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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001465-MR

CASSANDRA COLO'N — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 13-CI-006008

NORTON HOSPITALS, INC.,
D/B/A NORTON AUDUBON
HOSPITAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Cassandra Colo'n appeals from the Jefferson Circuit Court's denial of her Motion to Alter, Amend, or Vacate the court's order granting summary judgment to Norton Audubon Hospital concerning Colo'n's medical negligence claim. For the following reasons, we affirm.

I. Procedural and Factual Background

This case arose when Colo'n sought treatment at Norton Audubon for a rash on her upper leg, which she believed to be a spider bite. She was diagnosed as having cellulitis of her thigh, and given medication, Bactrim and Keflex, to treat the rash. After receiving the medication, Colo'n was discharged with instructions to continue the two medications. She returned to Norton Audubon a few days later complaining that the rash and itch were getting progressively worse. She was treated with steroids and told to continue the Bactrim and Keflex as previously prescribed. A few days later, she was admitted to the emergency room as the itching and rash had progressed. She was intravenously treated with Kefzol, at which point she began to exhibit signs of a serious allergic reaction, including swelling and spreading of the rash. Colo'n was then given saline, Claritin, and put on oxygen to treat her allergic reaction. Once her swelling and rash begin to subside, she was released.

Colo'n then filed this medical negligence claim alleging that the hospital was negligent in its charting, treatment, and care since her allergy could have easily been detected by a simple test. On November 22, 2013, concurrently with their answer, Norton Audubon filed requests for admissions specifically seeking information regarding Colo'n's expert proof. Colo'n did not provide answers to these requests, nor did she seek an extension of time to do so and thus the requested information was deemed admitted.[1] On January 3, 2014, Norton

[1] Pursuant to CR 36.01(2), a matter is admitted within 30 days of service unless the party served with the request answers or asks for additional time. Colo'n does not dispute these admissions,

Audubon then filed a motion for summary judgment based on Colo'n's default admissions. Colo'n filed a motion for continuance, asking for more time since her counsel had allegedly withdrawn without notifying her of pending deadlines. Her motion was heard on February 2, 2014, and a hearing scheduled for March 26, 2014, giving her an additional seven weeks to respond.

Two weeks prior to the hearing, Colo'n submitted discovery responses, but did not respond to the summary judgment motion. Colo'n again requested additional time to respond. The trial court granted her an additional 60 days and advised her that she would need an expert to support her medical negligence claim and to overcome the admissions already deemed admitted. She stated that she was actively seeking an expert, and understood that expert testimony was necessary to establish a breach of the standard of care. However, Colo'n subsequently filed a response to Norton Audubon's summary judgment motion, stating that she did not need an expert to prove her claim, arguing that *res ipsa loquitur* applied.

Following a hearing on June 3, 2014, on the summary judgment motion and *res ipsa loquitur* claim, the trial court entered an Opinion and Order granting summary judgment in favor of Norton Audubon. Colo'n filed a Motion to Amend, Alter, or Vacate the judgment, which was denied. Colo'n's appeal followed.

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despite the fact that the trial court indicated in its order granting summary judgment that the tardy admissions alone would be a sufficient basis for granting summary judgment in favor of Norton Audubon.

II. Standard of Review

CR[2] 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). "While the Court in *Steelvest* used the word 'impossible' in describing the strict standard for summary judgment, the Supreme Court later stated that that word was 'used in a practical sense, not in an absolute sense.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.,* 319 S.W.3d 366, 370-71 (Ky. 2010).

Although the appellate court reviews the substance of the summary judgment ruling *de novo*,

> a reviewing court must also consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling. 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

[2] Kentucky Rules of Civil Procedure.

> properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion.

Blankenship v. Collier, 302 S.W.3d 665, 668 (Ky. 2010) (internal citations omitted).

III. Argument

Colo'n makes three arguments on appeal. First, she argues that the trial court erred in holding that her case does not fit the *res ipsa loquitur* exception to the expert testimony requirement. Second, she argues the trial court erred in granting summary judgment for Norton Audubon before ruling on whether an expert was needed. Lastly, she argues the trial court erred in granting the summary judgment motion before allowing her full discovery.

A. Res Ipsa Loquitur

First, Colo'n argues that the trial court erred in requiring her to produce an expert since she contends she can maintain her medical negligence claim under *res ipsa loquitur*, thus obviating the need for an expert.

