RENDERED: December 17, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002651-MR

MARTIN MELTON — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 95-CI-00264

JAMES W. MIDDLETON, M.D.;
AND FAMILY MEDICAL CENTER
OF HART COUNTY, PSC — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, GARDNER AND MILLER, JUDGES.

EMBERTON, JUDGE: Martin Melton appeals the summary dismissal of his medical negligence claim resulting from the alleged failure to properly diagnose and treat his ruptured appendix. In granting the appellee doctor's motion for summary judgment, the trial court concluded, that because the claim does not fall within the ambit of the doctrine of res ipsa loquitur, expert testimony was required to defeat the motion. We agree and affirm.

Briefly stated, after having been examined by a general surgeon in the emergency room of Caverna Memorial Hospital on

January 21, 1995, with complaints of abdominal pain, appellant was referred to the care of his family physician, Dr. James Middleton, who admitted him to the hospital for observation. Because physical examinations and tests revealed no abnormalities, Dr. Middleton ordered that appellant remain hospitalized to again be evaluated by a general surgeon. On January 23, 1995, Dr. Ronilo Diaz removed appellant's acutely inflamed appendix.

Appellant instituted the instant action alleging medical malpractice on January 3, 1996. After answering, Dr. Middleton filed interrogatories on February 2, 1996, requesting the identity of expert witnesses supporting his allegations and the substance of facts to which the experts were expected to testify. On May 15, 1996, appellant responded stating that the identity of experts was "undetermined at this time, will supplement answers."

On June 18, 1997, Dr. Middleton moved for summary judgment supported by the affidavit of Dr. Diaz, appellant's treating surgeon. In his affidavit, Dr. Diaz stated that on the basis of his review of appellant's medical records, it was his belief that Dr. Middleton had acted "as a reasonably competent physician in treating Mr. Melton." Thereafter, the trial court granted appellant until August 4, 1997, to respond to the motion. When appellant failed to respond by that date, the trial court entered summary judgment dismissing the complaint by order dated August 5, 1997. At appellant's request, this order was subsequently vacated by the trial court in order to allow

appellant to submit a response. In that response, appellant argued that expert testimony was not required to support his claim because the negligence in question falls under the doctrine of res ipsa loquitur.

On September 19, 1997, the trial court again entered summary judgment dismissing the complaint, stating the timeliness of a diagnosis of acute appendicitis "does not fall within the parameter of the common knowledge or experience possessed by lay jurors." Thus, the trial court, reasoned, expert testimony was required to counter Dr. Diaz's affidavit. We find no error in the trial court's analysis.

The doctrine of res ipsa loquitur upon which appellant relies presupposes a situation in which a layman would be competent, on the basis of common knowledge and experience, to conclude that such things do not happen where a patient has been afforded proper skill and care. Perkins v. Haulsaden, Ky., 828 S.W.2d 652 (1992). Notable examples of the type of negligence to which the doctrine might be properly applied are cases in which a sponge is left in the patient following a surgical procedure; where the wrong limb is amputated; where a bone is broken during a therapy treatment; or the dentist's drill slips off a tooth. Common sense dictates that such things normally do not occur in the absence of medical negligence. Moreover, Professor Prosser, in Prosser and Keeton on Torts, Section 39 (5th ed. 1984), cautions that the existence of an undesirable result alone is an insufficient basis for invocation of the doctrine of res ipsa. Ordinarily, evidence of a more technical character is required to

supply the requisite standard of care, as well as to support a claim that the standard has been breached. Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122 (1991).

Viewing appellant's claims in light of this authority, we completely agree with the trial court's conclusion that it was incumbent upon appellant to counter Dr. Diaz's affidavit with expert testimony supporting his theory of the case. Furthermore, it is apparent from the record that the trial court afforded appellant ample opportunity to produce the requisite evidence.

The judgment of the Hart Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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