

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000095-MR

RICHARD THOMPSON; AND
CRYSTAL THOMPSON

APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 09-CI-01239

ALEX ARGOTTE, M.D., P.S.C.;
ALEX ARGOTTE, M.D.,
PERSONALLY AND INDIVIDUALLY;
NEW LIFE SURGICAL WEIGHT
LOSS CENTER OF WESTERN
KENTUCKY, INC.; AND MERCY
HEALTH PARTNERS-LOURDES, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Richard Thompson and his wife Crystal Thompson

(collectively referred to as appellants) bring this appeal from a September 19,

2013, summary judgment of the McCracken Circuit Court dismissing their negligence claims against Alex Argotte, M.D., P.S.C., Alex Argotte, M.D., personally and individually (Argotte), New Life Surgical Weight Loss Center of Western Kentucky, Inc., and Mercy Health Partners-Lourdes, Inc. (Lourdes Hospital) (collectively referred to as appellees). We affirm.

In late October 2008, Thompson began having severe abdominal pain. Thompson's primary care physician, Dr. David French, referred Thompson to the emergency room of Lourdes Hospital in Paducah, Kentucky. The emergency room physician, Dr. John Brazzell, requested a consultation with the on-call surgeon, Argotte. Thompson was diagnosed by Brazzell as having diverticulitis and subsequently admitted to the hospital. Argotte recommended trying a conservative treatment approach to treat the diverticulitis. Thompson remained in the hospital for the next several days, and on November 8, 2008, Thompson's colon ruptured. The following day, Argotte performed exploratory surgery upon Thompson. Argotte ultimately removed a portion of Thompson's colon and performed a colostomy.

Two days after Thompson's surgery, on November 11, 2008, Argotte sent a letter to the hospital requesting that his emergency room and hospital clinical privileges be suspended from December 1, 2008, until December 21, 2008. Thompson was released from the hospital on November 24, 2008. Thereafter, Thompson received a letter stating Argotte was moving his medical practice to Illinois in January 2009. Thompson subsequently developed double pneumonia,

an incisional hernia, and a large parastomal hernia. French recommended that Thompson see another surgeon. Thompson eventually underwent additional surgery in February 2011 to repair the parastomal hernia and to reverse the colostomy.

Appellants filed a complaint in McCracken Circuit Court on November 6, 2009, alleging that appellees committed medical negligence, specifically asserting that Argotte deviated from the acceptable medical standard of care for a physician in performing surgery upon Thompson and in his follow-up care. The complaint was amended in May 2012. Relevant to this appeal, appellees filed a motion for summary judgment seeking dismissal of appellants' complaint. The circuit court granted summary judgment on September 19, 2013, dismissing appellants' negligence claims. The circuit court concluded that appellants had not identified an expert witness who would testify at trial that appellees had breached the applicable standard of care in the treatment of Thompson, relying on *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010).

On September 27, 2013, appellants served a Kentucky Rules of Civil Procedure (CR) 59.05 motion to set aside and vacate the September 19, 2013, summary judgment.¹ In support thereof, appellants attached the affidavit of Dr. Robert Cacchione, a surgeon from Louisville who operated on Thompson in 2011.

¹ The motion contains no recitation for the basis in filing, other than stating the circuit court was "wrong." Since the motion was filed within ten days of the summary judgment, this Court has treated the motion as being timely filed under Kentucky Rules of Civil Procedure (CR) 59.05, which pursuant to CR 73.02(1)(e), tolled the running of the time for appeal until the circuit judge ruled on said motion on December 13, 2013.

Appellants' motion to set aside and vacate the summary judgment was denied by order entered December 13, 2013.² This appeal follows.

Appellants contend that the circuit court erred by granting the motion for summary judgment and dismissing their complaint against appellees.

Summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. CR 56; *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). When considering a summary judgment motion, the record must be viewed in a light most favorable to the nonmoving party with all doubt resolved in his favor. *Steevest*, 807 S.W.2d 476.

Appellants specifically assert that the circuit court erred by determining that appellants failed to produce the expert testimony required in a medical malpractice action to establish the requisite standard of care and breach thereof. Appellants further contend that the court erred by denying their motion to set aside and vacate the summary judgment and to strike appellants' supplemental expert disclosure of Dr. Cacchione, whose affidavit was submitted after summary judgment was entered.

It is well-established that the burden of proof is upon plaintiff in a medical malpractice case. *Morris v. Hoffman*, 551 S.W.2d 8 (Ky. App. 1977). The negligence of a physician generally must be established by medical or expert testimony unless the negligence and "injurious results" are so apparent that a

² The circuit court treated the motion to set aside and vacate as a motion under CR 60.02, rather than CR 59.05. For purposes of our analysis, the distinction is immaterial to this opinion.

layperson with general knowledge would have no difficulty recognizing it. *Id.* at 9 (citing *Johnson v. Vaughn*, 370 S.W.2d 591 (Ky. 1963)). *See also Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1992). And, the circuit court may not grant summary judgment as a punitive sanction against a party for failing to timely disclose its expert witnesses during discovery. *Love v. Walker*, 423 S.W.3d 751 (Ky. 2014) (citing *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991)).

However, it is also clear that summary judgment is proper when it is based upon “an actual failure of proof due to a complete lack of expert testimony, and not on a failure to meet a deadline due to an untimely disclosure” *Id.* at 756. The Supreme Court has recognized:

In a medical malpractice action, 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 defendants are entitled to summary judgment as a matter of law. The trial court's determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion.

