

IN THE COURT OF APPEALS 11/12/96
OF THE
STATE OF MISSISSIPPI
NO. 93-CA-00967 COA

HARVEY R. WELLS

APPELLANT

v.

EUGENE E. TAYLOR, M.D.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. RICHARD T. WATSON

COURT FROM WHICH APPEALED: ADAMS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JEFFREY M. NAVARRO

ATTORNEYS FOR APPELLEE:

STEPHEN P. KRUGER

W. HUGH GILLON, IV

NATURE OF THE CASE: CIVIL: MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED IN FAVOR OF
DEFENDANT

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BEFORE FRAISER, C.J., DIAZ, KING, AND PAYNE, JJ.

DIAZ, J., FOR THE COURT:

The Adams County Circuit Court granted summary judgment against the Appellant, Harvey R. Wells (Wells) in this medical malpractice case. Aggrieved from this judgment, Wells appeals to this Court asserting the following four issues: (1) whether the trial court erred in failing to consider Wells's discovery responses in determining whether summary judgment should be granted; (2) whether the trial court erred in determining that the present case did not fall within the exception to the general rule requiring expert testimony; (3) whether a genuine issue of material fact existed as to the facts upon which Dr. Eugene Taylor's (Taylor) expert witness based his opinion; and (4) whether the trial court should have granted Wells's motion for a continuance. Finding no reversible error, we affirm the judgment.

FACTS

Wells was admitted to the Franklin Parish Hospital on October 17, 1990 after he suffered a pelvic fracture and other related injuries caused when a tree fell on him. Wells was subsequently transferred to Jefferson Davis Memorial Hospital where he was treated by Dr. Taylor, an orthopaedic surgeon. Dr. Taylor diagnosed the pelvic fracture, and noted questionable changes in the vascular condition of Wells's legs. Dr. Taylor obtained a surgical consultant to evaluate Wells's possible vascular problem. Eventually, Wells was transferred to the Veterans Administration Hospital in Jackson where the attempts to treat his vascular problem were unsuccessful, and therefore, both legs were required to be amputated below the knee.

On December 10, 1992, Wells filed a complaint against Dr. Taylor alleging that his amputations were a result of Dr. Taylor's negligent diagnosis and treatment of his vascular problems. Two months after Wells ignored a court order compelling him to respond to Taylor's interrogatories and request for document production, Taylor filed a motion for summary judgment.

Wells filed his responses on the day of the hearing for summary judgment; none of which included any expert affidavits setting forth the appropriate standard of care. Wells also filed a motion for a continuance alleging that he was unable to obtain an expert affidavit as of the date of the hearing.

DISCUSSION

I. INTERROGATORY ANSWERS

Wells argues that the trial court erred in failing to consider his answers to interrogatories when it ruled on the motion for summary judgment. After reviewing the record, we find that the lower court did in fact consider Wells's answer to interrogatories when it ruled on the motion for summary judgment. In its decision, the trial court states:

[T]he main point to be considered by the [c]ourt in this hearing on motion for summary judgment was the response to Interrogatory number 24, which clearly states that Dr. Pool told counsel for the plaintiff on December 3, 1992, by telephone that . . . the defendant . . . failed to properly diagnose and treat thrombosis in plaintiff's leg. That's the answer to interrogatories signed by the attorney for the plaintiff.

From the above statement, it is apparent that the trial court considered the answers to interrogatories in its determination of the motion.

The lower court found that the present case fell squarely within the bounds of the law stated in *Walker v. Skiwski*, 529 So. 2d 184 (Miss. 1988). Likewise, we find that case to be dispositive. In the *Walker* case, Walker's son experienced complications from a circumcision performed by Dr. Skiwski. Walker filed a suit on behalf of his son alleging that the doctor had negligently performed the circumcision. *Walker*, 529 So. 2d at 185. After several "discovery skirmishes," Dr. Skiwski filed a motion for summary judgment. *Id.* Dr. Skiwski supported his motion with several expert affidavits contending that he performed the circumcision consistent with the requisite standard of care. In response, the Walkers relied solely upon Mr. Walker's answers to interrogatories where he stated that he saw his son's pain and suffering, and that in his opinion, Dr. Skiwski negligently performed the circumcision. *Id.* at 187. The Walkers also listed five expert witnesses each of whom the Walkers contended would testify that Dr. Skiwski was negligent. The Walkers however, did not provide the sworn testimony of any of the five experts that they had listed. *Id.* Instead, Mr. Walker offered his own statement of what his experts would have stated. *Id.* The court rejected the testimony stating that it was pure hearsay and that Rule 56(e) declares such evidence to be incompetent in regard to a motion for summary judgment. *Id.* This is exactly the case before us. Wells's answers to Dr. Taylor's interrogatories include hearsay statements from two doctors to Wells's attorney indicating that Dr. Taylor was negligent. Wells concedes the fact that his responses to the interrogatories are hearsay, but contends that the responses created an issue of material fact. According to the law stated above, hearsay is incompetent evidence in such an instance.

