

RENDERED: September 5, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-001469-MR

KIMBERLY J. STEVENS

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
CIVIL ACTION NO. 94-CI-005464

JAMES T. PATTERSON, D.M.D. and
JAMES T. PATTERSON, D.M.D., P.S.C.

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, GUDGEL and HUDDLESTON, Judges.

HUDDLESTON, JUDGE. Kimberly J. Stevens appeals from summary judgment in favor of James T. Patterson, D.M.D., in a dental malpractice action. Finding no error, we affirm.

On November 5, 1993, Stevens underwent oral surgery to have her wisdom teeth removed. Dr. Patterson performed the procedure. As is not uncommon with such a procedure, Stevens experienced severe pain following the surgery. Dr. Patterson prescribed Vicodin for pain. Around November 9, 1993, Dr. Patterson treated Stevens for a dry socket. When the pain persisted, Stevens contacted Dr. Patterson again on November 12,

1993. She was complaining of pain and other symptoms believed to be side effects of the Vicodin. Dr. Patterson advised her to continue taking the pain medication and to contact him the following week. According to Stevens, she returned to Dr. Patterson's office on November 16, 1993, complaining of continued pain and swelling on the right side of her face. At this time, Dr. Patterson prescribed Keflex, an antibiotic, for the prevention of an infection. Rather than improving, however, Stevens claims that her condition deteriorated and she began running a fever. She returned to Dr. Patterson again on November 23, 1993. Contrary to Stevens's testimony, Dr. Patterson testified that Stevens was not experiencing swelling at this time. Since Stevens was obviously encountering problems with her jaw, Dr. Patterson referred her to Dr. Perelmuter, an orthodontist, to see if she might be suffering from temporomandibular joint ("TMJ") syndrome.¹

Stevens saw Dr. Perelmuter on the following day, November 24, 1993. Unlike Patterson, Dr. Perelmuter did notice some swelling. He administered a splint, prescribed Flexeril² and recommended that she return to Dr. Patterson. On Thanksgiving Day, November 25, 1993, Stevens claims that the pain and swelling continued. She returned to Dr. Patterson's office on November 26, 1993. He insists that, once again, there was no swelling. Stevens

¹ TMJ involves "[s]evere aching pain in and about the temporomandibular joint" Taber's Cyclopedic Medical Dictionary 1960 (17th ed. 1993).

² Flexeril is used "for relief of muscle spasm[s] associated with acute, painful musculoskeletal conditions." Physicians' Desk Reference (PDR) 1329 (43rd ed. 1989).

was advised to continue with Dr. Perelmuter's treatment. Despite the treatment by Drs. Perelmuter and Patterson, Stevens's condition worsened.

On November 29, 1993, Stevens sought "emergency" treatment from Dr. Perelmuter. As Dr. Patterson had left town on vacation two days earlier, and Stevens's condition had worsened, Dr. Perelmuter referred Stevens to Dr. Goldman, another oral surgeon, to determine whether Stevens had an infection. Dr. Goldman, who saw Stevens on the same day, diagnosed an infection and prescribed Clindamycin, Flagyl and Percocet.³ In her office on November 30, 1993, Dr. Goldman administered a local anesthetic so that she could incise and drain the infected area. When Stevens's condition continued to deteriorate, Dr. Goldman hospitalized her on December 1, 1993. She remained in the hospital for eight days.

Several months later, alleging that Dr. Patterson had been negligent in his failure to diagnose the infection, Stevens filed this dental malpractice action.⁴ On March 18, 1996, after about a year and a half of discovery, Dr. Patterson moved for

³ Clindamycin and Flagyl are both used "in the treatment of serious infections caused by susceptible anaerobic bacteria." PDR at 2014, 2149. Flagyl is also used to treat many other types of infections, including bone and joint infections. Id. at 2015

Percocet is prescribed "for the relief of moderate to moderately severe pain." Id. at 915.

⁴ There has been no allegation that Dr. Patterson was negligent in the performance of the surgery. In fact, it is well-established that "the presence of infection following an operation or in an area under treatment is not prima facie evidence of negligence (i.e., does not warrant an inference of negligence)." Harmon v. Rust, Ky., 420 S.W.2d 563, 564 (1967).

summary judgment because Stevens had not been able to produce a medical expert to testify that his treatment fell below the required standard of care. On April 1, 1996, the court ordered Stevens to produce a medical expert by 5:00 p.m. on April 3, 1996, and to respond to the motion for summary judgment by April 8, 1996. On April 3, 1996, Stevens filed a pretrial compliance listing Thomas Eugene Stump, D.D.S., of Winston-Salem, North Carolina, as her expert witness. On April 8, 1996, Stevens responded to Patterson's motion for summary judgment by stating in part:

[I]n the present case, negligence can be inferred from the record and Stevens'[s] medical expert will testify as to whether Patterson's conduct fell below the standard of care

* * *

Stump may testify as to whether Patterson's acts or omissions deviated from the appropriate standard of care (Emphasis supplied.)⁵

On April 12, 1996, after holding a telephonic conference, the court sent a letter to the attorneys advising them of its conclusions regarding the necessity of expert testimony in medical malpractice cases:

Dear Counsel:

⁵ Significantly, Dr. Stump's deposition had not been taken at the time.

