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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001665-MR
AND CROSS-APPEAL NO. 2015-CA-001749-MR

P. MORRIS PHILLIPS

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 11-CI-005034

DR. JOSEPH CIESLAK

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; JOHNSON AND NICKELL, JUDGES.

KRAMER, CHIEF JUDGE: P. Morris Phillips appeals the Jefferson Circuit Court's decision to summarily dismiss a dental malpractice claim he asserted against the appellee, Dr. Joseph Cieslak, due to Phillips' failure to substantiate his claim with expert proof. Finding no error, we affirm.

Dr. Cieslak has also filed a protective cross-appeal, which he acknowledges would become unnecessary to address if Phillips' appeal is affirmed. Because we have affirmed with respect to Phillips's appeal, it is unnecessary to address the particulars of his cross-appeal; it is dismissed as moot.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Phillips has advanced periodontal disease which has caused him to have all but two of his teeth extracted and which requires him to wear dentures. In June 2000, he began receiving treatment for his condition from Dr. Cieslak, an oral and maxillofacial surgeon. Phillips had difficulty stabilizing his dentures and had Dr. Cieslak place implants in his upper and lower jaw to anchor them. Placing these implants required Phillips to undergo several dental surgeries over the course of several months, and during each surgery Dr. Cieslak was required to use a drill in Phillips's mouth. During one of these surgeries, which occurred on February 6, 2003, the drill Dr. Cieslak was using broke and an approximately 10-millimeter-long fragment of it became embedded in the right side of Phillips's lower jaw.

According to Phillips, Dr. Cieslak never told him about the drill fragment in his jaw. Dr. Cieslak, on the other hand, maintained that he did not discover the presence of the drill fragment until sometime around April 24, 2003, when he subsequently performed an X-ray of Phillips's lower jaw. But, Dr. Cieslak further maintained that shortly after he reviewed the April 24, 2003 X-ray, he discussed the situation with Phillips and informed Phillips that it was safer for the drill fragment to remain where it was unless and until it began causing

problems. In any event, Phillips eventually stopped treating with Dr. Cieslak sometime in 2006.

In 2009, Phillips began to see a dentist, Dr. Darren Greenwell, regarding pain he was having in his jaw and in the regions of his implants. Around October 2010, Phillips began experiencing pain in the right side of his lower jaw to the degree that he could no longer wear his lower denture plate for an extended period of time. On or about February 25, 2011, Phillips consulted with Dr. Greenwell and complained of pain and mobility in the denture implant in the region of his lower right jaw. Dr. Greenwell observed that the area of Phillips's right lower jaw was swollen and red. He performed an X-ray of Phillips's mouth and, after reviewing it, he told Phillips there was what appeared to be a broken drill fragment embedded in Phillips' right lower jaw. Dr. Greenwell then referred Phillips back to Dr. Cieslak and sent Dr. Cieslak a copy of the X-ray.

Later that day, Dr. Cieslak met with Phillips in his satellite office located in Radcliff, Kentucky, and attempted to find and remove the drill fragment. After approximately one hour with no success, Dr. Cieslak told Phillips to meet with him in one of his other offices where he had a CT scanning device; that way, he told Phillips, they could take a three-dimensional picture of the drill fragment and locate it more effectively. After departing from Dr. Cieslak's office, however, Phillips went back to Dr. Greenwell and asked him to recommend someone else to remove the drill fragment. Upon Dr. Greenwell's recommendation, Phillips treated

with Dr. Chris Babcock, another oral and maxillofacial surgeon, who ultimately removed the drill fragment on March 29, 2011.

Phillips filed a malpractice claim against Dr. Cieslak in Jefferson Circuit Court on July 29, 2011. In relevant part, his complaint alleged:

13. [Dr. Cieslak] in his treatment of [Phillips] and in leaving a drill bit in [Phillips's] jaw violated the dental standard of care by:

- A. Failing to take x-rays to determine if a drill bit was in [Phillips's] jaw in February 2000;¹
- B. Failing to follow sound dental practice and procedures and failing to ensure prior to releasing [Phillips] after his dental procedures that no foreign objects were in [Phillips's] jaw;
- C. Failing, during [Phillips's] follow-up visits, to discover that a drill bit was embedded in [Phillips's] jaw; and
- D. Failing to advise [Phillips] that he had left a broken drill bit in [Phillips's] jaw.

After a period of discovery and motion practice, however, Phillips narrowed the contours of his theory. Phillips did not assert that the *presence* of the drill fragment in his jaw, or any need to have it *removed*, was due to negligence on the part of Dr. Cieslak. And, assuming Dr. Cieslak had discovered and had told him about the drill fragment, Phillips did not contend that any decision on the part

¹ This was apparently a typo. As noted, the surgery that led to the drill fragment in Phillips's jaw occurred on February 6, 2003.

of Dr. Cieslak to *leave* the drill fragment in his jaw breached of any medical standard of care.

Rather, the theory of Phillips's case eventually rested upon two other bases. First, Phillips argued Dr. Cieslak had acted negligently by allegedly *not* discovering or informing him about the drill fragment. Had he known about the drill fragment earlier, Phillips argued, he could have made more informed decisions as to the need and nature of his prospective dental treatment. Phillips's second basis—which he put forth for the first time in a pre-trial memorandum he filed two months after Dr. Cieslak filed a July 23, 2015 motion for summary judgment in this matter—was that Dr. Cieslak had, in his view, acted negligently by attempting to remove the drill fragment at an office location that was improperly equipped for that procedure.

