

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000122-MR

COLLEEN CLINES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 12-CI-006686

SUSAN E. JANOCIK, M.D., PLLC;
BRYAN D. MURPHY, M.D.; AND
JOSEPH G. WERNER, M.D.

APPELLEES

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

BEFORE: ACREE, JOHNSON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Colleen Clines brings this appeal from a June 30, 2015, summary judgment in favor of Bryan D. Murphy, M.D., an August 6, 2015, summary judgment in favor of Joseph G. Werner, M.D., and an August 6, 2015, summary judgment in favor of Susan E. Janocik, M.D., PLLC, upon Clines' medical malpractice action. We affirm.

On December 17, 2012, Clines filed a medical negligence action against Janocik, an internist, Murphy, an ENT specialist, and Werner, an orthopedist. Clines claimed that Janocik, Murphy, and Werner negligently failed to timely diagnosis her with Hodgkin's Lymphoma. In particular, Clines alleged:

6. At one of her visits in late 2010, Colleen reported to Dr. Janocik that she had noticed an enlarged lymph node in her groin area and had associated discomfort. Also, commencing in the late fall of 2010, the plaintiff began to suffer from low to moderate pain in her lower back on a regular and continuing basis. Beginning in December 2011, Colleen initiated visits to Dr. George Howard, D.C. for treatment of her lower back pain.

7. On or about February 4, 2011, Colleen returned to Dr. Janocik arising out of continued complaints of lower back pain. On said visit, Dr. Janocik notes a "...ICM firm smooth mobile "probably" lipoma in the left lower back near SI, tender to palpation." Despite said finding, Dr. Janocik did not order any diagnostic testing.

8. On April 6, 2011, the plaintiff returned to Dr. Janocik continuing to complain of progressively worsening back pain over the proceeding six months. Dr. Janocik again noted the same finding of a "probable lipoma" on Colleen Clines' left lower back. Dr. Janocik instructed Colleen to undergo physical therapy and to try muscle relaxers until an appointment with an orthopaedic [sic] doctor could be arranged. Again, no diagnostic tests were ordered.

9. On April 28, 2011, Colleen was seen, after referral, by the defendant, Joseph G. Werner, Jr., M.D., for an orthopaedic consultation arising out of her "... longstanding history of low back pain which had remained unimproved with conservative care." Dr. Werner noted no lower limb adenopathy or lymphedema. He found tenderness at the intercrystal midline to deep palpation, but found no other evidence of lumbar musculoskeletal issues, other than "very slight" lumbar scoliosis based upon x-rays. Dr. Werner diagnosed lumbar scoliosis, lumbago. He advised physical therapy and that Colleen should return as needed.

10. Colleen continued with her physical therapy, but failed to make any significant progress. Colleen continued throughout this time to register complaints of fatigue to her medical professionals. By June 13, 2011, when Colleen continued to have significant complaints, the physical therapist requested that Dr. Janocik (in Dr. Werner's absence) order an MRI. Dr. Janocik refused and deferred to Dr. Werner regarding this request.

11. As a result, Dr. Werner was contacted by Colleen's mother requesting that the recommended MRI be ordered. Dr. Werner ordered the MRI and Colleen had the MRI of the lumbar spine performed on June 23, 2011. The interpreting radiologist, Gregory Elliott, M.D., found "abnormal marrow signal within the L2, L4 and L5 vertebral bodies." Elliott found "the L2 vertebral body and left pedicle and inferior right aspect of L4 exhibit[ed] similar marrow signal and appear[ed] sclerotic." The radiologist suggested, "These are most likely benign and potentially represent atypical hemangiomas. Early Pagets disease of the L2 vertebral body is a consideration though unusual in a patient of this

age. Other sclerotic lesions are also difficult to entirely exclude. CT evaluation may be helpful to evaluate the matrix to aid in establishing a diagnosis.” Despite this recommendation, neither of Colleen's treating physicians ordered any additional testing or imaging at this time.

12. Dr. Werner saw the plaintiff again on July 5, 2011. Colleen shared with Dr. Werner the intensity of her back pain and advised that she had tried physical therapy, chiropractic treatments, Flexeril, Tramadol and got no relief from the back pain from any of these treatments. Dr. Werner reviewed the MRI results with her. He noted the signal changes Dr. Elliott described and stated in his office visit that "he tend[ed] to agree with [the radiologist's statement that the abnormal marrow signals were probably benign and attributable to atypical hemangioma, since] there are no constitutional symptoms whatsoever of fever, chills or involuntary weight loss to substantiate any diagnosis more suspicious." He recommended cardiovascular exercise, that Colleen stop smoking, continue physical therapy, and prescribed Lidoderm patches for her back pain.