Love, 423 S.W.3d at 757 (citation omitted).

Pursuant to CR 26.02(4)(a)(i), a plaintiff may be compelled to identify every expert witness that he or she intends to call as an expert at trial. In response to the allegations in the complaint, appellees sought on several occasions the identities of appellants’ experts. In the case *sub judice*, appellants requested numerous discovery deadline extensions over a nearly four-year period after the complaint was filed. Ultimately, appellants provided for discovery only two expert

witnesses, Dr. David French and Brenda Hurt. French was Thompson's family physician, and Hurt was a licensed practical nurse (LPN) at Lourdes Hospital. In successfully defeating an earlier motion for summary judgment in February 2013, appellants had produced French's affidavit wherein he opined that Argotte had breached the standard of care in treating and operating upon Thompson.

Thereafter, appellees deposed French. During his deposition, French retracted his previous opinion that Argotte breached the standard of care as concerns the medical treatment that Argotte provided to Thompson. French further acknowledged that he was not an expert as concerns the medical standard of care for a surgeon. French ultimately admitted that he could not give an opinion upon whether Argotte's unavailability for post-operative treatment of Thompson caused any harm to Thompson. Simply stated, French admitted he was not qualified to give an expert opinion upon the applicable standard of care or breach thereof in Argotte's treatment of or surgery upon Thompson. As concerns Hurt's deposition testimony, she did not present any evidence regarding the standard of care required of a surgeon, including whether informed consent for surgery was properly obtained from Thompson. Accordingly, in the absence of expert testimony establishing the standard of care and breach thereof, we cannot conclude that the circuit court erred by granting summary judgment dismissing appellants' medical negligence claims against appellees.

Appellants further maintain that summary judgment was improperly rendered dismissing their claim as to lack of informed consent given by Thompson.

Appellants admit that Thomson signed an informed consent form that stated he authorized Argotte to perform an exploratory laparotomy with possible colon resection. However, appellants claim that appellees did not adequately inform Thompson of the risks associated with the surgery, including development of a parastomal hernia or an incisional hernia. Additionally, appellants assert that Thompson did not consent to having a colostomy nor was he ever informed that a colostomy might be necessary during his November 2008 surgery.

Informed consent is mandated by statute. Kentucky's informed consent statute is set out in Kentucky Revised Statutes (KRS) 304.40-320 and reads as follows:

In any action brought for treating, examining, or operating on a claimant wherein the claimant's informed consent is an element, the claimant's informed consent shall be deemed to have been given where:

- (1) The action of the health care provider in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with the accepted standard of medical or dental practice among members of the profession with similar training and experience; and
- (2) A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedure and medically or dentally acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures;

- (3) In an emergency situation where consent of the patient cannot reasonably be obtained before providing health care services, there is no requirement that a health care provider obtain a previous consent.

Our Courts have recognized that “[a]n action based on lack of informed consent ‘is in reality one for negligence in failing to conform to a proper professional standard [of care]’” *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 119 (Ky. App. 1999) (quoting *Holton v. Pfingst*, 534 S.W.2d 786, 788 (Ky. 1975)); *Vitale v. Henchey*, 24 S.W.3d 651 (Ky. 2000); *Baltzell v. Van Buskirk*, 751 S.W.2d 902 (Ky. 1988). To prevail upon a claim of lack of informed consent, “the general rule is that expert testimony is required to negate informed consent.” *Hawkins*, 17 S.W.3d at 119. The narrow exception to this general rule is “where the failure is so apparent that layman may easily recognize it or infer it from [the] evidence.” *Keel v. St. Elizabeth Medical Center*, 842 S.W.2d 860, 862 (Ky. 1992).

As noted, the only expert offered by appellants on this issue was Brenda Hurt, an LPN. As the circuit court correctly concluded, Hurt presented no expert testimony or opinion concerning the standard of care of a surgeon in obtaining informed consent. In this case, appellants simply failed to offer expert testimony that Argotte breached the standard of care in obtaining Thompson’s consent. And, the exception for the need of expert testimony is inapplicable as a layman could not easily recognize Argotte’s negligence, given the complexity of the medical issues involved. Consequently, we agree with the circuit court’s entry

of summary judgment dismissing appellants' negligence action based upon lack of informed consent.³

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

ALL CONCUR.

³ We note that Richard Thompson and Crystal Thompson did not bring an action for the tort of battery against Alex Argotte, M.D., P.S.C., Alex Argotte, M.D., personally and individually, New Life Surgical Weight Loss Center of Western Kentucky, Inc., or Mercy Health Partners-Lourdes, Inc.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANTS:

Wendell Holloway
Madisonville, Kentucky

BRIEF FOR APPELLEES ALEX
ARGOTTE, M.D., PSC.; ALEX
ARGOTTE, M.D., PERSONALLY
AND INDIVIDUALLY; AND NEW
LIFE SURGICAL WEIGHT LOSS
CENTER OF WESTERN
KENTUCKY, INC.:

Christopher P. O'Bryan
Andie Brent Camden
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLEES ALEX ARGOTTE,
M.D., PSC.; ALEX ARGOTTE, M.D.,
PERSONALLY AND
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SURGICAL WEIGHT LOSS
CENTER OF WESTERN
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BRIEF APPELLEE MERCY
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