

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001471-MR

ORVILLE McCARTY; AND
JOANN¹ McCARTY

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 95-CI-00103

JOHN D. BOSWELL, M.D.; AND
CONSOLIDATED HEALTH SYSTEMS, D/B/A
HIGHLANDS REGIONAL MEDICAL CENTER

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Orville and JoAnn McCarty have appealed from an order of the Floyd Circuit Court entered on June 15, 2001, which granted summary judgment in favor of John D. Boswell, M.D., and

¹ Although the notice of appeal in this case shows the spelling of the first name as "JoAnne", her signature on the notice of appeal shows the spelling of her first name to be "JoAnn". For the purposes of this Opinion, we will spell her first name "JoAnn".

Consolidated Health Systems (the appellees) and dismissed the McCartys' medical malpractice action. Having concluded that the trial court did not abuse its discretion by excluding the expert testimony proffered by the McCartys or by denying them an extension of time in order to offer more medical proof, and that there is no genuine issue as to any material fact, we affirm.

Orville McCarty was admitted to Paul B. Hall Medical Center on October 30, 1993, after he suffered several seizures. According to the admitting diagnosis, Orville suffers from liver failure and chronic ethanol abuse. His condition was listed as critical and the prognosis was far from promising. Orville remained at the hospital until November 22, 1993, when his condition improved and he was discharged. Arrangements were then made for Orville to follow-up with a hematologist, Dr. William John, at Highlands Regional Medical Center.²

Orville returned to the medical center for his follow-up visit on November 30, 1993, and he also returned on December 13, 1993, at which time he was seen by Dr. Donald R. Fleming, an oncologist. Upon noticing a swelling under Orville's jaw, Dr. Fleming decided to have a fine needle aspiration done of the area, which was performed by Dr. Boswell, a pathologist at

² During his stay at the hospital, it was determined that Orville had leukocytosis, which is a marked increase in the number of leukocytes in the blood stream. A hematologist is a physician who specializes in matters pertaining to the blood, including the diagnosis and treatment of blood diseases.

Highlands Regional Medical Center.³ Upon reviewing the pathology slides of the tissue taken from the submandibular swelling, Dr. Boswell issued a report on December 14, 1993, in which he opined that the swelling under Orville's jaw was a "poorly differentiated malignant neoplasm." In his report, Dr. Boswell further commented that "[t]he findings are most consistent with a metastatic poorly differentiated small cell neoplasm." In laymen's terms, Dr. Boswell diagnosed Orville with cancer.⁴ Dr. Boswell did not recommend any further biopsies prior to diagnosing Orville with cancer. Orville returned to the medical center on December 20, 1993, at which time Dr. Fleming recommended chemotherapy. According to Orville, Dr. Fleming and Dr. John informed him that he had only one year to live.⁵

³ A pathologist is a physician who studies the nature of disease and its causes, as compared to an oncologist, whose expertise is in the staging and treatment of cancer. Since oncologists generally do not hold themselves out as having expertise in microscopic biopsy interpretations, such as a fine needle aspiration, they commonly rely on the interpretations of pathologists. That is to say, if a pathologist diagnoses a patient with cancer, the oncologist then relies upon that diagnosis in determining the proper course of treatment for the patient.

⁴ Cancer is defined as "[a]ny of various malignant neoplasms characterized by the proliferation of anaplastic cells that tend to invade surrounding tissue and metastasize to new body sites." Stedman's Medical Dictionary 124 (1995). Neoplasm is defined as "[a]n abnormal new growth of tissue that grows by cellular proliferation more rapidly than normal, continues to grow after the stimuli that initiated the new growth cease, shows partial or complete lack of structural organization and functional coordination with the normal tissue, and usually forms a distinct mass of tissue which may be either benign or malignant." *Id.* at 550. Thus, by concluding that Orville had a "poorly differentiated malignant neoplasm," Dr. Boswell was in effect diagnosing him with cancer.

