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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001465-MR

CHARITY PARKS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 16-CI-01802

JAMES YHI LIAU — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, SPALDING, AND THOMPSON, L., JUDGES.

GOODWINE, JUDGE: Appellant, Charity Parks ("Parks"), appeals from a Fayette Circuit Court order granting summary judgment in favor of Appellee, James Yhi Liau ("Dr. Liau"). The trial court found it impossible for Parks to prevail on her medical negligence action against Dr. Liau because she did not have an expert to testify that he deviated from the standard of care as pertains to obtaining Parks' informed consent for the procedure. Therefore, the trial court

found Dr. Liau was entitled to judgment as a matter of law. After a careful review, finding no error, we affirm.

BACKGROUND

Parks had a history of migraines, for which she sought surgical treatment. She consulted with Dr. Liau, complaining of a drooping brow, an eyelid impairing her vision, and inquiring about surgical treatment for her migraines. After discussing Parks' options, Dr. Liau performed a supraorbital decompression surgery, commonly known as a brow lift, on December 16, 2014. Although Parks hoped the surgery would alleviate her migraines, she claimed the surgery caused her to suffer "from a myriad of symptoms including swelling in her head and constant eye irritation as if the eyes were full of sand."

Parks filed a complaint on May 13, 2016 but did not request discovery until nearly a year and a half later. The parties entered into an agreed scheduling order, which set a deadline of January 19, 2018, for Parks' expert witness disclosure under CR[1] 26 information. However, Parks waited until January 26, 2018, to make her CR 26 submission disclosing expert witnesses.

Parks' untimely disclosure identified Dr. Adam Schaffner ("Dr. Schaffner") of Port Washington, New York, as the expert on Dr. Liau's purported deviation from the appropriate standards of care. During his deposition on May

[1] Kentucky Rule of Civil Procedure.

31, 2018, Dr. Schaffner retracted all previous criticisms of Dr. Liau, including whether Dr. Liau failed to obtain Parks' informed consent, based on medical records first presented to him at his deposition. Additionally, Parks made no attempt to establish whether the adverse outcomes complained of were substantial risks and hazards associated with the procedure performed at the time Dr. Liau obtained her consent.

Dr. Liau moved for summary judgment, arguing Parks failed to prove that Dr. Liau deviated from the standard of care in his treatment and in obtaining Parks' informed consent based on Dr. Schaffner's retraction and failure to establish the alleged injuries were substantial risks associated with the procedure. The trial court held a hearing on July 13, 2018, during which the court noted Dr. Liau's performance was no longer criticized by an expert. Although the discovery period had expired, Parks argued summary judgment was premature and requested additional time to depose Dr. Liau. Parks never requested an extension of discovery deadlines, and she did not request written discovery from Dr. Liau until after the motion for summary judgment had been filed.

The trial court found Parks failed to meet "her burden of proof in offering sufficient expert testimony as to Dr. Liau's supposed deviation from the standard of care" regarding his treatment of Parks and concluded Dr. Liau was entitled to judgment as a matter of law. The trial court noted that Parks' only

remaining argument was that Dr. Liau "violated a standard of care as it pertains to obtaining Parks' informed consent for the brow lift procedure." Although Dr. Schaffner had no direct criticisms of Dr. Liau concerning informed consent, Parks argued more discovery was needed, and summary judgment on this issue would be premature. The trial court found Parks had ample opportunity to obtain Dr. Schaffner's opinion regarding informed consent during the discovery period and failed to do so. Without an expert opinion on the matter, the trial court concluded Parks could not meet her burden. The trial court entered an order granting summary judgment on August 6, 2018.

Parks then moved to alter, amend, or vacate the trial court's order granting summary judgment, which the trial court denied by order entered August 30, 2018. This appeal followed.

STANDARD OF REVIEW

Although we review "the substance of a trial court's summary judgment ruling *de novo*," we "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." *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010). Defendants in medical malpractice actions "are entitled to summary judgment as a matter of law" when "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[.]'" *Id.* (quoting *Green v. Owensboro Med. Health Systems, Inc.*, 231 S.W.3d 781, 784 (Ky. App. 2007)). We review 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 . . . for an abuse of discretion." *Id.*

ANALYSIS

On appeal, Parks argues (1) she established a prima facie informed consent case based on Dr. Schaffner's deposition testimony and her own affidavit and (2) the trial court prematurely granted summary judgment in favor of Dr. Liau. First, Parks argues an expert opinion is not required to establish a prima facie case of Dr. Liau's failure to obtain her informed consent because Dr. Schaffner's deposition testimony and her affidavit suffice.

To establish a prima facie informed consent case, a plaintiff must prove the following two elements set forth in Kentucky Revised Statutes (KRS) 304.40-320:

> (1) The action of the health care provider in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with the accepted standard of medical or dental practice among members of the profession with similar training and experience; and
>
> (2) A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of

> the procedure and medically or dentally acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures[.]

