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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001532-MR

JAN SHAW — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 15-CI-00164

TAYLOR COUNTY HOSPITAL DISTRICT
HEALTH FACILITIES CORPORATION,
D/B/A TAYLOR REGIONAL HOSPITAL;
and MARY SLONE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Jan Shaw appeals the Taylor Circuit Court order granting summary judgment to Taylor Regional Hospital and Mary Slone. Shaw also appeals the order denying her motion to alter, amend, or vacate the judgment

(which Shaw, who represents herself, had titled "Motion to Reconsider"). We affirm.

Shaw alleged that her injuries occurred because of a mammography she underwent at the Hospital on June 17, 2014; Mary Slone was the technician who performed the mammography. Shaw, who had received silicone breast implants in 2000, said she warned Slone of that fact prior to the procedure. However, according to Shaw, Slone exerted excess pressure which caused the implant in Shaw's left breast to suffer abnormalities.

Shaw sought further medical treatment. She was sent for a second mammogram on August 15, 2014. The radiologist's report stated that a deformity was present, that the implant was "inflated" but "not ruptured." The hospital waived the fees for the two mammograms and the radiologists' reports, but it denied Shaw's requested costs for reconstructive breast implant surgery.

Shaw and her fiancé (Bert Vetter) filed suit against the hospital and Slone on June 15, 2015. Neither Shaw nor Vetter were represented by counsel. Vetter's claim was dismissed on October 16 of that year.[1] Shaw continues to represent herself throughout these proceedings.

[1] By order dated October 16, 2015, the Taylor Circuit Court held that Vetter's consortium claim could not be sustained because he was not married to Shaw. *See* Kentucky Revised Statute (KRS) 411.145(2); and *Angelet v. Shivar*, 602 S.W.2d 185, 186 (Ky. App. 1980) ("[A] claim for loss of consortium is directly dependent upon the marital relationship for its existence. At the time the intentional act or acts were committed there was no marital relationship, and we join those jurisdictions which hold that a claim for loss of consortium may arise only when the injury to the spouse occurs after the marriage.").

On December 22, 2015, the hospital and Slone filed their first motion for summary judgment, asking the circuit court to dismiss Shaw's claim for failing to comply with discovery. The circuit court held a hearing two weeks later. Shaw requested additional time (six months) to complete the appellees' interrogatories and requests for admission (Kentucky Rules of Civil Procedure (CR) 36.01 and 36.02). She further stated that she was seeking legal assistance and had obtained "good evidence" in her support of her claim. In a subsequent order, the circuit court granted Shaw an additional sixty days to respond to the discovery requests.

Although Shaw filed her response to the interrogatories and requests for admissions, she did not disclose any expert witnesses in support of her claim nor did an attorney enter an appearance on her behalf. The appellees renewed their motion for summary judgment in April 2016. In the hearing on that motion, held on May 17, 2016, Shaw stated that she had an expert ("we are working on it") and that she had contacted an attorney that was interested in representing her. The circuit court again granted Shaw more time but cautioned her that, should she not disclose an expert witness by July 12, 2016, the court would have no recourse but to grant the hospital's motion for summary judgment.

In a memorandum filed by Shaw in June 2016, she raised the issue of *res ipsa loquitur* for the first time. She later read from that memorandum in the July 2016 hearing. At that time the circuit court asked Shaw if she could cite any legal authority to support her claim of *res ipsa loquitur*, but she could not. She merely stated that only she and Mary Slone were in the room when the initial

mammogram was performed; Shaw contended that her alleged injury would not have occurred except for negligence on the part of Slone or the hospital. When asked by the circuit court if she had an expert witness or an attorney to represent her, Shaw stated that she did not.

