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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001456-MR

NOVA E. MATHENEY

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 04-CI-00157

J. NEAL SHARPE, M.D.;
SURGICAL ASSOCIATES, P.S.C.;
AND J. MATTHEW SCHWAB, M.D.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Nova E. Matheney brings this appeal from March

18, 2005, summary judgments of the Shelby Circuit Court

dismissing his medical malpractice complaint against Dr. J.

Matthew Schwab and Dr. J. Neal Sharpe. We reverse and remand.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In March 2004, Matheney filed a complaint in the Shelby Circuit Court against, *inter alios*, Dr. Schwab and Dr. Sharpe. The facts leading to the filing of this complaint are fairly straightforward. On or about March 25, 2003, Matheney went to the emergency room at Jewish Hospital Shelbyville complaining of stomach cramps. Dr. Schwab performed and read an ultrasound as showing gallstones present in Matheney's gallbladder. On March 26, 2003, Dr. Sharpe, a surgeon, performed a laparoscopic procedure on Matheney to remove his gallbladder. During the procedure, it was discovered that the gallbladder was surgically absent. Dr. Sharpe admitted in his answer to the complaint that he had previously removed Matheney's gallbladder. The record reflects that Matheney's gallbladder had been removed in 1998. Matheney initiated this action against Dr. Sharpe and Dr. Schwab for their negligence in subjecting Matheney to an unnecessary surgical procedure.

Dr. Schwab and Dr. Sharpe both filed motions for summary judgments, and on March 18, 2005, the circuit court entered orders granting their motions. In both summary judgments, the court specifically held that "with no expert witnesses, Plaintiff has failed to make a showing of negligence." This appeal follows.

Matheney contends the circuit court committed error by granting Dr. Schwab and Dr. Sharpe's motions for summary

judgment and dismissing the medical negligence claims. For the reasons hereinafter elucidated, we agree.

Summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. (CR) 56; Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). When considering a summary judgment motion, the record must be viewed in a light most favorable to the nonmoving party with all doubts resolved in his favor. Id.

In granting the summary judgments, the circuit court opined that Matheney could not prove his medical malpractice claims against Dr. Schwab and Dr. Sharpe in the absence of expert testimony establishing their negligence. The record indicates that Matheney failed to properly disclose the identity of his medical experts and the substance of their opinions in compliance with CR 26.02. Both Dr. Schwab and Dr. Sharpe propounded interrogatories to Matheney requesting the identity of all experts and the substance of their opinions. Matheney failed to timely respond to the interrogatories. Matheney did tender a late response that consisted of two names and addresses. However, there was no summary of facts or opinions as to the experts' testimony. The circuit court concluded that Matheney failed to comply with CR 26.02 and with the court's previously entered pretrial order. With no expert witness

testimony, the court then concluded that summary judgment was proper because Matheney would be unable to prove medical negligence without such expert testimony.

It is well-established that the burden of proof is upon the plaintiff in a medical malpractice case. Morris v. Hoffman, 551 S.W.2d 8 (Ky.App. 1977). The negligence of a physician generally must be established by medical or expert testimony unless the negligence and "injurious results" are so apparent that a layperson with general knowledge would have no difficulty recognizing it. Id.; Johnson v. Vaughn, 370 S.W.2d 591 (Ky. 1963). See also Perkins v. Hausladen, 828 S.W.2d 652 (Ky. 1992).

In this case, the record indicates that Dr. Sharpe admitted in his answer that he had previously surgically removed Matheney's gallbladder. However, Dr. Sharpe stated that he was unaware of such fact at the time of the laparoscopic procedure in March 2003. In light of this admitted fact, we are of the opinion that the alleged medical negligence of both Dr. Sharpe and Dr. Schwab was well within the general knowledge of a layperson. Indeed, a layperson would have no difficulty in recognizing Dr. Sharpe's purported deviation from the standard of care in advising and undertaking to remove a gallbladder that he had previously removed. Moreover, we, likewise, believe that a layperson would have no difficulty recognizing Dr. Schwab's

purported deviation from the standard of care in reading Matheney's ultrasound as a diseased gallbladder, when, in fact, no gallbladder existed. Simply put, the alleged medical negligence is such that expert testimony was simply unnecessary. We believe that material issues of fact exist upon whether Dr. Schwab and Dr. Sharpe were negligent, thus creating disputed factual issues for a jury. Accordingly, we conclude the circuit court committed error by entering summary judgment dismissing Matheney's malpractice claims against Dr. Schwab and Dr. Sharpe.

Additionally, we note that it is inappropriate to use a CR 56 summary judgment in a procedural dispute as a sanction against a party's counsel. Baptist Healthcare Systems, Inc. v. Miller, 177 S.W.3d 676 (Ky. 2005). The court's order "overruling" appellant's motion to reconsider and set aside summary judgment clearly reflects that the court was sanctioning counsel for the disregard shown for an earlier court order regarding discovery. At minimum, to consider summary judgment as a sanction under the circumstances of this case, the court must make findings of willfulness or bad faith on behalf of the party to be sanctioned and must show whether less drastic sanctions were imposed or considered before dismissal was granted. Greathouse v. Am. Nat'l Bank and Trust Co., 796 S.W.2d 868 (Ky.App. 1990).

These necessary findings were absent from the circuit court's order. Given our holding that expert witnesses are unnecessary in this case, the circuit court clearly abused its discretion in imposing summary judgment as a sanction against Matheney's attorney.

For the foregoing reasons, the summary judgments of the Shelby Circuit Court are reversed and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert G. Lohman, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEES J. NEAL
SHARPE, M.D. AND SURGICAL
ASSOCIATES, P.S.C.:

Gerald R. Toner
Amy M. Stewart
O'Bryan, Brown & Toner, PLLC
Louisville, Kentucky

BRIEF FOR APPELLEE J. MATTHEW
SCHWAB, M.D.:

Richard P. Schiller
Kimberly S. Naber
SCHILLER, OSBOURN & BARNES,
PLLC
Louisville, Kentucky