

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001361-MR

CHRISTINA KAY CARTWRIGHT HITCH,
INDIVIDUALLY AND AS NEXT FRIEND OF
RICHARD EDGAR HITCH, JR.

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 13-CI-00202

ST. ELIZABETH MEDICAL CENTER, INC. and
ST. ELIZABETH PHYSICIAN SERVICES, LLC
and SUSAN YELICH, M.D.

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, DIXON, D. LAMBERT, JUDGES.

COMBS, JUDGE: Christina Hitch, individually and as next friend of
Richard Hitch, appeals from the order of the Campbell Circuit Court which granted
summary judgment to Dr. Susan Yelich, St. Elizabeth Medical Center, and St.
Elizabeth Physician Services. After our review, we affirm.

The nature of this appeal is procedural; therefore, only a brief recitation of the underlying medical facts is necessary for our analysis. Mrs. Hitch is the widow of Richard Hitch. Mr. Hitch had a medical history of chronic obstructive pulmonary disease (COPD) and coronary artery disease. On January 3, 2012, Mr. Hitch underwent surgery for removal of a dysplastic colon polyp. The segmental resection was performed by robot, and Dr. Yelich sewed the reconnection, or anastomosis, by hand.

The anastomosis did not heal correctly, and Mr. Hitch underwent an operation to repair it. Later, another operation was performed in order to treat an abdominal wound infection. Mr. Hitch's recovery was complicated by his pre-existing COPD, and he developed pneumonia. Although his physicians recommended another procedure to treat the complications from the pneumonia, Mrs. Hitch declined further treatment. Mr. Hitch died on February 26, 2012.

On February 25, 2013, Mrs. Hitch filed a complaint naming Dr. Yelich, St. Elizabeth Physician Services, and St. Elizabeth Medical Center as defendants. She alleged claims of negligence, vicarious liability, negligent hiring, negligent/intentional infliction of emotional distress, loss of consortium, and wrongful death.

On October 23, 2013, the parties filed an agreed scheduling order. Pertinent to this appeal, Mrs. Hitch agreed to disclose her expert witnesses by January 31, 2014. Disclosure would include the experts' opinions in compliance with CR¹

¹ Kentucky Rules of Civil Procedure.

26.02(4)(a). In her answer to interrogatories, Mrs. Hitch described the facts upon which her claims of negligence were based and the names of two experts. She admits in her brief that the disclosure did not include a specific statement for the basis of the experts' opinions.

On February 18, 2014, the defendants filed a motion for summary judgment. They argued that Mrs. Hitch had not complied with disclosure requirements and that, therefore, she did not present adequate information to withstand summary judgment. On April 24, 2014, the trial court granted the motion for summary judgment relating to the infliction of emotional distress and negligent hiring claims. However, it gave Mrs. Hitch an extended deadline of May 22, 2014, to file proper expert witness disclosures. She has not appealed this order.

On May 19, 2014, Mrs. Hitch provided her expert disclosure. Her only expert was Dr. Peter Wilk. Dr. Wilk submitted a letter in which he opined that Mr. Hitch should not have been subjected to the initial surgery. He stated that the polyp should have been removed in a colonoscopy and that his follow-up treatment did not comport with the standard of care.

The defendants filed a renewed motion for summary judgment on May 27, 2014, which the court granted on July 17, 2014. It found that Mrs. Hitch's expert opinion did not comply with CR 26.02(4)(a) because it did not propound evidence to support any findings of negligence. This appeal follows.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). 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). The movant must prove that no genuine issue of material fact exists, and the movant “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). In order to overcome a motion for summary judgment, the non-moving party must present “at least some affirmative evidence showing the existence of a genuine issue of material fact.” *Id.* See also CR 56.03. 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). Because summary judgments do not involve fact finding, we review *de novo*. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.2d 188, 189 (Ky. App. 2006).

In order to prevail in a medical negligence suit, a plaintiff must prove that the healthcare provider breached the “duty to use the degree of care and skill expected of a competent practitioner of the same class and under similar circumstances” and that the breach caused the plaintiff’s injury. *Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C.*, 120 S.W.3d 682, 687-88 (Ky. 2003). If proof is not established for any one of the three elements, the claim must fail. *M & T Chemicals, Inc. v. Westrick*, 525 S.W.2d 740, 741 (Ky. 1974).

