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IN THE
COURT OF APPEALS OF INDIANA

JUDITH DALLMAN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0702-CV-223
	)	
BRENT R. McINTOSH, M.D.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Matthew C. Robinson, Judge Pro Tempore
Cause No. 49D10-0512-CT-46462

December 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Judith Dallman appeals the trial court's grant of summary judgment to Brent R. McIntosh, M.D., on her medical malpractice claim. Dallman raises one issue, which we restate as whether the trial court erred by granting Dr. McIntosh's motion for summary judgment. Dr. McIntosh raises one issue on cross appeal, which we restate as whether the trial court erred by denying his motion to strike Dallman's untimely summary judgment designation. We affirm.

The relevant facts designated by the parties follow.[1] In 1994, Dallman injured her right arm in a fall and became a patient of Dr. McIntosh. Over the next two years, Dr. McIntosh also treated Dallman for other issues. On October 1, 1996, Dallman complained of numbness, tingling, and pain in both arms. McIntosh recommended that Dallman use a wrist rest, adjust her chair height, take breaks from typing, and use Ibuprofen. Dallman returned to Dr. McIntosh on November 11, 1996, complaining of shoulder and hand pain. Dr. McIntosh felt that Dallman had bilateral carpal tunnel syndrome and recommended that she use wrist splints as close to twenty-four hours a day as she could, use a wrist rest, and continue Ibuprofen. On November 25, 1996, Dallman again returned to Dr. McIntosh complaining of more discomfort in her shoulders and

[1] We remind Dallman that Ind. Appellate Rule 46(A)(5) requires assertions in the statement of the case to be supported by references to pages of the record on appeal or the appendix. Further, Ind. Appellate Rule 46(A)(6) provides that "[t]he facts shall be supported by page references to the Record on Appeal or Appendix . . . ." Dallman's statement of the case and statement of the facts are not supported by such page references. We also direct Dallman's attention to Ind. Appellate Rule 46(A)(10), which requires an appellant's brief to "include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal." Finally, Ind. Appellate Rule 51(C) requires page numbering of the Appendix, and Appellant's Appendix fails to conform to this rule.

hands. Dallman reported that she was not wearing the wrist splints every night but had some relief on nights that she did wear the splints. An EMG study revealed mild right carpal tunnel syndrome, and Dr. McIntosh determined:

> Clinically, it does appear the patient may have carpal tunnel syndrome but I'm not getting enough history and I'm not getting enough EMG evidence to make me rush into a carpal tunnel release. If the patient is not improved by the use of her splints more religiously, if her symptoms are unchanged even if she does wear them, then I think that doing a right carpal tunnel release might be done on the basis of the information that we have.

Appellee's Appendix at 87.[2] On December 4, 1996, Dr. McIntosh performed a right carpal tunnel release on Dallman due to "increasing symptoms and increasing anxiety in the patient, and electrodiagnostic studies compatible with the diagnosis." Id. at 93. According to the surgery notes, "[i]t was elected to bring the patient to surgery at this time and render carpal tunnel release." Id. On December 16, 1996, and January 27, 1997, Dallman had follow up visits with Dr. McIntosh and reported improvement in her symptoms.

Dallman filed a proposed complaint against Dr. McIntosh with the Indiana Department of Insurance. A medical review panel found that "in their expert opinion, the evidence does not support the conclusion that [Dr. McIntosh] failed to comply with the

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[2] Dallman incorrectly quotes this document as providing: "Clinically it does not appear that the patient may have carpel [sic] Tunnel Syndrome, but I'm not getting enough history and I'm not getting enough EMG evidence to make me rush into a carpal tunnel release." Appellant's Brief at 3 (emphasis added). Even after the error was pointed out in Appellee's Brief, Dallman again incorrectly quoted the document in her Reply Brief. See Appellant's Reply Brief at 3.

appropriate standard of care as charged in the complaint." Id. at 35. Dallman then filed her complaint against Dr. McIntosh in Marion County.

