

RENDERED: JULY 5, 2013; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000425-MR

MORNAN SUE ENGLISH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 11-CI-001583

METROPOLITAN VETERINARY
SPECIALISTS; AND ARIC
APPLEWHITE D.V.M.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Mornan Sue English brings this appeal from a February 13, 2012, Summary Judgment of the Jefferson Circuit Court dismissing a professional negligence claim against Metropolitan Veterinary Specialists and Aric Applewhite, D.V.M. We affirm.

English took her six-year-old dog, Sweetie Pie, to Dr. Applewhite, who practiced veterinary medicine at Metropolitan Veterinary Specialists (Metro Vet). Dr. Applewhite diagnosed Sweetie Pie as suffering from a “bilateral grade 2 medial patella luxations.” In particular, Dr. Applewhite “[r]ecommend surgery at this time on left knee given clinical signs and history, and will likely require surgery on right knee in future to prevent worsening clinical signs.” English agreed to allow Dr. Applewhite to perform surgery on Sweetie Pie’s left-hind knee; however, due to an error, Dr. Applewhite performed surgery on Sweetie Pie’s right-hind knee. Dr. Appelwhite later performed the appropriate surgery on Sweetie Pie’s left-hind knee at no cost to English. Sweetie Pie ultimately developed lameness and pain in her right-hind leg. Consequently, English consulted with other veterinarians, who recommended additional treatment, including another surgery on Sweetie Pie’s right-hind knee.

English initiated the instant action against Dr. Applewhite and Metro Vet claiming professional negligence in their treatment of Sweetie Pie. English asserted that Dr. Applewhite breached the standard of care by inadvertently operating on Sweetie Pie’s right-hind knee instead of her left-hind knee, by performing the surgery on the right-hind knee negligently, and by causing the right-hind leg to become lame and in need of additional treatment and surgery. English pointed out that Dr. Applewhite received a letter of reprimand from the Kentucky Board of Veterinary Examiners in connection with his treatment of Sweetie Pie.

Metro Vet and Dr. Applewhite filed a motion for summary judgment alleging that English failed to secure expert testimony to establish Dr. Applewhite's negligence. By summary judgment entered February 13, 2012, the circuit court agreed that English failed to demonstrate negligence and reasoned:

For the sake of this decision, the evidence will be considered in the light most favorable to [English]. That evidence, when so viewed, would suggest Dr. Applewhite operated on the wrong knee of Sweetie Pie and that doing so was a deviation from reasonable care expected of veterinarians in similar circumstances. However, in order to be entitled to recover even nominal damages, a plaintiff pursuing a professional negligence claim must be able to show by competent evidence that the deviation complained of was a substantial factor in causing some sort of damage. As discussed at the December hearing, this means another veterinarian must testify that because of this error, Ms. English incurred financial cost(s) she would not have otherwise incurred. In this case, [Dr. Applewhite and Metro Vet] eventually operated on both knees but only charged for one surgery. Thus, Ms. English has no compensable damages and that, in turn, means she has no actionable claim. This is so fundamental in our tort law that citation to authority is unnecessary. . . .

This appeal follows.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *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 nonmoving party. *Id.* Our review proceeds accordingly.

English contends that the circuit court improperly rendered summary judgment dismissing the professional negligence claim against Dr. Applewhite and Metro Vet. Specifically, English maintains that expert testimony was unnecessary as other evidence in the record amply demonstrated that Dr. Applewhite was negligent in his treatment of Sweetie Pie and that English submitted evidence of expenses related to Sweetie Pie's additional care caused by Dr. Applewhite's negligence. English also asserts that she secured an expert witness who would testify as to Dr. Applewhite's negligent treatment of Sweetie Pie.

For English to prevail upon her claim of professional negligence, it was incumbent upon English to demonstrate that Dr. Applewhite owed a duty of care, Dr. Applewhite breached the duty of care, and such breach caused injury. *See Boland-Maloney Lumber Company, Inc. v. Burnett*, 302 S.W.3d 680 (Ky. App. 2009); *see also* 78 Am. Jur. 2d *Veterinarians* § 7 (2013). And, a veterinarian's duty or standard of care is to exercise the care and diligence ordinarily employed by a reasonably competent veterinarian in similar circumstances. *Folsom v. Barnett*, 306 S.W.2d 832 (Ky. 1957); *see also* 78 Am. Jur. 2d *Veterinarians* § 7 (2013).

English alleges that Dr. Applewhite's surgery on Sweetie Pie's right-hind knee was both unnecessary and negligently performed, causing Sweetie Pie to suffer additional injury. In so alleging, it was incumbent upon English to demonstrate that Dr. Applewhite negligently performed the surgery and that such negligence caused the present injury to Sweetie Pie's right-hind leg. However,

English failed to do so as the record is simply void of any evidence to support English's allegations. English did submit veterinary records outlining additional treatment and surgery needed for Sweetie Pie's right-hind knee, but English did not submit any proof that such additional treatment and surgery were caused by Dr. Applewhite's negligence. And, English identified an expert witness to testify at trial but failed to submit an affidavit setting forth the expert's opinion as to the negligence of Dr. Applewhite in his care of Sweetie Pie. It is, of course, evident that Dr. Applewhite initially performed surgery on the wrong knee, but the only evidence in the record indicates that Sweetie Pie suffered no cognizable injury because surgery was also needed on the right knee. Simply stated, English failed to set forth a *prima facie* case of professional negligence against Dr. Applewhite or Metro Vet.

Accordingly, we conclude that the circuit court properly rendered summary judgment dismissing English's professional negligence claim.

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

ALL CONCUR.

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