Just a brief note to follow up on our recent conference call and to confirm our understanding at this time.

Given our discussions and having considered the information in the Court's file, I agree with you, John (Patterson's counsel), that this is not a case of res ipsa loquitur. The Court believes that to avoid a directed verdict Ms. Stevens would need an expert's testimony opining that Dr. Patterson's conduct fell below the standard of professional care and caused her problems.

At the same time, I told you both that I was reluctant to take Ms. Stevens's day in Court away from her by entering summary judgment. We concluded by agreeing that, Glenn [Stevens's counsel], you would confer with your expert and let John and me know within the next several days whether or not your expert is willing to testify on Ms. Stevens's behalf. If he is not, then I will enter a summary judgment and Ms. Stevens may appeal on whether or not she should be able to proceed without an expert.

If your expert is willing to testify, then we will reschedule the trial date and allow time for one or more experts to be deposed before the Court rules on the motion for summary judgment. (Emphasis supplied.)

After conferring with Dr. Stump, Stevens's counsel, in a letter dated April 18, 1996, advised the court: "Dr. Stump's conclusion, based on the portions of the record he reviewed, is that although Ms. Stevens's care might have been handled differently, there is insufficient evidence documented in the record that Dr. Patterson deviated from the standard of care." (Emphasis supplied.) As a result, the court granted summary judgment in favor of Dr. Patterson on April 19, 1996.

On appeal, Stevens insists that summary judgment was inappropriate because a factual issue remained as to whether she "actually exhibited symptoms of infection" when she saw Dr. Patterson. She further argues that (1) expert testimony is not necessary because the jury could determine whether Dr. Patterson was negligent based upon the evidence of the record and that (2) the doctrine of res ipsa loquitur establishes negligence. We disagree with all of Stevens's contentions.

In Steelvest Inc. v. Scansteel Service Center Inc., Ky., 807 S.W.2d 476, 482 (1991), the Supreme Court set forth the standard to apply in determining whether to grant or deny a motion for summary judgment:

[T]he movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the

motion for summary judgment be granted. (Citations omitted.) (Emphasis supplied.)

Furthermore, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Id. at 480.

Even if we assume that Stevens did have swelling when she saw Dr. Patterson as she says, the record before us lacks any evidence that Dr. Patterson was negligent in his failure to diagnose an infection. None of the dental experts familiar with the case (Drs. Perelmuter, Goldman and Stump) testified that Dr. Patterson's conduct fell below the required standard of care. In fact, while Dr. Perelmuter acknowledged that Stevens was experiencing swelling when he saw her on November 24, 1993, he did not diagnose an infection. Even when he saw her on November 29, 1993, Dr. Perelmuter did not diagnose an infection. Instead, he referred her to Dr. Goldman. The fact that Dr. Goldman ultimately diagnosed an infection on November 29, 1993, does not support an inference that Stevens actually had an infection when she saw Dr. Patterson on November 16, 23 or 26, 1993. Interestingly, however, the record does suggest that Dr. Patterson anticipated the possibility of an infection and attempted to prevent such by prescribing Keflex.

It is well-settled that "[n]egligence in medical malpractice cases must be established by expert testimony unless negligence and injurious results are so apparent that a layman with general knowledge would have no difficulty recognizing it." Morris v. Hoffman, Ky.App., 551 S.W.2d 8, 9 (1977). The same rule applies

to dental malpractice actions. Butts v. Watts, Ky., 290 S.W.2d 777, 779 (1956). Furthermore, "whether [a medical professional] was negligent in making a diagnosis 'must be determined in the light of conditions existing and facts known at the time thereof, and not in the light of knowledge gained through subsequent developments.'" Engle v. Clarke, Ky., 346 S.W.2d 13, 17 (1961).

Since Stevens was unable to produce an expert, the question becomes whether the alleged negligence was so obvious that layman with general knowledge would recognize it. The trial court held that the answer to that question is "no," and we agree. Considering that Drs. Perelmuter, Goldman and Stump were unable to say that Dr. Patterson's treatment fell below the required standard of care, a jury of laymen with general knowledge could not reasonably reach such a conclusion. Laymen simply do not "have sufficient general knowledge to 'recognize' that infection . . . [is] the result[] of negligence". Harmon v. Rust, Ky., 420 S.W.2d 563, 564 (1967). Furthermore, according to Engle, 346 S.W.2d at 17, the fact that Dr. Goldman subsequently diagnosed an infection cannot be considered as a factor in determining whether Dr. Patterson should have made such a diagnosis several days earlier. In fact, such a subsequent diagnosis does not prove that an infection existed when Stevens saw Dr. Patterson. It is particularly significant that Stevens's condition continued to deteriorate even after Dr. Goldman diagnosed and began treating the infection.