II. LACK OF EXPERT TESTIMONY

Wells filed his answer to Taylor's motion for summary judgment on the day of the hearing. Wells did not include any expert testimony in his answers. Wells's attorney filed an affidavit stating that a doctor advised him that Dr. Taylor acted negligently. Wells also offered the lay opinion of his sister that the amputations would have been prevented had Dr. Taylor began treatment on October 25 as opposed to October 26. The medical record indicates the first complaint of pain was recorded on October 26.

Rule 56 (c) of the Mississippi Rules of Civil Procedure allows the court to enter summary judgment on claims where there are no genuine issues of material fact. *Erby v. North. Miss. Medical Ctr.*, 654 So. 2d 495, 498 (Miss. 1995). The focal point of this standard is on material facts. *Erby*, 654 So. 2d at 499. In order to avoid an adverse judgment, the party opposing the judgment must bring forth probative evidence legally sufficient to make apparent the existence of triable fact issues. *Id.* (citations omitted). It is important to note that the mere presence of fact issues in the record does not per se entitle a party to avoid summary judgment. *Id.* The court must be convinced that there is a material fact issue that is significant in an outcome determinative sense. *Id.*

Our general rule is that medical negligence may be established only by expert medical testimony, with an exception for instances where a layman can observe and understand the negligence as a matter of common sense and practical experience. *Id.* at 500. The plaintiff must have evidence from a qualified expert to establish not only the applicable standard of care, but also to inform the court on how the physician deviated from the standard. *Hammond v. Grissom*, 470 So. 2d 1049, 1053 (Miss. 1985)

(citations omitted). Expert testimony is also needed to show how a breach of the physician's duty proximately caused the plaintiff's injury as well. *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 795 (Miss. 1995) (citations omitted).

The evidence that Wells introduced is inadequate because of his failure to supply evidence of Dr. Taylor's negligence in a form that would be competent evidence at trial. Wells offers no expert evidence that Dr. Taylor deviated from the standard of care, nor what that standard of care may have been. Wells contends that the present case should fall within the "layman exception." Without expert medical testimony, this Court is certainly not qualified to determine whether Dr. Taylor conformed to the appropriate standard of care, and neither is Wells's sister. We have serious qualms that one lacking expertise in the field is capable of providing an opinion of legal value regarding the competence and standard of care which Dr. Taylor was required to uphold. *See Walker*, 529 So. 2d at 188. We decline to find that the present case falls within the "layman exception."

III. DR. TAYLOR'S EXPERT

Wells also argues that there is an issue of material fact concerning Dr. Taylor's expert, and Wells's sister's affidavit. Dr. Taylor's expert relied on the medical records in stating that a problem was noted on October 26. Wells's sister states that the first complaint of pain was on October 25. Because Wells's argument seems to focus on the premise that his legs would have been spared had Dr. Taylor performed differently on October 25, Wells insists that this is a material fact issue. Restating the above, absent expert medical testimony to the contrary, we will not determine whether Dr. Taylor performed below the standard of care expected.

IV. MOTION FOR CONTINUANCE

Wells filed a motion for continuance under Rule 56(f) of the Mississippi Rules of Civil Procedure so that he could obtain an expert affidavit, which the court denied. The granting of a continuance is largely a matter within the discretion of the trial court. *Thomas v. Hilburn*, 654 So. 2d 898, 904 (Miss. 1995). Unless manifest injustice appears to have resulted from the denial, this Court should not reverse. *Thomas*, 654 So. 2d at 904. The Mississippi Supreme Court has held that, under certain circumstances, the failure to grant a continuance may be an abuse of discretion. *Terrell v. Rankin*, 511 So. 2d 126, 129 (Miss 1987). In the present case, we are hard pressed to find any abuse of discretion. The complaint was filed eight months before the hearing for summary judgment. Surely, this was ample time for Wells to obtain an expert affidavit.

We find no merit to any of the issues raised on this appeal; therefore, we affirm the judgment of the lower court.

THE JUDGMENT OF THE ADAMS COUNTY CIRCUIT COURT OF SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

