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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001833-MR

TERRY BOWLING

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 12-CI-04143

BAPTIST HEALTHCARE SYSTEM, INC.
D/B/A CENTRAL BAPTIST HOSPITAL; AND
UNKNOWN DEFENDANTS

APPELLEES

AND

NO. 2017-CA-001839-MR

GENESIA KILGORE-BOWLING

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 12-CI-04143

BAPTIST HEALTHCARE SYSTEM, INC.
D/B/A CENTRAL BAPTIST HOSPITAL; AND
UNKNOWN DEFENDANTS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES, AND K. THOMPSON, JUDGES.

DIXON, JUDGE: Genesisia Kilgore-Bowling and Terry Bowling (collectively, Appellants) appeal from the Fayette Circuit Court’s summary judgment dismissing their medical negligence and loss of consortium claims¹ against Baptist Healthcare System, Inc. After carefully reviewing the record, we find no error and affirm.

In its order granting summary judgment, the circuit court succinctly set forth the following relevant facts:

[Genesisia] was pregnant with twins. Following the C-section delivery on June 27, 2011, Dr. John Barton, the physician who delivered the babies, inspected the surgical wound and confirmed by count that all sponges and instruments used during the procedure had been removed from the abdomen. [Genesisia] was discharged from Central Baptist Hospital on July 1, 2011, and followed up with her physicians as instructed. She apparently began to experience some complications, including abdominal pain, and was referred to a general surgeon whom she saw on September 19, 2011. [Genesisia’s] physicians believed that her pain was due to an abdominal mass and possible gall stones. She was subsequently seen by Dr. Josh Steiner on September 28, 2011, in order to assess the mass and the gall stones.

¹ Terry’s loss of consortium claim was consolidated with Genesisia’s medical malpractice action in the circuit court. Although Terry and Genesisia filed separate appeals, both involve the same arguments and issues; consequently, we will resolve both appeals in one opinion.

On October 6, 2011, [Genesia] underwent surgery at St. Joseph East in Lexington to remove her gall bladder and the abdominal mass. Dr. Steiner removed her gall bladder, and Dr. Michael Bass, a plastic surgeon, performed the surgery on the abdominal mass. Dr. Bass noted in his post-operative report that he excised “firm necrotic fat . . . out of healthy-appearing tissues” and that he discovered “a mesh like plastic at the base [of the anterior fascia], which was removed as a strip.” He also states that “[t]his was all sent for permanent pathological analysis.” However, the mesh-like plastic strip was never sent to pathology and evidently was discarded following surgery. No explanation has been given by any party, witness, or other person as to what happened to the material. Dr. Bass did not photograph the material and is the only person known to the parties who has seen the object that was removed from [Genesia’s] abdomen.

[Appellants] filed this suit on September 12, 2012, alleging that Baptist Health was negligent in failing to prevent and later discover, diagnose, and remove the foreign object found inside [Genesia’s] abdomen. They contend that the foreign object was left during the C-section procedure. Baptist Health denies those allegations.

After a lengthy period of discovery, Baptist Health moved for summary judgment, alleging Appellants failed to establish Baptist Health breached the applicable standard of care and caused the alleged injuries to Genesia. In response, Appellants contended a jury could infer the negligence of Baptist Health, through its agents or employees, during the C-section procedure because a foreign object was subsequently removed from Genesia’s abdomen by Dr. Bass. In its written order, the trial court determined Appellants were not entitled to rely on the

doctrine of *res ipsa loquitur* for an inference of negligence. The court concluded Appellants failed to present evidence Baptist Health violated the standard of care, stating in relevant part:

[W]hose negligent conduct allegedly caused [Genesia's] injury? This question is particularly important to answer where, as here, there has been insufficient proof that the foreign object was left in [Genesia's] abdomen during the C-section procedure. Once again, neither Dr. Barton, Dr. Bass, nor any of [Appellants'] expert witnesses can testify with requisite probability that the "mesh like plastic" was a remnant of the C-section. In fact, the record indicates that [Genesia] had undergone other surgical procedures in her abdominal area prior to her C-section

The court granted summary judgment in favor of Baptist Health, and this appeal followed.

On appellate review, we must determine "whether the trial court correctly found there [were] no genuine issues of material fact and the moving party [was] entitled to judgment as a matter of law." *Norton Hospitals, Inc. v. Peyton*, 381 S.W.3d 286, 290 (Ky. 2012). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some

affirmative evidence showing the existence of a genuine issue of material fact for trial.” *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

Appellants contend summary judgment was improper because the existence of the mesh-like plastic strip removed from Genesis’s abdomen by Dr. Bass was sufficient for a jury to infer negligence and determine the hospital’s liability pursuant to the doctrine of *res ipsa loquitur*.

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. *Perkins v. Hausladen*, 828 S.W.2d 652, 655-56 (Ky. 1992). 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”. . . . *Id.* (quoting *Restatement (Second) of Torts*, Comment b, p. 157).

Blankenship v. Collier, 302 S.W.3d 665, 670 (Ky. 2010). The *res ipsa loquitur* exception to the expert testimony requirement may be applied in situations 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[.]” *Perkins*, 828 S.W.2d at 655.

