

IN THE COURT OF APPEALS 02/25/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00336 COA

**KIMBERLY YATES, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH
BENEFICIARIES OF ODELL YATES, JR.**

APPELLANTS

v.

GREENWOOD-LEFLORE COUNTY

HOSPITAL

APPELLEE

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

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

JAMES E. WINFIELD

ATTORNEY FOR APPELLEES:

LONNIE D. BAILEY

NATURE OF THE CASE: MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF APPELLEE

BEFORE BRIDGES, C.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Kimberly Yates (Yates), the Appellant appeals the order for summary judgment granted in favor of the Greenwood-Leflore Hospital by the Leflore County Circuit Court. On appeal, Yates asserts that the lower court erred in granting summary judgment against her for three reasons: (1) there was no summary judgment motion before the court; (2) material facts existed in the hospital's motion papers; and (3) Yates should have been given more time to conduct discovery. Finding absolutely no merit to the Appellant's issues on appeal, we affirm.

FACTS

On June 21, 1994, Yates filed a complaint against the Greenwood-Leflore Hospital alleging that the hospital and its emergency room doctor's negligence caused the death of her father, Odell Yates. Dr. Jeff Moses, the emergency room doctor, although named on the complaint, was apparently never served with process. The hospital filed a motion for summary judgment on December 1, 1994, with an attached affidavit of Dr. Rodney W. Baine in support of the hospital's motion. A hearing on the motion was held on January 20, 1995, where the court ordered Yates to file an affidavit within thirty days demonstrating that the hospital had deviated from the appropriate standard of care. The order stated that failure to provide the affidavit within the specified time would result in immediate dismissal of the case.

On February 23, 1995, the court entered its order of dismissal. That same day, Yates filed a motion seeking an extension of time to comply with the January 20, 1995 order. On March 3, 1995, eight months after the complaint was filed, with no discovery conducted, nor expert affidavit filed, Yates filed a second motion for extension of time of fourteen days to comply with the January 20, 1995 order. This motion was denied on March 8, 1995.

DISCUSSION

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 focus should be whether there are issues of material fact. *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). We must note that the mere presence of fact issues in the record does not automatically 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.*

Yates first argues that there was no motion for summary judgment before the court. After the hearing on the motion for summary judgment, the court entered an order initially denying the motion and gave Yates thirty days to file an expert affidavit stating the applicable standard of care, and how the Appellee deviated from that standard. The motion was thus denied with prejudice to the hospital for them to renew the motion at a later date. However, the order went on to state unequivocally that the Appellant's failure to file an expert affidavit within thirty days of the order *shall* result in the immediate dismissal of the case. Accordingly, the order to dismiss the case was entered on February

23, 1995, thirty-five days after the January 20, 1995 order was entered. Based on the language found in the original order stating the consequences absent an expert affidavit, we find no merit to this argument.

Next, Yates argues that there was in fact a genuine issue of material fact. Yates contends that Dr. Baine's affidavit in support of the hospital was "conclusory, and was insufficient to require a response." The 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 submit 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 Assn.*, 656 So. 2d 790, 795 (Miss. 1995) (citations omitted). No expert affidavit was ever submitted by Yates despite the lower court's allowance of thirty days to submit one after the summary judgment hearing. The problem with Yates' argument is that the burden lies with the plaintiff to establish a prima facie case of negligence. Because the present case does not fall within our layman exception to the rule, Yates was required to submit an expert affidavit in order to establish her case. Absent such an expert affidavit or testimony, we find no error in the judgment.

Finally, Yates argues that she should have been given more time to conduct discovery. Yates filed her complaint in June 1994. Summary judgment was granted eight months later on February 23, 1995. Our state supreme court has held that eight months is a sufficient amount of time to complete discovery. *McQueen v. Williams*, 587 So. 2d 918, 922 (Miss. 1991). The lower court acted within its discretion in refusing to grant Yates more time to conduct discovery. Based on the foregoing analysis, we find no reversible error; therefore, the judgment of the lower court is affirmed.

THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT GRANTING SUMMARY JUDGMENT IN FAVOR OF THE GREENWOOD-LEFLORE COUNTY HOSPITAL IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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

HERRING, J., NOT PARTICIPATING.