"Ordinarily[,] negligence cannot be inferred simply from an undesirable result; expert testimony is needed." *Perkins v. Hausladen*, 828 S.W.2d 652, 654-55 (Ky. 1992) (citing *Prosser and Keeton on Torts,* Sec. 39 (5th ed. 1984)) (internal quotations omitted).

> Under Kentucky law, a plaintiff alleging 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. Expert testimony is not required, however, in *res ipsa loquitur* cases, where "the jury may reasonably infer both

> negligence and causation from the mere occurrence of the event and the defendant's relation to it", and in cases where the defendant physician makes certain admissions that make his negligence apparent.

Blankenship, 302 S.W.3d at 670 (internal citations omitted). The doctrine of *res ipsa loquitur* includes two recognized exceptions to the expert testimony requirement: 1) "a situation where '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'" (e.g., when a surgeon leaves a foreign object in the body or removes or injures an inappropriate body part); and 2) situations in which "medical experts may provide a sufficient foundation for *res ipsa loquitur* on more complex matters[,]" or in other words, when a medical expert provides a basis for the inference that such an event usually does not occur without negligence. *Hausladen*, 828 S.W.2d at 655-56.

Under the second type of *res ipsa loquitur*, "it is a generally accepted proposition that the necessary expert testimony may consist of admissions by the defendant doctor." *Id.* at 655. In a number of Kentucky cases, the necessary expert testimony was found in the admissions of the defendant doctor. See *Laws v. Harter*, 534 S.W.2d 449 (Ky. 1976) (surgical sponge was left inside a patient after a surgical procedure); *Jewish Hospital Association of Louisville v. Lewis*, 442 S.W.2d 299 (Ky. 1969) (extensive bleeding occurred during a catheterization procedure); *Meiman v. Rehabilitation Center*, 444 S.W.2d 78 (Ky. 1969) (a patient suffered a hip fracture in the course of physical therapy designed for her to use her

new artificial leg); *Neal v. Wilmoth*, 342 S.W.2d 701 (Ky. 1961) (a dentist's drill slipped off the patient's tooth and went through patient's tongue and into his throat). In each of these cases,

> the medical evidence of record established that this type of injury was not an ordinary risk of the surgery, that the method by which it occurred was within the exclusive control of the defendant, and that the injury was not due to any voluntary action or contribution on the part of the plaintiff. The court also pointed out that in determining whether the evidence was sufficient to support an inference of negligence, both common knowledge and the testimony of medical witnesses could be relied on, separately and in combination.

Hausladen, 828 S.W.2d at 655.

In this case, Colo'n argues that two statements contained in her medical record constitute the type of admission that can substitute for expert testimony under the second *res ipsa loquitur* exception, and thus she does not need an expert to show that the conduct fell below the professional standard of care.

First, she alleges the statement, "a patch test, a skin prick test, or an intradermal test may show what antibiotic is causing your allergy[,]" contained in her discharge instructions consists of an admission that a "simple skin test" should have been performed to determine her allergy, thus avoiding her more severe allergic response. Second, she contends that an entry by nurse Ron King, who administered the intravenous antibiotic when Colo'n was admitted to the hospital after increased allergic symptoms, also constitutes an admission:

> Patient was seen in ED three times for allergic reaction after taking Bactrim and Keflex. Her allergy list only

> listed Bactrim. I confirmed her allergies during the admission process. Keflex was not listed as an allergy. Kefzol was ordered on her MAR. I administered it as scheduled. During infusion, her lips started swelling. I looked on her ED notes and noticed that her original reaction occurred after taking Bactrim AND Keflex. The pharmacist confirmed that Keflex and Kefzol are related and would [elicit] a similar allergic reaction. By this time, the infusion was complete. Maintenance fluids and tubing were changed. I called Dr. Tobias. He ordered a dose of Claritin for tonight and continuation of Benadryl, Pepcid, and Solu-medrol. He also ordered continuation of pulse ox and monitoring every 2 hours. Patient is upset and worried.

Norton Audubon argues the first statement is merely a notation of the appropriate test for a given patient and who should administer it, and the second statement is merely a nurse taking additional steps to do his due diligence to determine the cause of his patient's lip swelling and other reaction, and does not constitute an admission that the drugs were in a manner below the standard of care.

