

IN THE COURT OF APPEALS 02/13/96
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-01290 COA

DOROTHY McCRORY AND GLEN McCRORY

APPELLANTS

v.

DR. PERRY WALLACE

APPELLEE

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

TRIAL JUDGE: HON. ROBERT WALTER BAILEY

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

LAUREL G. WEIR

THOMAS L. BOOKER

ATTORNEYS FOR APPELLEE:

WILLIAM B. CARTER

NATURE OF THE CASE: MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR DR. WALLACE

BEFORE FRAISER, C.J., BARBER, AND McMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

Dorothy and Glen McCrory appeal from a summary judgment granted to Dr. Perry Wallace in this medical malpractice action in the Circuit Court of Lauderdale County. On appeal, the McCrorys contend that the trial court erred in granting summary judgment because there was a genuine issue of material fact regarding the existence of an oral guarantee. Our consideration of the assigned issues reveals no basis for reversal. We affirm.

FACTS

On February 1, 1993, Dorothy and Glen McCrory filed suit against Dr. Perry Wallace, seeking damages for an alleged drug-induced miscarriage. Dr. Wallace answered, denying all negligence. He alleged affirmatively that the plaintiff, Dorothy McCrory, was a patient in his clinic on July 10, 1992; that a pregnancy test was performed on Ms. McCrory which the technician read as negative on that date; and that he reported those results to Ms. McCrory and her husband. The McCrorys did not advise Dr. Perry at that time that Ms. McCrory had previously been advised by another health care provider that she was pregnant. On July 24, 1992, Dr. Wallace again examined Ms. McCrory and referred her to the University of Mississippi Medical Center in Jackson due to her continuing symptoms.

Dr. Wallace moved for summary judgment and filed with his motion the affidavit of Dr. John C. Clay, an expert in internal medicine, which averred that Dr. Wallace met and conformed to the standard of care for internal medicine in the planning and performing of all internal medicine procedures on Dorothy McCrory. Further, Dr. Clay opined that there was nothing Dr. Wallace could have done in the exercise of reasonable and appropriate medical care to have prevented Ms. McCrory's miscarriage. The McCrorys failed to respond to the motion by filing a counter affidavit by any medical expert and produced no expert testimony that Dr. Wallace deviated from the appropriate standard of care.

On June 7, 1994, the trial court entered summary judgment in favor of Dr. Wallace. The trial court held that Dr. Wallace was entitled to summary judgment as a matter of law because the McCrorys failed to offer evidence of the standard of care, breach of that standard, and that the breach proximately caused Ms. McCrory's miscarriage.

On June 13, 1994, the trial court granted the McCrorys permission to file a second, amended complaint, which was filed on November 3, 1994. The McCrorys thereby attempted to raise the issue of an "oral guarantee" by Dr. Wallace to Ms. McCrory that she was not pregnant at the time he originally saw her as a patient. On November 8, 1994, Dr. Wallace answered the second amended complaint, denied all negligence and moved to dismiss the second amended complaint, incorporating all matters previously heard by the court as part of his motion for summary judgment. On December 12, 1994, the trial court entered an order dismissing the McCrorys' second amended complaint because no genuine issue of material fact remained. The court held that Dr. Wallace was entitled to a judgment as a matter of law as to all matters raised in the second amended complaint.

DISCUSSION

I. EXPERT TESTIMONY IS NECESSARY IN MEDICAL NEGLIGENCE
CASES UNLESS EVIDENCE IS WITHIN THE COMMON KNOWLEDGE
OR UNDERSTANDING OF LAYPERSONS

For a plaintiff to recover in a medical negligence action the conventional tort elements of duty, breach of duty, proximate causation, and injury must be proven by a preponderance of the evidence. *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995) (citing *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346, 1355 (Miss. 1990)); see also *Phillips v. Hull*, 516 So. 2d 488, 491-92 (Miss. 1987). The McCrorys contend, as a matter of law, that expert testimony concerning Dr. Wallace's alleged breach of duty, and that Ms. McCrory's miscarriage was caused by that breach, is not necessary in this case because the matter is one within the common knowledge of a layman.

