, typically such proof must take the form of expert testimony. *Johnson v. Vaughn*, 370 S.W.2d 591, 596 (Ky. 1963) (explaining a physician's negligence must generally be established by expert medical testimony); *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 680-81 (Ky. 2005). That is, only expert testimony, as opposed to lay testimony, can establish for the jury "the applicable medical standard of care, any breach of that standard, and the resulting injury." *Blankenship v. Collier*, 302 S.W.3d 665, 675 (Ky. 2010).

There are two exceptions to the expert witness rule. *Id.* at 670. Both exceptions involve the application of the *res ipsa loquitur* doctrine and permit the inference of negligence even in the absence of expert testimony. *Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992). First, "[e]xpert testimony is not required . . . where 'the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it[.]'" *Blankenship*, 302 S.W.3d at 670 (citation omitted). This exception applies only when the evidence is such that "any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care." *Perkins*, 828 S.W.2d at 655 (citation omitted). Second, when "the defendant physician makes certain admissions that make his negligence apparent," expert testimony is unnecessary. *Blankenship*, 302 S.W.3d at 670.

If neither exception applies, and, "where a sufficient amount of time has expired and the plaintiff has still 'failed to introduce evidence sufficient to establish the respective applicable standard of care,' then the defendant[] [is] entitled to summary judgment as a matter of law." *Id.* at 668 (citing *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781, 784 (Ky. App. 2007)).

Fryman contends the first *res ispa loquitur* exception applies, thereby eliminating the need for expert testimony. Specifically, Fryman maintains a reasonable juror is competent to conclude from common experience and knowledge that Dr. Wiczkowski's utter failure to diagnosis and treat Fryman's heart condition violated medical standards.

We do not believe the average layperson possesses the knowledge or experience to know the medical standard of care applicable when a patient who presents himself to the ER with symptoms such as those exhibited by Fryman; consequently, whether Dr. Wiczkowski breached that standard is not deducible by the average layperson. Nor do we believe that the average layperson knows the appropriate method of diagnosing or treating a heart condition. This is especially true in light of Fryman's complex medical posture, which included a prior MRSA infection, back surgery, sepsis, diabetes, and a substance abuse problem.

Further, despite Fryman's assertions that Dr. Wiczkowski failed to provide him *any* medical care while in the Hospital's emergency room, the record reveals Dr. Wiczkowski did render some care to Fryman prior to transferring him to the Hospital's ICU. Specifically, in her response to Fryman's interrogatories, Dr.

Wiczkowski claimed she ordered several tests including "a CBC, CMP, amylase/lipase, urine analysis with culture, glucose check, serum acetone, [and] arterial blood gases," and prescribed Fryman multiple medications and treatments, including "Levaquin, Bactrim DS, Tylenol, Sodium Bicarbonate, an insulin drip, normal saline, and 3% normal saline."

The medical questions involved in this matter are complex, and we are simply unable to conclude the medical issues fall within the common experience of laypeople. Accordingly, absent expert testimony, we find a layperson is not competent to determine whether the alleged delay by Dr. Wiczkowski in recognizing and treating Fryman's heart condition constituted a breach of her standard of care thereby causing Fryman harm. *See, e.g., Blankenship*, 302 S.W.3d at 672 (finding expert testimony was needed to survive summary judgment because the diagnosis and treatment of acute appendicitis fell outside a layperson's common knowledge and/or experience).

Fryman also contends expert medical testimony concerning the requisite standard of care is unnecessary because Dr. Wiczkowski's failings amounted to negligence *per se*. "Negligence *per se* 'is merely a negligence claim with a statutory standard of care substituted for the common law standard of care.'" *Young v. Carran*, 289 S.W.3d 586, 588-89 (Ky. App. 2008) (citing *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 926-27 (Ky. 1994)); KRS 446.070 (codifying the common-law doctrine of negligence *per se*). Fryman fails to identify – and we cannot find – a Kentucky statute establishing the degree of

care and skill expected of a reasonably competent practitioner engaged in emergency room practice and acting in similar circumstances. Fryman's position is untenable.

In sum, we find the circuit court properly concluded Fryman needed to present expert testimony on the issue of medical negligence to survive summary judgment. Following that ruling, the circuit court afforded Fryman ample time to designate an expert witness; he simply chose not to do so. *Blankenship*, 302 S.W.3d at 673 ("If the court determines within its discretion that an expert is needed, it should give the plaintiff a reasonable amount of time to identify an expert[.]"). Accordingly, Dr. Wiczkowski is entitled to summary judgment as a matter of law. *Id.* at 668.

Next, Fryman asserts the circuit court erred in denying his motion to compel Dr. Qazi to answer certain questions propounded at Dr. Qazi's deposition. In light of our holding that Dr. Wiczkowski was entitled to summary judgment, this issue might be considered moot and our comment upon it dicta. However, Fryman sought to use a fact witness, Dr. Qazi, to cure his failure to present expert testimony of the standard of care. In theory, if the circuit court's refusal to order Dr. Qazi to answer Fryman's expert opinion questions was error, then Fryman might have established the standard of care by an expert, and thereby avoided summary judgment. Therefore, this question is not moot, and our consideration of it is not dicta.

