RENDERED: April 23, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003170-MR

LARRY SYCK AND MARY SYCK — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 92-CI-3783

LEON RAVVIN, M.D. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GARDNER, HUDDLESTON AND JOHNSON, JUDGES.

GARDNER, JUDGE: Larry and Mary Syck (the Sycks) appeal from an order of the Fayette Circuit court granting summary judgment for Dr. Leon Ravvin (Ravvin) in this medical negligence action. On appeal, the Sycks argue that the trial court improperly ruled that their expert witness, Dr. Yale Gerol (Gerol) was not qualified in this case and improperly excluded his deposition testimony. They also maintain that the court below erroneously granted summary judgment for Ravvin. This Court affirms.

Larry Syck (Larry) began seeing Ravvin in October 1990, for treatment of a back condition. Larry underwent surgery in January 1991, which entailed removing a portion of a disc that

was pressing on his dural sack, as well as sewing up a tear in his dural sack.[1] Ravvin testified that he noted significant scarring of the dura, the membrane covering the spinal cord, and that removal of the scarring resulted in a dural tear with fluid leakage. The dural tear continued to leak after the surgery, resulting in an accumulation of cerebrospinal fluid.[2] Additional surgery was performed in November 1991 to repair and re-sew the dural tear and remove the accumulation. Another accumulation of fluid occurred after the second surgery.

In November 1992, the Sycks filed a medical malpractice action against Ravvin. In October 1994, the parties deposed Gerol, the medical expert called by the Sycks. Gerol during the deposition, stated that he had not yet received Larry's actual diagnostic studies and had not had the opportunity to review medical records from three other doctors, the hospital nor depositions from Mrs. Syck or Ravvin.

This case was originally set for trial in August 1997. The Sycks were granted a continuance, because they could not produce Gerol for an evidentiary deposition or as a live witness at trial. The court granted the Sycks leave to secure a second medical expert, but they did not do so before the trial court's deadline. They subsequently advised the court that their only expert proof at trial would be the discovery deposition of Gerol from October 1994.

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[1]The dural sack covers the nerve roots as they exit the spinal cord, and it contains nerves as well as cerebrospinal fluid.

[2]This condition is known as pseudomeningocele.

In November 1997, Ravvin moved to exclude Gerol's deposition transcript from being read at trial based upon his lack of qualifications and his having not reviewed all relevant materials at the time of his deposition. The trial court held a hearing on the matter, and ruled that it would exclude Gerol's testimony. The court also granted summary judgment for Ravvin. On December 5, 1997, a final and appealable order was entered. The Sycks then brought this appeal.[3]

The Sycks first contend that the trial court erred and abused its discretion by excluding Gerol's deposition testimony, because they maintain his qualifications clearly indicate that he had the training, knowledge and experience to be considered an expert in his field of study. After reviewing the record below, we have concluded that the court did not err or abuse its discretion in refusing to allow Gerol's deposition testimony to be admitted at trial.

Courts have not adopted precise standards for qualifications as an expert, but such standing can be acquired by acquaintance with an observation of the subject matter. Kentucky Power Co. v. Kilbourn, Ky., 307 S.W.2d 9, 12 (1957); Lee v. Butler, Ky. App., 605 S.W.2d 20, 21 (1979). See also Washington v. Goodman, Ky. App., 830 S.W.2d 398, 400 (1992). A decision regarding the qualifications of an expert rests within the discretion of the trial court. Washington v. Goodman, 830 S.W.2d

[3]Ravvin argues in his brief that this appeal is not ripe before this Court, because the Sycks failed to timely file a notice of appeal. We decline to address this issue and have reviewed the case on the merits.

at 400; Kentucky Power Co. v. Kilbourn, 307 S.W.2d at 12; Lee v. Butler, 605 S.W.2d at 21. A trial court's ruling on such a matter ordinarily will not be disturbed upon appeal. Lee v. Butler, 605 S.W.2d at 21.

In the instant case, the circuit court did not abuse its discretion in ruling that Gerol's deposition would not be admitted at trial. A review of Gerol's deposition shows that at that time he had not received the actual diagnostic studies and stated that he intended to review the studies should he be called to testify at trial. He also stated that he had not reviewed the records of Dr. Mortara, Dr. Fannin, Dr. Wright nor the Good Samaritan Hospital records. He had also not reviewed Mrs. Syck's deposition, and he believed that Ravvin's deposition had not yet been taken. He stated that he would find Ravvin's deposition valuable and that it could alter his opinions. Cf. Kabai v. Majestic Collieries Co., 293 Ky. 783, 170 S.W.2d 357 (1943). Regarding his general qualifications, the record shows that he was then retired and had not operated since February 1985. He has never had a case dealing with pseudomeningocele, Larry's condition, but had a fluid leak case which occurred in 1971. All of these facts support the trial court's decision and show that it did not abuse its discretion. It allowed the Sycks' counsel extensions and an opportunity to secure another expert, but counsel apparently failed to do so.

The Sycks also contend that summary judgment was improper, because when viewing the record in the light most favorable to them, it was not impossible for them to obtain a

judgment in their favor. The record below shows that under even the strict summary judgment standards which exist, summary judgment was not improper in the case at bar.

Summary judgment 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 trial warranting a judgment in his or her favor against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991), quoting Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985); Farmer v. Heard, Ky. App., 844 S.W.2d 425 (1992). Summary judgment is properly granted only when there is no genuine issue as to any material fact, and the movant is entitled to prevail as a matter of law. Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 247 (1992); Kentucky Rule of Civil Procedure (CR) 56.03.

In the instant case, the Sycks after the trial court's decision to exclude Gerol's testimony, were left with no expert testimony to support their case. They now maintain that the depositions of Drs. Tibbs and Benzel contain information which would support their case; however, they have cited nothing concrete or specific.[4] They have cited no other evidence in the record which would support their case. Even under the strict standard set out in Steelvest, Inc. v. Scansteel Service Center, Inc., supra, they have failed to show that the trial court's decision to grant summary judgment for Ravvin was erroneous.

[4]We have reviewed the record and have been unable to locate these depositions.

For the foregoing reasons, this Court affirms the judgment of the Fayette Circuit Court.

ALL CONCUR.

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