In the case at bar, Genesis was morbidly obese and pregnant with twins. Dr. Barton ultimately delivered the twins at thirty-two weeks after monitoring showed worsening growth lag for both fetuses, decreased amniotic

fluid volume, an elevated Doppler study of Twin B's umbilical artery, and breech presentation of both babies. Genesis's medical history included laparoscopic procedures in 1993 and 1996 to treat endometriosis, as well as a laparoscopic appendectomy in 1996. Between 2001 and 2010, she underwent three dilation and curettage procedures to treat ongoing problems with her uterine lining.

In *Savage v. Three Rivers Medical Center*, 390 S.W.3d 104, 113 (Ky. 2012), a surgical sponge was discovered in the plaintiff's abdomen four years after a hysterectomy was performed at Three Rivers Medical Center in 2001. *Id.* at 109. The plaintiff's medical history included two previous abdominal surgeries, twenty-four years before her hysterectomy. *Id.* Considering the plaintiff's medical history, the Kentucky Supreme Court explained the need for expert testimony, stating:

The absence of symptoms prior to the 2001 surgery, and the very long span of time—24 years—between the onset of symptoms and the previous surgery may suggest that the sponge was lost during the 2001 surgery, but laypersons do not generally know the time required for a retained surgical sponge to become symptomatic. Some medical phenomena are counter-intuitive. It might be possible that a surgical sponge left at this particular location would not, in fact, be expected to cause problems for twenty to twenty-five years. Without some medical expertise, one cannot categorically exclude the prior surgeries as possible sources of the sponge.

Id. at 113. The Court, noting that expert evidence did not rule out the patient's two prior surgeries as potential sources of the sponge, concluded *res ipsa loquitur* did

not apply to allow an inference Three Rivers Medical Center was negligent in the 2001 procedure. *Id.* Explaining its reasoning, the Court stated:

Applying *res ipsa loquitur* to a specific defendant in a specific case requires a showing that the defendant had full control of the instrumentality which caused the injury. *See Ryan v. Fast Lane, Inc.*, 360 S.W.3d 787, 790 (Ky. App. 2012). If the injury can plausibly be attributed to negligence in the prior surgery, it cannot be said that Three Rivers had full control of the instrumentality (that is, the sponge) that caused the injury.

Id.

Under the facts presented here, Appellants contend a layperson could reasonably conclude the “mesh like plastic” was left in Genesisia’s abdomen during the C-section because she began experiencing abdominal pain in the months following the procedure. We disagree.

Approximately four months after her C-section, Dr. Bass removed a mass of necrotic fat from Genesisia’s abdomen. Dr. Bass discovered an approximately two-inch by one-inch strip of “mesh like plastic” adhered to the base of the necrotic fat. The identity of the “mesh like plastic” was never conclusively established, and Appellants’ expert witnesses were only able to speculate as to what the item could have been and how it came to be in Genesisia’s abdomen. Appellants’ obstetrics expert, Dr. Stoopack, admitted that the source of the foreign object was a mystery. Further, although Appellants acknowledged and minimized Genesisia’s surgical history in their briefs, they failed to cite any

evidence in the record where those procedures were addressed and/or ruled out as a possible source of the “mesh like plastic.”² With more than one potential source of the foreign material, a layperson would not be able to exclude Genesis’s prior surgeries without expert evidence. *See id.* Here, as in *Savage*, Appellants failed to establish Baptist Health had full control of the “mesh like plastic” material that allegedly injured Genesis. The trial court did not err by finding *res ipsa loquitur* did not apply to Appellants’ claim.

We next address whether summary judgment was proper because Appellants failed to establish Baptist Health, through its agents or employees, violated the standard of care. “In medical malpractice cases the 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 or death. The bare possibility of causation will not suffice.” *Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982) (citations omitted). To meet their burden of proof, Appellants were “required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care.”

Blankenship, 302 S.W.3d at 670 (citing *Perkins*, 828 S.W.2d at 655-56).

² CR 76.12(4)(c)(v) requires the argument in support of each claim to have “ample supportive references to the record and citations of authority pertinent to each issue of law and” Here, Appellants failed to specifically cite *where* the evidence supporting their allegations may be found. It is not the responsibility of this Court to construct legal arguments on behalf of the Appellants and scour the record to find where it might provide support for their claims. *Harris v. Commonwealth*, 384 S.W.3d 117, 131 (Ky. 2012).

Appellants believe the “mesh like plastic” was left in Genesis’s abdomen during the C-section because symptoms of abdominal pain began in the weeks following that procedure. However, Appellants presented testimony from three expert witnesses who were unable to state within a reasonable degree of medical probability that Baptist Health breached the applicable standard of care during Genesis’s C-section procedure. Even Dr. Stoopack conceded the source of the material was a mystery. Lisa Elkins, Appellants’ obstetric nursing expert, testified there were no surgical instruments used during a C-section that could be described as “mesh like plastic.” Further, Dr. Tamara Musgrave, Genesis’s treating physician, testified she was unable to state that a foreign object was left in Genesis’s abdomen during the C-section.

To defeat Baptist Health’s motion for summary judgment, Appellants were obligated to produce affirmative evidence showing the existence of genuine issues of material fact. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990). The record reflects Appellants failed to present *any* affirmative evidence that Baptist Health breached the standard of care. Because no genuine issues of material fact existed, Baptist Health was entitled to judgment as a matter of law.

For the reasons stated herein, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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