⁵ There are no medical records or depositions supporting this alleged statement.

Orville was prescribed an oral regimen of the chemotherapy drug "Vp-16" in 50 milligram doses twice per day for a ten-day period, beginning every 21 days.

On January 10, 1994, Orville returned to the medical center and informed the treating physician, Dr. John, that he was feeling much better. Dr. John noticed that the mass that had been located under Orville's jaw was gone. Orville then followed-up with Dr. Fleming on January 24, 1994, at which time Dr. Fleming noted that Orville was responding favorably to the chemotherapy treatment.

On February 8, 1994, Orville consulted Dr. Vijayalakshmi Puram, an oncologist at Pikeville Methodist Hospital, concerning the condition of Orville's lungs.⁶ Dr. Puram took x-rays of Orville's chest and informed him that he would obtain the pathology slides from Highlands Regional Medical Center and have them reviewed by Pikeville Methodist's pathologist, Dr. James A. Dennis. Dr. Dennis reviewed the slides on February 10, 1994, and made the following observations:

Review of the slides show an intensely cellular neoplasm that has characteristics of lymphocytic origin. The cells have large oval nuclei with indistinct nuclear membranes. There is an intense expression of cells undergoing autolysis or necrosis

⁶ Orville was concerned that he might have lung cancer.

and an intense proliferation of inflammatory cells as well as the malignant component . . .⁷

Dr. Dennis then sent the pathology slides to Dr. James L. Bauer, a pathologist with Chipps and Caffrey, PSC. Dr. Bauer reviewed the slides on February 15, 1994, and concluded that he was "unable to identify with assurity malignancy." Dr. Puram subsequently reported these findings to the McCartys and informed them that she had forwarded the findings to Dr. Boswell.

After reviewing the information provided by Dr. Dennis and Dr. Bauer, Dr. Boswell sent the pathology slides to North Carolina Baptist Hospital Bowman Gray School of Medicine for further evaluation. The slides were then reviewed by four additional pathologists, Dr. James Cappellari, Dr. Kim Geisinger, Dr. M. B. Hopkins and Dr. Teot. Dr. Cappellari, Dr. Geisinger and Dr. Teot all favored a diagnosis of an inflammatory lesion, but none of the doctors was sure as to the exact nature of the lesion. Dr. Hopkins favored a diagnosis of a benign, squamas-lined cyst of possible congenital origin. Once again, in laymen's terms all four of the doctors concluded that the aspiration taken from the submandibular masses did not indicate a "poorly differentiated malignant neoplasm." Dr. Hopkins, however, did comment that "[t]his is a very difficult

⁷ In essence, Dr. Dennis concluded from his review of the slides that it was possible that they could be interpreted as showing a poorly differentiated cancer suggestive of lymphoma.

aspiration to interpret." Dr. Hopkins further opined that "the inflammation has made this extremely difficult to interpret and the cohesiveness of groups of the cells can certainly be attributed to the original interpretation of a small cell neoplasm."

Based upon the additional findings, Dr. Boswell issued an addendum to his original report on March 9, 1994, in which he noted that the fine needle aspirate of the submandibular area was "inconclusive" and that after reviewing the case extensively he was "unsure as to the correct diagnosis." Dr. Boswell further recommended that Orville be followed closely without additional chemotherapy and that a recurrence of the mass be biopsied for definitive diagnosis. Unfortunately, the McCartys had already endured months of the negative side effects associated with chemotherapy, i.e., nausea, severe diarrhea, hair loss, and nosebleeds.

On March 21, 1994, Orville met with Dr. Fleming, who informed him that he was withholding further therapy. On April 4, 1994, Orville met with Dr. Syed G. Badrudduja, who noted that Orville had two skin lesions located on the submandibular gland area. As to the first lesion, Dr. Badrudduja commented that "this appears more like a chronic inflammatory process of the skin like a sebaceous cyst." As to the second lesion, Dr. Badrudduja commented that the "[t]he second lesion is not

typical of a cyst." Dr. Badrudduja recommended an excisional biopsy of the two lesions, but Orville ultimately refused.