Generally, expert testimony is required to establish lack of informed consent. *Keel v. St. Elizabeth Medical Center*, 842 S.W.2d 860, 862 (Ky. 1992). However, "a failure adequately to inform the patient need not be established by expert testimony where the failure is so apparent that laymen may easily recognize it or infer it from evidence within the realm of common knowledge." *Id.* More specifically, expert testimony is not required to establish lack of informed consent in "situations where no information is given to the patient regarding the risks and hazards of the procedure." *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 119 (Ky. App. 1999).

Parks specifically argues she presented a prima facie case that Dr. Liau did not meet the second statutory requirement. Because both requirements must be met, "a breach of the statutory standard may be established by proving that the medical provider failed to meet either one of the two subsections[.]" *Argotte v. Harrington*, 521 S.W.3d 550, 556 (Ky. 2017). "Proving the failure to comply with subsection (2) of KRS 304.40-320 requires an expert opinion only as needed to establish whether the risks and hazards involved [in the plaintiff's claim] are among those recognized among other-health care providers who perform similar

treatments or procedures." *Id.* (internal quotation marks omitted) (quoting *Sargent v. Shaffer*, 467 S.W.3d 198, 209 (Ky. 2015)). In *Argotte*, an expert opinion was not required to establish a prima facie informed consent case because the plaintiff had taken discovery from the defendant doctor. *Id.* at 556. There, the defendant doctor "provided the expertise required to show what risks associated with the [procedure] should be included in the notice to the patient." *Id.* Because the defendant doctor testified as to the risks of the procedure, the Supreme Court of Kentucky held the issue was a "factual question . . . that could readily be resolved by reasonable jurors without the assistance of expert testimony." *Id.*

Based on *Argotte*, there are two fatal flaws in Parks' case: (1) she failed to request written discovery from Dr. Liau until more than two years after filing her complaint and after Dr. Liau had moved for summary judgment; and (2) Dr. Schaffner ultimately refused to provide an opinion regarding informed consent without more information from Dr. Liau. This Court has held that an average layperson's affidavit does not satisfy the expert testimony requirement to establish a breach of the applicable medical standard of care. *White v. Norton Healthcare, Inc.*, 435 S.W.3d 68, 77 (Ky. App. 2014). Although Parks contends Dr. Liau did not discuss the consent form with her, there is no evidence to corroborate this allegation aside from her own self-serving affidavit. As such, the trial court

correctly found that Parks' affidavit and Dr. Schaffner's testimony were insufficient to establish a prima facie informed consent case.

Because Parks failed to present a prima facie case, we address her second argument that the trial court should have allowed her more time to take discovery from Dr. Liau to prove he failed to obtain her informed consent. Trial courts may only consider motions for summary judgment "after the opposing party has been given ample opportunity to complete discovery." *Blankenship*, 302 S.W.3d at 668 (quoting *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988)). In *Blankenship*, the plaintiff patient "failed to establish a genuine issue of material fact at the time [the defendants] filed their summary judgment motions" as there was no expert opinion "to support his claim of medical negligence." *Id.* The plaintiff objected to the motion, arguing "summary judgment was inappropriate . . . because it was only being used as a sanctioning tool to punish him for failing to timely disclose his experts and because there was a 'serious question' as to whether [the plaintiff] would even need experts to prove his medical malpractice case." *Id.* at 669. The Supreme Court of Kentucky held that the plaintiff "never created a legitimate dispute about the need for expert testimony." *Id.* at 672. The plaintiff had "made affirmative representations to the trial court that he would be using expert witnesses[.]" *Id.* Our Supreme Court upheld the trial court's grant of summary

judgment because "seventeen months had passed since [the plaintiff] had filed his complaint, more than four months had passed since the extended disclosure deadline, and approximately four months had passed since the filing of the defendants' summary judgment motions." *Id.* at 674.

Although "[w]e deliberately refrain from setting any time lines for identification of expert witnesses because each case must be considered by the trial court on a case-by-case basis[,]" the timing of the trial court's grant of summary judgment was appropriate in this case. *Id.* at 674, n.2. Parks indicated her expert witness, Dr. Schaffner, would provide testimony in support of her claims. She never argued expert testimony was unnecessary to support her claim until she responded to Dr. Liau's motion for summary judgment, arguing her affidavit and Dr. Schaffner's noncommittal testimony were sufficient to survive summary judgment. Parks also argued in her response that she could further develop Dr. Schaffner's opinion if the trial court permitted her additional time to take discovery from Dr. Liau. Parks did not seek discovery from Dr. Liau until twenty-one days after Dr. Liau filed his motion for summary judgment. If the trial court had permitted more time to take discovery from Dr. Liau, then she would have needed additional time to obtain a supplemental report from Dr. Schaffner even though the agreed-upon expert deadline had passed.

The trial court granted summary judgment after more than two years had passed since Parks filed her complaint, more than six months had passed since the agreed-upon expert witness deadline passed, and over a month and a half had passed since Dr. Liau filed his motion. "[T]he curtain must fall at some time upon the right of a litigant to put forth the most basic level of proof and the plaintiff's bare assertion that something will turn up cannot be made basis for showing that a genuine issue as to a material fact exists[.]" *Id.* at 675 (internal quotation marks and citations omitted). Thus, we hold the trial court did not abuse its discretion in granting summary judgment in favor of Dr. Liau.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

THOMPSON, L., JUDGE, CONCURS.

