Cite as 2013 Ark. App. 349

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-12-890

	Opinion Delivered May 22, 2013
JOHNNIE BLACK, as SPECIAL ADMINISTRATRIX of the ESTATE of EVERETTE R. BLACK, DECEASED APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRD DIVISION [NO. CV-09-4971]
V.	HONORABLE JAY MOODY, JUDGE
JOHN ROWEN, M.D., and JP ROWEN SURGERY, PLLC APPELLEES	AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Johnnie Black, the wife of Everette R. Black and administratrix of his estate, appeals in her capacity as administratrix from the August 13, 2012 order granting summary judgment to appellees Dr. John Rowen and JP Rowen Surgery, PLLC.[1] Appellant contends on appeal that the trial court erred in granting summary judgment to appellees. We find no error and affirm the grant of summary judgment.

The undisputed facts of this case reveal that Mr. Black fell in March 2007, suffering a fracture. He had ankylosing spondylitis and a spinal-cord lesion secondary to the fracture that

[1]The original complaint was filed by both Johnnie Black and Everette R. Black for injuries sustained by Mr. Black during a surgical procedure, which took place on August 6, 2007. Mr. Black died on July 28, 2012, during the pendency of the case and appellant was appointed administratrix of his estate on August 6, 2012. The order framing this appeal has the above caption as does the notice of appeal.

required surgeries, including decompression and fusion from both the anterior and posterior aspects. The posterior aspect of the surgeries was performed on July 31, 2007, by Dr. Phillip Kravetz. The anterior surgery was scheduled for August 6, 2007. Dr. Kravetz was to perform the surgery, with Dr. Rowen performing a thoracotomy to expose the area for Dr. Kravetz's anterior spine surgery. During the thoracotomy, Mr. Black experienced bleeding in his chest cavity that was determined to be from an injury to the aorta. Dr. Rowen attempted to control the bleeding and asked Dr. Kravetz to assist him. At some point, Dr. Kravetz left to inform the family what was happening. While Dr. Kravetz was gone, Dr. Rowen realized that the bleeding had not been controlled, and he continued his efforts to stop the bleeding. Dr. Frank Bauer, who was preparing for another surgery, was subsequently asked by a nurse to offer assistance to Dr. Rowen. Dr. Rowen, with the help of Dr. Bauer, was able to expose the aorta and cross-clamp it in approximately ten minutes. Mr. Black lost a lot of blood and had to be given twenty-two units of blood in addition to the cell-saver blood that was given back to him. He also was given eight units of fresh frozen plasma and ten units of platelets. Mr. Black suffered brain injuries following the surgery.

The Blacks filed a medical-malpractice complaint on July 17, 2009. Appellees filed an answer on August 13, 2009, denying the material allegations in the complaint and seeking to have it dismissed with prejudice. An amended complaint was filed on May 2, 2012. In that complaint, it was alleged that Dr. Rowen violated the standard of care and was negligent by: (1) failing to possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of his profession in good standing, engaged in the same type

or service or specialty in the locality in which he practices, or in similar locality and (2) failing to adhere to the standard of care required of him under the circumstances then and there existing. The complaint alleged that the negligent acts of Dr. Rowen were the proximate cause of Mr. Black's brain injuries.[2] Appellees filed an answer, again denying the material allegations in the complaint.

Appellees filed a motion for summary judgment on July 17, 2012. They asserted that the Blacks failed to prove by expert opinion that Dr. Rowen's actions fell below the applicable standard of care and that his alleged negligent action or inaction caused injury that would not have otherwise occurred. According to the summary-judgment motion, the Blacks' expert, Dr. Frank Arko, "can only say that he believes Dr. Rowen negligently caused the patient's injury, but he cannot say how or why. In his second opinion, Dr. Arko can only opine as to what he believes Dr. Rowen did wrong, but cannot say that it would have made a difference." Appellees included the deposition of Dr. Arko and a letter from the Blacks' attorney written before the deposition. In response, the Blacks asserted that issues of material fact remained unanswered. They also asked that they be allowed more time for their response. The Blacks filed a supplemental response to appellees' summary-judgment motion on August 7, 2012, stating that had Dr. Rowen "followed procedure required by the standard of care and called for assistance from one of the on-call surgeons for that day, it is more likely than not Mr. Black would not have suffered the injuries he did." They included a copy of

[2]The amended complaint also had a punitive-damages claim. However, the claim was dismissed by an order entered on June 1, 2012.

Baptist Health Medical Center's on-call list to support their position that qualified physicians were available to repair Mr. Black's aorta.[3] They contended that Dr. Arko's opinion satisfied the requirements of a prima facie case. Appellees filed a reply on August 8, 2012, reiterating why summary judgment should be granted. The hearing on appellees' summary-judgment motion took place on August 8, 2012. The court granted the motion for summary judgment and dismissed the complaint with prejudice.[4] This appeal followed.