"Our general rule is that the negligence of a physician may be established only by expert medical testimony with the exception for instances where a layman can observe and understand the negligence as a matter of common sense and practical experience." *Palmer*, 656 So. 2d at 794; *Walker v. Skiwski*, 529 So. 2d 184, 187 (Miss. 1988); see also *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346, 1355 (Miss. 1990); *Phillips*, 516 So. 2d at 491; *Cole*, 487 So. 2d at 205. "Lay testimony is sufficient to establish only those things that are purely factual in nature or thought to be in the common knowledge of laymen." *Palmer*, 656 So. 2d at 794 (citing *Drummond v. Buckley*, 627 So. 2d 264, 268 (Miss. 1993)). "[A] plaintiff in a medical malpractice case must, through expert testimony, establish the applicable standard of care and a breach of that standard" and that "the physician's [breach of] duty proximately caused the plaintiff's injury." *Biloxi Regional Medical Ctr.*, 564 So. 2d at 1355, 1357; *Hull*, 516 So. 2d at 491; *Hall v. Hilbun*, 466 So. 2d 856, 871 (Miss. 1985).

The McCrorys argue that this is a case where a layman can observe and understand Dr. Wallace's negligence as a matter of common sense and practical experience. We disagree. The allegedly negligent acts here are Dr. Wallace's failure to diagnose Ms. McCrory's pregnancy and his consequent prescription of Amoxicillin and Tetracycline for treatment. A layman does not know when a pregnancy test must be administered, how it is to be read, or when a physician violates the standard of care for reading pregnancy tests. Even if a layperson could testify regarding the standard of care required of Dr. Wallace in this case, he or she could not testify that the act of prescribing Amoxicillin and Tetracycline was the proximate cause of Ms. McCrory's miscarriage. This case is not an exception to our general rule that the negligence of a physician may be established only by expert medical testimony; therefore, summary judgment was appropriate. See *Palmer*, 656 So. 2d at 794.

II. THE SECOND AMENDED COMPLAINT

After suffering summary judgment on their original complaint, the McCrorys filed a second amended complaint seeking to revive their case by converting their failed claim for medical negligence to one of an oral guarantee. The McCrorys allege that after testing Ms. McCrory, Dr. Wallace guaranteed that she was not pregnant. They assert that the existence of an oral guarantee is an issue of material

fact, which a jury must determine. Under these circumstances they are incorrect.

The McCrorys rely on *Hudson v. Parvin* for the proposition that a medical malpractice action may sound in contract and avoid the requirement of expert testimony. *Hudson v. Parvin*, 582 So. 2d 403, 409 (Miss. 1991). In *Hudson*, the court stated that a patient may bring an action in tort and also in contract if the doctor has entered into a contractual relationship with the patient to produce a particular result from the course of treatment. *Id.* *Hudson* is distinguishable from the case at bar. In the present case, the complaint does not allege that Dr. Wallace and Ms. McCrory entered into a contract to guarantee her a specific outcome. The McCrorys allege that Dr. Wallace guaranteed them that Ms. McCrory was not pregnant. We find no precedent in Mississippi or elsewhere that establishes a cause of action sounding in contract for the guarantee of a diagnosis. We further note that the McCrorys do not contend that the alleged guarantee is an oral contract with an offer, acceptance, and consideration. In fact, the McCrorys allege that Dr. Wallace's guarantee that she was not pregnant was the "direct and proximate result of his acting below the standard of care for physicians and surgeons." Such a complaint alleges malpractice for which expert medical testimony is required. See *Palmer*, 656 So. 2d at 794; *Biloxi Regional Medical Ctr.*, 564 So. 2d at 1355; *Walker*, 529 So. 2d at 187; *Phillips*, 516 So. 2d at 491; *Cole*, 487 So. 2d at 205.

For the foregoing reasons the judgment of the trial court is affirmed.

THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT IN FAVOR OF DR. WALLACE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.