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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002351-MR

WILMA HYDEN — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE ALLEN RAY BERTRAM, SPECIAL JUDGE
ACTION NO. 98-CI-00669

LARRY F. SWORD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND TACKETT, JUDGES.

TACKETT, JUDGE: Wilma Hyden appeals from an order of the Pulaski Circuit Court that granted summary judgment to Larry F. Sword on appellant's suit for legal malpractice. After review of the record, we affirm.

In 1981, Hyden was diagnosed with fibrocystic disease, which is characterized by the creation of typically nonmalignant fiber cysts, in her left breast. She underwent several surgeries to remove cysts in her breast, but they continued to reappear. In April 1983, Dr. Michael Milan performed a subcutaneous mastectomy of her left breast and reconstructed the breast with a

tissue expander. Shortly thereafter, Dr. Milan replaced the tissue expander with a permanent double lumen breast prosthesis. This type of implant consisted of two compartments, an inner capsule filled with silicone gel and an outer shell filled with a saline solution.

After Hyden experienced problems, Dr. Milan replaced the first implant in September 1985 with a Replicon prosthesis. Dr. Milan's operative note indicated that there was complete deflation but "no gross defect in the outer shell." Hyden continued to experience problems and pain in her breast, so she decided to have the implant removed. In April 1989, Dr. Martin Luftman replaced the Replicon implant with another Replicon implant. Dr. Luftman's operative note indicated that the implant was discovered to be "intact" when removed.

Following the second replacement surgery, Hyden continued to complain about various health problems including pain and weakness in her chest and back. In 1990, Dr. Luftman's follow-up examination of her breast implant revealed "no suspicious problems." Nevertheless, after learning of information in 1992 concerning alleged defects in various brands of breast implants, Hyden consulted Larry Sword, an attorney, about possibly pursuing legal action against the manufacturers of her breast implants.

In October 1993, Sword filed a complaint on behalf of Hyden in Federal District Court in the Eastern District of Kentucky as part of the multi-district products liability class action against numerous breast implant manufacturers then pending

in Alabama. Sword also referred her to Dr. Paul Goldfarb, a rheumatologist experienced in the area of connective tissue diseases. Sword asked Dr. Goldfarb to evaluate whether Hyden's symptoms would qualify for recovery under the criteria being developed in the multi-district class action litigation. He diagnosed Hyden as suffering primarily from chest pain, possibly caused by cardiac disease, and depression. He did indicate that Hyden was reportedly experiencing some fibromyalgia, or muscle pain, and eventually concluded that her symptoms placed her in Category C (atypical connective tissue disease) under the Disease Compensation Criteria established under the settlement agreement in the class action suit. The initial schedule of benefits tentatively provided for payments of $10,000 for a Category C claim and $25,000 for a claim involving a "rupture"[1] of the implant.

After discussing the various available options, on May 26, 1994, Hyden signed an Acknowledgment document noting that she had read the Settlement Notice and directing Sword to submit the necessary documents to include her claim in the settlement rather than opt out of the class action settlement. At that time while a tentative compensation range had been proposed, the exact schedule of compensation had not been developed in the class action. The Acknowledgment states: "I [Hyden] understand that my eligibility for benefits under the current disease compensation fund will require, among other things, the timely submission of

[1]The criteria for defining a "rupture" under the settlement had not yet been determined by the federal trial court.

claim forms and a report of a 'qualified medical doctor.' I understand that the amount of compensation which I may receive, if any, has not been determined." In June 1994, Sword submitted Hyden's claim to the claims administrator in the class action. In October 1994, Sword told Hyden that the exact benefit schedule had not been set and the amount stated in the earlier documents probably would be reduced based on the actual number of claims. In July 1996, Sword's office assistant notified Hyden that she was eligible to receive $25,000 under the settlement based on proof that her implant had ruptured.

Meanwhile, Hyden had returned to Dr. Luftman for follow-up visits. In June 1996, Hyden complained of pain in her left arm and chest. She expressed a desire to have the implant removed, but Dr. Luftman told her removal probably would not eliminate her problems. His examination of the breast revealed no abnormalities or encapsulation. He indicated that her symptoms dated back to 1981-82, which was before she received the implant, and that "she very likely would have had these same symptoms with or without implants."