We disagree with Colo'n that these notations in her chart are sufficient to constitute an admission sufficient to obviate the need for an expert under *res ipsa loquitur*. Unlike the established case law, Colo'n's medical record did not show that this type of risk is not ordinary for this treatment; in fact, it shows the contrary. *See Hausladen*, 828 S.W.2d at 655. The first alleged admission is included in her discharge instructions under the section titled "Antibiotic Medication Allergy," which instructs the patient on how to properly take her medication, and includes a warning to look for signs of a reaction to

antibiotics. From this warning, one infers that an allergic reaction is an ordinary risk with antibiotic treatment.

Additionally, Colo'n's medical records cannot establish that the method by which her injury occurred was within the exclusive control of the defendant, nor does she actually specify which defendant health professional she alleges is at fault for her allergic reaction. Her medical record and these statements also do not conclusively show causality between her injuries and an identifiable breach of the standard of care, nor do they prove that her injuries were not due to any voluntary action or contribution on her part. Lastly, the facts of this claim, including multiple administrations of different drugs at different times and with different reactions, different healthcare providers, complex pharmaceutical interactions, and multiple possible causations, are not within the realm of the lay person to understand without the assistance of expert testimony. The trial court did not err by finding that Colo'n's claim does not fit under the *res ipsa loquitur* exception.

B. Expert Testimony

Colo'n next argues that the trial court erred in ruling on the summary judgment motion before first ruling on whether an expert was necessary. She contends that the court should have made a separate ruling about the necessity of an expert before ruling on the summary judgment motion.

In *Blankenship*, which is nearly factually and procedurally identical to the case at hand, the Supreme Court of Kentucky has clarified how to proceed in a

medical negligence claim where the necessity of an expert witness is contested and a motion for summary judgment is pending:

> where a plaintiff does create a legitimate dispute about the need for an expert witness prior to the expiration of the court's expert disclosure deadline, the trial court should first make a separate ruling on that issue, i.e., the need, or lack of need, for expert testimony in the case. 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 as outlined by this Court in *Baptist Healthcare*, *supra*. However, if the need for an expert is never disputed and if it would be unreasonable for the plaintiff to argue that an expert is not needed, (and most particularly if the plaintiff requests an extension for the express purpose of securing more time to identify his experts), there is no reason for a trial court first to enter a separate ruling informing the plaintiff that his case requires expert testimony before considering a defendant's summary judgment motion based on the plaintiff's failure of proof.

302 S.W.3d at 672-73. Here, the trial court specifically informed Colo'n that she would need an expert witness, and Colo'n acknowledged that fact, requesting multiple extensions of time to secure an expert. The need for an expert was not disputed until after these extensions were granted. Thus, pursuant to *Blankenship*, the trial court had no reason to first enter a separate order informing Colo'n that an expert was necessary prior to addressing Norton Audubon's summary judgment motion.

C. Discovery

Lastly, Colo'n argues that the trial court erred in granting summary judgment before allowing her full discovery. While a defendant may move for

summary judgment at any time, the Supreme Court has cautioned trial courts not to take up these motions until after the opposing party has had ample opportunity to complete discovery. *Blankenship*, 302 S.W.3d at 668.

In this case, the trial court waited six months from the date that Norton Audubon originally filed its motion for summary judgment to rule on the motion. Throughout the proceedings, Colo'n repeatedly assured the court that she would secure an expert, and that her prior counsel had consulted one with whom she would follow up.[3] Moreover, the trial court granted Colo'n two continuances, and instructed her about the need for an expert witness to testify to a breach of the standard of care and causation, prior to granting Norton Audubon's motion.

As the Supreme Court of Kentucky instructed in *Blankenship*, when a plaintiff in a medical malpractice claim fails to identify or present any expert proof, she cannot sustain her burden of proof. 302 S.W.3d at 668. Since Colo'n never produced an expert and does not fit an exception to the expert testimony requirement, she could not sustain her sole claim of medical negligence. Therefore, the trial court did not abuse its discretion in ruling on summary judgment for Norton Audubon before Colo'n completed discovery.

IV. Conclusion

For the forgoing reasons, the order and opinion of the Jefferson Circuit Court is affirmed.

[3] Colo'n initially retained counsel, but her counsel withdrew early in the proceedings. She seems to allege wrongdoing on the part of her former counsel in their withdrawal, but this issue is not relevant to the medical negligence claim at hand.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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