The standard of care must be established by expert testimony unless the negligence and injury are easily identifiable by laymen or if other medical testimony provides a basis for *res ipsa loquitur* (*i.e.*, that the matter is essentially self evident). *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781, 783-84 (Ky. App. 2007). Similarly, expert testimony is required to prove that the alleged negligence ***probably*** caused the injury; the mere possibility of causation is insufficient to withstand summary judgment. *Jackson v. Ghayoumi*, 419 S.W.3d 40, 45 (Ky. App. 2012).

We have carefully reviewed the evidence provided by the expert witness of Mrs. Hitch; *i.e.*, the letter from Dr. Wilk. In his letter, Dr. Wilk summarily declared that Dr. Yelich breached the standard of care by performing the polyp removal and that she did not meet the standard of care when she sewed the anastamosis. However, Dr. Wilk made no statements to indicate what the standard of care is. Without the basis of the standard, it is impossible to determine if a breach occurred. *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d at 784.

Mrs. Hitch does not argue that the standard is easily discerned by laymen; instead, she invokes the *res ipsa loquitur* exception to the necessity of expert testimony rule. However, she did not present this argument to the trial court. Therefore, we are unable to address it. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

Nonetheless, even if Dr. Wilk's letter were sufficient to prove that Dr. Yelich breached the standard of care, it fails to provide any basis of causation. Dr. Wilk listed several actions or inactions by physicians which he claimed did not meet the standard of care. However, at no point did he explain how the complications of a colon procedure caused Mr. Hitch's fatal pneumonia. A causal connection is not readily discernible in light of Mr. Hitch's undisputed pre-existing COPD. Furthermore, Dr. Wilk posited that if Dr. Yelich had not allegedly departed from the standard of care, "*perhaps* Mr. Hitch would have survived." [Emphasis added]. We reiterate that a speculative statement of possibility is not an adequate basis of causation. *See Jackson, supra*.

Mrs. Hitch's brief merely recites and repeats the language of Dr. Wilk's report. She has not provided any evidence which creates a genuine issue of fact relating to causation. Failure to establish a causal link between the alleged deficient healthcare and the injury is fatal to a lawsuit. *See Elswick v. Nichols*, 144 F.Supp.2d 758 (E.D. Ky. 2001). Accordingly, we are persuaded that summary judgment was appropriate.

We affirm the Campbell Circuit Court.

DIXON, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS BY SEPARATE OPINION.

D. LAMBERT, JUDGE, DISSENTING. I respectfully dissent.

The trial court's ruling, that the expert witness disclosures failed to comply with CR 26.02 is erroneous, and I would reverse. The right of a plaintiff to have a dispute resolved by a jury of his or her peers is one of the foundational building blocks on which our justice system stands.

The constitutional term 'inviolable' means that the right to trial by jury is unassailable. Henceforth, legislation and civil rules of practice shall be construed strictly and observed vigilantly in favor of the right and is not to be abrogated arbitrarily by the courts. The constitutional right to a jury trial cannot be annulled, obstructed, impaired, or restricted by legislative or judicial action.

Hazard Coal Corp. v. Knight, 325 S.W.3d 290, 295 (Ky. 2010) (quoting *Steelvest v. Scansteel Serv. Ctr., Inc.*, 908 S.W.2d 104, 108 (Ky. 1995)).

Removing a case from the jury's purview should not be done lightly by a trial court.

In this instance, the trial court concluded that the expert disclosures did not prove the existence of an unresolved issue of material fact. The trial court concluded that the disclosures related to the opinion of Peter Wilk, M.D., were insufficient to establish duty, breach of that duty, and causation. However, Dr. Wilk's disclosures do address each of the necessary elements.

In his report, Dr. Wilk provided an explicit finding on the standard of care for treatment and removal of a dysplastic polyp. His disclosure relates that he is a general and colon and rectal surgeon and that he holds about 300 U.S. Patents, mostly for medical devices, and including the DaVinci Robot, the specific device used by Dr. Yelich in this case.

Dr. Wilk opined:

The usual - the standard of care - treatment for a dysplastic polyp is removal with a colonoscope. This is a procedure that a trained endoscopist does every day. It is not complicated and it is not dangerous. It is also completely curative. Why this was not the procedure done on Mr. Hitch cannot be explained from the records I reviewed. This should have been the procedure offered Mr. Hitch. If it had been, all the unfortunate consequences that lead to his death would not have occurred.

Although there was no indication of an actual cancer, his doctors chose to perform an operation. If they were operating for a polyp that they thought to have a carcinoma within the polyp, they did not again follow the standard of care. The proper operation for a cancerous polyp in the left colon would have been a left hemicolectomy - removal to the left colon and the lymph nodes that are the primary site of metastases for a left colon tumor.