On February 13, 1995, the McCartys filed a medical negligence action against Dr. Boswell and Highlands Regional Medical Center. The complaint alleged that Dr. Boswell was negligent in one or more of the following respects: (1) failing to properly diagnose Orville McCarty's condition; (2) failing to recognize the inadequacy and impropriety of his diagnosis; (3) failing to timely recognize the inadequacy and impropriety of his diagnosis; (4) failing to refer Orville to the appropriate specialists; and (5) failing to perform appropriate follow-up examinations. The McCartys also made similar allegations against Highlands Regional Medical Center. Orville sought damages as a result of the side effects of his chemotherapy treatment, including the enhanced risk of leukemia for five years following the treatment. JoAnn McCarty sought damages for loss of consortium.

The appellees subsequently filed answers denying the allegations in the complaint and the case proceeded to the discovery process. On April 25, 1997, the appellees deposed Dr. Stephen Cohen, the McCartys' expert witness. Dr. Cohen is an oncologist who also specializes in hematology. Dr. Cohen testified at his deposition that he believed Dr. Boswell deviated from the standard of care attributed to pathologists by

diagnosing Orville McCarty with cancer. However, when questioned as to his qualifications to render such an opinion, the following colloquy occurred:

Q. Have you yourself looked at any of the slides in this case?

A. No.

Q. Have you requested to look at any of them?

A. No.

Q. Do you think that you are qualified to look at them and reach conclusions?

A. No.

On October 8, 1998, the McCartys' attorney filed a motion to withdraw from the case due to a conflict of interest with his clients. On January 6, 1999, the motion to withdraw was granted and the McCartys were ordered to obtain new counsel.⁸ The McCartys obtained new counsel on February 4, 1999. On February 11, 2000, Dr. Boswell filed a motion to dismiss for failure to prosecute pursuant to CR⁹ 41.02(1). Highlands Regional Medical Center filed a similar motion on February 14, 2000. Counsel for the McCartys filed a response on February 25, 2000, claiming that any delays in the case were a product of the fact "[t]he [p]laintiffs are people of modest means and this is

⁸ At this time nearly three years had passed since the commencement of the action.

⁹ Kentucky Rules of Civil Procedure.

the type of case that is expensive to prosecute." On October 16, 2000, the McCartys filed a motion requesting the trial court to order mediation. On January 18, 2001, the trial court ordered the parties to attend a mediation conference.¹⁰

On December 15, 2000, the appellees deposed Dr. Sanford Edberg, another expert witness identified by the McCartys. Dr. Edberg is a pathologist whose specialties are similar to those of Dr. Boswell. Dr. Edberg testified that he would not have diagnosed Orville with cancer. However, when asked if Dr. Boswell deviated from the appropriate standard of care in his treatment of Orville McCarty, Dr. Edberg responded as follows:

Q. It is my understanding, then, that your opinion does not --- you are not willing to say whether or not Dr. Boswell's reading of this particular set of slides did or did not meet the standard of care?

A. I would say that, personally, I would not have handled this case in the manner that he did.

Q. Is that as far as you're willing to go on your opinion?

A. That's correct.

On March 30, 2001, Dr. Boswell filed a motion in limine to exclude the testimony of Dr. Cohen as to his opinion that Dr. Boswell had deviated from the acceptable standard of care in treating Orville McCarty. Dr. Boswell argued that Dr.

¹⁰ There is no evidence in the record that any such conference ever took place.

Cohen's testimony should be excluded because Dr. Cohen himself had admitted that he is not qualified to read pathology slides; he never read the slides at issue; and he did not use an appropriate method in formulating his opinion. Dr. Boswell also requested that Dr. Edberg's testimony concerning his interpretation of the pathology slides be excluded as well. Dr. Boswell argued that although Dr. Edberg was qualified to look at the slides, his method of analysis was unreliable due to "hindsight bias."