The circuit court ultimately granted summary judgment in favor of Dr. Cieslak. In its order, the court largely adopted the reasoning of Dr. Cieslak's dispositive motion, explaining that even if Dr. Cieslak had failed to discover or inform Phillips about the drill fragment, no competent evidence demonstrated Phillips was harmed by the drill fragment's presence in his jaw during the eight or so years between when it became embedded and when it was extracted.

With respect to Phillips's theory that Dr. Cieslak's office had been improperly equipped on the date Dr. Cieslak unsuccessfully attempted to remove the drill fragment, the circuit court explained in its order of summary judgment that Phillips "changes his theory of liability whenever it is challenged," and that in

asserting this argument, Phillips had “refocused” his theory of liability yet again. In any event, the court held, this theory also required expert testimony to substantiate it, and no competent evidence demonstrated that Dr. Cieslak, through his failed attempt at removing the drill fragment from Phillips’s jaw without the assistance of a CT-scanning device, had breached any actionable standard of care.

This appeal followed.

STANDARD OF REVIEW

Summary judgment serves to terminate litigation where “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rule of Civil Procedure (CR) 56.03.

It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Cas. Co. v. Belknap Hardware & Mfg Co.*, 281 S.W.2d 914 (Ky. 1955). “[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation.” *O’Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). “‘Belief’ is not evidence and does not create an issue of material fact.” *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686

(Ky. App. 2007) (“A party’s subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment.”)

Furthermore, the party opposing summary judgment “cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant, and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

ANALYSIS

As stated by the Kentucky Supreme Court in *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 693-94 (Ky. 2003),

[i]n Kentucky, a medical malpractice action is merely a “branch of [the] well traveled road [of common law negligence],” and a medical malpractice plaintiff must demonstrate the same prima facie case- consisting of duty, breach, causation, and injury-required in any negligence case. Thus, a medical malpractice plaintiff must “prove that the treatment given was below the

degree of care and skill expected of a reasonably competent practitioner and that the negligence proximately caused injury[.]”

(footnotes omitted).

The focus of this appeal is upon the quality of evidence Phillips was required to present, for purposes of summary judgment, with respect to: (1) the degree of care and skill that should reasonably have been expected from Dr. Cieslak at all relevant times; and (2) whether any deviation from that standard by Dr. Cieslak caused Phillips’s injury.

We begin with Phillips’s claim that Dr. Cieslak acted negligently by failing to inform him about or discover the drill fragment. In this respect, Phillips does not assert that Dr. Cieslak’s alleged nondisclosure caused the removal of the drill fragment on March 29, 2011, to be any more difficult or painful than it otherwise would have been at some earlier point in time.

Moreover, while Phillips testified by deposition that he believed the drill fragment had caused him symptoms and problems (including jaw pain, diarrhea, infected gums, nausea, loss of appetite, and weight loss), the circuit court did not abuse its discretion² in determining that Phillips’s lay testimony was not enough to permit a jury to reasonably infer causation. In some cases, “causation is so apparent that laymen with a general knowledge would have no difficulty in recognizing it.” *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965). This is not

² See *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 681 (Ky. 2005) (explaining a trial court’s ruling with regard to the necessity of an expert witness is within the court’s sound discretion).

one of those cases. To review, Phillips was treated by Dr. Cieslak in 2003. He did not complain of problems or symptoms involving his jaw or implants until 2009, when he saw Dr. Greenwell. Dr. Greenwell did not even discover the drill fragment until 2011. And, as Dr. Cieslak's experts were prepared to testify at trial, other factors may have caused Phillips's symptoms, including Phillips's repeated use of ill-fitting dentures; the routine failure of his denture implants; and his poor oral hygiene. In light of the above, the cause of Phillips's symptoms and problems was outside the common life experiences of a layperson, and expert medical testimony of causation was required. Even Phillips's treating physicians, Dr. Greenwell and Dr. Babcock, testified *they* were unable to determine whether the drill fragment's presence in Phillips's jaw had actually caused Phillips to suffer any problems or symptoms.

Moving on, we will now address Phillips's claim that Dr. Cieslak acted negligently by attempting to remove the drill fragment at an office location that was improperly equipped for that procedure. Assuming Phillips effectively raised this claim, the circuit court did not abuse its discretion by determining that whether or not an oral surgeon has the proper equipment available for a given procedure is well outside the province of lay testimony. This claim required expert testimony to substantiate, which Phillips lacked.

That said, whether the circuit court deemed this to be an effectively raised and preserved claim is less than clear. But, it was not. As a general rule, a plaintiff may not assert new causes of action during the pendency of the

proceeding which were not set out in the complaint, unless they are tried by the express or implied consent of the opposing party. *See generally*, Kentucky Rule of Civil Procedure (CR) 15.02; *Traylor Bros., Inc. v. Pound*, 338 S.W.2d 687 (Ky. 1960). Here, as indicated above, this particular claim was not encompassed in the complaint Phillips filed in this matter. Phillips did not amend his complaint to assert it. Dr. Cieslak's motion for summary judgment—filed four years after Phillips filed his complaint, and which the circuit court ultimately granted—did not address this claim because the first time Phillips asserted it was in a pretrial memorandum. This was two months *after* Dr. Cieslak had filed his dispositive motion. And, Dr. Cieslak did not consent to try this particular claim; rather, he vigorously objected to the circuit court considering it in any respect.³

CONCLUSION

In short, Phillips has presented no basis of reversible error. We therefore AFFIRM. Dr. Cieslak's protective cross-appeal is DISMISSED as moot.

ALL CONCUR.

³ Shortly after Phillips filed his pretrial memorandum, Dr. Cieslak objected to trying this claim and the admission of any evidence relating to it by filing a supplemental motion *in limine*. In his appellee brief, Dr. Cieslak has not addressed this claim at all.

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