13. On or before the first week of September 2011, Colleen had begun experiencing the fever, chills, and night sweats that Dr. Werner had previously described as potentially indicative of a "more suspicious" diagnosis. Colleen reported the fever to Melinda Staten ARNP at The Women's Center as early as September 8, 2011; to Dr. Janocik on September 9 and 14, 2011; and to Dr. Murphy at her first visit with him on September 26, 2011.

14. When Dr. Werner saw Colleen on October 4, 2011, he included in his office note that Colleen reported "some fever" and "a lymph node in her neck" which she was having "excised and biopsied." On that visit, when again assessing the MRI discussed at Colleen's July 5, 2011[,] visit, Dr. Werner still stated that "the degenerative changes are likely the source of her back pain" and "[t]he marrow changes are nondescript and as noted by Dr. Elliott likely to be an atypical hemangioma, etc." Dr. Werner did advise Colleen that, if the lymph node biopsy was positive (*e.g., post-diagnosis*), he would want to have a CT scan of her lumbar spine performed. This course of action appears contrary to Dr. Werner's own notes of July 5, 2011 (which imply that he would believe further investigation of the abnormalities shown in the MRI would be indicated if Colleen showed "constitutional symptoms ... of fever ... [which would] substantiate [a] diagnosis more suspicious"). Dr. Elliott had recommended in his June 23, 2011[,] MRI interpretation that a CT scan be performed to *diagnose* the actual cause of the abnormal marrow signals and sclerotic appearance of multiple vertebrae detected by the MRI.

15. By early to mid-September 2011, Colleen was suffering continued back pain and worsening symptoms, including nausea, vomiting and fever. Her continuing reports of fatigue and history of mononucleosis were apparently disregarded or ignored. She continued to get Lidoderm patches from Dr. Werner for her back pain. On September 8, 2011[,] during a routine examination at The Women's Center for Gynecology and Bladder Disorders, a supraclavicular node suspicious for lymphoma was recognized. Melinda Staten, ARNP of The Women's Center ordered a thyroid ultrasound that confirmed

suspicious multiple enlarged lymph nodes (see Exhibit 1). This information was immediately conveyed to Dr. Janocik.

16. On September 14, 2011, Colleen again saw Dr. Janocik. Per the doctor's history, Colleen complained of node enlargement for two months, fevers for a week, and right lower quadrant pain for two to two and one-half months. Dr. Janocik's examination revealed a left-sided tender mobile firm inferior AC lymphadenopathy and a left supraclavicular node of ICM, present and tender. Dr. Janocik diagnosed lymphadenopathy and instructed Colleen to undergo a biopsy with further evaluation and management per the result thereof.

17. On September 16, 2011, per the instruction of Melinda Staten, ARNP, Lori L. Atkins M.D. of The Women's Diagnostic Center performed a "left superscriptions (sic) lymph node fine-needle aspiration" on Colleen on September 16, 2011. The findings of this procedure reported on September 21, 2011[,] disclosed the possibility of Hodgkin's lymphoma and an excisional biopsy was recommended. When Dr. Atkins called Colleen to advise her of the results, she gave Colleen the names of several oncologists. The results of the fine-needle aspiration was also disclosed by telephone and in writing to Dr. Janocik. Dr. Janocik referred Colleen to the office of Dr. Chad Secor, an ENT, where she was seen by Bryan D. Murphy, M.D.

18. On September 26, 2011, Colleen saw Dr. Murphy on consultation for left supraclavicular lymphadenopathy. Dr. Murphy described Colleen as

being "relatively asymptomatic", despite the over nine months of increasing pain, fatigue and symptomology Colleen had experienced and the more recent onset of fever, nausea and vomiting.

19. Dr. Murphy's examination of Colleen revealed a palpable 12 to 13 millimeter lymph node along the left side of the trapezious muscle and a 1.5 centimeter rounded firm node present in the supraclavicular fossa. He also noted the possibility of a cleft, suggestive of a small cluster of nodes. Dr. Murphy recommended excisional biopsy of the left supraclavicular node.

20. On October 18, 2011 (22 days later), Dr. Murphy performed an excisional lymph node biopsy, left deep cervical (supraclavicular). The sample was properly analyzed and the Hematopathology Report, Flow Cytometry Analysis stated that Colleen did not have evidence of B-cell or T-cell non-Hodgkin lymphoma. As cautioned on the October 20, 2011[,] report, however, the Flow Cytometry Analysis cannot be properly used to evaluate *Hodgkin's lymphoma* (see attached Exhibit 2 immediately under the finding of no evidence of non-Hodgkin lymphoma).

