

RENDERED: FEBRUARY 23, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000029-MR

GINA WOODS

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CI-00606

PREMIER THERAPY AND HEALTH CENTERS, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND TAYLOR, JUDGES; EMBERTON,¹ SENIOR JUDGE.

ACREE, JUDGE: Gina Woods (Woods) brings this appeal from the December 1, 2005, summary judgment of the Greenup Circuit Court dismissing her medical malpractice complaint against Premier Therapy and Health Centers, Inc. (Premier). We affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In September, 2003, Woods underwent surgery on her wrist. She was referred by her surgeon, Dr. Galen Weiss, to Premier for physical therapy following surgery. The physical therapy included anodyne treatment, a heat therapy applied to an affected area for temporary pain relief and/or improvement of circulation. Woods claims that, on her second to last visit to physical therapy, the treatment was administered differently than on previous occasions. Specifically, the treatment was left on her wrist for a longer period of time than usual and was much hotter than in her previous experiences. Immediately after the treatment was performed, red dots were visible on Woods wrist. A few days later blisters developed. Woods visited a dermatologist, Dr. Carol Cooper, and was diagnosed with post-inflammatory hyper-pigmentation and hypertrophic scarring.

Woods filed suit against Premier in September 2004, alleging that Premier was negligent in its application of the anodyne therapy on her wrist. On June 30, 2005, Premier filed a Motion asking for summary judgment because Woods failed to provide the name of an expert witness to support her claim of negligence. On September 2, 2005, the court entered an Order stating:

Plaintiff has 60 days from the date of this Court's ruling on August 25, 2005, to identify an expert witness in this action, and also to provide a notarized affidavit from such expert noting any opinions relative to standard of care and causation. This Court further orders that if no expert is identified within 60 days from the August 25, 2005 ruling, this Court will, upon further motion by Defendant, proceed to dismiss this action.

In November 2005, Premier filed a Renewed Motion for Summary Judgment that was heard by the trial court on December 1, 2005. Woods had yet to identify or provide an affidavit from an expert witness and the trial court granted summary judgment in favor of Premier and dismissed the claim. This appeal followed. Because we conclude that expert testimony was required under the circumstances, we affirm.

Summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56; *Steelevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (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 judgment, the circuit court opined that Woods could not prove her medical malpractice claim against Premier in the absence of expert testimony establishing its negligence. The record indicates that Woods failed to properly disclose the identity of her medical experts and the substance of their opinions in compliance with CR 26.02. Premier submitted interrogatories to Woods requesting the identity of all experts and the substance of their opinions. Woods responded that she had not yet determined what parties would testify as expert witnesses at trial. In its Motion for Summary Judgment, Premier submitted four Affidavits indicating that its treatment of Woods met the applicable standard of care. Woods submitted no opinion to the contrary.

The trial court determined that this case dealt with a medical issue beyond the scope of common knowledge and expert testimony was necessary. After Woods failed to respond to a pretrial order requiring her to disclose her experts and the substance of their testimony, the circuit court concluded that summary judgment was proper. Without such testimony, Woods would be unable to prove medical negligence.

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, 9 (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, 596 (Ky.1963). *See also Perkins v. Hausladen*, 828 S.W.2d 652, 654-55 (Ky.1992).

Kentucky consistently recognizes two exceptions to the expert witness rule in medical malpractices cases. *See Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky.1992). Both exceptions involve the application of the *res ipsa loquitur* doctrine and permit the inference of negligence even in the absence of expert testimony. *Id.* at 654.

One exception involves a situation in which:

“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;” illustrated by cases where the surgeon leaves a foreign object in the body or removes or injures an inappropriate part of the anatomy.

Id. at 655 (*quoting Prosser and Keeton on Torts*, Sec. 39 (5th ed.1984)). An example of the second exception would be the case in which the defendant doctor makes admissions

of a technical character from which one could infer that he or she acted negligently. *Id.* Neither exception is involved here.

We do not believe that the average layperson possesses the knowledge or experience to know what anodyne therapy is and whether severe burns are possible during the procedure in the absence of negligence. Nor do we believe that the average layperson knows of the appropriate manner in which to administer said treatment. Woods was required to present expert testimony on the issue of medical malpractice. Because she did not, summary judgment in favor of Premier was proper.

For the foregoing reasons, the decision of the Greenup Circuit Court is affirmed.

ALL CONCUR.

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