Fryman deposed Dr. Qazi on April 6, 2009. At Dr. Qazi's deposition, Fryman asked, and Dr. Qazi readily answered, fact questions regarding Dr. Qazi treatment and care of Fryman on December 18, 2006. However, acting under advice of counsel, Dr. Qazi refused to answer general questions regarding cardiology and appropriate emergency room treatment of a potential cardiac patient. Such questions included these:

> Dr. Qazi, is there any reason, in your view, to delay making an EKG on a person suspected of having a heart attack?
>
> If a person is having or about to suffer a heart attack, Dr. Qazi, how important is it that the situation is detected and treated as soon as possible?
>
> Dr. Qazi, what are the essential things that need to be done to stabilize a person who has a heart attack?
>
> If the blockage can be detected at the time it occurs or shortly thereafter, are there ways to restore flow to prevent the [heart] damage?
>
> An EKG is usually the first test the physicians use when a person arrives at the emergency room and reports chest pains, dizziness, shortness of breath, or fainting, all symptoms that may indicate myocardial infarction or heart attack. Do you agree with that or disagree?
>
> What are the ACC [American College of Cardiology] guidelines?

Shortly after Dr. Qazi's deposition, Fryman filed a motion to compel Dr. Qazi to answer the above-referenced questions. The circuit court denied Fryman's motion, finding Dr. Qazi was a treating physician and the questions unanswered by Dr. Qazi did not relate to his treatment of Fryman.

On appeal, Fryman maintains the circuit court's ruling amounts to reversible error because "Fryman was entitled, as a patient, to have questions pertaining to his overall health and total treatment answered whether it was given by his treating physician or by some other physician so long as it pertained to the illness addressed by [Dr. Qazi]." (Appellant's Brief at 23).

It is undisputed that Fryman had not formally retained Dr. Qazi as an expert witness.[3] Instead, Fryman subpoenaed Dr. Qazi to provide testimony, via deposition, concerning his treatment of Fryman on December 18, 2006. While the distinction between lay testimony and expert testimony is, at times, unclear – especially when the witness at issue is a professional, such as a physician – we find compelling Dr. Wiczkowski's position that Dr. Qazi should not be forced, as a treating physician, to provide expert opinions on Fryman's behalf. As aptly explained by New Jersey's highest court:

> [A]ll knowledge which one has of the actual facts of a litigation, whether the witnesses to those facts be professional or lay, is available and such witnesses thereof amenable to subpoena and compellable to give evidence of such facts. On the other hand, when the experience, training, and skill acquired by years of study and practice in a given profession or calling exists, such knowledge and skill are not the property of litigants. It belongs to the professional man in his chosen occupation. Neither justice nor public policy in our view forbids that the expert shall retain such knowledge and skill free from divulgement except by his voluntary acquiescence,

[3] Of note, Fryman did not identify Dr. Qazi as an expert witness in Fryman's response to Dr. Wiczkowski's interrogatories request. *See* CR 26.02(4)(1) (requiring a party to disclose, if asked through interrogatories, the identity of "each person whom the . . . party expects to call as an expert witness at trial"). Instead, as referenced above, Fryman only identified Nurse Scott and, subsequently, Nurse Urlage, as expert witnesses.

> whether it be sought for compensation in the exercise of his skill, in the expression of his professional judgment privately, or when he is called for that purpose into a court of justice.

Stanton v. Rushmore, 169 A. 721, 721 (N.J. 1934); *see also Charash v. Johnson*, 43 S.W.3d 274, 280 (Ky. App. 2000) (explaining, where a physician is not identified as an expert in discovery, she cannot testify about events and facts learned "beyond those personally observed"); *Imposition of Sanctions in Alt v. Cline*, 589 N.W.2d 21, 27 (Wis. 1999). A physician who cares for a patient is not automatically deemed that patient's expert witness merely by virtue of prior treatment rendered. To hold otherwise would involuntarily earmark every treating physician in this Commonwealth an expert witness for his or her patients. Accordingly, we will not disturb the circuit court's ruling.

Finally, Fryman complains it was prejudicial error for the circuit court to overrule Dr. Wiczkowski's motion for summary judgment in 2009 and then, two years later, grant Dr. Wiczkowski's summary judgment motion based upon the same facts and conditions. We disagree.

It is well-settled that an order denying summary judgment is a non-final, interlocutory order. *Battoe v. Beyer*, 285 S.W.2d 172, 173 (Ky. 1995); *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky. App. 2004). Similarly, it is axiomatic that an interlocutory order is "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." *Tax Ease Lien Investments 1, LLC v. Brown*, 340

S.W.3d 99, 103 (Ky. App. 2011) (citing Kentucky Rules of Civil Procedure (CR) 54.02)); *see also Bank of Danville v. Farmers Nat. Bank of Danville, Ky.*, 602 S.W.2d 160, 164 (Ky. 1980) ("Order was interlocutory and subject to change by the trial court at any time prior to the final adjudication.").

The circuit court's April 15, 2009 order denying Fryman and Dr. Wiczkowski's respective motions for summary judgment was an interlocutory, non-final order subject to revision at any time prior to entry of a final judgment. Accordingly, it was well within the circuit court's discretion to grant Dr. Wiczkowski's summary judgment motion in 2011 despite originally denying the motion in 2009. Fryman's argument lacks merit.

Conclusion

The Fleming Circuit Court's May 11, 2011 order granting summary judgment in Dr. Wiczkowski's favor is affirmed.

ALL CONCUR.

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