21. The supplemental report of the following day, October 21, 2011, (see attached Exhibit 3) from Genzyme reported that the Immunohistochemical Analysis (which is a study recognized as an accurate analysis for diagnosing classical Hodgkin's lymphoma -- nodular sclerosis subtype) from the same biopsy sample revealed positively that Colleen was suffering

from this disease. This October 21, 2011[,] supplemental report was faxed to Dr. Murphy on October 21, 2011[,] at 3:41 p.m.

22. The October 21, 2011[,] supplemental report was followed by a second Supplemental Report dated October 24, 2011, which also showed the definitive finding of classical Hodgkin's lymphoma -- nodular sclerosis subtype (see Exhibit 4). The results of all three pathology reports (October 20, 21, and 24, 2011) were also reported on Baptist Hospital East's Surgical Pathology Report prepared by Mark E. Richardson, M.D. (see Exhibit 5)), which is contained in Dr. Murphy's file.

23. Nevertheless, Dr. Murphy advised both Colleen Clines and Dr. Janocik on or about October 24, 2011[,] that Colleen had *benign* left supraclavicular nodes with no abnormal population of lymphocytes presumably based solely upon the Flow Cytometry Analysis. When Colleen returned to Dr. Murphy to have the stitches removed from the biopsy site, Dr. Murphy never referred to Colleen's chart during her visit. Colleen's mother specifically advised Dr. Murphy of Colleen's extreme fatigue.

24. The information that Dr. Murphy provided to the plaintiff and Dr. Janocik was inaccurate, as it was only part of the relevant findings. It appears that Dr. Murphy relied upon a testing methodology generally recognized for diagnosing non-Hodgkin's lymphoma and known as inadequate to determine and properly diagnose Hodgkin's lymphoma. Dr. Janocik

had specifically referred Colleen to Dr. Murphy to perform a biopsy to make this diagnosis.

25. Colleen's condition continued to worsen. Colleen was subsequently referred to an infectious disease specialist, Preethi Ananthakrishnan, M.D. on Colleen's family's request. Dr. Ananthakrishnan first saw Colleen on December 2, 2011[,] and ordered, among other things, a CT scan of Colleen's chest [sic], abdomen, and pelvis. The CT scans were performed on December 8, 2011. James N. Hiken, M.D. interpreted these scans as being "worrisome for lymphoma" with potential skeletal involvement.

26. On December 12, 2011, Dr. Ananthakrishnan reviewed Dr. Hiken's CT scan report and found that the scans "confirmed diffuse lymphadenopathy in the mediastinal, supraclavicular, and retroperitoneal areas, as well as sclerotic vertebral lesions." Dr. Ananthakrishnan then referred Colleen to Robert E. Darnell, M.D. to evaluate Colleen for a possible biopsy of an abdominal pelvic lymph node as a follow-up to the original lymph node biopsy.

27. Colleen saw Dr. Darnell on December 15, 2011. He reviewed Colleen's case and discussed various methods of biopsy. Colleen elected a percutaneous biopsy and the biopsy was scheduled for December 22, 2011.

28. By December 16, 2011, Colleen was extremely sick. Her mother called Dr. Janocik regarding how ill Colleen was and her fast-approaching scheduled trip to India, on which she was to leave on January 1, 2012. Colleen's mother advised Dr. Janocik they needed a "captain of the ship" and insisted they have an appointment with her as soon as possible. For the first time, Dr. Janocik discussed Colleen seeing a doctor at Consultants in Blood Disorders and Cancer, which she described as "... always the other option to explore." An appointment was scheduled for Colleen for December 21, 2011.

29. Colleen saw Stephen Myers, M.D. of the Consultants in Blood Disorders and Cancer practice on December 21, 2011. Dr. Myers discovered in Colleen's medical records the October 21 and October 24, 2011[,] pathology results showing the positive finding of Hodgkin [sic] Lymphoma. Dr. Myers was the first of Colleen's treating doctors to show in his own findings/notes the diagnosis of "classical non-Hodgkin's (sic) lymphoma -- nodular sclerosis subtype (Colleen actually diagnosed with Hodgkin's lymphoma), and added "probable Stage IV." He ordered a PET scan and procedures to evaluate Colleen for chemotherapy. (See Exhibit 6 attached.)

Complaint at 2-8.

Janocik, Murphy, and Werner filed separate answers and, in April 2015, filed motions for summary judgment. Therein, Janocik, Murphy, and Werner argued that Clines failed to produce expert witness testimony establishing the pertinent standard of care, breach of such standard of care, and injury therefrom. Clines responded and maintained that expert testimony was unneeded as a layperson could easily recognize the negligence of Janocik, Murphy, and Werner.

Additionally, Clines cited to an affidavit of a registered nurse, Anne E. Kleine-Kracht as giving expert medical testimony.