In July 1996, Hyden saw Dr. Gary Bray, an orthopedic surgeon, about a ganglion cyst in her wrist. Hyden expressed her belief that the cyst consisted of silicone gel that had leaked from her breast implant. Dr. Bray discounted Hyden's theory. Shortly thereafter, Hyden had the cyst surgically removed by Dr. Ronald Burgess. As with Dr. Bray, Dr. Burgess told Hyden that there was "no way" the cyst contained silicone gel from her

breast implant and he refused to order a pathological test of the fluid for identification purposes.

In February 1997, Hyden was notified by the claims administrator's office in the class action that her claim had been approved at the Level C category entitling her to $10,000 compensation, but her claim of rupture, which would have entitled her to $25,000 compensation, had been rejected because of lack of proof. On February 27, 1997, Hyden received a partial payment of $5,000 on the settlement claim. Sword submitted a request to ask the claims administrator to re-evaluate the status decision based on Dr. Milan's operation report stating their was a deflation of the outer shell of the first implant. In April 1997, Hyden received and accepted an additional $5,000 payment from the settlement program.

In July 1997, Sword notified Hyden that the claims administrator refused to revise her benefit schedule because the Settlement terms defined "rupture" as "the failure of the elastomer envelope surrounding a silicone-gel implant to contain the gel (resulting in contact of the gel with the body), not solely as a result of 'gel-bleed', but due to a tear or other opening in the envelope after implantation and prior to the explanation procedure." Dr. Milan's notes indicated only a deflation of the outer shell containing the saline solution, not a tear of the inner compartment containing the silicone gel. After Sword told Hyden that he had no reasonable basis to challenge the claims administrator's decision, she expressed

disapproval of Sword's performance and decided to terminate Sword's legal representation of her.

On August 5, 1998, Hyden filed a complaint pro se alleging that Sword had lied to her in connection with her lawsuit in the breast implant class action, had failed to get her medical records, and had committed legal malpractice. Along with his answer, Sword served Hyden with a set of interrogatories and requests for production of documents that, inter alia, asked her to identify each expert witness that she expected to call at trial. The interrogatories and requests also asked her if she had obtained an opinion from a licensed attorney about Sword's performance and if so, to provide a copy of any written opinion by the attorney. On January 15, 1999, the court conducted a pretrial conference and ordered Hyden to identify any expert witnesses she intended to present as a witness, as required by CR 26.02(4), and to comply with discovery within twenty days. On March 3, 1999, Hyden was deposed by the appellee. During the deposition, Hyden admitted that she had consulted no potential expert witness on either Sword's performance or the connection between the implant and her continuing medical problems. She also indicated that she did not intend to retain any expert witnesses for trial.

On April 5, 1999, Sword filed a motion for summary judgment under CR 56 seeking dismissal on the basis that Hyden had failed to produce any legal or medical expert testimony sufficient to raise a material issue of fact on either Sword's alleged failure to comply with the requisite standard of care or

the causation of her current medical problems. On June 8, 1999, the trial court conducting a hearing on the motion. During the hearing, Hyden admitted that she was unable to retain any expert witnesses to testify on her behalf.

In a well-reasoned opinion, the trial court granted Sword's motion for summary judgment. Because we agree with the views expressed by the trial court in its opinion, we adopt the following portion as our own.

> Under Kentucky's standard for evaluating a motion for summary judgment, the record must be viewed in a light most favorable to the party opposing the motion and all doubts are to be resolved in her favor. The Court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). At the same time, "a party opposing a properly supported summary judgment cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 482.
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> Kentucky has long recognized in medical malpractice cases the general rule that "negligence must be established by medical or expert testimony unless the negligence and injurious results are so apparent that laymen with a general knowledge would have no difficulty in recognizing it." Harmon v. Rust, Ky., 420 S.W.2d 563, 564 (1967). The rule applies not only to the element of breach, but also to that of causation. Baylis v. Lourdes Hospital, Inc., Ky., 705 (sic) S.W.2d 122, 123 (1991). The Court concludes as a matter of law that the Kentucky Supreme Court would recognize the same general rule in an action for legal malpractice.
>
> Ms. Hyden's allegations of professional negligence against Mr. Sword do not fall within that category of acts or omissions which a jury could properly evaluate in the absence of an expert legal opinion that Mr.

