DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CA06-44

OCTOBER 4, 2006

RHONDA COLEMAN
APPELLANT

V.

DENNIS W. JACKS, M.D.
APPELLEE

APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT
[NO. CV2002-516-2-5]

HON. ROBERT H. WYATT JR., JUDGE

AFFIRMED

This is the second time that this case is before us. Appellant Rhonda Coleman previously appealed from the trial court's decision granting summary judgment in favor of appellee, Dr. Dennis Jacks; however, in an opinion issued on August 31, 2005, we dismissed the appeal. *See Coleman v. Jacks*, CA05-718 (Ark. App. Aug. 31, 2005). In our previous opinion, we explained that we lacked jurisdiction to hear the appeal because the order being appealed from was not a final order due to the fact that all parties to the action, including several John Doe defendants, had not been dismissed. *Id*. Rhonda subsequently filed a motion to dismiss the John Doe defendants, which the trial court granted. She has now brought a second appeal.

The history of this case is as follows. On May 31, 2001, Rhonda and her husband, James, filed a complaint against Dr. Jacks, Jefferson Regional Medical Center, South

Arkansas Urology, and "John Does, 1-10" as defendants. The complaint was signed by the Colemans' then-attorney, Gail Anderson, and alleged the following facts. On or about June 1, 1999, Rhonda was admitted to Jefferson Regional Medical Center where she underwent a total hysterectomy and "bladder tack." On June 2, 1999, due to "undetected blood loss," Rhonda received a blood transfusion and underwent a second surgical procedure, following which she experienced "several post-operative complications and developments." After she was released from Jefferson Regional Medical Center, Rhonda began to experience "excruciating pain" in her abdominal area and noticed "strong, foul odors" from her urine. She then went to Dr. Jacks and received antibiotic treatment, but continued to experience pain and odor. She was admitted to Jefferson Regional on November 9, 1999 for an "IVP" procedure, although Dr. Jacks did not order any other laboratory tests. According to the complaint, Dr. Jacks falsely informed Rhonda that the IVP results were "fine."

The complaint alleged, among other things, that the defendants were negligent in failing to properly diagnose and treat Rhonda for her post-operative medical problems and complications. Rhonda sought damages for various reasons, while her husband, James, sought damages for "mental anguish" and for "loss of consortium." The complaint also alleged liability of the defendants pursuant to the doctrine of res ipsa loquitur.

Anderson subsequently filed a motion to be relieved as counsel on the basis of non-payment of fees. The Colemans' complaint was later dismissed without prejudice for failure to obtain proper service of process under Rule 4(i) of the Arkansas Rules of Civil Procedure.

On May 30, 2002, Rhonda filed a pro se complaint on behalf of herself and her husband James. The complaint was substantially the same as the one previously filed by Anderson one year earlier, but it did not include Southern Arkansas Urology as a defendant. Rhonda subsequently filed an amended complaint on October 18, 2002; a second amended complaint on May 13, 2003; and a third amended complaint on December 1, 2003. The third amended complaint listed Rhonda as the only plaintiff and omitted James's loss of consortium claim.

The trial court granted summary judgment in favor of defendant Jefferson Regional Medical Center on April 22, 2004. Dr. Jacks filed a motion for summary judgment on November 15, 2004, claiming that Rhonda could not meet her burden of proof pursuant to Ark. Code Ann. § 16-114-206 without expert testimony. He attached an affidavit of Dr. Alex Finkbeiner, Chairman of the Department of Urology at the University of Arkansas for Medical Sciences, in which Dr. Finkbeiner opined that there was no medical evidence to support Rhonda's allegations against Dr. Jacks. In her response to Dr. Jacks's summary-judgment motion, Rhonda produced no evidence (in the form of affidavits, depositions, correspondence, and the like) to rebut Dr. Finkbeiner's opinion other than to say that she intended to subpoena her treating physicians as expert witnesses to corroborate her allegations. The court granted Dr. Jacks's motion for summary judgment by order dated December 28, 2004. Rhonda filed her first notice of appeal on January 28, 2005.

Because the John Doe defendants were still parties to the action at the time Rhonda filed her first appeal, this court dismissed the appeal on the basis that she failed to appeal from a final order. *See Coleman v. Jacks*, *supra*. Rhonda subsequently filed a motion for voluntary non-suit to dismiss the John Doe defendants, which was granted on September 19, 2005; Rhonda then filed a second notice of appeal on October 19, 2005.

Rhonda contends that the trial court erred by granting summary judgment in favor of Dr. Jacks. Pointing to alleged inconsistencies in the evidence and claiming that Dr. Finkbeiner did not review all of the medical records, Rhonda argues that a question of fact remains regarding proximate cause and allegations of damage, and she asserts that reasonable minds could differ as to the conclusions to be drawn from the facts presented. She also claims that expert testimony was not needed in this case because the matter "lies within the comprehension of a jury of laymen" and "the medical records speak for themselves." Rhonda also argues that she met her burden of establishing the applicability of the doctrine of res ipsa loquitur.

