

RENDERED: MARCH 20, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001633-MR

JULIA ANN ASHCRAFT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 13-CI-01600

PATRICK B. KENNEDY, D.M.D.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Julia Ann Ashcraft, *pro se*, has appealed from the Jefferson Circuit Court's entry of summary judgment in favor of Patrick B. Kennedy, D.M.D., on her claims of dental malpractice. We affirm.

The facts of this matter are relatively simple and largely undisputed. Ashcraft presented to Dr. Kennedy's dental office on February 20, 2013, with

complaints of swelling and pain in her lower jaw. Following an examination, Dr. Kennedy determined Ashcraft was suffering from a bacterial infection. Ashcraft was given treatment options of tooth extraction or root canal to alleviate the problem. Ashcraft chose to have a root canal performed. Prior to beginning the procedure, Dr. Kennedy administered an injection of Septocaine (an anesthetic) into Ashcraft's gum line to numb the area. Ashcraft reported the injection made her feel ill and requested treatment be stopped. She indicated she was experiencing shortness of breath, chest pains and body chills. Dr. Kennedy immediately halted all work and escorted Ashcraft to the office lobby for observation and recuperation from any negative effects stemming from the injection. Dr. Kennedy sat with Ashcraft for ten to fifteen minutes before returning to his practice. Ashcraft remained in the lobby for some time thereafter. An offer by Dr. Kennedy's staff to transport Ashcraft to her home was declined. Ashcraft left the office in her own vehicle and arrived home without incident. The record does not indicate whether additional treatment was sought from Dr. Kennedy. However, evidence was adduced that a different dentist subsequently extracted one of the affected teeth.

On March 28, 2013, Ashcraft filed the instant suit alleging medical malpractice by Dr. Kennedy in that he "callously abandoned his patient in a condition of suffering" and negligently permitted her to drive herself home when she was clearly not in any condition to perform such a task. Although she alleged no actual injury and made no demand for compensatory damages, Ashcraft sought

a punitive damages award of \$1,000,000.00. Dr. Kennedy answered the complaint and denied the substantive allegations of negligence, argued Ashcraft's alleged damages, if any, were the result of her own negligence or that of others, and contended punitive damages were inappropriate under the circumstances.

On May 9, 2013, Ashcraft requested and was granted an extension of time to respond to Dr. Kennedy's interrogatories, requests for production of documents and requests for admissions. The record reveals she has yet to provide the requested discovery responses. Instead, on May 15, 2013, Ashcraft moved the trial court for entry of summary judgment in her favor. On May 29, 2013, Ashcraft filed a supplemental motion for summary judgment, and on June 6, 2013, filed a second supplemental motion seeking the same relief. Ashcraft's motions and supplements restated the allegations asserted in her complaint albeit in significantly greater detail. Dr. Kennedy filed a cross-motion for summary judgment on June 26, 2013, arguing Ashcraft's failure to allege a compensable injury and her failure to produce expert testimony establishing the standard of care, any breach thereof, and subsequent injury proximately caused by such breach, were fatal to her claims. In response, Ashcraft argued the general rule requiring expert medical testimony in medical malpractice actions was inapplicable because her allegations of "medical malpractice abandonment" could "be ascertained by the ordinary sense of a non-expert." She alluded to damages resulting from being "forced to endure pain for a period of two weeks" but offered no further explanation or proof of any such damages.

On July 24, 2013, the trial court granted summary judgment in favor of Dr. Kennedy in an order stating:

[t]he Plaintiff has failed to state a genuine issue of material fact in that the record is absent of any expert opinion critical of the Defendant, Dr. Patrick Kennedy, D.M.D. The Court finds that this is a case that requires expert testimony in that the medical issue is beyond the scope of common knowledge. Additionally, Plaintiff has failed to allege any actual injury in this case and has failed to provide expert proof that any injury was caused by Dr. Kennedy's action. Accordingly, the Defendant's Motion for Summary Judgment is hereby **GRANTED** and the Plaintiff's Motions for Summary Judgment are hereby **DENIED**.

Ashcraft's subsequent motion for reconsideration was denied by order entered on August 15, 2013, wherein the trial court, citing *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010), reiterated the necessity of expert testimony supportive of claims for dental malpractice. This appeal followed.