Dr. Boswell further requested that the trial court grant summary judgment in his favor, claiming that if his motion in limine regarding Dr. Cohen's testimony was granted, the McCartys would lack the required expert testimony to prove their claim of medical negligence. Dr. Boswell argued in the alternative that even if his motion in limine was not granted, he was still entitled to a partial summary judgment on the McCartys' liability theories of (1) failure to recognize an error in reading the pathology slides; (2) failure to perform a follow-up examination; and (3) failure to refer Orville to a specialist. As to JoAnn's loss of consortium claim, Dr. Boswell argued that her claim was derivative of her husband's claim and thus, he was entitled to summary judgment on the same grounds. Highlands Regional Medical Center joined in Dr. Boswell's

motions in limine and motion for summary judgment on April 3, 2001.

On March 30, 2001, the McCartys' second attorney filed a motion to withdraw from the case. At this time well over six years had passed since the commencement of the action. Nonetheless, the McCartys remained undeterred in their persistence to proceed with the case and by June 1, 2001, they had obtained yet another attorney. The McCartys' third attorney never filed a response to the aforementioned motions filed by the appellees. He did, however, file a motion for an extension of time in order to obtain additional expert opinions. On June 8, 2001, a hearing was held on the McCartys' motion for an extension of time and the appellees' motions in limine.

On June 15, 2001, the trial court entered an order denying the McCartys' motion for an extension of time and granting the appellees' motion in limine as to Dr. Cohen. The trial court reasoned that the methods used by Dr. Cohen in reaching his conclusions did not meet the requisite standards for admissibility set forth in KRE¹¹ 702.¹² The trial court also concluded that summary judgment was appropriate as to the McCartys' medical malpractice claim as they lacked the requisite

¹¹ Kentucky Rules of Evidence.

¹² The trial court based its decision on Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995)(overruled on other grounds, Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999)).

expert testimony necessary to prove that Dr. Boswell's conduct fell below the appropriate standard of care.¹³ The trial court did not address the remaining motions filed by the appellees, concluding that they were moot. This appeal followed.

The McCartys raise three issues on appeal. The McCartys claim the trial court abused its discretion by concluding that Dr. Cohen's testimony was inadmissible under KRE 702 and by denying them an extension of time in which to offer additional medical proof. The McCartys additionally claim that even without Dr. Cohen's testimony or additional medical proof summary judgment was improper.

Since the trial court's decision to grant summary judgment in favor of the appellees was based upon the lack of expert testimony establishing that Dr. Boswell's conduct fell below the appropriate standard of care, we will begin our analysis with the trial court's decision to exclude Dr. Cohen's testimony. KRE 702, which governs the admissibility of expert testimony, provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

¹³ As evidenced above, the McCartys only produced expert testimony on the issue of improper diagnosis. Thus, the issue of improper diagnosis remained the only viable theory of liability advanced by the appellants. As to JoAnn's loss of consortium claim, the court concluded that it must fail as it was derivative of her husband's claim. See e.g., Godbey v. University Hospital of the Albert B. Chandler Medical Center, Inc., Ky.App., 975 S.W.2d 104 (1998).

experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The language contained in KRE 702 is virtually identically to that contained in Fed. R. Evid.¹⁴ 702; and in Mitchell, supra, the Supreme Court of Kentucky adopted the standards for evaluating expert testimony set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc.¹⁵ According to the Mitchell Court, when a trial court is faced with a proffer of expert scientific testimony, it must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."¹⁶ The Mitchell Court went on to note that in making this determination a trial court "must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be applied to the facts in issue."¹⁷ Factors to be considered in making this determination are whether the scientific knowledge being presented has been tested, whether it has been subject to peer review and publication, what the evidence's known rate of error is, and whether the evidence has

¹⁴ Federal Rules of Evidence.

¹⁵ 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

¹⁶ Mitchell, 908 S.W.2d at 101 (quoting Daubert, 509 U.S. at 592, 113 S.Ct. at 2796, 125 L.Ed.2d at 482).

