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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-12-693

SUSAN QUATTLEBAUM AND DAVID QUATTLEBAUM APPELLANTS	Opinion Delivered June 5, 2013
V.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRD DIVISION [NO. CV-2011-1030]
DR. RODNEY McCARVER, MARK BURGHART AND ARKANSAS HEALTH GROUP ANESTHESIA	HONORABLE JAY MOODY, JUDGE
APPELLEES	AFFIRMED

PHILLIP T. WHITEAKER, Judge

Susan and David Quattlebaum appeal the order of the Pulaski County Circuit Court granting the summary-judgment motion filed by appellees Dr. Rodney McCarver, Mark Burghart, and Arkansas Health Group d/b/a Arkansas Health Group Anesthesia. We affirm.

Susan Quattlebaum underwent a medical procedure requiring epidural anesthesia in 2007. At that time, according to her complaint, she consented to allowing a student nurse-anesthetist to observe the epidural, although she did not consent to having him perform the procedure. Following the procedure, Susan developed an infection at the site of the epidural. The Quattlebaums subsequently filed suit against the appellees, alleging that they failed to properly prep and sterilize the epidural location and instruments; that they "failed to have proper protocols and procedures and/or failed to follow proper protocol and procedures to

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ensure a safe environment and sterile environment for the epidural procedure"; and, in the event that the student placed the epidural, that Susan did not give informed consent.

The appellees filed a motion for summary judgment, arguing that the Quattlebaums failed to file an expert affidavit in support of their claim for medical injury, as is required by Arkansas Code Annotated section 16-114-209(b) (Repl. 2006). In support of their motion, the appellees attached affidavits from Dr. Brad Lindsey, an anesthesiologist from Conway, and Tom Cranford, a certified registered nurse anesthetist (CRNA) from Searcy. Both Dr. Lindsey and Cranford opined that neither Dr. McCarver nor the CRNA present at Susan's procedure was negligent as to either Susan's failure-to-sterilize claim or her informed-consent claim.

The Quattlebaums filed a response to appellees' summary-judgment motion to which they attached affidavits of their own. Those affidavits were from Pamela Chambers, a CRNA with active licenses in Texas, New Mexico, and Arizona; Lisa Wallace, a registered nurse practitioner from Arkansas; and Dr. Merrill Hardy, an anesthesiologist from Jackson, Mississippi. The affidavits all generally averred that infections like the one suffered by Susan were rare and would not occur in the absence of negligence.

The circuit court granted the appellees' motion for summary judgment, finding that the Quattlebaums' experts' affidavits failed to properly establish the standard of care required of the appellees. Specifically, regarding the failure-to-sterilize claim, the circuit court found that the "conclusory statements of familiarity" with local standards did not satisfy the locality rule found in Arkansas Code Annotated section 16-114-106(b). Moreover, the court found

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that the affidavits did not provide evidence of a breach of the requisite standard of care. Finally, the court determined that the Quattlebaums' experts did not provide evidence of proximate cause, and the Quattlebaums had not proven the elements necessary to apply the doctrine of res ipsa loquitur. As to the claim of lack of informed consent, the circuit court again found that the affidavits did not satisfy the locality rule; in addition, the court concluded that there was no evidence of proximate cause of any damages resulting from the performance of the procedures by the student nurse-anesthetist rather than by the anesthesiologist.

The Quattlebaums filed a motion for reconsideration or for new trial, which the circuit court denied. They then filed a timely notice of appeal and now argue that the circuit court erred in granting the appellees' motion for summary judgment.

Summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *Hamilton v. Allen*, 100 Ark. App. 240, 267 S.W.3d 627 (2007) (citing Ark. R. Civ. P. 56(c) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). 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. *Id.* (citing *Mitchell v. Lincoln*, 366 Ark. 592, 237 S.W.3d 455 (2006)). The appellate court determines if summary judgment was appropriate based on whether the evidence presented by the moving party in support of its motion leaves a material fact unanswered. *Id.* The

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evidence is reviewed in the light most favorable to the party against whom the motion was filed, with all doubts and inferences resolved against the moving party. *Id*.

In a medical-malpractice action, the plaintiff must prove (1) the applicable standard of care, (2) that the medical provider failed to act in accordance with that standard, and (3) that such failure was a proximate cause of the plaintiff's injuries. *Webb v. Bouton*, 350 Ark. 254, 264, 85 S.W.3d 885, 891 (2002); *Hamilton*, *supra*. A medical-malpractice complaint is subject to a motion for summary judgment when the plaintiff fails to present expert evidence of those three elements and the defending party demonstrates that the plaintiff lacks proof on one or more of these essential elements. *Robbins v. Johnson*, 367 Ark. 506, 241 S.W.3d 747 (2006); *Parkerson v. Arthur*, 83 Ark. App. 240, 125 S.W.3d 825 (2003). The Quattlebaums thus had the statutory burden of proving these three essential elements by expert testimony. *See* Ark. Code Ann. § 16-114-206(a) (Repl. 2006); *Hamilton*, *supra*; *Dodd v. Sparks Reg'l Med. Ctr.*, 90 Ark. App. 191, 204 S.W.3d 579 (2005).

On appeal, the Quattlebaums primarily argue that the appellees' motion for summary judgment was insufficient because the supporting affidavits from the appellees' experts were "conclusory and contained no admissible evidence." For example, they contend that the affidavits of Dr. Lindsey and Cranford contain "no facts of any kind relating to the actions of the [appellees] or their treatment of the plaintiff" and do not explain how the experts were familiar with the standard of care in Little Rock, Arkansas. They also argue that the appellees' experts' affidavits do not meet the requirement of stating the experts' opinions within a reasonable degree of medical certainty. Therefore, the Quattlebaums conclude, the appellees'

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motion for summary judgment was unsupported by sufficient evidence to create a material issue of fact.

These arguments, however, were made for the first time in the Quattlebaums' motion for reconsideration. It is well settled that our appellate courts will not consider an argument made for the first time in a posttrial motion. *See Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (2002); *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002); *Rose v. Rose*, 2013 Ark. App. 256, ___ S.W.3d ___. An issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal. *Plymate v. Martinelli*, 2013 Ark. 194 (refusing to address an argument concerning the constitutionality of section 16-114-206 where it was not raised until the plaintiff's motion for new trial or for reconsideration). Stated another way, a party may not wait until the outcome of a case to bring an error to the trial court's attention. *LaFont v. Mooney Mixon*, 2010 Ark. 450, 374 S.W.3d 668. The Quattlebaums did not raise the specific arguments they make on appeal until their motion for reconsideration. They were not timely raised and are not preserved for our review on appeal, and we therefore affirm.

Affirmed.

HARRISON and WYNNE, JJ., agree.

Michael R. Lipscomb, for appellants.

Friday, Eldredge & Clark, L.L.P., by: *Michelle Ator* and *Bradley S. Runyon*, for appellees.