Appellant argues that summary judgment should not have been granted because Dr. Arko testified that Dr. Rowen deviated from the standard of care because he lacked the requisite skills to repair a complication associated with the surgery he was performing and he failed to seek a qualified surgeon to accomplish the repair. Appellees respond that summary judgment was properly granted because the Blacks failed to meet their burden of proof on the elements.

We consider summary judgment as one of the tools in a circuit court's efficiency arsenal.[5] Summary judgment is to be granted by a trial court if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as

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[3]This was a one-page unassigned call list for August 2007, which listed Dr. Watkins for thoracic and Dr. Dean for vascular.

[4]An order granting summary judgment was entered on August 8, 2012, listing the Blacks as the plaintiffs. Another order was filed on August 13, 2012, substituting Mrs. Black as the plaintiff.

[5]*Foreman Sch. Dist. No. 25 v. Steele*, 347 Ark. 193, 61 S.W.3d 801 (2001).

a matter of law.[6] The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried.[7]

Summary judgment is to be granted by a circuit court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law.[8] Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact.[9] On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered.[10] We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party.[11] Our review focuses not only on the pleadings but also on the affidavits and documents filed by the parties.[12]

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[6]Ark. R. Civ. P. 56; *Pfeifer v. City of Little Rock*, 346 Ark. 449, 57 S.W.3d 714 (2001); *Mashburn v. Meeker Sharkey Fin. Grp., Inc.*, 339 Ark. 411, 5 S.W.3d 469 (1999).

[7]*Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001); *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

[8]*Cent. Okla. Pipeline, Inc. v. Hawk Field Servs., LLC*, 2012 Ark. 157, ___ S.W.3d ___.

[9]*Id.*

[10]*Campbell v. Asbury Auto., Inc.*, 2011 Ark. 157, 381 S.W.3d 21.

[11]*Id.*

[12]*Id.*

To establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant breached a standard of care, that damages were sustained, and that the defendant's actions were a proximate cause of those damages.[13] Proximate causation is an essential element for a cause of action in negligence.[14] "Proximate cause" is defined, for negligence purposes, as that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.[15] Although proximate causation is usually a question of fact for a jury, where reasonable minds cannot differ, a question of law is presented for determination by the court.[16] When a party cannot present proof on an essential element of his claim, the moving party is entitled to summary judgment as a matter of law.[17]

Appellant contends that Dr. Rowen was negligent because he lacked the requisite skills to repair a complication associated with the surgery he was performing. Appellant relies on Dr. Arko's deposition testimony wherein he stated that Dr. Rowen did not have the appropriate skill set and/or training to repair the thoracic aorta. Appellees counter with another portion of Dr. Arko's deposition stating that Dr. Rowen was qualified to perform a thoracotomy to provide access for Dr. Kravetz by virtue of Dr. Rowen's training. Appellees

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[13] *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997).

[14] *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996).

[15] *Sharp*, *supra*.

[16] *Cragar v. Jones*, 280 Ark. 549, 660 S.W.2d 168 (1983).

[17] *Sanders v. Banks*, 309 Ark. 375, 830 S.W.2d 861 (1992).

also argue that Dr. Arko testified that he could only speculate as to how the injury to Mr. Black's aorta occurred. According to appellees, appellant's lack of proof on how the injury was sustained is fatal to appellant's burden of proving a breached standard of care. We agree.

Appellant further contends that Dr. Rowen breached the standard of care by not immediately calling for assistance to repair Mr. Black's aorta. Even if appellant had met her burden showing a breach of the standard of care by Dr. Rowen, we would still affirm the trial court's order of summary judgment. Appellant presented no proof on the element of causation. In order to overcome appellees' motion for summary judgment, appellant was required to present proof that but for the failure of Dr. Rowen to call for a "qualified" surgeon sooner than when Dr. Bauer came in to help, Mr. Black would not have suffered brain injuries. Appellant introduced an unassigned call list for the date in question, but this was not enough to overcome appellees' summary-judgment motion. On the record before us, appellees have demonstrated that no material issues of disputed fact existed and that they are entitled to summary judgment as a matter of law. Accordingly, we affirm the trial court's grant of summary judgment.

Affirmed.

GLADWIN, C.J., and HIXSON, J., agree.

Bailey & Oliver Law Firm, by: *Sach Oliver*, *T. Ryan Scott*, and *Frank H. Bailey*; *Offices of Todd Griffin, PLLC*, by: *Todd Griffin*; and *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellant.

Friday, Eldredge & Clark, L.L.P., by: *Laura H. Smith* and *Bradley S. Runyon*, for appellees.