¹⁷ Id.

a particular degree of acceptance in the relevant community.¹⁸ Moreover, the decision as to the qualifications of an expert witness rest in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.¹⁹

The McCartys claim that Dr. Cohen does in fact meet the factors and requirements set forth in Mitchell. The McCartys argue that Dr. Cohen's opinion is clearly relevant. In support of this argument, the McCartys claim that Dr. Cohen has studied the various reports relating to Orville's pathology slides. The McCartys further claim that Dr. Cohen's testimony is reliable as his opinion is based upon "looking at the number of pathologists who disagreed with Dr. Boswell."²⁰ We disagree and conclude that the trial court's decision to exclude Dr. Cohen's testimony was based upon sound legal principles and well within its discretion.²¹

Dr. Cohen, who is an oncologist, explicitly stated that he is not qualified to review or interpret pathology slides. Moreover, Dr. Cohen's expert opinion appears to be based on what the appellees have aptly labeled as "counting heads." Dr. Cohen simply counted the number of pathologists who

¹⁸ Id.

¹⁹ Id.

²⁰ The McCartys also appear to attach some significance to the fact that Dr. Cohen was aware that Dr. Boswell retracted his initial diagnosis.

²¹ Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

agreed with Dr. Boswell's diagnosis and contrasted that number with the number of pathologists who disagreed with his diagnosis. We are far from convinced that this method of counting variant readings is generally accepted within the relevant scientific community.

In addition, Dr. Cohen has failed to establish that his opinions have been verified through valid scientific testing and the record is completely devoid of any evidence suggesting that Dr. Cohen's method of counting variant readings has ever been subject to peer review or publication. Moreover, Dr. Cohen has failed to provide any basis upon which to find the known or potential error rate of his proposed technique. It appears that the trial court's decision to exclude Dr. Cohen's testimony was based upon the fact that there was a paucity of evidence supporting the "reasoning or methodology underlying [his] testimony."²² Thus, the trial court's refusal to admit Dr. Cohen's testimony did not constitute an abuse of discretion.

The McCartys argue in the alternative that not all scientific testimony is classified within the confines of Mitchell. The McCartys cite Collins v. Commonwealth²³ and claim that "unless an expert [is] testifying about his 'theories' or 'methodology,' no determination need be made under the Daubert

²² Mitchell, 908 S.W.2d at 101.

²³ Ky., 951 S.W.2d 569 (1997).

factors as to the expert's [testimony's] admissibility." The McCartys further argue that Dr. Cohen's testimony concerns basic, non-novel medical issues within the expertise of any medical doctor. We are unpersuaded by this argument, however, as the scenario presented in Collins is clearly distinguishable from the case at bar.

The expert testimony in Collins concerned basic female anatomy and the medical determination made by the expert pertained to whether or not it was possible for a sexually active female to have a hymen.²⁴ The expert opined that a female could engage in sexual intercourse and still have a visible hymen.²⁵ The expert's opinion was based primarily upon the experience she gained in the course of conducting numerous pelvic examinations.²⁶ Thus, the Supreme Court concluded that nothing of a scientific nature was present in the expert's testimony so as to "trigger the necessity of applying the Daubert analysis."²⁷

The pathological interpretation of a fine needle aspiration, on the other hand, requires specialized training in the field of pathology. Dr. Cohen illustrated this point in his

²⁴ Id. at 574-75.

²⁵ Id.

²⁶ Id.

²⁷ Id.

deposition when he testified that he was not qualified to look at Orville's pathology slides and render a conclusion based upon their contents.²⁸ If Dr. Cohen is not qualified to interpret Orville's pathology slides, then we are at a complete loss as to how he could be qualified to render an opinion as to whether or not Dr. Boswell's interpretation of those slides fell below the appropriate standard of care. Moreover, Dr. Cohen's proffered testimony, if admitted, would clearly exceed the realm of "basic anatomy." Thus, we are unwilling to extend the holding of Collins to the facts of the case sub judice.