SPALDING, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

SPALDING, JUDGE, DISSENTING: I respectfully dissent. In my view, the majority opinion fails to account for the issue of fact created by the evidence of record, particularly Dr. Schaffner's deposition testimony. I would have vacated the Fayette Circuit Court's summary judgment.

During his deposition, Dr. Schaffner testified to the risks associated with the procedure the appellant underwent. Specifically, Dr. Schaffner stated that certain risks could include "unsatisfactory appearance of the scar, problems with wound healing, hypertrophic scar, keloid scar, . . . altered sensation, paresthesia, hyperesthesia, numbness, itching, cosmetic dissatisfaction, nerve damage, . . . damaged vision, certainly with blepharoplasty, blindness. There is a lot obviously." Additionally, Dr. Schaffner said "[i]t's a common thing in the healing process for people to have itching and it's common for it to reduce over time in frequency and severity. But there have been cases of intractable itching that have been noted, absolutely, and it is a risk of the procedure absolutely and if the patient is not willing to assume these risks they shouldn't have the procedure." Dr. Schaffner further testified that these risks should be discussed with a patient prior to the procedure so that the patient may become familiar with the risks.

The appellant testified, by way of affidavit, to the following: "Had I been truthfully informed of Dr. Liau's inexperience with the specific migraine decompression surgery; the various diagnostic testing methods used to locate the trigger points; the alternative treatments which were available and the known risks of the procedure, I would not have consented to the elective surgery." Moreover, the appellant testified Dr. Liau never discussed the "Consent for Procedure and Transfusion" form with her.

KRS 304.40-320 clearly and unambiguously sets forth what a physician must do in order to obtain a patient's informed consent. Subsection (1) of that statute has been interpreted to require physicians obtain patients' consent in a manner consistent with "the acceptable standard of practice of the applicable medical specialty." *Argotte v. Harrington*, 521 S.W.3d 550, 555 (Ky. 2017). Subsection (2), on the other hand, is an

> objective standard, requiring that the risk information conveyed to the patient by the health care provider . . . be such that it provides, not the specific patient, but 'a reasonable individual,' with 'a general understanding of the . . . substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures.

Id.

Pertinently, for a physician to "satisfy the statutory standard for obtaining the patient's informed consent, the physician must comply with *both* subsections." *Id*. at 556 (citing *Sargent v. Shaffer*, 467 S.W.3d 198, 207 (Ky. 2015)) (emphasis in original). In other words, a plaintiff bringing an action pursuant to the statute may prevail by demonstrating that a physician failed to abide by *either* subsection (1) or subsection (2). *Id*. ("Consequently, a breach of the statutory standard may be established by proving that the medical provider failed to meet either one of the two subsections of KRS 304.40-320.").

Here, I would agree that the appellant cannot prevail by demonstrating a breach of subsection (1). "To show that a physician failed to comply with subsection (1) of the statute, a plaintiff must show the physician's actions for obtaining consent fell outside 'the accepted standard of medical or dental practice,'" which "can only be proven by expert testimony." *Id.* Because the appellant's expert had "essentially retracted any previous criticisms" of the appellee, the appellant lacked the evidence required to proceed forward on her claim.

However, expert testimony is not necessarily required to show that a physician failed to comply with subsection (2) of KRS 304.40-320. Rather, expert testimony is needed in such an instance only to the extent it is required to "establish 'whether the "risks and hazards" involved [in the plaintiff's claim] are among those "recognized among other-health care providers who perform similar treatments or procedures."'" *Id.* (citing *Sargent*, 467 S.W.3d at 209).

> Otherwise, whether the physician's notice to the patient would provide 'a reasonable individual' with a 'general understanding of the procedure and . . . [the] substantial risks and hazards inherent in the proposed treatment' is a question 'perfectly suited for application by jurors of ordinary competence, education, and intellect' without the need for expert testimony.

Id.

Thus, pursuant to *Argotte*, I do not believe that the appellant was necessarily required to provide expert testimony regarding subsection (2). However, in the matter at hand, expert testimony existed from Dr. Shaffner in the record at the time the appellee's motion for summary judgment was made, and I believe it was sufficient to establish that the risks associated with the appellant's procedure was recognized among other health care providers in the field. Dr. Shaffner's deposition testimony clearly establishes as much.

Furthermore, the appellant's affidavit testimony was evidence of "information" that may or may not have been "provided" by the appellee, as that language is utilized in subsection (2). "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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The risks detailed by Dr. Schaffner during his deposition were not reflected by the appellant during any of his contact with the appellant. Such evidence created an issue of fact as to whether "a reasonable individual . . . would have a general understanding of the procedure and . . . acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment," KRS 304.40-320(2), and such an issue of fact is one "perfectly suited for application by jurors of ordinary competence,

education, and intellect." *Argotte*, 521 S.W.3d at 556. In sum, the evidence of record was sufficient to overcome a motion for summary judgment.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
M. Alex Rowady William A. Dykeman Winchester, Kentucky	Melanie S. Marrs Tonya S. Rager Justin T. Baxter Lexington, Kentucky