

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001368-MR

FAYE BYRD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 98-CI-001057

EDGAR LOPEZ, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant Faye Byrd appeals the grant of summary judgment in favor of Appellee Edgar Lopez, M.D., in her medical negligence action. The issue before the trial court was whether Byrd was required to have an expert opinion to support her claims against Dr. Lopez. These claims included lack of informed consent and medical negligence for leaving breast implant fill valves in place for years longer than the manufacturer's recommended six month maximum. The trial court

granted summary judgment in favor of Lopez, stating that Byrd did not provide expert testimony supporting her claims. We affirm the trial court's determination.

Lopez performed surgery on Byrd in 1994 to remove previously placed breast implants and replace them with saline implants. Lopez had initially implanted silicone implants in Byrd after a bilateral mastectomy. Lopez' office notes from 1992 show that Byrd was contemplating having her implants removed and not replaced, and merely using prostheses in her bra due to her strong desire not to have to undergo any further surgeries. Lopez' notes show that he felt replacing the silicone implants with saline implants "might be a good alternative."

Byrd finally agreed to the saline implants in 1994, and states that Lopez informed her that she would never have to undergo surgery again. The record reflects Byrd's strongly stated fear of surgery, and intention not to have to ever undergo another surgery. Byrd also asserts that Lopez told her she would be ugly and disfigured if she removed the silicone implants and did not replace them with new implants. Byrd claims that this testimony is sufficient to support her claim of negligence in placing saline implants which would invariably require additional surgeries. No expert opinion is provided supporting Byrd's theory of the case.

The trial court stated that the manufacturer's directions with regard to use of the tubes, along with Byrd's physician's testimony about his later removal of the implant tubes and his own practice of following the manufacturer's directions, did not support a finding of medical negligence. The trial court found that Byrd's physician's individual plastic surgery practice did not establish the medical standard of care for plastic surgery in general. The trial court stated that Byrd had not provided the required expert testimony supporting her position, and that summary judgment must issue for that reason.

Lopez admits to knowledge of the manufacturer's recommendations that the tubes be removed within six months after surgery, but asserts that he left the tubes in to minimize the risk of additional surgery should the implants leak or deflate. Byrd bases her negligence claim on the manufacturer's insert which recommends, but does not mandate, removal of the tubes within six months. A manufacturer's insert, taken alone, cannot establish the standard standing alone, absent a showing that the physician had access to the insert and understood its directions as mandating certain behavior. Craft v. Peebles, 893 S.W.2d 138 (Haw. 1995).

The trial court found that Byrd had not provided expert medical testimony supporting her claim of negligence. While a

manufacturer's insert provides evidence of reasonable medical practice, an expert opinion must also be provided to support such a claim. Ramon v. Farr, 770 P2d 131 (Utah, 1989). Byrd failed to provide an expert opinion showing that it was a breach of the applicable standard of plastic surgery to leave the fill tubes in longer than six months.

Byrd argues that medical complications can occur if the fill tubes are left in for periods of time in excess of the manufacturer's suggested maximum. Byrd's expert witness who is her treating physician notes that the manufacturer recommends prompt removal of the fill ports, and that he never leaves such ports in longer than the manufacturer's suggested removal date. The manufacturer's information suggests removal within six (6) months after surgery to avoid the risk of tissue adhesions and other complications. Byrd's witness as to the cause of the deflation of the implant found that the length of time the fill valves remained in her body caused tissue ingrowth and implant deflation. Neither witness stated, however, that Lopez breached the applicable standard of care. In the absence of such testimony, Byrd cannot defeat Lopez's motion for summary judgment.

Lopez provided the trial court with the opinion of his expert witness, which asserted that Lopez's actions comported with the reasonable standard of care. This opinion states that

it is based on a reading of the medical records in this action. Lopez relies on this opinion as providing a complete defense to the allegations of medical negligence. We affirm the trial court's finding that this opinion supports a grant of summary judgment in favor of Lopez.

Kentucky law requires that a plaintiff alleging medical negligence prove that the treatment rendered failed to meet the degree of care and skill expected of a reasonably competent practitioner and that the negligence proximately caused the injury. Reams v. Stutler, Ky., 642 S.W.2d 586 (1982). As a general rule, malpractice generally "must be established by medical or expert testimony." Johnson v. Vaughn, Ky., 370 S.W.2d 591, 596 (1963). Byrd asserts that the fact that the fill tubes were left in far longer than the manufacturer recommended is sufficient evidence of negligence. The trial court stated that the testimony of an expert witness is required to supplement the manufacturer's insert in supporting a claim for negligence. Byrd's treating physician stated that he followed the manufacturer's inserts, and that it was his practice to remove the fill valves according to the manufacturer's directions. Dr. Laughlin did not state that Lopez failed to act as a reasonably competent practitioner should have. The trial court correctly found that this claim was insufficient to proceed to trial in the absence of an expert

opinion affirmatively stating breach of the applicable standard of care.

The trial court also granted Lopez summary judgment on the issue of lack of informed consent. Byrd asserts that Lopez failed to obtain informed consent prior to placing the implants. Byrd claims that the lack of informed consent constitutes actionable negligence. The parties admit, however, that Byrd was provided with numerous informed consent forms discussing the general risks associated with the procedure she was about to undergo. Byrd was provided the information and consent forms late on August 23, 1994, and the surgery took place early on August 24, 1994. Byrd argues that the timing did not allow her sufficient opportunity to read and understand the informed consent materials.

The trial court ruled that the applicable standard of care required of a physician in disclosing information to his patient is that of the "reasonable medical practitioner." 13 Leibson, Kentucky Practice Tort Law, Section 10.20 (1995). An informed consent action "is in reality one for negligence in failing to conform to the proper professional standard. . . ." Holton v. Pfingst, Ky., 534 S.W.2d 786, 788 (1975). Where a patient is provided with information generally advising her of the risks of a medical procedure, the informed consent requirement is satisfied. Hawkins v. Rosenblum, Ky. App., 17

S.W.3d 116, 119 (1999). While Byrd's expert witness Dr. Laughlin stated his standard of practice with regard to informed consent, and that he hoped that "the community of plastic surgeons" acted as he did, Laughlin did not expressly state that Lopez had breached the applicable standard of care. Absent such testimony, Byrd cannot proceed with her action.

An action for failure to provide informed consent can proceed without an expert opinion only where the patient is provided no information at all from her medical practitioners about the procedure. See: Keel v. St. Elizabeth Medical Center, Ky., 842 S.W.2d 860, 862 (1992). In the present case, Byrd was provided with pages of information. She signed documents showing that she had been provided with an opportunity to ask questions about the operation, and that she had no further questions about the procedure. Under such circumstances, an expert opinion is required to determine whether Lopez breached the applicable standard of care. See: Hawkins v. Rosenblum, supra., 17 S.W.3d at 119.

For the foregoing reasons, the grant of summary judgment is affirmed.

TAKETT, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT.

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