The McCartys further claim that the trial court abused its discretion by denying their motion for an extension of time. The McCartys cite Poe v. Rice,²⁹ and argue that "the order for summary judgment has the flavor of a dismissal for failure to prosecute." The McCartys claim the trial court failed to consider their difficulty in obtaining counsel or the expenses involved in procuring medical testimony. Thus, the McCartys argue that "[o]n the basis of Poe, the trial court should not have granted summary judgment on these grounds."

Poe simply stands for the proposition that summary judgment is inappropriate where it is used as a vehicle for

²⁸ Such testimony is hardly surprising as Dr. Cohen is not a specialist in the field of pathology; rather, he is an oncologist who has no expertise in the field of pathology beyond any courses he may have taken in medical school.

²⁹ Ky.App., 706 S.W.2d 5 (1986).

resolving "an essentially procedural conflict arising from [the] discovery [process]." ³⁰ As for the argument that the order for summary judgment in the case sub judice was premised upon the McCartys' failure to prosecute the case, we do not believe the trial court was motivated by anything other than sound legal principles in concluding that the McCartys had failed in a reasonable time to establish an essential element of their cause of action. The trial court did not abuse its discretion by denying the McCartys an extension of time in order to develop additional medical proof.

The McCartys' final argument is premised upon their contention that a lack of expert testimony does not necessitate summary judgment in a medical malpractice action. The McCartys seek to invoke the doctrine of res ipsa loquitur by arguing that expert testimony is not necessary in the case at bar as the jury can infer negligence from Dr. Boswell's own "admissions."³¹ The McCartys argue in the alternative that even in the absence of any "admissions" on the part of Dr. Boswell, the alleged

³⁰ Id. at 6.

³¹ The McCartys never raised the issue of res ipsa loquitur below. Although we could follow suit with the trend in other jurisdictions, Picarazzi v. State, N.Y.App.Div., 95 A.D.2d 958, 959 (1983); Buck v. Alton Memorial Hospital, Ill.App., 407 N.E.2d 1067, 1071, 86 Ill.App.3d 347 (1980); Rietveld v. Mountain States Telephone & Telegraph Co., Colo.App., 485 P.2d 525, 526 (1971), and conclude that the McCartys are precluded from raising this issue for the first time on appeal, since this is an appeal from a summary judgment we believe justice is better served by addressing the merits of this argument.

negligence that occurred in the case sub judice is of the kind that "any layman is competent to pass judgment [on]." While we agree with the McCartys that a lack of expert testimony does not necessarily necessitate summary judgment in a medical malpractice action, we do not believe the doctrine of res ipsa loquitur applies to the case sub judice.

In Perkins v. Hausladen,³² our Supreme Court applied the doctrine of res ipsa loquitur in the context of a medical malpractice action. The Supreme Court held that where the facts and circumstances are such that negligence can be inferred, expert testimony is not necessary to prove that the defendant acted negligently. In addressing the general rule that expert testimony is required in a malpractice case to show that the defendant failed to conform to the requisite standard of care, the Supreme Court stated as follows:

"However, it is a generally accepted proposition that the necessary expert testimony may consist of admissions by the defendant doctor. [Citation omitted]. And there is an exception to the rule in situations where the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts."³³

The defendant in Perkins, Dr. Hausladen, had in fact testified as to the appropriate standard of care in his deposition. Thus, the Supreme Court concluded that the

³² Ky., 828 S.W.2d 652 (1992).