By summary judgments entered on June 30, 2015, and August 6, 2015, the circuit court concluded that expert medical testimony was required to establish the applicable standard of care and breach thereof by Janocik, Murphy, and Werner. The circuit court also rejected the medical opinion of Nurse Kleine-Kracht. The circuit court determined that a nurse was not qualified to offer an expert opinion as to a physician's standard of care or breach thereof. As Clines failed to obtain medical expert testimony, the circuit court granted summary judgments to Janocik, Murphy, and Werner. This appeal follows.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefore are to be viewed in a light most favorable to the nonmoving party. *Id.*

Clines contends that the circuit court erred by rendering summary judgment in favor of Janocik, Murphy, and Werner. Specifically, Clines asserts that Nurse Kleine-Kracht was qualified to offer an expert medical opinion concerning the standard of care and breach thereof by Janocik, Murphy, and Werner. Alternatively, Clines maintains that expert medical opinion establishing breach of the standard of care was unnecessary because the medical negligence was so apparent that a laymen could recognize it.

In Kentucky, a plaintiff claiming medical negligence is generally required to set forth an expert medical opinion establishing the standard of care and that defendant breached such standard causing the injurious effects. *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010). Therefore, an expert opinion must establish the elements of a medical negligence claim – standard of care, breach of the standard of care, causation, and injury. *Baylis v. Loudes Hospital, Inc.*, 805 S.W.2d 122 (Ky. 1991). Under Kentucky’s evidentiary rules, the trial court must determine whether a witness is qualified to testify as an expert. Kentucky Rules of Evidence (KRE) 702; *Murphy v. Montgomery Elevator Co.*, 957 S.W.2d 297 (Ky. App. 1997). A trial court’s determination as to whether a witness is qualified to give expert testimony under this evidence rule is subject to an abuse of discretion standard upon appellate review. *Savage v. Three Rivers Med. Ctr.*, 390 S.W.3d 104 (Ky. 2012). For the reasons that follow, we find no such abuse of discretion.

There are two exceptions to the general rule requiring expert medical witnesses in a medical negligence case. The first is where the negligence and injury are “so apparent that laymen with a general knowledge would have no difficulty in recognizing it.” *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965). The second exception is “where other medical testimony provides an adequate ‘foundation for *res ipsa loquitur* on more complex matters.’” *Green v. Owensboro Medical Health Sys., Inc.*, 231 S.W.3d 781, 784 (Ky. App. 2007) (quoting *Perkins v. Hausladen*, 828 S.W.2d 652, 655 (Ky. 1992)).

In this case, Clines offers the affidavit of Nurse Kleine-Kracht as an expert. Nurse Kleine-Kracht opined that Murphy and Janocik breached the standard of care by failing to review biopsy test results confirming Hodgkin's lymphoma and that "the treatment regimen enlisted by [Murphy, Janocik, and Werner] was below accepted standards." Kleine-Kracht Affidavit at 4. Nurse Kleine-Kracht is a registered nurse with a Doctorate in Nursing Science. From the record, it appears that Nurse Kleine-Kracht has been working in private practice as a family therapist since 1974. However, she never worked in a medical office for a physician or acquired any specialized training or knowledge in the diagnosis of Hodgkin's lymphoma. The circuit court determined that Nurse Klien-Kracht was not qualified to render an expert opinion upon the proper standards of care, and we cannot say that the circuit court abused its discretion by so deciding. *Savage*, 390 S.W.3d 104. In short, Nurse Klien-Kracht did not possess the requisite knowledge or experience to enable her to render an expert opinion as to the standard of care or alleged breach thereof by Murphy, Janocik, or Werner.

Alternatively, Clines argues that a medical expert opinion was unnecessary in this case because a layperson could readily recognize that negligence occurred under the facts established below. Generally, the diagnosis of Hodgkin's lymphoma based upon a patient's presenting signs and symptoms is not within the purview of a layperson's common knowledge; rather, expert medical opinion is necessary. On the other hand, we do believe it well-within a layperson's knowledge to recognize a breach of the standard of care when a physician fails to

inform a patient of a positive biopsy test result for Hodgins's lymphoma. While such breach of the standard of care is within a layperson's knowledge, the elements of causation and injury are not under the facts presented herein. In fact, Dr. Thomas Woodcock, who was Clines' treating oncologist, testified at his deposition that he did not know within a reasonable degree of medical certainty whether the delay in Clines' diagnosis resulted in the development of a more advanced cancer by Clines or resulted in the necessity for additional treatment. Also, Dr. Woodcock had recommended to Clines three experts in the area of Hodgkin's lymphoma. Therefore, we are compelled to agree with the circuit court and conclude that the medical negligence of Murphy, Janocik, and Werner was not within a layperson's general knowledge.

In sum, we hold that the circuit court properly rendered summary judgments in favor of Murphy, Janocik, and Werner.

For the foregoing reasons, the summary judgments of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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