RENDERED: JULY 21, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001750-MR

DAVID SHACKELFORD — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS, III, JUDGE
ACTION NO. 11-CI-01223

PAUL WESLEY LEWIS, M.D.
AND ASHLAND HOSPITAL CORPORATION
D/B/A KING'S DAUGHTERS MEDICAL CENTER — APPELLEES

OPINION
REVERSING
AND REMANDING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, D., JUDGE: David Shackelford appeals from a summary judgment entered in this medical malpractice action by the Boyd Circuit Court in favor of defendants, Paul Wesley Lewis, M.D., and Ashland Hospital Corporation, which does business as King's Daughters Medical Center (hereinafter "KDMC").

Shackelford seeks review of the trial court's ruling that he lacked sufficient proof of causation. Having reviewed the record, this Court reverses and remands.

I. FACTUAL AND PROCEDURAL HISTORY

Shackelford complained of persistent headaches to his rheumatologist, Matthew Samuel, M.D. Samuel, who is not a party to this appeal or to the action below, diagnosed Shackelford with systemic vasculitis, and referred him to Lewis, an interventional radiologist, for a cerebral angiogram to confirm the diagnosis.

The angiogram procedure took place on December 20, 2010. Shackelford was informed that strokes were a known risk of this type of procedure, and gave consent to go forward. Shackelford was given Heparin, a commonly-used anticoagulant, as a precaution. The test proceeded without incident, and Lewis examined Shackelford before sending him to a recovery room for observation, finding him conversational and suffering no apparent ill effects.

While in recovery, Shackelford complained to nurses of white spots in his field of vision. The spots subsided after approximately thirty minutes, replaced by a headache. The nurses informed him that both complaints were common after-effects of an angiogram, and gave him pain medication for the headache. Shackelford reported no other symptoms. He remained at the hospital for monitoring for approximately eight hours, despite the fact that, according to expert deposition testimony, the typical monitoring period following a cerebral angiogram is four hours. Shackelford was then discharged.

Shackelford's wife testified that he exhibited signs of disorientation. She testified that when they were getting into the car to go home, he attempted to climb into a child's car seat rather than the front passenger seat. Nevertheless, she took him home. Shackelford's confusion apparently worsened, and he later attempted to go out into the snow while not wearing a shirt.

Shackelford returned to the hospital the next morning. Doctors performed a CT scan, which revealed nothing, but then took an MRI, which showed signs of multiple areas of infarct, indicative of a stroke. In the approximately twelve hours between his discharge and treatment, expert testimony indicated Shackelford's brain had "aged" by over forty years.

Shackelford initiated this civil action below. He retained vascular surgeon, Michael Khoury, M.D., as an expert witness. At his deposition, Khoury testified that he had no criticism of either the decision to perform the angiogram or the technique employed in performing it. The only criticism leveled at Lewis was the failure to examine Shackelford when he began to experience "transient floaters [in his field of vision] and headaches" in the immediate post-angiogram period. Khoury suggested that Lewis should have performed an immediate diagnostic MRI, and if the results indicated a stroke, admitted Shackelford for oxygenation and blood pressure management.

This testimony certainly established a standard of care, and a possible breach, but Khoury's testimony regarding causation became the critical issue. He could not affirmatively testify that Lewis' care amounted to a substantial

contributing factor of Shackelford's injury. In fact, Khoury testified that it was "impossible to tell" if the damage to Shackelford's brain "had been any different had he been hospitalized versus going home."

Following Khoury's deposition, both Lewis and KDMC moved for summary judgment. The trial court deferred ruling, instead allowing Shackelford to depose the defense experts, Peter Pema, M.D., and Gregory Postel, M.D., both neuroradiologists.

Both defense experts offered opinions in their reports that Lewis' treatment did not amount to a substantial factor in causing Shackelford's injury. At their depositions, plaintiff's counsel asked a series of general and hypothetical questions related to causation, and Pema was asked specifically about the facts surrounding Shackelford and the ensuing delay.

> Q: Assuming for the sake of argument that Mr. Shackelford was displaying signs of stroke at the hospital following his angiogram and he was released anyway, we have 12 year—12 hours until he was brought back. Is that true?
>
> A: Correct
>
> […]
>
> Q: So his brain aged what, according to King's Daughters Medical Center? 43.2 years?
>
> […]
>
> A: So what did you say? 36?
>
> Q: 43.2 years, 'cause you have 3.6 years a minute.

A: No. Per hour.

Q: Per hour. I'm sorry

A: You said it right the first time. 3.6 per hour, and it's 10 hours—or 12 hours you said.

Q: Yeah.

A: Yeah, sounds about right.

[…]

Q: Okay. Again, assuming for the sake of argument Mr. Shackelford was displaying signs of stroke and the hospital released him anyway, wouldn't you agree that his brain aging 43.2 years until the onset of treatment caused damage to his brain?

[…]

A: So you're asking if he was having a stroke and waited 12 hours, then you could—from their literature, you might imply that.

[…]

Q: The most effective treatments need to be given quickly.

A: Sure. The more—

Q: Okay. Usually within three hours after the symptoms appear?

A: That's the old literature. TPA [an anticoagulant used to break apart clots] can be given 4.5 hours by FDA. And then the procedure that I specialize in, the mechanical thrombectomy, can be done many, many hours even.

Q: Right.

Because the time to act is so limited, it is absolutely critical that people experiencing signs of stroke get to the hospital immediately.

Do you agree with that?

A: Yes.

Q: Time Lost is Brain Lost,—

A: Yes.

Q: —in other words?

A: Yes.