³³ Id. at 655 (quoting Jarboe v. Harting, Ky., 397 S.W.2d 775, 778 (1965)).

necessary expert testimony could be found in the "admissions [of] the defendant doctor." The Supreme Court further concluded that Dr. Hausladen's admissions as to the appropriate standard of care coupled with the additional medical testimony of subsequent treating physicians, "was sufficient to present a case of res ipsa loquitur, or circumstantial evidence, from which the jury could infer negligence . . ."³⁴

The McCartys rely on Perkins for their claim that a jury could reasonably infer negligence from Dr. Boswell's own "admissions." This argument appears to be based upon the McCartys' contention that that the statements contained in the addendum to Dr. Boswell's original report constituted some sort of admission on his part. The McCartys further argue that the jury can infer negligence from the fact that Dr. Boswell retracted his original diagnosis. Since we do not believe the statements contained in the addendum issued by Dr. Boswell constitute an "admission," we reject this argument.

The addendum prepared by Dr. Boswell on March 9, 1994, simply discussed the varying opinions of the seven pathologists who reviewed Orville's pathology slides. Dr. Boswell noted that most of the pathologists who reviewed the slides "feel that this is a difficult case to interpret." Dr. Boswell further commented that "the majority (4) feel this is an inflammatory

³⁴ Id. at 656.

process with (3) who feel that a malignant neoplasm is a definite diagnostic possibility." Although, Dr. Boswell stated that after reviewing the case extensively, he was now "unsure as to the correct diagnosis," and that his final diagnosis was therefore, "inconclusive," he also suggested that the submandibular masses disappeared as a result of Orville's chemotherapy treatment. Thus, Dr. Boswell never stated that his initial diagnosis was wrong. Moreover, Dr. Boswell never admitted any wrongdoing nor did he ever state that his initial diagnosis was incorrect. He simply acknowledged that there was room for reasonable disagreement as to the correct diagnosis. These statements alone are insufficient to invoke the doctrine of res ipsa loquitur.

As for the McCartys' argument that the alleged negligence that occurred in this case is of the kind that "any layman is competent to pass judgment [on]," we are not convinced that this case is one in which a normal person could conclude from common experience that the pathology slides should have been interpreted differently. Moreover, none of the pathologists who reviewed the slides indicated that Dr. Boswell's interpretation of the slides fell below the appropriate standard of care. In addition, the McCartys have failed to cite any Kentucky cases in which the doctrine of res

ipsa loquitur was applied to a mistake in diagnosis.³⁵ We are of the opinion that the doctrine does not apply in such situations. Accordingly, summary judgment was appropriate as the McCartys have completely failed to demonstrate the existence of a genuine issue as to any material fact.³⁶

Based upon the foregoing reasons, the order of the Floyd Circuit Court granting summary judgment in favor of the appellees and dismissing the McCartys' medical malpractice action is affirmed.

ALL CONCUR.

³⁵ The Kentucky cases that do apply the doctrine of res ipsa loquitur in the context of a medical malpractice action are clearly distinguishable from the case sub judice. See Perkins, supra (holding that res ipsa loquitur applied where the surgeon perforated the patient's sigmoid sinus during surgery); Keel v. St. Elizabeth Medical Center, Ky., 842 S.W.2d 860 (1992) (holding that res ipsa loquitur applied to a lack of informed consent claim); City of Somerset v. Hart, Ky., 549 S.W.2d 814 (1977) (holding that res ipsa loquitur applied where a surgeon left a scalpel blade in the patient's bladder after performing abdominal surgery); Laws v. Harter, Ky., 534 S.W.2d 449 (1975) (holding that res ipsa loquitur applied where a sponge was left in the patient during a surgical procedure); Jewish Hospital Association of Louisville v. Lewis, Ky., 442 S.W.2d 299 (1969) (holding that res ipsa loquitur applied where there was extensive bleeding following a catheterization procedure); Meiman v. Rehabilitation Center, Inc., Ky., 444 S.W.2d 78 (1969) (holding that res ipsa loquitur applied where a bone was broken during therapy treatment); and Neal v. Wilmoth, Ky., 342 S.W.2d 701 (1961) (holding that res ipsa loquitur applied where a dentist's drill slipped off his patient's tooth).

³⁶ See Hubble v. Johnson, Ky., 841 S.W.2d 169 (1992); and Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

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