In *Mitchell v. Lincoln*, ___ Ark. ___, ___, ___S.W.3d ___, ___ (June 22, 2006), our supreme court stated as follows:

> A trial court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated, and that the party is entitled to judgment as a matter of law. *Harris v. City of Fort Smith*, 359 Ark. 355, ___ S.W.3d ___ (2004). Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Young v. Gastro-Intestinal Center*, 361 Ark. 209, ___ S.W.3d ___ (Mar. 24, 2005). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary

items presented by the moving party in support of its motion leave a material fact unanswered. *Id*. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998).

Under Arkansas law, the burden of proof for a plaintiff in a medical malpractice case is fixed by statute. *See* [Ark. Code Ann.] § 16-114-206. The statute requires that, in any action for a medical injury, expert testimony is necessary regarding the skill and learning possessed and used by medical care providers engaged in that [specialty] in the same or similar locality. *See Young, supra*; *Williamson v. Elroy*, 348 Ark. 307, 72 S.W.3d 489 (2002). Specifically, the statute provides as follows:

(a) In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:

(1) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;

(2) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and

(3) By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

The court in *Mitchell* also discussed the issue of when expert testimony was required in a medical malpractice case, stating:

The vast majority of our cases to have considered this issue hold that expert medical testimony is necessary because the alleged medical negligence is not within the comprehension of a jury of laymen. *See Fryar v. Touchstone Physical Therapy*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 16, 2006) (connection between preexisting neck and spine injuries and alleged injuries caused by an unlicensed chiropractor's

> treatment "would not be a matter of common knowledge or understanding"); *Eady v. Lansford*, 351 Ark. 249, 92 S.W.2d 57 (2002) (expert testimony required to rebut defense testimony regarding whether a physician has a duty to inform a patient about rare side effects of a medication); *Skaggs v. Johnson*, *supra* (medical decision to leave a piece of drainage tube in a patient's leg, as opposed to an inadvertent leaving of objects in a patient's body, presented an issue outside the jury's common knowledge and required expert testimony); *Robson v. Tinnin*, *supra* (matters relating to the changing of dental implants and treatment of fractured teeth are not matters of common knowledge); *Davis v. Kemp*, *supra* (whether it was proper or improper on a first medical visit to irrigate a wound and administer antibiotics was not a matter of common knowledge, and the failure to find a piece of glass on the first visit would hinge upon whether or not good medical practice required the probing of the wound on the first visit); *but cf. Watts v. St. Edward Mercy Medical Center,* 74 Ark. App. 406, 49 S.W.3d 149 (2001) (no need to provide expert testimony on the issue of whether a broken hip can cause pain).

___ Ark. at ___, ___S.W.3d at ___.

In the case at bar, Rhonda failed to produce *any* evidence (in the form of affidavits, depositions, correspondence, and the like) in response to Dr. Jacks's summary-judgment motion. The fact that she indicated that she would produce expert testimony at some point is insufficient; she failed to meet "proof with proof" as required by law and, thus, there was no genuine issue of material fact for trial.

As for Rhonda's argument that she has established the applicability of the doctrine of res ipsa loquitur, in *Schmidt v. Gibbs*, 305 Ark. 383, 387, 807 S.W.2d 928, 931 (1991), a wongful-death medical malpractice case, our supreme court set forth those circumstances in which the doctrine of res ipsa loquitur may be invoked:

> 1. The defendant owes a duty to the plaintiff to use due care;
>
> 2. The accident is caused by the thing or instrumentality under the control of the defendant;

3. The accident which caused the injury is one that, in the ordinary course of things would not occur if those having control and management of the instrumentality used proper care;

4. There is an absence of evidence to the contrary.

In *Schmidt*, the court explained that, if each of the elements for the application of the doctrine of res ipsa loquitur is present, then the accident from which the injury results is prima facie evidence of negligence and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part. *Id*.

In attempting to bring her case within the gambit of the doctrine of res ipsa loquitur, Rhonda argues that her evidence satisfies the requirements of *Schmidt*, asserting that "Dr. Jacks is the 'instrument' or 'thing' that caused the bleeding" and that led to her subsequent medical problems, and argues that Webster's Dictionary includes "an individual" within its definition of a "thing"; however, she fails to cite any other authority to support this assertion. Furthermore, she fails to explain how the facts of this case relate to the other three elements that must be present to invoke the doctrine of res ipsa loquitur. Because this argument is not well-taken, we need not address it on appeal. *See Rainey v. Hartness*, 339 Ark. 293, 304, 5 S.W.3d 410, 418 (1999) (stating that an appellate court will not consider assertions of error that are unsupported by convincing legal authority or argument, unless it is apparent without further research that the argument is well-taken).

For these reasons, we hold that the trial court did not err in granting summary judgment for Dr. Jacks.

Affirmed.

PITTMAN, C.J., and NEAL, J., agree.