Initially, we note that contrary to the mandates of CR¹ 76.12(4)(c)(iv) and (v), Ashcraft's brief before this Court contains no references to the record supportive of her arguments nor does Ashcraft indicate whether or how her alleged errors were preserved for appellate review. We would be well within our discretion to strike the brief or dismiss the appeal for Ashcraft's failure to comply with the rules. However, because of the lenity generally afforded *pro se* litigants, we will not impose such a harsh sanction, but we will decide the issues presented based solely on the facts appearing on the face of the record.

¹ Kentucky Rules of Civil Procedure.

Before this Court, Ashcraft restates the claims she raised below. She alleges the trial court erred in concluding she had failed to carry her burden of proof and insists expert testimony was unnecessary to prove Dr. Kennedy's negligence or malpractice in "abandoning" her while she was in pain. Having carefully reviewed the record, the briefs and the law, we discern no error.

Summary judgment is a device utilized by courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is deemed a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove no genuine issue of material fact exists, and he "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id.* The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). *Steelvest* originally held the test would include the phrase "impossible" for the non-moving party to prevail at trial. The Supreme Court of Kentucky later clarified that the word "impossible" was "used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). The non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact[.]" *Chipman*, 38 S.W.3d at 390.

On appeal, our standard of review is "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). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006). With these standards in mind, we turn to the allegations of error presented.

In medical malpractice cases, the injured party must prove the given treatment fell below the degree of care and skill expected of a reasonably competent practitioner and that the negligence proximately caused the plaintiff’s injury or death. *See Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982). A physician has the duty to use the degree of care and skill expected of a competent practitioner of the same class and under similar circumstances. *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 687 (Ky. 2003); *Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991); *Cordle v. Merck & Co., Inc.*, 405 F.Supp.2d 800 (E.D. Ky. 2005). As in any negligence case, there are three essential elements that must be proved: duty, breach and consequent injury. *Grubbs*, 120 S.W.3d at 687. The term “consequent injury” encompasses two distinct elements—actual injury and legal causation between the breach and the injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88–89 (Ky. 2003). The absence of proof on any one of the required elements is fatal to a negligence claim. *M & T Chemicals, Inc. v. Westrick*, 525 S.W.2d 740, 741 (Ky. 1974).

“The burden of proof in a malpractice case is, of course, on the party charging negligence or wrong. That must be established by medical or expert testimony unless the

negligence and injurious results are so apparent that laymen with a general knowledge would have no difficulty in recognizing it.” *Johnson v. Vaughn*, 370 S.W.2d 591, 596 (Ky. 1963). Additionally, in Kentucky, a plaintiff who alleges “medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care.” *Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010) (citing *Perkins v. Hausladen*, 828 S.W.2d 652, 655–56 (Ky.1992)).

White v. Norton Healthcare, Inc., 435 S.W.3d 68, 75 (Ky. App. 2014). “To survive a motion for summary judgment in a medical malpractice case in which a medical expert is required, the plaintiff must produce expert evidence or summary judgment is proper. *See Turner v. Reynolds*, 559 S.W.2d 740, 741–42 (Ky. App. 1977).” *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. App. 2006).

In the case at bar, Ashcraft clearly failed to meet the threshold requirements for sustaining her action. First, she did not allege any actual, compensable injury resulting from Dr. Kennedy’s alleged negligence. Bare assertions are insufficient. The complete absence of proof on this required element is fatal to her claim. *Westrick*, 525 S.W.2d at 741. Likewise, the absolute nonexistence of any expert evidence regarding the standard of care or negligence by Dr. Kennedy renders Ashcraft’s claims unsustainable. *Andrew*, 203 S.W.3d at 170. In concert, these failures create a situation where no triable issue can remain—that is, there exists no possibility of showing negligence followed by an injury. Thus, summary judgment was proper.

Finally, contrary to Ashcraft's contention that no expert testimony was necessary, we note that trial courts have broad discretion to determine whether an expert was necessary to prove issues of medical-legal causation. *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 680–81 (Ky. 2005). We discern no abuse of the trial court's discretion in this matter and will not disturb that decision on appeal. There was simply no infirmity in the trial court's grant of summary judgment in favor of Dr. Kennedy given the facts presented and the substantial deficiencies in Ashcraft's allegations.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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