We do not agree with Stevens's argument that the doctrine of res ipsa loquitur establishes negligence. "The phrase res ipsa loquitur means 'the thing speaks for itself.'" Ralston v. Dossey, 289 Ky. 40, 157 S.W.2d 739, 741 (1941). Under this doctrine, the mere happening of an injury "affords reasonable evidence that the [injury] arose from want of care on [the] defendant's part" where it is shown that the injury is "such as in the ordinary course of events would not happen if those who had the control of [the situation] used the degree of care imposed upon them by law." Id. Accordingly, the "applicability of the doctrine depends in major part on whether the particular injury was of a kind that a jury could find would not usually occur in the absence of negligence." Jewish Hospital Assoc. v. Lewis, Ky., 442 S.W.2d 299, 300 (1969).

According to the Restatement (Second) of Torts § 328D(1) (1965), several conditions must be met before the doctrine of res ipsa loquitur can be applied:

It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when[:]

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

A res ipsi loquitur case, according to the Restatement, is:

[O]rdinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it.

Restatement, supra, § 328 D, cmt. b, p. 157, quoted with approval in Perkins v. Hausladen, Ky., 828 S.W.2d 652, 656 (1992).

Stevens has not alleged that her development of an infection was the result of Dr. Patterson's care. There are a number of things that could cause an infection. Furthermore, she was advised in advance that infections commonly occur after this type of oral surgery. Stevens alleges instead that her condition deteriorated after Dr. Patterson deviated from the required standard of care by failing to diagnose the infection.

Significantly, Dr. Patterson did prescribe Keflex to prevent an infection and there is no evidence that Stevens actually had an infection when she saw Dr. Patterson. Furthermore, in the absence of expert testimony, we are unable to say that, even if she did have an infection at that time, the infection would not have progressively worsened in the absence of negligence, i.e., even if Patterson had made the diagnosis. Interestingly, Stevens's condition continued to deteriorate after Dr. Goldman diagnosed and treated the infection. Under these circumstances, the circuit court correctly determined that Stevens would have to produce an expert to proceed to trial.

We agree with the circuit court that the allegation involved in the present case are factually distinguishable from the cases upon which Stevens relies. For example, in Perkins v. Hausladen, supra, the surgeon accused of negligence in performing surgery to remove diseased tissue from a patient's inner ear admitted on deposition that one of the prime objectives of the surgeon is to make sure he does not tear the sigmoid sinus, a vein that drains the brain over into the internal jugular vein. This occurred in Perkins, and there was evidence that the surgeon had admitted to the patient's husband that he had "drilled in and . . . had hit a blood vein and had to stop surgery." 828 S.W.2d at 653. In the case at hand there is, as has been noted, no comparable evidence. Thus, unlike Perkins, the evidence is insufficient to present a case of res ipsa loquitur, or circumstantial evidence, from which a jury could infer negligence.

During the discovery period which lasted approximately a year and a half, Stevens was given a full opportunity to obtain an expert to testify that Dr. Patterson's conduct fell below the required standard of care. She could not do so. When she finally did identify Dr. Stump as an expert, he was unable to say that Dr. Patterson deviated from the standard of care and she was forced to inform the court that he had refused to testify against Dr. Patterson. Since we have held that expert testimony is required to establish negligence in this case, the letter from Stevens's counsel was, in effect, her admission that it would be impossible

for her to produce evidence of negligence at trial.⁶ When it "appears impossible for the nonmoving party to produce the required evidence at trial warranting a judgment in his [or her] favor," summary judgment is appropriate. Steelvest, 807 S.W.2d at 482.

For these reasons, the summary judgment dismissing Stevens's complaint is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Vicki L. Buba
SEILLER & HANDMAKER, LLP
Louisville, Kentucky

ON BRIEF:

Maury D. Kommor
Glenn A. Cohen

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

John F. Parker, Jr.
BOEHL STOPHER & GRAVES
Louisville, Kentucky

ON BRIEF:

William P. Swain

⁶ Even if Stevens could produce evidence of negligence, it would be difficult for the jury to find that any harm resulted from the negligence because the infection was diagnosed and treated just a few days after the alleged negligent diagnosis. As Stevens's condition continued to deteriorate after Dr. Goldman initiated treatment, it would be a major inference for the jury to find that Dr. Patterson's failure to diagnose the infection a few days earlier caused the condition to become so severe.