Dr. McIntosh filed a motion for summary judgment and designated Dallman's complaint and the medical review panel's decision. He argued that, "in the absence of any countervailing expert opinion" presented by Dallman, he was entitled to summary judgment as a matter of law. Id. at 37. Four days past the deadline for filing a response, Dallman filed a brief in opposition to Dr. McIntosh's motion for summary judgment and designated her own affidavit, Dr. McIntosh's deposition, and her medical records that were an exhibit to Dr. McIntosh's deposition.

Dr. McIntosh filed a motion to strike Dallman's designation as untimely. After a hearing, the trial court denied Dr. McIntosh's motion to strike but granted his motion for summary judgment. Specifically, the trial court found that "[t]he cause and subsequent treatment of [Dallman's] condition (carpal tunnel syndrome) is not a matter of common knowledge among lay people, but a matter requiring expert testimony" and that Dallman "failed to advance any expert medical testimony to contradict the opinion of the medical review panel." Id. at 7. Dallman filed a motion to reconsider or, in the alternative, a motion to correct error, which the trial court denied.

Our standard of review for a trial court's grant of a motion for summary judgment is well settled. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(c); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756

N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Id. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. Id. at 974.

A plaintiff in a medical malpractice action must prove: 1) a duty on the part of the defendant in relation to the plaintiff; 2) failure on the part of the defendant to conform to the requisite standard of care required by the relationship; and 3) an injury to the plaintiff resulting from that failure. Boston v. GYN, Ltd., 785 N.E.2d 1187, 1190 (Ind. Ct. App. 2003), reh'g denied, trans. denied. "Because of the complex nature of medical diagnosis and treatment, expert testimony is generally required to establish the applicable standard of care." Id. "However, in some situations, a physician's allegedly negligent act or omission is so obvious that expert testimony is unnecessary." Id. (citing Wright v. Carter, 622 N.E.2d 170, 171 (Ind. 1993)). "Cases not requiring expert testimony are those fitting the 'common knowledge' or res ipsa loquitur-exception." Id. at 1190-1191 (citing Malooley v. McIntyre, 597 N.E.2d 314, 318-319 (Ind. Ct. App. 1992)). Application of this exception is limited to situations in which the physician's conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach of the applicable standard of care. Id. at 1191. The rationale underlying these cases is that the facts themselves are sufficient to raise an inference of negligence without expert testimony. Id.

In support of his motion for summary judgment, Dr. McIntosh designated the opinion of the medical review panel, which had unanimously determined that "in their expert opinion, the evidence does not support the conclusion that [Dr. McIntosh] failed to comply with the appropriate standard of care as charged in the complaint." Appellee's Appendix at 35. A unanimous opinion of the medical review panel that the physician did not breach the applicable standard of care is ordinarily sufficient to negate the existence of a genuine issue of material fact entitling the physician to summary judgment. Boston, (citing McGee v. Bonaventura, 605 N.E.2d 792, 794 (Ind. Ct. App. 1993)). Consequently, the burden shifted to Dallman to either rebut the medical review panel's opinion with expert medical testimony or present evidence within the "common knowledge" exception.

Dallman presented no expert medical testimony to rebut the medical review panel's determination. Instead, Dallman argued that Dr. McIntosh's performance of surgery on Dallman rather than using more conservative measures was within the general knowledge of laypersons and, consequently, expert testimony on her behalf was unnecessary. We disagree. Dr. McIntosh correctly argues that "the medical issues surrounding the need for, and timing of, surgical intervention in cases of carpal tunnel are not subjects well within the knowledge of laypersons." Appellee's Brief at 12. As a result, the common knowledge exception does not apply to this case.

In light of the medical review panel's unanimous decision and Dallman's failure to rebut Dr. McIntosh's designated evidence with her own expert testimony, Dallman has

not established a genuine issue of material fact. The trial court, therefore, did not err by granting Dr. McIntosh's motion for summary judgment. See, e.g., Boston, 785 N.E.2d at 1191 (holding that the physician was entitled to summary judgment because the patient failed to designate any expert testimony). Because Dallman's argument fails even if her materials designated in opposition to Dr. McIntosh's motion for summary judgment are considered, we need not address Dr. McIntosh's cross appeal argument that the trial court erred by denying his motion to strike Dallman's untimely summary judgment designation.

For the foregoing reasons, we affirm the trial court's grant of summary judgment to Dr. McIntosh.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur