RENDERED: April 2, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000064-MR

GLEN EVERETT BENTLEY, Administrator
of the ESTATE OF INA KATHRYN BENTLEY — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 96-CI-00132

HOSPITAL CORPORATION OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, Chief Judge; COMBS and DYCHE, Judges.

COMBS, JUDGE: Glen Everett Bentley, as administrator of the estate of Ina Kathryn Bentley, appeals from the judgment of the Mason Circuit Court entered on November 7, 1997, which summarily dismissed the plaintiff's claim for medical malpractice against Hospital Corporation of Kentucky, d/b/a Meadowview Regional Hospital. We vacate and remand.

In May 1995, Ms. Bentley was admitted to Meadowview Regional Hospital for a total replacement of the left knee to be performed by Dr. Charlotte Harris, an orthopedic surgeon. Dr. Harris had been treating Bentley's severe degenerative arthritis of the hips and knees for nearly a year preceding the May 1995

admission. Bentley had recently undergone a total replacement of the right hip and a total replacement of the right knee. She had been on crutches for 20 years; prior to surgery, she was nearly confined to a wheelchair because of the pain and stiffness in her joints. Three days after the left total knee replacement surgery was performed, Bentley advised Dr. Harris that her right knee was swollen and painful. Bentley advised Dr. Harris that a nurse had twisted her knee while re-positioning her in bed. X-rays confirmed that Bentley had suffered a supracondylar femur fracture just above the prosthesis. The fracture was treated with a knee immobilizer. As a result of the fracture, Ms. Bentley suffered a permanent shortening of her right leg.

In June 1996, Bentley filed her complaint, alleging negligence on the part of the hospital and/or its employee(s) with respect to her care. Specifically, Bentley alleged that a hospital employee, "while attempting to assist [her] back into bed, grabbed her left leg and dropped it onto her right leg causing the fracture." In October 1997, after the deposition of Dr. Harris was taken, the hospital moved for summary judgment.[1] Dr. Harris was unable to state that Bentley had sustained the fracture as a result of care that deviated from generally accepted hospital practice. At her deposition, Dr. Harris testified as follows:

> Q. I have a letter here that you wrote to Mr. Blackburn here on September 16th, 1996, wherein the second paragraph, you describe Ms. Bentley's fracture

[1]Ms. Bentley passed away on June 25, 1997. On August 9, 1997, a motion was filed to revive the action.

as a pathologic type of fracture due to her osteoporosis. . . .

A. Yes. I did describe it as pathologic-type fracture.

Q. And in the case of Ms. Bentley, can her fracture that she sustained in her right femur be described in your opinion as a pathologic-type fracture?

A. Yes.

Q. And just as you stated a few moments ago, is a pathological fracture like Ms. Bentley sustained one that is attributable to an ongoing chronic process moreso (sic) than a traumatic event?

A. Yes.

Q. So, the fracture that Ms. Bentley sustained in this particular occurrence is one that you attribute to her severe osteoporosis; is that correct?

A. Yes.

* * * * *

Q. Let me ask it a different way then. Dr. Harris, you don't know one way or the other, based upon medical probability or improbability or even medical speculation whether or not the fracture on Ms. Bentley's right femur of her leg was caused by any inappropriate positioning on the part of any of the personnel at Meadowview Regional Hospital, do you?

A. No.

* * * * *

Q. Isn't is just as likely that it occurred with the exercise of reasonable care?

A. Yes.

The hospital argued that without the supporting testimony of an expert witness, Bentley could not get her claim against it to the jury. Moreover, the hospital argued that there was no other evidence sufficient to create a question of fact regarding the

hospital's alleged violation of its duties and/or that such violation caused Bentley to suffer the fracture. The trial court granted the hospital's motion for summary judgment. This appeal followed.

The issue before us is whether summary judgment was appropriate in this case. Kentucky courts follow a strict standard for granting summary judgment. In Steelvest, Inc. v. Scansteel Serv. Center, Inc., Ky., 807 S.W.2d 476, 483 (1991), the Kentucky Supreme Court stated:

> We adhere to the principle that summary judgment is to be cautiously applied and should not be used as a substitute for trial. As declared in Paintsville Hospital, it should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.' It is vital that we not sever litigants from their right of trial, if they do in fact have valid issues to try, just for the sake of efficiency and expediency.

In general, negligence in a medical malpractice case must be established by expert testimony as explained in Bayliss v. Lourdes Hosp. Inc., Ky., 805 S.W.2d 122 (1991):

> It is an accepted principle that in most medical negligence cases, proof of causation requires the testimony of an expert witness because the nature of the inquiry is such that jurors are not competent to draw their own conclusions from the evidence without the aid of such expert testimony.

Id. at 124 (footnote omitted). The appellant submits that Dr. Harris's deposition testimony sustains her position. Based on the contents of the deposition as cited above, we cannot agree.

However, in light of the unusual nature of Bentley's injury, we are mindful of the doctrine of res ipsa loquitur — which would excuse the need for an expert medical witness. While

not cited by the appellant, Meiman v. Rehabilitation Center, Inc., Ky., 828 S.W.2d 652 (1992), dealt with evidence indicating that a patient's femur had been broken while a physical therapist was attempting to outfit her with an artificial leg. The court held that expert medical testimony was not required in order to establish negligence.

Restatement (Second of Torts) §328D (1965), provides as follows:

> (1) 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 [Emphasis added].

This case is a close call as to the propriety of summary judgment. Although the appellee hospital appears to have established a prima facie showing of nonliablity, we are not convinced that it would have been impossible for the plaintiff to present evidence at trial to create a genuine issue of fact. As mentioned earlier, Ms. Bentley passed away on June 25, 1997. Despite her failing health, a deposition was not taken in order to preserve her testimony. However, two of her sons and her husband are available to testify as to their direct observations of her treatment in the hospital and as to her ordeal following her alleged injury there. The existence of these witnesses,

coupled with the highly unusual occurrence of the fracture pursuant to the reasoning of Meiman, supra, renders it less than impossible for the appellant to raise a genuine issue of fact for a jury to determine.

Therefore, under the stringent test of Steelvest, supra, we are compelled to vacate entry of summary judgment by the Mason Circuit Court and remand this matter for a trial.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Bruce E. Blackburn Raceland, KY	Martin A. Arnett Louisville, KY