> Sword acted negligently. Mr. Sword did not miss any obvious statute of limitations or commit any other act that would appear obviously negligent to a layperson. The Court concludes, therefore, as a matter of law that, in order to evaluate Ms. Hyden's claims that Mr. Sword negligently presented her case to the MDL or negligently advised her to participate in the Settlement Program, a jury would need the benefit of an opinion by a qualified legal expert asserting that Mr. Sword had been negligent.
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> Additionally, the Court concludes as a matter of law that, in order to establish any damages, Ms. Hyden would have to present an opinion by a qualified physician establishing a casual link between one or more of her health problems and a defective condition in one or more of her breast implants. It would be impossible, for example, for Ms. Hyden to raise a triable issue of fact for a jury on whether she would have received more than $10,000 by opting out of the MDL's Settlement Program and pursing a separate lawsuit, when she is unable to present any medical evidence to support such a claim. Obviously, a jury could not arrive at a conclusion that a defective breast implant was a substantial factor in causing injury to Ms. Hyden without the benefit of a medical opinion establishing this fact.
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> Ms. Hyden has clearly stated on record, both in her deposition (at pages 163-166) and before this Court, that she does not have any legal or medical expert testimony to support her claim and no intention of obtaining any.
>
> Consequently, the Court concludes as a matter of law that Ms. Hyden has failed to raise a triable issue of fact, either on liability or damages, in that she has failed to provide the expert testimony necessary to support her claims. There is no genuine issue of material fact, and defendant Sword is entitled to judgment as a matter of law.

We note that while there are no existing Kentucky cases applying the medical malpractice method of proof to legal malpractice actions, a significant number of other jurisdictions

have adopted this approach in requiring expert testimony to establish legal malpractice unless the negligence and injury is capable of common knowledge. For example, in Barth v. Illinois, 139 Ill.2d 399, 564 N.E.2d 1196 (1990), the Illinois Supreme Court indicated that the rules of evidence governing medical malpractice action generally are applicable to legal malpractice suits. It noted that because the doctrine of res ipsa loquitur does not apply to legal malpractice cases, "The standard of care against which the attorney defendant's conduct will be measured must generally be established through expert testimony. Failure to present expert testimony is usually fatal to a plaintiff's legal malpractice action." Id. at 407, 564 N.E.2d at 9-10. (citations omitted). See also Pearl v. Nelson, 13 Conn. App. 170, 534 A.2d 1257 (1988); Wastvedt v. Vaaler, 430 N.W.2d 561 (N.D. 1988); Hooper v. Gill, 79 Md. App. 437, 557 A.2d 1349 (1989), cert. denied, 496 U.S. 906, 110 S.Ct. 2588, 110 L.Ed.2d 269 (1990); Pongones v. Saab, 396 Mass. 1005, 486 N.E.2d 28 (1985); Zweifel v. Zenge and Smith, 778 S.W.2d 372 (Mo. App. 1989); Storm v. Golden, 371 Pa. Super. 368, 538 A.2d 61 (1988); Lazy Seven Coal Sales v. Stone & Hinds, 813 S.W.2d 400 (Tenn. 1991). Other courts have upheld the grant of summary judgment against a plaintiff who fails to present expert testimony to support a claim of legal malpractice. See, e.g., Moore v. Lubnau, 855 P.2d 1245 (Wyo. 1993); Rice v. Hartman, Fawal & Spina, 582 So.2d 464 (Ala. 1991); Borgegrain v. Gilbert, 784 P.2d 849 (Colo. App. 1989); Graves v. Jones, 361 S.E.2d 19 (Ga. App. 1987).

In the current case, we agree with the trial court that Hyden's claims of legal malpractice do not fall within the "common knowledge" exception for the need to present expert testimony to establish malpractice. Hyden failed to present any expert testimony and indicated she would not attempt to acquire an expert witness at trial. Therefore, the trial court did not err in granting summary judgment to the appellee.

For the foregoing reasons, we affirm the order of the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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