Q: Is it true that studies have shown that stroke patients who are treated within 90 minutes of the onset of their symptoms show the most improvement?

A: I wouldn't doubt that. I can't quote the article though. But in general, the quicker you can treat patients, the better they do.

Q: Okay. Because there's a— I think you indicated a person can go so long that the things they could do before, they can't do then.

A: Right.

Q: 12 hours is a long time. True?

A: In the treatment of an acute stroke, it's, relatively speaking, a long time yes.

[…]

Q: The faster you treat a stroke, the better the chance of a full recovery the patient has?

A: The faster you treat a stroke, the better the chance of a good recovery, which would include a full recovery.

Q: Okay. Failing to recognize the signs of stroke and releasing the patient delays the need for immediate treatment. True?

A: I would think so.

Q: To the detriment of that patient?

A: Most likely.

Q: Delays impacts the length of recovery?

A: I would think so.

After the completion of the depositions, the trial court issued an order granting the Appellees' motions for summary judgment. Shackelford initiated this appeal, arguing that the trial court impermissibly "chose form over substance" in issuing its ruling, and further arguing that the totality of the medical evidence adequately proved causation, despite the fact that no witness used the phrase "reasonable probability."

II. ANALYSIS

A. STANDARD OF REVIEW

Summary judgment is a procedural mechanism designed to expedite the disposition of litigation and avoid superfluous trials in cases where the record presents no genuine issue of material fact. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991). Where the non-moving party has presented no unresolved issue of material fact, the moving party is entitled to judgment as a matter of law. CR 56.03. A court must review the record in the

light most favorable to the non-moving party, and draw all reasonable inferences in his favor. *Bituminous Casualty Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2007). Only when it appears impossible from the record that the non-moving party can produce any evidence at trial upon which the fact-finder could possibly find in his favor should a court grant summary judgment. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996).

On appeal, this role of this Court parallels that of the trial court; we examine the record for unresolved issues of material fact.

B. TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT

This action hinges on whether Shackelford produced sufficient proof that Lewis' actions caused his injury. Kentucky courts use the definition for "legal cause" found in the Restatement (Second) of Torts § 431 (1965), which provides that an actor's conduct is legal cause for an injury where the conduct "is a substantial factor in bringing about the harm." *Bailey v. North American Refractories Co.*, 95 S.W.3d 868, 871 (Ky. App. 2001).

In order to recover, a plaintiff in a medical negligence action must offer proof of causation to a reasonable degree of medical probability. *Sakler v. Anesthesiology Associates, P.S.C.*, 50 S.W.3d 210 (Ky. App. 2001). In most instances, such proof must come in the form of expert testimony. *Andrew v. Begley*, 203 S.W.3d 165 (Ky. App. 2006) (*see also Meador v. Arnold*, 264 Ky. 378, 94 S.W.2d 626 (1936); *Reams v. Stutler*, 642 S.W.2d 586 (Ky. 1982)).

Though in certain instances, where the damaging nature and negligence of the complained-of behavior is obvious, courts need not require expert evidence. This Court held in *Green v. Owensboro Med. Health Sys., Inc.*, 231 S.W.3d 781, 783-784 (Ky. App. 2007):

> However, there are two circumstances in which negligence may be inferred without expert medical testimony. The first is where the negligence and injurious results are "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) (citations omitted); *Johnson v. Vaughn*, 370 S.W.2d 591, 596 (Ky. 1963). *See also Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992); *Baptist Healthcare Systems, Inc., supra,* at 680. The second is where other medical testimony provides an "'adequate foundation for *res ipsa loquitur* on more complex matters.'" *Perkins, supra*, at 655 (quoting *Prosser and Keeton on Torts* Sec. 39 (5th ed. 1984)).

Shackelford correctly points out that "[t]he seminal case on this issue, *Rogers v. Sullivan,* 410 S.W.2d 624 (Ky. 1966), does not require an expert medical witness to use the magic words 'reasonable probability.' *Rogers* only holds that testimony so phrased satisfies the requirement that an issue requiring medical expertise be proven by 'the positive and satisfactory type of evidence required to take the case to the jury on that question.'" *Turner v. Commonwealth*, 5 S.W.3d 119, 122 (Ky. 1999) (quoting *Rogers* at 628).

We conclude that the issue of causation falls into one of the two categories not requiring expert medical testimony. Given the ubiquity of information regarding stroke symptom identification and the necessity of prompt

treatment, it has become common knowledge that "time lost is brain lost"[1] as to timely medical intervention.

Even if we had concluded that these facts required expert medical evidence, the deposition testimony of defense expert, Dr. Pema, also reached the issue of causation. However, given the applicability of the common knowledge exception to expert testimony here, his statements merely bolster and lend further credibility to the common knowledge regarding the need for prompt treatment of stroke.

III. CONCLUSION

After a careful review of the record, and finding that the trial court's ruling is inconsistent therewith, this Court must conclude that the judgment was the result of error. Accordingly, we reverse the judgment of the Boyd Circuit Court, and remand for further proceedings.

TAYLOR JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

[1] This simple statement makes up the cornerstone of a public service advertising campaign mounted by several national health organizations, including the American Heart Association and the American Stroke Association. It boasted extensive play on television and radio, as well as internet advertisements.

BRIEF FOR APPELLANT:

A. David Blankenship
Paintsville, Kentucky

BRIEF FOR APPELLEE:

David F. Latherow
Ashland, Kentucky

Kenneth Williams, Jr.
Ashland, Kentucky

W. Mitchell Hall, Jr.
Ashland, Kentucky

William F. Bottoms
Ashland, Kentucky

Ashley Adkins
Ashland, Kentucky