They did not do that. The surgeon performed a "segmental" resection which is removal of only a small section of the bowel containing the polyp and not the lymph nodes to which it would drain. This is an improper cancer operation - had Mr. Hitch had cancer - which he did not.

The operation the surgeon chose to perform is a straightforward operation easily performed with a small incision or laparoscopically performed. The surgeon

chose to perform the operation with the DaVinci Robot. I am the inventor of the DaVinci Robot. It has many advantages in certain operations - but no advantage in the operation the surgeon chose to perform - a segmental resection.

After resecting the bowel, the surgeon chose to bring the two ends of the resected bowel out of the abdomen to perform an open, hand sewn anastomosis. While this allows a close view and easy anastomosis, it does increase the potential for wound contamination. An open, hand-sewn anastomosis, properly performed, should not leak. As Mr. Hitch's anastomosis did leak, it was, therefore, not properly performed.

Mr. Hitch's post-operative condition deteriorated immediately and his doctors were improperly slow in assessing and treating his complications which ultimately led to his demise.

Mr. Hitch had a history of tobacco use - 150 pack years - this made him very susceptible to lung complications.

In the post-operative unit Mr. Hitch was detected to have subcutaneous emphysema - an air leak possibly or probably for an improper insertion of an intravenous line. His chest X-ray immediately showed collapse of his lower left lobe.

Mr. Hitch's condition did not improve. On the fourth post-operative day, a chest X-ray reveals extensive pneumoperitoneum - or air in the abdomen. A small amount of air in the abdomen post-operative in the day or so after an abdominal operation is of no concern. However, a large amount of air on day 4 should immediately raise the concern of an anastomotic leak or bowel injury - which is a catastrophic complication of a colonic anastomosis.

He was not considered for a leak until day 8 when he was felt to have a wound infection and had a second operation. The operation revealed that his anastomosis

had disrupted as the end of the colon appeared ‘a bit ischemic’ - meaning that the surgeons had not left an adequate blood supply to the colon which was used for the anastomosis - another improper action. The anastomosis was found to be almost completely disrupted.

At the second operation, the colon was resected and a colostomy was performed.

After the second operation, Mr. Hitch’s pulmonary problems continued and worsened.

A third operation was performed on the 17th post-operative day for wound dehiscence.

Mr. Hitch continued with pulmonary problems, collapse and abdominal infection from his colonic disruption. He developed acute renal failure, multisystem failure and died more than 2 months after admission.

Mr. Hitch’s care was below the standard of care. He had significant pre-operative pulmonary disease and, thus, increased risk of surgery with a general anesthesia. He was cleared by a cardiologist, but no pre-operative pulmonary consult was obtained.

With the increased risk of a general anesthetic, and an easy, acceptable, non-operative treatment of his dysplastic polyp available - namely removal by colonoscopy - that should have been the treatment of choice for Mr. Hitch. His doctor’s failure to treat his polyp via colonoscopy is a departure from the standard of care.

Likewise, his doctor’s failure to perform a proper cancer operation was a departure from the standard of care.

Likewise, the failure of his doctor to perform a satisfactory anastomosis is a departure from the standard of care.

Likewise, his doctor's failure to recognize in a timely fashion that the anastomosis had disrupted is a departure from the standard of care. Perhaps, if they had recognized it earlier and treated properly, Mr. Hitch would have survived.

Yet, despite the expert opinion proffered by the Hitch estate, the trial court found that the disclosure was not compliant with CR² 26.02 and was not sufficient to defeat the motion for summary judgment. The trial court reasoned that, despite Dr. Wilk's opinion that the surgery should never have been done and to do so was a deviation of the standard of care, it was inadequate proof of the standard of care, because he failed to explain why the colonoscopy was the standard. CR 26.02(4)(a)(i) first notes that a party may require the other party to identify any expert witness expected to be called at the trial and a summary and grounds for each opinion. CR 26.02(4)(a)(ii) permits further discovery to be taken of the expert witness by deposition upon oral examination or by written questions. While Dr. Wilks may not have articulated the entire history of how and when using the less invasive means available to remove a dysplastic polyp became the standard of care, nevertheless, the summary of the expert opinion was produced and it would have been the purpose of further discovery to fully develop the evidence of the medical testimony. Summary judgment should not be granted until the parties have had the opportunity to complete discovery.

² Kentucky Rules of Civil Procedure.

For the trial court to have granted the motion for summary judgment denied the Appellant the right of redress and, was erroneous for the reasons described herein. I therefore respectfully dissent.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES
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