On July 15, 2016, the Taylor Circuit Court entered its order granting summary judgment to the hospital and Slone, holding that, "Plaintiff cannot prevail on her claim unless she can show, through expert testimony, that Defendants failed to conform to the standard of care, and caused her to suffer an injury. . . . Plaintiff does not support her claim with the expert proof required by Kentucky law." The circuit court cited to *Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010), in support of its ruling. The circuit court further held that the doctrine of *res ipsa loquitur* was not applicable under the facts of this case:

> It is the opinion of this Court that *res ipsa* [*loquitur*] cannot be used to establish the necessary standard of care in this case, which leaves this technical area of medical practice[,] open to speculation by members of a jury[,] that cannot be supported or proven without expert testimony. Since the Plaintiff did not provide an expert as ordered by the Court the Defendants' motion for summary judgment is GRANTED.

Shaw then filed her "Motion to Reconsider" in which she reiterated her claim of *res ipsa loquitur* and insisted that the circuit court's summary judgment was premature, that it had failed to consider several motions she had filed just prior to the July hearing. Meanwhile, the appellees had filed a "Motion to Require Disclosure of Any Assistance from Counsel," whereby they argued that

it was obvious that Shaw was receiving help from an attorney and asked the circuit court to order Shaw to reveal the source of her assistance. Another hearing was held, after which the circuit court denied Shaw's motion and found the appellees' motion to be moot. Shaw then filed her appeal.

In *Blankenship*, *supra*, the Kentucky Supreme Court discussed the applicable standard of review in granting summary judgment in medical negligence cases:

> Although a defendant is permitted to move for a summary judgment at any time, this Court has cautioned trial courts not to take up these motions prematurely and to consider summary judgment motions "only after the opposing party has been given ample opportunity to complete discovery." *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). Thus, even though an appellate court always reviews the substance of a trial court's summary judgment ruling *de novo*, *i.e.,* to determine whether the record reflects a genuine issue of material fact, 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. *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781, 784 (Ky. App. 2007); [*s*]*ee also Neal v. Welker*, 426 S.W.2d 476, 479–480 (Ky. 1968). 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.

Blankenship, 302 S.W.3d at 668. As in *Blankenship*, Shaw was given multiple extensions of time (at her request) to provide her the opportunity to present an expert witness, after Shaw stated that she had consulted with some and "was working" on procuring one to testify at trial. When Shaw failed to meet the ultimate deadline of July 12, 2016, the circuit court fairly ruled that the hospital and Slone were entitled to summary judgment. *Id.* at 673.

It was not until just prior to the July 2016 hearing that she put forth her theory of *res ipsa loquitur*. But "[t]his was not an ordinary negligence case resolved by *res ipsa loquitur*. Expert testimony was necessary." *Chamis v. Ashland Hosp. Corp.*, 532 S.W.3d 652, 657 (Ky. App. 2017).

> We have recognized that in at least two circumstances the fact-finder can fairly and competently evaluate the claim without the benefit of expert opinion testimony. First are the *res ipsa loquitur* cases in which "the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts." *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965) (citations omitted). "Expert testimony is not required ... 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.'" *Blankenship*, 302 S.W.3d at 670 (citation omitted). Second, expert opinion is not required "where the defendant physician makes certain admissions that make his negligence apparent." *Id.*
>
> Neither [defendant has] admitted that they violated a standard of care and so [the plaintiff] relies upon *res ipsa loquitur*—the theory that any reasonable person could reasonably infer negligence from circumstances of the injury; or generally, that the injury could not have occurred but for the negligence of [the defendants].

Adams v. Sietsema, 533 S.W.3d 172, 179 (Ky. 2017). Here, the hospital offered documentary evidence that Shaw's 2012 mammogram showed some irregularities in the implants. Such evidence reasonably raised the inference that other possibilities were present that could negate the *res ipsa loquitur* theory. As such, it was incumbent upon Shaw to present an expert witness. She failed to do that despite the circuit court's three extensions of time in which to do so.

> [T]he trial court's decision to grant summary judgment based upon a failure of proof is subject to *de novo* review on appeal. Upon such review, we agree that in the absence of expert testimony to the contrary, [the plaintiff]'s evidence failed to create a genuine issue of material fact as to [the defendants]' breach of a standard of care, and as a matter of law, [the defendants] were correctly granted summary judgment.

Adams, 533 S.W.3d at 181.

The judgment and order of the Taylor Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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